EMPLOYMENT TRIBUNALS

Claimant: Mr T Jarecki

Respondent: Like U CIO

Heard at: Birmingham (via CVP) **On: 6-7 July, 9-10 November 2023**

Before: Employment Judge Edmonds
Mr D McIntosh
Mr N Howard

Representation
Claimant: In person
Respondent: Miss S Sodhi, litigation consultant (6-7 July and 9 November)
Mr S Hoyle, litigation consultant (10 November)

JUDGMENT having been sent to the parties on 14 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The respondent is a charitable organization, which was set up by the claimant and his wife, with the claimant later taking the role of General Manager. Its purpose was to help migrant communities with day to day problems. From 1 February 2021, Mr Chylarecki was appointed Chair of the charity and it is from this point onwards that the claimant says that he encountered difficulties. He disagreed with the way that Mr Chylarecki wanted to run the charity and the claimant says that, after making protected disclosures about various matters, he was dismissed by the respondent. The claimant did not have two years' service at the time of his dismissal and therefore this case focusses on whether his treatment was related to those alleged protected disclosures.

2. ACAS early conciliation commenced on 11 June 2022 and ended on 1 July 2022, with the claimant's claim form being filed with the Tribunal on 26 July 2022.

Claims and Issues

3. The claims and issues in this case had been clarified at a preliminary hearing before Employment Judge N Clarke on 3 February 2023. The final list of issues (excluding remedy, which we agreed would be addressed at a separate hearing if needed) was as follows:

1. Time Limits

1.1 Given the date the claim form was presented (26 July 2022) and the dates of early conciliation (11 June to 1 July 2022), any complaint about something that happened before 12 March 2022 may not have been brought in time.

1.2 Were the unfair dismissals and whistle-blowing detriment complaints made within the time limit in section 111/48 of the Employment Rights Act 1996? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?

1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Protected disclosure

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

2.1.1.1 On 4 November 2021, by WhatsApp message to the respondent's Chairman (Mr Chylarecki), that stated "I want to meet with you tomorrow. You have put Maria and Sebastian's health and safety at risk, and I would like to know what is it you plan on doing with if afterwards."

2.1.1.2 On 27 January 2022, by written submission to the Charity Commission which contained statements that:

(a) The Chairman is using the respondent's assets for his personal gain by claiming part of the respondent's premises as his personal space.

(b) *That a trustee is receiving a preferential rate for his office compared to other tenants.*

(c) *That the respondent was putting an employee's (Maria) health and safety at risk by breaking procedures.*

2.1.1.3 On 10 March 2022, by telling a trustee (Mr Grzegorz Guz) and Mr Neil Harrison (a Consultant for the respondent) that he (the claimant) had made a written submission to the Charity Commission.

2.1.2 Did he disclose information?

2.1.3 Did he believe the disclosure of information was made in the public interest? The claimant says that he believed the respondent's actions were harmful to the public because they were hindering the respondent's charitable activities in both quality and quantity.

2.1.4 Was that belief reasonable?

2.1.5 Did he believe it tended to show that:

2.1.5.1 A criminal offence had been, was being or was likely to be committed. The claimant says that he believed that the Chairman was acting fraudulently.

2.1.5.2 A person had failed, was failing or was likely to fail to comply with any legal obligation. The claimant says he believed that trustees were not permitted to have benefits from the respondent and that the Chairman was not allowed personal gain.

2.1.5.3 The health or safety of any individual had been, was being or was likely to be endangered. The claimant says he believed that Maria and Sebastian's health and safety was at risk.

2.1.6 Were those beliefs reasonable?

2.2 If the claimant made a qualifying disclosure, was it made:

2.2.1 To the claimant's employer?

2.2.2 To the Charity Commission (s43F Employment Rights Act 1996)

If so, it was a protected disclosure.

3. Unfair dismissal

3.1 Constructive dismissal

3.1.1 Did the respondent do the following things (between early November 2021 and late January 2022):

3.1.1.1 Give the claimant an annex to his contract, reducing his salary from £24,000 to £18,000 p/a

3.1.1.2 Forbid the claimant from any activities relate to the Community Centre

3.1.1.3 Limit the claimant's work to commissioned fundraising and administration

3.1.1.4 Create a hostile working environment for the claimant and his wife?

3.1.2 Did those matters or any of them breach the implied term of trust and confidence? The Tribunal will need to decide:

3.1.2.1 Whether the respondent behaved in away that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

3.1.2.2 whether it had reasonable and proper cause for doing so.

3.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

3.1.4 Did the claimant resign in response to the breach by giving six months' notice on 26 January 2022? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

3.1.5 Did the claimant affirm he contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

3.1.6 What was the reason or principal reason for dismissal (i.e. what was the reason for the breach of contract)? The claimant says that it was because he had blown the whistle on 4 November 2021. The respondent says that it was for misconduct.

3.1.7 Was it a potentially fair reason?

3.1.8 Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

3.2 Dismissal by the respondent

3.2.1 The claimant was dismissed by letter of 14 March 2022. What was the reason or principal reason for dismissal. The respondent says that it was misconduct, which is a potentially fair reason.

3.2.2 The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

3.2.3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular whether:

3.2.3.1 there were reasonable grounds for that belief;

3.2.3.2 at the time the belief was formed the respondent had carried out a reasonable investigation.
3.2.3.3 the respondent otherwise acted in a procedurally fair manner;
3.2.3.4 dismissal was within the range of reasonable responses.

3.2.4 Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

4. Wrongful dismissal / notice pay

4.1 What was the claimant's notice period?
4.2 Was the claimant paid for that notice period?
4.3 If not, was the claimant guilty of gross misconduct that entitled the respondent to dismiss without notice?

5. Detriment (Employment Rights Act 1996 sections 47B 48)

5.1 Did the respondent commence a disciplinary process against the claimant from 28 February 2022?
5.2 By doing so, did it subject the claimant to detriment?
5.3 If so, was it done on the ground that he made a protected disclosure (either of those matters in 2.1.1.1 or 2.1.1.2 above)?

Procedure, documents and evidence heard

4. The Tribunal heard evidence from the claimant and, on his behalf, his wife Mariia Lata, and from Mr Chylarecki on behalf of the respondent. The parties had not been able to agree a single file of documents for use at the hearing and therefore we were presented with one file of 147 pages from the respondent, and a further claimant file of an additional 62 pages. We would note that a number of the documents in the claimant's separate file were highly relevant to the proceedings and therefore it is disappointing that the parties were not able to agree one combined file for use at the hearing. In these written reasons, we refer to the bundles as "R file" (respondent's file) and "C file" (claimant's file) and the page numbers are to the relevant pages of those files.

5. The claimant has submitted that the respondent has not provided full documentation to the Tribunal. The respondent was ordered to do a further search for documentation during the hearing: specifically related to an invoice for the Prince 2 training, and one additional document was found. Generally, the Tribunal does find that there is a marked lack of documentation in relation to the matters in this case. However, we are unable to say whether that is because the respondent has failed in its disclosure obligations or whether it is because the respondent did not keep full records of what was happening. Either way, we can understand the claimant's frustration.

6. This claim was originally due to be heard over two days on 6 and 7 July 2023. Unfortunately that was insufficient time to complete evidence and

submissions, and two further days were therefore listed on 9 and 10 November 2023 in order to enable the parties to give oral submissions (the respondent having expressed a preference for oral submissions) and for the Tribunal to consider their decision and issue oral Judgment. That was done on 10 November 2023, with the claimant also providing written submissions to supplement his oral submissions. These written reasons are provided pursuant to a request from the claimant made on 14 November 2023.

