Case Number: 3306575/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Charles Macdonald	**v**	Milton Keynes Development Partnership LLP

Heard at: Cambridge

On: 31 October and 1, 2, 3, 4 and 7 November 2022
In Chambers: 7 November 2022

Before: Employment Judge Tynan

Members: Mr C Grant and Mr C Davie

Appearances
For the Claimant: Mr J Ratledge, Counsel
For the Respondent: Mr A Burns, Leading Counsel
Mr M Bignell, Counsel

JUDGMENT

1. The Claimant's various complaints pursuant to section 48 of the Employment Rights Act 1996 that he was subjected to detriments in contravention of section 47B of the Employment Rights Act 1996 are dismissed on the grounds that the Tribunal has no jurisdiction to consider them, his Claim having been presented out of time in circumstances where it was reasonably practicable for the Claim to be presented within the primary time limit applicable to those complaints.

2. The Claimant's complaint that his dismissal was automatically unfair pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

3. The Claimant's complaint that he was unfairly dismissed contrary to section 98 of the Employment Rights Act 1996 succeeds.

4. For the reasons set out in the Tribunal's conclusions below, the final amount of any *Polkey* deductions will be determined at the Remedy Hearing.

REASONS

5. The Claimant presented his Claim to the Employment Tribunals on 6 May 2021, following Acas Early Conciliation between 24 February 2021 and 7 April 2021. He complains that he was subjected to various detriments and then dismissed on the grounds and by reason that he made protected disclosures to Milton Keynes Council ("the Council"). He complains, in the alternative that his dismissal was unfair pursuant to section 98 of the Employment Rights Act 1996 ("ERA 1996").

6. The issues in the case were identified and agreed at a case management hearing on 19 January 2022. On the fifth day of the Final Hearing the issues were simplified and clarified by Counsel by way of an agreed updated List of Issues. However, in his closing skeleton and submissions on behalf of the Claimant, Mr Ratledge confirmed that the Claimant was in fact no longer pursuing the detriment complaints identified as issues 10(c), (d), (e) and (g) in the updated List of Issues, with the result that, for the purposes of section 47B of ERA 1996, he no longer asserted that he had been subjected to detriments by Mr Bracey, Mr Palmeiri and Mr Proffitt of the Council or by Lambert Smith Hampton (a commercial and residential real estate consultancy and agency, to which further reference is made in the course of this Judgment), in each case acting as the Respondent's agent with its authority. That meant the focus of his remaining detriment complaints concerned his redundancy, as well as the alleged actions of Mr Robert Middleton, a Labour Cabinet Member of the Council, and Mr Paul Simpson, the Council's then Deputy CEO, both of whom were also members of the Respondent's Board, and a further unidentified individual. For the reasons set out below, we have concluded that we have no jurisdiction in respect of his surviving detriment claims, as they are out of time.

7. There was a single agreed Hearing Bundle comprising five lever arch files, running to 2050 pages. Insufficient thought was given by the parties to the contents of the Hearing Bundle as we were not referred to a great many documents. The page references in this Judgment correspond to the Hearing Bundle.

8. The Claimant gave evidence and we heard from the following six witnesses on behalf of the Respondent:

    a. Mr Stuart Proffitt, the Council's Director of Environment and Property – Mr Proffitt largely addresses the "Greenleys transaction"

in his witness statement, namely a transaction involving the sale of land at Greenleys rugby club in Milton Keynes;

b. Ms Jacinta Fru, Chief internal Auditor at the Council – as with Mr Proffitt, Ms Fru's witness statement is principally concerned with the Greenleys transaction, in particular the Council's engagement of Mr Marcus Forgham, a RICS Registered Valuer and Director at Lambert Smith and Hampton, in 2019 to review and provide an independent expert report on the Greenleys transaction (the "Greenleys review");

c. Ms Tracey Aldworth, Deputy Chief Executive of the Council and Managing Director of the Respondent since November 2020 – Ms Aldworth was a Board Member of the Respondent prior to her appointment as its Managing Director and in her witness statement she addresses events leading up to the Claimant's departure and her appointment, including issues that arose on the MK Gateway transaction (referred to below);

d. Ms Nicola Sawford, Chair of the Respondent's Board since 1 April 2020 – Ms Sawford's witness statement largely addresses the alleged redundancy of the Claimant's role in 2020;

e. Ms Bernadette Conroy, Independent Board Member and Chair of the Respondent's Nominations and Remuneration Committee – as with Ms Sawford, Ms Conroy's witness statement largely addresses the alleged redundancy of the Claimant's role in 2020;

f. Mr Michael Bracey, the Council's Chief Executive – Mr Bracey's witness statement addresses certain issues that have fallen away as a result of the Claimant's decision to no longer pursue certain of his detriment complaints, though it also addresses his input to the eventual decision to place the Claimant's role at risk of redundancy.

Jurisdiction

9. Section 48 of ERA 1996 provides as follows:

> ***48 Complaints to employment tribunals.***
>
> *(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or*
>
> *(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.*
>
> *(4) For the purposes of subsection (3)—*
>
> *(a) where an act extends over a period, the "date of the act" means the last day of that period, and*
>
> *(b) a deliberate failure to act shall be treated as done when it was decided on;*
>
> *and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.*

10. Under section 48, a complaint must ordinarily be presented before the end of the period of three months beginning with the date of the act or failure to act upon which the complaint is based, though there is also provision that if the act or failure upon which the complaint is based is part of a series of similar acts or failures then the three-month period runs from the last act or failure. This provision is separate from, and additional to, the provisions relating to an act which *'extends over a period'* (section 48(4)). In Arthur v London Eastern Railway [2007] IRLR 58 the Court of Appeal stated that it was designed to cover a case which cannot be characterised as an act extending over a period (by reference to a connecting rule, practice, scheme or policy) but where there is some link between the acts which makes it just and reasonable for them to be treated as in time and for the claimant to be able to rely on them. In order for the acts in the three-month period and those outside it to be connected, the Court went back to the statutory wording that they must be part of a 'series' and acts which are 'similar' to one another. It held that a tribunal should hear evidence to determine whether acts or omissions form part of such a series and not rely on submissions alone. Potentially relevant considerations were described by the Court of Appeal as follows:

- it is necessary to look at all the circumstances surrounding the acts
- were they all committed by fellow employees?
- if not, what connection, if any, was there between the alleged perpetrators?
- were their actions organised or concerted in some way?
- why did they do what is alleged?
- it is not necessary that the acts alleged to be part of the series are physically similar to each other
- it may be that a series of apparently disparate acts could be shown to be part of a series or to be similar to one another in a relevant way by reason simply of them all being on the ground of a protected disclosure (Lloyd LJ disagreed on this point).

11. Whilst the Claimant's witness statement does not address the potential considerations above, they are addressed briefly in Mr Ratledge's Skeleton Argument (paragraph 60). Ultimately however, it is not necessary that we determine whether there were acts extending over a period, alternatively whether there was a series of connected acts, since we have concluded that the Claimant's detriment complaints are out of time even if we proceed on the basis that time in respect of all of the claimed detriments only runs from the date of the last claimed detriment in the List of Issues, namely from 18 September 2020 when, according to the Claimant his redundancy was confirmed following an accelerated redundancy process.

12. Subject to any extension for Acas early conciliation, any Claim pursuant to section 47B of ERA 1996 should have been presented by the Claimant to the Employment Tribunals by no later than 17 December 2020. Instead, the Claimant only contacted Acas under the early conciliation scheme on

24 February 2021, over two months out of time, and he did not present his Claim until 6 May 2021, over 5 months out of time.

13. Employment Tribunals have a discretion to extend the three-month time limit on the basis that it was not 'reasonably practicable' to present the claim in time and that it was presented within a reasonable time of it becoming reasonably practicable to do so. The test of reasonable practicability is one of what was reasonably feasible within the time limit (see Saunders v Southend-on-Sea Borough Council [1984] IRLR 119, CA): it is not a broader test of what is just or equitable. The factors affecting what may have been reasonably practicable are varied: at one extreme a postal strike or sudden illness may prevent a claimant from presenting his or her claim in time, at the other end a claimant's ignorance of his or her rights (if reasonable in itself) might be sufficient. What is clear is that it is for a claimant to establish by evidence that it was not reasonably practicable to present a claim in time. They have the burden of proof in the matter.

14. The Claimant's witness statement does not address why it was not reasonably practicable for him to present his claim in time. Mr Ratledge has addressed the matter in paragraph 61 of his Skeleton Argument. He states that the Claimant "felt on thin ice" and was concerned not to "create even larger waves at work". Putting aside that this was not evidence given by the Claimant in his witness statement or in the course of his evidence at Tribunal, Mr Ratledge goes on to acknowledge that the Claimant's dismissal removed this restriction. Taking his submission at its highest, and putting aside for these purposes that the Claimant's appeal against his dismissal was determined on 15 October 2020 and thereafter he was on garden leave, such that it is difficult to identify why he might be said to have still been on thin ice from that point or what further waves might have been created, there is no explanation as to why the Claimant could only reasonably present his Claim on 6 May 2021 if, on his own case, his dismissal on 18 December 2020 removed any restriction he may have been under.

15. Although this was not referred to in his Skeleton Argument, Mr Ratledge additionally highlighted in his closing submissions that the Claimant had experienced ill health in 2020. The Claimant was signed off work during the redundancy consultation process with severe stress and anxiety. Although the Tribunal was not referred to the available medical evidence in the course of the Final Hearing, the Claimant's medical records at pages 1885 to 1895 of the Hearing Bundle evidence that he experienced low mood and anxiety symptoms in 2018 and 2019, for which he was prescribed Citalopram. Whilst the records do not indicate ongoing issues or any further prescription of Citalopram or similar medication beyond summer 2019, the fact that the Claimant was certified unfit for work with severe stress and anxiety for a period of approximately six months in 2020 would indicate an underlying ongoing susceptibility on his part. Nevertheless, whatever symptoms and effects the Claimant may have been experiencing (which are not described in his witness statement), these were not such as to prevent the Claimant from attending his

dismissal appeal hearing on 9 October 2020 and articulating his grounds of appeal in some detail. In July and September 2020, the Claimant was also able to put forward carefully crafted submissions that challenged, amongst other things, the stated financial rationale for the proposed redundancy of his role (pages 1581-1582 and 1687-1689), and in August 2020 he submitted two detailed Data Subject Access Requests. He was also able to instruct solicitors and to provide them with sufficient information that they were in a position to write in some detail to the Respondent on 20 August 2020 indicating potential legal claims. They have continued to advise him and to represent his interests since then. It has not been suggested that they were unable to secure his instructions or to take reasonable steps to protect his interests.

