EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101977/2020

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Held via Hybrid, In Person and Cloud Video Platform (CVP) on 2, 3, 4, 7, 8, 9 and 10 February 2022

Employment Judge: R McPherson
10 **Members: W Muir and Z Van Zwanenberg**

Mr Mark Turner	**Claimant** **Represented by:** **S Harkins –** **Consultant**
Scottish Triathlon Association Ltd	**First Respondent** **Represented by:** **B Caldow** **Solicitor**
Mrs Jane Moncrieff **c/o Triathlon Scotland**	**Second Respondent** **- as above**
Mrs Fiona Lothian **c/o Triathlon Scotland**	**Third Respondent** **- as above**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant claims for

1. detriment having been withdrawn are dismissed; and

2. automatic unfair dismissal in terms of s103A ERA 1996 does not succeed.

REASONS

Preliminary Procedure

1. The claimant presented his ET1 on **Friday 27 March 2020** without Early Conciliation, the claimant having sought Interim Relief following upon the certain events which are alleged to have occurred in the course of the claimant's employment at Scottish Triathlon Association Ltd and further claim of automatic unfair dismissal and detriments on grounds of making a protected disclosure (commonly described as whistleblowing) in terms of s47 of the Employment Rights Act 1996. The ET1 identified the claimant's former representative as acting for the claimant and is understood to have done so until the respondent agent intimated the current representative in late January 2022.

2. The ET3 for all respondents were presented timeously.

3. The application for Interim Relief was withdrawn by the claimant and dismissed by Judgment dated 23 April 2020 and issued to the parties on 24 April 2020.

4. The claimant in the ET1 set out that he relied upon asserted protected disclosure said to have been made on **Monday 2 December 2019.** That ET1 identified his former representative as acting. The claimant's subsequent agenda for case management Preliminary Hearing, at 2.1 also gave notice of the disclosure as being on 2019 (to Jane Moncrieff, the respondent's then CEO), the Note of Case Management Hearing held **Friday 5 June 2020** (the June 2020 case management Preliminary Hearing), dated **Wednesday 8 July 2020** and sent to the parties **Thursday 9 July 2020** did not describe notice being given of any other alleged disclosure relied upon.

5. While, for the claimant a draft proposed list of issues prepared by his current representative was provided on **Tuesday 1 February 2022,** the Tribunal does not consider that as formulated they were wholly of assistance in reflecting the matters in respect of which notice had been given, including having regard to the ET1 and the subsequent case management Notes (which

identify his former representative as acting) and agenda, the draft proposing as an issue whether the letter of Monday 2 December 2019 contained "*further information*" which the Tribunal considered presupposes that notice was given of reliance on earlier information, and further "Did his actions in *reporting his disclosure to third parties, after making his initial disclosure, mean he did not make the disclosure within 1 of the 6 specified methods*?", to the extent that it may be read to suggest that reporting of an alleged disclosure to a third party was relied upon.

6. The issues for the Tribunal included:

   a. Did the claimant have a genuine belief that the information relied upon in the asserted disclosure (being the Monday 2 December 2019 communication) tended to show (sections 43B and & 43C Employment Rights Act 1996 [ERA 1996]), relying on subsection(s) of section 43B(1)(b) and s43(1)(d), that the respondent had failed to comply with a legal obligation (including contractual) to which they are subject and /or the health and safety of any individual has been or is likely to be endangered; and

   b. Was that belief a *reasonable belief*; and

   c. Did the claimant have a *genuine belief* that the disclosure was in *the public interest* AND;

   d. Was that a reasonable belief (s43B (1))

   e. Do any of the exceptions apply (disclosure of criminal offence s43B93) or are subject to legal privilege (s43B (4))

7. The asserted disclosure on which notice was given (including having regard to paragraphs 3, 5 to 13 and 33 of the 44-paragraph paper apart to the ET1) and subsequent case management notes, as being relied upon, was the communication of **Monday 2 December 2019** was made to the employer.

8. Further the Tribunal required to consider whether the protected disclosure was the **reason** or **principal reason** for the dismissal and was automatically unfair in terms of s103A ERA 1996.

9. The respondent defends the claim, arguing that the asserted disclosure did not amount to a protected disclosure, any alleged detriments relied upon were not in consequence of the alleged disclosures and that the reason or principal reason for termination of employment was not that the claimant made a protected disclosure and thus (automatic) unfair dismissal did not arise.

Preliminary Issues

10. Prior to the hearing itself, on an application for the claimant, the hearing was amended to hybrid to allow the claimant (only) to attend by CVP from New Zealand.

11. At the outset of this hearing

    1. neither party expressed any legal objection to the giving of evidence by video link on a voluntary basis from New Zealand; and

    2. for the claimant, it was accepted that as the claimant had not engaged with ACAS Early Conciliation the determinant element of the claim could not be insisted upon and as such the claim was as for a declaration that the claimant has been unfairly dismissed under s103A of the Employment Rights Act 1996 (ERA 1996) and for compensation for aggravated damages, the claimant contending that the reason or the principal reason for his dismissal was that he made a protected disclosure of the respondent on **Monday 2 December 2019** and as such his dismissal was automatically unfair. It was agreed that paragraphs **41 and 4 (c), (d) and (f)** of the **ET1** were deleted. It was not in dispute that the claimant did not have the 2-year qualifying service to assert Ordinary Unfair Dismissal. The respondent did not concede that aggravated damages were available to the claimant; and

3. for the claimant, claims against the second and third respondents (being Ms Jane Moncrieff and Ms Fiona Lothian) were withdrawn and Tribunal Judgment dated 2 February 2022 was issued dismissing those claims.

Hearing

12. An agreed joint bundle extending to 555 pages was provided. That was supplemented at the outset with additional documentation for the claimant on day 1 being a 2-page profit and loss document for the claimant's current business for the year ending 2022 together with an updated schedule of loss, and, in the afternoon of day two, an extract interview with the claimant published in June 2019.

13. The claimant provided oral evidence, it was noted by the Tribunal, through the hearing itself that the amendment to hybrid granted at the request of the claimant on Friday 28 January 2022, had the effect of the claimant giving his evidence remotely and with a 13-hour time difference. Additional witnesses for the claimant were **John Dargie,** who had been an employee with the respondent from around 2005 until 2007 and whose subsequent membership and coaching role with the respondent had come to an end when he was expelled after a process that had concluded in 2019, and **Cameron Harris** an elite triathlon athlete based at Stirling University and who had been coached by the claimant. Objections at the outset for the respondent to the relevance of both those witnesses were noted by the Tribunal, however, the Tribunal considered that it was in accordance with the overriding objective that both those witnesses should be permitted to give their evidence, with it falling to the Tribunal to consider their relevance.

14. For the respondent, oral witness evidence was provided by **Jane Moncrief** now-former **Chief Executive Officer** (the respondent's former **CEO**) for the respondent, **Fiona Lothian** the respondent's Head of Performance, who was the claimant's former line manager and a former elite athlete, **Rebecca Trengrove** volunteer Board Member of Scottish Triathlon with the role of Welfare Director within the Board and **Dougie Cameron** volunteer Chair of the volunteer Board of Scottish Triathlon.

15. Following the conclusion of the evidential element of the hearing parties were provided with an opportunity to share with each other their draft written submissions in advance of providing same to the Tribunal by Thursday 10 March 2022 which was extended by agreement (on the application of Rule 50) to **Friday 8 April 2022**. Parties confirmed their positions via email to the Tribunal which document attached and set out

    1. The position agreed by the claimant and respondent set out below has endeavoured to (i) take cognisance of the question posed by the Tribunal judge during the hearing; and (ii) observe recent case law (such as *Frewer –v- Google*) as to open justice.

    2. In this case, the parties and their witnesses are clearly identifiable and have given evidence in open Tribunal. Reference has been made in evidence to others, such as coaches and athletes, who did not give evidence and who would never give evidence, in the dispute in question. The bundle contains various documents which have also referenced various persons. In some instances, reference is made to private matters that have no direct relevance to either party (for example, a university student's private circumstances, such as injury) and differ markedly from, for example, commercial or similar interests.

    3. A document has been produced … which goes to some length to capture and reference each person in the bundle who could be an athlete and may have been referred to expressly or within a document. It is not suggested that each and every person may be named in the judgment, or indeed, has in fact been named or referenced in the evidence before this tribunal. Rather parties are agreed that it would be open to the tribunal to refer to each person in this table by the suggested short form reference, should it be necessary to refer to them in the judgement. These people are not "significantly involved" in the proceedings and their identities do not add to the substance of the issues in dispute.

    4. It seems to us that it would be permissible in the judgment even absent the table and considering this point further to an agreed position put

forward by the parties, for a tribunal to report in its judgment in general terms, such as that "the tribunal heard evidence about an athlete, in respect of whom the claimant has expressed concerns as to whether the athlete had been given too heavy a training session on return from time off". The benefit of the attached table may make writing the judgment easier and in turn easier for the parties to read, but it would also, it seems to us, observe the privacy of those athletes.

