EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr E S G Sablin		(1) Advance Global Capital Ltd (2) Ms J A McKinley (3) Mr N H Hartley (4) Mr H J M Van Deventer (5) Mr D J Kreps

Heard at: London Central Employment Tribunal

On: 1, 2, 3, 4, 7, 8, 9, 10, 11 February 2022
(11 March 2022 in chambers)

Before: Employment Judge Adkin
Mr G Bishop
Dr V Weerasinghe

Representations

For the Claimant: Mr N Smith, Counsel
For the Respondent: Ms K Balmer, Counsel

JUDGMENT

(1) The following claims are not well founded and are dismissed by a majority decision:

a. Unlawful detriment on the grounds of having made a protected disclosure contrary to s.43B and 47B Employment Rights Act 1996 ('ERA') (against Rs1-5);

b. Automatic unfair dismissal (protected disclosure) contrary to s.103A ERA (against the First Respondent only).

c. "Ordinary" unfair dismissal contrary to ss.94(1) and 98 ERA (against the First Respondent only).

REASONS

Procedural matters

1. This hearing was a video hearing using CVP technology in which parties, witnesses and the Tribunal participated remotely. There were some hiccups with the technology but ultimately the hearing was effective.

2. For reasons given orally the Second Respondent's Application to participate in cross examination in a question and answer written format as an alternative to live cross examination was refused. The Tribunal considered the Second Respondent's witness statement and only attached such weight as we were able given that she was not tendered for cross examination.

3. Written reasons were not requested at the hearing. Any party may request written reasons within 14 days of the date that this judgment is sent out.

The Claim

4. The Claimant presented his claim on 22 January 2021.

5. An agreed list of issues is attached as an appendix to this claim.

Evidence

6. The Tribunal received witness statements from the Claimant, all named individual respondents and additionally from Ms Sudha Bharadia. References thus [SB3] are to paragraphs in those witness statements.

7. We were provided with a final hearing bundle of some 5,778 pages and an additional bundle of documents to which some documents were added during the course of the hearing amounting to a further 1,575 pages. References in this format [123] are to the main bundle and [A345] are to the additional bundle.

8. Unfortunately neither of these unnecessarily large bundles was compliant with the Employment Tribunals *Presidential Guidance on Remote and In-Person Hearings* dated 14 September 2020, in particular paragraph 24 with the result that the electronic page numbering does not line up with the hardcopy page numbering, leading to delay in identifying pages. Particularly in bundles of these sizes, searching for hard copy page numbers takes time and frequently directs the searcher to the wrong page, especially given that there is a lot of numerical data throughout the bundle. It also causes confusion and delay in referencing both during the hearing and the Tribunal's subsequent deliberations. This did not have any impact on decision on the substantive merits of the case, but is worth noting to avoid legal advisers involved in this case making the same mistake in future.

Findings of fact

The First Respondent

9. The First Respondent AGC describes itself as a small global impact investment manager, based in London. It is regulated by the Financial Conduct Authority ("FCA"). AGC was founded by the Second Respondent, Janet McKinley in 2012. Ms McKinley is a non-executive Director and as at the time of the hearing Chair of the Board. She is also the principal investor and General Partner of AGC's main fund.

10. The First Respondent aims to generate beneficial social or environmental effects rather than simply focussing on profit. Indeed it was not profitable during the period of time material to this claim. The business specialises in financing receivables (also known as invoice financing or invoice factoring) of small and medium-sized businesses ("SMEs") in underserved markets. The First Respondent offers short term finance by selling unpaid invoices at a discount to a lender in exchange for a cash advance.

11. According to the Third Respondent, the First Respondent's CEO Mr Hartley, the First Respondent applies strict environmental, social and governance ("ESG") screening criteria to decide which investments to promote. The company also focusses on investments which are working to address financial inclusion, creating more economic opportunities for women and strengthening local financial ecosystems. AGC states that it works with potential lenders to put their capital to work in accordance with their values and to do social good.

12. As at 2015, AGC was small and described by the Claimant "start-up family office". It had only just done its test pilot phase in May 2015. At all material times, AGC had a very small number of full time employees: specifically 6 in 2014; 15 in 2015; and 12 in 2020 [AB113-16].

13. As to the regulatory scheme, prior to 17 July 2020, AGC was categorised as a small authorised AIFM (i.e. Alternative Investment Fund Managers). This has been described to us as a sub-threshold fund or non-full scope AIFM.

Background to Claimant's employment

14. The Claimant Mr Giles Sablin has an engineering degree along with a Master's Degree from Stanford University and an MBA from the Wharton School at the University of Pennsylvania. Prior to his employment with the First Respondent he held positions at several banks including Merrill Lynch and Renaissance Capital. He was the head of Investment Banking for Francophone West Africa at Ecobank.

15. On 27 July 2015 the Claimant was made a job offer with the First Respondent as regional "Head of Africa" reporting to the Head of Origination & Structuring on a salary of £85,000. Under the contract there was a discretionary performance related bonus to reward "exceptional performance". Notwithstanding this apparently high threshold, we infer that there was some

expectation at least among members of the senior team that they would receive an annual bonus each year.

16. On 1 September 2015 the Claimant commenced employment with the First Respondent as Head of Funding for Africa.

Whistleblowing policy

17. The Claimant's contract contained a clause which obliged him to report "whistleblowing" to the Board [457]. The First Respondent had in place a formal whistleblowing policy.

Early regulatory concern

18. In October 2015, very early into his employment the Claimant raised a concern with Mr Hartley, copying Mr Hendrik Van Deventer about the basis of charging clients, which had in the Claimant's view potential regulatory implications. He wrote:

> "there is in my view a non insignificant risk that AGC might be perceived of not acting in the best interest of its LP leading to reputational risk with the Lps and regulatory risk with the FCA."

19. It seems that this concern did not create any particular difficulty in the Claimant's relationship with the two recipients. Certainly the Claimant in his witness statement does not suggest that some detrimental treatment or difficulty arose at that time.

Title change

20. In March 2016 the Claimant's job role changed to Co-Global Head of Origination and Structuring. Shortly afterward in July 2016 this became Head of Origination and Structuring. The Respondents highlighted that the Claimant received promotions notwithstanding raising regulatory concerns.

21. At that time the Claimant was seen as a high performer. On 1 September 2016 Mr Hartley wrote to Ms McKinley:

> "If anyone deserves a raise in base comp[ensation] it is Gilles [the Claimant]. He is an absolute star, a team player, and works long hours. Almost always he beats me to the office and he stays late and works most weekends. Without him we would be in dire straits. By himself he has tripled the list of potential candidates."
>
> [words in parentheses added]

22. This was an unequivocal endorsement of the Claimant's efforts at that time.

23. By 1 February 2017, after a couple of pay rises the Claimant was by this stage receiving a base salary of £100,000 a year.

Concern about operational function

24. On 22 February 2017 the Claimant raised with Mr Hartley in an email some concerns in further to an ongoing discussion on the topic of the operation function of the First Respondent business. He wrote:

> "As our portfolio grows I also think that there is a need to clarify the respective responsibilities of Origination/Finance/Ops/Risk to ensure that each elements of controls and security which have been negotiated and validated by the IC [Investment Committee] are and remain in place once a facility goes live" [613]

25. The following month on 22 March 2017 the Claimant continued to raise a similar theme:

> "I think that we also need to have a in depth review at our operation and control procedures."

26. He raised concerns about ensuring that partners in developing countries were implementing proper processes to monitor risk, and alluded to suggestions regarding risk monitoring that he had originally suggested back in November 2015.

27. Mr Hartley responded "I agree that they merit tighter monitoring. The question is how we do it with our current resources." [616]

CIO

28. In April 2017 the Claimant job role and responsibilities changed and he became Chief Investment Officer ("CIO"). Preceding this change there was a WhatsApp exchange between the Claimant and Mr Hartley. The Claimant was positive about taking on the CIO role and suggested that Mr Hartley take on a COO [Chief Operating Officer] role, which he said was critical at this stage of the First Respondent's development.

29. In a document entitled "Action by Written Consent of the Directors of Advance Global Capital Ltd" dated 26 April 2017 and signed by the Second, Third and Fifth Respondent, the following resolution was documented:

> Effective 15 May 2017, Gilles Sablin will assume the title and responsibilities of Chief Investment Officer. Nathaniel Hartley will remain Chief Executive Officer and assume additional duties as the Chief Operations Officer. The title of Head of Origination will be discontinued.

30. The Claimant, in his statement says that he was not informed of the discontinuation of the Head of Originations title and that the substantive nature of his role did not change and that he continued originating opportunities and winning business. The Claimant contends that later on his title was Chief Investment Officer and Portfolio Manager, which is how it was described in a document entitled "investment policy" dated 2 September 2019 [A1067].

31. We find that the Claimant was as far as he himself and his colleagues were concerned the Chief Investment Officer. The document referred to above merely emphasised that in addition had a portfolio. Portfolio manager was not part of his title. It is clear however that portfolio management took up a large part of his time. In his witness evidence, supported by analysis he says that 80 – 90% of his time was spent on portfolio management. This was not contested by the Respondents, although it is clear from some contemporaneous documents that Mr Hartley wanted the Claimant to do more of what he considered to be the CIO role.

Segregation

32. One of the live points of dispute between the parties and a crucial background to the alleged protected disclosures is the question of segregation i.e. the segregation of different functions. It does not appear to be in dispute that in a large financial institution such as a investment bank there is a high degree of segregation of different functions to manage risk. The extent to which segregation could practically be done within a much smaller organisation the size of the First Respondent was in dispute.

33. Segregation was part of the stated policy of the First Respondent. The First Respondent's Compliance manual version 2.1.0 (dated January 2017) contains the following: [A1237] –

> The Firm has sought to organise its business as far as possible (given its nature and size) to minimise the risk of Personnel undertaking multiple functions inappropriately through effective segregation of duties. In particular the Firm seeks to ensure that no single individual, including the Principals, has unrestricted authority to undertake all of the following:
>
> • initiate a transaction;
>
> • bind the Firm;
>
> • make payments; and
>
> • account for it."

34. Under "Firm procedures and the Segregation of Functions", the compliance manual has this: A1238 –

> Where the scope for the complete segregation of duties is limited, the Firm will implement appropriate controls to manage any residual risks or conflicts (actual or potential).

35. In the relevant FCA Handbook "Investment Funds sourcebook" (release 15; January 2022) following guidance is given at 3.7.1-3 (A1513):

> Functional and hierarchical separation
>
> (1) An AIFM [Alternative Investment Fund Manager] must functionally and hierarchically separate the functions of risk

> management from the operating units, including from the functions of portfolio management.

36. At 5.1.10 (A1519) –

> Where a firm is unable to ensure the complete segregation of duties (for example, because it has a limited number of staff), it should ensure that there are adequate compensating controls in place (for example, frequent review of an area by relevant senior managers).

37. 5.1.8 [A1517]

> The effective segregation of duties is an important element in the internal controls of a firm in the prudential context. In particular, it helps to ensure that no one individual is completely free to commit a firm's assets or incur liabilities on its behalf. Segregation can also help to ensure that a firm's governing body receives objective and accurate information on financial performance, the risks faced by the firm and the adequacy of its systems

38. Although the versions of the FCA documents provided in the agreed bundle postdate the material events, we have proceeded on the assumption that these provisions are materially similar to those in force at the time.

Strong opinions

39. On 5 May 2017 the Claimant apologised in a WhatsApp or text exchange for coming across as critical, emphasising that Mr Hartley had done a great job but being puzzled by a particular detail in a transaction.

40. Mr Hartley's reply began

> "It's fine. We need strong opinions! No worries …. " [603]

41. The Respondents highlighted this exchange as an example of Mr Hartley having no difficulty with being robustly challenged by the Claimant.

Chief Investment Officer – announcement and job description

42. On 1 July 2017 the Claimant's appointment as CIO was announced to founding investors. Mr Hartley explained that that the Claimant was thought to be appropriate for the role based on the depth of his experience. It was explained that his most recent role had been Head of Origination and Structuring. Mr Hartley explained that the Claimant focusing on CIO responsibilities would enable Mr Hartley himself to focus more on the efficiency of the operations.

43. A job description was drawn up for the Chief Investment Officer. We have heard evidence about the key responsibilities of this role which were described as follows:

1) In conjunction with the CEO, formulating the portfolio investment strategy in line with the fund's financial and social goals

2) Ensuring the cultivation of prospective transactions and aligning the pipeline with the agreed investment strategy, continually re-assessing risk appetite and other investment criteria on an ongoing basis to ensure optimal timing and acceptable risk-adjusted returns

3) Overseeing the execution of the investment strategy and coordinating the origination, structuring and underwriting of investment opportunities

4) Overseeing the financial, operational, and legal due diligence efforts for potential transactions

5) Acting as voting member of the Investment Committee and providing recommendations and advice on investment opportunities

6) Implementing investment policies in line with the fund's mandate

7) Monitoring the portfolio and analyzing the performance drivers and risk factors on an ongoing basis

8) Ensuring the continued development and improvement of AGC's investment practices and processes to ensure they adequately fulfil the fund's mandate

9) Playing an integral role in fund raising by attending investor meetings, presenting the fund's strategy and investment process, articulating the rationale for the portfolio composition and assessing the results against fund's mandate and relevant benchmarks

10) Managing and developing a growing team of investment management professionals

11) Maintaining and distributing an accurate and up-to-date report of all confirmed and estimated partner inflows and outflows to assist the investor relations team with ensuring the pipeline of prospective investor transactions is in line with anticipated partner-related cash flows

44. It is the Claimant's contention that much of this role was already been done by him, and that there was a limited additional of strategic element (point 1 above), building on the core portfolio manager role which he had already been performing.

45. On 1 November 2017, the Claimant received a further salary increase to a base salary of £120,000.

Efact and aftermath

46. In 2015, the First Respondent entered into a USD$2.5 million revolving credit facility agreement with Efact S.A.C. ("Efact"), a partner company in Peru. Efact was a factoring company. Drawings under the credit facility were permitted against and secured by receivables (the payment of debts and payables (invoices) purchased by Efact.

47. In the first quarter of 2017, it was discovered that the First Respondent had provided funds against invoices which had been fabricated by Efact. The potential loss arising from the fraud amounted to approximately USD$2.5 million. As a result of the Efact fraud, it was acknowledged by the First Respondent that there were weaknesses in the First Respondent's risk and operation procedures, and in particular, in respect of the verification of the invoices provided to the First Respondent as collateral.

48. Following on from the Efact fraud, a new verification procedure [676], was implemented from September 2017, with the objective of preventing a similar fraud from occurring in the future. Some elements of that verification process might be described as aspirational. For example various methodologies for verifying investments are said to be carried out by the "AGC Operations Team". In reality, was being characterised as a "team", was one person, namely Mr Redi Gjomema. The Respondents' case is that at that stage they were building up the team. The Claimant's contention in the hearing before us is that this was described in misleading terms.

49. This verification procedure document could only be accessed by approved investors, not members of the general public.

50. The Third Respondent was COO (Chief Operating Officer) as well as CEO and therefore senior manager in charge of implementing the verification process.

December 2017Great Tao

51. In December 2017, the Claimant secured and structured as 'Originator' a USD$5.0 million investment against Zhejiang Great Tao Factoring (Hong Kong) Co. Limited ("Great Tao"). The Great Tao transaction was structured as a supply chain finance/reverse factoring transaction between suppliers in mainland China and debtors offshore from China.

52. In a reverse factoring transaction the client of the factoring company is the company which will repay the invoice given as collateral when this invoice matures. In such a scenario the factoring company can verify the invoice directly with the debtor before disbursement. It was believed that this feature of the arrangement led to a reduced risk of fraud.

53. The Investment Committee unanimously approved this transaction. As part of the deal, the First Respondent held a contractual right and ability to verify

directly with the Great Tao debtors that each invoice was genuine. The Investment Committee minute dated 10th May 2017 shows a risk evaluation of 'Low' against collateral.

54. On 27 December 2017 Claimant wrote to the Fourth Respondent Mr Hendrik Van Deventer, Mr Hartley, Mr Antic, Mr Chamings with a reference request for $960k for Great Tao. Quite early on Great Tao was requesting further finance, such that Mr Hartley commented with some surprise on the rapidity of the further request, writing "these guys are swinging from the fences". Nevertheless additional funding was provided.

55. On 23 April 2018, someone called Dean at Great Tao Factoring Co Ltd emailed Mark Chamings and David Antic, copying the Claimant in an email entitled "The Procedure to conduct the verification". The email goes on "here's the procedure agreed with Gilles [Sablin] to conduct verification of the invoices in your ledger", then a process is set out. Also that emailed it's said that SAFE has blocked access to GT's bank account.

Great Tao Fraud

56. Unfortunately, as it transpired later on in 2018, many of the invoices and 'irrevocable undertakings to pay' provided by Great Tao in support of requests for funds to be advanced were forgeries. It should have clear on examination that this was so. The client names on the invoices included Ronald Reagan, Tom Hanks, JRR Tolkien and Bill Clinton. Whether this was a deliberate joke or merely an attempt to provide English sounding names is unclear. Additionally, it became clear on examination that the forged documents contained the name of the same legal adviser used by different companies in different countries, which should have caused concern, since this was unlikely. Further, addresses were duplicated across different documents, which again ought to have raised concerns.