16. In our judgement, even had the Claimant felt he was on thin ice and not wanted to make waves (an assertion that sits uncomfortably with the fact that his solicitors did make waves on his behalf by writing to the Respondent on 20 August 2020 asserting that he had been subjected to detriments as a whistleblower and that his potential dismissal would be automatically unfair), by the conclusion of his dismissal appeal on 15 October 2020 any reasonable desire on the part of the Claimant not to make waves fell away. He had the benefit of ongoing legal advice and was evidently engaging with his solicitors and providing them with his instructions such that they could reasonably have taken steps to issue even a basic protective claim on his behalf. In our judgment it was reasonably practicable for the Claimant to have notified his potential detriment complaints to Acas under the early conciliation scheme at any time between 16 October and 17 December 2020, and thereafter to have presented his Claim in time. Even had we been persuaded by the Claimant that it was not reasonably practicable for him to have taken any steps in that regard until after his employment terminated on 18 December 2020, we would have said that allowing for the Christmas holiday period he ought reasonably to have presented his Claim within no more than three weeks of that date. The Claimant has failed to explain why a number of months elapsed before the Claim was presented to the Employment Tribunals, including for example why it was not presented immediately once Acas had been contacted on 24 February 2021.

17. Given that the whistleblowing detriment complaints have been brought outside the primary time limit for notifying such complaints to Acas and thereafter presenting a claim to the Employment Tribunals, in circumstances where it was reasonably practicable for them to be notified and presented in time, the Tribunal has no jurisdiction to consider the complaints and they are therefore dismissed.

18. There is no issue between the parties that the Claimant's complaints that he was unfairly dismissed, contrary to sections 103A and 98 of the Employment Rights Act 1996, have been brought in time. The findings of fact that follow are inevitably focused upon the dismissal.

Narrowing of the Issues

19. The parties agree that on 7 March 2019 the Claimant made a protected disclosure to Mr Proffitt and Mr Middleton regarding concerns he had in relation to the procurement process, marketing and consideration received by the Council in respect of the Greenleys transaction. They also agree that the Claimant repeated his concerns about the transaction: on 26 April 2019 to Mr Simpson; on 5 June and 12 July 2019 to Mr Duncan Wilkinson, the Council's Head of Audit; and on 25 July 2019 to Ms Fru. The parties further agree that on 26 September 2019 the Claimant repeated his concerns to Mr Forgham of Lambert Smith and Hampton who, as noted already, had been instructed by Ms Fru to investigate the Claimant's concerns and who subsequently set out his opinions in a report dated 23 October 2019 (already referred to as the Greenleys review).

20. By the commencement of the Final Hearing, the Claimant conceded that he had made protected disclosures about and to the Council, rather than about and to the Respondent.

21. As noted already, by the conclusion of the Final Hearing the Claimant no longer pursued Issues 10(c), (d), (e) and (g) in the List of Issues, so that the only remaining issues were whether Mr Simpson, Mr Middleton and an unidentified individual (Issues 10(b), (f) and (a) respectively) had subjected the Claimant to detriments, in each case acting as agent of the Respondent with its authority, and whether the Claimant had additionally been subjected to detriments as a whistleblower by being put at risk of redundancy by the Respondent, subjected to an accelerated redundancy process by it and then dismissed from its employment. Whilst all but the dismissal complaint are out time, in our findings of fact below we touch upon various of the matters about which the Claimant makes complaint, since these are relevant in coming to a judgement as to the reason why the Claimant was dismissed from the Respondent's employment, specifically whether he was dismissed by reason that he made protected disclosures.

Findings of Fact

22. The Respondent is an independent legal entity. It was set up to manage and develop residual development land assets in Milton Keynes, purchased by the Council from Homes England in 2013. The Respondent is owned by the Council and DevelopMK Ltd, and thereby ultimately accountable to the Council's Cabinet, comprised of elected Local Councillors.

23. The Claimant was employed by the Respondent from 1 July 2013 as its Chief Executive Officer. It is not suggested that the Claimant was other than a trusted and competent CEO.

24. In May 2020, Mr Roger Bell, one of the Respondent's independent Board Members, prepared a report that reviewed and summarised the Respondent's economic performance since 2013 (pages 1407 – 1417).

Whilst Mr Bell recognised that it could be argued that a red book revaluation for the year ended 31 March 2020 dominated the overall result, nevertheless he concluded that the organisation's performance from 2014 through to 2019, *"is firmly in value creation territory"*. He observed,

> *"Performance of this nature rarely happens by chance and is unlikely to be a result of fate or accident – more likely it is the team's deep, collective knowledge of the sub-markets within the Milton Keynes metropolitan region which has driven performance".*

Mr Bell further wrote,

> *"With a strengthened team, new leadership and hopefully a more formalised strategic process – MKDP's performance should meet future challenges with confidence".*

We find that his reference to "new leadership" was to Ms Sawford, who had then very recently been appointed Chair of the Respondent's Board, rather than evidence, as the Claimant seemed to suggest at Tribunal, that the Board was by then minded to replace him as the Respondent's CEO.

The Greenleys review

25. We have not felt it necessary to go into detail regarding the Greenleys review. Mr Forgham's report, dated 23 October 2019, is at pages 753 to 817 of the Hearing Bundle. We have read it. It is an admirably clear report that directly addresses the Claimant's critical concerns in relation to the Greenleys transaction. Mr Forgham was provided with a copy of the Claimant's four-page written concerns and they are appended to his report (the Claimant complains that this was a breach of confidentiality). He also met with the Claimant on 26 September 2019. In his report, Mr Forgham records the ambit of his instructions, details the background, summarises the Greenleys transaction, confirms his understanding of the marketing process, documents the history of the site, provides a brief overview of the firm who handled the disposal, comprehensively lays out the Claimant's concerns/objections, outlines the Claimant and Mr Palmeiri's respective views of the land value, and then offers his own opinion of value, supported with evidence and a detailed description of his methodology, before addressing the questions raised in relation to the transaction and, in turn, each of the Claimant's stated objections. The report is of the highest quality: if it was a Judgment we would have said of it that it was Meek compliant.

26. The Claimant was provided with a copy of Mr Forgham's report on 9 December 2019 once the report had been considered by its sponsors, Mr Proffitt and Mr Richardson, the Council's Section 151 Officer, namely the person with statutory responsibility to ensure that there are proper arrangements in place in respect of the Council's financial affairs. In an email to Mr Wilkinson a few days earlier on 5 December 2019, the

Claimant referred to a review then being undertaken by Mr Bracey (to which we return at paragraph 55 below) and wrote,

> *"… I sincerely hope that the timing of Michael's sudden review is coincidental and that both myself and my colleagues at MKDP are not potential victims having spoken out".*

27. In response, Mr Wilkinson stated that "the latest draft report" (we believe he was referring to a separate report being prepared by Ms Fru to consider what control issues could be incorporated following the Greenleys review) had not been shared with Mr Bracey and, accordingly, to his knowledge wasn't a factor in Mr Bracey's thinking.

28. The Claimant emailed Mr Wilkinson and Ms Fru on 16 January 2020, expressing the view that breaches of protocol, process and best practice had been placed aside. In his witness statement, he complains that the report was incorrectly scoped and "therefore set up to come to a conclusion that cleared all parties without engaging fully with the concerns". We disagree. We find that it reflects a genuine effort and desire on the Council's part to understand, examine and address the Claimant's concerns. The Claimant is an experienced professional of some standing, but having read his statement and heard his testimony and been taken to various documents in the Hearing Bundle, we conclude that he lacks the ability to bring objectivity to bear when it comes to Greenleys. In particular, we find that his dissatisfaction with the Greenleys review is clouded by his ongoing professional disdain for Mr Palmeiri and unwillingness or inability to accept that another professional, Mr Forgham had come to a different view to himself regarding the transaction.

Issue 10(b)

29. The Claimant's complaint in relation to Mr Simpson arises from an email Mr Simpson sent the Claimant on 10 April 2019 when Mr Simpson was the Council's Deputy CEO (page 573). Having identified in his email that Mr Proffitt had provided him with detailed responses to the Claimant's queries in relation to the Greenleys transaction and expressed himself satisfied that the Council's contract procedure requirements had been met, Mr Simpson went on to say,

> *"As such, I don't think there is anything now to be gained to try and unravel this deal, but I would after our conversation, be interested to understand any ongoing concerns about general process for future reference. As we discussed, you have raised some potentially serious matters, and I am reflecting on how best to respond to what you shared with me. That said, I am worried that working relationships have been affected by recent events, as senior politicians are raising concerns about our collective ability to work together and to deliver to their agenda and priorities. As such, there needs to be some form of resolution to the current situation if we are going to restore trust and confidence."*

Although Mr Simpson was also the Council's nominated member of the Respondent's Board, we are in no doubt that Mr Simpson was expressing his views in his capacity as the Council's Deputy CEO and that this would have been understood at the time by the Claimant. Mr Simpson wrote to the Claimant using his Council email account and signed off his email in his capacity as Deputy CEO. He referred to "our" i.e, the Council's, Procurement team. His reference to "our collective ability to work together" referred to the Claimant's (and possibly the Respondent's) ability to work effectively with the Council rather than the Respondent Board's ability to work collectively as a team. Greenleys was a Council site and project with which the Respondent was not involved, and there is no obvious reason therefore why Mr Simpson might have expressed concerns as a member of the Respondent's board, let alone done so on behalf of the Board as a whole, in respect of whom he held no mandate. Equally, there is no obvious reason why senior politicians might have been raising concerns about cohesion within the Respondent's Board. When Mr Simpson referred to concerns and to a loss of trust and confidence, the ordinary and natural reading of his email is that he was referring to how matters were perceived within the Council, including by certain unnamed politicians. He was not purporting to represent the views of the Respondent's Board in relation to a transaction that was of no direct interest to it.

