EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Mr R F P Alles **Implex Consultants Ltd (1)**
Mr A Bhardwaj (2)

Heard at: **London Central Employment Tribunal (via CVP)**

On: **3,4,5,9 10,11,12 May 2023**

Before: **EJ Webster**
Mr J Carroll
Ms C Marsters

Appearances
For the Claimant: **Mr J Wynne (Counsel)**
For the Respondent: **Mr A Allen KC (Counsel)**

RESERVED JUDGMENT

1. The Claimant's claim for unfair dismissal pursuant to s98 ERA 1996 is not upheld.

2. The Claimant's claim for automatically unfair dismissal pursuant to s103A ERA 1996 is not upheld.

3. The Claimant's claim for detriment pursuant to s47B ERA 1996 is not upheld.

4. The Claimant's claim that the respondent failed to provide written terms of employment as required by s1 ERA 1996 is not upheld.

REASONS

The Hearing

5. The hearing started late in the afternoon on day 1 due to a shortage of judicial resources.

6. The List of Issues had been agreed between the parties in advance. The List was significantly reduced as the Claimant withdrew his claim in relation to several Protected Disclosures. The List set out below reflects the withdrawals.

7. On day 2 we heard an application from the Respondent for parts of the Claimant's witness statement to be excluded. That application was refused. Full reasons were given at the time and shall not be repeated here. In short, the Tribunal did not consider it was in a position to be able to properly adjudicate on the relevance of the issues covered in the significant number of paragraphs that the Respondent sought to exclude. The Respondent had in any event prepared a supplementary witness statement for the Second Respondent which the Tribunal allowed to be relied upon as evidence in chief to offset any possible prejudice.

8. We began evidence in the afternoon of day 2. Evidence was concluded at lunch time on day 5 and the parties gave written submissions and addressed the Tribunal regarding those submissions on day 6. The Tribunal spent the afternoon of day 6 and all of day 7 in Chambers.

9. The Tribunal was provided with a bundle numbering 1144 pages. Added to this, by agreement, was an additional version of a document already in the bundle.

10. We were provided with written witness statements for the following:

(i) The Claimant

(ii) The Second Respondent (two statements) R2

(iii) Ms Jayne Heales 'JH' (Prepared the investigation into alleged misconduct)

(iv) Ms Erica Hameed 'EH' (prepared the disciplinary report)

(v) Mr Samuel Barnes Barrington 'SBB' (Director of R1 and dismissed the Claimant)

11. All provided oral evidence and were cross examined.

12. Both counsel gave helpful written submissions and addressed us orally, briefly commenting on their counterpart's written submissions.

The Issues

Qualifying Disclosures

13. Did the following occur and, if so (taken individually, in groups or as a whole) did they amount to disclosures of information by C pursuant to s.43B(1) ERA?

    Fourth Set of Disclosures

    a. C spoke to R2 about the dispute between R2 and Vibhuti Sharma (§14 amended GoC). ***August/September 2019***

    b. C disclosed information relating to Letters of Wishes and Sunflag to Vibhuti Sharma, her son and (via them) to legal advisers, who in turn disclosed the information to R2. The information disclosed by the Claimant to Vibhuti Sharma and her son consisted of an oral disclosure the terms of the Letter of Wishes and the provision of a copy of the Letter of Wishes to them. The Claimant believes that the information was disclosed by the legal advisers to R2 in writing. (§16 amended GoC).

    c. During the disciplinary meeting by telephone on 9 December 2021 C disclosed to Jayne Heales that R2 was not appropriately implementing his father's wishes in relation to the discretionary trusts set up upon the death of R2's father (§18 and §32 amended GoC).

14. In the reasonable belief of C, did the disclosures tend to show one or more of the following:
    a. in relation to disclosures **Error! Reference source not found.** to 1.c, that a criminal offence had been, was being or was likely to be committed;
    b. in relation to disclosures 1.a to 1.c, that there had been, was being or was likely to be a failure to comply with a legal obligation;
    c. in relation to disclosure 1.b, that information relating to any of the above matters at 2a and or 2b had been, was being or was likely to be concealed.
15. Did C hold a reasonable belief that the disclosures were made in the public interest?
16. Were the disclosures made:

    a. in relation to disclosures **Error! Reference source not found.** to 1.c, to the Claimant's employer within the meaning of 43C(1)(a) ERA; and/or
    b. in relation to disclosure 1.b, in the course of obtaining legal advice within the meaning of section 43D ERA.
17. In relation to disclosure 1.b for the purposes of section 43G ERA:
    a. Did the Claimant reasonably believe that the information disclosed and any allegation contained within it was substantially true;
    b. Did the Claimant not make the disclosure for purposes of personal gain;
    c. Were one of the following conditions met:
        i. At the time he made the disclosure did the Claimant reasonably believe that he would be subjected to a detriment by his employer if he made a disclosure to his employer or to a prescribed person (in accordance with section 43F ERA);

ii. in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, did Claimant reasonably believe that it was likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
iii. had the Claimant previously made a disclosure of substantially the same information—
    1. to his employer, or
    2. in accordance with section 43F.

d. in all the circumstances of the case was it reasonable for the Claimant to make the disclosure?

Automatically unfair dismissal, s103A ERA

18. Was the reason (or, if more than one, the principal reason) for C's dismissal that he had made a Protected Disclosure(s) set out above?

Whistleblowing Detriment, s47B ERA

19. Did R2 subject C to the detriment of dismissal on the grounds of one or more of the Protected Disclosures set out above?

Unfair dismissal, s 98 ERA

20. Was C dismissed for a potentially fair reason?
    a. R1 relies on the potentially fair reason of conduct, section 98(2)(b).
21. Did R1 conduct a reasonable investigation?
22. Did R1 possess a genuine belief in C's alleged misconduct?
    b. C asserts his role was wide-ranging and that the alleged misconduct was not misconduct at all but fell entirely within his role's remit.
23. If so, did R1 have reasonable grounds for believing that C was guilty of that misconduct?
24. Was C's dismissal within the range of reasonable responses?

Failure to Provide S1 Statement of Particulars

25. Did R1 provide C with the particulars required by s1 ERA? R1 admits that it did not (§8 GoR).

26. Has C successfully brought a claim specified in Schedule to the 5 Employment Act 2002? C relies on his claims for automatically unfair dismissal, whistleblowing detriment and unfair dismissal as set out above.

27. Did C bear responsibility for producing the statement of particulars required by s1 ERA? If so, does such responsibility constitute "exceptional circumstances" which would make the award of the minimum amount of two weeks' pay unjust or inequitable (s38(5) Employment Act 2002)?

28. Would it be just and equitable in all the circumstances to award the higher amount of four weeks' pay instead (s38(2) Employment Act 2002)?

General remedy issues

29. If the Claimant was unfairly dismissed / subjected to a detriment:

    a. Should any basic and/or compensatory award be reduced on account of the Claimant causing or contributing to their dismissal?

    b. Should any compensatory award be reduced in accordance with the '*Polkey* principle' and if so by what amount? This involves consideration of whether the Claimant would have been dismissed fairly in any event, notwithstanding any unfairness found by the Tribunal.

    c. If the Claimant succeeds in his claims of Automatically Unfair Dismissal and/or Whistleblowing Detriment:
        i. Were the Protected Disclosures made in good faith; and
        ii. To the extent that they were not, would it be just and equitable in all the circumstances to reduce the award made to him?

    d. Should any award be increased because of the R1's failure to comply with the ACAS code of practice? C relies on the following failures:
        i. Predetermining the outcome of the disciplinary process (§81-82 GoC); and
        ii. Failing to conduct the disciplinary hearing on 27 January 2022 in a manner consistent with the ACAS code of practice and in particular by failing to explain to C the case against him in a clear and cogent manner (§84 GoC).

       The Claimant reserves the right to specify additional failures subsequent to disclosure.

    e. Should any award be reduced because of the Claimant's failure to comply with ACAS code of practice by failing to appeal the decision to dismiss?

The Law

30. s43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

31. s**43B Disclosures qualifying for protection**

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
. . .
(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)

32. s43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—
(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

33. s43D Disclosure to legal adviser

A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

34. s43F Disclosure to prescribed person

(1) A qualifying disclosure is made in accordance with this section if the worker—
(a) makes the disclosure … to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
(b) reasonably believes—

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
(ii) that the information disclosed, and any allegation contained in it, are substantially true.
(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

35. s43G Disclosure in other cases

(1) A qualifying disclosure is made in accordance with this section if—
(a) …
(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
(c) he does not make the disclosure for purposes of personal gain,
(d) any of the conditions in subsection (2) is met, and
(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
(2) The conditions referred to in subsection (1)(d) are—
(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,
(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
(c) that the worker has previously made a disclosure of substantially the same information—
(i) to his employer, or
(ii) in accordance with section 43F.
(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—
(a) the identity of the person to whom the disclosure is made,
(b) the seriousness of the relevant failure,
(c) whether the relevant failure is continuing or is likely to occur in the future,
(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.
(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that

disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

36. s43L Other interpretative provisions

(1) In this Part— “qualifying disclosure” has the meaning given by section 43B; “the relevant failure”, in relation to a qualifying disclosure, has the meaning given by section 43B(5).
(2) In determining for the purposes of this Part whether a person makes a disclosure for purposes of personal gain, there shall be disregarded any reward payable by or under any enactment.
(3) Any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention.

37. s47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
(a) from doing that thing, or
(b) from doing anything of that description.
(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
(a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
(b) it is reasonable for the worker or agent to rely on the statement.
But this does not prevent the employer from being liable by reason of subsection (1B).
(2) … this section does not apply where—
(a) the worker is an employee, and
(b) the detriment in question amounts to dismissal (within the meaning of Part X).

(3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “worker”, “worker's contract”, “employment” and “employer” have the extended meaning given by section 43K.

39. s48 Complaints to employment tribunals

. . .
(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.
. . .
(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
. . .
(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, a temporary work agency or a hirer 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 do the failed act if it was to be done.
(5) In this section and section 49 any reference to the employer includes
. . . (b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

Unfair Dismissal

40. s95 ERA Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) …, only if)—
. . .
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is

entitled to terminate it without notice by reason of the employer's conduct.