5. We have not suggested anonymising those athletes or persons who we are told had given statements at any time, as those persons, it has been suggested for the claimant, volunteered statements to the claimant for use. Those were not privately controlled. Persons who were employees of the respondent or University and so part of the fabric of the sporting / educational entities who were engaged in these matters are not included as their reference appeared to be largely in connection with their employment and there can similarly be no anonymity.

16. The Tribunal's private deliberation took place at the **Members' Meeting** on **Tuesday 26 April 2022** being the earliest mutually available date for the full panel of the Tribunal.

Findings of Fact

17. The respondent is a membership organisation and is the governing body for triathlon sport (swim-bike-run) in Scotland and is recognised by though not governed by British Triathlon. The respondent has for a number of years operated from premises within the campus of the University of Stirling. The respondent has a small number of paid employees, around 6, who operationally are directed and overseen by the Chief Executive. The Chief Executive reports to a volunteer Board which includes a volunteer Chair, the Board does not direct day to day activities but has a strategic planning oversight role. Additional to the Board the respondent has a President which is essentially an honorary role acting as the public face of the organisation at high profile events. The respondent is associated with British Triathlon, along with other home nation equivalent governing bodies. Triathlon Scotland

operates 3 squads within its Performance Programme Academy Squad, Confirmation Squad being athletes who may move to Development Squad and Development Squad itself of around 8 athletes who may choose to train at the University of Stirling or elsewhere.

5 18. The University of Stirling offers athletes, including triathlon athletes, the opportunity to study and train at its facilities.

19. In or around **January 2019,** and wholly separate from the respondent arrangements, the University of Stirling elected to recruit as its then Performance Triathlon Coach, Andrew Woodroffe (the then USPTC) to
10 support performance triathlon athletes. This was, in broad terms, a new development, as up to that point such coaches were traditionally engaged through Triathlon Scotland. Andrew Woodroffe had previously been an apprentice coach with the respondent.

20. Elite and other triathlon athletes in Scotland have the autonomy to choose
15 their own coaches, while the respondent operates to provide opportunities for triathlon athletes, including junior athletes including deploying resources on training events both at the University of Stirling and beyond, no athlete is required to appoint as their coach, a coach engaged by the respondent.

21. Following a recruitment exercise by the respondent including interviews in
20 early 2019 and in which the claimant was flown from Australia to attend a 2-day recruitment process, the claimant who had for around 13 years been self-employed operating a business for performance athletes in Australia, was initially offered the post of **Lead Performance Coach** with Scottish Triathlon Association Ltd on 29 January 2019 and was engaged as **Lead Performance**
25 **Coach** within the respondent's Performance Programme commencing on **Monday 20 May 2019**. The claimant moved with family from Australia under a 12-month work visa, which at the time was the only available option due to changes in UK visa arrangements, which was organised via the respondent. The claimant sold his business in Australia in that period.

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22. On **Wednesday 29 May 2019** the claimant was provided with a Statement of Particulars Revised Contract (the May 2019 Contact), identifying at clause **1 Duration** that the contract would commence 20 May 2019 and shall continue… unless your employment is terminated earlier in accordance with **clause 12** (which set out that *this Contract can be terminated by either party giving to the other not less than one month's written notice*) and a 3-month probationary period. The May 2019 Contract provided at **Clause 2** that the claimant was employed as **Lead Performance Coach** reporting to, and line managed by the Head of Performance of Triathlon Scotland (that is Fiona Lothian) and that the claimant was "*expected to perform all duties, which may be required of you in this role and as set out in the attached Job Description.*" It described his normal place of work as the respondent's offices within the campus of the University of Stirling.

23. The **May 2019 Contract Job Description** identified that the claimant's job title was Lead Performance Coach - Triathlon Scotland Performance Coach (TSPP), that he was engaged on a full-time basis within the respondent Performance Department, he would report to the Fiona Lothian (the respondent's Head of Performance), that he had Budget responsibility and that:

   - **key Interfaces** would include the respondent Pathway Performance coaches, the USPTC, Scottish Institute of Sport Service Providers, Sportscotland Partnership Manager, British Triathlon Federation Head Coach/ Performance Pathway manager and club coaches.

   - The overall purpose was described as:

      - To develop athletes to become medallists at major Games and Championships

      - To develop athletes to British Triathlon Podium-Potential Level

      - To lead the delivery of the respondent performance programme (Triathlon Scotland Performance Programme/ TSPP)

- To lead on skills, training loads and behaviours required on the different TSPP squads in line with the British Triathlon Athlete Development Framework

- To ensure athlete wellbeing is at the forefront of programme delivery

- The **May 2019 Contract Job Description** identified **7 Key responsibilities** including**:**

  (1) **Management and Leadership**

  (2) **Performance,**

  (3) **Coaching,**

  (4) **Communication,**

  (5) **Performance Development,**

  (6) **Budget and Financial** and

  (7) **General** which included: to help develop and maintain a successful image and profile of the respondent Performance Programme in both the UK and worldwide and contribute to the development, evaluation of the Performance Plan as required**.**

Of the 7 areas of key responsibility, only one was direct athlete coaching.

24. In **June 2019,** the claimant advised his line manager of what the claimant regarded as challenges of working with the then USPTC.

25. On **Saturday 20 July 2019** the claimant issued an email to Ms Fiona Lothian describing what he considered were challenges of working with the then USPTC.

26. On **Monday 29 July 2019** the claimant sent his line manager an email setting out criticism of the then USPTC including that he "*believed his current coaching methodology was working and athletes improving. And for the most*

part that is true but it also shows a lack of humility and ego" and criticised the USPTC.

27. On **Friday 9 August 2019,** the claimant attended a 3-month review with the respondent with his line manager and the respondent's former CEO and again described what the claimant regarded as challenges of working with the then USPTC.

28. Subsequently on **Friday 9 August 2019, Jane Moncrieff** the respondent's then (and now former) **CEO,** issued an email to the claimant thanking him for his time that day setting out that "*a number of things were discussed which I think are helpful going forward... I have a meeting arranged with"* David Bond being the Line Manager for then USPTC *"for next Wednesday to discuss what we talked about re you and"the* then USPTC and referenced a communication coach.

29. From around **Monday 9 September 2019** the respondents in discussion with the University of Stirling agreed that the claimant would adopt a senior role supported by the then USPTC with both being advised of same.

30. On **Friday 4 October 2019** the respondent's line manager issued an email to the claimant, the USPTC and the line manager for the USPTC which set out that she hoped that she had captured the discussions and that if anything had not been recorded please let her know and which covered General Principals, Delivery, Roles & Responsibilities, Support Staff, Planning, Session Delivery, Training Peaks Centre Meeting Agenda and which concluded: *"I, for, one, am excited by the potential for next stage in the development of the Centre, lets make it work together*".

31. On **Thursday 24 October 2019** the claimant met with his line manager and described that working with the USPTC was difficult for him, including describing he perceived it as a pride swallowing, shit eating existence and stated that he would resign unless the respondent changed, the respondent's line manager. in response sought examples and offered to speak to the USPTC's line manager.

32. On **Thursday 31 October 2019** the claimant completed his 6 Month Review Staff Appraisal Document (the October 2019 6-month Staff Review). No concerns were expressed in that 6 Month's Staff review regarding the claimant. The claimant set out that, for the most part, the year was going well he thought he would be doing more hands-on coaching but at the same time he also enjoyed the big picture/strategy work. He described that his biggest challenges had been with the external coaches. In relation to concerns, he referenced the majority of athletes were guided by external coaches and that he would prefer to have more control over the athlete's programs and development. He discussed with his line manager that apart from Cameron Harris, the other athletes were coached by different coaches (than the claimant), this was unlikely to change in the near future, and this was a" *real frustration"* for him. His line manager recorded in her note that he would prefer to have more control over the athlete's programs and development and "*putting the results of the TS program in the hands of these coaches in not how we achieve high performance in my opinion."* The claimant described what he felt was a better model but realised that model did not leave him with a role. The claimant described the split between coaching and coach development and while he was prepared to get on with the role, which was 25% coaching and 75% coach development, he had concerns about the lack of coaching on his personal development and coaching career.

33. On **Thursday 31 October 2019** at 4.27 pm claimant's line manager issued an email to the claimant with her written comments set out in the October 2019 6-month Staff Review) *"Thanks for your time this morning, hopefully, I have accurately documented our conversation, if anything has been missed or is a misrepresentation please add …Please than send back … even if there are no additional comments please send it back as an accurate record of our discussion. Given the concerns you have raised around the balance of hands on coaching delivering directly to athletes versus working to influence non TS coaches who you feel don't have the skills and experience with TS athletes once you have returned the appraisal document I'll discuss it further with*" the respondent's then (and now former) CEO.

34. The claimant confirmed to his line manager by email on **Thursday 31 October 2019** that he was happy with the summary "*bar one point in the last paragraph. Can we change the wording in the first sentence of the last paragraph to that* ***I feel that the role should be 75% coaching*** *and* ***25% coach development*** *as opposed I could do it."*

35. On **Sunday 3 November 2019,** and while the claimant and his line manager were in Edinburgh Airport travelling back from a British Triathlon Conference, his line manager said to him that they would be having a meeting and indicated as a heads up it would be a difficult conversation and identified in his timeline provided to the Tribunal that she referred him to his job description.