30. The ensuing friendly exchange between the Claimant and Mr Simpson provides no indication that the Claimant was unduly concerned by Mr Simpson's comments above, certainly not that he believed he was being criticised as a whistleblower or that Mr Simpson was voicing concerns within the Respondent, let alone speaking on behalf of its Board. For his part, Mr Simpson welcomed the opportunity to meet with the Claimant to discuss the issues that had been raised. They subsequently met on 26 April 2019. The Claimant accepts that his protected disclosures to Mr Simpson on 26 April 2019 were made to and about the Council. As the meeting was the culmination of the email exchanges just referred to, it reinforces our conclusion above that Mr Simpson was expressing himself as the Council's Deputy CEO when he emailed the Claimant on 10 April 2019.

31. Mr Simpson was, of course, Mr Bracey's Deputy. However, we do not infer from this fact alone that Mr Bracey shared the concerns that were alluded to in Mr Simpson's email or that he was aware by April 2019 that the Claimant had made a protected disclosure to Mr Proffitt and Mr Middleton on 7 March 2019. We return below to the issue of Mr Bracey's knowledge of the Claimant's protected disclosures. However, we have seen no evidence within the five lever arch files of documents that comprise the Hearing Bundle nor did we hear evidence at Tribunal to support that Mr Simpson shared the Claimant's comments or details of the issues more generally with Mr Bracey.

Issue 10(a)

32. In terms of the chronology of events, the next claimed detriment is that on or around 4 February 2020 an unidentified individual acting on behalf of the Respondent falsely accused the Claimant of having made serious accusations about Ben Allott, the Park Trust's Head of Property, in order to discredit the Claimant. In his closing submissions, Mr Ratledge identified that the most likely culprit was Mr Middleton.

33. On 4 February 2020, the Claimant attended a scheduled meeting with David Foster, Chief Executive of the Park's Trust, to discuss a number of transactions. In his witness statement the Claimant alleges that Mr Foster was agitated and asserted during the meeting that the Claimant had made serious accusations against Mr Allott regarding his involvement in the Greenleys transaction. Whilst the Claimant suggests in his witness statement that Mr Foster may have been provided with copies of his emails, when the Tribunal asked the Claimant to elaborate further, he was unable to provide any further details, including what the alleged accusations were or how Mr Foster had come to believe they had been made or that the Claimant was responsible for them. We are puzzled as to why the Claimant did not explore the matter further with Mr Foster during their meeting in order to gain a clearer understanding or what was being alleged and how it may have come about. The Claimant does not say that he discussed with Forster his own concerns about the Greenleys transaction or that Mr Forster was aware, or that the Claimant made him aware, that he had made various protected disclosures in 2019.

34. The following day, 5 February 2020, the Claimant and Mr Foster were in email contact regarding the Pineham transaction that their respective organisations were involved in. Mr Foster seemingly acknowledged tensions during their meeting the previous day as he wrote,

> *"Sorry we did not get along or find a solution to Pineham".*

He did not say why they had not got along, though his focus seemed to be the Pineham matter rather than anything else.

35. Mr Foster's email prompted a lengthy response from the Claimant who addressed various issues arising out of draft Heads of Terms on the Pineham transaction, before turning his attention to the Greenleys transaction. He wrote,

> *"…your agitation and assertion that I had made serious accusations against your Head of Property was disturbing. I obviously don't know how the concerns around Greenleys have been presented to you, but I can confirm that no such allegations have been made."*

He did not elaborate as to whose "the concerns around Greenleys" were, but even if Mr Foster had understood the Claimant to harbour concerns, there is no further information available to us from which we might infer

that Mr Foster understood they were regarding wrongdoing of the sort within the ambit of section 43B(1) of ERA 1996.

36. Mr Foster's brief response to the Claimant the same day (page 920) was limited to the draft Heads of Terms. He did not accept or refute that he had accused the Claimant of having made serious accusations against Ben Allott.

37. There is no evidence in the Hearing Bundle and the Claimant does not suggest in his witness statement, nor did he suggest in his evidence at Tribunal, that Mr Foster may have shared whatever passed between them on 4 February 2020 with others at the Parks Trust, let alone outside the Trust. For completeness, although this was not advanced by the Claimant, we find that Mr Bracey was never made aware of these interactions between the Claimant and Mr Forster. There is no obvious reason why he would have been made aware of them.

38. Putting aside that the complaint is out of time, given the Claimant's burden of proof in the matter, he has failed to establish basic facts to support this complaint. At its highest, his evidence is that he came away from a meeting believing that Mr Foster was irritated with him because he understood that the Claimant had levelled unfounded accusations against a member of his staff. That falls some way short of establishing primary facts from which the Tribunal might infer or conclude that the Claimant was subjected to a detriment by someone at the Council acting as agent of the Respondent with its authority because the Claimant made a protected disclosure to the Council. At most he has suggested that he may have been subjected to a detriment, but the other elements to support a complaint are lacking.

Issue 10(f)

39. Other than being placed at risk of redundancy in July 2020 and then allegedly being subjected to an accelerated redundancy exercise before being dismissed, the Claimant's only other detriment complaints relate to Mr Middleton. The Claimant complains about emails sent by Mr Middleton on 4 March, 16 April and 4 May 2020 as well as comments allegedly made by Mr Middleton during a Board meeting on 4 May 2020. The emails in question are at pages 953, 1126 and 1379 of the Hearing Bundle.

40. The Claimant's email exchange with Mr Middleton in March 2020 was initiated by the Claimant following an exchange of emails with Mr Palmieri, Council Lead for Property Commercialisation, regarding draft Heads of Terms on a transaction known as MK Gateway. The Claimant told Mr Middleton that there was no point hiding his concerns about Mr Palmieri's "processes, practice and experience". He expressed the view that Mr Palmieri was out of his depth negotiating a development contract as complex as the one required on MK Gateway. He then referred to the Greenleys transaction, stating that he completely disagreed with the outcome of the Greenleys review. However, he went on to say,

> *"But having said my piece I am not going to pursue it further as there doesn't appear an appetite to address the issues".*

It is clear that the outcome of the Greenleys review rankled with him. We find that it was as much his ego and pride in the matter as it was his ongoing professional disdain for Mr Palmieri. He was particularly sensitive to any perception that Mr Palmieri may have been vindicated at the expense of his own professional views and reputation in the matter and, in raising further concerns about Mr Palmieri, we find that he thought it important to put down a marker that he stood by his previous criticisms. In the context of his complaints that Mr Middleton subjected him to detriments as a whistleblower, it is notable that it was the Claimant rather than Mr Middleton who introduced Greenleys into their exchange. We conclude that is because it continued to matter to the Claimant rather than to Mr Middleton.

41. The Claimant's email prompted a measured response from Mr Middleton in which he correctly noted that nothing adverse had been unearthed by Lambert Smith Hampton. There is some indication of frustration on his part insofar as he referred to the Greenleys review as, *"an expensive long winded and independent audit".* Mr Middleton went on to acknowledge that, *"everyone has strengths and weakness"*. He noted that Mr Palmieri was demonstrably strong in the fields of political engagement, stakeholder engagement, intra-organisational collaboration, and translating political and ambition into deliverable schemes. He went on to say that if the Claimant had questions around Mr Palmieri's "approach to fundamentals and deal construction, surely the best thing would be to sit down for an hour to discuss". In other words, notwithstanding the outcome of the Greenleys review, that he remained receptive to any concerns the Claimant may have.

42. In his response to Mr Middleton, approximately one hour later, the Claimant did not take up Mr Middleton's suggestion of a face to face discussion. Instead, he made a fairly broad statement as to the reasons for his lack of confidence in the Greenleys review, before concluding,

> *"I don't have any particular axe to grind, I have obligations to MKDP Board amongst others and the only thing I really ask for, integrity, objectivity, accountability etc."*

His comments could only reasonably be understood to be calling into question Mr Paleiri's and/or the Council's integrity, objectivity and accountability.

43. Mr Middleton responded to the Claimant a few minutes later. He wrote,

> *"If you harbour concerns about* "integrity, objectivity, accountability etc.", *you really do need to evidence it. If you do have evidence,*

> *please submit it to Stuart and myself. At this time, I have seen no evidence, instead I have heard opinion and conjecture".*

We find that the issue for Mr Middleton was not that the Claimant may have harboured concerns, rather it was that he was making fairly general assertions and impugning others' integrity, objectivity and accountability etc without bringing forward objective evidence himself to support what he was saying. The Claimant did not respond to what was a very clear invitation from Mr Middleton to substantiate his comments. We think the Claimant's failure to do so is telling and also revealing in terms of what we have observed within these proceedings to be a propensity on his part to make assertions without first sufficiently reflecting as to whether they are objectively well-founded. This includes complaints asserted and then withdrawn by him at a late stage in the Final Hearing when they plainly could not be substantiated.

44. Mr Middleton forwarded his exchange with the Claimant to Mr Proffitt for his information. Mr Proffitt was Mr Palmieri's Line Manager. There is no evidence in the Hearing Bundle that Mr Proffitt escalated the matter further within the Council. We find that he did not do so and, moreover, had no particular reason to do so.

45. By 17 April 2020, various issues in relation to the Heads of Terms in relation to MK Gateway remained unresolved. As he had done a few weeks earlier in March 2020, the Claimant brought Mr Middleton into copy on an exchange of emails with Mr Palmieri. The Claimant complains that Mr Middleton's email response was a detriment. The email began,

> *"Dear all,*
>
> *Saxon Court* [the Council's former Head Office] *is a strategic redevelopment site. Its delivery is a priority for the Cabinet, both politically and financially, particularly given the pressing aims of Renaissance CMK."* (page 1126)

Mr Middleton went on to identify four *"political points to aid your operational discussions"*. Whilst Mr Middleton referred to Mr Palmieri as *"looking to move things along in a more accommodating and fleet footed fashion"*, we find that Mr Middleton was essentially seeking to knock heads together. Whilst the Claimant is right to describe Mr Middleton as bringing political pressure to bear, we reject his characterisation of Mr Middleton's actions as seeking to undermine the Claimant's professional integrity. We think the Claimant's ego and professional pride have caused him to perceive it that way. The ongoing email exchanges between the Claimant and Mr Palmieri, including what we regard as the Claimant's *'snippy'* comments on 4 March 2020 regarding Mr Palmieri's abilities, evidenced to Mr Middleton, as they would to any objective observer, that the relationship between the two men was increasingly dysfunctional and impacting on a transaction of some political and financial significance to the Council. We find that Mr Middleton sought to cut through this

dysfunction in a firm but balanced way, by encouraging the Claimant and Mr Palmeiri, and their colleagues, to focus on the task in hand rather than allowing themselves to be distracted by personal issues and resentments. Mr Middleton rightly observed in concluding his email,

> *"Empty (dilapidated) Council owned built assets can become powerful, very public and emblematic symbols of decline".*

There was no mention of the Greenleys transaction and nothing to indicate that Mr Middleton's email was other than in response to the tensions and impasse that had arisen on MK Gateway.

