



EMPLOYMENT TRIBUNALS

Claimant: Mr Martyn Diamond Black

Respondent: Alain Charles Publishing Ltd

Heard at: London Central (via CVP)

On: 7th – 11th February 2022

Before: Employment Judge David Hughes
Mr Philip Madelin
Mr Samuel Pearlman

Representation

Claimant: Debbie Grennan (counsel)

Respondent: John Ratledge (counsel)

RESERVED JUDGMENT ON LIABILITY

The unanimous judgment of the Tribunal is:

1. The Claimant's claim for being subjected to a detriment for making a protected disclosure under s43B of the Employment Rights Act 1996, contrary to s47B of the ERA 1996, is well-founded as is upheld;
2. The Claimant's claim for unfair dismissal contrary to ss103A and 98 of the ERA 1996 is well-founded and is upheld;
3. The Claimant's claim for wrongful dismissal is well-founded and is upheld;
4. The Claimant's claim for victimization contrary to s27 of the Equality Act 2010 is well-founded and is upheld;
5. The question of remedy will be decided at a later hearing, subject to the following directions:
 - (a) The remedy hearing is listed to take place on 08.07.2022, time estimate 1 day, via CVP. If either party wishes the hearing to take place on

a different day, they must write to the Tribunal, giving their reasons for wanting a different date, by 13.05.2022, copying in the other party;

- (b) The Claimant is to send any updated Schedule of Loss by 20.05.2022. Any updated Schedule of Loss must show all the sums the Claimant is claiming in these proceedings and showing all calculations. The Claimant's schedule should also show and account for any mitigation (ie other income which the Claimant may have been able to earn or receive following his dismissal);
- (c) The Claimant must send to the Respondent, by 20.05.2022, copies of any documents in his possession or control that he relies upon in relation to remedy that have not already been disclosed, including documents relating to financial losses and injury to feelings, together with documents that support another party's case or which adversely affect his own or another party's case. ("Documents" includes papers but also recordings, emails, text messages, social media and other electronic information);
- (d) The Claimant must send to the Respondent, by 20.05.2022, a copy of any additional witness statement from himself on which he wishes to rely at the remedy hearing, together with the statement of any other witness on whose evidence he wishes to rely at the remedies hearing;
- (e) The Respondent must send to the Claimant, by 03.06.2022, any updated counter-schedule and copies of any documents in relation to remedy that have not already been disclosed, including documents on which the Respondent intends to rely, documents that support the Respondent's own case or support the Claimant's case, or which adversely affect either party's case;
- (f) The Respondent must send to the Claimant, by 03.06.2022, the statement of any witness on whose evidence the Respondent wishes to rely at the remedy hearing;
- (g) No additional witness evidence will be allowed at the remedy hearing without the tribunal's permission. Witness statements must be typed in 1.5 line spacing; have numbered paragraphs; set out the events in chronological order, with dates; contain all the evidence relating to remedy which the witnesses called to give, including any evidence about the claimants financial losses and any attempts to mitigate; contain only evidence relevant to the issue of remedy; not be excessively long, and

cross referenced where relevant to documents in the remedy hearing bundle;

- (h) The parties must liaise to attempt to agree the contents of a joint remedies bundle;
- (i) By 4 pm on 24.06.2022, the Respondent's solicitor must email to the claimant a paginated and indexed remedies hearing bundle, in searchable PDF format, and a separate bundle containing any witness statements for the remedy hearing, again in searchable PDF format;
- (j) By 4 pm on 01.07.2022, the parties must exchange written skeleton arguments for the remedies hearing;
- (k) By 4 pm on 06.07.2022, the Respondent's solicitor must email to the tribunal the PDF remedies bundle to londoncentralet@justice.gov.uk, together with the witness statements bundle and respective skeleton arguments of each party. The email must contain the contact details (name, telephone number and email address) of the parties and in the subject line must have the title and case number and the words "For CVP on 08.07.2022";
- (l) Under rule 6, if any order of the Tribunal is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

REASONS

Introduction

1. In this case, the Claimant claims against the Respondent for issues arising from a disclosure that he made in August 2020. His claim includes detriments that he says he suffered following making that disclosure, constructive unfair dismissal, victimisation and wrongful dismissal.
2. A preliminary hearing before Employment Judge Burns in August 2021. A draft list of issues had been prepared before the start of the hearing, and at the start of the hearing counsel confirmed that it was agreed. We set out the issues below.

Who everyone is

3. The Claimant in this case is Martyn Diamond Black. He was employed by the Respondent, Alain Charles Publishing (“ACP”) from 26/02/2018 and 01/10/2020. In his Claim Form, he describes his job title as Head of Events and Magazine Manager for Health, Safety, Security Review.
4. ACP is a company that publishes magazines and related websites on a number of subjects. The exact nature of its publications is not important to this case, but they appear to focus on Asia and Africa. The company also organises events such as conferences.
5. The Claimant called 3 witnesses in addition to giving evidence himself. Georgia Lewis worked for ACP from November 2015 to September 2020, firstly as editor of Oil Review Africa, being promoted after 9 months to managing editor of all nine ACP magazines. Michael Ferridge worked for ACP as Sales Director from 2016 to 2020. Soumen Chakraborty worked for ACP as a Conference Producer from May 2018 to April 2021.
6. ACP called 3 witnesses: Jane Withey undertakes administration and accounting services for ACP. It was unclear whether she does so as an employee – her statement gives her professional address as that of ACP – but that does not matter for the purposes of this case.
7. Nicola Orr is a HR consultant. She has done HR work for ACP as an independent consultant for 10 years, before which she worked in-house for ACP. She told the Tribunal that ACP accounts for less than 10% of her turnover, although it was unclear whether that related to her business as a whole, or her own professional time.
8. Nick Fordham is the Managing Director of ACP. The company’s chairman is his father. Nick Fordham has been ACP’s Managing Director for over 10 years.

The issues

9. Both parties were represented by counsel, for whose assistance we are grateful. The issues identified by counsel were as follows:

Introduction

1. *The Claimant contends that:*

- a. *They have made protected disclosures under section 43B of the Employment Rights Act 1996 (“the Act”);*
- b. *They have been subject to detriment by the Respondent as a result of the protected disclosures in contravention of section 47B of the Act;*
- c. *They were constructively unfairly dismissed in contravention of section 103A of the Act and/or section 98 the Act);*
- d. *They were subject to wrongful dismissal in contravention of the Act;*
- e. *They were subject to Victimisation under section 27 of the Equality Act 2010;*

Jurisdiction (protected disclosure detriment and victimisation)

2. *The Claimant made an early conciliation notification on 9 December 2020 with ACAS issuing the early conciliation certificate 20 January 2021. The Claimant presented his claim to the Tribunal on 18 February 2021.*
3. *Accordingly, any detriment complained of which occurred prior to 10 September 2020 is prima facie out of time.*
4. *Did the acts complained of form a course of continuing conduct which brings the claims in time?*
5. *If not, was it reasonably practicable for the Claimant to present the claim in time and was the claim then presented within such further reasonable period such that the Tribunal should extend the limit to hear any of the Claimant's complaints around the alleged detriments that occurred prior to 10 September 2020?*