7. There is one additional point to note in relation to the evidence heard. On 7 July 2023, Mr Chylarecki was giving evidence and referred to an email in which an individual had raised some concerns about a lack of space available when the Princes Trust were on site (R file 66). Mr Chylarecki suggested that this document showed that the Princes Trust did not wish to deal with the claimant. The claimant commented that in his view the email did not say that the Princes Trust did not want to work with him. At this point Mr Howard, thinking that he was on mute, made a comment to himself to the effect that it did not say that the Princes Trust did not want to work with the claimant. Once he realised that he was not in fact muted he apologised for having said this out loud.

8. Later that afternoon, after a break, the respondent's representative asked for it to be noted that they had a concern about Mr Howard's comment and whether it showed apparent bias. Following a discussion, the respondent's representative confirmed that she did not wish to make any formal application in this regard, and that they just wished for their concern to be noted. It was confirmed to the respondent that, as the case was to go part-heard in any case, they would have the opportunity to write to the Tribunal if they were intending to make any application, but they should do so in good time before the reconvened hearing. No such application was made.

9. For the avoidance of doubt, the Tribunal is confident that there was no real or apparent bias in the comment made by Mr Howard. This was an isolated comment expressing his opinion about a piece of evidence that had been provided to him in the course of the proceedings. It is unfortunate that the parties heard his view at that time, but this was a view that he could rightly and properly express as part of deliberations and was based purely on the evidence before him, both written and oral. Forming a view on a particular piece of evidence which is presented during the course of proceedings is not indicative of any real or apparent bias.

Facts

Background

10. The respondent is a charitable organisation, set up by the claimant and his wife (although she was not initially employed by the respondent). Its purpose was to help migrant communities with day to day problems. When it was set up, the claimant's intention was for it to support migrants generally, although it appears that the Board of the charity subsequently moved the focus (to the claimant's dissatisfaction) towards the Polish community more specifically, and towards a more social club type of environment (hence applying for an alcohol license).

11. The respondent has a Board of trustees, which was originally made up of three individuals but rose to six, including Mr Chylarecki of the respondent as Chair from 1 February 2021.

12. We heard evidence from the claimant, his wife (who also worked for the respondent during part of the relevant period) and Mr Chylarecki on behalf of the respondent. Generally, contrary to the respondent's submissions, the Tribunal felt that the claimant gave candid evidence about the matters in question and how he felt at the relevant time. He saw the respondent as his vocation and it was clear from his evidence that he feels that it has been ruined by the behaviours of the Board, in particular Mr Chylarecki. In contrast, we found that Mr Chylarecki's evidence was somewhat defensive and, as explained further below, we find that his evidence was not credible on a number of points. Therefore, where there is a direct dispute between the evidence of Mr Chylarecki and the claimant, we have generally found on balance that we prefer the account of the claimant.

13. The claimant's employment with the respondent started on 1 June 2020. He was employed under the terms of a contract of employment (R file page 47). Section 4 of that contract provided that the claimant would have an annual salary of £24,000 ordinarily, but in the first year he would only take half that amount due to the charity being newly formed. The clause went onto provide that if the Charity's income surpassed £100,000, he would be compensated for the other half of his salary in a manner "not endangering the Charity's cashflow". He would be provided with his full salary from the beginning of the second year, or the moment the Charity reaches £100,000, whichever comes first. The claimant's notice period was set out in clause 2 as being six months.

14. The claimant's job title was General Manager, and his extensive duties are set out at clause 3 of his contract. They are detailed and include a duty to "Ensure Like U fulfils its legal, statutory and regulatory responsibilities". Arguably this could include health and safety matters but it is not spelled out specifically, and these duties could have been personal to him or delegated to others by him. What is clear is that, as the overall general manager, the claimant would be accountable to the board to make sure the legal, statutory and regulatory responsibilities are met, whether or not responsible for it on a day to day basis. For completeness, we would mention that clause 11 of his contract contains a generalised health and safety clause, that does not put responsibility on the claimant.

15. On 1 February 2021 Mr Chylarecki joined the respondent as Chair. This was not his only role and he was not a full time paid Chair, he had other roles with other organisations. He had an office at the respondent, which he used as a base, so he was on the respondent's premises most days although not always doing respondent work.

16. The claimant's wife, Mariia Lata, was also employed by the respondent between the summer of 2021 and February 2022, although the exact dates are not known. Prior to her employment commencing, she did ad hoc pieces of work for the respondent, such as when she was asked to review the respondent's policies and procedures. The claimant's wife was therefore aware of the respondent's policies and procedures and had copies of them.

Migrant Support Centre and Restaurant

17. One of the key projects that the claimant and his wife worked on was a Migrant Support Centre in Worcester. In or around April/May 2021, Mr Chylarecki informed the claimant and his wife that he was taking greater control of the Migrant Support Centre. The claimant would have been unhappy about that as it was something that he had worked on heavily and felt passionately about.

18. In around May 2021 the respondent's restaurant opened, and was managed by someone named Diana. The claimant had been instrumental in setting the restaurant up. Diana resigned around the end of June 2021 due to unsociable working hours, however then asked to return around one month later. It was alleged that Mr Chylarecki refused because he wanted to put his ex-partner into that position and therefore said that there was no time to do a recruitment process at that point. It is clear that the claimant felt, when the Chair put his ex-partner in post, that the Chair was not following proper processes and was taking over. We can understand why the claimant felt that way.

19. The claimant says that he had been clear that he did not want alcohol to be served at the restaurant, both because of his own views on alcohol (which stemmed from a family member who had had alcohol problems) and because he did not think alcohol would align to the charitable nature of the charity. Mr Chylarecki instead felt that alcohol would render the centre more sociable and generate more income. Mr Chylarecki said that it was in fact the claimant's idea to serve alcohol, however we found the claimant's position on the topic of alcohol entirely credible and do not accept that it was his suggestion. We make no finding on whether it was right or wrong to serve alcohol, but the differing views are reflective of their differing approaches to the charity.

Changes to the claimant's role

20. Between June 2020 and April 2021, the claimant took half pay in line with his contract of employment, and then in April 2021 his pay rose to full pay.

21. The claimant's role then changed with effect from 1 October 2021, as set out in an Annex to his employment contract dated 25 August 2021 (R file page 55). The claimant prepared this Annex himself as part of his responsibilities as general manager, and signed it, however we find that in reality he was unhappy about the changes and only agreed to them because he felt that if he did not he might be removed from the charity entirely. The Annex set out that, save as set out in the Annex, his terms and conditions remained unchanged. There were two key themes to the changes:

    21.1 A reduction in the claimant's duties. Specifically, he would only be responsible for (a) representing the charity regarding charitable activities (b) fundraising and (c) grants and charity commission reporting. He would have no responsibility for legal and regulatory matters. He would specifically no longer be responsible "*either legally or factually, for any activities happening in the Community Centre*". He

would therefore no longer have responsibility for health and safety matters (or any other legal/regulatory matters), or for the migrant support centre, amongst other things. This was a clear reduction in role accountability and it is worth noting that it meant that the claimant was no longer involved in matters which he had seen as critical parts of his role and critical to the charity.

21.2 A reduction in the claimant's pay from £24k per annum, to £18k per annum, but with the potential to earn a bonus equal to 12.5% of all fundraising income. Therefore, theoretically he could earn more, although we have no knowledge as to what level of income the respondent was expecting to generate. Based on the claimant's initial contract of employment referring to pay arrangements changing once £100k of income was generated, if that was to be the annual fundraising income then this would mean an overall increase in pay, although it was not of course guaranteed. The evidence we were shown was not sufficient to inform the Tribunal as to whether the threshold of £100k was ever met or not. We also note reduced salary may also have reflected the reduced duties associated with the role.