46. We find that the Claimant recognised at the time that he and / or his team had perhaps 'lost sight of the woods for the trees' in the discussions regarding the Heads of Terms, or at least that the arguments they were seeking to make had not prevailed, because he replied to Mr Middleton the same day,

> *"I will reluctantly accept the Council's opinion.*

He went on to say,

> *"The process we have been through in the past few weeks has obviously been far from perfect and we need to review how to manage similar situations going forward."*

The Claimant's comments, specifically his focus upon "the past few weeks", evidence to us that at the time he understood Mr Middleton's observations to relate to MK Gateway. If he had believed that they related to the Greenleys transaction, or more specifically to his protected disclosures the previous year, he might have said so, for example as he had done a few months earlier in his exchanges with Mr Wilkinson. There is nothing to suggest any connection between Mr Middleton's comments and the Claimant's protected disclosures. In a further short exchange between the Claimant and another colleague, Matthew Green the same day, there is likewise no suggestion that Mr Middleton might somehow be reacting to the Claimant's protected disclosures the previous year. Instead, according to Mr Green's comments, it was simply a matter of Mr Palmeiri's alleged "incompetence".

47. There is no evidence in the Hearing Bundle that this exchange between the Claimant and Mr Middleton was escalated to Mr Bracey. We find that it was not brought to Mr Bracey's attention and that there was no reason why it should have been.

48. As regards the alleged events of May 2020, the Respondent disputes that Mr Middleton made comments critical of the Claimant during a Board Meeting on 4 May 2020. It is not in dispute that Mr Middleton emailed the Claimant following the Board Meeting. The Claimant's account of that meeting is at paragraphs 121 and 122 of his witness statement. Whilst he

does not set out what comments were allegedly made, he claims that he experienced Mr Middleton's comments as a personal attack and that they were expressed sufficiently strongly that he received a number of calls from colleagues after the meeting. He does not identify who those colleagues were. We prefer Mr Middleton's contemporaneous record, namely an email he sent the Claimant the same day (page 1379) in which he referred to being duty bound during the Board meeting to keep his comments diplomatically brief and vague. As with Mr Middleton's other communications in the Hearing Bundle, he expressed himself in measured terms. There are no emails or other documents which suggest that the Claimant considered Mr Middleton to have expressed himself other than diplomatically during the meeting. Similarly, there is no contemporaneous suggestion that Mr Middleton's comments during the meeting, or in his follow up email, however expressed, were influenced by or in response to the Claimant's protected disclosures in 2019. Equally, there is nothing in either Mr Middleton's email or the meeting minutes that calls into question whether the concerns expressed by Mr Middleton on 4 May 2020 were genuinely held and expressed, or which suggests he may have had some undisclosed agenda. We accept Mr Middleton's explanation that he was concerned in May 2020 that the Claimant had brought what he considered to be a poorly drafted report to the Board regarding MK Gateway, without having first *"socialised"* the project with the Board, notwithstanding it had been ongoing for at least 18 months and Heads of Terms had been in negotiation for at least two months. Rather than articulate these concerns in front of others on 4 May 2020, we find that Mr Middleton was, as he said at the time and in his evidence at Tribunal, diplomatically brief and vague during the meeting itself, raising his concerns in private with the Claimant afterwards in appropriately measured terms.

49. There is no evidence in the Hearing Bundle that the Claimant raised any concerns with other Board members regarding Mr Middleton's conduct on 4 May 2020. We find that he did not do so. There is also no evidence that Mr Middleton escalated his concerns to Mr Bracey. We find that he did not and that there was no reason for him to do so.

<u>The Claimant's redundancy – Issues 10(h) & (i) and 15</u>

50. Whilst the Claimant's complaints that he was subjected to detriments by being placed at risk of redundancy and being subjected to an accelerated redundancy process are out of time, in coming to a judgement as to the reason why the Claimant was placed at risk of redundancy and ultimately dismissed, the Tribunal has focused its attention on the mental processes of the relevant decision makers, as well as those who may have influenced their decisions.

51. In order for the Respondent's Board Members to have been motivated or influenced by the Claimant's protected disclosures, they must either have known or believed that he had made one or more protected disclosures or else have been influenced in some material way by others who knew that the Claimant had made protected disclosures and were themselves

motivated or influenced by them in terms of their own conduct and influence over the Board. In summary, the Claimant asserts that Mr Bracey proposed a cost saving arrangement to the Respondent's Board and that the Board then adopted this proposal because the Claimant had made protected disclosures. Mr Bracey, Ms Aldworth, Ms Sawford and Ms Conroy were each cross examined on the basis that they both knew the Claimant had made protected disclosures and were motivated or influenced by the fact of those disclosures in their actions and decisions. We have focused therefore on what each of them knew and when, and whether and, if so, how this influenced them.

52. We start by making clear that we have no reservations as to the honesty and integrity of the Respondent's witnesses. Mr Bracey and Ms Fru were particularly impressive witnesses, their testimony being rooted in hard facts and evidence. Under cross examination their responses were focused and articulate and, particularly in the case of Mr Bracey, supported with clear examples.

53. Mr Bracey's background is in social care; we suspect the quality of his testimony and his written communications in the Hearing Bundle, including the concise, focused way in which he documents his interactions with others - for example, a discussion with the Claimant on 16 December 2019 at page 876 of the Hearing Bundle - are a reflection of that background and experience. Amongst other things, we accept Mr Bracey's description of his management style, in particular the trust he necessarily places in senior colleagues to do their job and to escalate issues where, in their professional judgement, it is important that he is kept informed or the matter requires his attention and personal input.

54. It is possible that the Claimant's assertions in relation to Mr Bracey, specifically that Mr Bracey was aware of the Greenleys transaction and his protected disclosures in relation to it, are informed by his own experience of leading an organisation with approximately 10 staff; if so, we think he has lost sight of the fact that Mr Bracey leads an organisation with several thousand employees, delivering over 200 services to the people of Milton Keynes. We accept Mr Bracey's evidence that he had a relatively high-level overview of the Respondent's projects through informal meetings every 6-8 weeks with the Claimant and the Respondent's Chair. As noted already, Greenleys was not one of the Respondent's projects so there is no obvious reason why it might have been mentioned during these interactions. The Claimant does not assert that he personally made Mr Bracey aware of his protected disclosures.

55. In late 2019, Mr Bracey became more focused on the Respondent in so far as a Council Plan adopted by councillors required the Council to establish a disruptive council-owned housing company to deliver 2,000 affordable homes for local families by 2023. Given the political importance attaching to the policy, Mr Bracey personally lead this work. He identified that the Respondent could be a suitable vehicle through which to develop such a housing company. We accept Mr Bracey's evidence in his witness statement and at Tribunal as to how this initiative developed during 2019

and 2020, including his account of constructive interactions with the Claimant during which there was no suggestion by the Claimant that the initiative, or Mr Bracey's work on it, might somehow be linked to the Greenleys transaction or the Claimant's disclosures in relation to it. In the course of 13 separate meetings with 26 individuals in December 2019 and January 2020 as part of his work on a report regarding the possibility of developing local housing under the auspices of the Respondent, Greenleys was never mentioned by anyone to Mr Bracey.

56. We further accept Mr Bracey's evidence that whilst Greenleys was present on a Council Internal Audit Plan, along with other matters, Mr Wilkinson did not share with him the fact that Lambert Smith and Hampton had been appointed to undertake a review of the Greenleys transaction nor make him aware of the Claimant's disclosures and involvement. It is in the nature of the work done by Internal Audit that such details will often remain confidential within the team, certainly whilst the matter is under investigation and often even once the investigation has concluded, in order to protect whistleblowers. Given the conclusions of the Greenleys review, it is unsurprising that the matter was not then escalated to Mr Bracey. Other than being aware in very general terms that Greenleys was one of a number of matters on an Internal Audit Plan, we find that Mr Bracey was unaware of the details and entirely ignorant of the Claimant's disclosures in relation to it. We find this remained the case until some time after these proceedings were begun and accordingly that Mr Bracey was unaware of the Claimant's disclosures: when he drafted, finalised and, on 20 January 2020, presented his report to the Council's Group Leaders in relation to the development of a local housing company; when he wrote in confidence to Ms Conroy on 29 January 2020 to feed back a number of operational concerns that had come to his attention in the course of the various December and January meetings just referred to; and when he shared his report with the Respondent's Board on 16 March 2020.

57. Mr Bracey was likewise unaware of the Claimant's disclosures when in June 2020 he sought and secured the Council's approval of the Milton Keynes Council COVID-19 Management Action Plan (the "Action Plan") which aimed to reduce expenditure by £5.5 million over a three year period. One of the thirteen themes of the Action Plan was to achieve management savings and one of the approved documented actions in that regard was for the Council to work in partnership with the Respondent to identify and implement efficiencies through sharing services/functions. Mr Bracey's priority was identifying savings within the Council; whilst the need or otherwise for savings within the Respondent was ultimately a matter for the Respondent's Board, Mr Bracey saw an opportunity for both organisations to save costs if the Council sold senior management time to the Respondent. In this regard, Mr Bracey was aware that the real estate sector had been significantly disrupted by the pandemic and that the Respondent had experienced a dramatic reduction in car parking income, its principal source of recurring revenue. He therefore met with Ms Sawford and Ms Conroy on 19 June 2020 to share his thinking with them. He subsequently brought a formal proposal to the Respondent's Board on

7 July 2020 under which the Respondent would "buy" one and a half days per week of senior executive time from the Council, namely the services of its Deputy Chief Executive who would be seconded to the Respondent under a formal agreement whereby they would perform agreed duties on behalf of the Respondent's Board. We refer to these proposed arrangements as the "Bracey proposal". If implemented, the arrangements would potentially displace the Respondent's role as CEO.