36. On **Saturday 16 November 2019** the claimant had a meeting with his line manager during which he considered that he was made to feel that issues he considered he had with the USPTC were down to the claimant.

37. On **Tuesday 19 November 2019** a day in advance of a prearranged meeting with the respondent's then CEO and Louise Wright the volunteer respondent Board Performance Director the claimant requested what he described as a short meeting with the then CEO. During the meeting, which was not short, he set out that unless things changed, he would look to resign once his 12-month visa expired.

38. On **Wednesday 20 November 2019**, the claimant attended the pre-arranged meeting with the respondent's CEO and Louise Wright respondent's volunteer Board Performance Director. The claimant was not satisfied with the response of the CEO and the volunteer Board Performance Director during this meeting and subsequently emailed on Tuesday 26 November 2019, requesting additional notes he prepared of that meeting to be added, which notes included asserting that it was his perception that in this meeting he was made to feel, unfairly, that many of the issues within the Performance Program were his fault, that throughout the meeting asserted that it was his perception that the CEO was trying to force him to resign and indicated that while he had informed the CEO of his intention to resign after his 12 months visa expired

that was unless things changed and he would like to stay, and he felt that the USPTC *"was coaching too many athletes personally and that a number of 3-6 is the maximum number any coach can do effectively in my opinion"*. The CEO was noted to have disagreed, the claimant brought up an example of a conversation he indicated had had with a British Triathlon coach who believed that no one coach should be coaching more than 6 athletes with the claimant indicating that the USPTC was coaching 10 athletes, which the CEO disagreed with.

39. Subsequently on **Wednesday 20 November 2019,** the claimant sent what app messages to the respondent volunteer chair Dougie Cameron, the claimant asked if it would be possible to meet the following week and described that he assumed that the chair had *"been made aware of recent events"* and would like to discuss with the chair further if possible. The chair responded that it would not be appropriate for the chair to become involved in day to day running of the respondent, the chair set out his position as he saw it**.** The claimant's response was that he understood the volunteer chair's position "*however I feel that I am being misrepresented and am being treated unfairly. I have evidence to support this hence I wanted to share that with you as I was not given the opportunity to do that today."* The claimant did not specify what he meant by recent events nor in what way he was being represented and what the evidence was.

40. On **Friday 22 November 2019** the claimant arranged a meeting with an HR representative from British Triathlon, who advised that the claimant should raise any concerns with the respondent's Board.

41. On **Monday 25 November 2019** the claimant attended a meeting with his line manager and the respondent's then CEO**.** The claimant set out that he had spoken with **Kevin McHugh** of **Sport Institute of Scotland,** and **British Triathlon HR "***for advice following his meeting last Wednesday"* (20 November 2019) **"***as he felt that he was being forced to resign"* and described that he had informed one athlete Cameron Harris and had asked Cameron Harris to keep it confidential. The claimant was recorded as intimating that this meeting had been much more positive than the meeting on Wednesday

20 November. Actions identified from that meeting were that Centre Strategic Group were to meet to discuss the claimant and the USPTC, Sandy Hodge from SportScotland would complete a 360-Degree Review and provide feedback to the respondent CEO, positive messages were to be conveyed to athletes and external meetings or meeting with partners of key actions to be agreed and a record kept for accuracy.

42. A summary note was provided to the claimant of the meeting on Monday 25 November and on Tuesday 26 November 2019, the claimant requested several pages of additional notes including as above set out his views on the number of athletes he considered that the USPTC was coaching and the disagreement of the then CEO.

43. In **November 2019**, the respondent arranged for the independent **360-Degree Review** to be undertaken by Sandy Hodge of the separate body SportScotland on the respondent's Performance Programme and staff which was subsequently completed and published in **February 2020** with 10 recommendations (The February 2020 360-Degree Performance Review).

44. On **Thursday 28 November 2019**, the claimant had a meeting with **Alistair Russell** who had been employed by the respondent as a coach education tutor in **2015,** and who offered to the claimant assumptions regarding qualifications achieved at Level 1 and subsequently at Level 2 Triathlon Coaching course by the USPTC.

45. On **Sunday 1 December 2019** the claimant secured an unsigned **"***to whom it may concern letter"* dated that day **(the Sunday 1 December 2019 to whom it may concern letter)** from Alistair Russell and which set out that Alistair Russell and a Linda MacLean were the two tutors engaged on a Level 1 Triathlon Coaching Course in December 2015. It did not describe that Alistair Russell had a role in passing the then USPTC, although it expressly set out Alistair Russell's view of the USPTC at the time of that Level 1 Course and described that the now-former CEO had spoken to Linda McLean in *"the corridor".* It did not suggest that Alistair overhead or knew what had taken place in that discussion. While it also further set out assumptions by Alistair

Russell regarding qualifications achieved at Level 1 and subsequently at Level 2 by the USPTC, it did not set out a factual assertion that Linda MacLean inappropriately passed the USPTC at that level 1 course. Linda McLean was subsequently interviewed by Rebecca Trengrove.

5 46. On **Monday 2 December 2019** at 9.05 am the claimant issued an email to the CEO, the respondent volunteer chair Dougie Cameron and to a Mr Ward at his separate British Triathlon email, which email was cc'd to the claimant's then representative, the email read*" Hi Jane, Please find attached a letter from my solicitor for your reference, Regards Mark Turner Lead Performance*
10 *Coach*" (the **claimant email of Monday 2 December 2019**). The attached letter was undated and although opened *"Dear Jane*", did not identify its author at the foot (**the Letter attached to the claimant's email of Monday 2 December 2019**).

47. **The Letter attached to the claimant's email of Monday 2 December 2019**
15 set out:

Dear Jane

Re: Whistleblowing

I write to make qualifying disclosures pursuant to s43A;43B (1) (b)(d) & s.43c (1) (a) under the Employment Rights Act 1996.

20 *Please accept this letter as an invocation of the Whistle Blowing Policy & Procedures*

In blowing the whistle I am providing facts and information to you to act upon.

For the avoidance of doubt, in blowing the whistle I am not making 'allegations'

25 *I reasonably and genuinely believe the disclosures contained within this letter are substantially true*

The predominant reason in blowing the whistle is to bring your attention to the fact that a person has failed, is failing and is likely to continue to fail to comply with any legal obligation to which s/he is subject.

The following matters are raised in the public interest.

The following applies:

I am bringing to your attention by reasonable means that I recently genuinely believed Dougie Cameron, Jane Moncrieff and Fiona Lothian have failed, are failing, and are unlikely to comply with the legal duty under the health and Safety at Work Act 1974 to 'observe a duty of care' for the health, safety, and welfare at work to Triathlon Scotland employees, voluntary workers, coaches, athletes, members and parents. This matter is in the public interest.

For the avoidance of doubt, it is transparently clear that there has been a long standing systematic abuse of leadership which is demeaning disrespectful and caustic. Threats of detrimental action and unreasonable pressures of work have resulted in a significantly higher number of staff suffering from mental health breakdowns and further individuals from stress and anxiety

For the avoidance of doubt and in addition to the aforementioned. I am aware of other dishonest practices, one being of Jane Moncrieff instructing course facilitators to pass Andrew Woodrow on the Level 1 and Level 2 coaching course. The later being undertaken only a few weeks of his "completion" to level 1 coaching.

It is my reasonable and genuine belief that in facilitating the employment of Andrew Woodroffe that Jane Moncrieff has failed to provide pathway athletes and university students with a properly qualified coach and that such actions compromise the health and wellbeing of all individuals coached and managed by him. You have failed in your legal duty to enable safe system department which is a legal duty requirement under s2 (1)(2) (a) (e) of the HSAWA 1974.

Moreover, it is my reasonable belief that both Jane Moncrieff and Fiona Lothian repeatedly failed to observe a statutory 'duty of care' for the health, safety and welfare of the Company employees and voluntary working through

a host of public humiliation, threatening and verbally abusive actions. The risk to an individual's health and wellbeing is palpable.

It is in the public interest that all employees and voluntary workers employed and engaged by (or on behalf of) Triathlon Scotland know that the working environment poses a foreseeable risk to health and wellbeing due to the relevant failures by Dougie Cameron, Jane Moncrieff and Fiona Lothian to observe the Company's legal obligation under the auspices of the both the Health and Safety and Work Act 1974, and furthermore, The Management Standards Approach.

I'm asking the Company to ensure that I'm not subjected to any detriment for having blown the whistle. For the avoidance of doubt, I am profoundly concerned that Management will now try and get rid of me for blowing the whistle and/or make my life a living hell. In the event I am subjected to any detriment for having blown the whistle I will assert my statutory rights under s47 (B)(1)ERA 1996 in the Employment Tribunal. To this end, I inform you that I will hold Triathlon Scotland, Dougie Cameron, Jane Moncrief and Fiona Lothian personally liable pursuant to the s47B(1)(1A)(1B)(1C)(1D)(a) (b) of The ERA 1996 in the event that you/they personally subject me to any form of detrimental treatment for blowing the whistle.

Please note that this email has been copied to my representative who will formally liaise with British Triathlon on my behalf given the seniority of your respective positions and the nature of my concerns.

Yours faithfully.