22. We find that overall it was the reduction in responsibility which concerned the claimant more than the change to the financial package, as the claimant saw himself as integral to the charity and he had a strong personal connection to it given he was instrumental in setting it up.

23. We also find that, by this point, the relationship between Mr Chylarecki as Chair and the claimant is clearly starting to deteriorate. We also find that by this stage Mr Chylarecki has a clear vision for change at the charity and is starting to implement that. In terms of the motivation for changing the claimant's duties, we find that this was an attempt by Mr Chylarecki to remove the claimant from more of the day to day activities of the centre: he wanted the claimant to focus on raising money but stay away from the day to day running of the centre.

Claimant's performance October 2021 onwards

24. The respondent submitted in evidence that there were issues with the claimant's performance during 2021, and Mr Chylarecki informed the claimant that he had "anger issues". We find that the claimant did demonstrate anger in the workplace, but that this was motivated by the fact that he was being undermined by Mr Chylarecki. We did not see any evidence of any significant performance issues. Although we were pointed to a delay in updating policies, we do not see this as a significant issue.

25. We heard contradictory evidence about the nature of the claimant's responsibilities from October 2021 onwards. On the one hand, his contract of employment clearly limited his responsibilities as we have explained. In addition, Mr Chylarecki decided to ask the claimant's wife to report directly to the Board rather than to the claimant: we find that in itself that was a sensible suggestion to avoid any potential for it ever being argued that there was favouritism between the two. However, on the other hand, when the claimant points out that his wife was unsupported in relation to concerns which she raised about her role, Mr Chylarecki submitted that the claimant

still maintained overall responsibility for the issues she raised, including health and safety matters, even though he had removed line management and health and safety matters from the remit of the claimant's role. We find that Mr Chylarecki's submission is inconsistent and contradictory – it appears to the Tribunal that when it suits Mr Chylarecki he says that the claimant does not have responsibility for certain matters, but when it does not suit him, he says that the claimant does have responsibility. To be clear, we find that from October 2021 the claimant had no responsibility for his wife's employment or health and safety matters relating to her or more generally.

The 4 November 2021 "Disclosure"

26. On 2 November 2021 the claimant's wife sent Mr Chylarecki an email raising a concern about her safety at work. During the hearing it came to light that the email about this matter was not in the bundle, and the Tribunal requested to see that document. In this email, the claimant's wife said that there was to be a meeting with a particular individual beneficiary on 4 November 2021 and that she did not feel safe to stay alone with him in one room, especially because a panic button did not work the last time. She requested that someone attend the meeting with her. This request came about because of some specific issues relating to that particular beneficiary of the charity which gave the claimant's wife genuine cause for concern.

27. Mr Chylarecki did not reply to that email. He says that he was ill at the time, and we accept that he did have suspected COVID-19, however we find that he had definitely read and understood the email in question yet chose not to reply or to forward it on to someone else to deal with. We have no reason to doubt that Mr Chylarecki potentially had COVID-19 as he says he did, however we were not provided with evidence as to how ill he felt. Therefore, we cannot comment as to whether he was ill or simply isolating in accordance with the rules in place at the time, however we do note that in a later WhatsApp on 4 November 2021 (to which we refer shortly), Mr Chylarecki referred to himself as "self-isolating" with suspected COVID-19.

28. On 4 November 2021 the claimant's wife decided not to attend the meeting because she had not received any assurance that she could be accompanied to it. In the circumstances, that was a reasonable decision for her to take. She had a genuine health and safety concern, and in the absence of a solution, reasonably decided not to attend and put herself at risk. Although there was a building manager named Sebastian present in the building, he would not have been in the meeting itself and she was worried that the panic button did not work and therefore she would have not have been able to reach him in an emergency. We acknowledge that the respondent's evidence is that the panic button was working: we do not know whether it was or not however the key point is that she did not think it was working and did not get a reply to reassure her that it was. The fact that she did not attend does not mean that she did not raise a valid concern or that there was not a valid risk.

29. On 4 November 2021 (R file page 124) the claimant had a WhatsApp conversation with Mr Chylarecki: the conversation was in Polish however we were provided with a translation. During the hearing Mr Chylarecki said

that the translation was "not exactly" accurate as the words could be translated in many different ways and the translation given was in his view leaning towards the claimant's evidence. However, the document had been shared many months before the hearing and the respondent had raised no concerns about the translation prior to the hearing itself, and on balance we find that it was an accurate reflection of what was said.

30. The claimant's message said "*I want to meet you tomorrow. You put Mariia's and Sebastian's H&S at risk, and I want to know what do you intend to do about it".* At that point in time the claimant had no responsibility for health and safety, and therefore this was raised as an employee towards their employer, rather than as a manager exercising their own health and safety responsibilities.

31. Although the claimant does not give specific details of the health and safety risk referred to in his message, we find that Mr Chylarecki's response shows that he fully understood what was being raised and that it was indeed obvious what was being referred to given the context. In evidence Mr Chylarecki said that he had "absolutely no idea" what the claimant was referring to by the message. Contrary to the respondent's submission, although it is true that Mr Chylarecki did say "What are you talking about", we find that this was not a suggestion that he did not understand but rather that he disagreed with the claimant's position on the matter. We say this because his response went on to say *"I informed Sebastian yesterday that I will not be in the hub in the morning, so you (plural) had enough time to cancel the meeting"*. From those words, it is very clear that Mr Chylarecki knew that the message referred to the claimant's wife's situation (hence use of the word "plural") and that it referred to the meeting which the claimant's wife had requested support at on that day. He fully connected the message to the claimant's wife's email of 2 November, which also shows that he had read and digested that message despite being at home with suspected COVID-19.

December 2021 / January 2022

32. On 14 December 2021 the claimant's wife raised a concern that a particular individual had smelt of alcohol on that day despite using power tools in the community hub (C file page 48). The claimant was copied into the conversation and the following month, on 17 January 2022, also asked for clarification on whether the individual would be banned from the centre until he received professional help. Following Mr Chylarecki confirming that he was not banned, the claimant's wife raised a further concern about the matter on 18 January 2022.

33. On 13 January 2022, another member of staff emailed various individuals including the claimant and Mr Chylarecki to explain that two beneficiaries had complained about the food they had received, with one of them suggesting food poisoning. On 17 January 2022, having heard nothing, the claimant asked various individuals at the respondent for an update, and Mr Chylarecki replied to say that the matter was closed and that this was not something he should be concerned with as he should be focussed on catching up with overdue tasks. We agree with the respondent, in that responsibility for this kind of matter had been removed from the claimant

from October 2021. However, what this also shows is that the employee who raised the issue must have perceived that the claimant would be involved, hence including him on the email.

34. During the course of the hearing, the respondent also disclosed a document showing that an invoice for a training course was sent by the claimant to Mr Chylarecki on 13 January 2022. There is no actual content within the email, but it shows that the claimant sent an invoice to Mr Chylarecki on that date, and we accept that this was an invoice for a Prince 2 training course, although given the date of the email we also accept that this may have been sent some time after the course itself.

35. In December 2021 / January 2022, the claimant had an email exchange with a third party, namely the Public Health Engagement Team at Worcestershire County Council, in relation to a potential COVID-19 impact focus group community grant. On 14 January 2022 the claimant emailed the Public Health Engagement Team to say that the charity's board was working more slowly than he had hoped. He put forward a suggestion of taking on the project on a self employed basis. Then, three days later on 17 January 2022, the claimant informed the Public Health Engagement Team that the respondent was not going to be taking the project forward. We were not shown any Board minutes or other documentation regarding this. He again offered to deliver it on a self-employed basis. This was rejected by the Public Health Engagement Team as they were only working with organisations.