Disclosure Qualifying for Protection (section 43B (1) of the Act)

6. *Has the Claimant made a disclosure of information which tends to show one of certain specified types of allegations of wrongdoing has taken place?*

7. *The Claimant contends that the report prepared by the Claimant and submitted to Mr Nick Fordham on the 20 August 2020 amounts to a disclosure of information and presented a breach of legal obligations and/or information tending to show a breach of a legal obligation has been or is likely to be deliberately concealed.*
8. *The Respondent admits the Claimant submitted the report to Mr Nick Fordham on the 20 August 2020 but puts the Claimant to proof as to as to which breaches of legal obligations and/or information tending to show a breach of a legal obligation has been or is likely to be deliberately concealed in relation to the question of whether he had a reasonable belief in the disclosure. The Respondent accordingly denies that the Claimant made a protected disclosure.*
9. *If so, did the Claimant reasonably believe that the disclosure of this information was in the public interest?*
10. *The Claimant contends that the Report findings raised concerns of behaviour amounting to or potentially amounting to Breaches of the Company's Anti-Bullying and Harassment Policy, Equal Opportunities Policy and Whistleblowing Policy; and misconduct and or gross misconduct as stated in paragraph 9(1) of the Claimants Grounds of Claim*
11. *The Respondent contends that the Claimant did not have a reasonable and genuine belief that his disclosure was in the public interest as outlined in paragraph 36 of the Respondent's Grounds of Resistance.*

Protected Disclosure Detriment (Whistleblowing) (section 47B (1) of the Act)

12. *Was the Claimant subjected to the following acts, or deliberate failures to act?*
13. *The Claimant contends that he was subjected to the acts, or deliberate failures to act at paragraphs 13,14,15, 20 and 21 of the Claimant's Grounds of Complaint.*

14. *If so, were any such acts or deliberate failures to act done on the grounds that the Claimant had made a protected disclosure?*
15. *The Claimant contends that because of making the protected disclosure the Claimant was subjected to the detriments at paragraphs 13,14,15,20 and 21 of the Claimant's Grounds of Complaint.*
16. *The Respondent contends that the Claimant was not subject to the detriments as alleged on the grounds of making a protected disclosure as detailed at paragraphs 18,19,20,21,31 and 32 of the Respondent's Grounds of Resistance.*

Constructive Unfair Dismissal

17. *Did the Respondent commit a fundamental breach of the Claimant's contract of employment?*
18. *The Claimant contends the allegations detailed in paragraph 26 of their Grounds of Claim individually or collectively amounted to a fundamental breach of the Claimant's contract of employment.*
19. *The Respondent contends that the Claimant's allegations did not individually or collectively amount to a fundamental breach of the Claimant's employment contract as detailed in paragraphs 7,8,18,19,20,21 and 27 of the Respondent's Grounds of Resistance.*
20. *If so, was the Claimant entitled to resign in response to that breach?*
21. *If so, did the Claimant resign in response to the breach without first affirming any such breach?*
22. *The Claimant contends he resigned without affirming any breach in response to the acts and omissions listed in paragraph 26 of the Grounds of Claim amounting to a repudiatory breach of the Claimant's contract of employment.*

23. *The Respondent contends that the Claimant resigned as a result of starting a new Company and not in response to any breach as detailed in paragraph 33 of the Respondent's Grounds of Resistance.*

24. *If the Tribunal finds that the Claimant was dismissed, did the Respondent have a fair reason for the dismissal?*

25. *The Respondent relies on the potentially fair reasons of gross misconduct and some other substantial reason as detailed in paragraphs 43 and 44 of the Respondent's Grounds of Resistance respectively.*

26. *If so, was it reasonable for the Respondent to (constructively) dismiss the Claimant for that reason?*

Constructive Automatic Unfair Dismissal

27. *Did the Claimant make a protected disclosure as outlined at points 6-11 of the List of Issues?*

28. *If so, was the fact that the Claimant had made a protected disclosure the sole or principal reason for the Claimant's constructive dismissal (if established)?*

Wrongful Dismissal

29. *Did the Respondent commit a fundamental breach of the Claimant's contract of employment?*

30. *The Claimant contends the Respondent failed to pay the Claimant his notice pay.*

31. *The Respondent contends that they did not commit a fundamental breach of the Claimant contract of employment.*

32. *If so, was the Claimant entitled to resign without working a period of notice?*

33. *The Claimant contends the allegations detailed in paragraph 26 of their Grounds of Claim individually or collectively amounted to a fundamental breach of the Claimant's contract of employment, which forced the Claimant to resign.*

34. *The Respondent contends therefore the Claimant resigned in breach of his contract without working his period of notice and was not entitled to a payment of notice pay.*

Victimisation

35. *Has the Claimant done a protected act?*

36. *The Claimant contends that the allegations at paragraph 33 of the Claimant's Grounds of Claim amount to a protected act.*

37. *The Respondent contends that the allegations at paragraph 33 of the Claimant's Grounds of Claim did not amount to a protected act as outlined at paragraph 49 of the Respondent's Grounds of Resistance.*

38. *Has the Respondent subjected the Claimant to detriment?*

39. *If so, is this because the Claimant has done a protected act?*

40. *The Claimant contends that because the Claimant had done or the Respondent believed that the Claimant had done or may do a protected act, the Claimant was subjected to the detriments at paragraphs 13,14,15,20 and 21 of the Claimant's Grounds of Complaint.*

41. *The Respondent contends that the Claimant was not subject to the detriments as alleged on the grounds of making a protected act as detailed at paragraphs 18,19,20,21,31 and 32 of the Respondent's Grounds of Resistance.*

Remedy

42. If the Claimant's claims are upheld:

- a. What financial compensation is appropriate in all of the circumstances?
- b. Is a declaration from the Tribunal appropriate in all of the circumstances?

10. The list of issues was lengthy, but as we have said, it was agreed by counsel. The case had been listed for a 5 day hearing. We were unable to start the hearing until the afternoon of the first day, and it would not have been proportionate to attempt to refine the list of issues. When we came to deliberate on our findings, we did find the list of issues helpful.

What happened

The Claimant's employment

11. The Claimant was employed by the Respondent from 26.02.2018. His initial role was Events Consultant. In July 2018, he was promoted to Head of the Event Division. His role included the overseas marketing and design of all events.

12. Although the Respondent denied this change of title, the Claimant's appraisal of 21.06.2018 refers to the change. In the comments at the end of the appraisal, it reads "*Change title to Head of Events*" – *HR will discuss this further with*". We interpret that to mean that specifics of the change, rather than the change itself, were to be discussed by HR, and find that the change did take place. This is consistent with the positive comments by the Claimant's line manager in the appraisal. And in the report that he prepared into possible wrongdoing in India, the Claimant described himself – without apparent demur from anyone – as "*Head of Events*".

13. The Claimant thereafter worked closely with Michael Ferridge, on a series of Health, Safety and Environment events, which we understand to have taken place in the Middle East and which required the Claimant to travel there often. The Claimant had conference production, event sales, marketing and operations teams reporting to him.