48. On **Monday 2 December 2019 3.30 pm** the **claimant's** former representative set out criticism in an email to British Triathlon copied to the respondent's CEO, made on behalf of the claimant, describing that respondent's chair had informed the claimant that he could not and will not interfere with the day-to-day running of the respondent and asserted that the volunteer chair was "*wholly ineffective in his role and that his unwillingness to act on known unlawful acts compromises the integrity of both"* the respondent and British

Triathlon. The claimant's former representative did not provide any specification on what those alleged acts were.

49. On **Monday 2 December 2019** the respondent Board organised a Zoom meeting of the Board at which the volunteer Chair of the Board handed the **Monday 2 December 2019 claimant letter** over to a group of the Board as he had been named in the letter and he had been advised his mother was terminally ill.

50. On **Thursday 12 December 2019** the volunteer **President** of the respondent wrote to the claimant to "*acknowledge recent receipt of your letter to the CEO…. regarding 'whistleblowing'* it set out Rebecca Trengrove the volunteer Board Member and Welfare Director "*will meet with you to investigate your claims and also to interview others as necessary. She will report to a group of the Board who will decide what action (if any) needs to be taken*" described that Rebecca Trengrove was currently working aboard but would be back in January 2020, and proposed meetings on Thursday 16, Wednesday 22 or Friday 24 January 2020.

51. On **Thursday 9 January 2020** the volunteer President of the respondent wrote to the claimant noting that the claimant was due to return from a holiday in New Zealand, copying in Rebecca Trengrove in order that she and the claimant could firm up arrangements to meet as set out above.

52. The claimant responded to the Rebecca Trengrove on **Friday 10 January 2022** and the respondent volunteer President, by email, advising that the claimant would "*have all the information you need for the meeting next week"* once he had collated it all and described that he would wish to bring with him a friend. That friend was named as his former representative.

53. The claimant was self-certified as signed off work from **Monday 13 January 2020.**

54. On **Tuesday 14 Jan 2020** at 10 am the respondent's now-former CEO emailed the claimant to say she knew he was not feeling well enough to work today and tomorrow "*I just wanted to check with you whether there is anything*

Triathlon Scotland can do to support you." and referenced a training camp that week (Monday 18/Tuesday 19 Jan 2020) *"if you feel like you are not up to it we can put in measures in place"* for the camp to go ahead or not.

55. On **Thursday 16 January 2020** the claimant provided a 4-page letter, drafted with the assistance of his former respondent, to the respondent "Given the seniority of those I complain against at Triathlon Scotland ***I cannot in good conscious remain in the employment of TS*** *on the basis that the unlawful practices are both condoned and allowed to have occurred without consequence by the Board of TS and British Triathlon. … I am not capable of working at the premises of Triathlon Scotland or in the vicinity of Jane Moncrieff or Fiona Lothian. I am currently absent from work and due to visit my GP on Monday* (20 January 2020) *at which point I expect to be declared unfit for work for a period of time."* The claimant described that he had a perception that both the respondent's then CEO and his line manager actively and wilfully, harass, offend, demean intimidate, publicly humiliate, exclude, and negatively affect him in his work role and which behaviour he described commenced following concerns raised including on the coaching abilities of the University of Stirling's then Performance Triathlon Coach.

56. On **Thursday 16 January 2020,** the claimant attended the scheduled meeting with Rebecca Trengrove the respondent volunteer Board Member and Welfare Director, a 30-page full transcript set out matters including;

    1. that the claimant's understanding was he had two main responsibilities to put Scottish athletes onto the GB games and deliver performance at Commonwealth Games.

    2. The claimant described that fundamentally that the role that he was led to believe that he was doing, and the role he was doing were "*vastly different"* and that he could not, in his opinion achieve what he described as those key performance outcomes in the current environment. When asked what he thought he would be doing the claimant described that he thought he would be doing more hands-on coaching "*I'm doing very minimal hands-on coaching… and actually working with athletes on a one-*

to basis I thought I would be doing more of that but I'm doing very little of that and my main role is probably supporting other coaches".

3. The claimant referred to additional material he elected to bring and was asked about the allegations he set out in **the Monday 2 December 2019 claimant letter** and set out his position**,** including confirming that he had referenced **the Sunday 1 December 2019 to whom it may concern letter** which, the claimant accepted in evidence in this Tribunal, had assumed a conversation had taken place which he was not privy to and further confirmed in the meeting that had not spoken to anyone who facilitated the level 3 course he had referred to.

4. The claimant offered criticism of the USPTC in connection with an athlete regarding the approach, on what was described as a shoulder injury and training, in which regard the claimant considered his opinion had been dismissed. The claimant described that he had minimal influence over what he described as University of Stirling athletes and offered criticism that the USPTC was personally coaching 9 of 11 athletes on the University of Stirling squad and that "*whilst they are university athletes they are also Triathlon Scotland athletes and should be coached by"* the claimant while he was only coaching two.

5. The claimant was asked to expand on what he described as threats of detrimental actions and described interactions that he constantly was made to feel it was all his fault and when describing his perception of difficulties in working with the USPTC was told there was a system in place and described during his 6 monthly review, that he told his line manager that he didn't believe that they were going to deliver performance on the basis of key performance indicators and had described "*If I' can be completely honest with you.. you know why am I even doing? I'm not really coaching anyone I'm* (the USPTC's) *assistant and when that person had a day off "I get to coach 'yay' but I have little influence over anyone"* .

6. The claimant further described that on the back of the 6-month review he had met with the respondent's CEO and stated "*look we've got a meeting*

*tomorrow. I don't want to surprise you but for me, unless things change, I've been six months now bringing up my concerns (*referencing the USPTC) *and my job and I need more support, unless things change for me. I'm going to see out my 12 months and resign".* In response the claimant described that respondent's then CEO replied "*but unless things change… oh okay ... well look, we don't know your buying into what we're doing anyway. We're not sure you're the right person for us and you need to think about that*". The claimant described that he was utterly floored by that as he had been told his performance was excellent and that the respondent had been talking about getting his 12-month visa extended. Further the claimant described on 19 November that he had said that the CEO that unless things change, he would look to resign once his 12-month visa expired.

7. The claimant further described telling the CEO that she could not force him to resign to which she replied that she could and described that this was about the claimant's ego.

8. The claimant additionally criticised the respondent's volunteer Chair for congratulating the USPTC for a job well done after being given a Development Coach award.

9. The claimant was asked to comment on the respondent's commissioned review of its **Performance Department** being undertaken by a member of the **Scottish Institute of Sport** (SH of SIoS). The claimant described that he had been advised by that person that 28 people including athletes, SIoS practitioners and coaches would be spoken to and the claimant described that there was no trust in the respondent as an organisation.

10. The claimant described that someone had described his line manager as a wolf in sheep's clothing and an absolute bitch.

11. The claimant criticised the respondent's Chair for having, in the claimant's view, unreasonably refused to meet with him.

12. The claimant described that he did not have a lot of faith in this process and Rebecca Trengrove sought to reassure him that she was a fairly new board member, her role was neutral, she was not there to defend the organisation or to uphold the claimant's complaint

5 57. Towards the conclusion of the meeting, the claimant described that there were (what he regarded as) serious allegations and "*from my point of view I can no longer remain, I will; not work at Triathlon Scotland while the"* CEO and his line manager were there.

58. On **Friday 17 January 2020,** Rebecca Trengrove emailed the claimant 10 confirming that a transcript of the meeting would be prepared and suggested the claimant provide a screenshot of the text exchange with the respondent's chair, and confirmed that she would be interviewing others "*once I have done so I may want to talk to you again- if so I will be in touch. At this stage….* ***I would hope to have concluded the investigation by mid-February"***

15 59. On **Friday 24 January 2020,** Rebecca Trengrove met with the claimant's line manager and a 30 page transcript of that meeting was created, so far as relevant that was provided within the bundle and p239 to p268, the Tribunal does not consider it necessary to summarise beyond noting that it confirmed that the 12 month visa was the only available option at the time, that she had 20 felt that USPTC had been frustrated having gone through an apprenticeship programme and that he had been doing more of the planning, she described that she absolutely did not have concerns that the USPTC was setting inappropriate programmes and described around a conversation on trust that she was agreeing with the claimant that she was also someone who gave 25 trust easily and in relation to some interplay between the claimant and the USPTC she couldn't decide if there was a little powerplay. She further described an interaction with the claimant when she had given the claimant a lift and the claimant had engaged in a lengthy conversation saying he was going to resign, the USPTC didn't do what he said and she had reassured him 30 that, she would speak to the University of Stirling's Supervisor for their Performance Triathlon Coach. In relation to the event described by the claimant when it was suggested that the CEO could sack him, she described

that it had been her understanding that the CEO's response was to the claimant having effectively goading the CEO. In response to being asked whether she thought there was a way back for the claimant into the Triathlon Scotland, she commented that she struggled and that he **had certainly lost her trust describing that she was supportive right through until that complaint came, which she described as serious long term in not supporting staff.** The claimant's line manager was not in a position to determine the claimant's employment.

