Case Number: 2202339/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT (sitting alone)

BETWEEN:

Mr R Sanguiliano

Claimant

AND

JCI Capital Ltd (1)
Mr D Pinci (2)
Mr D Clasadonte (3)
Mr M Bernardeschi (4)
Mr G Torzi (5)

Respondents

ON: 9 and 14 December 2021
Appearances:
For the Claimant: Mr L Davidson, counsel
For 1st and 5th Respondents: Ms N Hausdorff, counsel, not participating
For 2nd, 3rd & 4th Respondents: No appearance

REASONS FOR JUDGMENT

1. This decision was given orally on 14 December 2021. No request for reasons was made by the parties who participated at this hearing, namely the claimant and the first and fifth respondents. In May 2023 the third respondent, who was not present at this hearing, made an application for written reasons which was granted at a Case Management Hearing on 23 June 2023.

2. By a claim form presented on 17 April 2020 the claimant Mr Riccardo Sanguiliano brought a claim for automatically unfair dismissal and for notice pay and unlawful deductions from wages. The claim was about the events leading to his dismissal and the amount of a profit share he was underpaid.

This remote hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. A member of the press attended the hearing on day 1 only.

5. The parties and member of the press were able to hear what the tribunal heard and see the claimant as a witness as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

6. A request was made by the members of the press to inspect the claimant's witness statement and this was accommodated.

7. The participants were told that was an offence to record the proceedings.

8. The tribunal ensured that the claimant, as the only witness, had access to the relevant written materials. I was satisfied that the claimant was not being coached or assisted by any unseen third party while giving his evidence.

Witness outside the jurisdiction

9. The claimant, the only witness in this case, was in Italy joining by CVP. It was only when the claimant swore to the truth of his statement and confirmed his name and address, that the Judge noted that the witness was outside the jurisdiction.

10. I raised the point that it was for a party calling the witness to ensure that it was lawful in the country in which the witness was based, to give evidence in our jurisdiction by that means. Neither party had considered this in advance. It is a point that has come into more focus as CVP hearings have become more common.

11. Although the respondents did not have the right to participate in this hearing I heard briefly from Ms Hausdorff on the point. It was submitted for the respondents that enquiries needed to be made and could not be achieved today. The claimant was keen for the hearing to go ahead. Enquiries were made by the claimant of the Italian Embassy in London and it was hoped that written confirmation of the verbal response, that there was no objection, would be obtained swiftly. Unfortunately it was not. We therefore adjourned mid-afternoon on day 1 for that confirmation to be obtained.

12. On Monday 13 December 2021 the tribunal was forwarded an email received by the claimant on that date from the Welfare Department of the

Consulate General of Italy, stating that the Consulate General of Italy had no objection to the claimant giving evidence remotely in proceedings in the Courts of England and Wales. On this basis the tribunal was content to proceed, taking the claimant's evidence by CVP from Italy.

The issues

13. The issues were set out in a Case Management Order made by Employment Judge Walker on 28 October 2021. The respondents failed to enter an ET3/Response in time. The first and fifth respondents sought leave for an extension of time by lodging a draft Response on 12 July 2021. Judge Walker refused the application for an extension of time and this matter was not in issue for this hearing. The claim was undefended.

14. The first and fifth respondents appeared via counsel at this hearing, who asked for permission to ask a few cross-examination questions of the claimant. Mr Davidson for the claimant objected to this. I refused leave, it being the standard position under Rule 21 that the respondent could not participate and I had been given no pressing reason as to why the tribunal should depart from this position.

15. The issues were set out in the Order of 28 October 2021 as follows:

<u>Protected disclosure</u>

16. Did the claimant make a protected disclosure under section 43B Employment Rights Act 1996?

<u>Whistleblowing detriment</u>

17. The claimant said that on 21 November 2019 he raised concerns to the second, third and fifth respondents about an attempt to invest the funds of low risk clients into the high risk Toro Fund.

18. Was the claimant subjected to a detriment? He relies upon three matters:

    a. On 22 November 2019 being given notice of redundancy and being placed on garden leave.
    b. On 26 November 2019 being invited to a disciplinary meeting and on 15 January 2020 that disciplinary meeting took place.
    c. The first respondent failing to pay money owed under his written contract and pursuant to a verbal agreement.