41. s98 General

(1) 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.
(2) A reason falls within this subsection if it—
. . .
(b) relates to the conduct of the employee,
. . .
(4) Where the employer has fulfilled the requirements of subsection (1), 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.

(1) 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 (20 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it –
  (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  (b) Relates to the conduct of the employee,
  (c) Is that the employee was redundant, or
  (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
(3) In subsection (2)(a)
  (a) ‘capability’ in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
  (b) ‘qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.
(4) In any other case where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismiss 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 reasonable 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.

42. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98(2)(b) Employment Rights Act 1996 ('ERA'). In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) ERA is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band of reasonable responses also applies to the belief grounds and investigation referred to.

43. The test as to whether the employer acted reasonably in section 98(4)ERA 1996 is an objective one. We have to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted (*Iceland Frozen Foods Ltd v Jones [1982] IRLR 439*). We have reminded myself of the fact that I must not substitute our view for that of the employer (*Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82*);

44. We have also reminded myself that this test and the requirement that we not substitute our own view applies to the investigation into any misconduct as well as the decision. (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*. This means that I must decide not whether we would have investigated things differently, but whether the investigation was within the range of investigations that a reasonable employer would have carried out. We know that we must assess the reasonableness of the employer not the potential injustice to the claimant Chubb Fire Security Ltd v Harper [1983] IRLR 311). and only consider facts known to the employer at the time of the investigation and then the decision to dismiss (W Devis and Sons Ltd v Atkins [1977] IRLR 31.)

42. 103A Protected disclosure

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Facts

43. All of our findings are reached on the balance of probabilities. We heard evidence concerning a wide range of matters not all of which were relevant to the Issues. Where the Judgment does not refer to a matter discussed before us that does not mean that we have not considered it, merely that it was not relevant to our conclusions.

44. This is a case with relatively straightforward set of events occurring over a short period of time against a complicated and lengthy background. Despite being primarily background information, the context for the events is crucial to the parties' perceptions of events and therefore important for our conclusions.

45. We therefore set out some overarching findings regarding the background before addressing the situation that has caused these claims.

The Family

46. SD Bhardwaj had three sons. Priya Bhushan Bhardwaj (known as PB), Vijay Bhardwaj and Ravi Bhardwaj.

47. PB married Usha Bhardwaj and they had 4 children, one son and three daughters – Alok Bhardwaj (R2), Shruti, Suru and Vibhuti.

48. Vibhuti was married to Sunil Sharma and one of her sons was Vaibhav.

49. The extended family lived and worked internationally. They were not all British Nationals nor were they all resident in the UK either physically or for tax status purposes. The family are wealthy and SD Bhardwaj set up various trust funds for the benefit of his sons and their subsequent children.

50. The family companies were sometimes owned through somewhat opaque structures including trusts, shell companies in Jersey and charitable trusts.

51. Insofar as it is relevant we note that the family's money and investments was also often held in complex structures internationally.

The First Respondent

52. The First Respondent (R1) is a small company employing six people. It appears to carry out varied business transactions across various jurisdictions. The summary provided by the respondent in submissions, as drawn from unchallenged evidence, was *"Its primary business is trading, project development, financing and negotiating for raw material, spare parts and machinery. It has also diversified into property investment and property management. It is owned 100% by Lenville Overseas Ltd (BVI), which is in turn owned by 100% by a charitable trust, the Divit Trust."* From other evidence the Tribunal also finds that it provided business consultancy services to other companies – often those linked to it by family ownership.

The Claimant's work and working relationships

53.. Mr Bhardwaj was one of three brothers who jointly owned and run a company called VEL.VEL was the Claimant's employer between 1983 and 1998. Subsequently, when the brothers apparently fell out, PB asked the Claimant to work directly with him (from around 1996 onwards). R1 was set up by Mr P Bhardwaj in 1997. When R1 was established, the Claimant's employment was through R1. The Claimant followed PB from VEL to R1 and in essence became his finance director. It was clear from the Claimant's evidence that PB was his boss but also his friend. They travelled extensively together on business over many years and no doubt developed a friendship after so long working together. That friendship led to the claimant having intimate knowledge of PB's family particularly when his family were working closely with PB and particularly when PB was financing family led ventures and projects. We have no hesitation in finding that PB was likely to have confided in the Claimant during conversations over a long period of time of his wishes and hopes for his family and his children and their businesses, as many friends do.

54. We also accept that this close working relationship and friendship between PB and the Claimant led to the Claimant, over the years, to have access to documents and knowledge regarding some aspects of PB's personal financial affairs including knowledge about the possible existence of trust funds and how they were established and in some cases who the other beneficiaries were. This occurred because PB chose to share such information and documentation with the Claimant when it was relevant to the work he was being asked to do. We do not accept that the Claimant had free reign to access PB's personal financial affairs nor that he had detailed, up to date information about PB's personal wealth and finances at the time of his death. If something was relevant to the Claimant's work he was told about it. When it was discussed as part of their friendship, we find it is more likely than not that what occurred were high level discussions about wishes not intricate details about the financial planning he was putting in place for his children or how he intended to dispose of his estate.

55. The Claimant is a chartered accountant with an MBA in marketing. During his employment at R1 he had a varied range of responsibilities across many different projects that involved significant numbers of other companies and individuals. We find that his role was generally to carry out PB's wishes as, broadly put, a financial or marketing consultant. He worked on a very wide range of projects including projects in Canada and the US. This included working closely with PB's family members, in particular one of PB's daughters, Suru.

56. In evidence the Claimant was clear that, other than PB and then AB, he did not consider that he worked for any of the family members but with them. He accepted that he worked for PB and then subsequently for AB. He accepted that they were more senior than him. We find that he considered himself on a par with the remaining family members who he worked with on certain projects. When asked, he agreed that he provided consultancy services to the family members whilst being paid by R1. We accept that on a day to day basis neither

PB nor subsequently AB had control over the Claimant's day to day tasks. Nevertheless, he was ultimately accountable to them and only them and this was his understanding of his role both at the relevant time and throughout his employment.

57. From 2015 until 2019, the Claimant worked for AR Textiles in Canada with Suru for approximately 90 % of his time. He described his relationship with Suru as being like a mentor to her and agreed that he was in effect providing consultancy services for free to Suru's venture via his employment with R1. He accepted that he did not view her as his employer or his boss. He also accepted that he was never paid by anyone other than R1. He agreed that he was initially there at the request of PB and that subsequently AB was fully aware of his role and dealings with Suru's company.

58. The Claimant did no work with or for Vibhuti but had worked with her husband and son on a couple of minor projects.

59. The Claimant did not provide examples of working with the remaining sister, Shruti.

60. Overall, we find that there was not an employment relationship between the Claimant and the wider family. We have no doubt that he had relationships with the family given the length of time he worked for what was, in essence, a family company and through project work across a set of family companies. That coupled with his friendship with PB meant that he felt close to, and perhaps even a moral duty of care towards other members of the family and in particular PB's daughters. However we do not accept his apparent assertions that he could work with whoever he wanted whenever he wanted and that he owed a duty of care on a professional basis to the other family members as individuals. There was simply no evidence provided to substantiate that. The projects he was allocated to were at PB's says so. His relationship with R2 was more distant because they did not have the personal relationship to underpin it, but the Claimant in evidence recognised that R2 was the most senior person in the company despite the fact that he was a more recent director. He agreed that AB was aware of and sanctioned his work – whoever that work was for. We do not accept that the claimant was free to decide who his allegiances lay with – he was employed by R1 and his boss was R2 at the relevant time.

61. As part of his work for Suru he was appointed a Treasurer for her company. We find that there were no processes or expectations on the Claimant to declare that directorship. At the relevant time he was the sole director of R1 and he had nobody to declare it to. Further, there was no conflict, real or otherwise in him being a director for Suru's company given that he was spending 90% of his time working on that project at the time with the full knowledge and authorisation of firstly PB and subsequently (and at the time that he became a director) R2. Nothing was provided to us that suggested that being a director of Suru's company was somehow at odds with R1's work or purposes or somehow went against R1's best interests. It was not clear why R2 thought that it would be at that time. It was also clear that R2 was a director of multiple companies and had interests across a wide range of organisations and no records were

provided to us that he had declared those interests either formally or informally either. We conclude that there was no requirement within the company for Directors to declare their directorships in other companies.

Wills and Trusts

62. PB died in 2016. His will (which we had copies of) left everything in his estate to his wife, Usha Bhardwaj ('UB'). UB died in 2019. Her will left everything in her estate to R2. R2 was an executor for her will.

63. We did not hear evidence from any of the three sisters. It is apparent that Vibhuti was and is unhappy with the Wills of her parents and is seeking to challenge R2's inheritance. She has instigated proceedings in the High Court. It is not clear what the other sisters think.

64. There are numerous Trust funds that have been established by SD Bhardwaj (PB's father). The Claimant provided a significant amount of evidence of his understanding of those funds. For clarity, the funds we were informed about as being in existence were:

(i) the Sukta Trust;
(ii) the Salley Trust;
(iii) the Shivam Trust;
(iv) the Satyam Trust;
(v) the Rivervale Trust;
(vi) the United Brothers Trust; and
(vii) The Martand Trust.

65. We were also told by the Respondents that each of the three sisters were beneficiaries of their own Trusts. We were not provided with values of those Trusts but their existence was not challenged by the Claimant.

66. We were not told who the Trustees of the various Trusts were save that R2 was not a Trustee of any of the named ones above. We were told that they were professional trustees and on some occasions, the banks who held the assets provided that service. We accept that evidence.

67. The Claimant asserted that PB's relationship with the Trusts was somewhat informal. He asserted that despite being a beneficiary of several of the Trusts, in effect PB could tell the Trustees what to do with the money and how to disperse it. He also sought to assert that PB had established the trusts not his father – this was despite PB being a beneficiary.

68. The Claimant's intended inference to us was that the Trusts were mere legal veils over money that belonged to PB and his relatives as opposed to being genuine Trusts. Beyond the Claimant's assertions in this regard we were provided with no evidence to substantiate this.