60. Also, on **Friday 24 January 2020** Rebecca Trengrove met with the respondent's former CEO and a 22-page transcript of that meeting was created, so far as relevant that was provided within the bundle, the Tribunal does not consider it necessary to summarise beyond noting that she described that she had felt the claimant had been goading her that she could not sack him when she responded that she could, although this was not her intention.

61. On **Monday 27 January 2020,** the claimant set out in an email to Rebecca Trengrove that he had read the transcript and commented "*the situation I currently find myself in has arisen, in the first instance out of my notification to* (the respondent's then CEO*) that I was unhappy with that I was not being allowed to perform the job that I was employed to do. For the avoidance of doubt, I consider this fact to be a breach to my contract of employment and I also believe that I am entirely entitled to vocalise my disaffection with a view to remedying the breach".* The claimant clarified in his evidence that this was a reference to his view that he was employed to be the lead performance coach but was not allowed to coach athletes, while the USPTC was allowed to coach athletes both from within the University and beyond. He further described that during the meeting he had sincerely believed that Rebecca Trengrove was being appropriately inquisitive but having read this transcript this feeling had been short-lived. He was critical that he had not been asked to give names of those employees he said had been bullied and that he only answered her questions, that he had not been provided with an opportunity to

speak freely and that a further meeting would be appropriate. The claimant in his evidence accepted that this characterisation was unfounded.

62. On **Wednesday 29 January 2020,** Rebecca Trengrove responded: "*transcript is exact record* "and explained that she had not been able to ask questions about the supporting material as she had not seen it beforehand and that was why she had asked that it be sent beforehand. She reassured the claimant that she had read the material in considerable detail. She pointed out that she had asked the claimant to provide details of (what was alleged as) bullying behaviours and he indicated that he provided the names of two former employees in respect of which she had noted to investigate further. Further, in respect, he had set out he had written statements from former employees identified, if she was to take those into consideration then he needed to send them to her. She pointed to asking if there was anything else he wanted to share and further set out if there was any additional material that he "*would like to submit then please send it in advance- I cannot meaningfully consider it during the meeting and would prefer to have it in advance* "so she could read it and discuss it with him. She offered Monday 3 and Friday 7 February as meeting dates.

63. On **Wednesday 29 January 2020,** the claimant's line manager raised concerns internal to the respondent, including the suggestion the claimant had, it appeared to her, been promoting a private coaching business while wearing respondent branded clothing and publishing a blog on 14 January 2020.

64. On **Thursday 30 January 2022** the claimant issued an email to the respondent's then CEO setting out that he had discussed his underlying health with his GP who had recommended that he try returning to his role with reasonable adjustments in place and described that he was "*very keen to undertake coaching and fulfil my contractual responsibilities but do not feel confident or capable of working alongside*" the CEO or his line manager "*and therefore returning to the office is not an option for me while investigations are ongoing following my disclosure. Please advise if temporary arrangements can be implemented to permit me to work from home, this would naturally*

involve me attending all coaching sessions as required including training camps. I will also ensure that the receipts for" his line manager's "*reimbursement be returned so she can be repaid the outstanding monies"*

65. On **Friday 31 January 2020** the respondent's then CEO emailed the claimant in accordance with her normal practice, to discuss any adjustments and proposed she and his line manager have a call with the claimant on Monday 3 February 2020 to discuss a return-to-work plan.

66. The respondent's former CEO communication of **Friday 31 January 2020** inviting the claimant to discuss a return-to-work plan was a genuine offer and superseded the reservations of both the former CEO and his line manager expressed to Rebecca Trengrove on **Friday 24 January 2020.**

67. On **Friday 31 January 2020,** the claimant responded by email copying the respondent volunteer President (Gavin Calder), setting out that while he fully appreciated that there are policy processes to be undertaken that in the circumstances, he did not consider it appropriate that the former CEO or his line manager undertake any telephone conversation with him. "*In all honesty, I consider your instruction in this regard as a further attempt by you to assert your authority and intimidation over me. I believe I have been clear in that I am not capable of having any discussions with you not least as a result of your behaviours but equally on account that I have no confidence in your sincerity. I am happy to have a discussion in regards to a return to work with adjustments and consider it more than reasonable to hold an expectation that they would be better served by"* the respondent's volunteer President or another volunteer member of the Board.

68. In **January 2020** the respondent's former CEO announced that she would leave the respondent by April 2020.

69. The **February 2020 360 Performance Review** described that the culture within the programme was generally positive and there was a belief that good people have created a good culture for athletes and students alike, and set out 10 recommendations, including that the respondent should clearly define the structure, roles and responsibilities, levels of delegation and authority/

autonomy with the coaching structure and clearly articulate the connectivity between the performance programme coaching team and club/independent coaches.

70. On **Saturday 1 Feb 2020** Rebecca Trengrove confirmed to the claimant she had booked a venue in Dundee for **Friday 7 February 2020 "***As I said in my earlier email if there is any additional material you would like to submit then please send it by Tuesday afternoon. I would prefer to have time to consider it properly in advance so we can discuss it at the meeting and have a very busy schedule next week"*.

71. On **Friday 7 February 2020** the claimant attended a second scheduled meeting with Rebecca Trengrove a 9-page transcript of that meeting was created, in which the claimant confirmed that he had been given an outline of the recommendations from the 360 Performance Review and had advised its author that he had no confidence that the recommendations would be put in place while the CEO (who he intimated he knew had elected to leave) and the Performance Director were in place. The claimant confirmed that he had said to the CEO at a pre-meeting that he would resign unless things were going to change. The claimant further described that he had been asking to come back, being off with stress (in January 2020) and that having spoken to his "*doctor and … and wanted to go back under a reasonable adjustment… and start coaching but work from home*" (p 353) and described that he could do his job as a coach.

72. On **Monday 10 February 2020**, in advance of the Rebecca Trengrove report, the claimant issues a 3-page statement offering criticism of the USPTC.

73. On **Tuesday 11 February 2020,** the claimant's former representative (which document was provided in the agreed bundle and no issue was raised on grounds of litigation privilege) issued an email to Sandy Hodge the author of the 360 Performance Review at SportScotland copied to the claimant and the separate organisation British Triathlon, which stated "*I believe you are aware on 2nd December our client made protected disclosures to his employer. In addition to Triathlon Scotland's breach to his own employment contract, our*

client identified historic and systematic behaviours displayed by" the now former CEO and his line manager " *that amount to a risk to health and safety under regulation 14 of the Management of Health and Safety at Work Regulations 1999. We are deeply* concerned *that the ongoing investigation conducted by the Welfare Director Rebecca Trengrove is a façade. It appears that Triathlon Scotland (TS) have been materially influenced by our client's disclosures and that they are intending to take active and deliberate measures to his detriment. For the avoidance of doubt, our client believes those measures will culminate in the unfair termination of his employment under the pretence of his underperformance or inability to work within the objectives of the Company".* It asserted criticism of Rebecca Trengrove in relation to her second meeting with the claimant. It described that the claimant **had** provided information to the media and set out that "*I do not consider that to be a breach of any express or implied duty confidentiality owned by my client that he may ordinarily have been bound by. My client will rely upon the cases of Initial Services v Putterill [1968] 1 QB 396 and Lion Laboratories Ltd v Evans [1985] QB 526 in this regard. For your information, I have attached copy documents that have been provided to the media. … For the avoidance of doubt, the purpose of this letter is to promote your immediate intervention with TS to ensure that all processes and policies with respect to my client's complaints are strictly followed, and in a manner with will stand up to public scrutiny*."

74. On **Wednesday 12 February 2020** Rebecca Trengrove provided her report to an Investigation Panel created from respondent volunteer Board members who had not been subject to criticism, her 11-page report had an appendix that set out the supporting documents provided by the interviewees including the claimant and **Linda Maclean,** documents referred to and identified she had interviewed 9 individuals and while describing that the claimant had reasonable points to make on both the relationship between the respondent and the University of Stirling she felt he did not make them in a reasonable way and had "*blown out of proportion the challenges he faced and sought to deflect his frustrations with his job role onto others"* and described that had had a "*tendency to perceive slights and negative motive when none are intended and had limited self-awareness that he himself has contributed to*

the current issues." So far as relevant to the issues before this Tribunal, she set out her analysis for not upholding either allegation that

1. The then CEO of the respondent instructed course facilitators to pass a specified individual (who was subsequently engaged by the University of Stirling), on what was described as Level 1 and Level 2 coaching courses: including having spoken to the individual who it was suggested had been instructed to pass the specified individual on Level 1noting that the specified individual had a Sports Science degree and prior triathlon knowledge the combination of which meant he was deemed to have accredited prior learning and didn't require to do level 1 but was asked to do the course partly for his own development; nor

2. The then CEO of the respondent *facilitated* the University of Stirling in its decision (in 2019) to engage their Performance Triathlon Coach, and in doing so compromised "*the health and wellbeing of all individuals coached and managed by him".*

75. Rebecca Trengrove further set out 9 recommendations including that the new respondent "*CEO seriously consider recommendations made in the 360 Performance Review, that the outcome of the roles"* and that the "*outcome of the roles and responsibilities discussion between the respondent and University of Stirling had not been clearly communicated to others, and this has caused a lot of frustration Irrespective of whether"* the claimant *"returns to work I therefore advise that Triathlon Scotland meet athletes (both at the Stirling Performance centre and those on Triathlon Scotland performance programme) in person to outline clearly what those roles and responsibilities are*" and notifying the Board if issues arose.