Responsibility for inadequate verification checks

57. In any event it seems that on the balance of probabilities no one in the First Respondent carried out an adequate check of this invoice documentation.

58. One of the most hotly contested points of dispute in the matter before us was the extent to which the Claimant personally was to blame for this absence of basic due diligence. His contention is that separation of functions under the FCA (Finance Conduct Authority) rules would mitigate against him as an originator carrying out the risk control/administrative function of checking documentation and that the responsibility for this activity very clearly fell within the remit of the operations team following under the responsibility of Third Respondent Mr Hartley as COO.

59. There is a distinction to be drawn between the verification process as part of the origination of the transaction and the investigation which was carried out once fraud was suspected. The reality in this case is that the verification process cannot have been properly carried out such that documents were checked for the first time in the investigation.

60. Ultimately both Mr Chamings the Chief Risk Officer and Mr Gjomema left employment with the First Respondent, we are told at least in part relating to failures connected with this transaction. We have not heard evidence from either of these individuals about their role, nor whether they accepted that there had been failings. In short it is not possible for this Tribunal to make a determination as to the extent to which these two individuals were culpable.

61. While the Respondent does not suggest that the Claimant should have personally checked each individual invoice, the Respondents' position is that the Claimant should have provided a framework for junior members of the First Respondent operation team to check these invoices. This is disputed.

62. The Tribunal finds that the checking of the individual invoices was part of the verification process which should have fallen under the responsibility of Mr Hartley as COO. Whether there was some ambiguity or evolution over time in the demarcation between origination and operations is discussed further below under the heading “Scope of responsibility of operations team”.

Investigation of fraud

63. Once the team at the First Respondent began to suspect fraud in this transaction Mr Hartley only felt aggrieved that the Claimant did not assist in the scrutiny of documents to understand what had gone wrong. This was no longer due diligence and represented an investigation in what had gone wrong. The Claimant remained of the view that it was still not his role to scrutinise the documents.

64. It seems to the Employment Judge Adkin and Mr Bishop that in an organisation of the small size that the First Respondent was in 2017-2018, it is probably best to characterise the circumstances of the Great Tao fraud as a collective failure of the team. This is as a matter of broad impression rather than a forensic analysis.

65. The Minority, Dr Weerasinghe, finds that the verification of the invoices was the sole responsibility of the COO (Mr. Hartley), not the CIO (Claimant). The term portfolio ‘oversight’ has not been defined. Given that Mr. Hartley says that it had taken him days to re-check the invoices, how, portfolio ‘oversight’ by the CIO would have prevented the fraud is not clear. Moreover, in oral evidence, the Claimant said that the Respondent never told him he was at fault. Furthermore, in his 2019 review p1949, Mr. Hartley accepts responsibility for the lapses in the verification process. Furthermore, emails at p721 – 725, show Mr Hartley conducting and leading a verifications process.

2018 review

66. On 11 January 2018 in a review document dated 11 January 2018, Mr Hartley made an assessment of the Claimant's performance. The Claimant apparently did not see this document at the time, but he does not dispute its veracity.

67. This review document contained the following under the heading 2018 priorities:

> "As CIO Gilles needs to finish assuming the material responsibilities associated with being the primary individual with oversight of the fund. In addition to adhering to sound portfolio management and diversification requirements he must also begin to take a more active role in reviewing and approving the NAV, managing FX risk and creating the factsheet.
>
> Continue with the great progress made in originating new, high quality deals that offer potential to scale the AUM of the fund while also yielding acceptable rates of return and minimizing credit risk. An important aspect of this will be an assessment of whether our current investment committee process is fit for purpose, or if it needs to be amended or streamlined in some way.

68. On this point Dr Weerasinghe comments additionally:

> "In the 2018 review, at p1033, under the heading '2018 Priorities (updates), Mr. Hartley scores 8 out of 10 for the above priority. He says managing FX remains to be done but there is a contradiction because the Claimant asks for this in his self-assessment for 2019, see below. Moreover, in his statement, the Claimant says managing FX risk is a task which is primarily the responsibility of the COO/CFO as evidenced by his job scope. He further points out that per the Delegated Mandates & Authorities dated May 2019 (Additional Documents/A//31/190), only the Third Respondent and the Fourth Respondent are listed as authorised FX dealers. It seems this matter has been settled with no evidence of insubordination or pushback from the Claimant. Moreover, in his witness statement at para262, the Claimant has presented a list of CIO specific duties and estimates a total of 13 hours spent per month for those duties. There was no evidence of a rebuttal from the Respondent."

Risk/operation function (originally PD#1) Jan 2018

69. On 22 January 2018 Claimant sent an email to Mr Hartley (and later Ms McKinley) in which he raised concerns about the First Respondent's risk and operation function. This was put forward initially as the first protected disclosure. It was clarified before the Tribunal that the Claimant accepts that this does not amount to a protected disclosure. We have considered it however as it is part of the background of potential relevance to the context in which later alleged protected disclosures were made and received.

70. This email, which amounts to 1 ½ pages in very close type is headed "AGC Risk and Operational functions" and attached a spreadsheet analysis entitled "Large Debtors Exposure". This follows on from the "TradeRiver" situation. TradeRiver was a partner to whom the First Respondent had provided finance which had got into difficulty with one of its own large clients at that time. By

2021 TradeRiver was able to recover the situation but in early 2018 this was not known and accordingly the matter was of some concern.

71. The Claimant's email suggested that there were some wider lessons to be learned from that situation. He suggested that a comprehensive review of the entire portfolio should be carried out to ensure that there were not equivalent problems with other clients. He suggested it was possible that there were structural weaknesses in the risk and operation functions. He suggested that there was an opportunity to adopt best practices of other investment companies. He finally concluded that the solution to these risks was to recruit a mid-level operations professional and a non-executive member of the credit risk committee and investment committee with experience of risk management at a senior level.

72. He signed off the email

> "I would also like to reiterate that the paragraphs above are mere suggestions which I hope will positively contribute to the reflection and discussion on the improvement of our risk and operational functions."

Deteriorating atmosphere

73. The Claimant contends that from 22 January 2018 onwards all of the Respondents subjected him to an increasingly tense and hostile atmosphere, relentlessly and deliberately undermining and side-lining him and that the Board did not support him.

74. This is a very broad allegation. As the Tribunal highlighted to the Claimant during earlier stages of the hearing, it is quite difficult to make findings about such a broad allegation without specific allegation of things said and done on particular times. We find that the Claimant has failed to substantiate that 22 January 2018 marked the beginning of an increasingly tense and hostile atmosphere.

Logros Ecuador (PD#2) – 9.4.18

75. On 9 April 2018 the Third Respondent Mr Hartley approved a substantial payment to a client called Logros Ecuador on a transaction as part of a $2.5m facility which he had originated without waiting for approval of other senior colleagues.

76. The Claimant sent an email to Mr Hartley, Mr van Deventer and Mark Chamings, in which he raised concerns that Mr Hartley had breached internal policies and procedures. He flagged up a concern about exposing the First Respondent to financial and reputational risks. This is the second alleged protected disclosure. We have described this as the second protected disclosure in order to maintain consistency of referencing.

77. The Claimant wrote in this email at 11:19:

> "I have not been privy to the discussion on Logros Ecuador which took place last week so I can't comment on the specifics of the situation. However, I would like to put on record that I am greatly concerned that you took upon yourself to approve the first disbursement for Logros Ecuador in apparent breach with some of our internal procedures and policies:
>
> To date, I have not signed-off/approved the Logros Ecuador file in my capacity of CIO. I believe however that the explicit approvals of the CRO and CIO are conditions precedent for a new facility to be opened. I actually have some outstanding questions on the file - which I will share in a separate email;
>
> From the trail of emails on the situation, I understand that approving the entire utilisation request from Logros Ecuador, would put the facility out of formula. I believe that "out of formula payments" need to be approved by two "C level staff", and approval need to be documented in a payment form. Can you please clarify if a 2nd C level approved this payment?
>
> As a FCA authorised investment firm it is imperative that we develop a culture with no tolerance for breach of policies and procedures. As senior staff we have a responsibility to lead by example and hold ourselves to the highest standards in all situations. Failing to do so would materially undermine our chance of success and expose AGC and its senior staff to grave financial and reputational risks."

78. The Claimant has highlighted to us the Investment Committee Policy version 2.0 (dated June 2018), which contains a provision that for File Sign-Off:

> "The Chief Risk Officer, Chief Investment Officer and Chief Operations Officer will all review the file"

79. The revision of this policy post-dates the material events in April 2018. We have not being provided with a copy of version 1.0 which dates from November 2013.

Mr Hartley's response to Claimant's concerns

80. In response, also on 9 April 2018 Mr Hartley wrote to the Claimant, Mark Chamings and Mr van Deventer in combative terms:

> "Just for the sake of clarification, and for the avoidance of any doubt, I approved the payment myself today. Why? Because I anticipated that what has transpired would actually take place. Specifically: nothing.
>
> If we all think that how we are currently doing things is correct, we are wrong. We have to change. More time has been spent dissecting and discussing minor discrepancies on a modest

> disbursement to a new client than there has been on discussing how we can obtain financial information on our material debtors.
>
> What's more important to us? $100k of invoices that are out of formula which the factor has agreed to rectify, or the $2.5 million exposures? Our priorities are absolutely fucked up right now, and I am not going to mince words about it. Everyone wants to have a look at Logros. Who is putting their hand up to look at Mitsui? It's wrong.
>
> Mark when I emailed you and David on Friday saying we need to look at this over the weekend that didn't mean me waiting 48 hours to get a response which roughly mimicked the analysis I sent to you and David.
>
> And David, who received three emails from me between Friday and Sunday, hasn't responded to anything at all. If he wants to progress at this firm, that standard is not good enough. That message needs to be sent. Shall I do it, or will you? If he wants a 5 day a week, 9 to 6 job, this isn't the place for him. And that goes for all us. If this business is to be successful that's not going to cut it.
>
> …. When I am back in the office the tone is going to start changing because the pressure is on now. If the slowest among us cannot keep up, they will be left behind.

81. In another email, dated 9 April 2018 Mr Hartley sent the Claimant an unpleasant email which said:

> "If you want to be the CIO you can start doing the dirty work. If you don't then we can take the title away" (POC 90.6) ("Alleged Detriment 6").

82. At 19:40 Mr Hartley sent an email to the Claimant (copying Mr van Deventer and Mr Chaming) saying that the Claimant was free to raise his concerns.

83. Later that evening, Mr Hartley replied to the Claimant's email sent at 11:19:

> "Gilles if you want to discuss setting the example you can start by assisting us with actually being the CIO rather than accepting the title and none of the responsibilities. Because right now you seem to shunt all the work to others … Incidentally you were out on holiday. You're either in or you are out. Not some halfway house where you can pick and choose what you want to do. Sudha attempted to contact you repeatedly last week to no avail … I would be wary of citing the FCA in correspondence. The only reason I am intervening is because you are not reliably fulfilling your role. Shall we shift the focus to that? It's something both Janet and I have observed. Shall I cite this in front of your colleagues? … If you put the same amount of effort into fulfilling

> your role as CIO as you do on focusing on other people's compensation and KPIs we would be miles ahead."

Claimant escalates concerns (PD#3) – 10.4.18

84. On 10 April 2018 the Claimant sent an email to the Second Respondent Ms McKinley, in which he escalated his concerns about the issues raised in Alleged Protected Disclosure 2 and raised "grave" concerns about governance, culture, a lack of separation of functions and breaches of procedure. This is the third alleged protected disclosure.

85. The Claimant provided a detailed chronology of events leading to NH approving the $2.5m facility for Factor Logros del Ecuador. In particular he alleged that Mr Hartley had approved the payment itself in breach of procedures and policies, and when challenged had responded with the "dirty work" email set out above.

86. He summarised his concerns as follows:

> "We are essentially facing a situation where the CEO originated and structured a transaction, approved the file and the first disbursement without the formal approval of other C level , in breach of AGC's procedures and policies;
>
> The fact that Nate felt it was appropriate to send an email where he justified approving the payment because he " … anticipated that what has transpired would actually take place. Specifically: nothing." Does not reflect well on AGC. Furthermore, even if his claim that the team (and I would include myself) had not act diligently enough on his request the tone and terms of his email are disparaging, unprofessional and quite unacceptable in my opinion. The emails that he sent to me at 19:42 and 20:59 are also quite disappointing and troublesome, instead of acknowledging my concerns, Nate chose to send veiled threats and (in my opinion groundless) accusations.
>
> As a FCA authorised investment firm I think it is imperative that we develop a culture and governance with no tolerance for breach of policies and procedures and with the respect of colleagues as a cornerstone. I also believe that senior staff have a unique responsibility to lead by example and hold themselves to the highest standards in all situations. Failing to do so would materially undermine our chance of success and expose AGC and its senior staff to grave financial and reputational risks.

87. Ms McKinley wrote the same day back to the Claimant in fairly emollient terms thanking him for calling the incident her attention cautioned him from “duelling emails”. She requested that he give her a week to speak to the relevant people

and asked him to reflect on the root causes of the current tension. She asked for thoughts on the work process and improving productivity. She emphasised everyone took regulatory responsibilities very seriously and agreed that tensions could run high stress. She asked if he could mend some fences and focus his time coming up with well thought out recommendations on the fee structure going forward.

Claimant's considered response (15.4.18)

88. On 15 April 2018 the Claimant responded setting out what he believed there was tension. He said that the portfolio at signs of weakness and instability and "negative credit events" with three accounts. He raised concerns about the credit risk and operational approach/methodology. He raised a concern about there being no clear view on the path to profitability and how to reach breakeven. He raised concerns about the culture of the team and a reluctance to hold people to account within their area of responsibility. He acknowledged however that given the stage of development of the First Respondent business that these challenges are not surprising.

89. By a couple of weeks later it seems on the face of it matters blown over. The Respondents highlight a message exchange where Mr Hartley wrote to the Claimant about another topic in terms which suggested that he appreciated that the Claimant was busy.

> "Yeah next week is fine. I will do the correlations. You have your hands full"

CIO job scope

90. On 26 October 2018 Mr Hartley provided a Job scope for Chief Investment Officer role to the Claimant as the business evolved into a more mature organisation. The Claimant responded saying that he did not have any immediate comment although he would have a detailed review of it.

Other redundancy

91. In 2018 the First Respondent made a Ms Nici redundant.

Annual reviews in 2019

92. In an email to Ms McKinley in January 2019 about Mr Hartley's performance in 2018, the Claimant described Mr Hartley as doing a great job, leading to growth in assets under management, working long hours and being responsive to requests for assistance or resources. Areas for development he suggested include a culture/environment where team members are held accountable for their respective areas of responsibilities, a mechanism for reviewing problems and determining causes and also continuing to strengthen the control function of the business (risk and operation).

93. In his turn in the Claimant's review, Mr Hartley was complimentary about the Claimant as being a high performing member of the team. It was a good review. He wrote that the Claimant was very engaged with an analytical mind and high attention to detail. He went on:

> "Although Gilles and I occasionally have disagreements on some elements of managing the business we are always able to disagree and quickly reach a resolution which benefits everyone. He is not afraid to speak his mind and is quick to acknowledge the points raised by others, or weaknesses in his own lines of thought. To me this represents someone who has a low degree of insecurity"

94. As an area of strength he recorded the following:

> "Gilles is able to speak his mind and "stick to his guns". Although this can be a disadvantage in certain circumstances it is indicative of his capacity to formulate his own opinions and not be influenced or browbeaten by others who do not share his views."

95. He was recommended variable compensation i.e. a bonus of £62,500.

Scope of responsibility of operations team

96. The exact scope responsibility of the operations team was not entirely settled during the periods material to this claim as demonstrated by an email from Jannes Coetsee Finance Operations Manager to Hendrik Van Deventer at the end of April 2019. It seems from that email that Mr Van Deventer saw the operations team as a "control" function, with the investment team responsible for resolving "issues" as the main point of contact with a client.

97. It is clear from the sign off to this email that Mr Coetsee was seeking clarity from the leadership team as to the demarcation between responsibilities of the operations team versus those who had originated a transaction, post commencement of it.

98. Mr Danny Burden of Nadeus Business Advisory Limited was brought in on a consultancy basis to assist the First Respondent in the summer of 2019. His background was in risk in commercial lending. On 7 July 2019, he wrote to Mr Van Deventer, summarising discussions that had taken place the previous month. On the topic of governance, he wrote this:

> "Governance
>
> We talked through the approval process for new and existing deals. The current set up seems to be a product of the evolution of the organisation, with "Origination" effectively also being in control of the actual approval of the files. From an external viewpoint, this isn't ideal. A more standard approach would be to

> have a balance of Risk and Origination voting members on the Investment Committee, with either a CEO as the foot in both camps or, perhaps more suitable in this case, a requirement for a unanimous decision on each file.
>
> Also, considering the 'ownership' of partners, clearly the Originator remains the controller. There may be a case - as the portfolio grows - for switching this to either the Ops team or to Jannes, effectively a hunter and farmer approach. This frees up the Originators for new business and potentially makes for more focused 'client management'.