69. Several of the Trusts were referred to by the Claimant in some detail. We consider that the relevant details were as follows:

    (i) The United Brothers' Trust was dissolved in 2019. Its beneficiaries were PB and his brothers and their male heirs. One of the drivers for dissolving it at that time was the change to the law regarding non-domiciled tax status.
    (ii) The Satyam Trust benefitted R2 and his sisters

Events leading up to the Disciplinary Process

70. The Claimant accepted in evidence that from around 2019 onwards he was accessing and scanning documents from within what had been PB's office. He downloaded and collated a huge number of documents which he put on a USB drive and sent to Vibhuti. These were included in the bundle though we were taken to relatively few of them.

71. One of the methods used to obtain documents was to take them from a cupboard in what had been PB's office. That cupboard was locked though everyone who worked at the office had a key to it. Subsequently, from 2021 onwards the office became AB's office. It is the Claimant's case, which we accept, that the majority of the documents he sent to Vibhuti were obtained in or around November 2019 and sent to her then. He did not try to access the cupboard again after it officially became AB's office. So at the time of taking the documents the office was an unused room full of (organised) papers with a locked cupboard.

72. At this time the Claimant was the sole director of R1 whilst R2 was 'just' an employee. The Claimant however knew that he was reporting to AB though we find that there was no day to day management of him. During the time between PB's death and AB becoming a director of the first respondent, the Claimant was primarily working with Suru in Canada and had little day to day need to report to anyone apart from Suru – though we examine the nature of that working relationship below. However we do find that R2 was fully aware of the Claimant's activities for Suru and sanctioned them.

73. The Claimant accepted that the documents he took were not relevant to R1, nor to his work for R1 nor to the claimant himself as an individual. They were documents relevant and belonging to the 'Family Bhardwaj' as a whole. He did not accept that they belonged to R2 but to the family as a whole. The Respondent's case was that they were not family documents and having belonged to PB they subsequently belonged to R2 who was sole heir.

74. Of the numerous documents which the Claimant now admits to having taken, the Respondents became aware of 6 particular documents before the disciplinary process was started and it was these that were specifically referred to in the disciplinary process. They were:

(i) Deed of Trust letter of wishes

(ii) Documents related to due diligence for the acquisition of a company called Crosby
(iii) Overdue gas bill for a residence
(iv) 2 Indian property deeds (docs 4 and 5)
(v) A document relating to a promissory note from 2019

75. The Claimant says that he took the documents because he thought that they would be useful and relevant to Vibhuti in her efforts to challenge R2's entitlement to the entire estate after Usha Bhardwaj had died. He considered that they demonstrated PB's true wishes both in respect of a fairer split between the siblings, the sisters' entitlement to £10million each following a deathbed wish made by PB and their entitlement to other assets under the Trusts. His assertion throughout the hearing was that R2 was concealing documents from his wider family so as to avoid having to divide the estate differently and give his sisters their fair share.

76. We have already concluded that the Claimant had no professional relationship with Vibhuti and had only done a small amount of work with her husband and son. Therefore in effect we find that he was being asked by a friend to take documents from his workplace, that did not belong to him, and give them to the friend.

77. The issue of ownership of the documents was disputed.

78. We conclude that the Claimant, at the time that he took them, believed that the documents regarding the Trusts, including the Letter of Wishes, belonged to PB, as opposed to the wider family. He considered them to be relevant to the family and the dispute they were having, which may be correct. However he did not genuinely believe that they belonged to the wider family including Vibhuti. He knew that they were PB's and he felt morally justified in taking them because he thought they were relevant to Vibhuti's moral (in his view) and possibly legal, entitlement to challenge her father's will.

<u>The six documents</u>

79. We find that copies of the letter or letters of wishes were more likely than not with the official Trustees if they were valid documents. We do not consider that PB would have written a letter of wishes that he wanted respected and not given it to the Trustees. He was a professional man, running many companies and involved with many Trusts both personal and business related. He would have understood both his standing within the Trusts and that of the Trustees. Although the relationship with the Trustees may have been porous in the days of PB we had no evidence before us to determine that the Trustees had been in some way tampered with or inappropriately influenced to the extent that had these letters of wishes been sent to them, they had not kept them or not abided by them inappropriately. We also had no evidence to suggest that AB was in some way hiding them from the sister. The obvious route for Vibhuti would have been to enquire with the trustees if she considered that she might be a beneficiary.

80. We find that the gas bill clearly belonged to either the estate of Usha Bhardwaj or to the person resident at the property (Shruti) and they were sent a copy of the bill as per R2's handwritten instructions. It is obvious to any observer that no other family member could have any ownership rights over this gas bill. The Claimant did not seek to assert that. He said that he considered that this document showed how much Shruti was struggling financially and it was therefore relevant to Vibhuti in challenging the fairness of the estate.

81. Document 2 was an engagement letter from PSJ Alexander to V&S Investments Limited about the acquisition of a company called Crosby and an associate due diligence exercise. The Claimant says in his w/s as follows:

"paragraph 69 - (pages 310 to 317 of the Bundle). V&S Investments was an investment vehicle set up by PB for Vaibhav. I had worked on quite a lot of acquisitions, including Crosby and this was a document I had when clearing out my files and didn't think it was really that significant. However, it did have a handwritten annotation by PB (page 312 of the 473 Bundle) where he was negotiating the cost of PSJ Alexander's services in relation to the potential acquisition. I thought that there was an outside chance that it might help Vibhuti's case because I thought it showed that PB cared about members of the family other than Alok. So it was among the documents which I scanned and sent to her. It was on the memory stick I provided to her in October 2020 (pages 956 to 950 of the Bundle).

82. His own evidence therefore confirms that he knew the document did not belong to Vibhuti nor to the wider family. He did not even think it was particularly relevant or significant yet he decided to take it.

83. Documents 4 and 5 were about the sale of an Indian property by R2. The Claimant asserts that the property had been 'frozen' by an Indian court order because of court proceedings in India and that he considered the existence of the documents showed that R2 was going to breach that Court Order. It is clear on the face of the documents that they belonged to R2 and not any of the family members. We accept it had relevance to possible court proceedings in India but it is clear to us that the Claimant took copies of it knowing that it did not belong to him nor to the person he was sending it to.

84. We find that it was entirely reasonable that he opened the envelope in the first place given that he was a Director of R1 and the envelope was addressed to R1. Nevertheless, his decision to then scan it and send it to himself was questionable and we address it in full below.

85. The wills for PB and then UB made it clear that everything in their estate was left to AB and whilst it was morally difficult perhaps for the daughters and for the Claimant to accept that PB's property now passed to R2 that was the reality from those documents that we have seen. To be clear we were presented with no information or evidence regarding the challenge to these documents in the High Court and make no findings in regard to those proceedings or their basis. We are simply observing the evidence that we were provided with.

86. In summary, we find that the six documents that formed the basis for the disciplinary process were of interest to the Claimant and Vibhuti, but they did not belong to them and the Claimant knew that at the time that he scanned them and sent them to Vibhuti. Had he not known that he would have been open about taking them and providing them to Vibhuti and he would not have had to retrieve them from a locked cupboard – whoever's cupboard it was at the time. The Claimant's justification for taking the documents has been the same throughout which is that he felt they were relevant to the family as a whole and the sisters' moral (in his view) right to information regarding PB's finances. We do not accept that he ever believed that the documents belonged to him nor that they belonged to R1. We do not accept that he believed that they were in any way related to his employment at R1 or his work for the wider family. He believed that they were relevant to a legal or moral challenge to R2's inheritance and took them for that purpose and with that justification alone.

Sunflag

87. Sunflag was a company in which PB had had shares. Those shares appear to have been disposed of at some point. We have tried to piece together the relevant information we need to determine this matter from the evidence provided. As stated above the ownership and governance of the various Trusts and ownership of assets was complex and frequently opaque. We take the unusual step of cutting and pasting from the witness statements in large sections below because the Tribunal were not given explanations that are easily summarised.

88. The Claimant says the following about those shares in his witness statement (para 32):

"It is clear in the minutes of Sunflag's shareholders meeting of 12 January 2016 (pages 717 to 720 of the Bundle) that PB was still the shareholder of the Sunflag shares at that time. I note that paragraph 21 of the Grounds of Resistance (as amended) (page 150 of the Bundle) says that PB was not the legal or beneficial owner of Sunflag at the time of his death. This is apparently confirmed by a letter to Alok from Sunflag dated 3 October 2022 (page 539 of the Bundle). However, the Annual Return filed on or about 19 January 2017 with the Jersey Companies Registry clearly records PB (deceased) as the holder of 1,250 shares in Sunflag (page 216 of the Bundle) but, at some point between then and January 2019, he ceases to be recorded as a shareholder and an equivalent shareholding is listed as held by PN Nominees Ltd in the British Virgin Islands (see the 2019 return at page 221 of the Bundle)."

89. He then relies upon an email he sent at (1041A, C's email address is deleted for the purposes of this judgment)

Mon, 14 Sept 2020 at 19:12
Vaibhav
I also down loaded the 2017 shareholding where there were 4 shareholders. This was changed to Ravi & Vijay having 5,000 shares (The 1,250 shares of £1

were split into £0.25 and SD Bhardwaj's shares were divided between the male grandsons. Your grandfather's shares seem to have been transferred to nominee's.
This could raise issues of Indian inheritance for your great grandfathers share plus your grandfathers 5,000 shares which he has transferred to nominee's."
Rgds
Pasqual

90. The Claimant explains sending that email as follows (para 34):
Although PB's interests in Sunflag (namely his shareholding and the benefit of his shareholder's loan) should have passed to his wife, Usha, on his death, they were not declared as an asset of either PB or Usha by Alok in his emails to Vibhuti. I believed that Alok was concealing those interests from his sisters and HMRC so as to take the benefit of those interests and avoid paying inheritance tax. As such, I raised the missing Sunflag shareholding with Vibhuti after I reviewed Alok's emails.