76. On **Sunday 23 February 2020**, the respondent's volunteer Board Investigation Panel adopted the recommendations of Rebecca Trengrove and set out 3 additional recommendations including that the working relationship between the respondent and the University of Stirling should be clarified and documented to ensure that all parties are clear regarding the aims, roles and responsibilities of each party and that this is communicated as per Rebecca

Trengrove' s recommendation, and so far as relevant the respondent investigation panel further set out that, in relation to allegations:

1. That the then CEO of the respondent instructed course facilitators to pass the individual, who was subsequently engaged as USPTC, on Level 1 and Level 2 coaching courses: it agreed with the Investigation Officer (Rebecca Trengrove) and did not uphold that allegation; and

2. That the then CEO of the respondent *facilitated* the University of Stirling in its decision (in 2019) to engage their Performance Triathlon Coach, and in doing so compromised "*the health and wellbeing of all individuals coached and managed by him*" it agreed with the Investigation Officer (Rebecca Trengrove) and did not uphold that allegation.

77. On **Friday 28 February 2020** and following an approach by the claimant to a Sunday newspaper, in which he raised allegations, the newspaper requested comment from the respondent's Chair (Dougie Cameron) requesting comment on the current status of the investigation into the claimant's allegations, matters relating to the culture of the respondent and how it responded to the allegation that it instructed course facilitators to pass Andrew Woodroffe on what were described as Level 1 coaching courses.

78. On **Sunday 1 March 2020** a Sunday newspaper, published an article headed *Absence of Leadership claim made against* '*toxic Triathlon Scotland Lead performance coach shocked and appalled by his experience*' reflecting the matters raised by the claimant and identified the USPTC.

79. On **Monday 9 March 2020** the claimant's former representative made email contact with Sport Scotland copying in British Triathlon and described in relation to the claimant and Mr Dargie, (who had, by that point been expelled from Triathlon Scotland) that "*both individuals are consciously supporting each other*".

80. On **Monday 10 March 2020,** the respondent volunteer Board had an unscheduled telephone meeting following the Sunday newspaper article in which they reviewed the claimant's continued employment in consequence of

the media reports with options around termination being canvassed for the first time.

81. On **Wednesday 11 March 2020** the respondent's now-former CEO, wrote to the claimant setting out that the respondent Board required the claimant to attend a meeting with two of its directors to explain the outcome of the Board's review and set out that "*separately there is a need to discuss your employment more generally and matters connected to your employment, including whether your employment should continue, particular arising from your recent conduct*" with the claimant being requested to attend on **Friday 13 March 2020.**

82. On **Thursday 12 March 2020,** claimant's wife issued a social media post expressing her critical opinions of the respondent Board, British Triathlon and Sport Scotland and requesting that readers read the Sunday newspaper article published above.

83. On **Friday 13 March 2020,** the respondent arranged for their volunteer board Finance Director **Duncan McRae** and **Penny** the respondent's volunteer age group Director to meet with the claimant. Duncan McRae had been on the board as Finance Director for around 2.5 years he had limited direct sports contact while Penny had only been on the Board for around 2 years. As agreed by the respondent Board the claimant was provided with an opportunity to read, but not to take the report prepared by Rebecca Trengrove. The claimant advised that he did not agree with the summation/conclusion of the report by Rebecca Trengrove and on being asked to comment set out criticisms including of USPTC pointing out that the claimant had 25 years' experience, described that he was far more experienced and had not been employed by to be USPTC's assistant. The second part of the meeting focused on the claimant's job including Duncan McRae asking "*do you want the job*" to which the claimant responded "*Ideally yes*" and in response, it being put that the claimant had a different view of the 75/25 25/75"*it's not how you would like it to be",* the claimant responded "*so what are you saying"* with Duncan McRea asking "*is that the job you want"* to which the claimant responded that he could not work in that environment "*I*

can't work under" his line manager or the then-current CEO and confirmed that he "*want a job"* but that he could not work under his line manager or the then-current CEO offering criticism of both. To which Duncan McRea responded, "*so what I would like you to do if that's ok is to come back to us next week saying how you see this might because the concern or problem with the board irrespective of what you think about the report is bringing your concerns highlighting them absolutely the right thing to do*" and described that "*what I find difficult thinking about your position going forward is going to the press bring the sport into disrepute, speaking to the media"* and referenced the claimant's wife's post on **Thursday 12 March 2020 .** Duncan McRea commented "*I don't understand and this is why I would like you to come back to me how is that compatible with working for an organisation so if there is a way we can bring it together we would like to hear from you".* The claimant in response criticised the board for not considering what if what the claimant was saying was true "*none of you have considered that for any minute you have completely dismissed what everyone has said. I had no option but to go to the press because no one was listening, the whistleblower allowed to go to the press".* The claimant criticised the extent of the investigation carried out by Rebecca Trengrove commenting that it was clear to him when reading her report, she had failed to speak to the people he had put forward *there was no intention of doing an independent investigation".* The claimant in response to being asked if he was resigning responded *"No I'm not saying that … I just said to you I can't work under"* his line manager and the then current CEO and described that he wanted to do his job *"I want to do the job I thought I was coming here to do which is to coach and make a programme whatever that looks like, that my answer*". In response the claimant saying, "*so where does that leave you as a board"* Penny replied, "*It leaves us with decisions to make*", and the claimant offered criticism of the respondent board including a former member.

84. On **Tuesday 17 March 2020** the claimant issued an email to a separate organisation **SportResolution**, the respondent's now-former CEO and his former representative with the subject heading "Appeal". He set out that he "*write to appeal the decision taken by the Company following formal*

notification to me of the findings of the "investigation" as provided orally to me on Friday 13th March 2020." He listed what he described as 10 grounds of appeal, including lack of independence in the investigation process; unreasonable inadequacy of investigation; ineffectiveness of key process and procedures applied; inappropriate influences of key personnel; what the claimant described as deliberate and malicious deny and defend approach; failure to validate witness statements; failure to deal with complaints appropriately and effectively in terms of general investigation; unfair labelling of himself as complainant as the troublemaker, overall effectiveness of dealing with serious complaints; and lack of demonstration of reassurance that the respondent would take (unspecified) necessary steps to mitigate the risk of repetition of the (unspecified) issues disclosed by him.

85. On **Friday 20 March 2020** the respondent Board issued a letter to the claimant (the March 2020 Termination Letter) setting out that the Board "*is not in favour of continuing your employment having determined that there has been an irretrievable breakdown in the relationship between Triathlon Scotland, your employer and yourself the employee. This is a unanimous decision of the Board of Triathlon Scotland*."

86. The March 2020 Termination Letter described *"we were careful to ensure that in making this decision we excluded from our minds the fact that you had presented complaints and that you had and still do seek to identify those as public interest disclosures. We seek to reassure you that the fact that you presented complaints that we had to investigate, is of no bearing whatsoever to our decision to terminate your employment*" and that as the claimant was advised at the meeting the previous Friday the respondent had *"spent considerable time and resources on investigating matters and we have not stepped away from any of our responsibilities as your employer at this time and in dealing with the investigation"*

87. The March 2020 Termination Letter set out, in relation to its decision as to employment that "*you have made many different expressions of dissatisfaction, complaint and attack on Triathlon Scotland. We have had many third parties commend our practices and reject your allegations that you*

have chosen to take, amplify and separately articulate out with the employment relationship and out with the investigation we were undertaking. You have posted or been responsible or been attributable to social media postings critical of Triathlon Scotland"

5 88. The March 2020 Termination Letter described that "*This decision is not a disciplinary sanction. This is a decision taken regarding your employment and the decision is made to exercise our contractual entitlement to issue you with notice and payment in lieu thereof."*

89. The March 2020 Termination Letter, set out that the respondent offered no 10 appeal as it was not obliged to do so and that Sports Resolution had no locus, although described it would review its outcomes of the investigation and contemplate the appeal points and it did not anticipate involving the claimant in any conclusions given that his employment had ended.

90. The March 2020 Termination Letter described that while the claimant had 15 made a request to apply to move his visa to tier 2, it was expected that was predicated on that basis of employment continuing but it understood that there was no ability to transfer his visa to level 2 including had his employment continued.

91. The March 2020 Termination Letter acknowledged the circumstances of the 20 then covid pandemic and described that evidently there was nothing they could do other than direct the claimant to guidance and encourage him to stay safe.

92. The claimant was paid one month's pay in lieu of notice.

93. On **Friday 27 March 2020,** the claimant presented his ET1, which identified 25 his former representative as being the author of communication on **Tuesday 11 February 2020**.

94. Following the termination of the claimant's employment his visa expired and he moved along with his family back to Australia and thereafter New Zealand coinciding with the onset of the Covid 19 pandemic where he established a

coaching business in May 2020 which provides training, mentoring and guidance for sports coaches.

Conclusions on witness evidence

95. The Tribunal heard evidence from the claimant Mr Turner, John Dargie a former employee whose employment with the respondent had terminated a number of years before the claimant's employment had commenced and had been expelled from membership of Triathlon Scotland and Cameron Harris.