99. This seems to suggest to the majority (EJ Adkin and Mr Bishop) that the Claimant's view that there should be a distinction between the originator and operations in respect of approval was endorsed by Mr Burden as the ideal, but the First Respondent was not at that stage yet operating this separation [1703] or at least there were differing views amongst members of the team.

100. Dr Weerasinghe doubts this conclusion and comments:

> "The principle of segregation was well understood. Citing the FCA rule SYSC 5, the R's Compliance Manual 2017 states:
>
> "The Firm has sought to organise its business as far as possible (given its nature and size) to minimise the risk of Personnel undertaking multiple functions inappropriately through effective segregation of duties. In particular the Firm seeks to ensure that no single individual, including the Principals, has unrestricted authority to undertake all of the following: initiate a transaction; bind the Firm; make payments; and account for it."
>
> It is the phrase "as far as possible" that Mr. Hartley cited on cross examination. However, there was no explanation as to why it was not possible. Furthermore, this approach does not comply with FCA rules for AIFMs because there were no compensatory controls set up.

101. The verification policy in relation to new partners was updated in August 2019 [1848]. This contained the following: "Take on verifications will normally be completed by the COO, the Finance Operations Manager or the Manager: Risk"

102. On 9 September 2019 the verification policy change was changed again [1810].

Great Tao fraud 2019

103. By 29 May 2019 the First Respondent's table of "provision" (i.e. clients where there were concerns) [A1360] contained the following:

> "Several issues on the account, but business continues to trade. Corporate guarantees against 2 entities and PG's against 2 shareholders. Investigation into business assets and legal

> proceedings are on going. Ongoing discussions with counterparty and lawyers to resolve issues on frozen bank account. Based on independent corroboration expect $7m in liquid assets to be available once bank account is unfrozen. Expecting material progress by end of May 2019. Prudent to not recognise any income on this position until resolved. Further delays in resolving account issues will be assessed for possible provisions. To be revisited for April NAV production" [emphasis added]

104. By June 2019 the bank in which funds belonging to Great Tao were previously alleged to have been frozen confirmed that this was untrue and that in fact there was no money the account. From the First Respondent's respective this made it absolutely clear what had previously been suspected that there was very likely to have been a fraud.

105. On 9 June 2019 the Claimant wrote in some detail about the Great Tao situation to Mr Hartley and Mr Van Deventer, explaining in detail what the current situation was. He explained what he thought should happen, including David Chamings and Redi Gjomema ordering and marshalling the information that they had to inform next steps regarding pursuing Great Tao and being able to answer questions from the board and investors. [1048]

Claimant's suspicion of fraud Great Tao (PD#4) – 12.6.19

106. On 12 June 2019 the Claimant sent an email to and Mr Kreps (copied to R3 and R4), in which he notified Ms McKinley and Mr Kreps of his suspicion that the First Respondent had been defrauded on the Great Tao transaction (POC 38) ("Alleged Protected Disclosure 4"). At the submissions stage, Mr Smith helpfully and appropriately conceded that this did not amount to a protected disclosure.

Concern about process leading to fraud (PD#5) – 18.6.19

107. On 18 July 2019 at 01:46 the Claimant sent an email to Ms McKinley, in which he raised concerns that fraudulent activity was enabled by weaknesses in the First Respondent's processes. He repeated his request for an audit on the Great Tao transaction to establish how the fraud occurred. This is the fifth alleged protected disclosure. His email contained the following:

> If you recall, in an email dated 15 April 2018 (attached for reference), I raised some concern on the fact that our reluctance to conduct thorough analysis to determine the root causes of problems was a weakness of AGC's culture and a source of potential moral hazard. As the key sponsor of the Great Tao transaction I feel even more strongly that a comprehensive review of this deal should take place as I do not wish the Board to be left with the impression that the underwriting and structuring of the transaction did not properly take into account the inherent risks of a transaction with some mainland China component.

> Furthermore, in spite of the extensive checks and verification which were conducted before each disbursement (c. 6/7 in totals) and at month ends it has recently transpired that a material proportion of the invoices that we have funded were not genuine. In my opinion this development would make a thorough review even more urgent for the following reasons:
>
> o Establishing with certainty the level of fraud that we are facing would be instrumental in determining the appropriate recovery strategy with Great Tao, and in particular deciding if taking legal proceedings in China is advisable;
>
> o Developing a detailed understanding of what happened would be very instrumental to properly articulate to investors the underlying reasons for this situation.

Dentist

108. Later on 19 June 2019, arising from attempts to get to grips with the Great Tao fraud situation, Mr Hartley lost his temper with the Claimant and sent some intemperate messages. The Claimant was trying to push a telephone call back couple of hours so that he can attend the dentist. Mr Hartley responded in these terms:

> "Yes it is, because I have other things to do in addition to GT. My entire life is wrapped up in AGC, and I might lose my job now because of this deal. Everyone might. And if you're asking me to stop trying to save myself and the business so you can go to the dentist, I am not going to do that. I am a director and could get prosecuted for issues like this, I cannot wait for anyone. I have done more work on the verifications in the last 24 hours.
>
> Why I am doing that? 10:11
>
> I am doing that to cover our ass 10:12
>
> I can't prevent you from going to the dentist, doctor or anyone else. Nor do I want to. 10:13
>
> But I am not going to wait for anyone anymore. 10:14
>
> Because this a threat to our livelihoods 10:15
>
> Mine at least. 10:16"
>
> [times generated by WhatsApp]

109. Mr Hartley denied that this suggested that he believed he was guilty of some sort of breach. His account was that he did not consider the Claimant was taking the matter seriously, and felt that he was having to do work that in his view the Claimant should be doing. He explained his comments about being prosecuted as due to apprehension about what might happen and lack of

understanding rather than acceptance that he believed he was guilty of some sort of criminal conduct.

June 2019 advisory note about Claimant

110. On 24 June 2019 Mr Hartley produced a "staff advisory note". This was a note to file about the Claimant in which he detailed briefly the history of the GT transaction, and the fabricated documents which had been provided in the spring of autumn of 2018. He expressed a criticism that the Claimant and did not pitch in with the verification efforts because he felt it was not his job:

> "Gilles did not pitch in with the verification efforts because he felt this was "not his job", taking a pedantic interpretation of his job scope to extreme lengths. Because of this lack of support and accountability, a systematic review of all documentation provided by Great Tao was never conducted. Only when all other reasonable means of repayment were exhausted was it decided to go back and review all the paperwork. Subsequent inspection by the CEO (supported by email and phone verifications) indicated that a systematic fraud had occurred, with essentially all of the documentation underpinning the RCF revealing itself to be fake. Gilles again chose to distance himself from the tedious process of verifications, preferring to let his colleagues get on with it.
>
> There was no expectation for Gilles to handle all of the work on his own, but it set a very bad example for the team that the originator neglected to get involved with a lot of the dirty work associated with a transaction sponsored by him."

111. Mr Harley then went on to criticise the Claimant for not having visited China during 2019, especially in June 2019 when he was at a conference in Vietnam which was a 3.5 hour flight away.

112. Mr Hartley's "assessment" which was more of a general conclusion reads as follows:

> "A root-to-branch assessment of the origination and operational functions of the business are in process at the time of this note being written. There is a lack of clarity surrounding the accountability and "ownership" of partner relationships which is detrimental to the business. In addition, some bad leadership examples have been set whereby senior staff withhold their support from teammates despite the fact that the requirement for assistance is both obvious and material."

113. The Claimant was not aware of this Staff Advisory Note at the time and hence did not have an opportunity to respond.

Mr Hartley's concerns about lawyer disclosure

114. On 17 July 2019 Mr Hartley expressed his concerns that Addleshaw Goddard LLP the law firm acting for the First Respondent had disclosed concerns about the Great Tao fraud to their auditor Ernst & Young LLP

> "Alright Gilles. Addleshaw just told EY about Great Tao.
>
> I want them fired.
>
> Like tonight.
>
> fucking unbelievable.
>
> Gilles we need to speak with them tomorrow." [A704]

115. Mr Hartley's evidence to the Tribunal was that his upset and frustration, which is clear from this text diatribe was because of his concerns about Addleshaw Goddard's competence.

116. The Tribunal does not accept this explanation as being likely on the balance of probabilities. Mr Hartley did not give any satisfactory explanation as to what incompetence on the part of Addleshaw Goddard might have lead to his reaction in these terms. We infer from the circumstances that Mr Hartley was concerned about the steps that the auditors Ernst & Young might take if it was clear that there was fraud.

Ms McKinley's London visit

117. In July 2019 Ms McKinley visited London. There were four days of management meetings, which included consideration of overall fund strategy, governance operations risk and portfolio overview and an update on Great Tao

118. Several strategic meetings of the First Respondent are held at which a proposed restructure involving the removal/phasing out of the CIO is discussed and recorded.

119. In a dated 8 June 2019 Mr Hartley wrote to Mr Van Deventer to confirm steps as follows under the heading "team structure":

> CIO role to be phased out and replaced with 3 Portfolio Managers each accountable for their investments, but also jointly accountable for the portfolio as a whole.
>
> Gilles [Claimant] to become Principal Executive Officer of the fund
>
> All references to "Origination" to be eliminated and replaced with "Investment" [1694, 1696]

120. The responsibilities of this new role were not defined. Furthermore, as to how this role differs from other senior roles was not explained.

September 2019

121. In September 2019 the First Respondent had reached a critical threshold in terms of funds under management. It went through a process with FCA, which leading to "full scope permissions" from July 2020 onward meaning that its regulatory regime under the FCA became more strict.

122. Mr Van Deventer's evidence (HVD23) on this process is

> "The FCA scrutinised AGC, our organisation structure and our individual responsibilities. We were transparent about that fact that people wore multiple hats. I specifically disclosed that I sat on the Investment Committee, was Compliance Officer and had an operational and risk oversight role at the time. They asked questions about decision making and influence to which we transparently responded. They accepted how AGC was structured and managed and signed off on the full scope permissions on 17 July 2020."

Incentive plan

123. In September 2019 the Claimant was granted 70 units in an incentive plan in the First Respondent [412]. This was the same number of units as Mr Hartley, Mr Van Deventer and Ms Bharadia.

Mr Hartley's self-assessment (2019)

124. In a self assessments dated 9 December 2019 Mr Hartley in answer to the question "What do you think you need to improve on", Mr Hartley says:

> "In 2020 I will need to ensure that the proper people are in those roles and have bought into my way of doing things. Senior staff should know when and where to get involved in important matters without expecting a bureaucratic diktat that outlines a prescriptive approach for every possible iteration of what could occur in the future."

125. This appears to be something of a reaction to the Claimant's view on segregation of responsibilities. Mr Hartleys further says, in answer to the above question:

> "Large transactions such as Great Tao merited greater scrutiny during the DD and disbursement process to ensure adequate care was taken to prevent fraud. I should have done more to interrogate (or interrogate again) the information that had been provided to us. Specifically on the KYC and verification components."

126. He clearly accepts responsibility for the lapses in the verification process.

Review of 2019 performance (Jan 2020)

127. On 7 January 2020 Ms McKinley again visited London. During this visit she had a meeting with the Claimant. The Claimant recorded what was said in that meeting in a typed “non-verbatim” note

> Janet [McKinley] indicated that she had been surprised that none of the points raised related to the CIO role and she reiterated that she felt that the role should be cancelled on the basis that the oversight of the portfolio was a collective effort."

128. Ms McKinley mentioned to the Claimant in that meeting that she felt he had a "hands off" approach and that he had been reluctant to conduct invoice verification. She mentioned that he had not got legal fees under control. She said that he was doing himself a disservice by not communicating with her. She said that "people" felt that he was slow to reply to emails, although gave no specific information about who that was.

129. In January 2020 Mr Hartley submitted a review on the Claimant’s performance to Ms McKinley. The Claimant alleges this is the fifth detriment.

130. On 21 January 2020 Mr Hartley sent an email with reviews for all of his immediate management team. In relation to the Claimant's performance for the previous year and goals for the following year it said this in a review completed on 30 December 2019:

> Gilles is incredibly bright and detail-oriented, but he seems to be drifting further and further from the flat-hierarchy, team-based approach that AGC has evolved into.
>
> While I think he can be an effective portfolio manager for his deals, I haven’t seen a strong interest in stepping up to fulfil more of the functions associated with a traditional CIO role (based on my understanding of similar roles). Many of these critical tasks are handled by others, primarily Hendrik and myself. And I suppose that would be acceptable if his current portfolio was performing well, and the future pipeline was strong. But on both counts Gilles has had a very rough year. There appears to have been a fraud at Great Tao, which could have completely capsized our business if not for a guarantee from our owner; [PARTNER NAME] repaid close to $10 million in the spring, and we had no plan to redeploy those funds (despite my repeated warnings to the team) and in late Q4 [PARTNER NAME] announced that they were being bought and that the facility would also be getting repaid sometime in early Q1 2020. Gilles was caught completely by surprise.
>
> So, if these important CIO tasks are being delegated to others so he can focus on his book, why has this been such a bad year when he freed up all that capacity?
>
> To compound things, he often seems very hierarchical in his approach and he has sometimes questioned why Hendrik or I

want input from junior members of staff on certain topics. This is coupled with a general disinterest - sometimes mentioned verbally or in writing – in getting involved in the dirty work associated with building a business.

Some examples follow:

- A couple of times this year I asked him to take the lead in putting together some “next gen” versions of our policies and nothing happened. I am left with the impression that unless I give him specific, precise orders for something he simply won’t do it. But if I have to invest dozens of hours outlining what I want him to do, I could just as easily do it myself. So why bother? I want to delegate but I simply don’t have a lot of confidence to do so because I am worried I will get sucked into countless hours of interminable debate with no clear outcome and at the end, I just end up doing it myself. He wants assignments to be so prescriptive as to preclude him actually taking initiative and doing the work himself. In essence, others would need to do the work so he could review it and provide comments, when in reality I am asking him to do the reverse.

When we discovered the problems with GT I asked several times for assistance with verifications which should have been done prior to the first disbursement. I had to interrogate the hundreds of documents provided to us by GT on my own. I ended up consuming some of my own holiday days (and evenings on weekends) doing - or attempting - verifications on paperwork covering around $7 million in collateral. I ended up sending hundreds of emails and these efforts helped establish the basis for our assessment of the transaction. Hendrik shared with me some texts from Gilles indicating that he thought he was unfairly taking "shit" for this transaction and that it wasn't really his job to assist with the verifications. Even if that was the case on a **business-as-usual basis**, surely in an "all hands on deck" situation he would have the sense to pitch in and provide a well-needed assist [1893]

….

Gilles can be, and has been, a valuable member of the team. But 2019 has led me to question if he should be the CIO or, more broadly, if we even need to have a CIO at all. The investment committee has four members, and decisions need to be unanimous. If the CIO cannot make the call individually, is he really a CIO at all? I think we should move to a system of having multiple portfolio managers. I feel this is more reflective of reality. There is indeed a place for a sharp, dedicated portfolio manager. But if that is all they really want to be, or all they have demonstrated the capacity TO BE, then perhaps that’s not a

> senior management role at all. Senior managers at AGC should be expected to fill multiple roles, if not by design they by necessity

131. The 'business-as-usual' comment is revealing in that it to some extent supports the Claimant's case that the was not an expectation of him to carry out this verification process on a business as usual basis. The use of verifications may be something of a misnomer here. The verification process was as we understood it a kind of due diligence process to be carried out before finance was advanced to a partner organisation. Mr Hartley is using verification here to mean an investigation after it was clear that something had gone wrong.

132. The Claimant felt that he was being blamed for the lapses of the Operations Team. He deliberately distanced himself from the post fraud investigation/ re-verification. In his oral evidence, the Claimant said that he was "very involved in the recovery" which he considered to be distinct from the investigation.

Other redundancy

133. In January 2020 Mr Gjomema, whose role was potentially to be made redundant, left under a settlement agreement.

February 2020 Board meeting

134. On 7 February 2020 there was a Board Meeting of the First Respondent in San Francisco at which it was agreed that Mr Hartley would liaise with external employment advisors Peninsula regarding a proposed settlement agreement with the Claimant. The partially redacted note we have received in evidence at page 2866 contains the following:

> "HR -related topics were discussed. Specifically, [redacted] It was further agreed that NH would begin discussions with Peninsular [redacted] Gilles Sablin."

135. It was explained during the hearing that this document had been redacted in part given that it related to another employee who was also going to be offered a settlement agreement for termination.

136. We find that, notwithstanding there was subsequent consultation, the reality was that the First Respondent's Board had made a decision that the Claimant's role was going to be made redundant at this stage. It follows that whatever the other effects of the subsequent alleged protected disclosures, they did not make a difference to whether or not the Claimant's role was going to be made redundant.

137. By a majority (Employment Judge Adkin and Mr Bishop) we find that this redundancy would have happened irrespective of those subsequent alleged protected disclosures. We find that the decision of the Board in February 2020 was the culmination of discussions which had taken place during 2019 about elimination of the Chief Investment Officer role together with a broader concern about reducing the costs base in an organisation which had to that date never been profitable. Other employees were made redundant or at least agreed to leave rather than face redundancy. It is not suggested that those other

employees had made protected disclosures. We accept the written and oral evidence of Mr Hartley and Mr Van Deventer about the motivation to reduce the costs base.