91. R2's response in his supplementary witness statement is as follows:

"In paragraphs 31 to 34 of his witness statement, the Claimant refers to PB's alleged interest in Sunflag Limited (Jersey). My father attended all the meetings as a nominee on behalf of the beneficial owners of the shares. For clarification, my father had relinquished all his interest in the shares and loans in Sunflag Limited (Jersey) on 23rd November 1995. He entered into a nominee agreement on the same date. On 19th July 2006, the shares were transferred to the current owner and again a nominee agreement was signed between PB and the current owners on the same date. I, as the executor of my father's Will, the lawyers dealing with the estate accounts, and the independent directors of Sunflag Limited (Jersey) were all satisfied with the documents provided.
I would like to point out that since the fact that he was merely a nominee shareholder rather than beneficial owner of the shares was unknown to the Claimant and my sister and her son."

92. It is not for us to determine the legality or the legitimacy of how these assets were owned or shared. However, the claimant seems to rely upon the email dated 14 September and the respondents' knowledge that he had passed this information on (even if they were not aware of the email itself) as one of his disclosures which he says resulted in him being dismissed. He says in his witness statement that he considered, at the time, that the failure to disclose these shares meant that R2 was concealing these assets from the sisters and HMRC so as to avoid sharing them or paying tax on them.

93. The claimant's email dated 14 September to Vibhuti on this issue does not, on the face of it, suggest that the claimant is sending it to her for any reason other than to suggest tactics whereby Vibhuti could leverage some sort of negotiation with R2. The claimant does reference tax issues but we were not provided with evidence that he sent any notification regarding this to HMRC.

94. In cross examination this motive was put to him. He said that the considered

that it was an executor's duty to disclose all of a deceased's assets and he considered that this, along with other documents he had found, showed that R2 was not complying with that obligation.

95. He was also asked whether he considered that this was the reason that he had been dismissed. He said that he had not been allowed to raise it at the disciplinary meeting and accepted that his dismissal was not based on him raising this issue with Vibhuti or her son specifically but was on the grounds that he had made a lot of disclosures to Vibhuti and that R2 had understood that she had an 'unbelievable' amount of information which was referring to matters such as this.

96. R2's evidence regarding Sunflag was not challenged. We therefore accept that PB had not had a beneficial interest in the shares since 1995 and that he had transferred their ownership in 2006.

97. It is clear that this email was not one of the six documents that the respondent relied upon when dismissing the claimant. We find that R2 and those investigating the alleged gross misconduct were not aware that this particular email had been sent. We are not clear what the claimant is then suggesting about the respondents' knowledge of this email or its content. The claimant suggests, we think, that the Respondent suspected that the claimant was the source of much of the information Vibhuti and her lawyers had once the six documents were discovered and that this is another example of that.

98. Whilst this is possible given that one of the documents they find is evidence of the claimant editing letters from Vibhuti's lawyers, we had no evidence to substantiate that he ascribed the claimant as the source of that supposedly unbelievable amount of information. In any event, if what R2 says in his witness statement is correct, Vibhuti having this information regarding Sunflag would not cause him any consternation nor provide her with any leverage for negotiations. Given that his evidence on this was not challenged we consider it very unlikely that someone knowing about shares that PB had not owned since 1995/2006 was going to cause any concern.

99. On balance, we find that R2 did not know expressly about this email or its content. He did know that Vibhuti had access to information but her knowledge of this particular bit of information would not cause him to suspect the claimant as it was not, as far as he was concerned, a piece of information that was necessarily confidential or troublesome. We also did not hear anything to suggest that this information was private or not publicly accessible in any event.

100. We also conclude that none of the 3 people directly involved in the disciplinary process were aware of this email or the allegations contained therein.

Discovery and disciplinary action

101. In November 2021 R2 discovered, on a scanner, that the claimant had

been scanning and emailing himself documents and on perusal found that the Claimant had been sending emails to Vibhuti's solicitors and editing them to assist with her litigation against them. We accept that his discovery of the claimant's actions was as per his witness statement and at this stage was limited to the six documents described above.

102. We accept that what then followed was a choregraphed process whereby SBB was appointed as a director and JH was appointed to investigate the matter. We find it more likely than not that as a small company, they were advised either by HR advisers or their lawyers, that they needed to take steps to appoint independent investigators and to distance R2 from the decision making as much as possible.

103. The Respondent states that as R2 and the Claimant were the only two directors it needed to appoint another director to have to make any decisions regarding the outcome of the process. The appointment of SBB was reasonable in circumstances where he represented the sole owner and shareholder of the company and therefore had an interest in how the matter progressed. The fact that SBB was appointed near the beginning does not, in our view indicate that the decision had been premade, merely that a decision about a director's behaviour would have to be made in circumstances where the only other director in post ought not to make that decision if possible because of his closeness to what was being alleged. A representative for the sole owner of the company seems a reasonable choice in the circumstances.

The Investigation

104. JH was appointed by R2. We accept that he liaised with her including agreeing her terms and telling her what had led to the situation unfolding. His role included providing her with the documents he had found that formed the basis of his concerns. We have no doubt that he was forthright in his views about what he thought the Claimant had done and what he thought about it. He was, he has accepted, aggrieved by what he thought the Claimant had done.

105. It was put to JH repeatedly that she was in various ways beholden to R2 because she viewed him as her client and knew that the outcome he wanted was to dismiss the Claimant. It was implied that the investigation and subsequent disciplinary exercise was a tick box exercise as opposed to a genuine, independent fact finding and decision making process. We reject the suggestion that JH was in some way beholden to R2 to such an extent that she would not be professional in her role. Nevertheless it is an inescapable fact that she knew that he was strongly aggrieved and that he was the most senior person in the company. It would not have been a great leap for her to guess that he wanted the Claimant dismissed if she found that what he believed had happened had indeed happened. However that would have been the case whoever was instructed, and we find that it was better that an independent person was appointed than that R2 undertook the investigation himself particularly when so personally involved. There was nobody else suitable positioned within the company. We do not consider that he expressly told JH that he wanted the Claimant to be dismissed and by virtue of instructing her he

was indicating that he wanted a proper investigation completed rather than the opposite.

106. In evidence the Claimant accepted that what he was particularly aggrieved by about the investigation and disciplinary process was that R2 did not sit down with him and discuss it. He considered that the very fact that it was done at arms length meant that it was unfair. He considered that in the past, where people had behaved badly they had been spoken to and a departure agreed, often by him whose role within the organisation was frequently to do the dismissing. He considered that treating the situation so formally was unfair and upsetting to him. We analyse this further below.

107. We accept that it may have been possible for SBB to have undertaken the investigation, but that would have meant that it would be difficult to find someone to make the final decision. The fact that R2 was the best placed person to facilitate JH speaking to the right people and being given the documents does not necessarily mean that her appointment was either pointless or ineffective.

108. The Claimant was suspended from work on 26 November 2021 due to the seriousness of the allegations.

Investigation process

109. JH invited the Claimant to a meeting on 9 December 2021 by letter dated 8 December 2021. We do not infer anything from the short time frame given to the Claimant at this point. She did not want to send the Claimant the documents in question in advance due to their confidential nature. Given that it is their contention that the Claimant had taken these documents it is not clear on what basis they could not send the Claimant copies of these documents again. This is particularly the case when technical issues prevented the claimant from being able to access the Zoom call and the meeting proceeded by telephone only. The Claimant's inability to see the documents and comment on them properly put him at a significant disadvantage and meant that the information he was able to give regarding the documents was vague, and by necessity incomplete. We find that to have ensured a fair meeting, JH ought to have adjourned the meeting until the technical issues could have been resolved or she ought to have sent the documents to the Claimant.

110. However, we also note that on the Claimant's own evidence, he did not want to engage with the process and he was willing to lie about his access to the documents and what he had done with them. He accepts that he was deliberately vague as well as vague by necessity. We find on balance that even if he could have seen the documents being referred to he would not have offered truthful explanations as to how he came by the documents nor why he had them. This is because he admitted as such in evidence before the Tribunal. He said that he did not want to expose Vibhuti – but we also find that it was because he knew he ought not to have taken them, that they did not belong to him or the wider family as he now asserts, and that by taking them and sending

them to Vibhuti he had severely undermined his relationship with R2.

111. During the interview, the Claimant told JH about his concerns that PB's wishes were not being properly implemented. The notes record him as saying

"JH asked what PA's motivation was to advise the sister of his colleague in such a difficult personal dispute. PA replied that it was to implement what he was told by AB's father and to ensure his wishes were represented. PA said that a change to the law in April 2017 in relation to domicile, had resulted in advice from PSJ Alexander to try and minimize the tax impact. PA said that he would want to see AB's father's wishes reflected appropriately after working with him for 38 years."

112. There are various references throughout the notes to the claimant supplying information to Vibhuti. To a great extent the claimant either lies in response to those questions or is equivocal relying upon the fact that he cannot see the documents that she is referring to. Nevertheless, it is clear that he does not tell her the extent of the documents that he has sent but he does clearly state that his justification in assisting Vibhuti was to ensure that PB's wishes were properly implemented clearly inferring that he did not believe that they were being at the time.

113. We accept that the task given to JH was as outlined in paragraph 6 of her witness statement namely:

- Whether there was appropriate further evidence relating to the circumstances of the document scanning to support the IT evidence that they had been personally scanned by the Claimant;
- Whether there was evidence that the documents were personal and confidential and were not being accessed for commercial reasons related to the Claimant's employment;
- Whether the process of obtaining documentation from a confidential cupboard and scanning these documents could reasonably be considered a breach of trust and confidence;
- Whether the documents had been shared with another person or company;
- Whether the Claimant had not properly declared his interest in other companies; and
- Whether the Claimant had not properly declared that he was providing advice to a person with whom his employer was directly and personally in dispute.

114. As well as interviewing the Claimant, JH also interviewed

(i) R2
(ii) Venkat S; employee who had arranged the technician to attend the MFD scanner (role unknown) (page 386)
(iii) Suzi d'Cruz, office manager; and
(iv) Crina Lita, receptionist and facilities supervisor

115. She also considered the 6 documents listed above and some CCTV

footage.