96. The Tribunal concludes that Cameron Harris was straightforward and honest in his recollection of matters within his knowledge although it was not suggested that he had raised any matters with the respondent at the relevant time. The Tribunal was not assisted by Mr Dargie's evidence, it found his evidence broadly lacking relevance to the issues for the Tribunal and in so far as elements were potentially relevant, the Tribunal preferred the respondent evidence as having been given in neutral terms.

97. In relation to the claimant's evidence, it was recognised that the claimant was giving evidence remotely and with a 13-hour time difference, however, while having regard to both those factors which the Tribunal recognised may impact on the claimant's evidence, the Tribunal remained satisfied that it preferred the respondent's evidence to that of the claimant. In particular, the Tribunal considered that the claimant's perception, including the role which he would have preferred to have obtained and which the respondent did not offer, substantially impacted the reliability of his evidence.

98. The Tribunal found the evidence of Rebecca Trengrove compelling and wholly straightforward. Fiona Lothian was wholly straightforward in her evidence and the Tribunal found it reliable. Jane Moncrieff and Dougie Cameron were straightforward in their respective evidence.

Submissions

99. Both parties provided detailed written submissions.

100. It is not considered necessary to repeat the submission for the claimant. They were detailed and extended to some **27 pages,** addressing issues for this Tribunal**.** The claimant referred to a number of cases which the Tribunal for clarity has found it useful to set out in chronological order; **Initial Services v Putterill & Anor** [1968] 1 QB 396 (**Putterill**)**,** which concerned whether pled allegations of misconduct ought to be prevented from being considered at a hearing against a former employee (that is struck out without inquiry); **Lion Laboratories Ltd v Evans & others** [1985] QB 526 (**Evans**), a decision of the Court of Appeal in England arising from (what in Scotland would be) in effect interim interdicts in connection with claims for breach of confidence and breach of copyright against two former employees and the editor and owners of a national newspaper; **Babula v Waltham Forrest College** [2007] CA 7 **(Babula)**; **Kuzel v Roche Products** Ltd 2008 IRLR 530 **(Kuzel)**; **Cavendish Munro Professional Risks Management Ltd v Geduld** [2010] IRLR 38 (**Cavendish**); **Kraus v Penna Plc** [2004] IRLR 164 (**Kraus**); **Blackbay Ventures Ltd t/a Chemistree v Gahir** [2014] IRLR 416 (**Gahir); Kilraine v London Borough of Wandsworth** [2018] EWCA 1436 (**Kilraine**); **Chesterton Global Ltd (t/a Chesterton) v Nurmohamed** [2017] EWCA Civ 979 (**Nurmohamed**); **Eiger Securities LLP v Korshunova** 2017 IRLR 115 **(Korshunova); Ibrahim v HCA** [2019] EWCA Civ 2007 **(Ibrahim)** and **Royal Mail v Jhuti** [2019] UKSC 55 **(Jhuti).**

101. It is not considered necessary to repeat the respondent's 37-page submission which extends to 161 primary paragraphs addressing issues nor the respondent's 4-page supplementary submissions in response to the claimant's submission. In summary, it was argued that the claimant had not made a protected disclosure and that in any event, the claimant had failed to demonstrate that the dismissal (which occurred within the 2-year qualifying period for Ordinary unfair dismissal) was by reason of the alleged whistleblowing within the terms of s103A ERA 1996.

102. The respondent referred to a number of cases which the Tribunal for clarity has found it useful to set out in chronological order; **Abernethy v Mott Hay & Anderson** [1974] ICR 322 (**Abernethy**); **Smith v Hayle Town Council** [1978]

ICR 996 (**Smith**); **Maund v Penwith District Council** [1984] IRLR 24 CA (**Maund**); **Korashi v Abertawe Bro Morgannwg University Local Health Board** 2002 IRLR 4 **(Korashi); Knight v Harrow LBC** [2003] EAT/0349/03/DA **(Knight**); **Darton v University of Surrey** [2003] IRLR 133 (**Darton**); **Krause** 2004; **Perkin v St Georges Healthcare NHS Trust** [2006] ICR 617 **(Perkin); Boulding v Land Securities Trillium (Media Services)** [2006] UKEAT0023/06 (**Boulding**); **Babula** 2007**; Bolton School v Evan** [2007] IRLR 140 **(Evan); Cavendish** 2010; **Panayiotou v Chief Constable of Hampshire Police** [2014] IRLR 500 (**Panayiotou**); **Chandhok v Tirkey** [2015] IRLR 195 (**Chandhok**) **; Y-A Soh v Imperial College of Science, Technology and Medicine** [2015] UKEAT/0350/14 (**Y-A Soh**); **Goode v Marks & Spencer Plc** [2010] UKEAT/0442/09 (**Goode**); **Parsons v Airplus International Ltd** [2017] UKEAT/01111/17 **(Parsons); Phoenix House Ltd v Stockman** [2017] ICR 84 (**Stockman**); **Kilraine** 2018; **Riley v Belmont Green Finance Ltd** [2020] UKEAT/0133/19 (**Riley**); **Fitzmaurice v Luton Irish Forum [2021]** EA-2020-000295 (**Fitzmaurice**).

Written Notice of Case

103. Parties are entitled to fair notice of the position adopted by the other party having regard to the ET1 and ET3. The claimant did not seek to argue that reliance as an asserted disclosure would be placed on any other communication than the **Letter attached to the claimant's email of Monday 2 December 2019.**

Privacy and restrictions on reporting; discussion and decision

104. In the course of this hearing, reference was made to a number of individuals who were not a party to the claim, nor employees of the respondent and not called as witnesses and the Tribunal intimated that it would be helpful for parties to set out their views on the operation of Rule 50 for such individuals, however, no Order was sought in the course of the hearing to restrict the identification of those individuals.

105. After the respective written submissions, the parties agreed on a list of individuals who they considered ought to be anonymised in this written

judgment. While it is helpful to have an agreement between the parties on the application of Rule 50, the Tribunal has reminded itself of the terms of **Rule 50** of the 2013 Rules. While the USTPC had been named in the 1 March 2020 Sunday newspaper article, that did not preclude consideration of an individual's Article 8 ECHR right to respect for an individual's private life. However, the principle of open justice assumes that the details of the case should be made public unless there was some identifiable injury to an individual's Article 8 ECHR right which went beyond embarrassment or reputational damage. It is considered that the public can understand the difference between allegations made by and relied upon by the claimant and findings in fact. The Tribunal concluded that it was not necessary, having full regard to the open justice principle, to anonymise individuals who played a significant role in the subject matter of these proceedings.

Public interest disclosure (PID) */ "Whistleblowing"*

106. In relation to any asserted whistleblowing complaint issues for the Tribunal would include whether the claimant;

1. had a genuine belief that the information he was relying on at the material time tended to show (Sections 43B & 43C ERA 1996), relying on subsection(s) of section 43B (1) (b) the respondent had failed to comply with a legal obligation to which they were subject, and/or section 43B(1)(d) the health or safety of any individual had been, is being or is likely to be endangered?
2. Was that belief a *reasonable belief*; and
3. Did the claimant have a *genuine belief* that the disclosure was in *the public interest* AND
4. Was that a reasonable belief (s43B (1))
5. The claimant asserts the disclosure was made to the employer within the meaning of s43(1)(c).

Automatic Unfair Dismissal

107. The claimant argues that the dismissal was automatically unfair in terms of s103A of the Employment Rights Act 1996. S103A provides**:**

"s103A Protected Disclosure

5 *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."*

108. The issue for the Tribunal would be, if **the Letter attached to the claimant's email of Monday 2 December 2019** was a protected disclosure was the 10 reason, or principal reason for the dismissal that the claimant has made that protected disclosure.

Relevant Law Protected Disclosure generally

109. Section 47B ERA 1996, so far as relevant, provides:

"47B Protected disclosures.

15 *(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."*

110. Section 43A ERA1996 defines a protected disclosure as a "*qualifying disclosure"* (as defined in s.43B ERA 1996) which is made by a worker in 20 accordance with any of ss.43C to 43H ERA 1996.

111. Section 43B ERA, provides:

"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 25 ***in the public interest*** *and tends to show one or more of the following—*

(a) … ,

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

112. The word "*information"* (or for that matter *"disclosure*") is not defined in the ERA 1996. In **Cavendish**, the EAT held, considering whether a solicitor's letter that set out that health and safety requirements were not being complied with was an unprotected allegation. The EAT, indicating in contrast that to say "*wards of the hospitals have not been cleaned for two weeks and sharps were left lying around"* would be conveying information, that for the legislation to have effect, a disclosure must involve information, and not simply voice a concern or raise an allegation.

113. Subsequently, the Court of Appeal in **Kilraine v London Borough of Wandsworth [2018]** IRLR 1850 (**Kilraine**), approved the EAT decision in **Kilraine v London Borough of Wandsworth** [2016] IRLR 422 in which it was noted the statute did not draw a distinction between information and allegation.

