EMPLOYMENT TRIBUNALS

Claimant: **Mr S Williams**

Respondents: **(1) APB (London) Investment Limited**
(2) Ying Xu
(3) Wei Ping Xu

Heard at: **East London Hearing Centre** **On: 26 November 2021**

Before: **Employment Judge Porter (sitting alone)**

Representation

Claimant: Mr A Sendall, counsel

Respondents: Not in attendance

JUDGMENT having been sent to the parties on 22 December 2021 and written reasons having been ordered by the Employment Appeal Tribunal the following reasons are provided:

REASONS

1. Written reasons are provided pursuant to the Order made by HHJ Auerbach on 9 August 2022, a sealed copy having been sent to the tribunal on 30 September 2022.

Background

2. On 18 September 2020 the claimant presented claims of:

   2.1. Unfair dismissal;

   2.2. Automatically unfair dismissal under s 103A Employment Rights Act 1996 ("ERA 1996");

   2.3. Detriment under s47B ERA 1996;

   2.4. Race discrimination;

2.5. Unlawful deduction from wages;

2.6. Breach of contract.

3. The claimant also made an application for interim relief, which was listed for hearing on 27 October 2020.

4. The respondents entered a Response defending the claims (page 62).

5. On 27 October 2020 EJ McLaren made an Interim Relief Order (page 90-91).

6. The respondents made an application for reconsideration of that Order.

7. A closed preliminary hearing took place before REJ Taylor on 26 January 2021 when each of the parties was represented by counsel and:-

7.1. The claimant withdrew the claims of:

7.1.1. Race discrimination;

7.1.2. Unlawful deduction from wages;

7.1.3. Breach of contract

7.2. Various orders were made (page 120-126) including:

7.2.1. By 29 May 2021 the respondent must send the claimant copies of all documents relevant to the issues listed in the Case Summary below.

7.2.2. The claimant has agreed to prepare a final list of issues, including a schedule of alleged protected disclosures, by 29 January 2021.

8. At a hearing on 19 February 2021 the application for reconsideration was successful and the Interim Relief order was revoked (page 192)

9. Solicitors for the claimant presented to the tribunal an agreed List of Issues (pages 142-144), including a Schedule of the alleged Protected Disclosures (pages 145-149).

10. Following the hearing on 26 January 2021 the claimant's solicitors made application that an Amended Details of Claim (pages 129 -141) be treated as an Amendment to the Claim. That application was granted by REJ Taylor on 8 February 2021 (page 160).

11. The claimant notified the tribunal in writing that the respondents were no longer legally represented and had failed to comply with the order of disclosure

made by REJ Taylor. The respondents failed to reply to correspondence from the tribunal requesting an explanation.

12. By letter dated 27 July 2021 the respondents were notified that an Unless Order had been made, requiring the respondents to comply with the order for disclosure by 11 August 2021 failing which "their responses to the claim shall be struck out and they shall be treated as if no response has been filed."

13. By letter dated 21 August 2022 the tribunal notified the respondents:

> "Further to the Unless Order sent to the parties on **27 July 2021** which was not complied with by **11 August 2021**, the Response has been dismissed under Rule 38. The respondent will be entitled to notice of any hearings and decisions of the Tribunal but will only be entitled to participate in any hearing to the extent permitted by the Employment Judge."

Constitution of the tribunal on 26 November 2021

14. This was a remote hearing which has not been objected to by the parties. The judge, the parties, witnesses and representatives were invited to attend by CVP. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. EJ Porter noted that a claim under s47B ERA 1996 should be heard before a full panel. However, as the Response had been dismissed and the respondents treated as if no response had been filed, EJ Porter was satisfied and held that this was an undefended claim and therefore she was able to hear the claim sitting alone without members.

Issues to be determined

15. No Rule 21 judgment has been entered. By the tribunal's letter dated 21 August 2022 the parties were notified: The Claimant will be required to prove each element of his case.

16. The issues are as set out in the Agreed List of Issues, which appears at pages 142-143 of the bundle and is set out in Appendix 1.

Orders

17. A number of orders were made for the conduct and good management of the proceedings during the course of the Hearing. In making the orders the tribunal considered the overriding objective and the Employment Tribunals Rules of Procedure 2013. Orders included the following:-

17.1. It was ordered that the hearing would proceed in the absence of the respondents, who had failed to attend and who had failed to provide any explanation for their non-attendance. It was noted that they had received notice of the hearing. Counsel for the respondent confirmed that the claimant's representatives had been in contact with Mr Keith Rudwick, a manager employed by the first respondent and who had knowledge of this claim. Mr

Rudwick had confirmed that the respondents had indicated to him that they did not intend to attend this hearing, of which they were aware;

17.2. The interpreter was therefore released.

Submissions

18. Counsel for the claimant relied upon written submissions which the tribunal has considered with care but does not repeat here.

Evidence

19. The claimant gave evidence.

20. He provided his evidence from a written witness statement, to which he made a a number of small amendments before confirming the truth of his evidence under affirmation. The claimant gave additional oral evidence.

21. A bundle of documents was presented by the claimant. References to page numbers in these Reasons are references to the page numbers in the Bundles. As part of the consideration of remedy, an additional document was provided by the claimant, prepared by his solicitors, headed "Tax Calc- Schedule of Loss", indicating the calculation of the grossing up for the award of compensation. Both the bundle and the Tax Calc- Schedule of Loss had been copied to the respondents.

Facts

22. Having considered all the evidence the tribunal has made the following findings of fact. Where a conflict of evidence arose the tribunal has resolved the same, on the balance of probabilities, in accordance with the following findings.

23. In reaching its findings the tribunal noted that the claimant was a credible witness whose evidence was, for the large part, supported by the documentary evidence.

24. The first respondent was created to develop the Royal Albert Docks in East London. The Royal Albert Docks project website describes its aim as "revitalising London's Albert Dock with a £1.7 billion, 4.7 million square foot project." This is a large-scale regeneration project in east London that is intended to enhance the local community and economy. The first respondent has around 20 employees and also a HR director.

25. Mr Wei Ping Xu (also known as Mr Xu Wei Ping) is the Chairman and director of the first respondent. Mr Xu does not speak English. He is the third Respondent. The first Respondent's CEO is Ying Xu (known as Nancy Xu) (who is the daughter of Mr Xu). She is the Second Respondent.

26. Mr Xu (the third respondent) is also the Chairman of ABP China, which is the parent company of the Respondent. While ABP China is a separate entity from the Respondent, the leadership team of ABP China (which is the Head Office operation of the Respondent's parent company) and the third respondent exert significant influence over the Respondent.

27. CITIC Construction Co Ltd ("CITIC") is a subsidiary of the CITIC Group. CITIC Group is the biggest conglomerate in China with a financial and non-financial business mix. The first Respondent's parent company is in a joint venture company in which CITIC invests.

28. The claimant is a Chartered Accountant having qualified in 1989. He was employed by the first Respondent from 15 April 2016 as a consultant and, from 1 August 2018, was employed as Finance Director. His contract of employment acknowledges that the claimant was continuously employed by the first respondent from 15 April 2016 (see page 226).

29. The claimant reported to Ms Xu (the second respondent) and was a member of the first Respondent's Senior Management Team (SMT).

30. The SMT included the claimant, the second respondent, Mr Miu, Chief Operating Officer, Neil Robinson (Director of Global Communications) and Mr Rudwick, Director of Operations, HR and Administration.

31. As Finance Director, the claimant was responsible for the finances of all the UK companies in the ABP UK group, including the first Respondent, RAD Phase 1 Devco Limited (Phase 1 Devco) (which is the company set up by the Respondent to deal with phase one of the development of the Royal Albert Docks) and the holding company for the UK group Advanced Business Park (London) Investment Holdings Limited (ABP Holdco). The first Respondent is effectively a service company with minimal activity. Its principal activities are employment of staff, lawyers, tax advisors and payment for rent for the Royal Albert Dock development project's offices. Its costs are then recharged to the other UK Group development companies, for example, Phase 1 Devco, which built the property assets, engaged contractors and professional team. Phase 1 Devco also has obligations to the lenders who have lent money for the development.

32. The first Respondent also has the rights to the remaining phases of the Royal Albert Dock development project because it is the developer under the Development Agreement with the Greater London Authority.

33. In or around November 2019, the claimant became concerned about the financial position of the first Respondent and the ABP UK Group. As a non-insolvency specialist, it was the claimant's understanding that a liquidator would determine whether or not wrongful and/or fraudulent trading had occurred after a company has undergone an insolvent winding up, and in making that determination the liquidator will assess the directors' conduct during the period

between the time when business could be no longer be viable and the liquidator's appointment.

34. As both a Chartered Accountant and Finance Director the claimant held the genuine and reasonable belief that it was important for him to highlight the risks that the first Respondent's directors, and other directors in the group, were running with respect to insolvency, wrongful trading and fraudulent trading in the UK. He held the honest and genuine belief that continuing to trade while being unsure about whether the company was able to pay debts as they fell due put the UK companies, including the first Respondent, in the zone of insolvency requiring specialist insolvency advice to be taken up. The claimant held the honest and genuine belief that this was a very serious matter for the directors, and that the directors were likely to break insolvency law obligations unless they followed his advice.

35. The claimant had a number of conversations with Ms Xu and sent emails to her, expressing his concern about funding, unpaid creditors and the risk of insolvency. The claimant held the honest and genuine belief that there was a lack of acknowledgment or concern by the first Respondent, its directors and its shareholders of the need to ensure that sufficient funding was always in place and, as a result, there was a significant likelihood that the required funding would not be in place and, if this occurred, the Respondent would be in breach of its contractual and other legal obligations, including becoming insolvent and would be likely to be engaging in wrongful trading.

PID 1

36. On 15 November 2019 the claimant sent to the second respondent an email about the risk of insolvency in the absence of adequate funding from the first Respondent's shareholders (see pages 356 to 361). In that email the claimant set out:

36.1. Detailed information about the financial state of the group of companies including monetary figures demonstrating potential insolvency;

36.2. His concern that

"You are also aware that any of the overdue creditors (owed more than £750) can serve ABP London or Phase 1 Devco with a Winding Up Petition at any moment – even today.

This means that the shareholders (ie ABP China and/or CITIC) must provide immediate cash funding if the ABP London group is to continue to trade, and I have written to you separately on this point.。

Despite the above, the business is still trying to commit to new expenditure.

Today as an example I have been provided with two urgent file submissions:

- Car insurance for V Class, Bentley & Rolls Royce - £11,628

- Floor boxes for the Altitude building to enable an event - £4,416

Unless we know where the money is coming from we cannot commit to this expenditure as we already owe too much money. Frankly we do not have the funds to operate the business.

In the absence of that funding, or even an indication of when or how much that funding will be, the UK business must STOP making further commitments because it is insolvent - it cannot settle its liabilities as they fall due.

If this is the case, you as CEO and a Director have a duty to inform the Board and the shareholders – ie ABP China and CITIC. They must decide what to do next – ie provide the necessary funding, or call in the Administrators.

36.3. A Chinese translation of his words.

PID 2

37. On 6 December 2019, the claimant submitted a board paper to the second respondent on the first Respondent's solvency issues and recommending that urgent action be taken (see pages 362 to 385). The board paper was subsequently issued to the Board in Chinese (see pages 363 to 375). The paper set out detailed information relating to the current financial position of the respondent company and detailed the seriousness of the insolvency position facing the first Respondent, in that in relation to Phase 1 Devco, there were insufficient funds to pay the Respondent's debts as and when they fell due. The board paper also stressed the uncertainty as to when sufficient funds would arrive from the first Respondent's parent company (ABP China). In particular, the paper identified that there was likely to be a breach of UK insolvency laws in the absence of provision for sufficient shareholder funding from ABP China. The paper also identified the risk for individual directors during periods of insolvency – the risk of being faced with a charge of wrongful trading and/or fraudulent trading and becoming personally liable for the company's debts. The report identified the need to take specialist insolvency advice in order to avoid or mitigate that risk.

PID 3

38. On 16 December 2019, the claimant sent an e-mail to Ms Yang (effectively the CEO of ABP China), copying in the second respondent, with a draft email addressed to the second respondent and the CITIC UK finance representative, to be sent to the third respondent and the directors of the Respondent's UK companies (including Phase 1 Devco, Holdco) including the CITIC director. The draft email detailed the seriousness of the insolvency position facing the first Respondent, Phase 1 Devco and Holdco. In this email to Ms Yang the claimant sought permission to issue the draft email to the Board (see pages 386 to 388). The draft email detailed over £2,157,526 of outstanding unsecured UK creditors and stated: "To date the [Respondent's] finance team have been providing excuses to suppliers as a way of 'buying time' for ABP/CITIC to find the funds to keep the ABP London business solvent. The team have now run out of excuses. We are now at the stage where suppliers

are taking action against ABP London and Phase 1 Devco….' The email also provided examples of creditors who had reached the end of their patience and were about to take different forms of legal action to recover outstanding debts owed by the first respondent and other companies within the group. The email detailed the need to pay employees wages and the first respondent's inability to pay. The claimant made a request for £1.5 million of emergency funding.

39. On or around 17 December 2019, the second respondent told the claimant not to send this email to the Board because they had already received many previous emails and reports from the claimant about the Respondent's insolvency and they were getting annoyed.

PID 4

40. On 20 January 2020, the claimant emailed the second respondent about the need for senior lenders' consent in relation to the proposed intra-group sale and leaseback of properties at the Royal Albert Dock (ABP Investment Deal) that were a fundamental part of the senior lenders' security package. Amongst other reasons, lenders' consent is required because the structuring of these transactions assumed that the lenders would not receive 100% of the sale proceeds in spite of the sale of their pledged assets (see pages 389 to 390). The email includes the following:

> Pritchard have given an undertaking to the Senior Lenders to pass all sale proceeds to the Revenue Collection Account, and she would need to confirm to the bank that all proceeds have been received. This means that Sharpe Pritchard will not be able to complete these transactions without formal Lenders Consent unless 100% (ie not 87.5%) of the sale proceeds have been received at completion without deductions for rent in advance etc."