36. We saw an internal email exchange (C file page 49) between the claimant and Mr Chylarecki about the matter. Mr Chylarecki said that the respondent had looked into a proposal by the claimant to split the funds 50/50 with the claimant, but felt it would put too much pressure on him. Although on the face of it considering the claimant's workload is reasonable, we find it strange that the respondent would not wish to pursue potential funding, in particular given that the claimant's role was to bring in funding. We also note that, in asking the claimant to focus on the policies, risk assessments and paperwork for audit, and not fundraising, this would have the impact of removing the claimant's ability to earn bonus under his contract of employment. We have not been provided with any documentation showing that this decision was taken by the Board more widely, and we find that it was in fact Mr Chylarecki who was controlling the decisions on this matter.

37. The claimant replied on the same date, expressing his concern about his financial position given the respondent's constant refusal of funding. We believe he had valid financial concerns. In his reply, he also points out that if a charity has a dispute with employees regarding salaries, it needs to be addressed in the Charity Commission Report.

38. The following day Mr Chylarecki replied (C file page 50). In this email he referred to there being missing rent payments, gas and electricity debts not being managed and outstanding lists of missing receipts. We find that at this point, Mr Chylarecki was trying to build a case against the claimant in order to potentially find a way to remove him from the respondent's employment one way or another.

39. By this point we find that there is a hostile working environment more generally. By way of example, we were shown an undated WhatsApp conversation between claimant and various board members (C file page 45). In the first part of his conversation Mr Grala (another member of the Board) is very hostile to the claimant. The claimant's message was professional in nature, however Mr Grala's response was a personal attack on the claimant using a derogatory tone. It is clear that Mr Grala has a lack of respect for the claimant and viewed him as not having performed well. It is also clear that by now the focus of the respondent is on the restaurant, whereas the claimant is trying to source broader funding – they have different agendas. Then other members of the Board join the conversation and again criticise the claimant. There is also a reference to the claimant not having paid three months rent towards the end of the message. It is clear that the relationship between the claimant and the Board of the respondent has broken down by this stage and that the claimant was subjected to a toxic work environment.

40. On 17 January 2022 the claimant emailed various members of the board, requesting information to include in his charity commission report. We find that given the claimant's reduced role since October 2021 this is information that he no longer had access to himself. He requested the information by the end of the month.

41. Mr Chylarecki responded on 18 January 2022, saying that he was concerned that the report was being worked on so close to the deadline which he said was only a month away, and that he would need to chat to the rest of the Board about what to do. However, in evidence Mr Chylarecki accepted that he had made a mistake in thinking that the claimant was late and we would also note that the claimant is not requesting significant amounts of information from the respondent. In addition, given the claimant's reduced duties, the Board would need to provide that information to the claimant and we find that Mr Chylarecki's response indicates that he was actively looking for ways to complain about the claimant. He does not provide the requested information or explain to the claimant how to obtain it.

42. On 18 January 2022 the claimant's wife emailed the board, raising various concerns including safety concerns (C file page 55). On 20 January 2022 Pawel Ostrowski sent a detailed reply addressing her concerns, although we note that the claimant's wife did not feel the matters were resolved to her satisfaction. The claimant then responds on 21 January 2022, alleging breaches of employment law, and noting that there were rooms available onsite (including Mr Chylarecki's office) which were not used for charitable delivery and suggesting that they could be used to enable greater social distancing. We do find it surprising that Mr Chylarecki had his own separate dedicated office, given the small size of the charity and the fact that he did not work for it full time.

43. There was no reply to this email in the Bundle and Mr Chylarecki said that this was because a verbal conversation had taken place (which the claimant denied). On balance we prefer the claimant's evidence and find that no verbal conversation took place: we are not persuaded that the nature of their relationship by this point was such that Mr Chylarecki would have taken the initiative to try to discuss the concerns raised directly.

Claimant's resignation and alleged disclosures to Charity Commission and National Lottery

44. On 26 January 2022 the claimant handed in his resignation (R file page 85). He made it clear in his resignation letter that his resignation was prompted by his disagreement with the direction that the charity was being taken in, and him being constantly ignored. He gave six months' notice and said that during his notice period he would only perform the specific duties listed in his amended contract. He ends the letter "*Thank you for the time we have spent together, it was a truly unforgettable experience"*. We find this comment to have been tongue in cheek and does not indicate any real gratitude towards the Board.

45. Given that he listed out various matters of concern in his resignation letter, including improper financial conduct and inclusion issues, hostile working environment – we find that this resignation letter constituted a formal written complaint, and therefore whilst it did not state that it was a grievance, it was. No investigation into the claimant's concerns was commenced by the respondent, despite the resignation letter specifically asserting improper financial conduct. We find that a reasonable employer, despite their animosity towards the claimant, would have taken that allegation seriously and done something about it.

46. The following day, on 27 January 2022, the claimant sent a detailed document to the charity commission (R file page 121) containing a large number of concerns (including those identified in the List of Issues above, along with various other concerns), and specifically stating that he was blowing the whistle. We find that the claimant did not inform the respondent at that time that he had sent that complaint, and the charity commission did not make contact with the respondent for a number of months so the respondent would not have known that way either. The claimant says that Mr Chylarecki was looking at the claimant's emails but it came from his gmail account so he could not have seen it.

47. The claimant also made a disclosure to the National Lottery about his concerns on the same day. We find the content of it to have been almost identical to the disclosure made to the Charity Commission, save that certain sections were updated to reflect the audience and that it was sent from his work email address. In any case, this was not a pleaded protected disclosure by the claimant.

48. At the end of January 2022, the claimant was placed on garden leave by the respondent. We find that this was to get the claimant out of the way so that they did not have to deal with him anymore. Around this time, the claimant's wife also left the respondent's employment.

Disciplinary process

49. On 28 February 2022 the claimant received an invitation to an investigation meeting. We find that something has prompted the respondent to decide that, rather than leaving the claimant on garden leave for the next five months, they would take pro-active measures to seek to remove him earlier. At this stage the claimant was not informed of the specific allegations

against him. Whether or not the respondent had concerns about the claimant's conduct, we find it surprising that after a month on garden leave they suddenly started a disciplinary investigation. We find that something or some things has prompted this, and that otherwise the respondent would have left the claimant on garden leave for his notice period.

50. We find that it was not prompted by the claimant's disclosure to the charity commission, as the respondent was not at that stage aware of that disclosure.

51. What we do know is that during February there were some discussions between the claimant and respondent about alleged unpaid wages, as referred to during the later investigation meeting on 3 March 2022 (R file pages 91 and 100). From the outset of that investigation meeting on 3 March 2022, the discussions in fact initially focussed on the claimant's pay and a clear dispute about that, and that discussion was in fact initiated by the board member, Mr Guz. Therefore we find that behind the scenes there was a separate conflict between the parties about pay, although we were not provided with documents about this. We find that this was a key reason why the disciplinary process was suddenly started at that time, although the backdrop to the respondent wanting to find a way to remove the claimant from its employment had been going on for some time by this point.