58. As set out above, we accept Mr Bracey's evidence that he was unaware of the details of the Greenleys transaction or, more pertinently, the Claimant's protected disclosures in relation to it until some point after these proceedings were commenced and accordingly that they did not inform the Action Plan or his thinking or actions more generally in so far as these affected the Claimant. The Claimant's assertions to the contrary are not objectively well founded. Echoing Mr Middleton comments in 2020, we consider they are conjecture on his part and reflect a pre-occupation with his ongoing professional rivalry with Mr Palmeiri which was not shared by others. The Claimant is unable to point to any direct evidence that Mr Bracey was aware of his protected disclosures, least of all that he himself made Mr Bracey aware of them in their various interactions over the course of a year or more. Instead, he seeks to infer that Mr Bracey must have been aware of them, partly given his position as the Council's Chief Executive Officer. He relies in particular upon the fact that an email exchange from early March 2020 regarding Saxon Court, in which Mr Proffitt referred to the Greenleys transaction and review (including that "allegations of wrongdoing were made"), was forwarded to Mr Bracey by Ms Alsworth on 10 March 2020 (page 986). Mr Bracey believes that he did not read into the exchange. That is unsurprising as Ms Aldworth had said when forwarding it to him that she was seeking to find out more. She did not suggest that he needed to read the email trail or take any specific action in response to it. Mr Bracey's failure, we find, to read the various emails that were forwarded to him reflects the reality of the pressures he was operating under as the Council's CEO as well as his management style and approach we have already referred to.

59. As regards the Respondent's Board, it first met on 7 July 2020 to discuss the Bracey proposal, though Ms Sawford and Ms Conroy first discussed the proposal in outline with Mr Bracey on 19 June 2020. The Board members present on 7 July 2020 were Ms Sawford, Ms Conroy, Mr Bell, Mr Middleton, Mr Steve Richardson (attending as a substitute for Ms Aldworth who had a conflict of interest in the matter), Mr Huw Lewis (independent Board Member) and Mr Steve Mallen (independent Board Member). Mr Bracey and Mr Mike Clarke (independent Committee Member) were also in attendance. Mr Bell, Mr Richardson, Mr Lewis, Mr Mallen and Mr Clarke did not make written statements in these proceedings or attend Tribunal to give evidence. There was no information before the Tribunal therefore as to their knowledge or otherwise of the Claimant's protected disclosures.

60. Ms Sawford had taken up her appointment as Chair of the Board on 1 April 2020. We find that during an introductory meeting on 12 March 2020 with the Claimant and Ms Conroy, who was then the Respondent's Interim Chair, there was no mention, let alone discussion, of the Greenleys transaction and certainly no mention that the Claimant had made protected disclosures to the Council. Likewise, Greenleys was not mentioned at an earlier Board meeting on 16 March 2020 that Ms Sawford attended as an observer. When questioned by Mr Burns as to whether he had any evidence that Ms Sawford knew anything about Greenleys at all when the Bracey proposal was adopted, the Respondent replied, *"I have no evidence of this."* We accept Ms Sawford's evidence that she first learned of the Claimant's protected disclosures as a result of correspondence from the Claimant's Solicitors dated 20 August 2020.

61. As regards Ms Conroy, the emails at pages 984 – 986 of the Hearing Bundle evidence that, like Mr Bracey, Ms Conroy was copied into the March 2020 email exchange in relation to Saxon Court in which Mr Proffitt had referred to the Greenleys transaction. Mr Proffitt expressed the view that accusations had been made,

> *"without fact or basis, which could damage or tarnish the reputations of individuals but also of MKC and MKDP".*

Mr Proffitt also said that it had been inappropriate for the Claimant to draw a Cabinet Member (Mr Middleton) into conversations of this nature.

62. The Claimant drafted a response to Mr Proffitt's email and sent this to Ms Conroy at 12:38 on 9 March 2020, asking her,

> *"Do I send a response or do I first need to find myself an Employment Lawyer?"*

Given that he was in correspondence with the Council in relation to a transaction to which the Respondent was not a party, the Claimant did not elaborate as to why it concerned the Respondent or why he might have needed to find himself an Employment Lawyer.

63. The Claimant did not await Ms Conroy's guidance or views in the matter. Instead, he sent a response to Mr Proffitt early the following morning, copying in Ms Conroy. Having placed on record his concerns in relation to the Greenleys transaction, he went on to say,

> *"… I would like to make it clear that I did not make any formal allegations of wrongdoing. For you to infer I did is wrong and wholly inappropriate".*

64. If the Claimant, who was fully versed in the matter, considered on 10 March 2020 that he had not made any formal allegations of wrongdoing in relation to the Greenleys transaction, the question arises why Ms Conroy might have come to a different view given her lack of involvement in and

knowledge of the transaction. We accept her evidence that she did not then know, nor did she suspect, that the Claimant had made protected disclosures the previous year.

65. Ms Aldworth was also copied into the email exchange between the Claimant and Mr Proffitt regarding Saxon Court. As noted already, Ms Aldworth forwarded the email exchange to Mr Bracey, stating that she was trying to find out a bit more. Her email does not indicate whether she was seeking to find out more about Saxon Court, Greenleys or both transactions.

66. We accept Ms Sawford and Ms Conroy's evidence that the Greenleys transaction was not discussed at the Board Meeting on 7 July 2020, let alone the fact that the Claimant had raised concerns about it with the Council. We find that the only people at the meeting on 7 July 2020 who had a detailed understanding of the Claimant's concerns in relation to Greenleys were Mr Middleton and Mr Richardson.

67. Ms Sawford and Ms Conroy subsequently met with the Claimant three days later on 10 July 2020 for his first consultation meeting. They went into the meeting still ignorant of the Greenleys transaction and of the Claimant's concerns in relation to it.

68. The meeting notes from 10 July 2020 (page 1503) evidence that when the consultation process commenced, the Claimant principally challenged the the Board's decision from a strategic business perspective and also questioned whether it was financially warranted. As the meeting continued, the meeting notes document that the Claimant expressed the view that the proposal was politically motivated and could be because of a possible whistleblowing exercise. Whilst the Claimant seemingly did not elaborate as to what he meant by that, Ms Sawford and Ms Conroy did not explore this further with the Claimant. Their explanation at Tribunal was that they were in listening mode, overlooking that active listening involves probing and securing clarification where relevant. Nevertheless, we do not infer anything from their failure to explore the Claimant's comments further with him. Instead, we find that they were relatively inexperienced in such matters and adhered a little rigidly to the advice they had received from HR, namely that the purpose of the consultation was to listen to what the Claimant had to say about the Respondent's proposals to place his role at risk of redundancy.

69. The focus of the various interactions between the Claimant and the Board in the weeks following the initial consultation meeting on 10 July 2020, was the underlying financial rationale for the proposal, as is evident from the notes of a second consultation meeting held on 20 July 2020 (pages 1548 and 1549) and the Claimant's follow up written representations emailed to Ms Sawford and Ms Conroy on 28 July 2020 ahead of a scheduled third consultation meeting on 30 July 2020. In his email, the Claimant put forward a detailed analysis of potential cost efficiencies as well as his own assessment of the Respondent's immediate revenue streams. He made

no mention in his email of either the Greenleys transaction or his disclosures in relation to it. Within a little over twenty-four hours, Ms Sawford shared the Claimant's representations with the Council's Legal Services and HR Department. She said that her initial view and that of Ms Conroy was that the Claimant's representations and proposals *"do not change our decision".* Unfortunately, the Claimant then became ill with the result that the meeting scheduled for 30 July 2020 did not go ahead. Instead, and as suggested by the Claimant on 30 July 2020 (page 1595), Ms Sawford provided a written response to the Claimant on 3 August 2020. It was a relatively brief response that did not engage point by point with the Claimant's analysis. Ms Sawford wrote,

> *"There was still deep concern regarding the impact of Covid-19 and its consequent effect on MKDP's finances and operational expenses. Visibility of the external environments is also a significant concern for the Board as well as the impact of a potential 'second wave'. As a result there is an appetite from the Board to reduce operating expenditure particularly over the coming three to six months."*

She went on to say,

> *"The Board took the view that a number of your suggestions were either long term investment initiatives or related to financing and the view emerged that this was too long a time scale and therefore did not address the pressing and immediate need to reduce running costs."*

70. The Claimant was not then aware that the Nominations and Remuneration Committee had met on 31 July 2020 to consider the Claimant's proposals, following which Ms Conroy had prepared a report to the Board setting out three broad contextual principles to support discussion and which addressed each of the Claimant's proposals in turn. It is perhaps unfortunate that the report, or at least the contextual principles and responses to the Claimant's alternative proposals, was not shared in full with the Claimant as part of the ongoing consultation process. Be that as it may, it evidences to the Tribunal active engagement by the Nominations and Remuneration Committee with the Claimant's representations. The minutes of a subsequent Board Meeting held on 3 August 2020 evidence that Ms Conroy took the Board through the Nominations and Remuneration Committee's report, providing clarification where necessary. The meeting minutes record that they all agreed with the principles and noted the early stage thinking of the Committee, but that no final decisions were taken.

71. The following day, 4 August 2020, the Claimant advised Ms Sawford that he had been signed off by his GP for an initial period of one month from 28 July 2020. The Respondent arranged for the Claimant to be referred for an Occupational Health assessment. The Claimant raised a number of questions about the proposed assessment on 11 August 2020, though

stated that he had no issue attending the assessment. The same day he submitted detailed Data Subject Access requests to the Council and the Respondent. Then, on 20 August 2020, his Solicitors wrote to Ms Sawford asserting that he had made protected disclosures, that he *"has been subjected to a pattern of detrimental treatment by his employer"*, and that this treatment had led to a proposed automatically unfair dismissal.

72. Although the consultation process was still ongoing, the Claimant's Solicitors asserted that the Claimant already had a strong claim for ordinary unfair dismissal. They referred to the Respondent's failure to pool the Claimant with other senior roles at the Respondent and made specific reference in this regard to the roles of the Property Director and Senior Development Consultant. This was not something that had been suggested by the Claimant over the previous six weeks. The Claimant's Solicitors went on to assert,

> *"there has been a complete absence of meaningful dialogue or consultation about alternatives before a decision was communicated on 10 July 2020".*

73. It is difficult for the Tribunal to understand that assertion. No decision was communicated on 10 July 2020. The meeting notes from 10 July 2020 (page 1499) evidence that Ms Conroy and Ms Sawford explained to the Claimant that the Board was proposing that the role of CEO should be made redundant. The undisputed notes of the meeting evidence that the Claimant himself referred to it as a *"proposal".* Furthermore, the Respondent's letter to the Claimant immediately following the meeting (page 1500) likewise refers to the Respondent,

> *"commencing consultation on the proposed changes".*

74. In their letter of 20 August 2020, the Claimant's Solicitors further referred to it being clear from objective evidence that a decision had been made before 10 July 2020 and, accordingly, that the consultation process was a sham. It is unclear what objective evidence they were referring to since they did not elaborate further. The Claimant's Solicitors further asserted that the Claimant had a potential claim for disability-based discrimination, though this was not pursued further. Towards the end of the letter they wrote that the Claimant would not be in a position to attend the Occupational Health assessment. This seems to have been linked to the fact that he had been signed off work, though their letter only refers to the Claimant's physician as having advised him not to participate in the dismissal process. It is at odds with the Claimant's statement on 11 August 2020 that he would be happy to attend an assessment.