41. As the pledged assets were to be mortgaged to Hang Seng bank, the Claimant was conveying a concern that a mortgage loan would have been raised under false pretences unless Hang Seng were fully aware of the situation. The Claimant further highlighted this concern by stating:

> "I have been asked by Helena not to speak to the lawyers about Lenders Consent for the ABP Investment transaction."

42. Helena Zheng (PA to the Chairman and the CEO) asked the claimant not to discuss this issue with the Respondent's lawyers (Sharpe Pritchard). The claimant was genuinely concerned that assets which were already pledged to the Chinese banking syndicate were about to be mortgaged to another bank (Hang Seng Bank) under false pretences.

43. The claimant informed the second respondent by e-mail of Ms Zheng's instruction not to discuss lenders' consent with the lawyers. The claimant never received a response from the second respondent, verbal or otherwise, contradicting this instruction .

44. The claimant was genuinely concerned that the Respondent was at serious risk of breaching its legal obligations towards its lenders and running

the risk of fraudulently mortgaging pledged assets. The claimant disclosed these concerns on many occasions. His concerns were ignored. This culminated in the claimant emailing John Miu (Chief Operating Officer) on 11 March 2020 (page 406) setting out information relating to the sale and leaseback, his concerns about a possible breach of legal obligations and that his concerns were being ignored.

45. A decision was made that Ms Zheng and Marco Wang (ABP China's in-house lawyer) take over the claimant's responsibility to instruct the Respondent's lawyers, Sharpe Pritchard, on these sale and leaseback transactions. Mr Miu informed the claimant of this decision, which is clearly evidenced by the documentary evidence – Ms Zheng asking for copies of the documentation for herself and Marco Wang (page 391), and Marco Wang engaging in correspondence with the solicitors (page 391). Ms Zheng, as a PA, had no legal, financial or commercial experience. Mr Wang was based in China acting for the purchaser in the sale and leaseback transaction. Sharpe Pritchard wrote to the claimant and the second respondent to confirm that they could not take instructions from either Ms Zheng or Mr Wang (see pages 395 to 396).

PID 5

46. On 10 and 14 February 2020, the claimant emailed Ms Yang again to address insolvency matters including the risk that the Greater London Authority could terminate the Development Agreement with the Respondent due to the Respondent's insolvency and what appeared to the claimant to be attempts by Ms Yang to take over some of his role regarding payments (see pages 398 to 400). These emails were copied to the second respondent and other members of management. In his e-mail to Ms Yang on 10 February 2020 the claimant states

> "supplier creditors totalling £3,225,512 including £1,396,627 that has been outstanding for more than 90 days .... I confirm that the existing cash balance of £475,000 is not enough to enable the ABP London Project to continue to the end of February without increased risk of legal action and/or the ability to manage the business in any meaningful way. I would suggest that at least £2,000,000 is provided immediately to enable this."

and that there was a significant risk of losing the development rights to phases 2-6 of the development because

> "The risk of the GLA giving notice to terminate the Development Agreement for reason of insolvency is therefore very high".

47. For a period of several months from the claimant's email of 15 November 2019 alerting the second respondent to the risk of insolvency, (see paragraph 36 above), the second respondent and the parent company, ABP China, excluded the claimant from correspondence relating to various transactions, ignored his advice and prevented the claimant from instructing Sharpe Pritchard, the first Respondent's solicitors.

48. On 28 February 2020, the claimant had a face to face meeting with Mr Xu, the third respondent, in ABP's offices at Building 1000, Dockside Road, London. His PA (Ms Zheng) acted as translator as Mr Xu does not speak English. Neither Mr Xu nor Ms Zheng took notes during the meeting. At the meeting, Mr Xu made it clear that he wanted the claimant to leave the business by the end of March 2020 and that he was going to be replaced with a Chinese Finance Director. His replacement was apparently still in China but due to arrive in the UK in March 2020. This meeting was prior to the UK lockdown as a result of the coronavirus pandemic.

49. Prior to the meeting, the claimant prepared the spreadsheet titled 'Exit Payment' (page 417) which he emailed to Keith Rudwick (Director of HR, Operations & Administration) and copied to the second respondent and Mr Miu on 12 March 2020 (see paragraph 53 below) because the claimant believed that the third respondent was looking for ways to bring about the claimant's dismissal, because the claimant had been raising concerns about insolvency and the need for lenders' consent for the ABP Investment Deal. The claimant suspected that the meeting had been called to dismiss him, and if that was the case then the claimant wanted to make sure that the third respondent was aware of the first respondent's contractual obligations to the claimant.

50. During the meeting on 28 February 2020:

50.1. The claimant was not dismissed. He was not given notice of termination;

50.2. the claimant reminded the third respondent that if the third respondent was to seek to terminate the claimant's employment, the claimant was entitled to six months' notice as well as the KPI and Landmark payments.

50.3. The third respondent said that he also wanted to have the claimant's services on an ad hoc consultancy basis and that he was willing to do a 'deal' covering notice and payment of the claimant's bonuses. Mr Xu stated that they would need to meet again to discuss matters further.

51. Mr Xu remained in the UK until around July 2020. There was no follow-up meeting as suggested. The claimant continued in employment. He did not receive notice of termination until the dismissal letter dated 11 September 2020 (see paragraph 76 below).

52. On 6 November 2019, the claimant sent the latest draft of his CV from his work email address to his personal email address because he was thinking of leaving the Respondent. He had serious concerns that the Respondent and the project were insolvent and his concerns about cashflow and funding were being ignored. The claimant did not resign.

53. Following the meeting on 28 February 2020, the claimant was concerned that Mr Xu, the third respondent, might decide to attempt to dismiss him in the

near future, potentially without paying his notice period or the bonuses he was due. He therefore emailed Mr Rudwick and copied in Ms Xu and Mr Miu on 12 March 2020 (pages 415 to 416). In that email, the claimant set out his belief that he would have grounds for bringing a claim if the Chairman dismissed him. Incorrectly, the claimant used the expression constructive dismissal instead of unfair dismissal. He now realises that constructive dismissal is where someone resigns and he meant to state he had an unfair dismissal claim. The claimant suggested the correct way to terminate his contract, believing that was what the Respondent wanted, and set out proposals for a settlement agreement. The email also stated "It was agreed that we would meet again to discuss an agreement, but so far no meeting has taken place." The claimant concluded the email by asking how to progress the matter. The claimant received no response to this email. He was not told, either verbally or in writing, that his employment had been terminated at the meeting on 28 February 2020.

PID 6

54. On 2 April 2020, the claimant emailed Neil Robinson (Director of Global Communications), Mr Rudwick, Mr Miu and Ms Xu (all members of the SMT) stating that the Respondent owed £3.2 million to suppliers, including £2 million that had been overdue for more than 90 days with "only £298,434 in the bank account". He also raised concerns over the crystallisation of the threat of legal action from suppliers. He also highlighted the directors being liable for wrongful trading in light of the Respondent's cash flow issues and suggested that solvency was discussed at the next SMT meeting (page 418).

55. There were no subsequent SMT meetings arranged by Ms Xu until the claimant left employment on 11 September 2020.

56. By email and letter dated 15 April 2020 the first Respondent offered to put the claimant on furlough leave or to accept redundancy (see pages 421 to 426). The claimant did not sign and return a copy of the letter dated 15 April 2020 and the issues of furlough and/or redundancy were not pursued with him further. The claimant continued to act as Finance Director.

PID 7

57. On 24 April 2020, the claimant's solicitors wrote to Ms Xu, outlining various concerns (including in relation to whistleblowing and race discrimination) and raising a grievance on the claimant's behalf (see pages 506 to 511). The letter expressed concerns over the UK Group's solvency including potentially wrongfully trading, not paying suppliers and not obtaining the lender's consent in relation to the intra-group leaseback and sale transactions. The letter includes the following:

> On 16 December 2019, our client emailed Liming Cui (Finance Assistant and Translator, and copied to Ms Xu) with a draft email to be translated and send to Mr Xu and the directors of Phase 1 Devco (including CITIC) regarding the seriousness of the insolvency position facing ABP, Phase 1 Devco and ABP Holdco and there being a breach of UK insolvency laws and the responsibilities of directors in such regard. Our client specifically mentions he is concerned that

> ABP is wrongfully trading and recommended that specialist insolvency advice be sought.
> Our client was told by Ms Xu not to send this email to the board because they had already received many previous emails and reports from our client about ABP's insolvency and they were getting annoyed.
> On 20 January 2020, our client emailed ABP China on the need for lenders' consent in relation to the proposed ABP investment and Strawberry Star sale and leaseback transactions. Amongst other reasons lenders' consent is required because these transactions assume that the lenders will not receive 100% of the sale proceeds despite the sale of pledged assets. On behalf of the CEO and ABP China, our client was asked by Helena Zheng (PA to the CEO) not to discuss this with ABP lawyers. In doing so, our client was concerned that ABP was going to breach its legal obligations towards the lenders. Our client disclosed his concerns on many occasions, which as they were apparently being ignored culminated in him emailing Mr Miu on 11 March 2020 (see below).
>
> ... On 11 March 2020, our client emailed Mr Miu asking him to pass on our client's concerns regarding the lenders' consent to ABP China. Our client did so as he was concerned that the issues he was raising were being ignored.
>
> On 12 March 2020, our client emailed Mr Rudwick (copied to Mr Miu and Ms Xu) raising his concerns about his meeting with the Chairman on 28 February 2020 when it was made abundantly clear that the Chairman wanted our client out of ABP within a month and that he was making arrangements for his replacement. Our client also explained that the meeting followed months where ABP and ABP China had chosen to deliberately exclude our client from correspondence relating to various transactions including the ABP investment deal, ignored his advice, and prevented him in instructing Sharpe Pritchard, ABP's legal counsel. Our client stated his belief that these provided ample grounds for a claim for constructive dismissal.
>
> The letter then set out the details of the breaches of obligations against the Claimant giving rise to the following claims: whistleblowing detriment/automatic unfair dismissal; race discrimination; constructive unfair dismissal; and breach of contract/unlawful deduction from wages

58. This letter included a data subject access request in accordance with the Data Protection Act 2018, requiring copies of the claimant's HR record and copies of all emails and WeChat messages between the Mr Xu, Mr Miu, Ms Xu, Mr Rudwick, Ms Yang and Mr Wang in relation to the claimant's employment. None of this information has been provided.

PID 8

59. On 1 May 2020, in light of a significant amount of unpaid liabilities, suppliers threatening and actually taking legal action to collect their debts and the lack of sufficient cashflow to meet these liabilities, the claimant wrote to Ms Xu reminding her about her responsibilities as a director when trading whilst insolvent (see pages 435 to 439). The claimant stated "I believe that there is now a very real danger that the [Respondent] is trading whilst insolvent and that

the company directors are directly exposed to the implications of wrongful and/or fraudulent trading. With this comes the direct risk of civil and criminal sanctions". The claimant recommended that his email should be sent to CITIC for its information and insolvency advice be obtained as a matter of urgency.

60. The email was ignored.

61. On 15 July 2020, Mr Rudwick invited the claimant to a grievance meeting on either 17 or 20 July 2020 via Zoom (see pages 440 to 441). The claimant's solicitors replied on the claimant's behalf to confirm his willingness to attend such a meeting, noting that further information was required from the Respondent prior to the meeting. It was therefore suggested that the meeting be postponed until the Respondent provided the requested information (see pages 515 to 516). The requested information has never been received by the claimant. The grievance hearing was not rescheduled and did not take place.

62. From December 2019 until the claimant's dismissal, ABP China had a practice of transferring from China just enough cash for the Respondent to pay salaries, some (but not all) loan obligations and the most urgent suppliers who had taken legal action. At the point of the claimant's dismissal, there remained a significant amount of long overdue UK supplier invoices together with unsettled loan obligations totalling some £69.9 million (see the summary ABP loan default schedule at page 342 (which is a document prepared by the claimant following various default letters being received in August and September 2020). Despite the claimant's advice and warnings of the risks entailed in failing to meet its obligations, the Respondent and other UK ABP companies continued to arrange credit with suppliers (e.g. security guards, lawyers etc), and then failed to meet their legal obligations to them, which resulted in them having to make threats, take legal action or withdraw their services.

63. Following demands for payment directed to the claimant (as Finance Director) from various suppliers of the Respondent and other group companies, and in the absence of sufficient cashflow, the claimant replied to the suppliers via email (copying in Ms Xu) making it clear that he had no authority to make payments and that the suppliers should liaise directly with Ms Xu. Examples include emails on 12 August 2020 to WTP (see pages 459 to 460) and on 10 September 2020 to Sharpe Pritchard (see pages 491 to 492).

64. Following the constant receipt of threats of winding up petitions, county court judgments and bailiff demands, the claimant wrote directly to Ms Xu (sometimes including Ms Yang in China) advising her to make immediate payment to the supplier to prevent the supplier taking further action.

PID 9 A & B

65. By email dated 21 August 2020 the claimant informed the second respondent that RAD Phase 1 Devco Ltd (one of the UK ABP companies) owed a named company £32,111.14 in relation to overdue invoices and late payment penalties. The email states:

"They are now about to commence the process of seeking the wind up of Phase 1 Devco unless they receive a firm proposal for payment by instalments.." (see page 468).