19. Was the claimant subjected to any such detriment on the ground that he made a protected disclosure?

20. Which, if any of the respondents are liable for each detriment (whether primarily or vicariously)?

<u>Automatically unfair dismissal</u>

21. Was the principal reason for the claimant's dismissal the fact that he made a protected disclosure?

22. Was the principal reason for the claimant's selection for redundancy the fact that he made a protected disclosure?

23. The claim for automatically unfair dismissal lies only against the first respondent.

Unlawful deductions from wages

24. To what sums is the claimant entitled by virtue of the Reimbursement clause of his contract?

25. Were those sums wages for the purposes of section 13 Employment Rights Act 1996?

26. Did the first respondent unlawfully deduct those wages?

27. Remedy is to be determined at a later date.

Documents and statements

28. There was a bundle of documents from the claimant of 336 pages, a cast list and chronology. Some of the documents were in Italian and translations were given. I was told that these were electronic translations. They were not court approved translations. Some documents in Italian were not translated, for example a document dated 6 September 2019 by which the claimant said he waived certain rights under Italian law.

29. The tribunal heard from the claimant. Unfortunately the page numbers given in his statement did not line up with the pages numbers in the bundle but it was possible to locate the documents referred to.

30. The tribunal had a written submission from the claimant to which counsel spoke. It is not replicated here. All submissions, case law and legislation referred to was fully considered even if not expressly referred to below.

31. Counsel for the respondents asked for permission to make a submission in reply to the claimant's submission. I refused this application as the respondents did not have leave to participate in the liability hearing and the claimant objected to the application.

Findings of fact

32. This is an undefended claim. The tribunal had the evidence of the claimant and submissions from his counsel. The findings of fact made below are based on the unchallenged evidence of the claimant and the documents to which the tribunal was taken.

33. The claimant was employed by the first respondent, a financial services company, as a portfolio manager in the UK from 2 September 2019 to 18 January 2020. He did not have two years' service. He had previously been employed by the first respondent in Milan, Italy between 2 May 2019 and 1 September 2019 but it was not contended that there was continuity of employment for the purposes of the Employment Rights Act 1996.

34. The first respondent (R1) is a financial services company dealing with asset management, investment banking and capital markets. The first respondent was authorised and regulated by the Financial Conduct Authority until 21 April 2021. After that date it was no longer able to provide regulated activities and products.

35. The second respondent (R2) Mr Pinci was the Chief Executive and an employee of R1. He resigned as a Director on 30 July 2020. The third respondent (R3) Mr Clasadonte was the compliance officer. The claimant understands that he no longer works for R1. The fourth respondent (R4) Mr Bernardeschi was a portfolio manager and was a Director of R1 for a short period from 30 July 2020 to 16 September 2020. The fifth respondent (R5) Mr Torzi was an investor in the first respondent. The claimant said that he exercised significant practical control over the operations and strategy of R1. The claimant's position is that R5 made significant decisions and was based in R1's offices and was present at all strategic meetings. The claimant said that he was "*effectively the boss".* The claimant had direct involvement with R5 and met him at least once a week.

36. Whilst there was a question over the status of R5, the claimant was unlikely to know his contractual position with R1. Based on the findings made below including R5's involvement in the key meeting of 21 November 2019 at which the relevant disclosure was made, I find on a balance of probabilities that even if R5 was not an employee of R1 he was either a worker or an agent of R1, such that he was involved with the day to day running of R1.

<u>The contractual provisions relied upon</u>

37. The claimant had a UK contract of employment from 2 September 2019 – bundle page 106. This contract was written in English.

38. Clause 4.1, headed "*Remuneration",* said that the employee "*shall be paid 70% of the gross profits generated from the wealth management department and profit related to the global Equity fund, both deducted of any rebate due to introduction of clients. The remuneration shall be paid monthly and will include tax and national insurance deductions. The employee is not entitled to receive payment in respect of hours worked in excess of the employer's normal working hours.*

39. Clause 4.3 provided for employer pension contributions at 2% of gross

salary.