75. The Solicitors' letter of 20 August 2020 was referred to the Council's Legal Services Team who sent an initial holding response which confirmed that in light of comments in the letter regarding the Claimant's wellbeing, a further appointment would be made for an Occupational Health assessment on 1 September 2020 with a further consultation meeting

proposed to be held thereafter on 9 September 2020 (pages 1646 and 1647). We have re-read the response and consider it to have been sensitively written and entirely appropriate in the circumstances.

76. The Claimant followed up his Solicitors' letter with an email to Ms Sawford on 26 August 2020. Whilst he was apparently not well enough to attend an Occupational Health assessment that had been arranged for 25 August 2020 and had been advised not to participate in the dismissal process, because he could not participate or suitably represent himself, he was able to submit a formal grievance, which he asked to be investigated in accordance with the Council's Whistleblowing and Grievance Policies. In circumstances where, five months earlier, the Claimant had failed to act upon Mr Middleton's invitation to evidence any concerns he had regarding integrity, objectivity, accountability etc, and given also his emphatic statement to Mr Proffitt in March 2020 that he had not made any formal allegations of wrongdoing, we can understand why the Council's Head of HR and Learning and Development referred to the Claimant's email as,

> *"pressure being put on us to settle to avoid wrapping us up in knots in investigations".*

77. On the same day that the Claimant purported to invoke the Council's Whistleblowing and Grievance Policies, his Solicitors wrote to Ms Sawford to advise that he would not be attending the Occupational Health assessment arranged for 1 September 2020. The given reason was again that he had been advised by his physician not to participate in the dismissal process. We have difficulty in understanding why, if such advice was given, it might have been thought to extend to an Occupational Health assessment that was specifically intended to consider how the Respondent might help and support him.

78. On 3 September 2020, the Nominations and Remuneration Committee met to consider the points raised in paragraph 7 of the Claimant's Solicitors' letter of 20 August 2020, namely whether the Claimant's role should be pooled with other senior roles at the Respondent. The minutes of the Committee's meeting record the Committee's conclusion as follows,

> *"…this would not be an appropriate alternative as it would generate considerably lower savings than those proposed. This consideration will be shared with the Board at its meeting on 7 September."*

These conclusions were not supported with any data and we were not referred to any further data at the Final Hearing.

79. On 4 September 2020, the Council's Legal Services Team sent a five-page response to the Claimant's Solicitors' letter of 20 August 2020. Whilst they denied that the Claimant had made protected disclosures, they addressed in turn, and in detail, each of the alleged detriments to which the Claimant claimed he had been subjected.

80. At a further Board Meeting held on 7 September 2020, the Respondent's Board considered the proposals in paragraph 7 of the Claimant's Solicitor's letter of 20 August 2020. At the meeting, Ms Sawford reported the discussions of the Nominations and Remuneration Committee from its own earlier meeting on 4 September 2020. The minutes of the 7 September meeting evidence that the Board discussed the Claimant's proposals and that Ms Sawford and Mr Bell provided comments and clarification as necessary. As was the case on 3 August 2020, no decision was taken, the Board simply noting the deliberations of the Nominations and Remuneration Committee. We can find no evidence in the Hearing Bundle that the Board considered the matter further following its meeting on 7 September 2020 or that it provided a detailed response on it to the Claimant or his Solicitors, though Ms Conroy did subsequently provide the Claimant with a copy of the Board's discussions under cover of an email dated 11 September 2020 in which she referred to providing an update on the Board's consideration of the alternative proposals put forward by him. It seems thereafter that the pooling proposal was overlooked.

81. On 4 September 2020 the Claimant was certified unfit by his GP for a further period of two months. Under the Council's Restructure, Redundancy and Redeployment Policy, which the parties agree was applicable to the Claimant's employment, a 30-day consultation period was mandated in all cases where 19 or fewer employees were affected. By 8 September 2020, the consultation process had been ongoing for some 60 days, albeit the Claimant had been certified unfit since 28 July 2020. Given that he had been signed off work for a further two months, Ms Sawford informed the Claimant that the Respondent could not extend the consultation period indefinitely. She therefore proposed moving the scheduled consultation meeting on 9 September 2020 to 16 September 2020, on the basis that the Claimant could either attend via Teams and have an employee representative to support him or put forward his comments in writing. She expressed the view that whilst the Respondent did not wish to make the process any more difficult for the Claimant, the meeting scheduled for 16 September 2020 would not be moved again and, accordingly, that if the Claimant was unable to participate the Respondent would conclude the consultation process without him. She encouraged him to participate in the process as best he could, even if this was in writing.

82. On 10 September 2020, ahead of the rescheduled consultation meeting, the Council's Head of HR and Learning and Development, Mr Zaman drafted a letter to the Claimant formally notifying him of his redundancy and circulated this to the Nominations and Remuneration Committee. Mr Zaman emphasised, and we accept, that he was doing so,

> *"without jumping the gun"*.

83. On 15 September 2020, the Claimant sent a two-page email to Ms Conroy in which he summarised his contribution to the Respondent's success over

the preceding seven years. He referred to having been subjected to scrutiny since December 2019, with increased pressure being applied by the Council. He reminded Ms Conroy that as an independent Board member she had duties and obligations towards the Respondent, including an obligation to exercise independent judgement. He expressed concerns that Mr Bracey had acted outside the governing arrangements between the Council and the Respondent and exceeded his executive authority. He did not repeat the allegations in his Solicitors' letter of 20 August 2020 that he had been subjected to detriments as a whistleblower or that his proposed redundancy was the culmination of his treatment in that regard, though did refer to "*having to stand up on occasions and be counted*". As well as raising governance issues, the Claimant returned to the underlying financial rationale, emphasising the significant annual cost saving that could be achieved through a reduction in the Respondent's borrowings. He invited Ms Conroy to consider two further alternative proposals. Firstly, he suggested that his role should have been pooled with the Council's Director of Environment and Property and Commercial Property Lead (namely the roles held by Mr Palmieri and Mr Proffitt). Secondly, he said,

> *"The opportunity for me to reduce hours to one and a half days per week in order to reduce operational costs has never been offered".*

84. The Claimant confirmed at Tribunal that, although he had not said so explicitly, he would have considered a reduction in his working pattern to one and a half days per week in order to avoid his redundancy. In any event, we are satisfied that Ms Conroy and, in turn, the Nominations and Remuneration Committee and the Board understood that this was what the Claimant meant by his comments.

85. Finally, the Claimant highlighted that should notice of termination be served on 18 September 2020, this would result in the Claimant being made redundant less than four weeks short of his 55th birthday, denying him the benefit of the enhanced provisions of the Local Government Pension Scheme for employees made redundant over the age of 55. We can understand why this was a particularly important consideration for the Claimant, but equally that there would have been cost implications for the Respondent if it had deferred his termination date in this way.

86. The Nominations and Remuneration Committee met again on 16 September 2020. They discussed the Claimant's proposal that the two Council roles should be pooled with his own but concluded that the Respondent could not include Council employees in the process given that it had no jurisdiction or authority over them. As regards the second proposal, the Committee

> *"…considered that as a subsidiary of MKC it also had a duty to consider the cost savings to both entities. This proposal would not yield savings to MKDP's parent company."*

87. In the circumstances, the Committee determined that they would recommend to the Board that neither proposal represented a viable alternative to redundancy but that the Committee should explain to the Board that the second proposal could be considered viable if the Board was minded to consider only the needs of the Respondent and not that of the Council.

88. However, on the following day 17 September 2020, Ms Conroy emailed Mr Bell and Ms Sawford with a draft Committee recommendation to take to the Board that afternoon. The recommendation differed from the previous day when the Committee had identified that the Claimant's second proposal was potentially viable. Instead, the Committee's draft recommendation was as follows,

> *"The Board considered the proposal and noted that whilst the alternative would be viable solely in the context of MKDP, the Board has a responsibility to consider the wider implications for its parent company and the long term joint working of the two organisations. In this case the proposal would not result in reduced costs across both organisations and they would not benefit from the strength and working relationship that would arise from combined CEO leadership."*

89. Thirty-nine minutes after Ms Conroy sent that email, the Respondent's Board convened and by the conclusion of the meeting thirty minutes later had resolved to adopt the Committee's recommendation to proceed to make the role of CEO redundant. The following day, 18 September 2020, the Claimant was issued with formal notification of redundancy. Mr Zaman's draft letter had been amended to address the alternative proposals put forward by the Claimant in his email of 15 September 2020.

90. On 27 September 2020, the Claimant appealed against his redundancy. In his dismissal appeal, which runs to seven pages (pages 1730 – 1737) the Claimant did not state explicitly that he had been automatically unfairly dismissed as a whistleblower, though he referred to the Respondent's failure to investigate his whistleblowing complaint and grievance submitted on 26 August 2020. The overriding focus of his dismissal appeal was in relation to the other matters raised by him in the course of the redundancy consultation process. We cannot identify that he asserted that his role should have been pooled with other senior roles at the Respondent. The Claimant addresses the appeal at paragraphs 173 – 176 of his witness statement. He asserts that Mr Mallen, who heard his appeal, refused to consider his whistleblowing concerns as part of the appeal process. He further complains that his request for the minutes of relevant meetings in which his redundancy had been considered and ultimately decided, was refused. It is unclear what minutes he is referring to.

91. After Ms Aldowrth began working as the Respondent's Managing Director in or around October 2020, she received a pay increase of £14,385 to reflect her additional responsibilities. We were not told how much, if any,

of that additional cost was charged back to the Respondent. The Respondent recruited an Assistant, primarily to support Ms Sawford and Ms Aldworth. We do not have further details as to the costs involved. It is not suggested by the Respondent that this hire would have happened had the Claimant not been dismissed.