66. By email dated 24 August 2020 the claimant advised the second respondent of action being taken in relation to outstanding office rent (see page 472). The e-mail relates to bailiffs arriving to get payment of long outstanding rent and states:

> "I refer to the Enforcement Notice issued by One Source on behalf of Newham Council. It appears that the bailiffs actually arrived at the offices in order to remove equipment up to the value of the outstanding rent which appears to be £160,223"

The claimant stated that if the bailiffs took the servers and IT equipment then it "would mean that ABP was no longer operational".

The Claimant also attached a previous email thread (dated 28.07.2020 – 24.06.2020), copied to Nancy Xu, in which he warned of the threat of legal action in relation to outstanding rent and provided a Legal Action Tracker excel spreadsheet which detailed legal actions taken by 11 suppliers who were owed collectively £1,018,636. The actions taken include threats to shut off electricity supply, legal letters, statutory demands, enforcement action, and CCJ and wind-up petition threats.

67. Default notices were received from banks on numerous occasions. As Finance Director, the claimant continued to receive correspondence from the lenders relating to the Respondent's loan defaults. The claimant passed all of these onto Ms Xu and raised further concerns about the solvency of the Respondent.

PID 10

68. On 10 August 2020, the claimant emailed the second respondent attaching correspondence from the Bank of China, which reserved its right to make senior loans immediately repayable as Phase 1 Devco was late in paying £24.7 million to the senior lenders (see page 455). The email states:

> " Please remember that the lenders have the right to step in, appoint a receiver, and take control of APB's Beijing property security to ensure payment. Please also be aware that the any action taken by the lenders to secure their payment following default could trigger termination clauses in the DA allowing GL A to start the process of terminating the Development Agreement."

69. On 17 August 2020, the Respondent recruited a Chinese speaking person called Qi Lu in a senior finance role, who was planned to replace Dong Fang as Financial Controller (whose contract had not been extended). Despite being the Finance Director and responsible for the finance department, the claimant was excluded from the recruitment of Ms Lu and the decision not to extend Mr Fang's contract.

70. Following Ms Lu's arrival, on 19 August 2020, the claimant was asked by Mr Rudwick to provide Ms Lu with support and guidance during the transitional period as she took over the role from Mr Fang, particularly as Mr Fang was due to leave within two weeks.

71. The claimant then requested Ms Lu's CV and it became apparent that she did not have the experience to fulfil the role. After two or three weeks trying to fulfil her role, the claimant believes that Ms Lu resigned and Mr Fang's contract as Financial Controller was extended. This information was concealed from the claimant.

72. After raising his disclosures of information and concerns about non-payment of outstanding debts and insolvency the claimant was effectively excluded from the Respondent's finance operations and strategy, with Mr Fang, Financial Controller, doing his best to fulfil the role. The claimant continued to try to fulfil his role as Finance Director to the extent that the Respondent allowed him to do so. For example, the claimant entered into detailed liaison with a potential new investor who could rescue the Royal Albert Dock project (see claimant's email to Mr Miu on 21 August 2020 at page 465). The claimant also tried to get the Royal Albert Dock site accepted by the NHS as a COVID pandemic Nightingale Hospital (see emails to Ms Xu and others on 20 April 2020 at page 427).

73. The claimant never received a response from Ms Xu or ABP China with respect to the potential investor or the NHS solution.

PID 11

74. The claimant continued to raise concerns and deal with requests for payment of outstanding liabilities and the consequence of non-payment. CITIC's lawyers had sent a number of letters to companies within the UK ABP Group requiring immediate payment of outstanding liabilities totalling £45m. In an email to Ms Xu (copied to Mr Xu) on 9 September 2020 (see page 486) the claimant stated:

" Yesterday CITIC's lawyers sent a series of letters to the various ABP companies and Dauphin requiring immediate payment of various significant liabilities within two days - ie tomorrow, otherwise they will take further steps which could lead to the winding up of the companies."

The claimant attached a copy of one of the letters from CITIC's lawyers.

75. Following the meeting on 28 February 2020 the claimant was not invited to attend any meeting to discuss the respondent's concerns about the claimant's suitability for the role and/or any concerns that the relationship of trust and confidence was breaking or had broken down.

76. On 11 September 2020, the claimant received a letter (the dismissal letter) from Mr Rudwick, Director of Operations, HR & Administration, terminating his employment with effect from 15 September 2020 (see page 493). The letter stated that

> "the Company has come to the view that your remaining in your position as Finance Director is no longer tenable…..
>
> Having sought to resolve the concerns about your suitability for the role amicably over many months, the Company now considers that the relationship of trust and confidence has irretrievably broken down…
>
> your last day of employment will be the 15th September 2020".

77. The dismissal letter did not specify which individual(s) had made the decision to dismiss on behalf of the first respondent. The claimant was not given the right to appeal against the dismissal.

78. She was his line manager. She was the CEO. She was clearly a party to the decision to marginalise and exclude the claimant from performing his role as Finance Director. She was fully aware of what was happening. She was fully aware of each of the disclosures. For the large part the disclosures of information which were sent by emails were either sent directly to her, or were sent to employees and/or workers employed in the ABP group of companies and copied to her. Disclosures of information were made to other members of the SMT. It is simply not credible that the disclosures of information to other members of the SMT were not made known to the second respondent as the CEO and the claimant's line manager. She was also party to the decision to dismiss. In her evidence to the tribunal at the Interim relief hearing she stated that she was aware that the third respondent "would be communicating the Company's decision to dismiss Mr. Williams to him on 28 February 2020. The decision to dismiss Mr. Williams was simply based on his performance and failures to carry out his duties as financial director diligently. I can confirm that the emails Mr. Williams has produced had no influence whatsoever on the 1st Respondent's decision to dismiss him." The tribunal does not accept that evidence as to the timing of the dismissal or the reason for the dismissal. However, it clearly shows that the second respondent was aware of the decision to dismiss and the reason for it. It is clear that the second respondent was, in her actions and failure to act, acting in the course of her employment.

79. Each of the second and third respondents was aware of each of the protected disclosures as they were made.

> *[The respondents have provided no satisfactory evidence as to the status of the second and third respondent within the first respondent company and their knowledge of the disclosures of information. However, the second respondent was, at the relevant time, the CEO of the first respondent, was the claimant's line manager and was a member of the SMT.. She was fully aware of each of the disclosures. For the large part the disclosures of information which were sent by emails were either sent directly to her, or were sent to employees and/or workers employed in the ABP group of companies and copied to her. Disclosures of*

information were made to other members of the SMT. It is simply not credible that the disclosures of information to other members of the SMT were not made known to the second respondent as the CEO and the claimant's line manager. The third respondent was chairman and director. He clearly took a part in the management of the first respondent's business. He was the one who decided to replace the claimant. The third respondent as chairman, director and father of the CEO, and with his position within the parent company, had a significant influence on the way in which decisions were made by and on behalf of the first respondent. He had knowledge of the disclosures of information as director and chairman of the first respondent and from his position within ABP China. It is simply not credible that the third respondent was unaware of the emails being sent to his daughter, the CEO of the first respondent of which the second respondent was chairman and director. It is simply not credible that he was unaware of emails being sent to Ms Yang, CEO of China. He was directly involved in the business of the first respondent : he made the decision to replace the claimant with a Chinese Finance Director, the respondents assert that he made the decision to dismiss the claimant. The respondents have failed to comply with the Order for Disclosure, had failed to respond to the claimant's subject access request, have failed to give evidence to this tribunal. The respondents cannot hide behind their refusal to disclose relevant documents. On balance the tribunal finds that each of the second and third respondents was aware of each of the protected disclosures as they were made.]

80. The receipt of the Respondent's termination letter on 11 September 2020 left the claimant in shock and fearful for his future, especially given the COVID pandemic. His area of expertise is the financing of major commercial office developments; he was previously the Finance Director for the Shard development. The pandemic led to the overwhelming majority of office workers working from home. The claimant held the genuine and reasonable belief that the five day working week in the office would never return, the future of office development in the UK, and his ability to find another job in his area of expertise, was uncertain.

81. Nevertheless, the claimant has taken many steps to seek employment. A schedule of his various job applications appears at page 643. He has written letters directly to potential employers, all without success (see pages 558 to 564). He has applied for roles all over the UK (and not just London) and included positions with starting salaries as low as £100,000, compared to the £165,000 he received from the first Respondent. The claimant has been informed that he has not been shortlisted for these lower paid roles because he has too much experience.

82. The claimant has made reasonable attempts to mitigate his loss by seeking other employment but, to date, has been unsuccessful. He has sought advice from various recruiters and headhunters, and as a consequence believes that it could take up to two years to obtain alternative employment. The claimant's area of expertise is the financing of major commercial office

developments, and most such projects in the south east are now on hold in view of the increase in staff working either wholly or partly from home as a result of the COVID pandemic.

83. The claimant presented the claim to the Tribunal on 18 September 2020.

84. On 27 October 2020 an Interim Relief Hearing took place before Employment Judge McLaren. The respondents were represented by counsel and instructing solicitor Beth Baird. The second respondent and Mr John Miu, Chief Operating officer were in attendance. (see Attendance note at page 31). An Interim Relief Order was made (see pages 90 to 91) including the order that:

> The respondent not being willing to re-instate or re-engage the claimant pending the determination or settlement of the complaint, an order under s130 of the Employment Rights Act 1996 is made that the contract of employment remains in force for the purposes set out in s 130(1) (a) & (b).

85. The respondents made an application for reconsideration of the Interim Relief order on the grounds that new evidence was available relating to:

(1) an argument that the Respondent had dismissed the claimant or given him notice of termination on 28 February 2020;

(2) evidence of alleged solvency to undermine C's reasonable belief in the truth of his disclosures.

86. A reconsideration hearing took place on 19 February 2021. Witness statements were provided by Beth Baird, solicitor with 3CS Corporate solicitors, and the second and third respondents. Each of the witnesses stated that the claimant had been dismissed on 28 February 2020 and that he was allowed to work a notice period of 6 months expiring on 28 August 2020. Evidence was also provided to challenge the claimant's assertion that the first respondent was insolvent and/or at risk of insolvency, that the first respondent was well-funded by its parent company.

87. Beth Baird's witness statement included the following:

> After being instructed on 20 October to respond to the Claimant's application, in the intervening period acting solicitors reviewed and considered the 11 page details of claim and sought to obtain detailed instructions from the Respondent, with a key individual in these proceedings being the Chairman of a huge corporation who doubtless was extremely busy at the time and was out of the jurisdiction. Acting solicitors also made efforts to secure and instruct counsel who would be available for the interim relief hearing at short notice and arranged conferences with that counsel. Efforts were made to search for relevant documents, which involved analysing dense financial information.
>
> Had the postponement been granted, there would have been time to adduce evidence that the notice period was given at the dismissal meeting on 28"' February 2020 and this evidence would have had an important influence on the judge's decision to make the Continuation Order. It was essential to obtain

instructions from the Chairman. However, this could not be obtained by the Respondent in the six working days between service of the application and the date of the hearing.

In the circumstances, neither acting solicitor nor counsel could make submissions about the 28"' February 2020 meeting without the full and proper instructions of the Chairman who was present at the meeting concerning the dismissal and the agreed notice.

88. The second respondent's witness statement included the following:

I confirm that in the context of Mr. Williams' dismissal, I was aware that Mr Wei Ping Xu would be communicating the Company's decision to dismiss Mr. Williams to him on 28 February 2020.

The decision to dismiss Mr. Williams was simply based on his performance and failures to carry out his duties as financial director diligently. I can confirm that the emails Mr. Williams has produced had no influence whatsoever on the 1st Respondent's decision to dismiss him.

89. The application for reconsideration was successful and the interim relief order revoked.

90. In the Grounds of Resistance, submitted on behalf of all three respondents, it was stated:

90.1. The principal reason for the Third Respondent's decision to dismiss the Claimant which was communicated to him on 28 February 2020 was that there were concerns about his performance and suitability for the role;

90.2. it is denied that the Respondent was insolvent.

90.3. Viewed with reasonable objectivity, the Claimant, (who is a chartered accountant and former Audit Senior), had access to the audited accounts and the management accounts and on any objective reading of these he could have no subjective reasonable belief that the information disclosed in the email, (i.e. that the Respondent was insolvent) had sufficient factual content and specificity to engage section 43B(1).

90.4. The Respondent had arrived at the decision to dismiss because the Claimant was not fulfilling the duties and objectives set out in his job description and was proving himself to be unsuitable for the role of Finance Director.

90.5. 75. During the course of his employment, the Claimant has repeatedly breached the provisions relating to confidentiality in his contract of employment by removing, and/or disclosing and/or

making use of company confidential information. The Respondent will say that it would have been entitled to summarily dismiss the Claimant as a result of these breaches and reserves all its rights and remedies in respect of those breaches.

91. For more than 9 months prior to his dismissal in September 2020, the claimant suffered detriment. He was excluded and prevented from doing his job, including dealing with his team. Other people were being asked to fulfil his role, but were doing it badly. The claimant was told that he was going to be replaced and Qi Lu was recruited to his team without his knowledge. He was then asked to facilitate Qi Lu joining the Respondent despite them being clearly unable to perform the role. He was left, as Finance director, to deal with a barrage of correspondence and complaints from suppliers who were blaming the claimant, as Finance Director, for their unpaid invoices. The Respondents failed to provide the claimant with any response to his concerns, failed to respond to his suggestions for further funding from the parent company to enable outstanding debts to be paid.

92. The claimant was personally and professionally embarrassed and humiliated both within the Respondent and the wider London real estate community (which in London and the south east is relatively small) by reason of the detrimental treatment and the dismissal. This created a significant level of stress leading to problems with sleeping and impacts on his mental health.

93. Since raising the various protected disclosures, the claimant had been having problems sleeping. He had recurrences of stress-related stomach pains that he used to have years ago, and his relationship with his partner of many years become strained. The claimant was shocked and distressed by the dismissal and had significant concerns about being able to find a job. He was relying on savings to fund supporting his family and legal fees.