14. In or around August 2018, the Claimant and Mr Ferridge discussed recruitment, and the Claimant's attention was drawn to the Glassdoor website. This is a well-known website on which employees can leave reviews of their employers. The Claimant said that he was aware of it as a forum that allowed anonymous moaning, but Mr Ferridge showed him posts that, the Claimant believed, would scare off talented potential recruits, especially in India. We will return to this below.

Covid -19/furlough

15. In March 2020, the Covid-19 pandemic started to make itself felt in the UK. England – where the Respondent is based – went into lockdown. The specifics of the measures introduced to address the pandemic are not central to this dispute, and we use terms such as “lockdown” not in any technical sense. With lockdown, the Respondent's staff were working from home, events were closed and the Claimant's team reallocated to other tasks.

16. On 01.04.2020, the Claimant was placed on the Coronavirus Job Retention Scheme, commonly known as furlough. He remained on furlough until 01.07.2020, when he was placed on “flexible furlough”.

17. In the first lockdown period, the Claimant was receiving screenshots from Dubai and India regarding negative Glassdoor reviews. He says that this was particularly affecting staff based in India.

18. Whilst on furlough, the Claimant was contacted by what he described as the Respondent's “*India branch*” about work related matters. The exact status of the operation in India is a matter of dispute, for reasons that will become clear below. The Claimant offered advice to the staff in India, but was concerned that, in doing so, he may breach the terms of the furlough scheme. He says that he raised this with Nick Fordham, but was told not to worry and that no-one would know.

19. The Claimant's evidence in cross-examination was that he agreed with Mr Fordham's statement, that the latter had made 3 calls during full furlough, and for the reasons Mr Fordham gave. These were; firstly, a pastoral call to check on the Claimant's wellbeing; secondly, to ask the Claimant to

make pastoral calls to his Middle East contacts, and thirdly, to discuss the feasibility of putting on an event in the Middle East.

20. The Claimant's evidence that pastoral calls to his contacts in the Middle East were intended to be somewhat more than check-ups on their wellbeing. And Mr Fordham was not able to speak to the calls that the Claimant said he was receiving from India.

21. We think it more probable than not that the Claimant did receive work-related calls from India, that he did tell Mr Fordham about them, and that Mr Fordham did reply along the lines the Claimant says. We prefer the Claimant's evidence on this, to that of Mr Fordham, where they differ. We found the Claimant to be a generally credible and reliable witness. We have less confidence in Mr Fordham's reliability as a witness, for reasons we go into below.

22. When he was on flexible furlough, the Claimant's working hours were 14 hours per week to be worked from Sunday to Wednesday between 09:00hrs and 12:30hrs.

23. The Claimant told us that, from mid-July, he was asked by Mr Fordham to do more work than he should have, within the flexible furlough working hours. Mr Fordham wanted him to work on a Dubai event that was still intended to proceed notwithstanding the pandemic. We accept this, and that the Claimant complained to Mr Fordham about it, and received an answer to the effect that he should say he was just speaking with friends if asked.

24. The Claimant had some time off for medical reasons. On a few days – the exact number is not material – he was off for periods that he estimated to be an hour to 90 minutes, for medical appointments. The Claimant said that Mr Fordham was kept abreast of the appointments, even when they fell on days when he would not, ordinarily, be working. And in September 2020 he went to Sweden for 6 days to visit his brother.

Report of alleged wrongdoing in India

25. The Claimant raised the subject of the Glassdoor reviews with Mr Fordham in August 2020, in a catch-up call. The Claimant said that he

knew who the person was, and recommended that the person be suspended whilst an investigation was undertaken.

26. The person whom the Claimant believed to be responsible for the Glassdoor posts was a Ms Subramanian. She was much discussed in the hearing, but she did not give evidence nor make a statement. The allegations against her formed part of the evidence that the Tribunal received. We necessarily have to comment on some of the allegations, and on the evidence in support of those allegations. It is not our function to determine whether the allegations were true.
27. The Claimant says that he told Mr Fordham that he suspected Ms Subramanian of making the Glassdoor reviews, and that Mr Fordham's response was "*I need her for admin*". The Claimant said that admin could be covered by staff in Dubai, but that Mr Fordham was doubtful. He asked the Claimant to prepare a report.
28. Mr Fordham's position on whether or not he requested a report was slightly different. He said that he asked the Claimant to send to him in writing the findings that he had already reached, but did not ask the Claimant to undertake any further investigations.
29. We find that Mr Fordham probably did not intend to ask the Claimant to make any further investigations. Subsequent events are consistent with a desire to go through the motions of an investigation, rather than any real wish to investigate, and it is unlikely that Mr Fordham wanted the Claimant to probe matters further. That said, we consider that Mr Fordham did not want to say outright that he was uninterested in a serious investigation. We think it probable, and find, that he expressed himself with some ambiguity, in a way that allowed the Claimant honestly to believe that he had been asked to investigate further.
30. The Claimant then investigated the matter. In his statement, he says that he "*...had established early on that the person posting these reviews was the office manager in India...because everyone I had spoken to had named her*". Quite when he came to believe that she was responsible is unclear, as it seems from his evidence that the Claimant had formed this

view *before* being asked to prepare the report. In his statement, the Claimant sets out his reasons for reaching this conclusion. We accept that it was the Claimant's genuine view that Ms Subramanian was responsible. To set out the basis for his conclusion is not necessary for the purposes of resolving this dispute, and may be unfair to a person who is not party to it and did not give evidence.

31. In the course of his investigation, the Claimant also received reports of bullying, discrimination, inappropriate behaviour and abuse of power by Ms Subramanian.

32. The Claimant prepared a report, which extended to 31 pages. The report was submitted to Mr Fordham on 20.08.2020. The report contained serious allegations. These included:

- (a) Alleged possible violations of criminal law in India, regarding infectious disease legislation in that country and threatening behaviour;
- (b) The possibility of civil wrongdoing in defamation;
- (c) Contraventions of the Respondent's internal rules and regulations;
- (d) Sexual harassment (curiously, not identified as falling within any particular one of the above categorisations);
- (e) Racism in recruitment (the alleged favouring of lighter-skinned people)

33. The report referenced the Claimant's earlier request that Ms Subramanian be suspended pending an investigation. It stated that, if she remained in place, few people "*working for the company in India*" would feel free to speak for fear of repercussions.

34. We have already noted that it is not for this Tribunal to judge whether the report's allegations were true or not. We received no evidence on whether the allegations would or would not amount to offences or civil wrongs in India. It is also true to say that, whilst the report does set out evidence, it is written in a rather assertive tone. That may be consistent with it being a report that – notwithstanding it followed the Claimant's investigation – called for further investigation. What the Tribunal does find is that the report set out the Claimant's genuine belief that Ms Subramanian was

responsible for serious wrongdoing in the Indian office, and that there was an evidential basis for that belief.

Events after the report

Investigation

35. We were told that Mr Fordham responded to the Claimant that Nicola – meaning Ms Orr – would be in touch. In some tension with that was the Claimant’s position that there was no telephone call between himself and Mr Fordham after he submitted his report. If that were right, how did Mr Fordham tell him that Ms Orr would be in touch? We have seen no email telling him that she would be. We therefore find it more probable that there was a telephone call between them, and that Mr Fordham told the Claimant that Ms Orr would be in touch.