The Law and Conclusions

92. Section 98(1) of the Employment Rights Act 1996 provides:

> In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

93. One of the stated reasons falling within Section 98(2) is that the employee was redundant.

94. If a Respondent establishes a potentially fair reason for dismissal, Section 98(4) of the Employment Rights Act 1996 goes on to provide:

> … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

95. The first question then is whether the Respondent has established, on the balance of probabilities, that it dismissed the Claimant by reason that he was redundant.

96. One of the difficulties faced by the Tribunal in this case is that the Respondent has failed to place evidence before the Tribunal that the Claimant's role was redundant within the meaning in section 139(1)(b)(i) of ERA 1996, namely that there was a reduced requirement for work of the kind done by the Claimant. The Respondent seems to have proceeded on

the assumption that because the Claimant worked 4 days per week and his de facto replacement, Ms Aldworth, worked 1.5 days per week (increasing at some unspecified later date to 2 days per week), the statutory definition in section 139(1)(b)(i) is thereby met. However, none of the Respondent's witnesses have given evidence as to what work the Claimant performed as CEO or what happened to this work after he left the Respondent's employment. Ms Aldworth was not familiar with what work the Claimant had performed as CEO. Ms Sawford had limited insight in this regard, since she had only taken up her appointment as Chair of the Board on 1 April 2020 and, as a non-executive, had relatively limited interactions with the Claimant by the time he was placed at risk of redundancy to know what he did and what became of his work after he left the Respondent's employment. Of all the Respondent's witnesses, Ms Conroy was perhaps best placed to assist the Tribunal since she was appointed to the Board in February 2018 and was also Chair of the Nominations and Remuneration Committee, so might have had a clearer sense of what the Claimant did and what became of his work after he left the Respondent's employment. However, her witness statement was silent on the matter and it was not addressed in the course of her evidence at Tribunal. There was some reference during the hearing to the Claimant's senior colleagues having assumed additional responsibilities and that the Assistant who was recruited by the Respondent has taken on some basic tasks that might otherwise have been performed by the Claimant, but otherwise the picture that emerged at Tribunal was incomplete. In our judgement the Respondent has failed to discharge the burden upon it to establish that the Claimant was dismissed by reason of redundancy within the meaning of section 139 of ERA 1996. However, that does not mean that we conclude that the Claimant was automatically unfairly dismissed because he made protected disclosures.

97. We are concerned with identifying the reason, or principal reason, that operated in the Respondent's mind when it dismissed the Claimant from its employment in 2020. Why did it act as it did? What, consciously or unconsciously, was the reason the Nominations and Remuneration Committee and then the Board concluded that the Claimant should be dismissed?

98. Royal Mail Group Ltd v Jhuti [2019] UKSC 55, which was a dismissal case, grappled with the question of which person is to be taken to have the state of mind that should be attributed to the employer. The decision-maker had been misled by Ms Jhuti's manager. The task was said to be context-dependent and should be approached in a broad and reasonable way in accordance with industrial realities and common sense. The Supreme Court concluded that if a person in the hierarchy of responsibility above the employee determines that they should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.

99. By the conclusion of the Final Hearing, the Claimant no longer asserted that Mr Bracey had subjected him to a detriment that was attributable to the Respondent. Mr Ratledge submits that Mr Bracey's Action Plan was flawed, and that it had emerged seemingly without discussion, scrutiny or approval from the Council. However, in the course of his evidence at Tribunal the Claimant accepted that he had no evidence that Mr Bracey had brought forward the secondment proposal because the Claimant had made protected disclosures. In any event, it follows from our findings above regarding Mr Bracey's lack of knowledge of the Claimant's protected disclosures that this is not a Jhuti type situation in which the Respondent adopted Mr Bracey's improper hidden efforts to secure the Claimant's removal from his post because he had made protected disclosures. Instead, Mr Bracey approached the Respondent with a bona fide proposal that he genuinely believed would deliver cost efficiencies for both the Respondent and the Council, and also potentially promote effective joint working between the two organisations. In the circumstances, the Respondent's actions and decision making in relation to the Claimant were not tainted by impermissible reasons operating in Mr Bracey's mind.

100. In order for the Claimant's section 103A ERA 1996 complaint to succeed, the Respondent must therefore, consciously or unconsciously, have adopted the Bracey proposal, or at least progressed it to a conclusion, because of the Claimant's protected disclosures rather than for the legitimate reasons it had been advanced in the first place by Mr Bracey. Whilst it is certainly not impossible nor inherently unlikely that this is what happened, it does require that we examine the matter critically and, in particular, that we give careful thought to whether there are facts from which we might draw adverse inferences.

101. Ms Sawford brought the Bracey proposal to the Board on 7 July 2020, taking time to speak to as many members of the Board as she could prior to the meeting to gauge their views. We have found that she was unaware of the Claimant's protected disclosures until the Claimant's Solicitors wrote to the Respondent on 20 August 2020. In which case, his disclosures were not the reason why she took the Bracey proposal forward, certainly in July and during the first weeks of August 2020.

102. We have likewise found that Ms Conroy was unaware of the Claimant's protected disclosures when the Bracey proposal was first mooted. It follows that the disclosures were also not the reason for her initial actions and decisions.

103. Ms Fru shared the Greenley's review and her own draft report with Mr Richardson and he was therefore plainly aware of the Claimant's protected disclosures when the Bracey proposal was first brought to the Board on 7 July 2020, as was Mr Middleton. We have asked ourselves whether the disclosures informed their actions and decisions, and whether they may have influenced the rest of the Board in the Jhuti sense. In this regard, we have already set out why Mr Middleton's emails of 4 March, 17 April and 4

May 2020, as well as his conduct at the Board meeting in May 2020, were not by reason of the Claimant's protected disclosures. The Claimant has not put forward a positive case in relation to Mr Richardson. If, as the Claimant asserts, Mr Middleton was influenced by the Claimant's protected disclosures, they could only have begun to inform his actions in relation to the Claimant over a year after the Claimant's disclosures to him. There is no obvious explanation for why they came to inform his thinking. In our judgement, that is because just as the Claimant's protected disclosures were not a factor in Mr Middleton's thinking in spring 2020, they continued not to be a factor in his thinking thereafter. As regards the 7 July 2020 Board meeting, we have accepted the Respondent's evidence that the Greenleys transaction was not referred to or discussed during the meeting. That does not mean, of course, that the Claimant's protected disclosures were not operating in Mr Middleton's or Mr Richardson's minds. However, in our judgement, there are simply no materials in the Hearing Bundle nor was any evidence placed before the Tribunal, and there are no other facts or circumstances, from which we might reasonably infer that Mr Middleton, or Mr Richardson, was motivated or influenced by the Claimant's protected disclosures at the Board Meeting on 7 July 2020, let alone that either of them influenced the meeting outcome to their own impermissible ends by securing the approval of the other Board Members then present to a proposal that had emanated not from them but from Mr Bracey who, in making it, was entirely unaware of the Claimant's protected disclosures. We are satisfied that the Claimant's protected disclosures played no part whatsoever in the decision taken by the Board on 7 July 2020.

104. As regards the first consultation meeting on 10 July 2020, this was not because the Claimant had made protected disclosures, rather it was the necessary first step in a consultation process that resulted from the decision taken on 7 July 2020, entirely unrelated to any protected disclosures of his, that the Claimant's role should be placed at risk of redundancy.

105. Ms Sawford and Ms Conroy's initial ignorance of the Claimant's protected disclosures creates a particular difficulty for the Claimant, since it begs the question why, on becoming aware of the disclosures some weeks into the consultation process, the disclosures assumed such significance in their minds that the disclosures rather than any cost savings became the operative reason why they continued with the consultation process and both recommended and voted to confirm the redundancy of the Claimant's position. Ms Crawford and Ms Conroy can be criticised for having failed to explore with the Claimant what he meant on 10 July 2020 when he said that the proposal was politically motivated and could be because of a possible whistleblowing exercise, but we do not infer from their failure to follow up with him on this point that in that particular moment or by the following meeting on 20 July 2020, his protected disclosures (about which they remained ignorant for several more weeks) became the dominant factor in their thinking and decisions.

106. As with Ms Sawford and Ms Conroy, the Claimant has not clearly articulated why the Greenleys transaction, or more specifically the Claimant's disclosures in relation to it, assumed such significance in Ms Aldworth's mind that it informed her actions in relation to him. In any event, she did not attend the Board meetings on 7 July and 3 August 2020, and did not vote at the meetings on 7 and 17 September 2020, further reducing the potential for her to influence the Board, even assuming she might have sought to do so for an impermissible reason.

107. There is no basis for us to infer that in the course of the consultation process, or certainly by 17 September 2020, Mr Middleton, Mr Richardson or the other members of the Board, or at least a majority of them, came to be principally informed by the Claimant's protected disclosures rather than any cost savings. Mr Middleton did not vote at the meeting on 17 September 2020. There is nothing to suggest that he or any other members of the Board knew or had some sense that the consultation process was a sham or, at least, that Board minutes, emails, correspondence and other documents were not an accurate reflection of what was informing their or the wider Board's thinking and decisions in relation to the Claimant. In our judgement, in all the circumstances, the Claimant's complaint that he was unfairly dismissed because he made protected disclosures is not well founded and accordingly shall be dismissed.

108. The question remains why the Claimant was dismissed from the Respondent's employment. Whilst the Respondent has failed to discharge the burden upon it of establishing that the Claimant's role was redundant within the meaning in section 139(1)(b)(i) of ERA 1996, we find that the reason for his dismissal was that the Respondent concluded it could reduce its overheads by removing the post of CEO from the organisation and buy in senior executive support from the Council, on the tacit understanding that the Claimant's former colleagues would 'step up to the plate' and take on additional responsibilities. In our judgement, the arrangements proposed by Mr Bracey and adopted by the Board constituted some other substantial reason of a kind such as to potentially justify the Claimant's dismissal i.e, within the meaning in section 98(1)(b) of ERA 1996.

109. The question then is whether the Respondent acted reasonably in relying upon the arrangements as sufficient reason for dismissing the Respondent. This involves a broad enquiry, that includes having regard to the size and administrative resources of the Respondent's undertaking. In this case, whilst the Respondent employed approximately 10 staff, it had access to the Council's Legal Services and HR teams for advice and support.