52. At the investigation meeting which took place on 3 March 2022, the claimant was asked about various matters in addition to the pay matters we have referred to above – including allegations around a Prince 2 training course he had attended (alleging that this course was for personal gain), utility payments (alleging failure to pay), and rent payments (alleging that payment was not made in a timely manner). In relation to the Prince 2 course that the claimant attended, he refused to answer questions about it. We find that the reason the claimant refused to engage was because it was obvious to him that this process was motivated by a desire to remove him from the business. In relation to rent, the claimant said that responsibility sat with the board, and that the payments were due quarterly although it was accepted practice to pay monthly. In relation to the gas and electricity bills, the claimant said they were paid by direct debit. We find the question "what about energy" posed by Mr Guz to be remarkably vague. As far as we can see from these notes, the claimant was not given any documents to clarify the respondent's allegations, although he does appear to have had an understanding of what the issues raised were.

53. We were shown a document purporting to be board notes following the meeting (R file page 105). This is undated and contains no detail, but appears to be a checklist of allegations against the claimant. This shows that the board are making the decisions regarding the claimant's employment collectively, and before any disciplinary meeting has taken place.

54. On 6 March 2022 the claimant left a WhatsApp group called Like U Board. By the time of the hearing, there was no content available to see from this group (C file page 62) and Mr Chylarecki submitted that "*there was no evidence on my device that anyone was using it"* and that he made an assumption that no one was using it. We find the respondent's evidence on

this point to be disingenuous. In the bundle there was a WhatsApp (C file page 45) which was clearly from this group and showed that it was actively used by a number of people on the Board. Given the absence of any board minutes (other than the document referred to above at R file page 105) or internal email exchanges which detail the decisions of the board in relation to the claimant's employment, we find that this WhatsApp group was actively used for that purpose. We find that messages have subsequently been deleted from the group by one or more members of the Board. Given the tone of the content at page 45 of the claimant's bundle from the WhatsApp that we have seen, we believe on the balance of probabilities that the WhatsApp group would have contained inflammatory language about the claimant and would have revealed a desire to remove him from the respondent's employment for reasons not wholly connected with the three allegations formally put to him in the disciplinary process.

55. On 8 March 2022 the claimant was invited to attend a disciplinary hearing (R file pages 94 and 106). This listed 3 allegations – (a) spending money on personal development (Prince 2 invoice) (b) creating and not managing property gas and electricity debt and missing rent payments and (c) providing misleading information to the Charity Board. Mr Chylarecki was to chair the meeting.

56. On 10 March 2022 the claimant emailed Grzegorz Guz (R file page 94), saying that he would not be attending the hearing due to the hostility shown to him by the Board. He alleged that the hearing was revenge for him having blown the whistle. Given the blatant hostility which had been shown to the claimant, we can understand why he did not wish to attend. We further find that the claimant's email amounted to another grievance.

57. Neil Harrison replied on behalf of the respondent. His reply was measured, although we note that he did not work for the respondent himself. Although he invited the claimant to raise a formal grievance, he also acknowledged that the claimant's allegations as set out in the claimant's email demonstrated a clear breakdown in the relationship with the respondent – in other words, he acknowledged that the claimant had raised a complaint in that email. Mr Harrison made clear that he was not aware of the facts of the claimant's alleged whistleblowing.

58. The claimant then replied again on the same day (R file page 95). He again referred to having blown the whistle and raised concerns about the impartiality of Mr Chylarecki, including concerns that Mr Chylarecki had endangered the health and safety of an employee, bullied an employee, was using charity property for personal gain and spent restricted funding which was supposed to be spent on rent on other matters. We find he was absolutely right to raise his concerns about impartiality as Mr Chylarecki was clearly not impartial. The claimant said that he would participate with independent mediators present. He was informed that the meeting would go ahead without him in response.

59. The disciplinary hearing was held in the claimant's absence (R file page 112) and it was conducted by Mr Chylarecki although the meeting notes do not say his name where the hearing manager's name should be set out. The notes show that Mr Chylarecki was provided with a detailed script of

matters to consider, however the notes also show that he does not appear to have addressed those matters and instead just recorded in very brief terms at the end of the notes that the claimant was being dismissed for gross misconduct for the three matters alleged. We find that no detailed consideration was given to any specific issues and Mr Chylarecki was simply going through the motions to effect a decision he had already made.

60. For completeness we set out our findings on the allegations re Prince 2, gas and electricity and rent:

60.1 In relation to the Prince 2 course, we find that this was a reputable project management course and would indeed have been useful to the claimant in his role. The respondent has not satisfied us either that the course was for personal gain or that the claimant failed to follow proper processes in signing up for the course. The payment had to be made by two signatories, and so the claimant could not have processed this alone.

60.2 In relation to gas and electricity, we accept that the payments were made by direct debit. Regardless of whether or not the account had a deficit, the respondent has not shown us any evidence to identify why that was the claimant's fault. During this period, due to on the one hand a period of reduced business consumption due to covid, followed by out of the ordinary price increases, we find that many direct debits were no longer reflective of true consumption and have found nothing to suggest blameworthy conduct.

60.3 In relation to rent, we accept the claimant's evidence that even though payments were habitually made on a monthly basis, this was due on a quarterly basis and we have not been provided with any evidence to show that the claimant placed the respondent in rent arrears from a legal perspective. We accept that given payments were normally made on a monthly basis, the Board might not have appreciated that the payments were still to leave the account when the claimant did not pay them monthly, however we do not see this as a significant conduct issue but rather something that might have prompted an informal discussion between the respondent and claimant. At worst, it could only have been a performance issue not a conduct one as there is no suggestion of any fraudulent or wilful behaviour on the claimant's part.

60.4 In relation to providing misleading information to the charity board, we have seen no evidence that he claimant has misled the board in any way.

61. The claimant was notified of his dismissal on 14 March 2022. Therefore, although the decision to dismiss him was taken on 11 March 2022, the date of dismissal was not until 14 March 2022 when he became aware of that decision.

62. On 16 March 2022, the claimant replied to express his disagreement with the outcome. Although the respondent has submitted that the claimant did not appeal against the decision, we find that this email should have been treated as an appeal by the respondent. The disciplinary outcome letter

informed the claimant that, if he wished to appeal, he should email Mr Chylarecki. His email was to Mr Chylarecki. Although he referenced alternative ways of resolving the dispute in that email, he said he would expect a response within 3 days. We find that the respondent should have treated this as an appeal. As far as we are aware, the claimant received no response to that email.

Charity Commission investigation

63. By letter dated 12 September 2022, the charity commission wrote to the respondent (R file page 129) informing them that regulatory concerns had been raised. This did not mention the claimant by name, however we find that the respondent would have made an assumption that it originated from the claimant given their history. Having said that, by this time it is a number of months since the claimant was dismissed and we have seen no evidence that the respondent was informed of the charity commission complaint before this date.

64. The respondent replied to the charity commission (R file page 131) and ultimately the charity commission took no formal action but made certain recommendations.

Law

Protected Disclosures

65. The law protects those who make protected disclosures from suffering dismissal or detriment as a result.

66. Section 47B of the Employment Rights Act 1996 ("ERA") states:

> *(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.*

67. Section 103A of the ERA states:

> *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).*

68. As to what constitutes a protected disclosure, section 43A of the ERA provides:

> *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*.

69. Section 43B of the ERA sets out that definition of a qualifying disclosure as follows:

> *(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 filed, 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; and

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.

70. A qualifying disclosure which is made to the employer is a protected disclosure. Similarly, the Charity Commission is included in the list of prescribed persons under section 43F of the ERA and therefore a qualifying disclosure to the Charity Commission will also amount to a protected disclosure if the provisions of that section are met.

71. For a disclosure to be a qualifying disclosure, it must disclose information, that is to say that it must convey facts (*Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT)*. Merely making an allegation or expressing an opinion without context will be insufficient (although on some occasions allegations and opinions can also be properly characterised as information). Context is important and a disclosure that would be insufficient when read alone can nevertheless be sufficient when read alongside the context in which it was said or written *(Kilraine v London Borough of Wandsworth 2016 IRLR 422, EAT)*.