40. Clause 5.1 headed "*Expenses and Receipts*" said: *"The Employee shall be reimbursed two monthly flights from London to Italy and all reasonable hotel, travelling, entertainment and other expenses properly incurred by him in the course of his employment with the employer subject to the production of valid receipts and in accordance with the employers regulations from time to time"* (page 109).

41. The contract contained confidentiality provisions and restrictive covenants applicable for one month after the termination date.

42. The claimant relied upon a verbal agreement made in mid-August 2019 with R2, R3 and R5 just before he made the move to London. The verbal agreement relied upon was that the profit share provisions in his UK contract of employment would apply retrospectively in respect of performance from May 2019 to August 2019, if he agreed to waive his entitlement to certain payments due under Italian law on the termination of his Italian employment contract. The Italian contract gave the claimant a salary of €85,000 plus a bonus of 50% of the performance and management fees on his accounts (his statement paragraph 13). The claimant also agreed not to draw a fixed salary in the UK but to received pay entirely based on profits generated. The claimant believed that he was asked to do this because he was a significant expense to the Italian business and this agreement created a better financial impression for R1 when it was trying to fundraise. I find on the claimant's evidence that such an agreement was reached and it was a binding agreement.

43. The claimant relied on a verbal agreement that his first profit share covering the period from May to September 2019 was to be paid to him in the September 2019 payroll. The claimant said that he trusted the respondents and did not seek to have this agreement incorporated into his contract. He considered that the agreement represented reasonable compensation for waiving his rights under Italian law.

44. The tribunal was taken to a document in Italian dated 6 September 2019 which the claimant referred to as a resolution contract in which he agreed to waive his rights under Italian law. Although this document was in the bundle at page 118 it was in Italian with no official translation and I make no finding as to precisely what it says. On the claimant's own evidence, I find that this document did not make any reference to the verbal agreement for retrospective profit share from May to September 2019.

45. This is an undefended claim and I find that there was an agreement for retrospective profit share from May to September 2019.

46. On about 15 September 2019 the claimant was approached by a non-statutory director of R1 who dealt with HR matters. She told him that his contract did not comply with the requirement for a national minimum wage so that it was necessary to pay him a nominal salary so this could be

shown on his payslip. The claimant was told that it would be treated as an advance payment of his profit share entitlement. This was not put in writing by either party. The claimant did not accept that the sum that was to be shown on his payslip, would represent his full contractual entitlement.

47. The claimant was paid the gross sum of £1,423.07 for September, October and November 2019 (payslips as pages 278-280). He was paid £197.04 in December 2019, described as salary (page 281) and in January 2020 he was paid salary of £1,423 and holiday pay of £394.08 (page 282).

48. The claimant's P45 at page 283 showed his pay to his leaving date of 18 January 2020 as £7,706.47.

The background to the disclosures

49. The wealth management department at R1 managed six accounts. They charge both performance and management fees for managing their clients' investments. A management fee is typically calculated as a percentage of assets under management (AUM) and is payable regardless of performance. The performance fee is typically calculated as a percentage of the increase to the AUM and is usually calculated and paid at the beginning of each quarter, 1 January, 1 April, 1 July and 1 October.

50. The management fee on the six accounts was at varying rates, never higher than 1%. They were payable by the clients quarterly in advance. A performance fee was payable on three of the accounts managed by the R1, payable by the client at the end of the quarter. For two accounts the performance fee was 10% of the profits generated in the quarter and for the third account it was 20%.

51. During the claimant's employment with R1, the largest client was the Statura Group which was a trust managing funds for private clients. The client contact was Mr DP. The client had a low risk profile towards its investments. Prior to the claimant joining R1, the funds for this client were underperforming. Their funds were held in two of the accounts managed by R1 on which the 10% performance fee applied.

52. The claimant worked together with Mr DP to improve the performance of this client's assets and maintained the low risk profile. DP gave instructions to the claimant that he did not want any of the funds related to R1 included in the portfolio considering their heavy losses in the past. By the end of May 2019 their assets has improved significantly.