94. The manner in which the claimant was treated by the respondents - undermining and excluding him from his role, the uncertainty as to whether he was to be dismissed, and ultimately the dismissal caused him significant stress and anxiety.

95. The letter from his GP dated 18 November 2021 at page 504 confirms the stress suffered by the claimant by reason of the dismissal and states "the stress remains and he remains under my care to help with this. I have advised him to contact Healthy Minds Bucks to help manage his emotional state."

96. The claimant was extremely shocked and upset by the respondents' application for reconsideration of the Interim Relief Order. He was very upset by the potential effect on him of the respondent's assertions that:

96.1. he had been dismissed in February 2020, an assertion that had not been made at the hearing before Employment Judge McLaren at the original Interim relief hearing on 27 October 2020;

96.2. the first Respondent was well funded by its parent company, ABP China;

96.3. he was proving himself to be unsuitable for the role of Finance Director.

The claimant was aware that judgments and reasons are published on the internet and are available for inspection by prospective employers. He believed that being accused by his former employer of lying and/or misunderstanding and/or misrepresenting the financial circumstances of the first respondent would adversely affect the claimant's ability to find other employment as a Finance director. To work as a finance director of a large public company and receive an equivalent salary package a candidate would have to come with "clean hands." The claimant was, in his words "wounded" by the questioning of the claimant's professional competence. He began to "wonder about his own sanity" and suffered a loss of confidence. He found it difficult to contemplate attending interviews and facing questions about on-line reasons which recorded allegations that he had lied to the court. The claimant had sleepless nights, worried about his sanity, the effect on his career. He suffered weight loss. The claimant tried to steady his anxiety by the knowledge that his statements about the financial affairs of the first respondent were well backed by documentary evidence. However, the respondent's failure to disclose documents led to further anxiety as the claimant was concerned that he had insufficient documentation to support his claim.

97. The respondent's detrimental treatment and the decision to dismiss him, and the likely effect of that on his future career has preyed on the claimant's mind and damaged his self-esteem.

98. In January 2021 the respondent failed to pay to the claimant wages, as ordered by the Interim Relief Order. This caused the claimant anxiety as this was his only source of income. The claimant notified Mr Rudwick by email on 28 January 2021. Mr Rudwick confirmed that all of the Respondent's employees had not been paid as it was awaiting funds from ABP China (see pages 498 to 499). He provided the claimant with a copy of the advance notice he had given the first respondent's remaining employees and stated

> "My apologies for not alerting you in advance, but on this occasion I have to say that it simply slipped my mind."

99. The claimant is concerned that the longer he is out of the workplace, the longer it will take for him to obtain a new role as he will have less recent experience than other candidates. The claimant is 58 years old with the prime age for finance directors being around 55. His age will affect his chances of finding suitable alternative employment.

100. The respondents have failed to provide to this tribunal satisfactory evidence to support their assertion that the first respondent is not insolvent or is not at risk of insolvency and is well-funded by its parent company. The

claimant has provided satisfactory evidence to counter these assertions. In particular, the claimant has provided details of 4 county court judgments registered against the first respondent totalling over £300,000, including a CCJ held by 3CS solicitors for about £35,000 of unpaid legal fees.

101. The Schedule of Loss at pages 223 to 224 sets out the claimant's financial losses following the termination of employment. He was paid his wages, pursuant to the Interim Relief Order from the termination of employment until 28 February 2021. At the termination of employment the claimant was entitled to a basic annual gross salary of £165, 000, together with benefits of private health care and pension. This is a net monthly basic salary of £8,216. The value of his private health care is £3,474.81 per year - £289.57 per month. The value of his pension is £1,375.00 per month. The tribunal accepts the figures as stated in the Schedule of Loss as supported by the documentary evidence. The claimant has received Jobseeker's allowance in the sum of £971.10.

102. The respondents did not provide the claimant with the necessary information to attend a grievance hearing, did not investigate the claimant's grievance, did not hold a grievance hearing.

103. The respondents did not follow any disciplinary procedure before terminating the claimant's employment, did not give him the right of appeal.

104. The Respondents' solicitors 3CS ceased to represent the Respondents in May 2021

The Law

105. Under s43A Employment Rights Act 1996 (ERA 1996) a protected disclosure means a qualifying disclosure (as defined by s43B) which is made by a worker in accordance with any of sections 43C to 43B.

106. A qualifying disclosure is defined in s43B as any disclosure of information which, in the reasonable belief of the worker, is made in the public interest and tends to show that:

1. a criminal offence had been, was being or was likely to be committed;

2. a person had failed, was failing or was likely to fail to comply with any legal obligation;

3. any matter falling within any one of the other five categories of relevant failure has been, or is likely to be deliberately concealed

107. A qualifying disclosure does not have to relate to a relevant failure of the employer that employs the worker making the disclosure. It may, for example, relate to the relevant failure of a colleague, a client or other third party.

108. S43(B) ERA 1996 requires a reasonable belief of the worker making the disclosure, not a genuine belief. This introduces a requirement that there should be some objective basis for the worker's belief. This was confirmed by the EAT in **Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT,** which held that reasonableness under s43B(1) involves applying an objective standard to the personal circumstances of the discloser, and that those with professional or 'insider' knowledge will be held to a different standard than laypersons in respect of what it is 'reasonable' for them to believe.

109. The fact that a worker must have a 'reasonable belief' does not mean that the worker's belief must necessarily be true and accurate. The statutory provisions require only that the information disclosed 'tends to show' that the relevant failure has occurred, is occurring or is likely to occur. It follows that there can be a qualifying disclosure of information even if the worker is wrong, but reasonably mistaken, in his or her belief. In **Darnton v University of Surrey 2003 ICR 615, EAT,** the EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as understood by the worker at the time the disclosure was made, and not on the facts as subsequently found by the tribunal.

110. For a disclosure to qualify under section 43B, the worker need only have a reasonable belief that his or her disclosure is made in the public interest.

111. Although the word 'disclosure' is not itself defined in the ERA, it is clear that the phrase 'disclosure of information' in S.43B is intended to have a wide reach and that an employee simply has to communicate the information by some effective means in order for the communication to constitute a disclosure of that information.

112. In Cave**ndish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT** the EAT stated its view, the ordinary meaning of giving 'information' is 'conveying facts'. In **Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA**, the Court of Appeal held that 'information' in the context of S43B is capable of covering statements which might also be characterised as allegations. Thus, 'information' and 'allegation' are not mutually exclusive categories of communication — rather, the key point to take away from **Cavendish Munro Professional Risks Management Ltd v Geduld** (above) was that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure. The Court of Appeal in **Kilraine** went on to stress that the word 'information' has to be read with the qualifying phrase 'tends to show' — i.e. the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in s43B(1)(a)-(f).

113. Where the disclosure is claimed to show a breach of a legal obligation under s43B(1)(b) the worker is not required to specify exactly what legal

obligation he or she has in mind so long as the nature of the legal obligation is clear. The same should apply to criminal offence disclosures under s43B(1)(a) - the worker will not be required to spell out in precise terms the criminal offence that he or she has in mind; it will suffice that he or she reasonably believes that there exists a criminal offence that covers the disclosed information.

114. S.43L(3) ERA 1996 provides that 'any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'. Accordingly, protection is not denied simply because the information being communicated was already known to the recipient.

115. Under s43C ERA 1996 a qualifying disclosure is made in accordance with this section if the worker makes the disclosure to his employer. The statutory provisions are silent on the identity of the person within the employing company or organisation to whom a disclosure should be made in order for it to be regarded as having been made to the worker's 'employer. The IDS Handbook on Whistleblowing suggests that a sensible construction would be that a disclosure made to any person senior to the worker with express or implied authority over the worker should be regarded as having been made to the employer.

116. S.103A ERA 1996 renders the dismissal of an employee automatically unfair where the reason (or, if more than one reason, the principal reason) for his or her dismissal is that he or she made a protected disclosure.

117. When faced with a case in which the claimant alleges that he or she has made multiple protected disclosures, a tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal. This was confirmed in **El-Megrisi v Azad University (IR) in Oxford EAT 0448/08,**.

118. In **Trustees of Mama East African Women's Group v Dobson EAT 0220/05** the EAT stated that establishing the reason for dismissal in a S.103A claim requires the tribunal to determine the decision-making process in the mind of the dismissing officer. This requires the tribunal to consider the employer's conscious and unconscious reason for acting as it did.

119. An employer must show the reason for dismissal and that the reason fell within one of the categories of a potentially fair reason set out in Section 98(1) and (2) Employment Rights Act 1996 ("ERA 1996").

120. An employee will only succeed in a claim of unfair dismissal under s103A ERA 1996 if the tribunal is satisfied, on the evidence, that the 'principal' reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal — Lord Denning MR in **Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA**. If the fact that the employee made a protected disclosure was merely a

subsidiary reason to the main reason for dismissal, then the employee's claim under S.103A will not be made out.

121. The employee acquires an evidential burden to show — without having to prove — that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason advanced. Once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal — **Maund v Penwith District Council 1984 ICR 143, CA**

122. The burden of proof was considered by the Court of Appeal in **Kuzel v Roche Products Ltd 2008 ICR 799, CA**. Lord Justice Mummery reiterated that the principles in **Maund v Penwith District Council** (above) apply to S.103A claims and rejected the contention that the burden of proof was on the claimant to prove that her making of protected disclosures was the reason for her dismissal. However, Mummery LJ stated that, once a tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. Mummery LJ set out essentially a three-stage approach to S.103A claims:

- first, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason

- having heard the evidence of both sides, it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or reasonable inferences, and

- finally, the tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the tribunal's satisfaction that it was its asserted reason, then it is open to the tribunal to find that the reason was as asserted by the employee. However, this is not to say that the tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not one advanced by either side.

123. Section 47B (1) ERA 1996 provides that a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his or her employer on the ground that the worker has made a protected disclosure.

124. Under S.47B (1A) ERA 1996 a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done by another worker of his or her employer in the course of that other worker's employment, or by an agent acting with the employer's authority, on the ground that the worker has made a protected disclosure.

125. In **London Borough of Harrow v Knight 2003 IRLR 140, EAT**, the Appeal Tribunal set out the requirements for a successful claim under S.47B(1):

- the claimant must have made a protected disclosure
- he or she must have suffered some identifiable detriment
- the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act
- and
- the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure

126. Lord Justice Elias confirmed in **Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA,** that the causation test for unfair dismissal is stricter than that for unlawful detriment under S.47B — the latter claim may be established where the protected disclosure is one of many reasons for the detriment, so long as the disclosure materially influences the decision-maker, whereas s103A requires the disclosure to be the primary motivation for a dismissal.

127. Section 47B (1) does not apply where the worker is an employee and the detriment complained of amounts to dismissal (within the meaning of the unfair dismissal provisions in — S.47B(2). Any such complaint instead falls under S.103A, which renders a dismissal automatically unfair if the sole or principal reason for it was that the employee made a protected disclosure.

128. The S.47B(2) exclusion only applies to a detriment that falls under S.47B(1) — i.e. a detriment to which an employee is subjected by the acts or omissions of the *employer*. Detriment under S.47B(1A) is not subject to any such restriction, meaning that fellow workers and agents of the employer can be liable to an employee for detriments amounting to the termination of the employment relationship, even where that detriment could have been pursued against the employer as an automatically unfair dismissal claim under S.103A. **Timis and anor v Osipov (Protect intervening) 2019 ICR 655, CA.** The employee can bring a dismissal as detriment claim against the individual worker who dismissed him or her under S.47B(1A) and a vicarious liability claim against the employer for that same dismissal under s47B(1B). That claim would, however, depend on establishing the worker's personal liability before the employer could be held liable.

129. The term 'detriment' is not defined in the ERA 1996, but it clearly has a broad ambit. In **Ministry of Defence v Jeremiah 1980 ICR 13, CA**, Lord Justice Brandon said that 'detriment' meant simply 'putting under a

disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL,** where it emphasised that it is not necessary for there to be physical or economic consequences to the employer's act or inaction for it to amount to a detriment. What matters is that, compared with other workers (hypothetical or real), the complainant is shown to have suffered a disadvantage of some kind.

130. A worker can only be liable for detriment if he or she acted, or deliberately failed to act, 'in the course of' his or her employment — S.47B(1A)(a).

131. So called "whistleblowing" claims have been likened in the courts to discrimination claims under the Equality Act 2010. Discrimination cases have established that whether an act takes place in the course of employment is a question of fact for the tribunal, and that the words should be construed in the sense in which every layperson would understand them.

132. For an agent of an employer to be personally liable for subjecting a worker to a detriment, he or she must have acted with the employer's authority — S.47B(1A)(b). An agent can have 'actual' authority — i.e. where the principal has either expressly granted authority to act on its behalf to the agent or appointed him or her to a position in which such authority is reasonably necessary — or 'apparent' authority. Apparent authority arises where a principal's words or conduct would lead a reasonable person in the third party's position to conclude that the agent was acting within the principal's authority, even if the principal and agent had in fact never discussed such a relationship.

133. Although there are no cases on the scope of the principal—agent relationship under S.47B(1A)(b), there is case law on the analogous provision contained in S.109(2)–(3) Equality Act, which states that discriminatory acts done by an agent for a principal, with the authority of the principal, are treated as also done by the principal, regardless of whether the act was done with the principal's knowledge or approval. **Unite the Union v Nailard 2019 ICR 28***, CA*, established that the test of authority under S.109(2) is whether the discriminator was exercising authority conferred by the principal and not whether the principal had in fact authorised the discriminator to discriminate.