36. We have not seen an email saying that, but consistent with it being so is that there are notes of a meeting that Ms Orr had with the Claimant on 27.08.2020. The meeting took place by telephone.

37. The notes were taken by Ms Orr. They record, under the heading “*outcomes*”, that the Claimant was very clear that he wanted Ms Subramanian dismissed. This is immediately followed by “*Does not seem to be happy with any other outcome...*”.

38. We do not accept the accuracy of the note that the Claimant was clear that he wanted Ms Subramanian dismissed. The Claimant was consistent throughout the hearing that his position was that he thought Ms Suramanian should be suspended pending an investigation, not dismissed. More importantly, in his report, he had recommended that course, rather than dismissal. Whilst his manner of expression before us was, at times, somewhat strident or gruff (which we do not use as a euphemism for rude – he was not rude), if one listened to what he said or read what he wrote, it is plain that he was not seeking that Ms Subramanian be dismissed, merely suspended.

39. Ms Orr’s notes the Claimant as being “*...very confident in his investigative abilities...*”. Although we have already commented on the tone of the report, again, if one reads what it says, it calls for an investigation. That

does not seem to be the stance to be expected of a person over-confident in his own investigative abilities.

40. The note identified next steps, in which it was observed that *“Needs HR investigation, cannot take MB report as read – need further clarification”*. This was the very course that the Claimant himself had sought, although he had sought Ms Subramanian’s suspension to facilitate further investigation.

41. There was a draft investigation plan attached to the note.

42. The telephone conversation with Ms Orr was surreptitiously recorded by the Claimant. The Claimant was challenged about the recording, and his failure to tell Ms Orr that he was recording the conversation. He answered that he didn’t think there was a need to tell her that he was recording, and that he didn’t think common courtesy required that he tell her. These answers strike the Tribunal as somewhat disingenuous. Ordinarily, we think it would be regarded as discourteous to record a telephone call without telling the other party that the recording was being made. That this was done is consistent with a degree of suspicion on the Claimant’s part. But the recording – or a transcript of it, which was before the Tribunal – is nonetheless a valuable record of what was said. And the transcript has the Claimant plainly saying that he had not asked for Ms Subramanian to be dismissed, merely to be suspended pending further investigation. He makes clear that he believes that suspension would lead to more information becoming available. Ms Orr appears to agree, at one point, that people coming forward may need to be protected against reprisals.

43. The accuracy of the transcript – as opposed to the courtesy with which it was obtained – was not in issue before us. We consider that it is a reliable record of the conversation that took place between the Claimant and Ms Orr. We consider that it establishes that Ms Orr’s note that the Claimant wanted Ms Subramanian dismissed was not accurate.

44. The Respondent contends that, the same day the report was received, Mr Fordham reassured the Claimant that the Respondent took the allegations seriously. They went through the report together. Mr Fordham is said to

have explained that the Respondent would have to tread carefully, as Ms Subramanian held a senior position at Emerging Market Solutions Partnership (“EMS”), described in the ET3 as “*the Respondent’s partner company in India*”. The Claimant disputes that there was any contact between himself and the Respondent, other than the contact with Ms Orr, between him submitting the report and his resignation.

45. We think that it is likely that there was some contact between Mr Fordham and the Claimant, if only to explain to him that Ms Orr would be in touch. At the start of the transcript of the call between Ms Orr and the Claimant, there is no explanation of why the call was taking place, which might have been expected if the Claimant had not been told that she would be in touch with him. It may be that there was discussion of the report’s contents, as it seems likely to us that the Claimant would have wanted to raise the contents. But it also seems likely to us that Mr Fordham limited himself as much as possible to advising that Ms Orr would be in touch.

46. Ms Subramanian was not suspended.

47. Ms Orr was, the Tribunal was told, asked to investigate the allegations.

48. Ms Orr was cross-examined about her investigation. She agreed that the 1st thing to do when conducting such an investigation would be to remind herself of any applicable policies, and that she did not do so in this case, although she said that she understood the Respondent’s policies to be pretty much standard.

49. Ms Orr accepted that, whilst she might not report back formally to the Claimant, he should have been broadly kept informed of the investigation. She accepted that the Claimant considered himself to be a whistleblower, that she had known that he so considered himself, and accepted that the Respondent’s whistleblowing policy required that endeavours be made to keep any whistleblower informed of the progress of any investigation.

50. Ms Orr accepted that the report raised serious allegations. She accepted that she had screenshots that, on their face, appeared to support allegations of sexual harassment and intimidation.

51. Ms Orr accepted that it spoke of a culture of fear, in which one concern was going to be how to get people to trust the process and speak honestly.
52. Ms Orr agreed that a number of identified persons – Mr Ferridge, Geogia Lewis, a person named Harshita who worked in Dubai, could have contributed to the investigation.
53. Ms Orr accepted that she had only spoken to the Claimant once about the report, in the conversation to which we have already referred. In cross-examination, she told the Claimant’s counsel that she expected the call to take 45 minutes to an hour, and that it was not intended to be the only conversation they would have on the subject. But not only did the call take place on a Thursday – not a working day for the Claimant – but when the Claimant explained this, Ms Orr’s response was that it would not take too much time. We do not consider that a telephone call anticipated to last 45 minutes to an hour would be described as not taking too much time.
54. One of the first things that is raised in the call is, whether the Claimant has spoken to anyone about the report. Ms Orr agreed that that was so, saying that she thought it important. It was put to her that the purpose of the call was to find out who was aware of the report, to which she responded that the purpose was to have an initial conversation about the report.
55. Ms Orr told us that her notes were prepared at the time. She made handwritten notes, which were shredded when she moved offices. But handwritten notes of conversations with two Indian employees were evidently not shredded, because they were included in the bundle. Ms Orr explained, regarding the shredding of her alleged manuscript note of the conversation with the Claimant, that a lot of hard copy papers were shredded when she moved office, and that she did not personally shred the documents. That is plausible enough. But she also accepted that, in April 2021, when she said the shredding had taken place, that she knew this dispute was going to a Tribunal hearing.
56. Challenged about her recording that the Claimant wanted Ms Subramanian dismissed and the inconsistency of that with the transcript,

Ms Orr answered that she understood him to feel that there were a number of allegations for which the penalty should be instant dismissal.

57. This was not what she had recorded. We have already noted our misgivings about the reliability of Ms Orr's evidence. We regret to say that we find that the typewritten note was prepared to support the Respondent's case rather than as an accurate record of what had been said. Her notes of her conversation with the Claimant were materially inaccurate. If they were prepared from handwritten notes taken at the time, then either those handwritten notes must have been inaccurate, and inaccurate in a way that is unlikely to have escaped Ms Orr's notice, or the typed notes did not accurately reflect the handwritten notes, which again Ms Orr should have noticed.

58. Pressed on this by the Claimant's counsel, Ms Orr's answer – that the Claimant didn't ask for Ms Subramanian to be dismissed, but was expecting any investigation to reach the same conclusion that he had and the ultimate outcome would be that she would leave the organisation – smacked of playing word games with counsel, and with the Tribunal.