53. The Toro Fund was R1's fund, managed by R4. During the claimant's employment it had been loss making. The claimant understood it to be a legal requirement that funds must have a minimum AUM of €100m before placing an order for investment in derivatives. He believed that as the Toro fund was managed by R1, it would in effect receive double

commission by investing money from the Global Equity fund into the Toro Fund.

The disclosures relied upon

54. At about 3pm on Thursday 21 November 2019 the claimant was called to a meeting with R2, R3 and R5. They told him that he was expected to purchase assets in the Toro Fund for all of his clients' accounts. He said that this action was illegal for many reasons, specifically the clients' mandate, the trustee instructions, risk management valuations and FCA rules about the size of funds.

55. I find that the disclosure he made at the meeting on 21 November 2019 is set out in paragraph 36 of his witness statement quoted below:

> *"I stated that this requested action was illegal for many reasons, specifically the client's mandate, the trustee instructions, risk management valuations and the FCA rules about the size of the Funds."*

56. The claimant's evidence was that he was aware that R1 was regulated by the FCA and required to comply with its Handbook and he believed the other respondents to be obliged to comply with this because of their senior positions within a regulated firm.

57. The claimant believed that the instruction was not compliant with the principles in the FCA Handbook. He set out in his witness statement the detail of his concerns. In his view the instruction breached the express requirements of at least one of their clients, Statura; that the Toro fund was loss making and did not represent a suitable investment, it was contrary to Statura's low risk profile, it would create a conflict of interest as the client would be charged twice for the investment and that the instruction was from the respondents' self-interest rather than in the interests of the client as it would increase the commission.

58. I asked the claimant how many clients he had and how many clients R1 had. The claimant said he managed all the clients and there were about six clients which were all family trusts. He did not know the exact number of people in each of the trusts but he estimated about 15 people per trust, making a total number of individuals affected by the investments of about 90.

59. In terms of the public interest claimant said he believed it was in the interests of his clients and "*the public more generally that potential breaches be addressed*". He believed that his clients in particular faced significant risk to their investments and this was not in their interests. The claimant considered it important that a FCA regulated company acted properly, and that R1 did not place other clients' investments at risk. I find for three reasons that the claimant reasonably believed that his disclosure was in the public interest: firstly the numbers affected, around 90 people;

secondly because he was experienced in the investment field and understood the importance of the FCA Rules and thirdly because he knew that the investments proposed were contrary to his clients' instructions and were based upon the respondents' interests rather than the interests of those clients.

60. The claimant told those at the meeting that he would not comply with the instruction because it would put him in breach of the FCA Handbook in particular with regard to acting with integrity and acting in clients' interests. His evidence was that R2, R3 and R5 were upset about his response and that they became verbally aggressive. He could not recall exactly what was said. The claimant said R5 warned him that if he did not do as instructed his profit share bonus would be at risk. R5 told the claimant at the meeting that he believed the bonus to be around £150,000.

61. Within an hour of the meeting the claimant's login credentials with Bloomberg were cut off so that he could not control his clients' accounts. R2 told him that this had been done to save cost.

62. The claimant gave an account about investment instructions given by R2 to one of the his direct reports; these instructions were given in Italian and were for investments into the Toro Fund and concerned the claimant's clients. The instructions were for €52 million, less than the €100million minimum required, as set out above (page 173). R4, who managed the Toro Fund, was copied in to some of the email correspondence at about 4:11pm on 21 November (see page 169). Given that he was copied on the email correspondence on that date, I find on a balance of probabilities that R4 was involved with the other respondents, in the decision making which had the potential to affect R4 as the fund manager.

63. Shortly before 5pm on 21 November 2019, Credit Suisse replied to the claimant's direct report, copying the claimant saying that the investment guidelines did not permit the investment. At about 5pm the claimant took the opportunity to have another conversation with R2, R3 and R5, saying he was aware of their instructions to his junior colleague and said it was clear breach of FCA Rules, repeating what he had said at the meeting earlier that day.

64. Ultimately the instructions did not proceed because R1's bankers prevented the investment from going ahead due to the high-risk nature of the investment and recognising that it would be in breach of FCA rules.