116. It was put to JH that once she had the claimant's explanation for taking the documents, she ought to have gone back to R2 to see what he thought of this explanation. Given that the Claimant has admitted lying in the investigation meeting with JH, it is not clear what benefit this step would have had. Nevertheless, in circumstances where she seemed to consider that her role was to investigate the breakdown in the relationship between R2 and the Claimant – the possibility that R2 could have accepted the Claimant's explanation for his possession of the documents is something that could have been considered before moving to the next stage.

117. JH has not adequately explained why she did not wait for the Claimant's comments on the notes of their meeting/conversation. There was no reason for her to progress without waiting. She had not given the Claimant a deadline by which to respond and his explanation in emails for the reason it may take him a little time to respond was plausible. It was work-related and he gave her a time frame during which he would respond. She provided no plausible explanation as to why she thought he was trying to protract the process nor on what basis she reached that conclusion. Nevertheless, on balance we find that the Claimant's changes to the notes were minimal and had no bearing at all on the meaning or interpretation of the notes of the meeting that they would not have changed JH's conclusions or recommendations such as they were.

118. We find that JH's conclusion letter was woolly and ought properly to have confirmed, what, in her view, the misconduct alleged was and why it ought to proceed to a disciplinary process. Instead, she seemed to think that a difference of opinion warranted a disciplinary process. We understand the need for an investigator not to necessarily comment on the severity of any misconduct or conclude what the outcome of the decision making process ought to be – nevertheless the absence of a finding that the Claimant's actions were capable of being or possibly amounted to misconduct or gross misconduct was a key omission from the report.

119. We find on balance that JH was unaware of the email sent by R2 to Suru dated 17 December 2021 which referred to the Claimant's employment being terminated. There was no reason for her to have seen that email and we had no evidence that she did. However she did see the email that referred to the Claimant's actions as being acts of Gross Misconduct as opposed to being just misconduct. Whilst we do not accept R2's explanation for the 'dismissal' email being an innocent slip whereby he intended to say 'suspended', we do consider that the reference to Gross Misconduct as opposed to Misconduct was a slip. R2 is not an employment lawyer or HR professional, the action was being investigated as possible gross misconduct and we consider that this was a genuine mistake when he did not understand the difference between using the two terms.

<u>The 'terminated' email</u>

120. R2 sent an email dated 17 December 2021 to his sister Suru that the

Claimant's employment had been terminated. We consider that as opposed to being a slip of the tongue, this was in fact a reflection of how R2 felt at the time and what he hoped would happen once the disciplinary process was completed. We find it implausible that he did not communicate this to SBB prior to SBB making the final decision which we address below. It was clear that he felt betrayed by the Claimant and felt that he could no longer trust the Claimant and we find on balance that he would have communicated that to SBB even if he did not communicate it to the external individuals carrying out the investigation and the disciplinary process.

The Disciplinary meeting

121. To hear the disciplinary meeting EH was appointed. She was independent of JH and the 2 Respondents. She was provided with JH's report and accompanying documentation as was the Claimant. The notes of the meeting between the Claimant and JH included the Claimant's amendments even though they had not been provided before JH finalised her report. Therefore although they were not taken into account by JH in formulating her report, we accept that the updated version of notes were considered by EH.

122. It was put to SBB in cross examination that he ought to have chaired or at least attended the disciplinary meeting given that he was going to be making the final decision. We accept that given that he was making the decision it is strange that he chose not to even attend the meeting. We accept his explanation that it was because he did not know what to do and had no experience of such matters. Nevertheless given the ability to appoint external advisers and experts to support him through that process, we are unsure as to why he was not advised at the meeting rather than once the meeting had been concluded.

123. We have found above that JH's report was woolly at best and did not properly identify what she had concluded was capable of being misconduct or gross misconduct. Nevertheless, it was clear from the invitation letter to the meeting what issues were to be discussed, what the claimant was accused of, what evidence they were relying upon and that this was a disciplinary meeting, the outcome of which could be dismissal. The fact that the letter also stated that the Claimant would be given the opportunity to discuss the matters further does not undermine the fact that he could and did understand that the meeting was a disciplinary meeting with possible sanctions attached – not just another conversation.

124. At the meeting the Claimant was given fair opportunity to comment on the documents and JH's report. The claimant was interrupted by JH when discussing the Indian property document. We accept that JH ought not to have been the person interrupting as she was meant to be a bystander not conducting the meeting. We also accept that it would have been better if the claimant had been able to say what he wanted about the Indian property deed and cannot see that JH had a legitimate basis for interrupting him at this time. However to a large extent the Claimant was given every opportunity to say what he wanted regarding the document. He was asked several questions about it.

He explained his view that it demonstrated 'murky activities'. He did not, in that meeting, refer to it potentially breaching a court order in India and, most importantly, he has told us in evidence that he would not have told the truth about the document in any event because he says that he would have denied sending it to Vibhuti in any event because he did not want to jeopordise her court case. Therefore any potentially thwarted opportunities are essentially meaningless if they would have been filled by lies as opposed to information regarding his concerns about potentially unlawful behaviour by R2 as he now alleges.

125. We accept that EH and JH knew that this situation was taking place against the backdrop of a legal dispute between R2 and his sister. Nevertheless, the Claimant lied when given the opportunity to explain his actions in relation to the documents and said that he had not sent them to Vibhuti. Given the chance to explain his reasons for obtaining and disclosing the documents, we find it more likely than not that he would have maintained that lie.

126. Also raised in the meeting was the breach of GDPR and Data protection generally. This had not been put to the Claimant as one of the potential acts of gross misconduct by JH and so to discuss it with him and more importantly for it to be such an important feature of the report by EH was not something the claimant could have expected or was equipped to respond to properly. The Respondent ought to have provided information about this potential issue in the investigation meeting and before the disciplinary meeting. Failing to do so was unreasonable and placed the Claimant at a disadvantage.

127. EH prepared the report at page 506, dated 4 February 2022 this was then sent to SBB. SBB decided, based on this report, that he would dismiss the Claimant. He says that he did not consider any other information.

128. There were other matters included in the dismissal letter, primarily the breach of trust and confidence between employer and employee that were her main findings.

129. We consider that SBB's involvement was a rubber stamping exercise. We find that he read the report and did not interrogate it in any way. We accept that SBB chose not to take part in the process before that because he did not know anything about disciplinary processes and was reluctant to become involved to that extent. Nevertheless, as decision maker he ought properly to have applied his thoughts to the situation as opposed to simply rubber stamping someone else's decision. We also accept that he knew at this point that R2 wanted the Claimant to be dismissed.

Appeal

130. The Claimant chose not to appeal as he said that the process was a sham. His conclusion that the matter was a sham was based on the email he was forwarded by Suru from R2. We have found that this email was not a slip on the part of R2 but recorded his genuine feelings about what he wanted to

happen to the Claimant. We can therefore see that the Claimant believed any appeal was likely to be pointless.

131. However we do not accept, as the Claimant has stated, that the entirety of the process and procedure was predetermined and that an appeal can be said to have been entirely worthless.

132. Had the situation been entirely predetermined, we consider that R1 would not have called in external advisers or appointed SBB to make the final decision. Rather than a legal exercise to dress up a predetermined decision, we consider that the process to that point was an attempt to ensure that R2's genuinely held beliefs did not predetermine the outcome and there is nothing to suggest that an appeal would not have been carried out with the same intent in mind.

Submissions

133. Both parties gave us detailed written submissions and addressed us orally. We do not seek to replicate those submissions here. We were provided with references to various case authorities by both Counsel that were carefully considered by the Tribunal in reaching its conclusions but are not always expressly referenced below.

Conclusions

Qualifying Disclosures

134. At the outset of the hearing the claimant sought to rely upon 3 disclosures which were set out under the heading ' Fourth Set of Disclosures'. During the course of the submissions, the first of those three was withdrawn. We are therefore only considering two:

(i) C disclosed information relating to Letters of Wishes and Sunflag to Vibhuti Sharma, her son and (via them) to legal advisers, who in turn disclosed the information to R2. The information disclosed by the Claimant to Vibhuti Sharma and her son consisted of an oral disclosure the terms of the Letter of Wishes and the provision of a copy of the Letter of Wishes to them. The Claimant believes that the information was disclosed by the legal advisers to R2 in writing. (§39 GoC).

(ii) During the disciplinary meeting by telephone on 9 December 2021 C disclosed to Jayne Heales that R2 was not appropriately implementing his father's wishes in relation to the discretionary trusts set up upon the death of R2's father (§41 and §78 GoC).

135. As referenced by both parties, the most recent relevant case in analysing what amounts to a qualifying disclosure is Williams v Brown UKEAT/0044/10/00.

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a

disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

136. We address each disclosure in turn before considering their effect.

137. It is noteworthy that Mr Wynne did not address the Sunflag matter in his submissions. It is not clear whether this element of the first disclosure was no longer pursued so we have considered it.

138. Mr Allen argued that the claimant has not at any point actually said what the 'information' is that the first disclosure provided. It is correct that the claimant has not articulated what information was included in the content of the documents. The claimant states that revealing the existence of and disclosure of the documents themselves amounts to information and that the sending of them to Vibhuti was the communication of information. He argues that by the very fact of sending the documents it flagged to R2 that he and Vibhuti were aware that R2 was withholding or concealing information and that he was breaching his legal obligations of disclosure in respect of the legal dispute with his sister. R2 was made aware of this by Vibhuti or her lawyers and so was communicated to him by them. They rely primarily on the lawyers' letter at pg 245. This letter is a long list of questions and queries regarding the estates.

139. In the absence of knowing what the 'information' he is alleging was disclosed, Mr Allen's submissions focussed on whether it was information that tended to show either a breach of a legal obligation or a criminal offence. We accept the respondent's submissions that there is nothing within the documents themselves that tend to show either a criminal offence has been, is being or will be committed. The claimant accepted as much in cross examination and we consider it is clear from the face of the documents. The claimant accepted in cross examination that he knew that a letter of wishes was not a legally binding document. Mr Wynne made submissions that the Claimant was simply bowing to Mr Allen's superior legal knowledge in this regard rather than accepting that he knew this at the time. We found it very difficult to assess what the claimant knew at the relevant time. His evidence around this area was equivocal and often confused by his apparent sense of moral obligation.