138. Dr Weerasinghe, takes a different view and does not consider that there is supporting evidence for the above majority view. He says that the Claimant's counsel referred to an unredacted version of the said Board meeting minutes in which there was no mention of an impending redundancy. He considers that the Respondent was merely 'testing the water' by offering a settlement, as per paragraph 225 of Claimant's statement. In any case, Dr Weerasinghe considers that the operative date for the redundancy from the perspective of considering the effect of protected disclosures should be the date of dismissal. By that stage on the Tribunal's unanimous view protected disclosures had been made.

139. On 27 February 2020 Mr Hartley produced a staff advisory note in which she complained that the Claimant had had his backpack stolen containing his MacBook and failed to report the theft for 48 hours. It is clear that Mr Hartley was unhappy about both the delay in reporting and the fact that the Claimant was still using a MacBook. [3617]

Redundancy

140. On 10 March 2020 Mr Hartley emailed the company's external employment advisers, Peninsula, confirming the potential for the application of a redundancy process for Claimant. He wrote:

> Our restructuring will continue in light of current market conditions and we believe one more redundancy may be required this year. This is a more senior post, for which there is only one seat. If we continue with the restructuring this role would be redundant.
>
> If we wanted to proceed down this route, what would be the next steps to obtain peninsula's assistance? Do I need to provide you a written justification for the redundancy, for example, which you or one of your colleagues could consider?

141. On 24 March 2020 Mr Hartley emailed Peninsula a proposed business case for redundancy for the CIO position. This is a four page document, which follows a structure, presumably provided by Peninsula. The points put forward in this document are that the cost base remains too high and is not allocated in the areas of the operation that would bring the largest benefit to the company in future. Growth is said to be slower than had been anticipated. It is stated that in 2020 the First Respondent would become a full-scope Alternative Investment Fund Manager (AIFM) by the FCA. To that end Mr Hartley stated that it was imperative that the business became profitable as this was one of the metrics used by FCA to assess and monitor viability.

142. The role of CIO would be eliminated. Further:

> "The slowdown in business growth will undoubtedly be compounded by the coronavirus crisis and its economic aftermath. This could please significant strain on the business over the remainder of 2020, and likely into 2021 as well."

143. Evidence for the proposal is said to be contained within the cash flow projections for 2020 which were continually weakening for the remainder of the year. Mr Hartley notes that there have been previous redundancies in 2017, 2018 and 2020.

144. Mr Hartley's oral evidence to the Tribunal was that a reduction of 52% of the First Respondent's costs base was made during the course of 2020, which included the saving made as a result of the Claimant's redundancy. We have not been referred to documentary evidence in support of this.

Notification of risk of redundancy

145. On 28 April 2020 Mr Hartley informed the Claimant orally that he "may be at risk of redundancy". During this conversation Mr Hartley mentioned that there was potentially a role of Financial Controller which someone else had been recently hired to do, which the Claimant might wish to consider. This matter was not explored further, perhaps unsurprisingly given that this role had a significantly lower salary.

Settlement

146. On 30 April 2020 the Claimant acknowledged proposed settlement agreement provided to him by the First Respondent. Although this exchange is marked "without prejudice and subject to contract", it is contained within the agreed bundle, suggesting that the parties have waived privilege in respect of this document.

147. The Claimant cited wider personal issues as a reason why he needed further time and asked if he could revert by 11 May 2020.

Grievance May 2020

148. On 11 May 2020 the Claimant raised a formal grievance under the First Respondent's Grievance Policy.

149. The Claimant complained about 1. the sudden and inexplicable announcement of his at risk of redundancy status; 2. a pattern of discriminatory and/or victimisatory behaviour since raising whistleblowing concerns, 3. inequality of remuneration and 4. A failure to honour promises to grant him shares. [2056-2079]

Further concerns about Great Tao fraud – (PD#6) – 11.5.20

150. Also on 11 May 2020 the Claimant sent an email to Mr Van Deventer (copied to Ms McKinley), in which he raised concerns about the Great Tao fraud issue and the lack of any audit on the Great Tao fraud, alleged breaches of FCA principles, lack of segregation of internal functions necessary to prevent fraud

and concerns in relation to the Logros Ecuador transaction (POC 45) ("Alleged Protected Disclosure 6"). [1991]

151. This email contains the following:

> "I am emailing you in your capacity of COO and Chief Complianc e officer to convey my concern that to my knowledge, to date the re has been no communication to investors on the fact that the F und has been subject to a fraud in relation to the Great Tao trans action and that funds were disbursed against fabricated invoices. If this indeed the case, I would recommend that a statement is r eleased to investors at the earliest. I have grave concerns that d elaying the disclosure any further would cause AGC to violate so me FCA principles, namely:
>
> "1. Integrity: A firm must conduct its business with integrity."
>
> "6. Clients' interests: A firm must pay due regard to the interests of its clients and treat them fairly."
>
> "7. Communications with Clients: A firm must pay due regard to t he information needs of its clients and communicate information to them in a way which is clear, fair and not misleadi ng."
>
> 8. Conflict of Interest: A firm must manage conflicts of interest fa orly, both between itself and its clients and between a client and another client."
>
> Furthermore, to my knowledge to date no audit has been conduc ted on the GT fraud, this seems to contravene the Fraud Prevent ion section of Advance Global Capital Compliance Manual (Rule s reference SYSC 6) which states that AGC's fraud prevention a nd detection arrangements have to integrate "timely handling an d thorough investigation into reports of suspected fraud".

Grievance process

152. On 16 May 2020 the Claimant was invited to a grievance meeting, chaired by the Fifth Respondent Mr Daniel Kreps, to discuss his grievance.

153. Mr Kreps is based on the West Coast of the US and is a non-executive director and Chair of the First Respondent's Board. He was candid with the Tribunal that he has been a friend of the Second Respondent Ms Kinley for many, many years.

154. The meeting took place on 20 May 2020 by Zoom the internet video platform. The Claimant, Mr Kreps and Ms Bharadia attended. [2577 & 2697]

Logros/Agritrade – further concerns – (PD#7) – May 2020

155. On 21 May 2020 the Claimant sent two emails to Mr Van Deventer (copied to Ms McKinley, Mr Hartley, Mr Kreps, David Antic and Jannes Coetsee in which

he raised concerns about the LOGROS and Agritrade transactions and alleged improper side-pocketing (POC 53) ("Alleged Protected Disclosure 7"). [2398] & [2406]

Whistleblowing notification – (PD#8) – June 2020

156. On 10 June 2020 the Claimant submitted a formal written 'Whistleblowing Notification' under the company's Whistleblowing Policy, in which he alleged malpractice and improprieties (POC 64) ("Alleged Protected Disclosure 8") [3305, 3221]

157. This was raised expressly under the First Respondent's Whistleblowing Policy to Mr Kreps in his capacity of Chairman of the Board of the First Respondent. In that document he raised and alleged breach of the "Fraud Prevention" Section (FCA Rules Reference SYSC 6) of the First Respondent's Compliance Manual, in that there have been reports of suspected fraud and no independent investigation conducted. He set out expressly that there were potential violations of core FCA principles, namely 1. Integrity, 6. Clients' interests, 7.Communication with clients and 8. Conflict of Interest.

158. The Whistleblowing Policy (reviewed 23 May 2020) [3009] contained the following:

> "Confidentiality: AGC will treat all such disclosures in a confidential and sensitive manner. The identity of the individual making the allegation may be kept confidential so long as it does not hinder or frustrate any investigation. However, the investigation process may reveal the source of the information and the individual making the disclosure may need to provide a statement as part of the evidence required.
>
> Anonymous Allegations: This policy encourages individuals to put their name to any disclosures they make. Concerns expressed anonymously are much less credible, but they may be considered at the discretion of AGC.

159. In an email dated 15 June the Claimant highlighted that the First Respondent's Whistleblowing Policy provided for confidentiality. He was concerned about Sudha Bharadia's involvement in the matter.

160. On 16 June 2020 in response to this Mr Kreps sent the Claimant a letter confirming that the Whistleblowing Notification would be investigated under the company's Whistleblowing Policy. [3698] He wrote:

> "I confirm that no one other than Janet, Sudha and Portman Compliance have been or will be informed of your identity as a "whistleblower". As a "non-executive" and non-resident member of the board it would be very difficult for me to investigate the complaint without local assistance. Therefore, Sudha's [Bharadia] involvement, at this stage, is extremely necessary and I reiterate that this does not represent a conflict with her corporate

> responsibilities. Furthermore, as your complaint deals with compliance matters, it is highly appropriate that I have the advice of our outside consultant on compliance, to ensure from a regulatory stance, that any findings are impartial and independent."

161. The Claimant later chased the outcome of this Whistleblowing matter on 21 July 2020.

Grievance outcome & appeal

162. On 17 June 2020 Mr Kreps sent the Claimant a grievance outcome, in which he did not uphold the grievance.

163. On 23 June 2020 the Claimant sent Mr Van Deventer an appeal against the grievance outcome [4026].

164. Mr Van Deventer sent a grievance appeal outcome letter to the Claimant on 15 July 2020 [5038].

Claimant questions about regulatory and compliance issues

165. On 24 June 2020 the Claimant wrote to Mr Van Deventer, copying Mr Kreps, Ms McKinley and Mr Hartley requesting an update on the treatment of the Agritrade and Logros Ecuador investments and their eventual designation as SSIs (side pocket, an accounting method that allows a fund to separate risky/bad assets from good ones).

166. On 1 July 2020 the Claimant wrote to Mr Van Deventer, copying Mr Kreps, Ms McKinley and Mr Hartley querying the minutes of the Evaluations Committee taken on 19 May 2020.

167. On 2 July 2020 the Claimant wrote to Mr Van Deventer querying why the Financial Statements for Global SME Growth Fund LP for year ended Dec. 31, 2019, which became available for issuance on 26 May 2020 did not contain references to the Great Tao fraud (including such facts as the expected 100% loss on the investment and the fact that the main shareholder of Great Tao was now in prison); the Logros Ecuador transaction (company no longer trading) and the Agritrade transaction (company in administration). He asked for confirmation of when these matters had been communicated to the auditors.

168. On 2 July 2020 Mr Van Deventer replied explaining that the positions have been disclosed and discussed with the auditors prior to issuance.

169. On 8 July 2020 the Claimant wrote to Mr Van Deventer about the Great Tao transaction; specifically what the auditors had been informed and why the fair value of the investment had been shown as cost (US$4.6m). He requested a legal confirmation from Addleshaw Goddard. On this day he also chased up a query about the FCA Senior Management Function.

Misleading statement concern (PD#9) – July 2020

170. On 2 July 2020 the Claimant sent an email to Ms McKinley, Mr Hartley, Mr Van Deventer and Ms Bharadia, in which he allegedly raised concerns that a statement sent to the fund's investors was misleading (POC 68) ("Alleged Protected Disclosure 9").

171. In particular the Claimant alleged that investors had been mislead by a statement that the Covid-19 pandemic was a material cause of a lower return in May 2020.

Grievance appeal

172. On 1 July 2020 Mr Van Deventer invited the Claimant to a grievance appeal hearing, which he attended on 8 July 2020.

173. On 15 July 2020 Mr Van Deventer sent the Claimant his grievance appeal outcome, which did not uphold the appeal.

Recommencement of redundancy process

174. Following on from the conclusion of the grievance appeal process, the Second Respondent, Ms McKinley wrote to the Claimant confirming that he was at risk of redundancy and inviting him to a consultation meeting on 20 July 2020 (later rescheduled for 4 August 2020 due to the Claimant's sickness absence).

175. As the significant of the Covid-19 pandemic, Ms McKinley wrote on 15 July 2020 [4815]:

> "In your Grievance, you also raised the fact that the Covid-19 pandemic has not had a material adverse impact on the Company and therefore the Company should not be looking into redundancies as a cost-saving measure. The effects of the global pandemic are ongoing and we continue to monitor the Company's performance on a regular basis. Whilst the pandemic has not had a material adverse impact on us, it does mean, like all businesses, that we do need to think carefully about our costs and structure. That said, in any event, the proposal to improve portfolio management and restructure the team was initiated by the Company before the Covid-19 outbreak and is not a direct consequence of the financial impact of the pandemic."

176. The Claimant was provided with a restructure proposal. This document was headed "Proposed Restructure Of Advance Global Capital Team June 2020".

177. The Claimant has characterised this to us this as a "new plan". [4814 & 4842]

178. This set out some of the history beginning with the departure of the Chief Risk Officer in January 2019, strengthening the risk and operation teams throughout 2019, strengthening the governance of the investment committee during 2019, considering how to strengthen portfolio management, possible redundancy of

the CIO role. The narrative under this last part referred to the latter part of 2017 and beyond where it came to light that some of the investment deals were not being properly risk managed citing fraud onto investment deals. It was confirmed that Ms McKinley spent some time with the senior management team in London in January 2020 and discussions about phasing out the CIO role continued.

179. According this document, from June 2020 the plan was to have a Portfolio Management Group, consisting of a team of people with complimentary skill sets whose remit would be to evaluate the ongoing composition of the portfolio, including two senior portfolio managers, namely Mr Hartley and Mr Van Deventer.

180. Statistics were set out in the document analysing the breakdown of assets managed by Mr Hartley, the Claimant and Mr Van Deventer in June 2020. Looked at as an overall portfolio the proportions are respectively 38%, 23% and 21%. Stripping out elements such as cash and foreign exchange to focus on the 81% of the overall portfolio "at work" with partner organisations broke down 47%, 23% and 30% respectively. A "near-term forecast" for the equivalent figures showed an overall portfolio breakdown of 40%, 18%, 22%. Focusing purely on the 80% of portfolio expected to be "at work" showed a breakdown of 50%, 18%, 32% respectively.

181. The document contained a table showing how responsibilities of the CIO were to be picked up by others.

182. The investment strategy for the remainder of the pandemic was to hold cash and make fewer new investments.

183. At the end of this document it says that it was important to note that the proposed restructure had not been presented to or signed off by the Board of the First Respondent, which would be the next step.

184. On 4 August 2020 the Claimant emailed Ms McKinley with his comments on the restructure proposal [5009/10]. This was an 11 page letter with a further 5 pages of appendices. In that the detailed document he took issue with a number of the premises contained within the Proposed Restructure document. This included the following:

185. That the CIO role had been mischaracterised by saying that the Respondent had a CIO driven investment model. He said that this was against the policies of the Investment Committee and the Portfolio Risk Committee.

186. That he did not accept the sizes of the portfolios ascribed to himself, Mr Hartley and Mr Van Deventer.

187. Looking forward he was confident that within the next 4 to 6 months the cash deployed with the existing and prospective investments that he oversaw would at least revert to the pre-crisis level of Dec-19 of c.US$ 55- 65m (accounting for between 40% and 50% of the funds in use).

188. That in his view FCA regulation would not permit one person to be both COO and have a portfolio management role.

189. In his view the work and duties of the Finance Operation Manager which would cease or diminish, and therefore logically it should be that role which should be identified as at risk of redundancy, not the CIO role.

190. He argued his case that with his experience he should not be made redundant and posed a series of questions.

191. The Claimant attended a redundancy consultation meeting chaired by Ms McKinley. [5720]

Notification to FCA

192. On 27 July 2020 Mr Van Deventer and Mr Hartley notified the Financial Conduct Authority (FCA) of "Fraud, error or other irregularities [5320]. The details provided were:

> "The Firm provides financing to small and medium sized businesses in developing markets through the discounting of confirmed invoices. The Firm has become aware that it may have advanced funds to the following borrowers based on false information being given to it:
>
> FACTOR L.O.G.R.O.S. DE ECUADOR S.A. ("Logros"), transaction date on or around 09/04/2018; and
>
> Agritrade International Pte Ltd ("Agritrade"), transaction date on or around: 20/12/2019.
>
> The Firm is aware prosecutors in China may be pursuing criminal proceedings against a third borrower, Great Tao Factoring (Hong Kong) Co., Limited ("Great Tao"), transaction date on or around: 22/12/2017.
>
> If monies have been advanced based on fraudulent information, recovery of the monies advanced is likely to become more difficult."

193. On the form boxes have been ticked showing that the issue had both been resolved and not been resolved, a logically contradictory position. Further detail was given as follows:

> "The Firm is in the process of resolving the matter.
>
> Affected investments
>
> Logros and Agritrade have been moved to fund side pockets while investigation and recovery procedures are undertaken. Investors and the fund's auditor have been informed. Incoming investors will not be exposed to these assets.