134. Only an employer, and not an individual worker or agent, can be liable for an automatically unfair dismissal by reason of a protected disclosure under s103A ERA 1996 , a worker or agent may be personally liable for the dismissal of an employee or worker as a detriment under S.47B(1A) **— Timis and anor v Osipov (Protect intervening) 2019 ICR 655, CA.**

135. **Timis -v- Osipov** [2019] ICR 655 held that in an action under s.47B(1A) ERA 1996 the compensation for the detriment can include losses flowing from the resulting dismissal. **Virgo Fidelis Senior School -v- Boyle** [2004] IRLR

268 held that such losses include injury to feelings. This means that the injury to feelings award is not restricted to detriments short of dismissal.

136. **Timis -v- Osipov** held that individual workers or agents can be liable for the percentage uplift awarded for failing to use the procedures laid down in the ACAS Code of Practice under TULR(C)A 1992 s.207A

137. Wrongful trading is a civil offence under section 214 of the Insolvency Act 1986 which occurs when the company directors have continued to trade when:

- They knew, or ought to have concluded that there was no reasonable prospect of avoiding insolvent liquidation

- They did not take every step with a view to minimising the potential loss to the company's creditors

138. Fraudulent trading is a criminal offence under section 213 of the Insolvency Act 1986 which occurs when the company directors have continued to trade with a clear intent to deceive and defraud creditors

139. An award of compensation for injury to feelings may be made where a claimant has suffered detrimental treatment under s47B. The onus is on the claimant to establish the nature and extent of the injury to feelings. The amount of the award under this head should be made taking into account the degree of hurt, distress and humiliation caused to the complainant by the discrimination. The tribunal has considered the case of **Armitage Marsden & HM Prison Service -v- Johnson (1997) ICR 275** and in calculating the award for injury to feelings in this case have applied the principles as set out therein which the tribunal summarises as follows:-

1. Awards for injury to feelings are compensatory not punitive.

2. Awards should not be too low, as that would diminish respect for the policy of anti-discrimination legislation. Nor should they be so excessive as to be viewed as "untaxed riches".

3. Awards should be broadly similar to the whole range of awards in personal injury cases.

4. Tribunals should remind themselves of the value in every day life of the sum they have in mind.

5. Tribunals should bear in mind the need for public respect for the level of awards made.

140. The tribunal has also considered the case of **Alexander -v- The Home Office [1998] IRLR 190 CA** wherein the Court of Appeal said that the level of injury to feelings awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the (Race Relations)

Act gives the effect. On the other hand awards should not be excessive because this does almost as much harm to the same policy.

141. Compensation for injury to feelings may include an added element of aggravated damages where the respondent has behaved in a high-handed, malicious or oppressive manner in committing the discriminatory act. **Alexander -v- The Home Office** (supra). ***In*** **Commissioner of Police of the Metropolis v Shaw 2012 ICR 464, EAT**, Justice Underhill identified three broad categories of case:

- where the manner in which the wrong was committed was particularly upsetting. This is what the Court of Appeal in Alexander meant when referring to acts done in a 'high-handed, malicious, insulting or oppressive manner'

- where there was a discriminatory motive — i.e. the conduct was evidently based on prejudice or animosity, or was spiteful, vindictive or intended to wound. Where such motive is evident, the discrimination will be likely to cause more distress than the same acts would cause if done inadvertently; for example, through ignorance or insensitivity. However, this will only be the case if the claimant was aware of the motive in question — an unknown motive could not cause aggravation of the injury to feelings, and

- where subsequent conduct adds to the injury — for example, where the employer conducts tribunal proceedings in an unnecessarily offensive manner, or 'rubs salt in the wound' by plainly showing that it does not take the claimant's complaint of discrimination seriously.

142. Features of mitigation, including the proffering of an apology, should be taken into account in assessing the level of aggravated damages. **Armitage, Marsden & HM Prison Service -v- Johnson (supra)**

143. The presence of high-handed conduct will not necessarily be enough, on its own, to lead to an award of aggravated damages. As the authorities cited previously make clear, aggravated damages are compensatory, not punitive. This means that there must be some causal link between the conduct and the damage suffered if compensation is to be available. In **HM Prison Service v Salmon 2001 IRLR 425, EAT,** the EAT made it clear that 'aggravated damages are awarded only on the basis, and to the extent, that the aggravating features have increased the impact of the discriminatory act or conduct on the applicant and thus the injury to his or her feelings'.

144. The tribunal has considered the decision and guidance given by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police (No.2) [2003] IRLR 102** and the updates to the amount recommended to be awarded for the three levels of award. The Court of Appeal confirmed that in carrying out an assessment of compensation tribunals should have in mind the summary of

the general principles on compensation for no-pecuniary loss by Smith J in Armitage v Johnson (above). The Court of Appeal observed: Three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric or similar personal injury, can be identified:

1) The top band. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the grounds of sex or race. Only in the most exceptional cases should an award of compensation for injury to feelings exceed the top limit.

2) The middle band should be used for serious cases, which do not merit an award in the highest band.

3) Awards of lesser sums are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence.

145. There is within each band considerable flexibility allowing tribunals to fix what is considered to be fair, reasonable and just compensation in the particular circumstances of the case. Regard should also be had to the overall magnitude of the sum total of the awards of compensation for non-pecuniary loss made under the various headings of injury to feelings, psychiatric damage and aggravated damage. In particular double recovery should be avoided by taking appropriate account of the overlap between the individual heads of damage. The extent of overlap will depend on the facts of each particular case.

146. The tribunal notes the formal revision of these bands in the case of Da'Bell v NSPCC 2010 IRLR 19 and the Presidential Guidance which states:

> In respect of claims presented on or after 6 April 2020, the Vento bands shall be as follows: a lower band of £900 to £9,000 (less serious cases); a middle band of £9,000 to £27,000 (cases that do not merit an award in the upper band); and an upper band of £27,000 to £45,000 (the most serious cases), with the most exceptional cases capable of exceeding £45,000.

147. Case law recognises that the fact that a claimant has brought successful discrimination proceedings may put him in a disadvantaged position on the job market. In **Chagger –v- Abbey National Plc 2010 IRLR 47** the Court of Appeal held that the original employer must remain liable for so called stigma loss. The position is not altered by the fact that the actions of the third party employers are unlawful. It can be very difficult for an employee to make good his suspicions that he is subject to unlawful victimisation /discrimination and he ought not to be criticised for being reluctant or unwilling to devote the time, money and stress necessary to advance that claim. The stigma problem for a claimant is relevant to the question of how long it will be before a job can be found. A Tribunal should take a sensible and robust approach to the question of compensation. Plainly it would be wrong to infer that the employee will in future suffer from wide spread stigma simply from his assertions to that effect

or because he is suspicious that this might be the case. Where there is very extensive evidence of attempted mitigation failing to result in a job a Tribunal is entitled to conclude that whatever the reason the employee is unlikely to obtain future employment in the industry.

148. In **Wardle –v- Credit Agricole Corporate and Investment Bank 2011 IRLR 604** the Court of Appeal held that it will be a rare case where it is appropriate for a Court to assess compensation over a career life time, but that is not because the exercise is in principle too speculative. If an employee suffers career loss it is incumbent on the Tribunal to do its best to calculate the loss albeit that there is a considerable degree of speculation. It cannot lie in the mouth of the employer to contend that because the exercise is speculative the employee should be left with smaller compensation than the loss he actually suffers. The job of the Courts is to compensate for loss actually suffered. It was wrong to assess future loss of earnings on a percentage chance of returning to equivalent earnings at a later date. The cut off point for future earnings is when the prospects of an equivalent job with equivalent earnings would have been greater than 50%.

149. The tribunal has considered the duty of the claimant to mitigate his loss and notes that:

149.1. It is the duty of the claimant to act in mitigation of his loss as a reasonable man unaffected by the hope of compensation from his former employer;

149.2. The onus is on the former employer to show that the claimant had failed in his duty to mitigate his loss

150. An award of damages or other compensation will generally be calculated on the basis of the net loss to the claimant, after deduction of the income tax which he would have been required to pay in the absence of the relevant wrong **(British Transport Commission v Gourley [1956] AC 185, HL).** So account has to be taken in calculation of the damages or compensation of the incidence of tax on the excess over £30,000, the threshold under s403 Income Tax (Earnings and Pensions) Act 2003 (ITEPA).

151. Where more than one respondent is found liable for the same act of unlawful discrimination, the employment tribunal is entitled to make an award for compensation on a joint and several basis. The tribunal has considered the race discrimination case of **London Borough of Hackney v Sivanandan and ors 2011 ICR 1374, EAT,** in which Mr Justice Underhill noted that the practice of apportioning liability was not uncommon and had met with the approval of the EAT in **Prison Service and ors v Johnson 1997 ICR 275, EAT.** Nevertheless, he considered that it lacked any clear legal basis. In Mr Justice Underhill's view, joint and several liability should be the norm when a claimant has suffered discrimination from multiple respondents and the damage caused by that discrimination is indivisible. He distinguished this case of indivisible damage from others where there is a rational basis for demarcating the damage caused by one tortfeasor from that caused by another, as, for example, in the

case of successive divisible discriminatory acts contributing to the damage suffered by the claimant. If the employer and employee are jointly liable, there is, on ordinary principles, no basis for apportionment. Underhill went on to state that tribunals should, in future, only make 'split awards' between respondents in respect of the same loss if such an order is positively sought by one of the parties and if the basis for such an award is clearly demonstrated. On appeal Lord Justice Mummery by implication, endorsed Underhill P's guidance on the limited circumstances when split awards should be made by stating that the EAT's judgment constituted a 'lucid analysis of the law'. **London Borough of Hackney v Sivanandan and ors 2013 ICR 672, CA.** The judgment **in Way and anor v Crouch 2005 ICR 1362, EAT,** was overruled as authority for the proposition that tribunals should focus on apportioning loss for which employer(s) and employee(s) are concurrently liable.

152. A complaint that a worker has been subjected to a detriment for making a protected disclosure must be presented to an employment tribunal before the end of the period of three months, beginning with the date of the act or failure to act to which the complaint relates, or, where the act or failure to act is part of a series of similar acts, the last such act or failure to act — S.48(3)(a) ERA.

153. A tribunal has the power to extend the time limit for a reasonable period if it is satisfied that it was not reasonably practicable for the complaint to have been presented in time — S.48(3)(b).

154. Where an act extends over a period of time, the date on which it will be deemed to have been done for the purposes of calculating when the time limit begins to run is the last day of that period — S.48(4)(a). Where there has been a deliberate failure to act, the time limit will begin to run on the date when the deliberate failure to act was 'decided' on — S.48(4)(b). In the absence of evidence to the contrary, an employer will be taken to decide on a failure to act when it does an act inconsistent with doing the failed act. If no inconsistent act is done, then the employer will be taken to have decided on a failure to act when the period expires within which it might reasonably have been expected to do the failed act if it was to be done — S.48(4)(b).

155. In **Flynn v Warrior Square Recoveries Ltd 2014 EWCA Civ 68, CA,** the Court of Appeal stressed the need for tribunals to identify with precision the act or deliberate failure to act that is alleged to have caused detriment when considering whether an act/omission extended over a period of time for the purposes of S.48(4)(a). It is a mistake in law to focus on the detriment and whether the detriment continued.

156. It is noted that the concept of 'a series of similar acts' for the purpose of S.48(3)(a) is distinct from that of an act extending over a period of time in the context of S.48(4)(a). In **Arthur v London Eastern Railway Ltd (t/a One Stansted Express) 2007 ICR 193, CA,** the Court of Appeal held that S.48(3)(a) could cover a situation where the complainant alleges a number of acts of detriment by different people where, on the facts, there is a connection between the acts or failures to act in that they form part of a 'series' and are 'similar' to one another. It may not be possible to characterise the

circumstances as an act extending over a period within the scope of s48(4) by reference, for example, to a connecting rule, practice, scheme or policy; but, in Lord Justice Mummery's words, 'there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them'. Such a link might be established by considering whether the acts had all been committed by fellow employees or, if not, what connection there was between the alleged perpetrators, or whether the acts were organised in any way. It would also be relevant to inquire why the perpetrators did what was alleged.

Determination of the Issues

157. This includes, where appropriate, any additional findings of fact not expressly contained within the findings above but made in the same manner after considering all the evidence.

158. The first issue is whether the claimant made a protected disclosure.

PID 1

159. On 15 November 2021 the claimant sent an e-mail to the second respondent setting out detailed information about recent financial transactions and the financial status of the respondent company (see paragraph 36 above). This email did convey facts, did contain sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996, namely that a criminal offence was being or was likely to be committed, that the first respondent had failed, was failing or was likely to fail to comply with its legal obligations. The email did not specify the criminal offence – fraudulent trading, it did not refer specifically to wrongful trading. However, this was a disclosure of information, which contained information to support the claimant's stated belief that the UK business must stop making further commitments because it was insolvent - it could not settle its liabilities as they fall due.

160. The claimant believed that the information tended to show that:

160.1. A criminal offence – fraudulent trading due to cashflow insolvency – was being committed or was likely to be committed; and

160.2. A person had failed, was failing or was likely to fail to comply with legal obligations – namely

160.2.1. Breaches of contractual obligations to pay liabilities as and when they fall due.

160.2.2. Potential wrongful trading due to cashflow insolvency.

160.2.3. the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

161. That belief was reasonably held. It is clear that the claimant had a good knowledge of the financial affairs of the first respondent company and other companies within the group and that his duties as finance director included reporting on the company's financial situation including cash flow and the ability to pay debts as they fell due.

162. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

163. The claimant believed that the disclosure was in the public interest, that any possible wrongful trading carried out by the first Respondent would affect a significant part of the public including UK suppliers of goods and services (who would be unsecured creditors in the event of insolvency) and the shareholders and stakeholders in the banks that have loaned hundreds of millions of pounds to the first Respondent. The first Respondent is leading a large-scale regeneration project in east London that is intended to enhance the local community and economy. This may have been jeopardised by any unlawful actions of the three respondents. Other companies and individuals with a stake in the Royal Albert Docks project may have been adversely affected by the insolvency of the first respondent.

164. The belief of the claimant was reasonable one. The first respondent had a significant part to play in the success of a public project - the revitalising of London's Albert Dock. The potential insolvency of the first respondent was likely to have a significant adverse effect on completion of the project, the other companies involved in the project, and the first respondent's creditors.

165. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith. The claimant had genuine concerns about the information he was disclosing, the potential insolvency and the possibility of wrongful and fraudulent trading. His concerns were founded on the information received by him in the performance of his duties as finance director.

PID 2

166. On 6 December 2019, the claimant submitted a board paper to the second respondent on the first Respondent's solvency issues and recommending that urgent action be taken (see pages 362 to 385 and paragraph 37 above). The paper set out detailed information relating to the current financial position of the respondent company and detailed the seriousness of the insolvency position facing the first Respondent.

167. This email did convey facts, did contain sufficient factual content to be capable of tending to show tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996, namely that a criminal offence was being or was likely to be committed, that the first respondent had failed, was failing or was likely to fail to comply with its legal obligations. The paper identified the risk for individual directors during periods of insolvency of being faced with a charge of wrongful trading and/or fraudulent trading and becoming personally liable for the company's debts. This was a disclosure of information, which contained information to support the claimant's stated belief that the UK business was facing insolvency and must take action to avoid the risk of fraudulent and/or wrongful trading.

168. The claimant believed that the information tended to show that:

168.1. A criminal offence – fraudulent trading due to cashflow insolvency – was being committed or was likely to be committed; and

168.2. A person had failed, was failing or was likely to fail to comply with legal obligations – namely

168.2.1. Breaches of contractual obligations to pay liabilities as and when they fall due.

168.2.2. Potential wrongful trading due to cashflow insolvency.

168.2.3. the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

169. That belief was reasonably held. It is clear that the claimant had a good knowledge of the financial affairs of the first respondent company and other companies within the group and that his duties as finance director included reporting on the company's financial situation including cash flow and the ability to pay debts as they fell due.

170. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

171. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

172. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

173. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

PID 3

174. On 16 December 2019, the claimant emailed the CEO of ABP China, copying in the second respondent, with a draft email addressed to the second respondent and the CITIC UK finance representative, to be sent to the third respondent and the directors of the Respondent's UK companies (including Phase 1 Devco, Holdco) including the CITIC director. The draft email detailed the seriousness of the insolvency position facing the first Respondent, Phase 1 Devco and Holdco. In this email the claimant sought permission to issue the draft email to the Board). The draft email detailed over £2,157,526 of outstanding unsecured UK creditors ((see pages 386 to 388 and paragraph 38 above). This email did convey facts, did contain sufficient factual content to be capable of tending to show tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's stated belief that the UK business must stop making further commitments because it was insolvent - it could not settle its liabilities as they fall due.

175. The claimant believed that the information tended to show that:

175.1. A criminal offence – fraudulent trading due to cashflow insolvency – was being committed or was likely to be committed; and

175.2. A person had failed, was failing or was likely to fail to comply with legal obligations – namely

175.2.1. Breaches of contractual obligations to pay liabilities as and when they fall due.

175.2.2. Potential wrongful trading due to cashflow insolvency.

175.2.3. the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

176. That belief was reasonably held for the same reasons as set out in relation to PID 1 and 2 above.

177. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager, who was copied in to the email. This was a disclosure to the claimant's employer, the first respondent.

178. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

179. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

180. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

PID 4

181. On 20 January 2020, the claimant emailed the second respondent about the need for senior lenders' consent in relation to the proposed intra-group sale and leaseback of properties at the Royal Albert Dock (ABP Investment Deal) that were a fundamental part of the senior lenders' security package. (see pages 389 to 390 and paragraph 40 above). This email did convey facts, did contain sufficient factual content to be capable of tending to show tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's stated belief that there was a potential fraud, that the UK Group were likely to breach their legal obligations to lenders, and potential concealment, that is, a desire to hide the fact that lenders consent was required.

182. The claimant believed that the information tended to show that:

182.1. A criminal offence was being committed or was likely to be committed – potential fraud. If the mortgage loan was raised without Hang Seng bank being aware that the mortgaged assets were already pledged to another bank, the Claimant considered that this was likely to be fraudulent.

182.2. Legal obligations – the UK group were likely to breach their legal obligations to the lenders if they progressed with the sale & leaseback transactions without lenders consent, and likely a breach of the obligations to Hang Seng bank for not disclosing the pledged nature of the mortgage assets;

182.3. Concealment – there seemed to the Claimant to be a desire to hide the fact that lenders consent was required for the sale of the pledged properties presumably so that Hang Seng's lawyers were not alerted.

183. That belief was reasonably held for the same reasons as set out in relation to PID 1 and 2 above. Further the claimant, in his role as Finance Director, was aware of legal obligations of the first respondent and group of companies relating to the sale and lease-back arrangement.

184. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

185. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

186. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

187. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

PID 5

188. On 10 and 14 February 2020, the claimant emailed Ms Yang again to address insolvency matters including the risk that the Greater London Authority could terminate the Development Agreement with the Respondent due to the Respondent's insolvency and what appeared to the claimant to be attempts by Ms Yang to take over some of his role regarding payments (see pages 398 to 400 and paragraph 46 above). These emails were copied to the second respondent and other members of management. These emails did convey facts, did contain sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's stated belief that there was a potential fraudulent trading, that the UK Group were likely to breach their legal obligations to lenders, and potential further breaches of legal obligations, wrongful trading and/or fraudulent trading.

189. The claimant believed that the information tended to show that:

189.1. A criminal offence was being committed or was likely to be committed – potential fraudulent trading due to balance sheet and cashflow insolvency

189.2. Legal obligations – A person had failed, was failing or was likely to fail to comply with legal obligations – namely:

189.2.1. Breaches of contractual obligations to pay liabilities as and when they fell due.

189.2.2. Potential wrongful trading due to balance sheet and cashflow insolvency.

189.2.3. The Claimant was concerned that the UK group would breach further legal obligations, wrongful

trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

190. That belief was reasonably held for the same reasons as set out in relation to PID 1 and 2 above.

191. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager, who was copied in to the email. This was a disclosure to the claimant's employer, the first respondent.

192. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

193. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

194. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

PID 6

195. On 2 April 2020, the claimant emailed Neil Robinson (Director of Global Communications), Mr Rudwick, Mr Miu and Ms Xu (all members of the SMT) stating that the Respondent owed £3.2 million to suppliers, including £2 million that had been overdue for more than 90 days with "only £298,434 in the bank account".(see page 418 and paragraph 54above). These emails did convey facts, did contain sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's belief that there was a potential fraudulent trading, that the UK Group were likely to breach their legal obligations to lenders and potential wrongful trading.

196. The claimant believed that the information tended to show that:

196.1. A criminal offence was being committed or was likely to be committed – potential fraudulent trading due to balance sheet and cashflow insolvency

196.2. Legal obligations – A person had failed, was failing or was likely to fail to comply with legal obligations – namely:

196.2.1. Breaches of contractual obligations to pay liabilities as and when they fell due.

196.2.2. Potential wrongful trading due to balance sheet and cashflow insolvency.

196.2.3. The Claimant was concerned that the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

197. That belief was reasonably held for the same reasons as set out in relation to PID 1 and 2 above.

198. The disclosure was made member of the respondent's SMT, including the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

199. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

200. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

201. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

PID 7

202. On 24 April 2020, the claimant's solicitors wrote to Ms Xu, outlining various concerns (including in relation to whistleblowing and race discrimination) and raising a grievance on the claimant's behalf (see pages 506 to 511 and paragraph 57 above). This letter did convey facts, did contain sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's belief that there was a potential fraudulent trading, that the UK Group were likely to breach their legal obligations to lenders , potential wrongful trading and likely breaches of employment law obligations.

203. The claimant believed that the information tended to show that:

203.1. A criminal offence was being committed or was likely to be committed – potential fraudulent trading due to balance sheet and cashflow insolvency

203.2. Legal obligations – A person had failed, was failing or was likely to fail to comply with legal obligations – namely:

203.2.1. Breaches of contractual obligations to pay liabilities as and when they fell due.

203.2.2. Potential wrongful trading due to balance sheet and cashflow insolvency.

203.2.3. The Claimant was concerned that the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

203.2.4. Employment law obligations owed to the Claimant.

203.3. Concealment – there seemed to be a desire to hide the fact that lenders consent was required for the sale of the pledged properties presumably so that Hang Seng's lawyers were not alerted.

204. That belief was reasonably held for the same reasons as set out in relation to PID 1 and 2 above. Further the claimant had taken legal advice and held the reasonable belief that there had been a breach of his rights as an employee.

205. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

206. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1. The tribunal accepts that the claimant did raise breaches of his own personal contract of employment. However, the vast majority of the disclosure of information relates to the conduct of the business, not the personal affairs of the claimant. Further, the claimant held the belief that the entire email was in the public interest.

207. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1. In relation to the allegation of breach of employment rights the belief that it was in the public interest to disclose the information was reasonable. It is in the public interest if Finance Directors of companies involved in such a large public project allege that they have been unfairly treated as a whistleblower, as a disclosure of information tending to show that the company was at risk of insolvency.

208. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal set out in relation to PID 1. The claimant had his own knowledge of financial affairs and did not make the disclosure of information relating to the alleged breach of employment obligations until after he had received legal advice.

PID 8

209. On 1 May 2020, financial accounts showed a significant amount of unpaid liabilities, suppliers threatening and actually taking legal action to collect their debts and that there was a lack of sufficient cashflow to meet these

liabilities. As a result, the claimant wrote to Ms Xu reminding her about her responsibilities as a director when trading whilst insolvent (see pages 435 to 439 and paragraph 59 above.) This email did convey facts, did contain sufficient factual content to be capable of tending to show tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's stated belief that the UK business must stop making further commitments because it was insolvent - it could not settle its liabilities as they fall due.

210. The claimant believed that the information tended to show that:

210.1. A criminal offence – fraudulent trading due to cashflow insolvency – was being committed or was likely to be committed; and

210.2. A person had failed, was failing or was likely to fail to comply with legal obligations – namely

210.2.1. Breaches of contractual obligations to pay liabilities as and when they fall due.

210.2.2. Potential wrongful trading due to cashflow insolvency.

210.2.3. the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

211. That belief was reasonably held. It is clear that the claimant had a good knowledge of the financial affairs of the first respondent company and other companies within the group and that his duties as finance director included reporting on the company's financial situation including cash flow and the ability to pay debts as they fell due.

212. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

213. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

214. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal set out in relation to PID 1.

PID 9 A and B

215. By email dated 21 August 2020 the claimant informed the second respondent that RAD Phase 1 Devco Ltd (one of the UK ABP companies) owed a named company £32,111.14 in relation to overdue invoices and late payment penalties and that the named company was about to start winding up proceedings (see page 468 and paragraph 65 above). This email did convey facts, did contain sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's belief that there was a potential fraudulent trading, that the UK Group were likely to breach their legal obligations to lenders , that there was potential wrongful trading due to balance sheet and cashflow insolvency, that the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

216. By email dated 24 August 2020 the claimant advised the second respondent of action being taken in relation to outstanding office rent (see page 472 and paragraph 66 above). The Claimant also attached a previous email thread (dated 28.07.2020 – 24.06.2020), copied to Nancy Xu in which he warned of the threat of legal action in relation to outstanding rent and provided a Legal Action Tracker excel spreadsheet which detailed legal actions taken by 11 suppliers who were owed collectively £1,018,636. This email did convey facts, did contain sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's belief that there was a potential fraudulent trading, that the UK Group were likely to breach their legal obligations to lenders , that there was potential wrongful trading due to balance sheet and cashflow insolvency, that the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

217. The claimant believed that the information tended in these emails and attachments to show that:

217.1. A criminal offence – fraudulent trading due to cashflow insolvency – was being committed or was likely to be committed; and

217.2. A person had failed, was failing or was likely to fail to comply with legal obligations – namely

217.2.1. Breaches of contractual obligations to pay liabilities as and when they fall due.

217.2.2. Potential wrongful trading due to cashflow insolvency.

217.2.3. the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

218. That belief was reasonably held for the same reasons as set out in relation to PID 1 and 2 above.

219. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

220. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

221. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

222. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

PID 10

223. On 10 August 2020, the claimant emailed the second respondent attaching correspondence from the Bank of China, which reserved its right to make senior loans immediately repayable as Phase 1 Devco was late in paying £24.7 million to the senior lenders (see page 455 and paragraph 68 above).

224. This email did convey facts, did contain sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's belief that there was a potential fraudulent trading, that the UK Group were likely to breach their legal obligations to lenders , that there was potential wrongful trading due to balance sheet and cashflow insolvency, that the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

225. The claimant believed that the information tended in these emails and attachments to show that:

225.1. A criminal offence – fraudulent trading due to cashflow insolvency – was being committed or was likely to be committed; and

225.2. A person had failed, was failing or was likely to fail to comply with legal obligations – namely

225.2.1. Breaches of contractual obligations to pay liabilities as and when they fall due.

225.2.2. Potential wrongful trading due to cashflow insolvency.

225.2.3. the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

226. That belief was reasonably held for the same reasons as set out in relation to PID 1 and 2 above.

227. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

228. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

229. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

230. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

PID 11

231. The claimant continued to raise concerns and deal with requests for payment of outstanding liabilities and the consequence of non-payment. CITIC's lawyers had sent a number of letters to companies within the UK Group requiring immediate payment of outstanding liabilities totalling £45m. In an email to Ms Xu (copied to Mr Xu) on 9 September 2020 advised Ms Xu and Mr Xu of the letters and the possible consequence (see page 486 and paragraph `74 above).