<u>The claimant's redundancy dismissal</u>

65. On Friday 22 November 2019, the day after making his disclosure, the claimant was asked to attend a meeting with R3. He was told that he was being made redundant. He was given a letter, which was dated 21 November 2019 (bundle page 186), giving notice of termination of employment. He was told that there was no suitable alternative employment, his employment would end on 18 January 2020 but that he

would be placed on garden leave during his two month notice period. The letter said there had been a consultation period. The claimant's evidence and my finding based on that evidence, is that no such consultation took place. The claimant had no prior warning of any redundancy situation.

66. I find based on the date of the letter, that it was prepared by R3, the author of the letter, on 21 November 2019, the day of the disclosure. It was handed to the claimant the following day. The letter was signed by R3 as a Director "*For and on behalf of [R1]".*

67. R1 had a contractual right to place the claimant on garden leave under clause 10.2 of his contract of employment.

68. The claimant's position was that the termination of his employment on 22 November was due to the disclosures he made on 21 November.

69. I have considered what was the reason for the claimant's dismissal. I find it was for the disclosures he made on 21 November 2019, for the following reasons. Firstly, the timing of the claimant's dismissal leads me to find on a balance of probabilities the disclosures formed the reason for his dismissal. The dismissal letter was given to the claimant the day after he made his disclosures and the letter was dated the same day as the disclosures. Secondly, he had no prior notice of any redundancy situation and I find that this was not the reason. Thirdly the claimant's evidence was that R2, R3 and R5 did not react well to his disclosures and this led to the immediate disconnection of his Bloomberg credentials within the hour to prevent him from trading. I find that the immediate disconnection of the claimant's access to Bloomberg and the preparation of a dismissal letter on the same day were in direct response to his disclosures which was the reason for his dismissal.

<u>Disciplinary proceedings</u>

70. On about 23 November 2019 the claimant flew to Italy. On 26 November 2019 he received an email by letter from R3 (page 191) requiring him to attend a disciplinary meeting on Thursday, 28 November 2019. The following two disciplinary charges were put to him:

    a) *Breach of clauses 12 and 14 of his contract in relation to restrictive covenants and disclosure obligations.*
    b) *Breach of the respondent's communication policy [and other provisions] as he had contacted the client using non-compliant and prescribed devices.*

71. The claimant was told that one of the possible consequences of the meeting could be the immediate termination of his contract of employment. He was told of his statutory right to be accompanied. The claimant was not given any more information or detail about these disciplinary charges. He was not told how he was said to have breached his covenants or disclosure obligations or how he had breached the respondent's non-

communication policy. The disciplinary meeting did not take place on 28 November because the claimant was in Italy.

72. On 11 December 2019 the claimant received a phone call from R3 seeking to rearrange the disciplinary hearing. The claimant asked for more information on the disciplinary charges but he was not given any further information. In an email sent at about 6pm on 11 December the claimant told the respondents that they were breaking the law and said that they had not paid his full salary, performance fees and expenses as required by the contract and they had not given him evidence of the "*false accusations*" (page 218). He said that further communication would be through his lawyers.

73. R3's position (email 12 December 2019 page 216) was that the claimant had been given all the necessary information in the letter of 28 November.

74. The disciplinary hearing took place by telephone on 16 January 2020. It was held by R3 with R2 present. This was the first time that the claimant learned the details of the first disciplinary charge which was that he had been in touch with the client in breach of his contractual restrictions. The claimant believes that the allegations related to him taking a call from his client contact Mr DP on about 23 November 2019 to say that he was shocked and worried to hear that the claimant had been made redundant. It is not necessary for me to make any finding in relation to the disciplinary charges as this is not in issue in these proceedings.

75. The claimant was not told the outcome of the disciplinary proceedings and his employment terminated on 18 January 2020 in accordance with the termination letter given to him on 22 November 2019. On termination, the claimant only received his basic salary.

76. The finding as to the reason for the disciplinary proceedings goes hand in hand with the reason for dismissal. I find that it was the negative reaction of the respondents to the disclosures made by the claimant on 21 November 2019 and their wish to be sure that they had secured the removal of the claimant from the employment of R1.