140. On balance we conclude that the claimant knew that the content of the letter of wishes did not tend to show a criminal offence nor did the information he provided about Sunflag. He argued however that their existence, rather than content, could show a criminal offence had been, was being or was going to be committed because the fact that they existed and his sister knew that they existed demonstrated that R2 was not complying with his legal obligation to either pay tax correctly or to comply with his obligations as an executor of his parents' wills and that could be a criminal matter. We do not accept that the claimant actually believed this. At its highest, he thought that it showed that the sisters were not being treated fairly and in accordance with what the claimant

considered PB had wanted, He did not believe that there was criminal activity. We do not consider that he really believed that the information he had about Sunflag showed a criminal offence either. His email about it talks primarily about tax issues in India.

141. Nevertheless we do accept that he believed that the existence of the Letter of Wishes, tended to show that R2 was not complying with his legal obligations as an executor because he was not disclosing what the claimant thought was important information about the existence and distribution of trust funds - and we accept that this could have been a reasonable belief in all the circumstances for someone who does not share Mr Allen KC's knowledge of an executor's responsibilities regarding a letter of wishes. We have taken into account the fact that the Claimant is a chartered accountant and may have had some specialist financial knowledge – but we are not clear that this would have stretched to knowledge of probate.

142. The context of the disclosure is important and they ought to be assessed in that light. (- *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, CA, para 41). We consider that the context here is that the Claimant genuinely believed that PB's express wishes regarding his daughters were not being adhered to and considered that sending the documents to Vibhuti would show R2 that she had enough information to challenge his actions and call out his alleged withholding of documents. In that context we consider that he genuinely believed that R2 was breaching what the claimant believed were R2's legal obligations either to divide the estate 'fairly' or to disclose the documents he had in his possession as part of the legal dispute.

143. Nevertheless, we do not accept that it was in the public interest or that the Claimant believed it was in the public interest at the time. The Claimant asserted that someone not complying with their obligations as an executor or hiding documents as part of a disclosure exercise was in the public interest. He suggested that there were possible tax implications. It is possible that this could be the case in certain circumstances. Nevertheless, we do not consider that this is what the claimant genuinely thought at the time. He considered that the documents showed that the sisters were not being fairly treated. He repeatedly stated during evidence that what he was doing what was morally right and 'fair'.

144. We conclude that his sole aim was to support Vibhuti in what he saw as a moral crusade to uphold what he believed his friend's wishes were. The decision by the Claimant to send it to Vibhuti and her son was prompted by his moral outrage, not a belief that there was a public interest in the money, tax owing or its division. Whilst he may have considered that there was a breach of legal obligations and this may therefore give rise to a valid legal challenge by Vibhuti which he felt was morally justified, he was in no way considering, or believing in, a wider public interest.

145. Even with his moral justifications we do not consider that he felt all the sisters were equal as he did not send the information to Shruti or Suru. If he genuinely believed that this information was so important and in the public interest then he would at least have sent it to the other sisters too. Instead he

was intent on supporting a legal case that he felt had a moral basis. Had he really thought that these matters were in the public interest he would have sent the documents to all the sisters, not just the person who was bringing legal action against R2.

146. He has also asserted that he wanted to ensure that HMRC were notified of any improper tax issues. Yet he took no steps to do this himself nor did he appear to suggest that Vibhuti and her lawyers did. None of the documents that he sent amount to information about tax. If the Claimant is relying upon the other documents and the 'unbelievable' amount of information that is referenced in R2's letter, we nevertheless do not accept that he thought that anything he was saying related to the correct tax payments that were in the public interest but were related to his desire to ensure that the sisters were paid what he believed they were owed. In any event, given his qualification as an accountant and someone well used to dealing with HMRC, we believe that if he was motivated by concerns regarding tax liabilities he would have contacted HMRC.

147. This disclosure was not made to his employer. The disclosure was to Vibhuti and her son. We have made findings of fact that the claimant was not employed by Vibhuti or her son or husband. The claimant therefore cannot rely upon s 43B ERA 1996. We also do not consider that their lawyers communicated to R2's lawyers the specific information that the claimant relies upon nor did they communicate that any of this information came from the claimant. We do not think that the letter from the solicitors suggests any specific information nor that the allusion to 'unbelievable' amounts of information somehow suggests that R2 knew the claimant was feeding this information to Vibhuti. He considered that they must have had general access to the information via the trustees or other avenues.

148. The claimant withdrew his reliance on s43D ERA as the legal advisors were not advising the claimant.

149. If the Tribunal did not accept that he made the disclosure to his employer (which we don't) then the claimant sought to rely upon s 43G ERA in the alternative. The claimant accepted that he did not make this disclosure to a prescribed person in accordance with s43F and seeks to rely upon s 43G. In order to rely upon s 43G the claimant must show as follows:

(i) That the allegation is substantially true; and
(ii) That he is not making the disclosure for personal gain; and
Either
a) That at the time he makes the disclosure he reasonably believed that he will be subjected to a detriment by his employer if he makes a disclosure to the employer or a prescribed person; OR
b) Where there is no prescribed person he reasonably believed that the evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer.

150. We accept that the claimant reasonably believed that the allegation that R2 was not distributing PB's wealth in accordance with his wishes was true and we had no evidence to suggest that he was sending these documents for any personal gain.

151. However we do not consider that he reasonably believed that he would be subjected to a detriment by his employer if he raised the issue of the estate with R2. Their relationship was a good and trusting one until this issue came to light. The claimant said that R2 could be mean but he gave no proper examples of that beyond his assertion that R2 was not treating his sisters well financially. We were provided with no evidence to suggest that the claimant could not raise difficult issues with him. Part of the claimant's arguments regarding his assertion that he was employed by the wider family as opposed to by R1 was that he had frequently dealt with disputes between family members. Yet, on this occasion, he chose to use subterfuge and deceit as opposed to any attempt to discuss the matter openly with PB. No good reason was given as to why he took this route other than his decision to support Vibhuti over R2.

152. No attempt was made to disclose the information to a prescribed person such as HMRC. It is not clear how the claimant said he might be subjected to a detriment if he told HMRC about the situation. Given that the claimant asserted that it was tax irregularities that were in the public interest that motivated him (at least in part) we consider that HMRC was an obvious prescribed person in these circumstances. We recognise that breaching obligations regarding disclosure may not have such a clear prescribed person but nevertheless, the claimant has not plausibly explained on how he says telling any official authority outside R1 and R2 would have led to detriments to him.

153. The respondent asserts that the claimant cannot rely upon the second limb of s 43G because there were prescribed persons that the claimant ought to have reported the matter to namely HMRC as the claimant is asserting that he considered that tax was not being properly paid. We agree as set out above in respect of any supposed tax wrongdoing. In respect of other possible legal obligations we agree that it is possible there is no such prescribed person and so have gone on to consider whether the claimant reasonably believed that the evidence would be concealed or destroyed if he made a disclosure to his employer.

154. We do not accept that the Claimant has demonstrated, on balance, that R2 was concealing the documents or likely to destroy them. There were a number of facts that suggested the opposite. Firstly, the documents had been kept, seemingly untouched for a considerable period of time after PB's death. No attempt had been made to destroy old documents or remove any potentially 'incriminating' ones. This was in a well ordered office where documents were in labelled files and locked cupboards and if the claimant was able to access them and scan them we are sure R2 could also have done so had he wanted to conceal or destroy documents. We prefer R2's explanation that he had not undertaken that exercise and had not gone through the files in any detail but

referred to them as and when a relevant business issue arose. He was therefore unaware of the majority of the documents that the claimant sent or if he was, it was because copies were held elsewhere. We do not accept that the claimant believed that R2 had gone through all his father's papers in detail and, on discovering documents he considered might detract from his inheritance entitlement, rather than disposing of them, he left them where they were as a form of concealing them.

155. We consider that if his intent was as suggested by the claimant, he would have destroyed any such information long before this given the lapse of time between his father dying and the current situation. The Claimant cannot have it both ways. Either R2 was unaware of the documents OR he was unlikely to destroy them given the length of time they had been in the office. We also think it very unlikely that R2 would destroy the documents given that the Trustees would have had copies as well. The claimant must have understood that, if valid, a copy of the Letter of wishes would have been with the Trustees.

156. Finally it was not reasonable for the claimant to make the disclosure to Vibhuti and her son under s43G because it was clear that this was information that he was speculating could be useful to R2's sister in a legal action against his boss. He did not even believe much of it was relevant and where it was he was not sure how it was relevant. He was just on a fishing expedition to see what he could find that might be useful to add to Vibhuti's negotiating ability as opposed to taking the time to know and understand what it really showed and why.

157. We therefore consider conclude that this disclosure does not satisfy the definition of a protected disclosure for the following reasons:

(i) It did not tend to show that a criminal offence had been, was or was likely to be committed;

Even if it was reasonable for the Claimant to believe that part of it tended to show breach of a legal obligation

(ii) It was not in the public interest and the claimant did not reasonably believe it was

(iii) He did not make the disclosure to his employer

(iv) He did not, at the time he made the disclosure reasonably believe that he would be subjected to a detriment by his employer if he made the disclosure to his employer or a prescribed person

(v) If there was no prescribed person for all of the information (though we consider that HMRC were the appropriate prescribed person) he did not reasonably believe that it was likely that evidence relating to the relevant failure would be concealed or destroyed if he told his employer

(vi) It was not reasonable in all the circumstances for him to make the disclosure to Vibhuti and her son.

158. For the avoidance of doubt, we also consider that it was not the fact that the documents existed or that Vibhuti could now 'use' this information or that

the claimant somehow made this known to R2 that caused him to be dismissed. We set out our detailed conclusions on the dismissal below but we conclude that the reason the claimant was dismissed was that he had knowingly stolen documents from his workplace and sent them to someone to use against his boss in a personally motivated legal dispute. The fact that he had taken them and the way that he had taken them and subsequently used them prompted the dismissal – not what they said or conveyed.