> The Firm is currently undertaking fact finding in relation to Great Tao and the Firm will take further action as appropriate based on any findings in due course.
>
> Governance
>
> As a general matter, the Firm is in the process of restructuring some management roles. The Firm has hired two new risk analysts, a new operations analyst and a further team member to the operations team. The Firm has also enhanced the governance of the Investment Committee ("IC") and has hired a new external, non-executive, independent consultant as Chair of the IC. IC membership has also been diversified with 3 additional observers being added. The Firm has also decided to move away from a model where a single individual (the Chief Investment Officer or CIO) oversees the overall investment strategy and carries out portfolio oversight to a model where these functions are fulfilled collectively. Consequently, the current CIO's role was identified as at risk of redundancy in April 2020. Note that the restructuring is still subject to consultation with the CIO (who is currently temporarily absent due to sickness) and board approval. The Firm also anticipates a Portfolio Management Group being established and new procedures being implemented which will complement the function and activities of the IC"

194. Under the heading additional information the following was provided:

> "Since being placed on notice of risk of redundancy the CIO has raised a number of concerns under the Firm's whistleblowing policy. The Firm takes whistleblowing allegations seriously and, as such, the CIO's concerns have been investigated and the CIO will shortly be provided with a summary of the Firm's findings. The findings of the investigation (which is substantially complete awaiting the outcome being communicated to the CIO following his return from sickness leave) have confirmed the importance of the restructuring of the portfolio management function, but that (a) the Firm acted properly in relation to the investments which form the subject matter of this notification and (b) there were no reasonable grounds to uphold any of the heads of allegation in the CIO's whistleblowing notification.
>
> **The CIO has not requested confidentiality in relation to the raising of whistleblowing concerns**. However, we request that the FCA treats this aspect of the notification as confidential."

[**emphasis** added]

195. Although the Claimant had not requested confidentiality, the First Respondent's Whistleblowing policy provided for it. It would seem that on the face of it that the reference to the Claimant as part of the was an unnecessary breach of the policy.

Whistleblowing investigation

196. On 6 August 2020 Mr Kreps sent the Claimant an outcome on his Whistleblowing Notification, concluding that that there was no malpractice, impropriety or breaches of policy or procedure.

Dismissal

197. On 7 August 2020 Ms McKinley sent the Claimant a letter confirming the outcome of the redundancy consultation, namely that the Claimant was being dismissed by reason of redundancy.

198. The Claimant was issued three months' notice of termination (subject to the right to terminate earlier) and was given a right of appeal.

Appeal

199. On 13 August 2020 the Claimant appealed against the decision to dismiss him by reason of redundancy [5150]. He filed further detailed grounds of appeal in relation to his dismissal on 17 August 2002. [5223 & 5259]

200. On 4 September 2020 Mr Kreps sent the Claimant an outcome letter not upholding his appeal against dismissal. [5365, 5357]

Notice period reduced

201. Mr Hartley sent the Claimant a letter advising that his termination date will be brought forward to 6 September 2020 and he would receive PILON. [5377]

202. The Claimant's effective date of termination from the First Respondent's employment was 6 September 2020.

Complaint to regulator

203. On 8 December 2020 the Claimant made a complaint directly to the Financial Conduct Authority (FCA).

Legal proceedings

204. The ACAS Early Conciliation period was between 1 and 22 December 2020.

205. On 22 January 2021 the Claimant filed his ET1 claim with the Employment Tribunal.

206. On 15 December 2021 the Claimant consented to a judgment in the High Court proceedings providing judgment in favour of the First Respondent and Money in Motion LLC its shareholder, paying costs on a standard basis (446).

207. On 20 December 2021 Employment Judge Beyzade made an order in the following terms: (1) claimant’s claims for other payments, race discrimination and in respect of the detriments on the ground of having made protected

disclosures listed at paragraphs 90.11 and 90.12 of the Grounds of Complaint are dismissed following withdrawal; (2) the Claimant's application to amend was granted in part.

LAW

208. We are grateful to both Counsel for their helpful and comprehensive written submissions.

Protected disclosure detriment ("whistleblowing")

209. The Employment Rights Act 1996 contains the following provisions:

> 43B Disclosures qualifying for protection.
>
> (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-
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> …
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
>
> 47B Protected disclosures.
>
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> 48 Complaints to employment tribunals
>
> (2) On a complaint under subsection (1), … it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
>
> (3) An employment tribunal shall not consider a complaint under this section unless it is presented—
>
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or,

> where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
>
> (4) For the purposes of subsection (3)—
>
> (a) where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b) a deliberate failure to act shall be treated as done when it was decided on;
>
> 49 Remedies
>
> (6A)Where—
>
> (a) the complaint is made under section 48(1A), and
>
> (b) it appears to the tribunal that the protected disclosure was not made in good faith, the tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the worker by no more than 25%.
>
> 103A Protected disclosure.
>
> 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

210. The burden of proving each of the elements of a protected disclosure is on a claimant (*Western Union Payment Services UK Ltd v Anastasiou*, 13 February 2014 per HHJ Eady QC at [44]).

211. In *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 the Court of Appeal held that a sharp distinction between "allegations" and "disclosures" which appeared to have been identified in earlier authorities was a false dichotomy, given than an allegation might also contain information tending to show, in the reasonable belief of the maker, a relevant failure. At [35], Sales LJ said:

> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)."

212. There is an initial burden of proof on a claimant to show (in effect) a *prima facie* case that she has been subject to a detriment on the grounds that she made a protected disclosure. If so, the burden passes to the not to prove that any

alleged protected disclosure played no part whatever in the claimant's alleged treatment, but rather what was the reason for that alleged treatment. Simply because the respondent fails to prove the reason does not act as a default mechanism so that the claimant succeeds. The ET is concerned with the reason for the treatment and not a quasi-reversal of proof and deemed finding of discrimination i.e. there is no mandatory adverse inference mechanism (*Dahou v Serco Ltd* [2017] IRLR 81, CA).

Whether belief reasonable

213. Whether a belief is reasonable is to be assessed by reference to "what a person in their position would reasonably believe to be wrongdoing": *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 per Judge McMullen QC at [62]. In that case Mr Korashi was a specialist medical consultant and an assessment of what was reasonable needed to be by reference to what someone in that position would reasonably believe.

Legal obligation (section 43B(1)(b))

214. In *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416 in which HH Judge Serota QC, sitting with members, held at paragraph 98 that in considering whether there had been a protected disclosure:

> 'Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. …'

215. This approach was cited and approved by Slade J in *Eiger Securities LLP v Korshunova* [2017] IRLR 115 (EAT). In that case the Employment Appeal Tribunal also considered what amounted to a legal obligation. In *Korshunova* the communication held by the ET to be a protected disclosure occurred when Ms Korshunova challenged a managing director (who was a compliance officer and registered with the FCA) about using her computer screen in using an online chat with an external trader without identifying himself as not being her. Both K and the third party trader were angry and considered this 'deception'. Slade J held that it was not enough for the Tribunal to find that K had a reasonable belief in how a client should be treated, or that what she was saying was true and applicable in this industry. She held [46]:

> "In my judgment it is not obvious that not informing a client of the identity of the person whom they are dealing if the employee is trading from another person's computer is, as in Bolton, plainly a breach of a legal obligation. That being so, in order to fall within ERA s.43B(1)(b), as explained in Blackbay the ET should have identified the source of the legal obligation to which the claimant believed Mr Ashton or the respondent were subject and how they had failed to comply with it. **The identification of the obligation does not have to be detailed or precise but it must be more that a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach**

> **of a legal obligation**. However, in my judgment the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached
>
> [emphasis added]

216. This approach to identification of the legal obligation may be somewhat stricter than the less legalistic approach taken in earlier cases such as *Bolton School v Evans* [2006] IRLR 500, EAT. The learned editors of *Harvey on Industrial Relations and Employment Law* suggest that what appears to be a difference in approach might be reconciled as follows:

> This apparent conflict (or at least difference in approach) was resolved in *Arjomand-Sissan v East Sussex Healthcare NHS Trust* UKEAT/0122/17 (17 April 2019, unreported) where Soole J held that it depends on the stage of the complaint/action that is involved. The more indulgent (realistic?) approach in Bolton School and Anastasiou was adopted at the stage of the original disclosure to the employer, which must be viewed in a commonsense way, not requiring citation of legal chapter and verse, but rather just enough for the employer to understand the complaint. On the other hand, Blackbay and Eiger concerned the specificity required at the stage of any eventual ET complaint, where it is reasonable to expect the claimant to make clear just what the infringed legal obligation was (especially as Eiger affirms that it must indeed have been a legal obligation, not just a moral or professional one).

Public interest

217. The Court of Appeal in *Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979 confirmed that public interest does not need to relate to the population at large, but might relate to a subset, in that case a category of managers whose bonus calculation was negatively affected. It seems that it cannot solely relate to the interest of the person making the disclosure. Underhill LJ offered this guidance at paragraph 31:

> 31 …the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest

218. As to the question of good faith and motivation he said this:

> 16 The requirement of good faith was removed by section 18 of the 2013 Act, also with effect from 25 June 2013. However a new subsection (6A) was introduced into both section 49 and section 123 of the 1996 Act giving the employment tribunal power to reduce any compensatory award for unlawful detriment or unfair dismissal by up to 25% if it found that the disclosure in question was not made in good faith. In other words, the question of good

> faith is no longer relevant to liability in a whistleblowing case but it remains relevant to remedy.
>
> …
>
> 30 …while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para 17 above, the new sections 49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "*in* the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

219. A worker's motivation for making the disclosure is not the proper test: *Ibrahil v HCA International* [2019] EWCA Civ 2007, [2020] IRLR 224 in which whistleblowing claim not necessarily ruled out because the worker was concerned at the time to clear his name and restore his reputation.

220. The learned editors of Harvey's submit:

> "Although C*hesterton Global* permits there to be a mixture of public interest and employee self interest, it is still possible for a tribunal to rule out whistleblowing if satisfied on the facts that the claimant was only motivated by self interest (and therefore had no reasonable belief in public interest)"

Causation

221. The causation test for *detriment* is whether the alleged protected disclosure played more than a trivial part in the Claimant's treatment (*Fecitt v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, CA).

Redundancy

222. In *Williams v Compair Maxam Ltd* [1982] ICR 156 the EAT gave the following guidance on a fair redundancy process:

> "1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, _f necessary, find alternative employment in the undertaking or elsewhere.
>
> 2. The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. When

a selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

3. Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance record, efficiency at the job, experience, or length of service.

4. The employer will seek to ensure that the selection is made fairly in accordance with these criteria and will consider any representations the union may make as to such selection.

5. The employer will seek to see whether instead of dismissing an employee he could offer him alternative employment."

CONCLUSIONS ON LIABILITY

Protected Disclosure Detriments Claim (s.43B)

Jurisdiction - Time limits

223. [**Issue 2**] Did the act(s) relied upon by the Claimant as detriments take place less than three months before the date on which the Claimant submitted his claim to the Employment Tribunal, in accordance with s.48(3) ERA 1996?

224. The claim was submitted on 22 January 2021. The termination of employment took effect on 6 September 2020. This was the last detriment. The ACAS early conciliation process started on 1 December 2020 and expired on 22 December 2020. Limitation would otherwise have expired on 5 December 2020, but by the operation of section 207B of the Employment Rights Act 1996, in fact it expired on 21 January 2021.

225. The Respondents argue that all detriments but detriment 3 (6.9.20) and detriment 10 (also 6.9.20) are out of time.

226. [**Issue 3**] If not, has the Claimant proved that the detriments were 'a series of similar acts or failures', the last of which was brought within time?

227. The Claimant has not satisfied the tribunal that there was an increasingly tense and hostile atmosphere from 22 January 2018 to 6 September 2020 (i.e. detriment 1).

228. The only relevant detriments here must post-date the first protected disclosure on our finding 11 May 2020.

229. Events from 11 May 2020, in particular the grievance and grievance appeal, the whistleblowing notification and the redundancy process are to some extent interlinked. We have dealt with the claims on their merits below.

230. [**Issue 4**] If not, has the Claimant proved that:

231. [**4.1**] It was not reasonably practicable for him to have presented his claim before the end of the limitation period?

232. Ms Balmer argues for the Respondents that the Claimant has not provided any evidence at all to satisfy the Tribunal that it would not have been reasonably practicable for him to have brought a claim in relation to the alleged acts of detriment by the Respondents dating back to 2018 and 2019. He was well aware of the concept of whistleblowing; he knew that claims could be brought in an Employment Tribunal; and he was well-remunerated and could easily have sought professional legal advice.

233. The Respondents submits that the Claimant knew that retaliation against whistleblowers was unlawful and that one could bring an Employment Tribunal Claim about it as he acknowledged during cross examination.

234. It is argued that the Claimant fails the test in s.48(3)(b) ERA set out above i.e. he has not shown that it was not reasonably practicable to present a claim within 3 months.

235. There is considerable force in Ms Balmer's submissions in respect of alleged detriments in 2018 and 2019 and difficult to see how the Claimant can have discharged the burden on him, however, we have not needed to decide this point in respect of matters pre-dating the first protected disclosure on 11 May 2020.

236. [**4.2**] that the claim was presented within such further period as the Tribunal considers reasonable?

237. We have not needed to decide this point in respect of matters pre-dating the first protected disclosure on 11 May 2020.

Qualifying Protected Disclosure

238. [**Issue 5**] Did the Claimant make a qualifying public interest disclosure within the meaning of s.43B of ERA? This involves consideration of the questions set out at paragraphs 6 to 10 below.

239. This is considered under each heading below.

240. The parties placed a degree of emphasis in the hearing before us on whether matters were or were not raised under the First Respondent's whistleblowing policy and whether or not the Claimant "thought he was a whistle-blower". While the answers to these questions potentially provide some insight into the Claimant's thought process and motivation for raising various matters, it does

not in itself determine whether or not the Claimant was whistleblowing (i.e. raising a protected disclosure), which must be determined by reference to the statutory requirements under section 43B of the Employment Rights Act 1996.

Disclosure of information

241. [**Issue 6**] Did the Claimant make a 'disclosure of information' within the meaning of s.43B? The Claimant relies on the following alleged disclosures of information made by him:

242. [**Issue 7**] If so, did any of the above disclosures of information tend, in the Claimant's reasonable belief, to show that:

243. It is convenient to take issues 6 and 7 together.

244. In the agreed list of issues, the breaches of legal obligation is clarified as follows:

> a. on Alleged Protected Disclosures 1 to 9: an alleged breach of legal obligations under the FCA Systems and Controls Sourcebook ("SYSC", specifically Rules SYSC 4, SYSC 6 and SYSC 7.
>
> b. an Alleged Disclosures 1 to 9: an alleged breach of legal obligations under the R1's Fraud Protection section of its Compliance Manual
>
> c. in respect of Alleged Protected Disclosures 6 to 9, that information tending to show that any such alleged breach of a legal obligation above was being or was likely to be deliberately concealed (s.43B(1)(f) ERA)?

245. The Senior Management Arrangements, Systems and Controls sourcebook (abbreviated to SYSC) is located within part of the FCA Handbook. This document provides relatively high level guidance, usually at the level of principles.

PD#1

246. [**i**] on 22 January 2018, an email sent by the Claimant to R3 (and later R2) in which he allegedly raised concerns about R1's risk and operation function (POC 31) ("Alleged Protected Disclosure 1");

247. This was withdrawn. In closing Claimant's counsel properly and appropriately conceded that this was not a protected disclosure.

PD#2

248. [**ii**] on 9 April 2018, an e-mail sent by the Claimant to R3, R4 and Mr Chamings, in which he allegedly raised concerns that R3 had breached internal policies and procedures and raised concerns about exposing R1, senior staff to

financial and reputational risks (POC 33) ("Alleged Protected Disclosure 2"); [3121]

249. The disclosure here is that Mr Hartley had approved a sum of money without appropriate sign off from other senior staff in breach of the First Respondent's internal procedures and policies.

250. Did this tend to show a breach of legal obligations under R1's protocols for the segregation of functions as far as reasonably practical?

251. The Tribunal unanimously find that there was a disclosure of information relating to Mr Hartley's conduct. We find that the Claimant believed, with justification that there had been a breach in the First Respondent's own internal policy. Further, applying the fairly low threshold for public interest in *Chesterton*, we find that the Claimant believed that he was making this disclosure in the public interest. This belief was reasonable, given that this was a matter that went wider than the Claimant's own personal interest.

252. What the Tribunal has found more difficult is whether in the reasonable belief of the Claimant, this disclosure tended to show that a person had failed to comply with a legal obligation.

253. The Claimant deals specifically with the second alleged protected disclosure at paragraphs 61-67 of his witness statement. There is no explicit reference to SYSC 4, SYSC 6 and SYSC 7, nor the First Respondent's Compliance Manual in either the disclosure itself or that part of his witness statement. There is no explicit reference to a specific legal obligation in respect of the segregation policy, as alleged.

254. SYSC 4 relates to the orderly management of a regulated business. SYSC 6 is contained in the additional bundle at pages A1522-A1530 and is referred to in the First Respondent's compliance manual at A1281. SYSC 6 relates to systems in relation to preventing financial crime and money-laundering. SYCS 7 relates to management of risks. These provisions generally operate at the level of principles rather than specific and detailed prescriptions.

255. The Claimant's witness statement contains a preamble to the individual alleged protected disclosures. This is entitled "Overarching beliefs about obligations as FCA regulated parties", beginning at paragraph 23. Out of this contains three "Belief Principles". Paragraph 24 addresses the first of these and reads as follows:

> "24. A failure to comply with/a breach of an FCA principle or rule could result in the breach of a legal obligation. FCA principles and rules are binding obligations placed on firms in the sense that failing to comply with them could result in enforcement actions by the FCA."