59. Ms Orr went on to say that she was left with the impression that the Claimant wanted Ms Subramanian dismissed, and that she was concerned his report may be biased against Ms Subramanian. Although we have commented on the Claimant's tone already, and we can quite see how a fair investigator might have some concern about this, to note honestly that the Claimant wanted Ms Subramanian dismissed would require an exclusive focus on his tone and a complete disregard for what he both said and wrote.

60. Ms Orr agreed that her note was silent on the Claimant saying that he was whistleblower. She had no explanation for why that wasn't in her note.

61. Ms Orr agreed that her note contained practically nothing of the substance of what the Claimant had told her. She said that this was because she was annotating a printed copy of the report.

62. Ms Orr denied that her note was a careful edit of what the Claimant had told her.

63. The Tribunal does not accept Ms Orr's denial. Her note doesn't just omit things, it actively misstates things. Its omissions and errors are uniformly to the Respondent's favour. Unfortunately, we do not think that Ms Orr's note was intended to be an accurate record of her conversation with the Claimant.

64. Ms Orr was asked whether the case was a classic case for suspension. Her initial answer – that suspension is not always the right option – was not an answer to the question at all. When this was pointed out, she said that it was not clearly the right option, it was an option that was being kept on the table.

65. Ms Orr was taken to a passage towards the end of the transcript, in which the Claimant said;

Claimant: "But if [Ms Subramanian] is left in place it's not going to happen. And if she's left in place and nothing happens then I've got to really consider my future in Alain Charles because, personally, I can't work in a Company where people are being intimidated and threatened and harassed in their normal working day".

Ms Orr: "Mmm, no I understand that"

66. It was put to Ms Orr that the Claimant was making two points; that Ms Subramanian needed to be suspended if a proper investigation was going to be made, and secondly, that he didn't want to work in a company where people were intimidated, threatened or harassed. Ms Orr agreed that she understood the second point. Asked whether she was disputing that she expressed support for the 1st point, her reply was that she was confident that some form of investigation could be managed with Ms Subramanian still in place.

67. This answer was instructive. It indicates not that Ms Orr was open minded as to whether Ms Subramanian needed to be suspended – which would have been an entirely proper attitude – but rather, a determination that she would not be suspended, regardless of the issues the Claimant pointed out.

68. Pressed about how the decision not to suspend was reached, Ms Orr said that the final decision didn't lie with her. She said that she and Mr Fordham discussed the question, that suspension would have inevitably led to some disclosure to Ms Subramanian of the allegations against her, and possibly of the individuals involved, and that her suggestion was that they try to seek some additional supporting evidence and speak to Ms Subramanian. She therefore recommended a full team survey of the Indian staff.
69. Asked whether she had considered the possibility that Ms Subramanian would say to staff that they should not say anything negative in the survey, Ms Orr said that it was a possibility, but couldn't recall whether it had crossed her mind. That answer was simply incredible. It would be one thing to have said that it had crossed her mind, but that a judgement call had been made that suspension was not warranted or that it presented greater disadvantages than advantages. But to say that she could not recall whether it crossed her mind defies belief. We find that any HR professional reading the report would regard that risk as an obvious one.
70. Ms Orr did not speak to Mr Ferridge, or to Georgia Lewis. She said that they were on her list of people to speak to, but was aware that both had left the Respondent, and on not the best terms. It was pointed out to her that Ms Lewis had not, at that point, left, that she was still working her notice. Ms Orr replied that she didn't prioritise speaking with Ms Lewis just because the latter was on her notice period. When it was pointed out that speaking to Mr Ferridge or Ms Lewis did not appear in her investigation plan, Ms Orr had no explanation.
71. Asked about the manuscript notes referred to already, Ms Orr accepted that one employee had told her on 01.10.2020, that he knew of the survey plan. Ms Orr agreed "...to an extent..." that that meant that the anonymous survey plan was fundamentally flawed, but said that a plan was in place and there was little she could do immediately.
72. Ms Orr spoke to Ms Subramanian on 17.09.2020. Asked to explain the 3 week delay, her said that it was probably due to workload, that a plan was

in place, and she was in contact with Mr Fordham regarding what the next steps should be.

73. Ms Orr's attention was drawn to the investigation plan in the bundle, which targeted the collection of evidence to be completed by 20th September, and investigations meetings to be completed by 30th September, and asked why she didn't speak to anyone until 17th. Her answer was that there was a lot of information in the report, and that she didn't necessarily need to speak to anyone about that. She agreed that it looked like a long delay.

74. We do not find this answer plausible. Her answer that there was a lot of information in the report, and that she didn't necessarily need to speak to anyone about that, is, of course, inconsistent with the Respondent's position that the report contained mere allegations, insufficient to amount to a disclosure for the purposes of s43B. The report did indeed contain a lot of information. But it was a report that, we consider, plainly invited – indeed, expressly invited – further investigation. We do not consider that a HR professional reading that report could honestly arrive at the conclusion that they did not need to speak with anyone about much of its contents.

75. Typewritten notes of Ms Orr's meeting with Ms Subramanian were revealed to exist in the course of Ms Orr's cross-examination. They had been sent to the Respondent's solicitors on 31.01.2022, we were told, but not disclosed to those representing the Claimant because it had not been appreciated that they were a fresh document.

76. The typewritten notes were said to have been made during the meeting with Ms Subramanian. This in itself is curious, as Ms Orr's practice in other conversations was to make handwritten notes. Unlike the manuscript notes that were disclosed, and indeed unlike the typewritten notes of her discussion with the Claimant, these notes did not indicate the date or time of the discussion.

77. We consider that Ms Orr's evidence is consistent not with any genuine wish to investigate serious allegations, allegations that may or may not

have been accurate but which had some evidence to support them. On the contrary, it was consistent with a going-through-the-motions approach.

Mr Fordham

78. This conclusion is supported by Mr Fordham's evidence. We did not find Mr Fordham to be a reliable witness.

79. Mr Fordham described the Claimant as having an "...*abrasive nature*...". We can see how the Claimant's manner might be described by some as abrasive.

80. Mr Fordham was at pains to emphasise, both in his statement and in answers in cross-examination, that EMS is not owned or directly operated by the Respondent, and that any action that the Respondent could take regarding Ms Subramanian was thus limited to asking EMS to take action.

81. We find that this position was disingenuous. Mr Fordham's response to the Claimant's report was, in appearance at least, for the Respondent to engage an independent HR professional to conduct an investigation. That HR professional designed an investigation plan, and arranged for a survey. She spoke to people – albeit not many, and in a rather lackadaisical fashion. If EMS had the operational independence that Mr Fordham suggested, we consider that he would have passed on the Claimant's report, or the substance of it, to EMS. EMS would have taken the decision about whether and, if so, how to investigate. We find that, whatever the legal ownership structure, the Respondent and Mr Fordham in particular was able to decide what was going to happen regarding any investigation into the Claimant's report, including whether or not Ms Subramanian was to be suspended.