159. The next disclosure relied upon by the Claimant is that during the disciplinary meeting by telephone on 9 December 2021 C disclosed to Jayne Heales that R2 was not appropriately implementing his father's wishes in relation to the discretionary trusts set up upon the death of R2's father (§18 and §32 amended GoC).

160. It is clear that the claimant told JH during their meeting that he felt that PB's wishes were not being adhered to. The notes record that. Nevertheless he does not suggest at any time that he considered it a crime nor even that it was unlawful. His statements during that meeting show that he believed it to be morally wrong but not necessarily that it was unlawful. He uses the words 'wishes' but this indicates that he understands that it is not in contravention of the will.

161. We do not consider that the claimant believed that by telling JH this he was conveying information that tended to show a criminal offence had been/was being or was going to be committed. We accept that it could amount to him communicating that he considered a legal obligation was not being met. We base these conclusions on the same grounds that we base our conclusions regarding the first disclosure relied upon above.

162. We accept that this information was made to JH who was an agent for his employer but also that this information was then directly conveyed to his employer by way of the investigation report.

163. Nevertheless, for the same reasons as above, we do not consider that any aspect of the claimant's disclosures were made because he thought they were in the public interest. In this instance he was telling JH about the information because he was trying to avoid being sanctioned for taking documents and because he considered that Vibhuti ought to have the documents to obtain her moral share of the money. We do not consider that anything about his conversation with JH denotes any belief, reasonable or otherwise, that this information was in the public interest. He was not considering the legal obligations of an executor or the tax implications other than as a negotiating tool for Vibhuti.

164. We do not therefore consider that the second disclosure relied upon by the Claimant amounts to a protected disclosure as he does not believe, reasonably or otherwise, that the disclosure was in the public interest.

Automatically unfair dismissal, s103A ERA

165. We have concluded that neither of the disclosures relied upon are protected disclosures. Nevertheless, for the avoidance of doubt we do not consider that the claimant was dismissed because he had communicated any information to Vibhuti or to JH and then on to the respondents.

166. We consider that he was dismissed because he had taken documents from his workplace that were not his, that were not related to his work and were sent to his boss's opponent in a family legal dispute. His intent was to undermine the position of R2 who was a close colleague and to all intents and purposes his boss. By doing that he necessarily, and by his own admission, destroyed any trust and confidence between him and R2. He accepted in cross examination that he lied during the disciplinary process, compounding the destruction of trust and confidence and that he realised that he probably could not work with R2 again once his actions had been discovered. His main objection seemed to be the decision to follow an arms length process as opposed to having a face to face discussion with R2 about the situation. We address that further below.

Whistleblowing Detriment, s47B ERA

167. Our conclusions on this are broadly the same as above.

168. We have considered the case law as set out by Mr Wynne in his submissions. We have considered our obligations to consider whether the protected disclosure was merely a material factor in the decision to subject the claimant to a detrimental act (*NHS Manchester v Fecitt* [2012] ICR 372) and reminded ourselves that it is our duty to penetrate though an invented reason where a person in the hierarchy of responsibility above the decision maker determines that because of a real reasons the employee should be dismissed for a bogus reason (*Royal Mail Ltd v Jhuti* [2019] UKSC).

169. We have not carried out a detailed analysis of this point in circumstances where we have determined that there was no protected disclosure. Nevertheless, we consider it appropriate to comment that we consider that the genuine reason for the Claimant's dismissal was the fact that he took documents that he knew did not belong to him, were not related to his work and were intended to directly undermine R2 in a personal legal dispute. That R2 wanted the Claimant to be dismissed and could no longer work with him was part of the factual picture that arose as a result of the Claimant's actions. Those factors were considered by the decision makers but there was no bogus reason put forward by the Respondent. We set out below in the unfair dismissal conclusions that we consider that part of the reason for dismissal was outside the range of reasonable responses but that the main basis for the decision to dismiss was reasonable and was not, in any way, a bogus or invented reason.

Unfair dismissal, s 98 ERA

170. We accept that the claimant was dismissed for a potentially fair reason namely conduct and the respondent had a genuine belief in that misconduct.

171. Those involved in the disciplinary process were JH, EH and SBB. Whilst the Claimant sought to assert that in fact R2 was behind the entire process. We disagree. We find that, in a situation where there was a small company with very few employees and where the person alleged to have carried out the misconduct was very senior, the decision to appoint external investigators and advisers was reasonable.

172. We find that JH's investigation process was flawed. She ought not to have proceeded with the investigation meeting once it became clear that the claimant could not see the documents. The documents were key and understanding the case against him was essential for the claimant to understand the evidence against him. There was no good reason for her not to adjourn the meeting and ensure that either the documents were sent to him or that he was enabled to take part in the process in a video hearing. We do not accept the explanation that the documents were confidential as being sufficient to justify the failure of proceeding with the meeting without making sure he had seen the documents. In the first instance they believed that he had probably already taken them therefore not showing them to him to protect confidentiality that has already been broken does not seem appropriate or justifiable. More importantly, if there was a genuine concern regarding providing copies of those documents, it does not outweigh the need for a fair process to occur where gross misconduct was being alleged. No reasonable explanation has been given as to why the meeting could not be rearranged in such a way as to allow him access to an online video platform that worked.

173. She did not wait for the claimant's comments on the notes of the investigation meeting. She has suggested that she considered that the Claimant was attempting to delay the process but has given no plausible reason for thinking that this was the case when he asked for legitimate, work-related reasons, to have a week to respond. JH was not able to explain to us why that was unreasonable when she did not challenge that he was travelling for work at the time. Nevertheless the impact of her failure to wait for the notes was minimal given that the changes were minor and irrelevant to the conclusions she reached.

174. The report she prepared following the investigation was poor. It does not offer any conclusions or findings as to what has happened. Whilst we accept that the role of the investigator is not to reach a conclusion as to whether something amounts to misconduct but it is to decide whether they think the behaviour has happened and whether it might be capable of being misconduct and ought to be considered for disciplinary sanctions. Her report merely concluded that there was a difference in opinion over the documents and the Claimant's behaviour.

175. Nevertheless, these flaws amount to procedural issues as opposed to causing substantive problems. In relation to the failure to show the documents to him, the claimant accepted in cross examination that he would have lied

about whether he took the documents and/or supplied them to anyone else - regardless of whether he had seen them or not. He was not, at this stage, willing to speak openly about what had been happening. His view was that because R2 was not willing to meet him and discuss the matter, that the process was somehow in itself offensive. He considered that as long standing employee he ought to have been treated with more respect and dignity and in his view that meant having a grown up conversation about the situation as opposed to following a formal process. He therefore did not feel obliged to tell the truth in the investigation process and that would not have differed had he seen the documents.

176. In relation to the failure to wait for his amended notes we have already stated that the amendments made little or no difference to the meaning of the notes and did not impact on JH's report. Further, EH and SBB had the correct notes when they made the decision.

177. In relation to the lack of conclusion within the report, although JH does not set out that she concludes misconduct could have been committed, she does set out the facts she has found and the explanations provided by the parties in relation to those facts. Further, it is clear to the claimant in the invitation letter that the disciplinary meeting would be considering this issues as possible acts of gross misconduct.

178. Overall, we find that the main flaw to the investigation process was the failure to provide the documents to the Claimant but this was rectified at the disciplinary meeting with EH as he was given copies of all the relevant documents at that hearing.

179. At the disciplinary meeting, the Claimant had full opportunity to comment on and explain all the documents. It is clear from the notes of that meeting and his evidence to us that he continued to lie about them. Therefore overall, although JH's decision not to give the Claimant proper opportunity to see the documents and consider them at the earlier meeting was unreasonable, the prejudice to the Claimant was wholly mitigated by his opportunity to view them at the disciplinary meeting. He has not sought to argue that he would have provided a different or honest explanation regarding the six documents had he had better notice of those documents before the hearing. In fact he maintains that he would have lied in all circumstances.

180. We have not found that the Claimant was prevented from speaking freely at the meeting and was shut down by JH regarding the Indian property documents in particular. He was given opportunities to discuss all matters to the extent necessary at the meeting. JH perhaps overstepped her role at the meeting but not in a way that effectively muted the Claimant in an important way.

181. EH considered all of the information from the investigation and that the Claimant raised. He raised his concerns about the failure to provide him with sufficient time to prepare for the investigation meeting including the fact that he did not have access to the documents, he raised R2's email stating that the

Claimant had already been dismissed and he raised the fact that his pay was late in December and that he considered that he was being disciplined to stop him holding R2 to account.

182. We find that EH considered all of the Claimant's concerns carefully. She considered whether the claimant had had sufficient time and found that he did and considered whether the lack of access to the documents at the first hearing significantly impacted matters. She concluded it did not. She accepted R2's explanation for the dismissal email being that he had used the wrong term. She also considered whether the late pay was caused by the situation and/or whether the Claimant was being silenced for making disclosures. Whilst we may disagree (to differing extents) with her conclusions regarding the first two matters our role is not to consider whether we agree with her but whether her decisions and actions were within the range of reasonable responses in all the circumstances. With regard to the last issue, namely that of whether the claimant was being 'silenced' we note that it is she who raised the use of the phrase protected disclosure and that the Claimant had not considered it previously. We consider that she did consider this possibility to an extent in that she took into account the Claimant's concerns that he was raising matters of grave concern regarding R2's behaviour.

183. EH concluded that the Claimant had taken the documents and had provided them to Vibhuti in such a way that it undermined the trust and confidence in the employment relationship between the Claimant and R2. She also concluded that he had breached the Data Protection Regulations and this was a breach of his obligations as a Director.

184. Given that this latter point was not included in JH's investigation nor the invitation letter we find that were this to have been the sole reason for the EH's conclusion that the Claimant had committed an act of gross misconduct then it is likely that the Claimant's dismissal, the whole process would have been unreasonable as he has not had any opportunity to properly address this part of the allegation.