256. The Claimant was asked about his understanding of the breach of legal obligation in cross examination, and specifically about SYSC. He said

> "I would not know each rule explicitly. We have a manual which has some sections. What I'm saying – in my view if there is a breach – this will have a legal ramification. It might result in the legal breach – Not saying I know all the rules".

257. He acknowledged in later questions that in 2020, in the later alleged protected disclosures he had cited specific FCA rules and that he knew to find these in the First Respondent's compliance manual.

Majority view on PD#2

258. The majority (Employment Judge Adkin and Mr Bishop) found that the Claimant did not have a reasonable belief in a breach of legal obligation. We find that the First Respondent's internal policy referred to amounted to guidance, which following *Kornushova*, was not necessarily sufficient, without more to amount to a breach of legal obligation.

259. We have reminded ourselves that a claimant may have a reasonable belief and yet be wrong. It is not the function of the Tribunal to determine whether or not there was an actual breach of legal obligation. We also bear in mind, based on authority, as discussed in the section on law above, that a claimant does not need to give "legal chapter and verse" in the disclosure itself, provided that there is enough for the employer to understand the complaint. There must however be a belief that the disclosure tends to show a failure to comply with a legal obligation, past, present or future. In the case of a future breach it is must be a likely failure. Even if the disclosure itself does not contain the source of legal obligation, in order to be a reasonable belief, this ought to be capable of reference to an actual legal obligation (per *Blackbay*).

260. The matters set out in the Claimant's witness statement, in particular at paragraph 63 e.g. the reference to investors being mislead and a possible criminal offence appear to us to stretch significantly beyond the actual content of the Claimant's email sent on 9 April 2018. The Claimant says that he "called out his [i.e. Hartley's] failure to adhere to FCA requirements".

261. These matters go beyond what was expressed in the contemporaneous disclosure to be a breach of internal policy and a concern about culture. We do not find that at the time of the disclosure that the Claimant had a reasonable belief that the matters disclosed showed a breach of legal obligation.

262. None of this is to detract from the fact that the Claimant was acting properly and with integrity and that he showed a degree of courage in calling out a breach of internal policy by someone who was senior to him.

Minority view on PD#2

263. Dr Weerasinghe, in a minority decision, disagrees with the conclusion of the majority. His position is that it is relevant that internal policy documents were made available to investors, that this was a serious breach and that there is sufficient connection between the breach of internal policy and FCA principles such that in his view the Claimant did have a reasonable belief in a breach of legal obligation.

264. Dr Weerasinghe further reasons that in his email of 9th April 2018, having raised his concern about the breach of the First Respondent's prescribed procedures, the Claimant went on to say: "As a FCA authorised investment firm it is imperative that we develop a culture with no tolerance for breach of policies and procedures."

265. He would have known that the Respondent's internal policies would reflect FCA rules. On the following day, the Claimant emails the Second Respondent and says: "We are essentially facing a situation where the CEO originated and structured a transaction, approved the file and the first disbursement without the formal approval of other C level staff, in breach of AGC's procedures and policies."

266. Dr Weerasinghe finds that this statement succinctly highlights the lack of segregation of duties which is a breach of FCA rule SYSC5. The Respondent's policy on segregation of duties is linked to SYSC5, p1220. Moreover, the policy does not indicate that it is for guidance only. Furthermore, the Claimant, being an expert in the field, would have understood that the policy requirement for two C level signatures was to do with segregation of duties.

PD#3

267. [**iii**] on 11 April 2018, an email sent by the Claimant to Ms McKinley (R2), in which he allegedly escalated his concerns about the issues raised in Alleged Protected Disclosure 2 and raised separate concerns about governance, culture, a lack of separation of functions and breaches of procedure within R1 (POC 35) ("Alleged Protected Disclosure 3"); [3131]

268. This disclosure is substantially the same as the second alleged protected disclosure. In the Claimant's witness statement, at paragraph 70, he makes reference to a different aspect of FCA guidance, namely SYSC 5, which he says stipulates that the firm must make arrangements concerning the segregation of duties so as to prevent conflict of interests.

269. SYSC 5.1.7 & 9 [A1518] read as follows:

> 5.1.7 The senior personnel of a common platform firm must define arrangements concerning the segregation of duties within the firm and the prevention of conflicts of interest.
>
> 5.1.9 Segregation of functions: additional guidance
>
> A firm should normally ensure that no single individual has unrestricted authority to do all of the following:
>
> (1) initiate a transaction;
>
> (2) bind the firm;
>
> (3) make payments; and
>
> (4) account for it.

Majority view on PD#3

270. By a majority, and for similar reasons to those given above, we find that this was not a protected disclosure.

271. The Tribunal unanimously accept that these matters were raised with a reasonable belief in the public interest.

272. The point of difficulty again is whether the disclosure tended to show in the reasonable belief of the Claimant a breach of the legal obligation. The nature of the disclosure is similar to that in the case of the second protected disclosure, i.e. a breach of internal procedures and a concern about culture.

273. The disclosure the face of it referred to the CEO Mr Hartley originating and structuring transaction and approving the first disbursement. There is no suggestion that he was trying to account for it such as to amount to a breach of SYSC 5.1.9.

274. It follows that in the view of the majority, this was not a protected disclosure.

Minority view on PD#3

275. For similar reasons that are set out above in the case of the second alleged protected disclosure, Dr Weerasinghe considers that the Claimant did have a reasonable belief that the second alleged protected disclosure tended to show breach of a legal obligation.

276. In those circumstances he would have found that this was a qualifying protected disclosure.

PD#4

277. [**iv**] on 12 June 2019, an email sent by the Claimant to R2 and R5 (copied to R3 and R4), in which he allegedly formally notified R2 and the R5 of his suspicion that the Fund had been defrauded as part of the Great Tao transaction (POC 38) ("Alleged Protected Disclosure 4"). [1066]

278. At the submissions stage, Mr Smith conceded that this did not amount to a protected disclosure.

PD#5

279. [**v**] on 18 June 2019, an email sent by the Claimant to R2 (and attaching an earlier email sent on 15 April 2018 [1073]), in which he allegedly raised concerns that fraudulent activity was enabled by weaknesses in R1's processes and reiterated his request an audit on the Great Tao transaction to be conducted to establish how the fraud occurred (POC 39) ("Alleged Protected Disclosure 5"); [1065]

280. Mr Smith submits on behalf of the Claimant that on 18 June 2019 [1065] Mr Sablin produced a compendious disclosure incorporating 3 documents:

281. the email to Ms McKinley at [1065] – this is the covering email of 18 June 2019;

282. he refers to the email dated 15 April 2018 [1073]. This contained the Claimant's considered response on the team following on from the circumstances in April 2018 leading to the alleged second and third detected disclosures relation to the Logros Ecuador situation. That email is not in itself relied upon as being a protected disclosure.

283. the email report of sent to Mr Hartley and Mr Van Deventer on 9 June 2019 [1048]. That was an analysis of the nature of the Great Tao transaction, the documents that had been supplied to support it (575 invoices relating to transactions in Mainland China and 29 other countries), the checks that had been carried out prior to the discovery of likely fraud and the Claimant's proposed next steps in terms of investigation.

284. Mr Smith submits that cumulatively Ms McKinley was being told that there was a significant flaw in the First Respondent's verifications procedures in respect of collateral in the form of invoices, to the extent that they will have to answer questions form the Board and possible investors. He submits that the report at [1049] is couched in very polite terms but is firm as to the absence of adequate systems/checks control and reporting methodologies.

Majority view on PD#5

285. In the assessment of the majority of the Tribunal (Employment Judge Adkin, Mr Bishop), the reality is that the email of 9 June 2019 does not firmly point out the absence of adequate systems/checks. It is an implication of the content of page 1050 that the Ops and Risk team checking the supporting documents either did not happen or was inadequate, but out of this is not stated in express terms.

286. Taking stock of the three emails viewed in their entirety, it is clear that the documents tend to show criminal activity, i.e. the underlying fraud. That is not the basis on which the claim is pursued.

287. The email sent by the Claimant on 18 June 2019 was an internal communication dealing with the fallout of the Great Tao transaction in which it became clear that the First Respondent had been the victim of a fraud. The nature of this email was the Claimant's reflections and opinions on that situation. These reflections were offered by the Claimant in recognition of the fact that he was the "key sponsor" of that transaction. He offered the opinion that a comprehensive review of the deal should take place on a together with some views on how should take place. The emails attached show, in the case of 15 April 2018, that the Claimant had identified some systemic weaknesses within the firm in relation to an earlier transaction and in the case of the email of 9 June 2019, that the were some possible inadequacies in the verification process in relation to the Great Tao transaction itself.

288. We do not find that there was information tending to show a breach of legal obligation, beyond the underlying fraud itself, which we do not understand is the basis upon which this disclosure is said to amount to a qualifying protected disclosure.

289. We do not find that this disclosure tended to show in the reasonable belief of the Claimant that there had been a breach of legal obligation, nor that in his reasonable belief this was in the public interest. This email contained his thoughts on how the First Respondent business should respond to the Great Tao situation, now that it was reasonably clear that there was some degree of fraud.

290. By a majority (Employment Judge Adkin and Mr Bishop), the Tribunal finds that this was not a protected disclosure.

Minority view on PD#5

291. Dr Weerasinghe's conclusion is that with reference to the Claimant's email of the 18th June 2019, pertinent information that was disclosed was:

> "Furthermore, in spite of the extensive checks and verification which were conducted before each disbursement (c. 6/7 in totals) and at month ends it has recently transpired that a material proportion of the invoices that we have funded were not genuine."

292. It is accepted that a failure in the Respondent's control system is not spelled out in "absolute blunt terms". However, given that both the Claimant and the Second Respondent are well informed in the field, the only interpretation of the above disclosure is that it points to a flaw in the Respondent's verification process. The wording 'in spite of the extensive checks' is pertinent in this regard.

PD#6

293. [**vi**] on 11 May 2020, an email sent by the Claimant to R4 (copied to R2), in which he allegedly raised concerns about the lack of communication to investors over the Great Tao fraud issue; the lack of any audit on the Great Tao fraud; alleged breaches of FCA principles; and a lack of segregation of internal functions necessary to prevent fraud. The Claimant also allegedly conveyed his concerns in relation to the Logros Ecuador transaction and recommended that the risk and operation team conduct an independent analysis of the situation (POC 45) ("Alleged Protected Disclosure 6"); [1991]

294. The Tribunal unanimously agrees that this was a protected disclosure.

295. The Claimant raised in express terms that there has been a failure to communicate to investors the circumstances of fraud. This seems to fall within the wording of section 43B(1)(f) i.e. that information tending to show a criminal offence has been deliberately concealed.

296. As to section 43B(1)(b), i.e. breach of a legal obligation, the Claimant has alleged potential violation of expressly named FCA principles. This seems to

us to go beyond simply an allusion to a concern about culture. Whereas there might be a debate to be had about whether or not violation of FCA principles is a breach of legal obligation, the Claimant himself is not lawyer. We consider it was reasonable of him to believe that violation of FCA principles did amount to a breach of legal obligation. He made express reference to these principles and the breaches thereof. It was reasonable of him to believe that the First Respondent organisation as a regulated firm was obliged to follow these principles.

297. While the Claimant may have had an ulterior motive in raising these matters, in the sense that he had been notified on 28 April 2018 that he was at risk of redundancy, that does not in itself determine the question of whether he had a reasonable belief in that matters set out above tended to show a relevant failure and a reasonable belief that these was made in the public interest. We find that the Claimant did have such a reasonable belief and that this was made in the public interest.

PD#7

298. [**vii**] on 21 May 2020, two emails sent by the Claimant to R4 (copied to R2, R3, R5, Mr Antic and Mr Coetsee), in which he allegedly raised concerns about the LOGROS and Agritrade transaction and referenced an improper side-pocketing issue (POC 53) ("Alleged Protected Disclosure 7"); [2553][2559]

299. The nature of the two emails relied upon is to pose a number of questions arising out of the “side pocketing” of the Logros Ecuador investment and the appropriate value to be attached to it. The emails ask questions and also offer advice about the appropriate approach fair value of the asset. He flags up that the difficulties with this investment predate the Covid-19 crisis.

300. There is clearly reference to an underlying fraud or misappropriation of funds, which would be, if this was part of the claim that we were determining, a disclosure tending to show a criminal offence. This is not what we are considering however.

301. Mr Smith on behalf of the Claimant acknowledges that this communication was in terms that were “polite, professional and non-accusatory”. We agree with that characterisation. The difficulty we have had is to identify with sufficient specificity the disclosure of information tending to show either a breach of a legal obligation (section 43B(1)(b)) or that a relevant failure was being concealed (section 43B(1)(f)).

302. We do not find that this amounted to a qualifying protected disclosure.

PD#8

303. [**viii**] on 10 June 2020, a formal written whistleblowing complaint submitted by the Claimant, in which he alleged malpractice and improprieties (POC 64) ("Alleged Protected Disclosure 8"); [3005]

304. We note that in the Respondents' closing submissions Ms Balmer, appropriately, does not argue that in the specific case of this alleged protected disclosure that the Claimant did not make a disclosure of information tending to show a breach of legal obligation or concealment. That is realistic. The focus of the Respondents' argument is that there was no genuine and reasonable belief in the alleged breaches and furthermore that there was no reasonable belief in the public interest, since these matters were simply raised by the Claimant trying to avoid or frustrate the potential redundancy of his role.

305. We have reminded ourselves that there is no "good faith" requirement in making a disclosure at the liability stage. In other words a disclosure can be made in bad faith or for an ulterior motive and still nevertheless be a protected disclosure.

306. We find that the Claimant was disclosing matters in relation to the failure to investigate fraud which he reasonably believed amounted to not only a breach of the First Respondent's internal policy, but the FCA rules at SYSC6. Again he references core FCA principles in relation to integrity, clients' interest, communication with clients and conflicts of interest.

307. We find that there was a disclosure which the Claimant reasonably believed attended to show a breach of a legal obligation falling under section 43(1)(b) and further that there was a potential concealment of the same under falling under section 43(1)(f). We find that there was an obvious wider interest, since this affected investors. That the Claimant's principal motivation in raising it may have been the redundancy situation is not the determinative point.

308. This was a qualifying protected disclosure.

PD#9

309. [**ix**] on 2 and 9 July 2020, an email sent by the Claimant to R2, R3, R4 and Ms Bharadia , in which he allegedly raised concerns that a statement sent to the fund's investors was misleading (POC 68) ("Alleged Protected Disclosure 9"). [4631][4628] AB523 - C references AB1280

310. The Respondents argue that it cannot have been the Claimant's reasonable belief that the information regarding May 2020 was misleading, since although the Claimant may have been right to suggest that there were underlying performance issues that predated the pandemic, the reality was that by May 2020 the pandemic was affecting factors such as the ability of the First Respondent's partners to have recourse to the courts in the event of non-payment. They simply do not accept his position that the poor performance of the fund was being wrongly attributed to the pandemic.

311. The Respondents' position put forward in Tribunal was that by May 2020 the Covid-19 pandemic was having a real effect on returns, since it was having an effect on the First Respondent's financial partners' ability to recover non-payment through the courts. This is undermined by Ms McKinley's letter of 15 July 2020 in which she admitted that there had been no material adverse impact.

312. We have reminded ourselves however that a claimant may be wrong and yet reasonably believe that a disclosure tends to show a relevant failure, based on the information that they have. We accept Mr Smith's submission that this was an evidenced-based contention that poor performance not attributable to the effects of covid. It followed therefore that based on the Claimant's understanding at that time investors were being mislead and that this was a breach of legal obligation in relation to those investors.

313. We find that the Claimant did reasonably believe that the information he disclosed tended to show a breach of legal obligation falling under section 43(1)(b) or potential concealment of the same under section 43(1)(f).

314. [**Issue 8**] If so, did the Claimant reasonably believe that the information disclosed by him, and any allegation contained in it, were "substantially true" (s.43F)?

315. It is unclear to the Tribunal that we need to determine this. Neither counsel has made reference to it in submissions. This would only be relevant if the Claimant was relying on protected disclosures made externally.

316. [**Issue 9**] If so, was that disclosure made to R1 or to another person whose conduct the Claimant reasonably believed related to the failure?

317. This is dealt with above. The disclosures were made to the First Respondent.

Public interest

318. [**Issue 10**] If so, were the alleged disclosures made by the Claimant in the public interest (s.43B(1))? The Claimant relies on the matters set out at POC 89.

319. This is dealt with above.

320. Paragraph 89 of the Particulars of Claim contains the following:

> "The protected disclosures set out in paragraphs 79 to 87 were made in the public interest because they were made in order to protect investors and the Fund's auditors from being misled and to ensure that the Respondents were complying with their legal and regulatory duties to disclose important information to the investors and regulators. It is a regulatory aspect of the finance industry by the FCA is to keep it honest and ensure good standards. It is a matter of public concern because of the importance of the financial sector to the UK economy and trust in the UK as a place to invest. In addition, the devastating impact that institutional collapse or malpractice can have on investors and others."