232. This email did convey facts, did contain sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA 1996. This was a disclosure of information, which contained information to support the claimant's belief that there was a potential fraudulent trading, that the UK Group were likely to breach their legal obligations to lenders , that there was potential wrongful trading due to balance sheet and cashflow insolvency, that the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

233. The claimant believed that the information tended in these emails and attachments to show that:

233.1. A criminal offence – fraudulent trading due to cashflow insolvency – was being committed or was likely to be committed; and

233.2. A person had failed, was failing or was likely to fail to comply with legal obligations – namely

233.2.1. Breaches of contractual obligations to pay liabilities as and when they fall due.
233.2.2. Potential wrongful trading due to cashflow insolvency.

233.2.3. the UK group would breach further legal obligations, wrongful trading and/or fraudulent trading if the UK companies continued to trade whilst insolvent.

234. That belief was reasonably held for the same reasons as set out in relation to PID 1 and 2 above.

235. The disclosure was made to the second respondent, the CEO of the first respondent and the claimant's line manager. This was a disclosure to the claimant's employer, the first respondent.

236. The claimant believed that the disclosure was in the public interest for the same reason as set out above in relation to PID 1.

237. The belief of the claimant was reasonable one – for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

238. [Relevant to remedy] The claimant, in making the disclosure did not act in bad faith- for the same reasons as the tribunal sets out its finding on this point in relation to PID 1.

239. Each of the disclosures of information, identified as PID 1-11 in the Schedule of disclosures (page 1145-159) and in the paragraphs above is a protected disclosure within the meaning of s43A ERA 1996.

Unfair dismissal

240. The claimant was dismissed and the effective date of termination was 15 September 2020. The tribunal accepts the evidence of the claimant and finds that the claimant was not dismissed, was not given notice of dismissal at the meeting on 28 February 2020. The third respondent gave a clear indication that the claimant was going to be replaced at some point in the future. However, no express words of dismissal were used. The claimant continued to work for the first respondent. He was not working out his notice period. He continued to work for more than 6 months after the meeting on 28 February 2020. Although the claimant entered into limited discussion about a compensation package for the indicated future termination of his employment, no agreement was reached, the claimant did not resign. The only express words of dismissal, the only notice of termination received by the claimant, was Mr Rudwick's dismissal letter of 11 September 2020 (see page 493 and paragraph 76 above), terminating the claimant's contract of employment on 15 September 2020. That dismissal letter makes no reference to a decision to dismiss having been made more than 6 months earlier. It makes no reference to the claimant working out his notice period.

241. The next issue is what was the reason for dismissal.

242. The claimant had more than two years' service. The first respondent has failed to establish the reason for dismissal. The Response was dismissed (see paragraph 13 above). No evidence has been heard from, or on behalf of, the first respondent at this hearing.

243. There are facts from which it can be inferred that the reason for the dismissal was the series of protected disclosures made from 15 November 2019. On or around 17 December 2019, the second respondent told the claimant not to send his email dated 16 December 2019 to the Board because they had already received many previous emails and reports from the claimant about the Respondent's insolvency and they were getting annoyed (see paragraph 39 above). Following the making of the protected disclosures the claimant was excluded from carrying out the full extent of his duties as Finance Director, he was told that he was going to be replaced at the meeting on 28 February 2020. He was excluded from management of the first respondent as no SMT meetings were held after April 2020 and appointments were made within the finance team without his approval or acknowledgment. There is no satisfactory evidence that the first respondent had genuine concerns about the claimant's ability to conduct his role as Finance Director – either before or after the making of the protected disclosure. The evidence is clear that the respondents reacted badly to the series of protected disclosures made by the claimant from 15 November 2019 to 9 September 2020 and this culminated in his dismissal. In all the circumstances the tribunal is satisfied and finds that the making of the protected disclosures, taken as a whole, was the principal reason for dismissal.

244. The claim under section 103A ERA 1996 is well founded.

Detrimental treatment

245. The next question is whether there was any detrimental treatment of the claimant.

246. Having considered the agreed List of Issues (see Appendix 1) the tribunal finds that

246.1. Helena Zheng did tell the claimant on or about 20 January 2020 that he could not discuss matters that were relevant to his role with the first respondent's lawyers;

246.2. A decision was taken that Helena Zheng and Marco Wang (ABP China in-house lawyer) take over the Claimant's responsibility to instruct the Respondent's lawyers Sharpe Pritchard on sale and leaseback transactions;

246.3. The third respondent did seek to have the claimant replaced as Finance Director;

246.4. From about 24 April 2020 the second respondent and others from ABP China began to exclude the claimant from important correspondence;

246.5. There was an attempt on or around 15 April 2020 to put the claimant on furlough;

246.6. The claimant's data subject access request, submitted on 24 April 2020, was ignored;

246.7. the first respondent ignored the claimant's requests for information made by his solicitors on 15 July 2020;

246.8. The first respondent failed to investigate the Claimant's grievance and failed to hold a grievance hearing;

246.9. The first respondent appointed Ms Lu to a senior finance role on 17 August 2020 without consulting the claimant;

246.10. The first respondent did prior to 17 August 2020 refuse to extend the Finance Controller's contract without consulting the claimant;

246.11. The first respondent did dismiss the claimant

247. It is clear that, from December 2019, after the claimant made his first protected disclosures the Board was "getting annoyed" and the third respondent, by 28 February 2020 had decided that he was going to replace the claimant. From that time onwards the claimant was prevented from carrying out his full duties as Finance Director, his advice was ignored, decisions were taken as to employment within the Finance department without his input, other employees, workers and or agents were given some of the claimant's duties. All of these acts and/or failures to act placed the claimant at a disadvantage. He was the Finance director of the first respondent, which had a big part to play in a major public enterprise - revitalising London's Albert Dock. He was left trying to resolve claims for payment of outstanding debts, his requests for funding were ignored, despite his repeated reports to the first and second respondent of the serious consequences for the first respondent and the directors if there was a finding of insolvency.

248. The next question is who was responsible for this detrimental treatment.

249. The respondents have provided no satisfactory evidence as to who made the decision to act, or failure to act, in relation to each of the allegations of detrimental treatment. The respondents have provided no satisfactory evidence as to the status of the second and third respondent within the first respondent company. However, the second respondent was, at the relevant time, the CEO of the first respondent, was the claimant's line manager and was a member of the SMT. She was clearly either an employer or worker of the first

respondent. She was clearly responsible for the detrimental treatment of the claimant. She was his line manager. She was the CEO. She was clearly a party to the decision to marginalise and exclude the claimant from performing his role as Finance Director. She was fully aware of what was happening. She was fully aware of each of the disclosures. For the large part the disclosures of information which were sent by emails were either sent directly to her, or were sent to employees and/or workers employed in the ABP group of companies and copied to her. Disclosures of information were made to other members of the SMT. It is simply not credible that the disclosures of information to other members of the SMT were not made known to the second respondent as the CEO and the claimant's line manager. She was also party to the decision to dismiss. In her evidence to the tribunal at the Interim relief hearing she stated that she was aware that the third respondent "would be communicating the Company's decision to dismiss Mr. Williams to him on 28 February 2020. The decision to dismiss Mr. Williams was simply based on his performance and failures to carry out his duties as financial director diligently. I can confirm that the emails Mr. Williams has produced had no influence whatsoever on the 1st Respondent's decision to dismiss him." The tribunal does not accept that evidence as to the timing of the dismissal or the reason for the dismissal. However, it clearly shows that the second respondent was aware of the decision to dismiss and the reason for it. It is clear that the second respondent was, in her actions and failure to act, acting in the course of her employment.

250. The third respondent was chairman and director. He clearly took a part in the management of the first respondent's business. He was the one who decided to replace the claimant. The second respondent, as CEO and the claimant's line manager, was aware of the meeting between the claimant and the third respondent on 28 February 2020. It is clear that the third respondent had the actual authority to dismiss the claimant. The application for revocation of the Interim relief order was based in part on the need to take instructions from the third respondent as to what was said at the meeting on 28 February 2020. It was not stated that the third respondent was acting outside the scope of his authority. The dismissal letter does not identify the person who made the decision to dismiss. However, it is clear that the third respondent made the decision to replace the claimant in February 2020. The third respondent as chairman, director and father of the CEO, his position within the parent company had a significant influence on the way in which decisions were made by and on behalf of the first respondent. He had knowledge of the disclosures of information as director and chairman of the first respondent and from his position within ABP China. On or around 17 December 2019, the second respondent told the claimant not to send his email dated 16 December 2019 to the Board because they had already received many previous emails and reports from the claimant about the Respondent's insolvency and they were getting annoyed (see paragraph 39 above). It is simply not credible that the third respondent was unaware of the emails being sent to his daughter, the CEO of the first respondent of which the second respondent was chairman and director. It is simply not credible that he was unaware of emails being sent to Ms Yang, CEO of China. He was directly involved in the business of the first respondent: he made the decision to replace the claimant with a Chinese Finance Director, the respondents assert that he made the decision to dismiss.

The respondents have failed to comply with the Order for Disclosure, had failed to respond to the claimant's subject access request, have failed to give evidence to this tribunal. On balance the tribunal finds that each of the second and third respondents was aware of each of the protected disclosures as they were made.

251. The respondents have provided no satisfactory evidence as to who made the decisions in relation to each of the alleged acts or failures to act as listed in the agreed List of Issues.

252. However, it is clear that, as each of the decisions related to the claimant's employment, the second respondent as CEO and the claimant's line manager, would have had the authority to act. It is highly improbable that anyone else within the first respondent would have made such decisions, relating to the Finance Director and a member of the SMT, without authority from the second respondent. In these circumstances the tribunal finds that the second respondent was responsible for each of the acts and/or failures to act. The respondents have failed to provide satisfactory evidence as to whether the second respondent acted on her own or on the instruction of the third respondent. It is clear that the decision to dismiss was taken by the third respondent, that the second respondent was party to it, and that the second respondent acted on the instruction of the Board or her father when she told the claimant not to send the email to the board (see paragraph 39 above).

253. Having considered all the circumstances the tribunal agrees with the claimant's submission and finds that there was a concerted effort by the individuals within the first respondent including, in particular, the second and third respondent, to marginalise and exclude the claimant from undertaking his role and when he continued to raise his perfectly legitimate concerns in his protected disclosures those individuals took steps to bring about the claimant's dismissal. The third respondent acted as agent of the first respondent company with its actual authority. The second respondent acted in the course of her employment.

254. In all the circumstances the tribunal finds that both the second and third respondent were responsible for the detrimental treatment.

255. The claimant was subjected to the detrimental treatment by the acts and/or deliberate failure to act by the second respondent in the course of her employment and by the third respondent as an agent of the first respondent with the first respondent's authority.

256. As to the reason for the detrimental treatment the tribunal refers to its findings above in relation to the reason for dismissal. On 17 December 2019, the second respondent told the claimant not to send his email dated 16 December 2019 to the Board because they had already received many previous emails and reports from the claimant about the Respondent's insolvency and they were getting annoyed (see paragraph 39 above). By 28 February 2020 the decision had been made to replace the claimant. As a consequence, he was excluded from management of the first respondent and

prevented from carrying out his full duties as Finance Director. Each of the acts of detrimental treatment arose from the decision to marginalise the claimant, to prevent him from carrying out his full duties as Finance Director. There is no satisfactory evidence that any of the respondents had genuine concerns about the claimant's ability to conduct his role as Finance Director. The tribunal finds that the making of the protected disclosures materially influenced the actions of the second and third respondent.

257. A significant reason why the claimant was subjected to the detrimental treatment by the first and second respondent was that the claimant had made one or more protected disclosures.

258. The first respondent is vicariously liable for the actions of the second and third respondents in subjecting the claimant to this detrimental treatment.

259. Following **Timis -v- Osipov [2019] ICR 655** the second and third respondents are each liable for the detrimental treatment of dismissal and the first respondent is vicariously liable for the actions of the first and second respondent in dismissing the claimant.

260. The next issue is whether the tribunal has jurisdiction to consider the claim, having regard to the time limit provisions in s48(3) and s48(4) ERA.

261. The tribunal finds that each of the acts or failure to act is part of a series of similar acts ending with the decision to dismiss communicated to the claimant by the dismissal letter dated 11 September 2020. There was a link between the acts and failures to act, namely each was part of the decision to replace the claimant and to marginalise him, to prevent him from carrying out his duties as Finance Director. The claim was presented on 18 September 2020. It was presented in time.

262. Further, and in the alternative, the tribunal finds that there was an act extending over a period of time within the meaning of s48(4)(a) ERA 1996. There was a decision made by the second and third respondent to replace the claimant as Finance Director and to prevent him from carrying out his duties as Finance Director until that replacement was found and the claimant removed from office. Each of the acts or failures to act were part of the practice, scheme or policy to replace the claimant and remove him from office. The period ended with the decision to dismiss communicated to the claimant on 15 September 2020. The respondent has failed to provide satisfactory evidence as the date the decision to dismiss was made but it was clearly quite soon before the decision was communicated to him by the dismissal letter in which Mr Ruddick comments "Having sought to resolve the concerns about your suitability for the role amicably over many months, the Company **now** considers that the relationship of trust and confidence has irretrievably broken down…" The tribunal therefore finds that the decision to dismiss was made within a few days before the dismissal letter was sent.