114. The Court of Appeal went on to say in **Kilraine** at para 35 to 36: *"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 which is capable of intending to show one of the matters listed in subsection (1) …. Whether an identified statement or disclosure in any particular case does or does not meet that standard, will be a matter for an evaluative judgment by the tribunal in the light of all of the facts of the case. It is a question that is likely to be closely aligned with the other requirements set out in section 43B (1) namely that the work in making the disclosure should have the reasonable belief that the information that he or she disclosures does tend to show one of the listed matters."*

115. The public interest test was considered by the Court of Appeal in **Chesterton Global Ltd (t/a Chesterton) v Nurmohamed** [2017] EWCA Civ 979 (**Nurmohamed**), which set out (para 27) that a Tribunal must determine:

    a. whether the worker believed at the time of making it, that the disclosure was in the public interest, and,

b. whether, if so that belief was reasonable.

116. Further in relation to 1.b. the Tribunal is required to recognise that there might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the Tribunal should not substitute its own view for another reasonable view. The necessary belief is simply that the disclosure is in the public interest. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not require to be the predominant motive in making it.

Discussion and decision asserted protected disclosure; the letter attached to the claimant's email of Monday 2 December 2019

117. The Tribunal reminded itself that the correct approach is to ask whether the statement by the claimant as asserted discloser, contained information of sufficient factual content and specification which can show one of the factors listed in s43B ERA 1996. This is a matter of evaluation in light of the context and facts in which it was made (**Kilraine)**. The Tribunal approached the matter of the relevant provisions by reading them broadly, having regard to the substance of what has been set out in the statement rather than taking an overly technical approach for a worker, at any level. The **letter attached to the claimant's email of Monday 3 December 2019** relied upon is set out above.

118. The Tribunal, so far as may be relevant, concludes that while the **letter attached to the claimant's email of Monday 3 December 2019** was carefully crafted, although it named the then USPTC, it did not offer information amounting to specific criticism of the actings of the USPTC. Rather it offered information criticising the respondent's then CEO Jane Moncrieff including for *"facilitating*" the University of Stirling in its engagement of their USPTC.

119. **The letter attached to the claimant's email of Monday 3 December 2019** sets out, so far as relevant to this claim, two essentially distinct allegations containing information:

1. The then CEO of the respondent instructed course facilitators to pass a specified individual (who was subsequently engaged by the University of Stirling) on what were described as Level 1 and Level 2 coaching courses: (the qualification allegation) and

2. The then CEO of the respondent *facilitated* the University of Stirling in its decision (in 2019) to engage the USPTC, and in doing so compromised "*the health and wellbeing of all individuals coached and managed by him". (the engaged allegation).*

120. The Tribunal concludes that the remaining elements of the **letter attached to the claimant's email of Monday 3 December 2019** do not convey actual information beyond voicing concern. Those remaining elements set out that:

1. *Dougie Cameron, Jane Moncrieff and Fiona Lothian have failed, are failing, and are unlikely to comply with the legal duty under the Health and Safety at Work Act 1974 to 'observe a duty of care' for the health, safety, and welfare at work to Triathlon Scotland employees, voluntary workers, coaches, athletes, members and parents…*

2. *there has been a long standing systematic abuse of leadership which is demeaning disrespectful and caustic. Threats of detrimental action and unreasonable pressures of work have resulted in a significantly higher number of staff suffering from mental health breakdowns and further individuals from stress and anxiety…*

3. *the working environment poses a foreseeable risk to health and wellbeing due to the relevant failures by Dougie Cameron, Jane Moncrieff and Fiona Lothian to observe the Company's legal obligation under the auspices of the both the Health and Safety and Work Act 1974, and furthermore, The Management Standards Approach"*

and in accordance with **Cavendish** those elements do not qualify as disclosures.

121. The Tribunal notes the proximately of the **Sunday 1 December 2019 to whom it may concern letter,** secured by the claimant on Sunday 1

December 2019 to what the Tribunal concludes was the carefully constructed **letter attached to the claimant's email of Monday 3 December 2019** drafted by the claimant's former legal representative and sent with **claimant's email of 9.05 am Monday 2 December 2019.**

5 122. The Tribunal does not require to accept the respondent's surprising (in the context of s s4 of the Health and Safety at Work Act 1974) assertion set out in paragraphs 62(o) and 65 (d) of its written submission, that the claim should not succeed, as pathway athletes and university students were not employees or workers "*They are not covered by the 1974 Act*".

10 123. For the purpose of s43 of ERA 1996, and as set out in guidance including in by the Court of Appeal in **Babula**, the question is not whether the analysis was correct in law, rather it is the reasonable belief of the worker that the information disclosed tended to show that a legal obligation existed.

124. In relation to the **qualification allegation**,

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1. **the Sunday 1 December 2019 to whom it may concern letter** which the Tribunal concludes the claimant secured from Alistair Russell in advance of the issue of the **letter attached to the claimant's email of Monday 3 December 2019**, on which he relies, in order to assert that he had a reasonable belief.

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2. The Tribunal has reminded itself that there is nothing within the statute which requires that a worker set out any specific statutory or regulatory provision.

3. The Tribunal accepts that the claimant had a belief in respect of the qualification allegation.

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4. The Tribunal does not accept that this belief was reasonable, including having regard to the terms of the **to whom it may concern letter which the Tribunal concludes the claimant secured** from Alistair Russell in advance of the issue of the **letter attached to the claimant's email of Monday 3 December 2019,** on which he relies. In particular, it describes

30 that there were two coaches at the December 2015 coaching course and

any reasonable reading at the time would have concluded that, despite Alistair Russell's criticisms which the Tribunal notes echoed in certain respects the claimant's view of the USPTC, Linda Maclean was the relevant education tutor for the individual who became the USPTC and that while an oblique comment was made it regarding a discussion in a corridor, it did not set out any actual knowledge on the part of Alistair Russell as to the circumstances in which the USPTC passed the Level 1 nor the circumstances in which the USPTC had subsequently achieved Level 2.

5. The Tribunal in coming to this view has reminded itself that such a belief would not require to be the predominant motive in making the statement. It was not, the predominant motive was the claimant's view of the then USPTC as a rival and the claimant's dissatisfaction with his own role with the respondent's including around the split between coaching and coach development.

6. The second question of whether the claim had a genuine belief that disclosure was in the public interest and was that a reasonable belief does not arise, however, the Tribunal's conclusion is that on an objective basis it could not be said that such a belief would be reasonable given the context and language used.

125. In relation to the **engaged allegation**,

1. the **Sunday 1 December 2019 to whom it may concern letter** which the Tribunal concludes the claimant secured from Alistair Russell in advance of the issue of the **letter attached to the claimant's email of Monday 3 December 2019** did not set out anything which the Tribunal considers support a factual matrix of the engaged allegation.

2. Again, the Tribunal has reminded itself that there is nothing within the statute which requires that a worker set out any specific statutory or regulatory provision.

3. The Tribunal does not accept that the claimant had a belief in respect of the engaged allegation.

4. The Tribunal in coming to this view has considered that such a belief would not require to be the predominant motive in making the statement. It was not.

5. The second question of whether the claim had a genuine belief that disclosure was in the public interest and was that a reasonable belief does not arise, however, the Tribunal's conclusion is that on an objective basis it could not be said that such a belief would be reasonable given the context and language used.

6. For this asserted protected disclosure taking all the circumstances of the case, recognising that there might be more than one reasonable view as to whether the specific statement was in the public interest, and while not substituting its own view for another reasonable view, concludes that the claimant did not have a belief at the time of making the qualification allegation, that it was the public interest.

7. The Tribunal in coming to this view has considered that such a belief would not require to be the predominant motive in making the statement. It was not.

8. The second question (whether, if so that belief was reasonable) does not arise, however, it is the Tribunal's conclusion is that on an objective basis it could not be said that such a belief would be reasonable given the context and language used.

126. It is the Tribunals' conclusion that in the whole circumstances and while it is argued that the claimant believed that a legal obligation was being breached, taking the information in the context that it was made the claimant did not have a belief at the time, that that statement was made in the public interest.

127. In conclusion, there was no protected disclosure, by the claimant, on **Monday 2 December 2019**.

Discussion and decision automatic unfair dismissal

128. In the absence of protected disclosure relied upon the question of automatic unfair dismissal does not arise, however, the Tribunal also accepts the respondent's evidence to the effect that the cause of the irretrievable breakdown was as set out in the termination letter, the claimant's decision to take forward, amplify and separately amplify allegations against the respondent out with the employment relationship and out with the investigation the respondent was undertaking. The claimant elected to do so without waiting for the outcome of the respondent investigation. In doing so the claimant's actions created an irretrievable breakdown in the relationship. The reason or principal reason for termination was not what the claimant seeks to characterise as a protected disclosure being the ***Letter attached to the claimant's email of Monday 2 December 2019.***

129. While the issue of loss arising does not arise in the circumstances, the Tribunal is satisfied that the claimant acted reasonably in seeking to minimise his loss by establishing a coaching business in May 2020.

Decision

130. The claimant's claims do not succeed.

131. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment. The Tribunal has done so applying the relevant law.

Employment Judge: **R McPherson**
Date of Judgment: **13 May 2022**
Entered in register: **19 May 2022**
and copied to parties