82. Mr Fordham at times sought to express sympathy with the Claimant, whom he said was living alone, with impaired eyesight. We do not accept that these expressions were genuinely meant. In his statement, Mr Fordham appears to seek to undermine the Claimant's position. He denies that the Claimant was promoted to Head of Events. He mentions past complaints that seem to us to have little, if anything, to do with this dispute, including complaints that were not formalised or withdrawn. In

answers in cross-examination, he suggested that the Claimant was irrational, and spoke about him in a rather condescending manner.

83. We find that Mr Fordham did not take the Claimant's report seriously. He described it as entering the realms of fantasy, giving as an example of fantasy an accusation of murder. Whilst it is true that the accusation of murder discussed may seem improbable, we note that it is contained in a screenshot of a WhatsApp message and clearly does not originate from the Claimant himself. He considered that his own knowledge enabled him to dismiss parts of the report. He regarded it as improbable that Ms Subramanian would be able practically to engage in some of the behaviour of which she was accused.

84. Mr Fordham's own account of the conversation that he says he had with the Claimant after the delivery of the report – a conversation that we accept happened – involves him giving reasons why Ms Subramanian could not be suspended.

85. The Claimant was not told of the decision not to suspend Ms Subramanian.

Marginalisation

86. The Claimant says that he was marginalised and isolated after he submitted his report.

87. In his Grounds of Claim, the Claimant set out his case as follows (quote paras 14 & 15):

14. The Respondent ignored the Claimant's recommendation to suspend Ms Subramanian and failed properly to investigate or address the concerns raised in the report.

15. Further, the Claimant was subjected to the following detriment after submitting his report:

(1) He stopped being invited to catch up calls with Mr Fordham, which had previously been a regular occurrence. After submitting the Report, the Claimant was only involved in two conference calls with Mr Fordham and Mr Angel, who

was a new director at the Respondent. All calls from the Claimant to Mr Fordham were ignored.

(2) Employees within the Claimant's team refused to answer his calls. The Claimant was informed by colleagues that Mr Fordham had instructed them not to speak with the Claimant.

(3) The Claimant's colleagues were instructed to send any proof reading tasks or news for events to Ms Subramanian and not to the Claimant, when such tasks formed part of his role.

(4) The Claimant was excluded from all meetings related to event sales, magazine sales, marketing and events, some of which he should have been running, including but not limited to;

a. The sales meeting on 26 August 2020; and

b. The sales and marketing meeting on 30 September 2020.

The Claimant would usually have attended these meetings once or twice a week and was therefore excluded from around 10 meetings in total

(5) Mr Fordham instructed Ms Subramanian to prevent the Claimant from speaking directly to the marketing teams in India and Dubai and that these teams were to send all correspondence to Ms Subramanian and not to the Claimant.

(6) The Claimant's colleagues were informed that the Claimant was to be in charge of the production of programmes for events. This amounted to a demotion in comparison with the Claimant's roll up to that point. The Claimant was neither consulted on this decision nor was he informed of it.

(7) Mr Fordham made derogatory remarks about the Claimant to colleagues, stating that the claimant was "disgruntled", "a liar" and that he was "dishonest".

88. We have already found that, contrary to the Claimant's evidence, Mr Fordham was in touch with him once after the report was received, to tell him that Ms Orr would be in contact with him. The Claimant admits there was one other contact, a conference call on 23.09.2020, involving Mr Fordham and Thomas Angel. This call is said to have started at 16:45hrs on that day, and to have lasted about 40 minutes.

89. Until the hearing, it was Mr Fordham's position that the Claimant was not excluded from any meetings to which he would normally have been invited, but that his reduced working hours due to flexible furlough, plus his need to attend medical appointments, meant that he was often not working

when meetings were taking place. Mr Fordham specifically mentioned a meeting on 26th August, saying that the Claimant had had a medical appointment on that date, the clear implication being that he did not attend for that reason.

90. At the hearing, telephone records for the 19th to 30th August were available (the Excel Records), as were records from 24th August to 30th September (the Bundle Records). The former appeared to be more complete than the latter.

91. The assistance that the Tribunal can gain from these records is open to dispute. The Claimant insisted that his extension number ended in "234". Mr Fordham insisted that there was no extension number "234" at the relevant time, and that the Claimant's extension number was "236". The records referred to above show no calls from an extension "234", but a number of calls involving extension "236". The Tribunal saw the email in which the Claimant resigned, which showed his extension as a 4 figure number ending in "234", which appears to support his contention. It is, of course, possible that the numbers were changed, as Mr Fordham said, but we think it improbable that that would have been done without anything about it being recorded.

92. The Bundle Records show a quite large number of calls. There appear to be 26 made on 19.08.2020. The majority are shown as either "busy", "no answer", or "failed". Of those that were answered, only 3 last over a minute, and a number of those where no answer is recorded are shown to have lasted over a minute.

93. The same records show two calls made on 23.08.2020, both of which lasted only a matter of seconds. There appear to be 14 calls on 24.08.2020, none of which is recorded as being successfully answered, and 33 calls on 25.08.2020, only one of which was answered and that call lasted less than 1 minute.

94. The Excel Records appear to show 18 calls on 26.08.2020, but 11 of these appear to be a conference call with numerous participants. All but one of these conference calls are listed as starting between 11:00hrs and

11:02hrs, and lasting between 2 minutes 11 seconds and 45 minutes 28 seconds. They cannot be separate calls, as the caller could not have started a different call at 11:01hrs, when that caller had started a call at 11:00hrs which lasted 45 minutes 28 seconds.

95. The Bundle Records also show calls from an extension “236” on 26.08.2020, and a small number of calls on other dates. They show two calls from “236” on 16th September, one lasting 9 minutes 10 seconds, the other 1 minute 46 seconds. Asked about a meeting that he said took place on that date, Mr Fordham explained its apparent absence from the record by saying that it could be that the Claimant’s mobile phone was called, or the system wasn’t working, and that in any event the call wasn’t made from his extension, but from a conference phone with a separate extension.

96. Mr Fordham’s evidence at the hearing was that the Claimant was at the meeting on 26.08.2020.

97. The Tribunal acknowledges that records can provide a more reliable source of information than human memory. But we think these records need to be approached with some considerable caution. We do not have confidence that we can rely on Mr Fordham’s evidence as the Claimant’s extension number. That a call or calls were made from a particular extension does not appear to us to mean that the Claimant was necessarily the person making the calls. There was no evidence from any other person said to have been present at the 26th August meeting. There were no minutes of the meeting, and no emails between participants in the meeting mentioning what was to happen following it or what had been said in it, and we saw no invitations to the meeting.

98. On balance, we accept the Claimant’s evidence that he was not in the meeting on 26.08.2020.

99. We also accept that the Claimant was excluded from other meetings to which he would ordinarily have been invited. In his Grounds of Claim, he specifically references, in addition to the 26.08.2020 meeting, a sales and

marketing meeting on 30.09.2020 and other meetings that took place once or twice a week.