ALLEGED PROTECTED DISCLOSURE DETRIMENTS

321. [**Issue 11**] Did the Respondents subject the Claimant to any or all of the followed alleged detriments (POC 90):

322. [**Issue 12**] If so, was any such detriment done on the ground that the Claimant had made a protected disclosure (s.47B(1))?

323. It is convenient to deal with Issue 11 and 12 together.

324. Given the finding of the Tribunal that only protected disclosures 6 (11.5.20), 8 (10.6.20) and 9 (2 & 9.7.20) amounted to qualify protected disclosures falling under section 43, it follows that only detriments which post-date 11.5.20 can have been as a result of a protected disclosure.

Detriment 1

325. [**i**] between 22 January 2018 and 6 September 2020, the [R3 only] Respondents allegedly subjecting the Claimant to an increasingly tense and hostile atmosphere; relentlessly and deliberately undermining and side-lining the Claimant; and providing him with a lack of support from the Board (POC 90.1) [R2, R3, R5] ("Alleged Detriment 1"). [see POC 90.1] -

326. It was clarified that this only related to the Third Respondent.

327. On our findings above, this alleged detriment cannot succeed before the first protected disclosure made on 11 May 2020.

328. This allegation was broad and lacked specificity. We do not find that it was made out beyond the specific instances of alleged detriment set out below.

Detriment 6

329. [**ii**] on 9 April 2018 and, again, on 28 April 2020, R3 allegedly threatening the Claimant's job security. Specifically, telling him by email on 9 April 2018 that "If you want to be the CIO you can start doing the dirty work. If you don't then we can take the title away." and orally on 28 April 2020 that he "may be at risk of redundancy" following the protected disclosures made by the Claimant. This left the Claimant feeling unsettled, unsupported and anxious about his future with the First Respondent (POC 43 & 90.6) (POC 90.6) ("Alleged Detriment 6").

330. These allegations of detriment have been somewhat unhelpfully listed together in the list of issues, when they occurred over two years apart, and the contexts were entirely different. We have treated them as part 1 and part 2 below.

331. As to **Part 1**, Mr Hartley's **9 April 2018** email this allegation is out of time and the Claimant has neither proved a continuing act, nor that it was not reasonably practicable to bring a claim, nor that it was presented in such a time as was reasonable thereafter. Furthermore it pre-dated the first qualifying disclosure and cannot succeed.

332. If we were wrong about both of these points however, the comment made by Mr Hartley in 9 April 2018 was aggressive and unpleasant and certainly potentially detrimental treatment. It was, we find, in response to the concerns raised by the Claimant on 9 April 2018 (alleged PD#2). If this allegation was not raised out of time and we were wrong about PD#2 not being a qualifying protected disclosure, causation would have been made out.

333. As **Part 2** to the alleged threat of redundancy on **28 April 2020**, the context here was entirely different. On the finding of the majority of the Tribunal, this predated the first qualifying protected disclosure by approximately two weeks. It cannot therefore have been part of a continuing act, nor a detriment because of a protected disclosure.

334. Mr Hartley was carrying out the request of the Board made in February 2020, and implementing a decision to make redundancies. We do not find it is appropriate to characterise this as a "threat", since it was notification of an actual redundancy process. We do not find that this was a detriment that could be considered separately to the dismissal.

Detriment 2

335. [**iii**] in 2019, the Respondents [R2, R3, R5] allegedly making wholly unjustifiable allegations about the Claimant's conduct in respect of the Great Tao transaction and the Board allegedly launching a campaign to find fault with him and to unfairly blame him for issues relating to that transaction that were not within his remit or responsibility (POC 90.3 & 90.10) ("Alleged Detriment 2").

336. On the finding of the majority of the Tribunal, this predated the first qualifying protected disclosure and was out of time.

337. While this is not relevant to our decision-making, we have made a comment on this matter on the basis that the parties seemed to be in hotly in dispute on the blame for this transaction.

338. Ultimately, we felt that it was unfair to lay the entire responsibility for the failure of the Great Tao transaction at the feet of the Claimant, in circumstances where there were other people whose role it clearly was to carry out some checking work, and there was a small management team. Mr Hartley appropriately recognised failing on his own part on this transaction in his performance review dated 9 December 2019 [1871].

339. Given the circumstances, we understand the frustration of the Claimant in losing out on a bonus when others did not.

Detriment 9

340. [**iv**] in 2019, the Respondents [R2, R3] allegedly manufacturing reasons to blame the Claimant for the Great Tao fraud and other distressed investments in order to conceal to investors and other stakeholders that the real reason for

the issues in the portfolio were systemic weaknesses and failings in the First Respondent's risk policies and procedures (POC 90.9) ("Alleged Detriment 9").

341. On the finding of the majority of the Tribunal, this predated the first qualifying protected disclosure and was out of time.

342. There appears to be substantial overlap between this allegation and that of detriment 2. For similar reasoning to that given above, this alleged detriment does not succeed.

Detriment 5

343. [**v**] on 28 January 2020, R3 allegedly making wholly unjustifiable criticisms about the Claimant's performance, resulting in the Claimant being unfairly deprived of his 2019 bonus (as communicated to him by R2 on 9 January 2020) (POC 90.5) ("Alleged Detriment 5").

344. On the finding of the majority of the Tribunal, this predated the first qualifying protected disclosure and was brought out of time.

345. There appears to be substantial overlap between this allegation and that of detriment 2. For similar reasoning to that given above, this alleged detriment does not succeed.

Detriment 7

346. [**vi**] between 11 May 2020 and 6 September 2020, R4 and R5 allegedly failing to take the Claimant's grievance and appeal concerns seriously, including allegedly failing to conduct an adequate investigation or decision-making process into the same or to provide any evidence to support their findings (POC 90.7) ("Alleged Detriment 7").

347. It was clear that the matters raised by the claimant, particularly in his grievance/protected disclosure dated 11 May 2020, the later disclosures and email queries and the further protected disclosures raised on 10 June 2020, 2 and 9 July 2020 were regarded with a degree of cynicism by the Respondents. We find that the Respondents doubted the Claimant's motivation in raising these matters and perceived the frequency of these requests, disclosures and queries as the Claimant deliberately trying to cause difficulties for the First Respondent organisation, or in some way to disrupt the redundancy process.

348. The Fourth Respondent Mr Van Deventer admits that he was tardy in June/July 2020 in responding to the Claimant. The reality was that the Claimant was making repeated requests of Mr Van Deventer.

349. Nevertheless, we find that, this somewhat sceptical attitude aside, the named Respondents did give due consideration to the matters that were raised by the Claimant. We accept the submission put forward by Ms Balmer that the First Respondent is a small organisation and that the steps taken by it must be viewed in that context.

350. The Claimant was provided with a copy of the grievance policy. He attended a grievance hearing. Evidence was gathered, including a written statement from Mr Hartley. The Claimant was given an update on progress. There was a discussion by email between Mr Kreps and Ms Bharadia on the evidence needed to answer the points raised by the Claimant in the grievance. Ms Bharadia came back to the Claimant to seek further information and clarifications. A grievance outcome letter was provided which gave detailed answers to each of the four grievance points which contained three pages of close type [3751].

351. As to the appeal, the appeal officer was changed at the request of the Claimant. Mr Van Deventer carried out a thorough investigation. He reviewed the files. There was a grievance appeal meeting on 8 July 2020. He made findings. He provided a five page grievance appeal outcome letter on 15 July 2020 [4859].

352. We do not accept that that the points were not taken seriously or that the investigation was inadequate. We do not find that the Claimant was subject to detrimental treatment.

Detriment 8

353. [**vii**] between 10 June 2020 and 6 September 2020, R5 allegedly failing to take seriously the Claimant's whistleblowing concerns (Alleged Protected Disclosure 8); failing to conduct an adequate or thorough investigation into the same or to provide any evidence in support of the findings; and disclosing the Claimant's identity as a whistle blower, to Mrs Bharadia (POC 90.8) ("Alleged Detriment 8").

354. Our finding in respect of the first element of alleged detriment 8, **failing to take seriously concerns**, is similar to that in respect of detriment 7. While there may have been some doubts in the minds of the Fifth Respondent Mr Kreps as to the Claimant's motivation, the First Respondent's whistleblowing policy was followed. As to the allegation of failure to conduct an adequate or thorough investigation, we accept the submission put forward on behalf of the Respondents that the very small size and limited resources of the organisation are relevant factors. An external consultant from Portman Compliance was brought in to assist with the investigation. An outcome was provided by Mr Kreps in a three page letter dated 6 August 2020 [5049]. We do not find that the investigation was inadequate in the circumstances so as to amount to detrimental treatment.

355. As to the separate allegation in respect of the Claimant's **confidentiality** as a whistleblower, it was confirmed to the Claimant in a letter dated 16 June 2020 by Mr Kreps [3698], that only Ms McKinley, Ms Bharadia and Portman Compliance had been or would be informed. While the Claimant had a concern about Ms Bharadia being involved, we accept the Mr Krep's explanation in the letter of 16 June 2020 that Mr Kreps was based in California and reasonably needed someone based in London to assist with the investigation element. Ultimately we have concluded that this was not a detriment.

356. (We have commented on the circumstances in which Mr Hartley and Mr van Deventer mentioned the Claimant's status as a whistleblower separately above).

357. We have considered causation in case we are wrong about these matters amounting to a detriments. We have reminded ourselves that applying simple 'but for' causation may lead to the wrong conclusion. We have to consider the reason why, by examination of Mr Kreps' conscious or unconscious thought processes as far as we can determine them. In our view the best evidence regarding confidentiality is the explanation put forward in the letter dated 16 June 2020. To paraphrase Mr Kreps, he needed someone "on the ground" to assist with the investigation given that he was not in the locality. In a small organisation his options were limited. We find that the decision to include Ms Bharadia was based on practicality rather than on the ground of the Claimant making a protected disclosure.

Detriment 4

358. [**viii**] between 24 June 2020 and 6 September 2020, the Respondents [R4 only] allegedly withholding important documentation from the Claimant and failing to answer reasonable and proper questions asked by him in respect of regulatory and compliance issues. Specifically, the Respondents failing to provide the Statement of Responsibilities and list of Prescribed Responsibilities requested by the Claimant in his emails of 24 June 2020, 1 July 2020, 8 July 2020, 21 July 2020 and 6 August 2020 (POC 90.4) ("Alleged Detriment 4").

359. The Claimant explains this part of his claim in his witness statement at paragraph 159.5:

> I have asked the Fourth Respondents to provide me copies of the Statement of Responsibilities of the Senior Managers of the First Respondents several times (namely on the 24 June 2020, 1 July 2020, 8 July 2020, 21 July 2020 and 6 August 2020), but he never provided this information I was entitled to see given the personal implication for me nor did he provide any explanation for his refusal to provide this information.

360. It is submitted on behalf of the Fourth Respondent Mr Van Deventer that he did not deliberately withhold important regulatory and compliance documentation from the Claimant, such as the Statements of Responsibilities and prescribed responsibilities. Firstly, Mr Van Deventer was extremely busy and, as he told the Claimant at the time, was struggling to respond to the Claimant's frequent email requests for documents and information at this time [e.g. 6/4078 & 4121]. Secondly and in any case, Mr Van Deventer could not provide some of the documentation requested by the Claimant as it did not exist. In particular, AGC did not yet have Statements of Responsibility as it was not required to have those in place until after the end of the transition period in December 2019. Thirdly, insofar as the Claimant wanted other documents which did exist, the Claimant was able to access all policies and procedures himself on the company's intranet. It is submitted that any failure to provide the Claimant with

these documents was wholly unrelated to any alleged whistleblowing by the Claimant.

361. The Tribunal accepts that delays in responding to requests are potentially capable of amounting to detrimental treatment. We accept the submissions put forward by Ms Balmer however. We find that the practical reality was that Mr Van Deventer was busy and struggling to deal with the volume of requests made by the Claimant. We find that it was for this reason rather than being because the Claimant had raised protected disclosures.

Detriments 3 & 10

362. [**ix**] on 6 September 2020, the Respondents [R2, R3, R5] allegedly subjecting the Claimant to an artificial and unfair sham redundancy process and unilaterally bringing forward his notice period by two months (POC 90.3) ("Alleged Detriments 3 & 10").

363. It is our finding that the Board had made a decision that the Claimant's role was going to be made redundant on 7 February 2020. This predated by several months the first protected disclosure on our findings. It follows that the decision to subject him to a redundancy process was not on the grounds that he had raised protected disclosures.

364. As to whether the process could be described as artificial or sham, we found that there was some discussion about removing the CIO model in 2019. We accept that during 2020 the First Respondent's Board focused on reducing the cost base, against a background where the organisation had never been profitable.

365. We do not accept that redundancy process was artificial or a sham, albeit we accept that there are some criticisms that could be made of it, which are discussed under the claim of unfair dismissal below.

Reasonable steps defence (s.47B(1D))

366. [**Issue 13**] Can the Respondent nevertheless show that it took all reasonable steps to prevent Respondents 2-5 from taking the above action?

367. We have not needed to deal with this.

Automatic Unfair Dismissal (s.103B ERA)

Qualifying Disclosure

368. [**Issue 14**] Did the Claimant make a qualifying public interest disclosure within the meaning of s.43B of ERA? This involves consideration of the questions set out at paragraphs 6 to 10 above.

369. These matters are dealt with above.

Majority view on automatic Unfair dismissal

370. [**Issue 15**] Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal the fact that he made a protected disclosure (s.103B)?

371. Given the finding of the majority (Employment Judge Adkin, Mr Bishop) that the decision to make the Claimant's role redundant pre-dated the first of the qualifying protected disclosures, we find that the protected disclosures were not the principal reason for the dismissal. We accept the Respondents' case that the principal reason for the redundancy in the case of the Claimant was an attempt to reduce the cost base in an organisation that was not profitable.

Minority view on reason for automatic unfair dismissal

372. In the view of the Dr Weerasinghe, in the minority, the principal reason for the dismissal was the making of qualifying protected disclosures. He is not satisfied that there was in reality a reduction in the requirement for portfolio management activity nor that there was a cost reduction exercise at least to the extent as contended by the Respondents. He accepts the Claimant's case that the vast majority of his activity was portfolio management and does not accept the Respondents' figures showing the near-term diminution in the proportion of portfolio management carried out by the Claimant which he considers to be unexplained. In his response to the Restructure Plan, the Claimant explained the reason for the drop of his share of portfolio holdings from Dec 2019 to June 2020 as shown in the table at page A1106, which shows different figures to the Respondents' equivalent figures at 4845. He explained the drop was caused by the repayment of cash by partners and that it was consistent with the Respondent's strategy to mitigate the impact of COVID. Furthermore, he expressed confidence that as the pandemic abated, he would be able to revert his share of the portfolio back to pre-pandemic levels. In Dr Weerasinghe's view, there is no evidence the Respondent took into account the transient nature of the situation in June 2020.

373. Dr Weerasinghe doubts the data suggesting that the Claimant contributed least amongst the three portfolio managers. He notes for example the Claimant's unchallenged evidence about the number of accounts/partners which were his responsibility and the number of submissions he made to the investment committee. Dr Weerasinghe takes the view that unless there is a substantial diminution of the Claimant's work, it is difficult to see how the Claimant's work can be covered by two portfolio managers working 50% of their time each as proposed in the restructure plan.

374. Dr Weerasinghe considers that the content of Mr Hartley's 2019 self-assessment which refers to senior people becoming involved in things without "a bureaucratic diktat" and a "prescriptive approach" was clearly directed at the Claimant and his principled position on segregation which is a theme contained within the protected disclosures and a point of dispute between the Claimant and Mr Hartley. In Jan 2020, Mr Hartley questioned whether the Claimant should be the CIO and whether a CIO role was needed at all. He further questioned the Claimant's suitability for a senior management role and said: "Senior managers at AGC should be expected to fill multiple roles, if not by

design then by necessity." This statement is outwith the FCA rules on segregation of duties. He draws the inference that the real reason for dismissal was that the Claimant had a made a series of protected disclosures which highlighted failings, breaches of procedure and breaches of FCA principals on the part of Mr Hartley. It was for this reason in Dr Weerasinghe's view that the Claimant's role was selected to be made redundant.

'Ordinary' Unfair dismissal (s.98 ERA)

375. [**Issue 16**] What was the reason (or, if more than one, the principal reason) for the Claimant's dismissal? The First Respondent contends that the reason for dismissal was a fair reason under sections 98(1) and (2), namely redundancy.

376. The Claimant contends that his dismissal was not for a fair reason but was, rather, by reason of him making protected disclosures. We have dealt with that issue above.

Majority view on unfair dismissal

377. By a majority (Employment Judge Adkin and Mr Bishop) wefind that the reason for the dismissal was redundancy.

378. [**Issue 17**] Was the Claimant's dismissal fair in all the circumstances, pursuant to s.98(4) ERA 1996? The Claimant submits that the dismissal was unfair both substantively and procedurally.

379. Mr Smith submits on behalf of the Claimant that the dismissal was substantively and procedurally unfair for a number of reasons.

380. The majority (Employment Judge Adkin and Mr Bishop) deals with each argument in turn.

381. First, that there was a significant change from the original plan "Peninsula business case" [1939] to the revised plan "Proposed Restructure Plan" [4843]. We do not accept that there was a fundamental change between the two documents.