263. The claim was therefore presented in time under s48(4)(a) ERA 1996.

264. The claim under s47B ERA 1996 is well-founded.

Remedy – Detrimental treatment

265. **Timis -v- Osipov** [2019] ICR 655 held that in an action under s.47B(1A) ERA 1996 the compensation for the detriment can include losses flowing from the resulting dismissal. **Virgo Fidelis Senior School -v- Boyle** [2004] IRLR 268 held that such losses include injury to feelings. This means that the injury to feelings award is not restricted to detriments short of dismissal.

266. **Timis -v- Osipov** held that individual workers or agents can be liable for the percentage uplift awarded for failing to use the procedures laid down in the ACAS Code of Practice under TULR(C)A 1992 s.207A

267. The respondents did fail to follow the ACAS Code of Practice by failing to investigate and determine the claimant's grievance. No meetings were held. The respondents failed to the follow the ACAS Code of Practice by failing to hold any disciplinary hearings before informing the claimant of its decision to dismiss and failed to provide him with the opportunity to appeal. These failures were part of the decision by the second and third respondent to marginalise the claimant and to bring about the termination of employment. The grievance was presented on behalf of the claimant by a firm of solicitors. It was addressed to the second respondent. Mr Rudwick, HR director, was made aware of the grievance and responded initially be inviting the claimant to a grievance hearing. However, the information requested by the claimant for the grievance hearing was not provided and the grievance procedure was not progressed any further. It is simple not credible that the third respondent was unaware of the grievance, given the serious matters raised in it by the Finance Director and that it raised matter relevant to the third respondent's decision to replace the claimant. The decision to dismiss was made by the third respondent. The second respondent was party to that decision. The dismissal letter was sent to the claimant by Mr Rudwick, HR director. It is simply not credible that the HR director would not have advised the second and third respondents about the need for compliance with the ACAS procedure. In any event, the respondents cannot rely on any ignorance of the law. The respondents clearly obtain legal advice as and when it suits them. The appropriate uplift is 25%.

Financial Losses

268. The claimant has mitigated his loss. He has made many efforts to find alternative work, without success. He was paid his wages under the terms of the Interim Relief Order until 1 March 2021. His financial losses from then until the date of the hearing are:

01.03.2021- 26.11.2021 say 9 months x £8,216 = £73,944

269. The claimant remains unemployed. The tribunal accepts the evidence of the claimant and finds that there are very few opportunities for similar employment at the moment because of the impact of the Covid-19 Pandemic. It is likely that the opportunities will continue to be very limited for at least the

next two years while the marketplace adjusts to changes in the need for developments of the kind in which the claimant specialises. The claimant's age may also be an impediment to him finding alternative work and the longer that he is out of work the greater that impediment will be. There is a risk that the claimant will suffer considerable disadvantage in seeking future work from the fact that he was employed as the Finance Director on a very high profile development where the developer has failed to pay its liabilities in full and on time. It may be difficult for the claimant to find other work as he is a whistleblower and the Respondents have pursued unsupported allegations that the claimant was dismissed for conduct and/or performance issues. The respondents have failed to respond to requests for documentation, have failed to respond to a Subject Access Request, have failed to comply with an Order for Disclosure of documents. It is more likely than not that the respondent will fail to reply to any request for a reference. In all the circumstances the tribunal agrees with the claimant and finds that it is likely to take the claimant at least two more years to find a suitable alternative position. His future loss of earnings is calculated as follows:

269.1. Future loss of earnings from 27.11.21 to 26.11.23 24 months x £8,216 = £197,184.00

269.2. Future loss of benefits from 27.11.21 to 26.11.23 24 months x £1,664.57 = £39,949.68

Injury to feelings

270. In determining the appropriate band in the Vento guidelines the tribunal has considered the guidelines, all the circumstances of the case and the effect that the detrimental treatment has had on the claimant, including the dismissal. The tribunal notes that the course of conduct of the second and third respondents, for which the first respondent is vicariously liable, resulted in the claimant being marginalised and excluded from his role, being told he was being replaced, a person being recruited to his team without his knowledge but then asked to facilitate their joining, his concerns being ignored, having to deal with complaints from unpaid suppliers and, ultimately, dismissed. The detrimental treatment and the impact on the claimant lasted for a period of more than 9 months prior to his dismissal. The claimant suffered distress and anxiety as the result of the course of detrimental treatment both in the period leading up to his dismissal and as a result of dismissal. He still suffers from stress and anxiety. In all the circumstances the tribunal agrees with counsel for the claimant that the award should fall in the top end of the middle Vento band and the tribunal awards the sum of £27,000.00

Aggravated damages

271. The subsequent conduct of the respondents has added to the injury suffered by the claimant. The respondents have conducted the tribunal proceedings in an unnecessarily oppressive and high handed manner. It challenged the interim relief order in part on false evidence that a decision to dismiss had been made in February 2020, and that the first respondent was not

at risk of insolvency and was well-funded by the parent company. The evidence as to the date of dismissal was clearly wrong, has not been supported by any satisfactory evidence, and clearly flies in the face of the dismissal letter, which makes no reference whatsoever to the decision to dismiss having been taken in February 2020, no reference to the allegation that the claimant had been working out his notice period since then. The claimant has adduced documentary evidence to show that the respondent did have financial problems, was at risk of insolvency. The 4 CCJ for outstanding debts of approximately £300,000 indicates that the first respondent is unable to pay its debts as they fall due and is not well funded by the parent company. The claimant was very upset by the revocation of the Interim relief Order as it left him with no income and reliant upon savings for the living costs of himself and his family and legal fees. In the proceedings the respondent raised wholly unsubstantiated allegations relating to the conduct and/or performance of the claimant. This had a significant detrimental impact on the claimant as he was concerned that any prospective employer would see the allegations on the public documents and he would struggle in the future to obtain alternative employment at the same level. The claimant was, in his words "wounded" by the questioning of the claimant's professional competence. He began to "wonder about his own sanity" and suffered a loss of confidence. He found it difficult to contemplate attending interviews and facing questions about on-line reasons which recorded allegations that he had lied to the court. The claimant had sleepless nights, worried about his sanity, the effect on his career. He suffered weight loss. The claimant tried to steady his anxiety by the knowledge that his statements about the financial affairs of the first respondent were well backed by documentary evidence. However, the respondent's failure to disclose documents led to further anxiety as the claimant was concerned that he had insufficient documentation to support his claim. In January 2021 the respondent failed to pay to the claimant wages, as ordered by the Interim Relief Order. This caused the claimant anxiety as this was his only source of income. The claimant notified Mr Rudwick by email on 28 January 2021. Mr Rudwick's response confirmed that all of the Respondent's employees had not been paid but they had received advance notice. Mr Rudwick's comment ("My apologies for not alerting you in advance, but on this occasion I have to say that it simply slipped my mind.") indicates a lack of concern for a former colleague on the SMT.

272. In all the circumstances the tribunal finds that the manner in which the respondents have conducted these proceedings has increased the impact of the detrimental treatment on the claimant and thus the injury to his feelings. The tribunal awards the additional sum of £25,000.00 of aggravated damages as claimed by the claimant, noting that this is roughly equivalent to three months earnings.

273. The claimant did not act in bad faith. No reduction should be made to the award of compensation.

274. There is no satisfactory evidence to support the assertion that there was a chance that the claimant would have suffered the same loss in any event. It is not appropriate to reduce the award.

275. The compensation exceeds £30,000.00 and must be grossed up in accordance with the Gourley principle. The tribunal accepts the accuracy of the grossing up figures prepared on behalf of the claimant by his solicitors which appears in the document headed "Tax Calc – Schedule of Loss" which has been copied to the respondents and is not repeated here.

276. The tribunal therefore orders that each of the respondents is liable to pay to the claimant compensation in the sum of £ 754,380.97 (gross) for the detrimental treatment under s47B Employment Rights Act 1996. Each of the respondents is jointly and severally liable for payment to the claimant of this sum. The claimant has suffered discrimination from each of the respondents and the damage caused by that discrimination is indivisible.

Remedy – unfair dismissal

277. The claimant was unfairly dismissed by the first respondent which is ordered to pay to the claimant compensation calculated as follows:

277.1. Basic Award. The claimant had 6 complete years' service and was aged 57 years at the effective date of termination. He earned in excess of the statutory cap of £538 per week.

277.1.1. 6 x £538.00 = £3,228.

277.2. Compensatory award:

277.2.1. Loss of statutory rights £500

278. The compensatory award does not include compensation for loss of earnings because this was included in the order for compensation under s47B Employment Rights Act 1996. The claimant is not entitled to double recovery.

279. The claimant did not contribute to his dismissal by blameworthy conduct It would not be just and equitable to award no compensation, or reduced compensation, on the basis of the claimant's alleged conduct as set out in paragraph 75 of the grounds of resistance. There is no satisfactory evidence to support the assertion in paragraph 75 that, during the course of his employment, the claimant repeatedly breached the provisions relating to confidentiality in his contract of employment by removing, and/or disclosing and/or making use of company confidential information. The basic award should not be reduced on the basis of the claimant's conduct.

Employment Judge Porter

1 November 2022

Appendix 1

AGREED LIST OF ISSUES

References

C - The claimant
Rs/R1 etc - The respondents
ERA - Employment Rights Act 1996
EqA - Equality Act 2010
TURLCA - Trade Union and Labour Relations (Consolidation) Act 1992

Protected disclosures

The alleged protected disclosures relied on by C, and relevant details in relation to each of them, are set out in the attached schedule.

1. In the case of each alleged protected disclosure:

a. Did C make a disclosure of information?
b. Did C believe that that information tended to show:

i. that a person had failed, was failing, or was likely (in the sense of likelier than not) to fail to comply with a legal obligation to which that person was subject; or
ii. that a criminal offence had been committed, was being committed or was likely (in the sense of likelier than not) to be committed; or
iii. that information tending to show any matter falling within one of the preceding paragraphs had been, was being or was likely (in the sense of likelier than not) to be deliberately concealed?

c. If so, was that belief reasonably held?

d. Was the disclosure made to R1?
e. If the disclosure was not made to R1

i. did C believe that the relevant failure related solely or mainly to the conduct of a person other than R or to any other matter for which a person other than R1 had legal responsibility;
ii. if so, was that belief reasonably held;
iii. if so, did C make the disclosure to that other person?

f. Did C believe that making the disclosure was in the public interest? The public interest relied on by C is set out in paragraph 46 of the amended details of claim.

g. If so, was that belief reasonably held?

h. In making the disclosure, did C act in bad faith? (NB: this issue is relevant only to remedy).

Unfair dismissal

2. Was the reason, or if more than one the principal reason, for C's dismissal that he had made one or more protected disclosures? If so, his dismissal is automatically unfair (s103A ERA).

3. If not, was the reason, or principal reason, for C's dismissal a potentially fair reason? The reason relied on by R1 is C's performance and lack of suitability for the role of Finance Director, as set out in paragraphs 4.3(e), 5.7, 32, 58.1, 58.3 and 71 of the grounds of resistance, as a reason relating to the conduct of C within the meaning of s98(2)(b) ERA, alternatively as a reason relating to his capability (s98(2)(a) and s98(3)(a) ERA) or as some other substantial reason (s98(1)(b) ERA).

4. Did R1 act reasonably or unreasonably in treating that reason as a sufficient reason to dismiss C?

Whistleblowing detriment

5. Was the Claimant subjected to any of the following alleged detriments:

a. Helena Zheng telling C on or about 20 January 2020 that he could not discuss matters that were relevant to his role with Rs' lawyers;

b. A decision that Helena Zheng and Marco Wang (ABP China in-house lawyer) take over the Claimant's responsibility to instruct the Respondent's lawyers Sharpe Pritchard on sale and leaseback transactions

c. R3 seeking to have C replaced as Finance Director;

d. From about 24 April 2020 R2 and others from ABP China began to exclude C from important correspondence;

e. R1 attempting from about 15 April 2020 to put C on furlough;

f. R1 ignoring C's data subject access request which was submitted on 24 April 2020;

g. R1 ignoring C's requests for information made by his solicitors on 15 July 2020;

h. R1 failing to investigate the Claimant's grievance or hold a grievance hearing

i. R1 appointing Ms Lu to a senior finance role on 17 August 2020 without consulting C;

j. R1 prior to 17 August 2020 refusing to extend the Finance Controller's contract without consulting C;

k. R1 dismissing C.

6. In the case of each alleged detriment:

a. Was the Claimant subjected to it by any act or any deliberate failure to act by R1, R2, R3, another worker of R1 in the course of that other worker's employment or by an agent of R1 with R1's authority?

b. Was a significant reason why C was subjected to that detriment by the respondent in question that he had made one or more protected disclosures?

c. Does the tribunal have jurisdiction to consider the claim, having regard to the time limit provisions in s48(3) and s48(4) ERA?

Remedy

7. What declarations if any should be made?

8. What recommendations if any should be made?

9. What loss has C suffered?

10. Has C taken all reasonable steps to mitigate his loss?

11. If C's claim of automatically unfair dismissal fails, should the amounts which have been paid pursuant to the continuation order made by the tribunal on 11 November 2020 be taken into account in assessing compensation for any heads of claim which do succeed?

12. In the absence of the unlawful conduct in question, was there a chance that C have suffered the same loss in any event? (*Polkey* / *Chagger*)

13. Unfair dismissal: did C contribute to his dismissal by blameworthy conduct?

14. Would it be just and equitable to award no compensation, or reduced compensation, on the basis of C's alleged conduct as set out in paragraph 75 of the grounds of resistance?

15. Should any basic award be reduced on the basis of C's conduct?

16. Should any award be increased or reduced, and if so by how much, pursuant to s207A TULRCA on the grounds that a party has

unreasonably failed to follow an applicable provision of the ACAS Code of Practice?

17. In the case of the claims for whistleblowing detriment: what if any injury to feelings has C suffered?

18. In the case of whistleblowing claims: was any protected disclosure made in bad faith?

19. What if any award of interest should be made?