185. Nevertheless it is clear that EH's primary conclusion was that the Claimant's behaviour had breached the implied clause of trust and confidence. Her letter at pg 506-511 is thorough and provides a detailed analysis of the evidence before her including all of the Claimant's concerns and comments. Her conclusion that the Claimant had carried out an act of gross misconduct was based on her factual conclusion that:

"PA has inappropriately duplicated (by the act of scanning) and retained (on his own personal electronic drive away from that of the company's security controls) both private and confidential company data, as well as private and confidential personal documentation related to the Bhardwaj family that was only accessible to PA through his engagement with Implex. As PA has admitted, he has been doing this for a number of years, it is unknown quite how much private and confidential information PA has in his personal possession."

186. Given that the Claimant admitted at the time that the above was true, (save for the ownership of the documents) we conclude that JH's conclusion was a reasonable conclusion in all the circumstances. We find that she reached this conclusion on her own account not because R2 had told a third party that the Claimant had already been dismissed. We have no doubt that R2 wanted the Claimant to be dismissed but we do not consider that EH relied upon this knowledge to reach her conclusion. The facts of the situation, even based on the Claimant's account of events, were plain enough to allow her to reasonably and independently reach her conclusion and make her recommendations to SBB.

187. There are elements of the conclusions that we have found to not be well founded and outside the band of reasonable responses including the fact that it was of concern that the Claimant had not formally disclosed his directorship of another company in circumstances where there was clearly no obligation to make such a declaration and the lack of notice and discussion about data protection breaches. Nevertheless, taking into account the situation as a whole and the core basis for her conclusions - namely that trust and confidence between R2 and the claimant had been irretrievably broken through the Claimant's actions of taking private documents and supplying them to a third party to support her legal action against R2, we find that it was reasonable in all the circumstances for EH to conclude that the Claimant was guilty of gross misconduct.

188. We find that SBB read the pack that EH sent him and rubber stamped her recommendations. We do not consider that he applied himself in any great depth to the process followed or the evidence supplied. We remain unclear as to why he would not attend a meeting with the Claimant. We also consider that he clearly knew that R2 wanted the Claimant dismissed and that they had undoubtedly discussed it.

189. In submissions, Mr Wynne said that SBB merely sanity checked the recommendations and to an extent we agree. Nevertheless we do not agree that SBB did not hold the necessary genuine belief having carried out that 'sanity check'. He had been appointed to oversee the disciplinary process and make the final decision. He had not been appointed to dismiss the Claimant even if that was seen as the likely conclusion if the investigation found that the Claimant had done what he was being accused of doing.

190. SBB did genuinely believe that the Claimant was grossly negligent and his conclusions did bear relation to the allegations first made against the Claimant. It was reasonable for him to conclude that the Claimant's actions in taking documents that the Claimant knew at the time and knew throughout did not belong to him, did not belong to R1 and did not belong to the wider family and using them against R2 undermined mutual trust and confidence. There was ample evidence to substantiate that including the Claimant's own evidence admitting that he had taken the documents.

191. The fact that JH and EH may not have understood the unique way in which the Claimant worked and/or his previous relationship with PB, does not change that

fundamental core fact which was the primary basis for firstly EH and secondly SBB's conclusions that the Claimant had committed gross misconduct.

"Having reviewed the conclusions and recommendations and considered all the evidence presented, I find that your behaviour is in breach of the implied trust and confidence of the employer / employee relationship you had with the Company, making your position untenable. I also find that you have breached the expectations of a legal company director by failing to diligently exercise independent judgment, to exercise reasonable care, skill and diligence and to avoid conflicts of interest (implied or express)."

192. We do accept that JH, EH and therefore SBB failed to take into account the reality of the running of R1 in terms of the obligations regarding disclosure of the Claimant's role as a Director for another company and that it was on this basis that part of SBB's conclusion that the Claimant had breached his obligations as a company director was based. Nevertheless we do not consider that this was the main reason for the Claimant's dismissal nor that it was the sole reason that SBB concluded that the Claimant had not fulfilled his obligations as a director.

193. Nevertheless, SBB's decision was based on reasonable grounds in all the circumstances of the case. Overall, a fair investigation had been followed when taking the entire process as a whole:

(i) The claimant was able to consider all the evidence against him (apart from the allegations of it being a breach of the Data Protection Act)
(ii) The claimant was given the opportunity to comment on all of the evidence
(iii) The relevant people were interviewed
(iv) The CCTV footage was considered
(v) SBB considered all of the evidence available

194. Mr Wynne stated that because JH had failed to reach a conclusion and EH had assumed that she had and the Claimant had failed to disprove this, their approach was fundamentally flawed. He said that she should have considered whether the Claimant had explained his actions and challenged R2. We conclude that JH and subsequently SBB did consider whether the Claimant had explained his actions. He had explained his actions, partly through lies that he now accepts are lies and partly through justifications that they did not accept as being sufficient justifications at the time. The reason they considered that they were insufficient explanations were that the Claimant was accepting that he had supported R2's sister in her legal dispute with against R2. The context of the company was considered – this was a small company where R2 and the Claimant were the Directors and had to trust each other for their relationship to work. That was true regardless of the fact that the Claimant had a relationship with other members of the family and had worked on projects with other members of the family for many years. Crucially the fact that his working relationship with R2 was over is also accepted by the Claimant. In evidence before us he clearly accepted that the working relationship between him and R2 would not have been able to continue because of his actions. His concern appeared to be the way in which it was handled. He wanted there to have been a conversation between him and R2 whereby an exit could be agreed. He

based this expectation on how other members of staff had been dealt with in the past. He did not consider that it was appropriate that third parties in the shape of JH, EH and SBB were involved. We have some sympathy with that for an employee of such long standing wanting to manage his own exit – nevertheless, he has accepted that his departure was almost inevitable once R2 had found out his support for Vibhuti. In that acceptance we consider that he understands now and understood at the time that he had committed acts that fundamentally undermined the trust and confidence between him and R2. We do not accept that he genuinely believed that he was entitled to take the documents and send them to Vibhuti because of his role within R1, because of his work historically for the family or because of any belief that the family owned the documents he sent. He believed that he was morally justified in trying to assist Vibhuti because he considered that R2 was not distributing PB's wealth in the way that he thought was correct or in accordance with PB's wishes. He did not at the time or now believe that it had anything to do with his work for R1 and he knew that it was, by its very nature, something that was bound to destroy his relationship with R2 if discovered.

195. There were therefore reasonable grounds on which SBB based his belief of the Claimant's gross misconduct in respect of the undermining of trust and confidence by reference to the sending of the documents to Vibhuti.

196. We do not agree that there were reasonable grounds on which to find that the Claimant had breached the Data Protection Act or failed to declare/register his role as a Director of another company. The Data Protection Act had not been properly discussed with the Claimant during the process and the basis for their conclusions in this regard, beyond the fact that the Claimant was sharing information that did not belong to him, have not been properly explained to us. We consider that there was a procedural failing in respect of this issue in that it was not raised as an issue with the Claimant prior to JH's outcome letter. It was not discussed in either the investigation meeting with JH or the meeting with EH. The Claimant therefore had no opportunity to address this aspect of the allegation yet it was one of the issues of misconduct upheld against him. Therefore the decision to uphold this aspect of misconduct was procedurally and substantively unfair as the conclusion was reached without any consideration of the Claimant's view of this matter or evidence from the Claimant on this matter.

197. It was also clear that although it was discussed properly with him, the Claimant's failure to declare himself as a director of another company was not considered in the context of the Claimant having been the sole Director of R1 at the relevant time, the fact that R2 was also a director of numerous companies and the overall running and structure of R1 and how it conducted its business with other family run companies. Although we have reminded ourselves that we must not substitute our opinion of what we would have done in terms of investigation or how what we would have concluded in terms of misconduct, we find that the conclusions regarding this aspect of the first respondent's decision making falls outside the band of reasonable responses in all the circumstances.

198. Nevertheless, we consider that, when looking at the decision as a whole, we consider that the main basis for both JH and SBB's conclusions was the undermining of trust and confidence caused by the disclosure of the six documents and the Claimant's admission that he had been assisting Vibhuti for over two years. That conclusion falls within the range of reasonable responses and was based on a reasonable investigation. Any procedural flaws were minor and did not undermine that core reason for their decision. We also consider that this matter alone would have constituted a reasonable basis for concluding that the Claimant had committed gross misconduct justifying dismissal.

199. SBB did consider whether a lesser sanction could be considered in light of the Claimant's length of service but concluded that given the severity of the breach of trust and confidence immediate dismissal was a reasonable decision in all the circumstances.

200. Procedurally the Claimant did have the right to appeal and chose not to. Whilst we understand his decision not to appeal because he had seen the email from R2 saying that he had already been dismissed, that does not mean that an appeal would have been completely pointless. We consider that his decision not to appeal was made primarily because he objected to the formal nature of the process to date and did not want to engage in that process any further. He objected from the outset to the formal nature of the process as opposed to its substance. It is probably correct that an appeal would have led to the same outcome but we do not accept that this was because R2 no longer wanted the Claimant to be employed. That is of course a significant factor but given that R1 was clearly taking independent advice, and was ensuring that decisions were made by people other than R2, we do not accept that an appeal would not have been independent in all the circumstances.

201. We therefore do not uphold his claim for unfair dismissal.

202. If we are wrong and either the procedural flaws that we identified or R1's additional reliance on the grounds that the Claimant had breached the Data Protection Regulations and failed to disclose his directorship for another company renders the entire dismissal unfair, we find that the Claimant contributed to his dismissal by 100% through his conduct. The Claimant took documents he knew did not belong to him and were not related to his work; he supplied them to someone who was in effect a friend and not a colleague as he asserts and he had the sole aim of assisting her in a dispute with his boss. He had performed this dual role for over 2 years. He has accepted that the working relationship could not continue once his actions were discovered and yet he continued to do it. We therefore conclude that the Claimant's actions contributed to his dismissal for gross misconduct and that any award should be reduced accordingly.

Failure to Provide S1 Statement of Particulars

203. As the Claimant has not successfully brought a claim specified in Schedule 5 to the Employment Act 2002, the Claimant's claim regarding the failure to provide him with the particulars required by s1 ERA does not succeed.

Employment Judge Webster

Date: 3 July 2023

JUDGMENT and SUMMARY SENT to the PARTIES ON

17/07/2023

FOR THE TRIBUNAL OFFICE