72. It is possible for multiple communications to be read together to amount to a qualifying disclosure, even if when read alone they would not (*Norbrook Laboratories (GB) Ltd v Shaw 2014 ICR 540, EAT*).

73. The worker must reasonably believe that the information disclosed tends to show one of the matters set out in section 43B of the ERA (*Kilraine, above*). This has both a subjective and objective element to it: did the worker believe that the information tended to show one of those matters and was that belief reasonable? (*Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA*).

74. The worker must have a reasonable belief that the disclosure is made in the public interest. Therefore, ordinarily, a disclosure relating to a private employment dispute will not constitute a qualifying disclosure. However, as in *Chesterton (above)*, the public interest test may be satisfied where only a small group of individuals are impacted by the matter that the disclosure

relates to, including where that group are employees of the organisation in question, if the employee can show that they had in mind a section of the public when making the disclosure. Relevant matters to consider include:

74.1 The numbers in the group whose interests the disclosure served;

74.2 The nature of the interests, and extent to which they are, affected;

74.3 The nature of the wrongdoing disclosed; and

74.4 The identity of the alleged wrongdoer

75. The case of *Morgan v Royal Mencap Society 2016 IRLR 428, EAT,* considered whether or not to strike out a claim on the basis that the claimant had no reasonable prospect of showing that a protected disclosure was made. In that case, the Claimant raised a disclosure about having to work in cramped conditions with an injured knee. The claimant argued that she believed that the disclosure was in the public interest on the basis that she thought 'it would shock the public to know the working conditions I was subjected to after I had broken my knee while at work'; that the public 'ought to know' about charities who 'paint a glossy picture on their websites' but who operate a culture of bullying and mistreat their employees; and that the health and safety of others was also potentially affected. The Employment Appeal Tribunal held that, taken at its highest, it was reasonably arguable that an employee could consider a health and safety complaint, even one in which the employee is the principal person affected, to be made in the wider interests of employees generally.

76. Where a claim relates to an alleged detriment (as opposed to dismissal), for a claim to succeed the worker must have been subjected to the detriment because they had made a protected disclosure. The protected disclosure must materially (i.e. more than trivially) influence the treatment (*Fecitt and ors v NHS Manchester (Public Concern at Work intervening 2012 ICR 372, CA)*: this is a different test to that for dismissals. In Fecitt, Lord Justice Elias compared detriment claims to discrimination claims where "unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions" (*Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931, CA*). He found that this principle is "equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing". He held that detriment claims under section 47B ERA will be made out if the protected disclosure "materially" (in the sense of more than trivially) influences the employer's treatment of the whistleblower.

77. It is for the employer to show the ground on which any act, of deliberate failure to act, was done (section 48(2) ERA). Therefore, if the claimant has shown that there was a protected disclosure, and that the respondent subjected them to a particular detriment, it is for the respondent to show that the reason for the detriment was not on the ground that they had made the protected disclosure. The Tribunal may draw inferences in reaching its conclusion.

78. Where a claim relates to a dismissal under section 103A ERA, it is instead necessary to consider whether the reason, or principal reason, for the dismissal was the protected disclosure. If it was, the dismissal will be automatically unfair. The principal reason is the one that was in the employer's mind at the time of the dismissal (*Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*), it cannot be a secondary reason. This is therefore a stricter test than that for detriment under section 47B of the ERA. Where the employee does not have two years' service, it is for them to show, on the balance of probabilities, that the reason for dismissal was an automatically unfair one.

Constructive dismissal

79. Section 95 of the ERA states that:

> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2), only if) –*
>
> *……..*
>
> *(d) 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.*

80. In accordance with *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA,* there must be a repudiatory breach of contract, that breach must have caused the employee to resign, and the employee must not delay too long before resigning. A series of more minor acts can, when taken together, constitute a repudiatory breach of contract (the "last straw" effect).

81. If the employee delays before resigning, they may be deemed to have affirmed the contract and waived their right to treat themselves as constructively dismissed. It is a question of fact as to whether the giving of notice (rather than resigning with immediate effect) amounts to affirmation of the contract. In *Bournemouth University Higher Education Corporation v Buckland 2010 ICR 908, CA*, it was held that a long notice period did not necessarily prevent a successful constructive dismissal claim in the circumstances.

Time limits

82. Section 48 of the ERA states:

> ……
>
> *(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.

83. Section 111 of the ERA states:

(2) Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal –

a. Before the end of the period of three months beginning with the effective date of termination; 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.

84. A dismissal does not take effect until the employee has been made aware of their dismissal (*Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust 2018 ICR 882, SC*).

Conclusions

85. We address time limits last, as it is only once it is known which allegations succeed that it can be assessed which claims were brought within the time limits.

Protected Disclosure

86. We consider each of the alleged protected disclosures in turn.

On 4 November 2021, by WhatsApp message to the respondent's Chairman (Mr Chylarecki), that stated, "I want to meet with you tomorrow. You have put Maria and Sebastian's health and safety at risk, and I would like to know what is it you plan on doing with if afterwards."

87. It is not disputed that the clamant wrote this message to Mr Chylarecki on 4 November 2021. What is disputed is whether that amounted to a disclosure of information. The respondent submits that this was not a clear disclosure of information as all it said was that the claimant's wife's health and safety was put at risk, and Mr Chylarecki did not understand what was being alleged. However, we have found that Mr Chylarecki did indeed fully understand what was being alleged.

88. We recognise that there is a distinction between information and the making of an allegation, and as was explained in *Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*, the simple phrase "you are not complying with health and safety requirements" is, on its own, insufficient to constitute conveying facts. However, the case of *Kilraine v London Borough of Wandsworth 2018 ICR 1850* makes clear that information and allegations are not mutually exclusive and that the context in which the comment is made is highly relevant. Although the message in

isolation did not provide details, when read in context (given the claimant's wife's email of 2 days earlier) it was abundantly clear what was being referred to and Mr Chylarecki, who was the claimant's wife's line manager and who had received that email two days earlier, fully understood what the claimant was referring to. Therefore it did disclose information.

89. Turning to whether the claimant believed that disclosure to be in the public interest, although generally complaints about an individual's own contract of employment will not satisfy the public interest requirement, it was made clear that, even if a disclosure relates to a worker's own contract, there may be features of the case that make it reasonable to regard disclosure as in the public interest.

90. We also have regard to the case of *Morgan v Royal Mencap Society 2016 IRLR 428, EAT*, although we note that this case considered only whether or not to strike out a claim on the basis that the claimant had no reasonable prospect of showing that a protected disclosure was made (rather than finding that a protected disclosure was indeed made). We conclude that the facts of that case are in some respects analogous to this situation. In the present case, the disclosure was about a health and safety matter, and the respondent is a charity which should conduct itself to high standards. The context here is that it was being alleged that the respondent was not taking appropriate steps to protect people, who in this scenario happened to be the claimant's wife but could be any other employee or member of the public, from beneficiaries who might behave inappropriately onsite. This included both not having meetings alone and also the panic button allegedly not working. In our view, this goes beyond an individual employment dispute and is a matter of public interest: the respondent operates a community hub / restaurant where members of the public would attend, as well as employees meeting with beneficiaries, and therefore the respondent's safety procedures are important to make sure both staff and the general public are protected sufficiently. Therefore, in this case based on the specific circumstances, whilst the complaint was about the claimant's wife and a gentleman Sebastian specifically, the claimant did believe the disclosure was made in the public interest because it could impact any person meeting a beneficiary on the respondent's premises.