110. Whilst the Respondent has failed to satisfy the Tribunal that the Claimant's role was redundant, in our judgement the fairness or otherwise of the dismissal for some other substantial reason still essentially falls to be determined in accordance with well-established principles applicable in

cases of redundancy related dismissals, including as laid down in *Williams v Compair Maxam Ltd [1982] ICR 156*.

111. In our judgement, there was some initial potential unfairness in terms of the slightly hasty manner in which the Bracey proposal was brought to the Board, namely on little more than 24 hours' notice and without any paper from either Ms Sawford as Chair or the Nominations and Remuneration Committee in support of the proposal. On the other hand, the Board did have the benefit of Mr Bracey's proposal, derived from his Action Plan. We accept that Ms Sawford endeavoured to discuss the matter with each member of the Board ahead of the meeting, in order to gauge their views, though it is not suggested that the Respondent's financial situation was such as to necessitate urgent consideration of the Bracey proposal. Indeed, even under the Respondent's own urgency procedure (the existence of which Ms Sawford and Ms Conroy were both aware, albeit the provisions of which they failed to familiarise themselves with), it is envisaged that urgent decisions may be taken on three days' notice (pages 157 and 158). Be that as it may, whilst the Board did not initially pause to consider whether cost savings could be achieved through other means, both the Committee and thereafter the Board actively engaged with the Claimant's initial set of alternative proposals in which he sought to indicate where costs savings could be achieved. We are satisfied that they did so in good faith and that Ms Sawford did not bring unreasonable pressure to bear or pre-empt further discussion when she indicated to her colleagues on the Nominations and Remuneration Committee and to the Council's Legal Services and HR teams that she and Ms Conroy's initial views were that the Claimant's proposals did not change the situation.

112. We do not consider that the Respondent acted outside the band of reasonable responses in failing to 'pause' the consultation process whilst it investigated the Claimant's concerns in his email of 26 August 2020 under its Whistleblowing and Grievance Policies. We do not consider that the Respondent unreasonably concluded that the Claimant was seeking to lever a settlement by tying the Respondent in knots. In our judgement their assessment of the situation and what they clearly perceived to be tactical conduct on the part of the Claimant, was a conclusion that a reasonable employer could come to in the circumstances. The Respondent may not have progressed the Claimant's concerns under its Whistleblowing and Grievance Policies but it did not ignore them. It addressed the bulk of the matters raised by the Claimant in some detail through the Council's Legal Services Team. As regards his request that certain of his concerns should be investigated under the Grievance Policy, the issues he was purporting to raise by way of a grievance concerned the decision to place his role at risk of redundancy as well as how the matter had been handled procedurally. We consider that these aspects were entirely capable of being dealt with within the ambit of the redundancy consultation process, they did not necessitate a standalone grievance process.

113. As we have identified in our findings above, the Board failed to come to a final decision on the proposal that the Claimant's role should be pooled with that of the Property Director and/or the Senior Development Consultant (or at least failed to document that any final decision was taken in that regard), even if the Nominations and Remuneration Committee had not looked favourably upon the proposal. The Committee's assertion that this would have resulted in a considerably lower cost saving was seemingly not explored further by the Board. We consider that the Board's failures in this regard were unreasonable.

114. We do not consider the Respondent to have been acting outside the band of reasonable responses when it declined to consider pooling the Respondent's role with two roles at the Council, including Mr Palmeiri's role. They were separate organisations operating financially independently of one another, even if the proposal in relation to the Claimant had the potential for synergies. In our judgement, few employers would have adopted or agreed to such an approach. We cannot say that this employer acted unreasonably in the matter. Save as set out below, nor do we consider that the Respondent acted unreasonably in bringing the consultation process to a conclusion notwithstanding the Claimant was unfit to attend the final consultation meeting. We are satisfied that the Respondent allowed him a reasonable opportunity to recover his health. It also endeavoured to refer him for an Occupational Health assessment with a view to identifying how he might be supported in the process. In circumstances where his sickness absence was becoming more long term, but given also that he had been able to put forward detailed representations both directly and through his Solicitors, we consider that the Respondent was not acting reasonably when it said that the Claimant could either attend his final consultation meeting via Teams and have an employee representative to support him or instead put forward his comments in writing. In the event, that is what he did. In our judgement, the Claimant is wrong to describe what happened as an accelerated redundancy process.

115. The principal reason why we have concluded that the Claimant was treated unfairly is that the Respondent seems to have pivoted at the eleventh hour in rejecting the Claimant's suggestion that he would consider a reduction to one and a half days per week in order to avoid losing his job. Throughout the consultation process the Respondent's stated rationale for the proposed redundancy of the Claimant's role was to achieve a cost saving. Whilst Mr Bracey had identified that the proposal also had the potential to further improve joint working between the two organisations, this was not identified within the Respondent as a potentially relevant consideration until immediately before the Board met on 17 September 2020 to finally consider the Claimant's position. As late in the process as 16 September 2020 the Nominations and Remuneration Committee noted that a reduction in the Claimant's days of work would represent a potentially viable alternative to the redundancy of his role; improved joint working only became a relevant, or even the decisive, factor when Ms Conroy circulated the Committee's draft recommendation to Ms

Sawford and Mr Bell immediately ahead of the Board meeting. We are not persuaded that the Claimant's proposal received careful consideration and evaluation on 16 and 17 September 2020, as Ms Sawford and Ms Conroy suggested. We accept that the amendment to the Committee's draft recommendation genuinely reflected Ms Sawford's own thinking in the matter, but the meeting minutes and other available evidence do not support that it gained wider traction or active consideration. On the contrary, we conclude that by 17 September 2020 the Board was focused on bringing matters to a conclusion. Its failure to pause, reflect and give more active thought to this final aspect was unreasonable.

116. We have no concerns in relation to the appeal process. Mr Ratledge does not refer to the appeal in his skeleton argument. In reality, the Claimant was able to put forward carefully crafted grounds of appeal and develop these during the appeal hearing. He received a fair hearing and thereafter a four-page decision on his appeal that engages fully with the grounds of appeal. We cannot identify any grounds upon which the appeal might reasonably be said to have given rise to unfairness.

117. For the reasons indicated in paragraphs 113 and 115 above, we conclude that the Claimant was unfairly dismissed.

118. Pursuant to s.123(1) of the Employment Rights Act 1996, where a Tribunal upholds a complaint of unfair dismissal, it may award such compensation as it considers just and equitable in the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal. In accordance with the well established principles in Polkey v AE Dayton Services Limited [1988] A.C. 344, the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the likelihood that the employee's employment would still have terminated in any event. The burden of proving that an employee would have been dismissed in any event rests with the employer. Nevertheless, Tribunals are required to actively consider whether a Polkey reduction is appropriate. In Software 2000 Limited and Andrews & Ors [2007] UKEAT 0533_06, the EAT reviewed the authorities at that time in relation to Polkey and confirmed that Tribunals must have regard to all relevant evidence, including any evidence from the employee and the fact that a degree of speculation is involved is not a reason not to have regard to the available evidence, unless the evidence is so inherently unreliable that no sensible prediction can be made. It is not an 'all or nothing' exercise. The decision of the EAT in Contract Bottling v Cave [2015] is illustrative of how a purely statistical chance of dismissal by reason of redundancy may be adjusted to reflect an employee's particular circumstances.

119. Applying Polkey principles in practice requires an evidenced based approach drawing upon common sense and experience, and in the final analysis ensuring that any final decision is just and equitable. We are mindful that, having treated the Claimant unfairly in the matter, the Respondent now has a vested interest in asserting that it was inevitable he would have left its employment.

120. As regards the pooling proposal put forward in the Claimant's Solicitors' letter of 20 August 2020, unfortunately this aspect was not explored with the Respondent's witnesses such that we are in a position to come to a judgement as to what would or might have happened had the underlying data been presented to and examined by the Board at the time and a formal decision been taken and/or documented on 17 September 2020. In circumstances where the Claimant seemingly did not raise any concerns in relation to this aspect in his dismissal appeal, we recognise the scope for argument that it ultimately made no difference to the outcome. However, we wish to hear further evidence and submissions on the point before coming to a judgement.

121. As noted already, we are satisfied that the Claimant would have accepted a reduction to one and a half days' work per week in order to keep his job. The question is whether, had this proposal been considered more carefully by the Board, his dismissal would or might have been avoided. We have come to the conclusion that there was a 75% chance that his dismissal might have been avoided. We accept that the potential for improved joint working with the Council became a relevant consideration in Ms Sawford's thinking at an advanced stage in the consultation process. However, notwithstanding the tensions and issues that had arisen in particular between the Claimant and Mr Palmeiri, we do not consider that it was such a weighty consideration that the Claimant's dismissal was inevitable or even a highly likely outcome. The Claimant may have lacked objectivity in relation to Mr Palmeiri but he was otherwise a capable CEO who had assembled a strong team at the Respondent and overseen strong performance which Mr Bell had acknowledged as having created real value in the organisation. The Board's primary focus from the outset of the consultation process was to achieve cost saving. We are concerned with what would or might have happened had the Respondent, acting as a fair and reasonable employer, continued to actively engage with the Claimant once he indicated a willingness to countenance a reduction in his days of work, even if he was, in parallel, also pressing the case for his role to be retained as it was. It is not suggested that the Board had lost confidence in the Claimant. At the eleventh hour, as the consultation process reached its conclusion, it seems to us that the Board simply adopted the recommendation and rationale put forward by Ms Sawford without critically engaging with the Claimant's proposal. Had the Board remined focused on the task in hand and given active, careful thought on 17 September 2020 to whether the Claimant could be retained on one and half days' work per week, we conclude that there was a 75% chance that it would have pursued this option, on the basis that any desired improvement in joint working could be achieved by other means, not least by the Board setting clear expectations in terms of the Claimant's relationships within the Council and providing appropriate oversight of these.

122. This case will be listed for a remedy hearing. Notice of that hearing together with any case management orders will be notified to the parties separately. Subject to our further judgement as to whether the Claimant

would or might have been retained on four days' work per week had his pooling proposal received further consideration, the Claimant's remedy will otherwise be based upon his remuneration on a reduced working pattern. We shall need to hear further evidence in order to come to a judgement as to whether and, if so, when this might have increased from one and a half days per week to two days per week, as we believe happened with Ms Aldworth.

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Employment Judge Tynan

Date: 10/1/2023

Sent to the parties on: 9/2/2023

NG
For the Tribunal Office