<u>The claim for unlawful deductions from wages and the third detriment</u>

77. The claimant received £7,706.474 for the entirety of his period of employment with R1 from 2 September 2019 to 18 January 2020. This was based on the nominal monthly salary that had originally been agreed.

78. The claimant's case is that he was not paid his profit share which he says accrued monthly that was payable three monthly to align with the clients' quarterly payments of management and performance fees.

79. As set out above, in the meeting on 21 November 2019 R5 told the claimant that he was putting at risk a bonus in the region of £150,000.

80. The quantum of any profit share is a matter for the remedy hearing. It has not been paid.

81. The claimant also claims for the cost of a return flight to Italy on 8-11 November 2019 in the sum of £102.99 under clause 5.1 of his contract. I find on the claimant's evidence that his has not been paid to him.

82. The claimant was not paid his profit share under the terms of his contract of employment or under the verbal agreement of August 2019 retrospectively to May 2019. I find that the reason he was not paid for this or his flight expense was because of the respondents' very negative response to his disclosures which went against their wishes and instructions.

<u>The FCA Principles</u>

83. The FCA Handbook requires regulated firms to adhere to their 11 Principles of Business referred to as "PRIN". If a firm breaches those principles the FCA can take enforcement action including removing the firm's authorisation to operate.

84. The FCA Rules are made under powers conferred in the Financial Services and Markets Act 2000, in particular as amended at section 137A by the Financial Services Act 2012, its general rule-making power and other legislation. Section 137A(1) says that the FCA may make such rules applying to authorised person (a) with respect to the carrying on by them of regulated activities, or (b) with respect to the carrying on by them of activities which are not regulated activities as appear to the FCA to be necessary or expedient for the purpose of advancing one or more of its operational objectives.

85. These form part of the relevant requirements for which the regulators may impose fines, seek injunctions or restitution orders them, compel the production of information and evidence, remove authorisation or prohibit a regulated firm from carrying out functions in the financial industry.

86. Examples of the principles include principle 1 that a firm must conduct its business with integrity and principle 2 that a firm must conduct its business with due skill, care and diligence.

The relevant law

87. Under Rule 21(2) of the Employment Tribunal Rules of Procedure 2013, where no Response has been presented on the expiry of the time limit, an Employment Judge shall decide whether on the available material a determination can properly be made of the claim, otherwise a hearing shall be fixed before a Judge alone. Under Rule 21(3) the respondent is entitled to notice of the hearing and any decisions of the tribunal but is only entitled to participate in any hearing to the extent permitted by the Judge.

88. Under section 48A of the Employment Rights Act 1996, a “protected disclosure” is defined as a “qualifying disclosure” which is disclosed in accordance with sections 43C to 43H of that Act.

89. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure as follows and as relevant to this case.

> *(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*

90. Under section 43C qualifying disclosure is made if the worker makes the disclosure to his employer.

91. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain information, whether expressly or impliedly. In ***Kilraine v London Borough of Wandsworth 2018 ICR 185*** the CA said that in order for a statement or disclosure to be a qualifying disclosure, it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) - (of section 43B). There is no rigid distinction between allegations and disclosures of information.

92. In terms of the reasonableness of the belief, the Court of Appeal in ***Babula v Waltham Forest College 2007 ICR 1026*** said that whilst an employee claiming the protection of section 43B(1) must have a reasonable belief that the information he/she is disclosing, tends to show one or more of the matters in that section, there is no requirement to demonstrate that the belief is factually correct. The belief may be reasonable even if it turns out to be wrong. Whether the belief was reasonably held is a matter for the tribunal to determine.

93. The leading authority on the public interest test is ***Chesterton Global Ltd v Nurmohamed 2018 ICR 731.*** The worker’s belief that the disclosure was made in the public interest must be objectively reasonable. The words “*in the public interest”* were introduced in 2013 to prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

94. In ***Chesterton*** whilst the employee was found to be most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. The claimant believed that his employer was exaggerating expenses to depress profits and thus reducing

commission payments in total by about £2-3million.

95. The Court of Appeal (CA) held that the mere fact something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

- The numbers in the group whose interests the disclosure served
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
- The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people
- The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not be taken too far.