382. Second, there is no evidence of the Proposed Restructure Plan having been approved by the Board. It is submitted that this is "carefully crafted and is bound to have been done on the advice of lawyers".

383. We find that this document did reflect the rationale of the First Respondent at the time when the redundancy of the Claimant's role came into effect. The fact that it may have been the subject of legal advice does not in our judgment make the decision to dismiss unfair.

384. Third, at paragraph 61 Mr Smith makes a variety of submissions about timing noting that the day of the redundancy notification conversation 28 April 2020 was the same day that Great Tao's parent company "went under" and

conjecture about legal advice that may have been given to the First Respondent. It is also suggested that Mr Hartley was motivated to dismiss the Claimant to avoid his own likely scrutiny/censure or even dismissal.

385. None of this in our assessment takes the decision to dismiss outside of the range of reasonable responses. The Tribunal has made a comment in our findings of fact about the blame for that transaction. As noted above, Mr Hartley recognised a failing on his own part on this transaction in his performance review dated 9 December 2019 [1871]. As we understand that this is a document that he would submit to Ms McKinley. It was not the case that he was entirely trying to hide his own culpability. In any event the Claimant was not dismissed for the Great Tao fraud, although he did lose his bonus for 2019. We find that there was a redundancy exercise that went broader than simply the Claimant, with the goal of reducing the cost base. Based on the figures that the First Respondent was considering, of the three senior managers with responsibilities for portfolios, the Claimant had the smallest portfolio of assets "at work" (i.e. stripping out other elements such as cash and foreign exchange). The CIO role was being deleted from the organisation. The First Respondent was entitled to decide to retain Mr Hartley as CEO/COO and Mr Van Deventer as CFO/Head of Compliance as these were plainly important roles aside from the portfolio management roles performed by the two men. By a majority the Tribunal has found that the decision to dismiss and its rationale pre-date the first of the protected disclosures.

386. Fourth, it is contended that the First Respondent was profoundly disturbed by the Claimant's stance of not going quietly and rather standing his ground and calling out wrongdoing. This is a recapitulation of the protected disclosure claims which have dealt with above.

387. Fifth, it is argued that the focus on the part of Ms McKinley on the previous "CIO driven model" is just window dressing and is misleading. He submits that in fact it was always a committee driven process. We accept Mr Smith's submission on behalf of the Claimant that the investment decisions were always taken in a committee driven process. That accords with how we understand the Investment Committee worked, and also with the comment made in the Redundancy Business Case document by Mr Hartley that the Chief Investment Officer role "where *nominally* all investment decisions are in the hands of one individual" [1939, emphasis added]. It was we find only nominal that the Claimant was in charge of investments.

388. We accept the submission that the phrase "one person responsible for portfolio oversight" used in the June 2020 Proposed Restructure document [4844] does create a potentially misleading impression of the way that the CIO role operated in practice. The Claimant in his response to that document at [5011] stated in

> "Under AGC procedures and policies the CIO title does not carry any specific and/or exclusive duties or responsibilities in relation to overall portfolio investment/construction."

389. The Claimant explained that he was one of 4 voting members of the Investment Committee along with Danny Burden, Mr Hartley and Mr Van Deventer and

Investment Committee policy did not ascribe to him any special or additional rights, duties or responsibilities through his title of CIO. He clarified that the discussion about deletion of the CIO role in July 2019 was precisely because the existence of the role potentially caused confusion given the reality that it was not simply one person taking investment decisions.

390. Does this take the decision to dismiss outside of the range of reasonable responses? Ultimately the decision to delete the CIO role was a business decision that the First Respondent was entitled to make. It is not the role of this Tribunal to substitute its own commercial judgement in this respect. The Claimant himself appears to accept the logic in deleting that role insofar as it did potentially create a misleading impression. The implication of his position is that having deleted the CIO the First Respondent should have found another role for him. Ultimately they did not choose to do that. Procedurally he was able to and did explain to Ms McKinley that she may have an inaccurate impression of the way that the organisation operated in practice in respect of investment decisions.

391. Sixth, that the First Respondent had no option but to delay the redundancy process until the outcome of the various investigations/appeals, following which they were delighted to have concluded these and were very keen to bring the termination date forward. It is said that the underlying motive for that is clear. These points it is said support a conclusion that they were merely going through the motions with redundancy consultation and that the outcome was a foregone conclusion.

392. We find that the Claimant was able to make his points during the redundancy consultation process. The First Respondent was bound to consider what he had to say. Consultation does not require an employer to necessarily adopt what is being proposed to avoid redundancy.

393. Seventh, that the decision to remove a senior manager with considerable expertise and a talent for business development made no sense at a time of greater uncertainty in the context of the pandemic and the exponential growth of the business. These were points that the Claimant was entitled to make as part of the process. The First Respondent was not bound to accept this analysis. We have reminded ourselves of the law on questioning the decision to make redundancies, which is summarised by the editors of *Harvey Industrial Relations and Employment Law* at Division D1/10/A/(2), thus:

> "It is generally not open to an employee to claim that their dismissal is unfair because the employer acted unreasonably in choosing to make workers redundant. The tribunals will not sit in judgment on that particular business decision."

394. In our assessment the reduction in the number of employees in this case falls within the statutory definition of redundancy in section 139(1)(b) of the Employment Rights Act 1996.

395. Ultimately the finding of the majority of the Tribunal (Employment Judge Adkin and Mr Bishop) is that the decision to dismiss fell within the range of reasonable responses, procedurally and substantively.

Minority view on unfair dismissal

396. Dr Weerasinghe felt that the First Respondent has not established a case for dismissal. He finds that the Respondent has not shown a genuine redundancy situation, for reasons set out in more detail above under the automatic unfair dismissal.

397. Even if Dr Weerasinghe is wrong about the automatic unfair dismissal, in the alternative concludes the claim for unfair dismissal is well founded because in his view the Respondents have not shown a genuine reason for the redundancy and given the other reasons set out above on automatic unfair dismissal.

Employment Judge Adkin

Date 11 May 2022

WRITTEN REASONS SENT TO THE PARTIES ON

12/05/2022.

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.

APPENDIX:

AGREED LIST OF ISSUES

1. The Claimants brings the following claims in the grounds of complaint:

    1.1. unlawful detriment on the grounds of having made a protected disclosure contrary to s.43B and 47B Employment Rights Act 1996 ('ERA') (against Rs1-5);

    1.2. automatic unfair dismissal (protected disclosure) contrary to s.103A ERA (against R1 only).

    1.3. "ordinary" unfair dismissal contrary to ss.94(1) and 98 ERA (against R1 only).

ISSUES ON LIABILITY

A. Protected Disclosure Detriments Claim (s.43B)

Jurisdiction - Time limits

2. Did the act(s) relied upon by the Claimant as detriments take place less than three months before the date on which the Claimant submitted his claim to the Employment Tribunal, in accordance with s.48(3) ERA 1996?

3. If not, has the Claimant proved that the detriments were 'a series of similar acts or failures', the last of which was brought within time?

4. If not, has the Claimant proved that:

    4.1. was not reasonably practicable for him to have presented his claim before the end of the limitation period; and

    4.2. that the claim was presented within such further period as the Tribunal considers reasonable?

Qualifying Protected Disclosure

5. Did the Claimant make a qualifying public interest disclosure within the meaning of s.43B of ERA? This involves consideration of the questions set out at paragraphs 6 to 10 below.

6. Did the Claimant make a 'disclosure of information' within the meaning of s.43B? The Claimant relies on the following alleged disclosures of information made by him:

    i. on 22 January 2018, an email sent by the Claimant to R3 (and later R2) in which he allegedly raised concerns about R1's risk and operation function (POC 31) ("**Alleged Protected Disclosure 1"**);

ii. on 9 April 2018, an e-mail sent by the Claimant to R3, R4 and Mr Chamings, in which he allegedly raised concerns that R3 had breached internal policies and procedures and raised concerns about exposing R1, senior staff to financial and reputational risks (POC 33) ("**Alleged Protected Disclosure 2**");

iii. on 11 April 2018, an email sent by the Claimant to R2, in which he allegedly escalated his concerns about the issues raised in Alleged Protected Disclosure 2 and raised separate concerns about governance, culture, a lack of separation of functions and breaches of procedure within R1 (POC 35) ("**Alleged Protected Disclosure 3**");

iv. on 12 June 2019, an email sent by the Claimant to R2 and R5 (copied to R3 and R4), in which he allegedly formally notified R2 and the R5 of his suspicion that the Fund had been defrauded as part of the Great Tao transaction (POC 38) ("**Alleged Protected Disclosure 4**").

v. on 18 June 2019, an email sent by the Claimant to R2 (and attaching an earlier email sent on 15 April 2018), in which he allegedly raised concerns that fraudulent activity was enabled by weaknesses in R1's processes and reiterated his request an audit on the Great Tao transaction to be conducted to establish how the fraud occurred (POC 39) ("**Alleged Protected Disclosure 5**");

vi. on 11 May 2020, an email sent by the Claimant to R4 (copied to R2), in which he allegedly raised concerns about the lack of communication to investors over the Great Tao fraud issue; the lack of any audit on the Great Tau fraud; alleged breaches of FCA principles; and a lack of segregation of internal functions necessary to prevent fraud. The Claimant also allegedly conveyed his concerns in relation to the Logros Ecuador transaction and recommended that the risk and operation team conduct an independent analysis of the situation (POC 45) ("**Alleged Protected Disclosure 6**");

vii. on 21 May 2020, two emails sent by the Claimant to R4 (copied to R2, R3, R5, Mr Antic and Mr Coetsee), in which he allegedly raised concerns about the LOGROS and Agritrade transaction and referenced an improper side-pocketing issue (POC 53) ("**Alleged Protected Disclosure 7**");

viii. on 10 June 2020, a formal written whistleblowing complaint submitted by the Claimant, in which he alleged malpractice and improprieties (POC 64) ("**Alleged Protected Disclosure 8**");

ix. on 2 and 9 July 2020, an email sent by the Claimant to R2, R3, R4 and Ms Bharadia , in which he allegedly raised concerns that a statement sent to the fund's investors was misleading (POC 68) ("**Alleged Protected Disclosure 9**").

7. If so, did any of the above disclosures of information tend, in the Claimant's reasonable belief, to show that:

i. in respect of Alleged Protected Disclosures 1 to 9, a person had failed, was failing or was likely to fail to comply with any legal obligation to which he is subject

(s.43B(1)(b) ERA)? The Claimant relies on the following alleged breaches of legal obligations:

a. on Alleged Protected Disclosures 1 to 9: an alleged breach of legal obligations under the FCA Systems and Controls Sourcebook ("SYSC", specifically Rules SYSC 4, SYSC 6 and SYSC 7.

b. an Alleged Disclosures 1 to 9: an alleged breach of legal obligations under the R1's Fraud Protection s.of its Compliance Manual; and

c. on Alleged Disclosure 2: an alleged breach of legal obligations under R1's protocols for the segregation of functions as far as reasonably practical?

ii. in respect of Alleged Protected Disclosures 6 to 9, that information tending to show that any such alleged breach of a legal obligation above was being or was likely to be deliberately concealed (s.43B(1)(f) ERA)?

8. If so, did the Claimant reasonably believe that the information disclosed by him, and any allegation contained in it, were "substantially true" (s.43F)?

9. If so, was that disclosure made to R1 or to another person whose conduct the Claimant reasonably believed related to the failure?

10. If so, were the alleged disclosures made by the Claimant in the public interest (s.43B(1))? The Claimant relies on the matters set out at POC 89.

Alleged Detriments

11. Did the Respondents subject the Claimant to any or all of the followed alleged detriments (POC 90):

11.1. between 22 January 2018 and 6 September 2020, the Respondents allegedly subjecting the Claimant to an increasingly tense and hostile atmosphere; relentlessly and deliberately undermining and side-lining the Claimant; and providing him with a lack of support from the Board (POC 90.1) ("**Alleged Detriment 1**").

11.2. on 19 April 2018 and, again, on 28 April 2020, R3 allegedly threatening the Claimant's job security. Specifically, telling him by email on 19 April 2018 that "If you want to be the CIO you can start doing the dirty work. If you don't then we can take the title away." and orally on 28 April 2020 that he "may be at risk of redundancy" following the protected disclosures made by the Claimant. This left the Claimant feeling unsettled, unsupported and anxious about his future with the First Respondent (POC 43 & 90.6) (POC 90.6) ("**Alleged Detriment 6**").

11.3. in 2019, the Respondents allegedly making wholly unjustifiable allegations about the Claimant's conduct in respect of the Great Tao transaction and the Board allegedly launching a campaign to find fault with him and to unfairly blame him for issues relating to that transaction that were not within his remit or responsibility (POC 90.3 & 90.10) ("**Alleged Detriment 2**").

11.4. in 2019, the Respondents allegedly manufacturing reasons to blame the Claimant for the Great Tao fraud and other distressed investments in order to conceal to investors and other stakeholders that the real reason for the issues in the portfolio were systemic weaknesses and failings in the First Respondent's risk policies and procedures (POC 90.9) ("**Alleged Detriment 9**").

11.5. on 28 January 2020, R3 allegedly making wholly unjustifiable criticisms about the Claimant's performance, resulting in the Claimant being unfairly deprived of his 2019 bonus (as communicated to him by R2 on 9 January 2020) (POC 90.5) ("**Alleged Detriment 5**").

11.6. between 11 May 2020 and 6 September 2020, R4 and R5 allegedly failing to take the Claimant's grievance and appeal concerns seriously, including allegedly failing to conduct an adequate investigation or decision-making process into the same or to provide any evidence to support their findings (POC 90.7) ("**Alleged Detriment 7**").

11.7. between 10 June 2020 and 6 September 2020, R5 allegedly failing to take seriously the Claimant's whistleblowing concerns (Alleged Protected Disclosure 8); failing to conduct an adequate or thorough investigation into the same or to provide any evidence in support of the findings; and disclosing the Claimant's identity as a whistle blower, to Mrs Bharadia (POC 90.8) ("**Alleged Detriment 8**").

11.8. between 24 June 2020 and 6 September 2020, the Respondents allegedly withholding important documentation from the Claimant and failing to answer reasonable and proper questions asked by him in respect of regulatory and compliance issues. Specifically, the Respondents failing to provide the Statement of Responsibilities and list of Prescribed Responsibilities requested by the Claimant in his emails of 24 June 2020, 1 July 2020, 8 July 2020, 21 July 2020 and 6 August 2020 (POC 90.4) ("**Alleged Detriment 4**").

11.9. on 6 September 2020, the Respondents allegedly subjecting the Claimant to an artificial and unfair sham redundancy process and unilaterally bringing forward his notice period by two months (POC 90.3) ("**Alleged Detriments 3 & 10**").

12. If so, was any such detriment done on the ground that the Claimant had made a protected disclosure (s.47B(1))?

Reasonable steps defence (s.47B(1D))

13. Can the Respondent nevertheless show that it took all reasonable steps to prevent Respondents 2-5 from taking the above action?

B. Automatic Unfair Dismissal (s.103B ERA)

Qualifying Disclosure

14. Did the Claimant make a qualifying public interest disclosure within the meaning of s.43B of ERA? This involves consideration of the questions set out at paragraphs 6 to 10 above.

Reason for Dismissal

15. Was the reason (or, if more than one, the principal reason) for the Claimant's dismissal the fact that he made a protected disclosure (s.103B)?

C. Ordinary Unfair dismissal (s.98 ERA)

16. What was the reason (or, if more than one, the principal reason) for the Claimant's dismissal? The Respondent contends that the reason for dismissal was a fair reason under sections 98(1) and (2), namely redundancy. The Claimant contends that his dismissal was not for a fair reason but was, rather, by reason of him making protected disclosures.

17. Was the Claimant's dismissal fair in all the circumstances, pursuant to s.98(4) ERA 1996? The Claimant submits that the dismissal was unfair both substantively and procedurally.

ISSUES ON REMEDY

Declarations and compensation

18. If the Claimant succeeds on any of his claims above, should the Employment Tribunal make any declarations and, if so, what declarations should be made?

19. If the Claimant succeeds on any of his detriment claims above, what remedy, if any, is he entitled to under s.49 ERA 1996?

20. If the Claimant succeeds on his unfair dismissal claim above, what remedy, if any, is he entitled to under sections 118-124 ERA 1996?

Increases or reductions

21. Did the Respondent unreasonably fail to comply with the ACAS Code of Procedure and, if so, is the Claimant entitled to an ACAS uplift under S207A Trade Union and Labour Relations (Consolidation) Act 1992?

22. Should any award for unfair dismissal also be reduced in line with *Polkey v AE Dayton Services Ltd* [1097] ICR 142 and/or for just and equitable reasons under s.122(2) ERA 1996?

23. Should any award made to the Claimant be decreased on the grounds that he has taken insufficient steps to mitigate his losses?

Interest and tax

24. An award of interest in respect of any discrimination award under s124(2) EqA 2010?

25. Should any of the award that falls above the £30,000 tax free exemption, be grossed up under s. 401 ITEPA 2003?