100. Mr Fordham denied that there was a meeting on 30th September, and denied that the Claimant would necessarily have been expected to attend a meeting the previous day because a letter of support for an event in Dubai had not been received. The hearing bundle contained an email inviting a number of people to a meeting on 29.09.2020, but the Claimant was not amongst the invitees. Mr Fordham said in answer to questioning from the Claimant's counsel that the meeting on 29.09.2020, to which the invite in the bundle related, concerned African Review of Business and Technology, a magazine on which the Claimant did not work. Mr Fordham denied that the meeting would have been the general type of marketing meeting the Claimant would be involved in.

101. The Tribunal did not find Mr Fordham's evidence on this point to be reliable. The reason why the Claimant was not involved given in the hearing was completely different from that contained in his statement.

102. A meeting that took place on 22nd September was discussed.

103. The Claimant said that he was asked by Sales & Management team why he wasn't involved in meetings. Mr Fordham denied any knowledge of this. He said in the hearing that the Claimant's responsibility at the time had been a HSE event, and on Health, Safety and Security Review Middle East and an associated website. He said that the Claimant should have produced a marketing plan for these. Mr Fordham said that he had chased Harshita – a Dubai based employee who was in charge of marketing the event – about why there was no marketing plan in place, and her answer was that the Claimant had not been in touch.

104. None of this had been included in Mr Fordham's statement. We consider that there is considerable force in the criticism made by the Claimant's counsel, that Mr Fordham was seeking to denigrate the Claimant.

105. We agree that Mr Fordham did appear to wish to denigrate the Claimant. We have already mentioned this above. He said that, in

lockdown, the Claimant had not had much to do – and implied, in the context of the answer referred to just now – that he wasn't doing it. He denied that the Claimant would go to virtually all meetings previously, and in response to the suggestion that the Claimant was very good at cross-selling and had been on visits to Nigeria supporting individual magazine managers, said that the Claimant had been to Nigeria to attempt to set up one event, which had not happened.

106. Asked about whether it might have appeared to the Claimant that a meeting on 22nd September was one he'd ordinarily attend, Mr Fordham replied that he struggled to get into the Claimant's head, and wished that the Claimant had picked up the phone.

107. We are persuaded that Mr Fordham did try to denigrate the Claimant. He spoke of him during the hearing at times in a condescending tone, and admitted having used strong language about him. The contrast between this and the animated way in which he spoke about Ms Subramanian, and obvious loyalty he felt towards her, was striking.

108. We find that the Claimant was excluded from meetings to which he would hitherto have been invited.

109. We accept the evidence of Mr Chakraborty that Ms Subramanian told him that, if he spoke to the Claimant or established contact with him, he would be dismissed or face disciplinary action. We accept that similar warnings were given to other employees. Ms Lewis had heard about such warnings, and although her evidence on this was what others had told her, it lends some support to that of Mr Chakraborty. We find this evidence credible. We accept that this was done on Mr Fordham's direction. And we accept that colleagues were told that the Claimant was to be in charge of even production programmes, a demotion in role about which he was neither consulted or informed.

110. Consistently with this, we accept the Claimant's account that colleagues were not answering his calls. Indeed, if the telephone records were accurate, they would appear to show a remarkable level of

unsuccessful calls. We accept that tasks were diverted from the Claimant to Ms Subramanian.

Leaking of the report

111. In September 2020, the Claimant was told by numerous employees that the content of the report had been shared with them or leaked to them. The Claimant was aghast at this, and more so when he came to believe that the report or its contents had been shared with Ms Subramanian. The Claimant said that he was told this by telephone.

112. We accept this. We accept the Claimant's evidence on this, and we also find that it is consistent with WhatsApp messages, screenshots of which were in the hearing bundle, which indicated that Ms Subramanian had been telling people that they needed to be honest in answer to the survey, but also that nothing negative should be said. We consider that this indicates that the contents of the report had been leaked to Ms Subramanian, who appears to have been keen to avoid any negative feedback.

113. On 01.10.2020, the Claimant sent an email to Mr Fordham, copying in Ms Orr, resigning. The Claimant said that what he described as "gaslighting efforts" in a call the previous week had been the last straw, but that the most important issue was the virtual ignoring of his report. He also sent an email for wider circulation, which was consistent with his resignation email.

The listed issues

Disclosure qualifying for protection

114. Applying the above factual findings to the issues identified, we find that the Claimant did make a disclosure of information that tended to show that a breach of legal obligations.

115. The report did contain information. Indeed, in his written submissions, Mr Ratledge refers to information in the report. The report includes the Claimant having spoken to numerous employees, and

reported what they said. Information can cover statements that could also be categorised as allegations – see Kilraine -v- London Borough of Wandsworth¹ - if the statement has sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a) to (f) of s43B(1) of the Employment Rights Act 1996.

116. Although the report did contain quite a bit of accusation, we consider that it contained sufficient factual content. For example, the allegation that an employee had said that Ms Subramanian was “*coming on heavy*” to him – and a picture of a WhatsApp message consistent with that – was clearly factual. It also had sufficient specificity to be capable of showing that Ms Subramanian was engaged in behaviour that the Claimant believed to be a failure to comply with a legal obligation. It presented evidence of inappropriate sexual advances towards an employee, of a culture of harassment², of a culture of bullying in the Indian office³, of breaches of Covid-19 quarantine measures⁴, of racism in hiring.

117. We are satisfied that the Claimant had a reasonable belief that the information tended to show that the above had occurred. The test is both objective and subjective. It required that the Claimant have a belief that the information tended to show a relevant breach. The Claimant said in his statement that he thought the information tended to show behaviour amounting to a breach of the Respondent’s employment law obligations regarding race and sex discrimination, safe systems of work and working environment, and relating to protection from harassment, defamation. In the report itself, he also referred to possible breaches of Indian law regarding Covid-19 quarantine measures.

118. We are satisfied that the Claimant honestly believed this.

119. We are also satisfied that he had a reasonable basis for so doing. Although the report does contain allegations, it contains statements of fact, and evidence that provides some support for its accusations.

¹ [2018] ICR 1850.

² See fig 1 in the report.

³ See fig 4 in the report.

⁴ See fig 6 in the report.

120. The Respondent disputes that the Claimant had a reasonable and genuine belief that his disclosure was in the public interest. Paragraph 36 of its Grounds of Response reads as follows:

The Respondent also contends that the Claimant did not have a reasonable and genuine belief that his disclosure was in the public interest. The Respondent contends that the Report was not substantiated with any credible evidence and therefore the Claimant did not genuine believe in its contents. Furthermore the reason he produced the Report was because Mr Fordham asked him to do so in order to provide further clarity on negative Glassdoor reviews as part of his role for commercial purposes. The Respondent accordingly contends it was not produced in the public interest.

121. We have already found that the Claimant did have a genuine belief in the truth of the contents of the report, and there was some foundation for that belief. The report cited evidence – the credibility of that evidence was for an investigation to judge. As for the point that it was produced because Mr Fordham ask him for it, that is in some tension with Mr Fordham’s evidence, which was that he asked the Claimant to submit to him in writing his concerns, but did not ask him to investigate further.

122. We have not been directed to any authority indicating that a report prepared at the request of another cannot amount to a disclosure in the public interest. It is not for this Tribunal to determine whether the disclosure made by the Claimant was in the public interest. Our function is to decide whether the Claimant had a reasonable belief that the disclosure was in the public interest.