96. The Court of Appeal also sounded a note of caution (paragraph 36) that the public interest test did not lend itself to absolute rules. The broad intent behind the amendment to the law in July 2013 introducing the public interest test, is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

97. The term "public interest" is not defined in the legislation. There is a two stage test according to the Court of Appeal in ***Ibrahim v HCA International 2020 IRLR 224*** (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest and (ii) if so, did he have reasonable grounds for so believing? The claimant's *motivation* for making the disclosure is *not* part of this test. The tribunal must look at the claimant's subjective belief at the time he made the disclosure (Judgment paragraph 25 Underhill LJ).

98. It is for the tribunal to rule as a question of fact on whether there was a sufficient public interest to qualify under the legislation. The term "public interest" is not defined in the legislation. In ***Parsons v Airplus International Ltd EAT/0111/17*** the EAT pointed out that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest. It could be both and this does not prevent a tribunal from finding on the facts that it was actually only one of those. In that case the claimant made a series of disclosures that in principle could have been protected but were found to be made as part of a disciplinary dispute with the employer which led to her dismissal for other reasons. The EAT found that the tribunal was entitled to find that the disclosures were made in her self-interest and not in the public interest.

99. Section 103A provides that an employee who is dismissed shall be

regarded …. as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. On the unfair dismissal claim the burden is on the claimant to prove the reason for dismissal as he did not have two years' service.

100. Section 105(1) provides that an employee shall be regarded as unfairly dismissed if the reason, or principal reason for dismissal was redundancy and it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer. Under section 105(6A) this applies if the reason for selection for redundancy was that specified in section 103A (above).

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

102. Under section 47B(1A) A worker has the right not to be subjected to a detriment by another worker in the course of that worker's employment or by an agent of the employer with the employer's authority on the ground that the worked made a protected disclosure. Section 47B(1B) provides for vicarious liability on the part of the employer and under section 47B(1C) it is immaterial whether the detriment is done with the knowledge or approval of the employer, subject to a reasonable steps defence in section 47B(1D).

103. To the extent that any detriment amounts to dismissal, it was held by the Court of Appeal in ***Timis v Osipov 2019 IRLR 52*** that section 47B(2) ERA can include a detriment claim against a co-worker in respect of a dismissal.

104. Under section 48(2) ERA the burden is on the respondent on a detriment claim to show the ground on which any act was done. The test is whether the protected disclosure materially influenced the relevant decision, in the sense of being more than a trivial influence: *see* ***Fecitt v NHS Manchester 2012 ICR 372 (CA)*** at paragraph 45.

<u>Unlawful deductions from wages</u>

105. Section 13(1) of the ERA 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

106. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him….., the amount of the deficiency shall be treated … as a deduction made by the employer from

the worker's wages.

107. Section 27 sets out the meaning of wages. Section 27(1) excludes any payments under subsection (2). Subsection (2)(b) covers any payment in respect of expenses incurred by the worker in carrying out his employment.

Conclusions

108. The first step was to consider whether the claimant made a protected disclosure.

109. It was submitted for the claimant that the disclosure, set out in paragraph 36 of his witness statement, included the information required by statute and cited ***Eiger Securities LLP v Korshunova 2017 IRLR 115 (EAT)*** at paragraph 35:

> *35. The claimant stated to Mr Ashton that it was wrong for him to trade from her personally designated computer without making it clear that she is not the person making the trade and identifying himself. If the statement had stopped there it may have been no more than an allegation of wrongdoing. However the claimant went on to tell Mr Ashton what her clients thought of his behaviour. This was new information given to Mr Ashton. The two sentences should be read together and considered in their context. This is an example of the situation envisaged by Langstaff J in Kilraine in which allegation and information are intertwined. Whether such words are to be regarded as "disclosure of information" within the meaning of section 43B(1) depends on the context and the circumstances in which they are spoken. The decision as to whether such words which include some allegations cross the statutory threshold of disclosure of information is essentially a question of fact for the employment tribunal which has heard evidence.*

110. The claimant in the present case said that he considered the investment instruction *"illegal for many reasons",* he set out those reasons and specifically mentioned the FCA rules. He made this disclosure to R2, R3 and R5 twice on 21 November 2019 so it was a disclosure made to his employer as well as to those personally named respondents. I find that it tended to show that compliance with the instruction to purchase assets in the Toro Fund for all of his clients' accounts, would amount to a failure comply with their legal obligations under the FCA principles.