91. We further conclude that the claimant's belief was reasonable in the circumstances.

92. We also conclude that the claimant reasonably believed that it tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation (in respect of the legal obligation to protect employees in the workplace and to protect individuals more generally on the respondent's premises). In addition, he believed that it tended to show that the health or safety of any individual had been, was being, or was likely to be endangered.

93. The disclosure was made to the claimant's employer and therefore, taking into account all of the above, it was a protected disclosure.

On 27 January 2022, by written submission to the Charity Commission which contained statements that:

- *The Chairman is using the respondent's assets for his personal gain by claiming part of the respondent's premises as his personal space;*
- *that a trustee is receiving a preferential rate for his office compared to other tenants;*
- *That the respondent was putting an employee's (Maria) health and safety at risk by breaking procedures.*

94. The claimant did write to the Charity Commission on 27 January 2022, and the letter did include all of those assertions. It was a very detailed letter, and clearly a disclosure of information.

95. In asserting that the charity's money had been used for personal gain, he also clearly reasonably believed that the disclosure was in the public interest: it is clear that the general public have an interest in understanding if a charity's money is being used improperly and/or if trustees of that charity are using the charity's assets for their own personal use.

96. We conclude that the claimant reasonably believed that his disclosure tended to show that a criminal offence had been, was being or was likely to be committed, that a person had failed, was failing or was likely to fail to comply with any legal obligation, and that the health or safety of any individual had been, was being, or was likely to be endangered. The disclosure was made to a prescribed person and was therefore a protected disclosure.

On 10 March 2022, by telling a trustee (Mr Grzegorz Guz) and Mr Neil Harrison (a Consultant for the respondent) that he (the claimant) had made a written submission to the Charity Commission.

97. The claimant's communications with Mr Guz and Mr Harrison on 10 March 2022 comprised two separate emails which were part of one ongoing email chain. We conclude that the claimant did not inform Mr Guz and Mr Harrison that he had made a written submission to the Charity Commission. He informed them that he had carried out whistleblower activities but did not specify the exact nature of them. This disclosure therefore did not occur as pleaded. His reference to the charity commission was in the context of wanting them to mediate, not that he had made a specific disclosure.

98. That said, although his first email on 10 March 2022 only disclosed that he had blown the whistle, in the second email he disclosed information about Mr Chylarecki and this second email would constitute a disclosure of information (albeit not a disclosure saying that he had made a written submission to the Charity Commission).

99. Again, we conclude that he did reasonably believe that this disclosure was made in the public interest. He was asserting that the charity's money had been used for personal gain.

100. We also again conclude that the claimant reasonably believed that his disclosure tended to show that a criminal offence had been, was being or was likely to be committed, that a person had failed, was failing or was likely

to fail to comply with any legal obligation, and that the health or safety of any individual had been, was being, or was likely to be endangered.

101. Although it was submitted that Mr Harrison was a consultant and not an employee of the respondent, in any event the disclosure was also made to Mr Guz and therefore was in fact disclosed to his employer. Therefore, the claimant's second email of 10 March 2022 would amount to a protected disclosure (but not a disclosure that he had complained to the charity commission as pleaded).

Constructive Unfair dismissal

Did the respondent do the following things (between early November 2021 and late January 2022):

(a) Give the claimant an annex to his contract, reducing his salary from £24,000 to £18,000 p.a.

102. The respondent did do this, albeit with increased bonus potential. However, this act occurred in August 2021 and took effect from 1 October 2021.

(b) Forbid the claimant from any activities relate to the community centre

103. Again, this did occur however it occurred in August 2021 and took effect from October 2021. There were specific examples between November 2021 and January 2022 where the claimant tried to get involved in matters and was told not to.

(c) Limit the claimant's work to commissioned fundraising and administration

104. The claimant's role was limited in this way, but with the addition of also representing the charity when it comes to its charitable activities. Again however that occurred with effect from 1 October 2021

(d) Create a hostile working environment for the claimant and his wife?

105. We conclude that the respondent did create a hostile working environment, in particular in relation to the claimant himself but also in relation to his wife in relation to failing to address concerns which she raised. We conclude that the respondent pushed the claimant out, used a derogatory tone of voice when communicating with the claimant (e.g. on WhatsApp) and it was clear that there was a general lack of respect for him. We conclude that the Board created a hostile working environment for him, between early November 2021 and late January 2022. The respondent also made it difficult for the claimant to achieve fundraising and thereby earn his bonus potential, by requiring him to focus on other matters despite this being part of his role. We conclude that the respondent's treatment of the claimant in this respect too was hostile and created a hostile working environment.

Did those matters or any of them breach the implied term of trust and confidence? The Tribunal will need to decide:

(1) Whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

106. We find that the respondent did behave in such a way, in relation to each of the points above. The respondent's conduct through all of these actions was designed to push the claimant out of the charity that he had founded with his wife and to undermine his position.

(2) Whether it had reasonable and proper cause for doing so.

107. We have found nothing which demonstrates any reasonable and proper cause for the respondent's actions.

Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

108. In relation to each of the allegations independently, given the context, we conclude that the breach was fundamental (and collectively even more so). This was a charity which the claimant had set up with his wife, and each of those acts were specifically designed to undermine and reduce his role in that charity and to push him out of it. We would add that in relation to the tone of communications we saw towards the claimant, there was no justification whatsoever for using that tone of voice with him.

Did the claimant resign in response to the breach by giving 6 months' notice on 26 January 2022? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

109. In relation to the three allegations which all relate to the changes in his role from October 2021, he did not. We find that, in fact by signing the Annex to his contract, he had decided to try to move on from those breaches because he wanted to remain in employment with the respondent despite being unhappy about them.

110. In relation to the hostile working environment, we find that he did resign in response to the breach, because things became untenable by 26 January 2022 both in relation to him not being permitted to carry out fundraising activities and in relation to the way he was being treated at work more generally.

Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

111. In relation to the three allegations which all relate to the changes in his role from October 2021, he did affirm the contract because he signed the Annex even though he was unhappy with it, and worked for several more months before resigning.

112. In relation to the hostile working conditions, he raised concerns consistently and did not accept the treatment of the respondent, and did not take any action to suggest that he had affirmed the contract before resigning. The fact that he agreed to work his notice period does not mean that he affirmed the contract. We recognise that the notice period was a long one and therefore this would mean remaining in the respondent's business for six months. We note that the claimant specifically stated that he would not perform any duties which were not set in the Annex during the notice period. In addition, the charity was his own initiative which he had set up, and it was reasonable for him to view it as appropriate to take some time to extract himself from it. The fact he worked his notice did not mean that he affirmed the contract. Section 95(1)(c) of the ERA 1996 envisages that an employee who is constructively dismissed may give notice, and even a long notice period being worked does not necessarily mean that the contract has been affirmed. In the circumstances, we conclude that the claimant did not affirm the contract.

What was the reason or principal reason for dismissal (i.e. what was the reason for the breach of contract)? The claimant says that it was because he had blown the whistle on 4 November 2021. The respondent says that it was for misconduct.

113. Three of the four alleged breaches of contract occurred before his protected disclosure. Therefore, the question remaining is whether the reason or principal reason for the hostile working environment was because he raised a protected disclosure. The claimant does not have two years' service and therefore his claim can only succeed if the reason for dismissal is because he raised a protected disclosure.

114. This can only relate to the 4 November 2021 disclosure as he resigned the day before he made his second disclosure. So did the respondent create a hostile working environment because he raised a health and safety issue on 4 November 2021? We conclude that the respondent disliked the claimant for a number of reasons, including that WhatsApp message, and also the Board of the respondent were making an active attempt to push the claimant out because they wanted control of the charity. We conclude that the main driver for this was Mr Chylarecki and he had persuaded others on the Board to hold similar views.