123. Public Interest is not defined in legislation. In Chesterton Global Ltd -v- Nuromohammed⁵, the Court of Appeal said that a disclosure may be in the public interest even when it relates to a breach of the worker’s own employment contract. The Court of Appeal identified the following as things that must be taken into account:

(a) the numbers in the group whose interests are affected;

⁵ [2018] ICR 731.

- (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing;
- (c) the nature of the wrongdoing;
- (d) the identity of the alleged wrongdoer

124. In this case, we consider that the Claimant's belief that disclosure was in the public interest was both genuine and reasonable.

Protected Disclosure Detriment (Whistleblowing) S47B(1) of the Employment Rights Act 1996

125. The detriments to which the Claimant says he was subjected are set out at paras 13 – 15 and 20-21 of his Grounds of Claim. Our findings on those are as follows:

- (a) Para 13 relates to the allegation that the report was leaked. We have already found that this was done;
- (b) Para 14 relates to the failure to suspend Ms Subramanian or properly investigate or address the concerns raised in the report. It is common ground that Ms Subramanian was not suspended. We find that the contents of the report were not properly investigated or addressed;
- (c) Para 15 relates to the marginalisation of the Claimant. We have already found that he stopped being invited to calls, that colleagues refused to answer his calls, that colleagues were instructed not to send proof reading tasks or news to him, that he was excluded from meetings, that Mr Fordham instructed Ms Subramanian to prevent the Claimant from speaking directly to the marketing teams in India and Dubai, and that the Claimant's colleagues were told that he was to be in a lesser role. We accept that Mr Fordham made derogatory remarks about the Claimant.

126. We find that all of the above were done because the Claimant had made a protected disclosure, in submitting his report.

127. Did the above subject the Claimant to a detriment? The question has been framed as being whether the treatment complained of is of such

a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment⁶.

128. We find that the above, with one exception, did subject the Claimant to a detriment. His marginalisation at work was, we think, plainly conduct that a reasonable worker would view to be to his detriment. Likewise the breach of confidence involved in leaking the contents of the report.

129. We are not persuaded that the failure to suspend Ms Subramanian, or to investigate the allegations in the report, was a detriment to the Claimant. He was undoubtedly upset, but these failures did not put him at any disadvantage.

Jurisdiction

130. Although this question is addressed earlier in the list of issues, this is an appropriate point at which to deal with it in our reasons.

131. The Respondent contends that any detriment before 10.09.2020 is out of time, and that the Tribunal lacks jurisdiction to deal with any such detriment.

132. We find that the conduct of which the Claimant complains formed part of a continuing course of conduct. Everything of which the Claimant complains was done in response to his submitting his report. Accordingly we find that the Tribunal does have jurisdiction to consider the entirety of the Claimant's complaint.

Constructive unfair dismissal

133. We find that the Respondent did commit a fundamental breach of the Claimant's contract of employment. The marginalisation of the Claimant and undermining of his role were in breach of the implied term of mutual trust and confidence.

⁶ Shamoon -v- Chief Constable of the RUC [2003] ICR 337 per Lord Nicholls of Birkenhead @ para 35.

134. We also consider that leaking of the report's contents, and the failure to investigate properly its contents, also amounted to a breach of the same term. We found Ms Orr's answer regarding the difficulty in working for a company that ignored the sort of culture that the report described illustrative of the sort of culture that an employee such as the Claimant should expect, all the more so coming from a witness whose answers appeared designed to favour the Respondent.

135. We find that the Claimant resigned primarily because of the leaking of his report's contents. We find that he did so without first affirming the contract, and that he was entitled to resign.

136. Although the Claimant's Grounds of Claim say that his concerns about compliance with Indian tax law also played a part in his decision to resign, his evidence before us was that it played no part in his decision, and we find that this was so.

137. We do not accept the Respondent's contention that the Claimant resigned so as to start his own business. We are mindful that his company was incorporated in mid-September 2020. We are somewhat doubtful of the Claimant's explanation, that he was not intending to compete with the Respondent. But we think it probable that this was along the lines of an insurance policy for the Claimant, something he was doing in case things did not work out well with the Respondent. He was already being marginalised when he incorporated his company.

138. The Respondent contends that there are potentially fair reasons for the Claimant's dismissal. It relies on the alleged gross misconduct involved in making his allegations against Ms Subramanian, and on some other substantial reason, namely the breakdown of the relationship between the parties.

139. We do not accept the Respondent's contentions.

Constructive automatic unfair dismissal

140. It follows from our findings that the Claimant did make a protected disclosure, and that the making of the disclosure was the sole reason for his constructive dismissal.

Wrongful dismissal

141. We have already found that the Respondent breached the Claimant's contract of employment. We find that the breaches were fundamental. We consider that the Claimant was entitled to resign because of these breaches, without working a period of notice.

Victimisation

142. We have already found that the Respondent subjected the Claimant to detriments, and why it did so.

143. It appears to be agreed by the parties that the question of whether the Claimant did a protected act under s27 of the Equality Act 2010, and whether the Claimant was subjected to detriments because he had done so, is, in substance, the same as that addressed above at paras 125 to 129.

144. A protected act is defined by s27(2) as follows:

- (a) *bringing proceedings under this Act;*
- (b) *giving evidence or information in connection with proceedings under this Act;*
- (c) *doing any other thing for the purposes of or in connection with this Act;*
- (d) *making an allegation (whether or not express) that A or another person has contravened this Act.*

145. S27(3) provides that "*Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith*".

146. The Claimant was not subjected to the detriments because he had brought proceedings under the EA 2010.

147. The Respondent has not contended that, because Ms Subramanian's alleged conduct took place in India, allegations about it fall outwith the scope of s27(2)(d). Its Grounds of Response read as follows regarding this element of the claim:

48. The Respondent denies that the Claimant was subject to victimisation under section 27 EqA.

49. *The Respondent denies that the allegations at paragraph 33 of the Claimant's Grounds of Claim amount to a protected act as alleged as the Respondent contends that the allegations made by the Claimant were both false and were not made in good faith by the Claimant who specifically targeted the allegations at Ms Subramanian and did not provide any credible evidence in relation to the same.*

50. *If the Tribunal finds that the Claimant did undertake a protected act (which is denied) the Respondent denies that because of making a protected act, the Claimant was subject to the detriments described at paragraphs 13,14,15,20 and 21 of the Claimant's Grounds of Claim as alleged as detailed at paragraphs 18,19,20,21,31 and 32 of the Respondent's Grounds of Resistance.*

148. Paragraph 49 states clearly that the Respondent's reason for denying that the Claimant's disclosures were a protected act, is because they were not made in good faith. We have already found that that they were made in good faith.

149. Likewise, we have already found that the Claimant was subjected to detriments because of making the disclosure.

Remedy

150. The question of remedy will be decided at a hearing on a date to be advised, time estimate 1 day.

Employment Judge – David Hughes

Date: 21/04/2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
...09/06/2022..

FOR EMPLOYMENT TRIBUNALS