111. I have considered whether the claimant reasonably believed his disclosure was in the public interest. His evidence was that investment into the Toro fund, contrary to the instructions of his clients, affected around 90 people. In the ***Chesterton*** case (above) the number of individuals affected was about a 100 and the Court of Appeal held that the public interest test was satisfied. In ***Chesterton*** the claimant believed that the company was deliberately mis-stating £2-3 million of costs and liabilities. This was enough to satisfy the public interest test. In the present case the sums involved were around €52million, substantially more than in ***Chesterton.***

112. In this case the interests of those affected had the potential to be substantial in that they risked losses to their considerable investments.

The investment in the Toro Fund was contrary to their instructions and their risk profile.

113. I find that that the claimant had a reasonable belief that his disclosure was in the public interest at the time his disclosure was made and that for the reasons given above he had reasonable grounds for believing this.

114. I accepted the claimant's submission that the claimant had nothing to gain personally from making this disclosure. I find that it was not made in self-interest.

115. I find that the claimant made protected disclosures.

<u>The dismissal</u>

116. I have found above that the reason for dismissal was the protected disclosures made by the claimant on 21 November 2019. The unfair dismissal claim lies only against R1 and the claim for unfair dismissal succeeds.

<u>The detriments</u>

117. I have found above that all detriments took place. The first two were that on 22 November 2019 the claimant was given notice of redundancy and placed on garden leave and that on 26 November 2019 he was invited to a disciplinary meeting with the disciplinary meeting taking place on 16 January 2020. The third detriment relates to two categories of unpaid amounts.

118. I have made findings above that the detriments were on the ground that the claimant had made protected disclosures. The causation test is satisfied.

119. In terms of who is liable for the detriments, I find that on all three detriments that this is R2, R3, R4 and R5 for whom R1 is vicariously liable. There was no reasonable steps defence in this undefended claim.

120. The disclosures were made to R2, R3 and R5. I saw that R4 had been copied in on the relevant email correspondence on 21 November 2019 as the fund manager of the Toro Fund, (see page 169 at 4.11pm) and this was sufficient for me to find, on a balance of probabilities that he was involved with the other respondents, in the decision making which had the potential to affect him as the fund manager.

<u>Unlawful deductions</u>

121. I have found above that there was a verbal agreement for the claimant's profit share under clause 4.1 of his contract retrospectively for the period May to September 2019. The amount of this entitlement is a matter for quantum at the remedy hearing.

122. In relation to the cost of the return flight from London to Italy I find that this is not recoverable under section 13 as it does not fall within the definition of wages under section 27(1) ERA. It is excluded under section 27(2)(b) being a payment in respect of expenses incurred by the worker in carrying out his employment. This follows the wording in clause 5.1 of the claimant's contract of employment, under the heading "*Expenses and Receipts"* which entitled him to reimbursement of two monthly flights from London to Italy incurred by him. The clause refers to it being in the course of his employment. The claimant submitted that I should separate the words: "*The Employee shall be reimbursed two monthly flights from London to Italy"* from "*and all reasonable hotel, travelling, entertainment and other expenses properly incurred by him in the course of his employment".* It was submitted that the two flights were "*a perk".* If it was intended as a perk, my finding is that the entitlement belonged under the clause relating to remuneration and not expenses. I did not have enough evidence to make a finding as to the purpose of the flights and I find on a balance of probabilities, given that the wording is in the clause, that it was required in the course of his employment.

123. I am supported in my decision that it is not wages because it is not included under the heading of Remuneration and is covered by a different clause on expenses. It is a contractual entitlement and the claimant made clear in his professionally drafted Grounds of Complaint paragraph 43 that he does not bring a breach of contract claim. The claim for unlawful deductions fails for reimbursement of the cost of the flight.

____

Employment Judge Elliott
Date: 26 June 2023

Sent to the parties and entered in the Register on:26/06/2023

________________________________ for the Tribunal