115. The claimant's role was however already being undermined before 4 November 2021. We find that the 4 November 2021 message was one factor that caused the respondent to create that environment but it cannot be said to be the reason or the principal reason, given that there was a wider undermining of his role which started before that disclosure. We find that the principal reason for the treatment of the claimant was because Mr Chylarecki disliked the claimant (as did other board members), the respondent had decided that it no longer wished him to be in the charity and wanted to run it differently, so was pushing him out.

Was it a potentially fair reason?
Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

116. It was not a potentially fair reason and the respondent did not act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant, however the claimant does not have two years service and in the absence of the dismissal being because of his protected disclosure, this claim must fail.

Dismissal by the respondent

The claimant was dismissed by letter of 14 March 2022. What was the reason or principal reason for dismissal? The respondent says that it was misconduct, which is a potentially fair reason.

117. We conclude that the reason for dismissal was not misconduct.

118. On 18 January 2022 there was an email from Mr Chylarecki which references the rent, gas and electricity issues. Therefore, prior to the claimant's resignation the respondent was starting to paint a picture of alleged misconduct on the claimant's part (albeit we conclude that this was part of an agenda to remove him). There had also been general conduct on the respondent's part with a view to undermining the claimant and seeking to remove him from the respondent's business prior to his resignation. However, having resigned on 26 January 2022 and been placed on garden leave, from the respondent's perspective we conclude that the claimant was then out of the business and the respondent at that time saw no need to take further action, hence no disciplinary matter being pursued immediately. However, during the course of the next month, we have found that there were separate discussions about money that the claimant believed he was owed, and that is what prompted the respondent to then decide to actually go through a disciplinary procedure. Therefore, the reason or principal reason for dismissal was the financial dispute.

The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

119. We conclude that the respondent did not genuinely believe that the claimant had committed misconduct for the reasons set out above. We conclude that the respondent used the alleged misconduct as a mechanism to remove the claimant for other reasons.

Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

(1) There were reasonable grounds for that belief;
(2) At the time the belief was formed the respondent had carried out a reasonable investigation
(3) The respondent otherwise acted in a procedurally fair manner
(4) Dismissal was within the range of reasonable responses

120. Before addressing this topic, although this was on the agreed list of issues, we should make clear that the claimant does not have two years' service

and therefore cannot bring a claim for ordinary unfair dismissal (which this issue relates to).

121. However, for completeness, we conclude that the respondent did not have reasonable grounds for its belief and had not carried out a reasonable investigation and had not acted n a procedurally fair manner. The process was orchestrated to secure the claimant's dismissal. . At the investigation meeting, a large part of the meeting was spent asking the claimant about other matters, notably the financial dispute which we have referred to. The claimant was not given sufficient details of the allegations to enable him to properly engage with the process. The respondent does not appear to have made sufficient enquiries about the allegations or the claimant's version of events. For example, we conclude that the respondent should have done more to investigate the potential benefits of Prince 2 (as well as further investigation about the other allegations). When the claimant did not attend the disciplinary hearing, which was chaired by someone who was clearly not impartial, the respondent appears to have simply gone through a paper exercise and not addressed its mind to the many questions that it had identified as needing to be answered at the meeting. The matters appear to have been decided collectively at a board meeting rather than by the decision maker and the claimant was not invited to an appeal hearing.

122. Therefore, had the claimant had two years' service, we would have had no hesitation in finding his dismissal to be unfair.

Was the reason or principal reason for dismissal that the claimant made a protected disclosure? If so, the claimant will be regarded as unfairly dismissed.

123. As explained above, given the claimant's length of service, his claim for unfair dismissal can only succeed if the reason, or principal reason, for dismissal was that he made a protected disclosure. We conclude that it was not. The principal reason for his dismissal (albeit not the only one) was the financial dispute between the parties, combined with Mr Chylarecki's general dislike of the claimant.

Wrongful dismissal / notice pay

124. There is no period of qualifying service required for a wrongful dismissal claim. The claimant was dismissed on 14 March 2022 (and not 11 March 2022 when the decision to dismiss him was made) and therefore early conciliation was started within the required time limit.

What was the claimant's notice period?

125. The claimant's notice period was six months, and was not varied by the Annex which took effect on 1 October 2021.

Was the claimant paid for that period?

126. It is not disputed that he was not paid for that period, given his dismissal for purported gross misconduct.

If not, was the claimant guilty of gross misconduct that entitled the respondent to dismiss without notice?

127. The claimant was not guilty of gross misconduct. In respect of the allegations, we have found that the Prince 2 course was related to his role and was not inappropriate, we have found that there was no evidence of the claimant committing misconduct, let alone gross misconduct, in respect of utility bills, and in relation to not paying the rent we have found that at the most this would warrant an informal conversation. We have also found no evidence to support the allegation that he was misleading the Board.

128. Therefore, the respondent was not entitled to dismiss the claimant without notice and he was wrongfully dismissed.

129. Remedy will be decided at a later date as consideration will need to be given to the claimant's earnings during what would have been his notice period which should be offset by way of mitigation of his losses. We note in particular that the claimant's claim form indicated that he in fact commenced new employment the following week, on a higher rate of pay. We will also need to consider any potential increase in compensation to reflect any failure by the respondent to comply with the ACAS Code of Practice on Disciplinary and Grievance matters.

Detriment (Employment Rights Act 1996 sections 47B and 48)
Did the respondent commence a disciplinary process against the claimant from 28 February 2022?

130. It is not disputed that this did happen.

By doing so, did it subject the claimant to detriment?

131. It is clear that it did.

If so, was it done on the ground that he made a protected disclosure (on 4 November 2021 or 27 January 2022)?

132. Having found that there was a protected disclosure, that there was a detriment and that the claimant was put to that detriment, the burden of proof is on the respondent to show that the detriment was not on the grounds of the disclosure in accordance with section 48(2) of the ERA 1996.

133. In relation to the Charity Commission disclosure, we have found that despite the close proximity in time between the disclosure and the commencement of the disciplinary process on 28 February 2022, the respondent did not know that the disclosure had been made. Therefore it cannot have been on that ground.

134. In relation to the 4 November 2021 protected disclosure, this carries a different legal test to that which we considered for automatic unfair dismissal. We must consider whether the detriment was "on the ground" of the protected disclosure, and whether the protected disclosure materially influenced the treatment of the claimant.

135. We have already found that the principal reason why the respondent suddenly decided to initiate disciplinary proceedings on 28 February 2022, after the claimant had been on garden leave for a number of weeks, was the financial dispute. However, that does not mean that it was the only factor.

136. We have seen that on 18 January 2022 Mr Chylarecki sent an email to the claimant referring to missing rent payments, and gas and electricity – therefore the wider picture was that prior to the claimant's resignation, the respondent was trying to build a case against him.

137. We conclude that there was a build up over time of Mr Chylarecki being upset at the claimant challenging the direction he was taking the organisation in. We conclude that, had the claimant not resigned, the respondent would have taken disciplinary action in order to remove the claimant. Once the claimant resigned, the issue was thought to be resolved from the respondent's perspective but then at the end of February 2022 once it became clear that the claimant was still raising issues the respondent decided to pursue a disciplinary procedure.

138. We find that the 4 November 2021 WhatsApp was ultimately a factor in the overall decision to move to disciplinary process. Although the immediate prompt for it was the financial dispute in February 2022 and therefore we have found this to be the principal reason for the purposes of the claimant's automatic unfair dismissal claim, this was against a backdrop of the respondent being generally frustrated with the claimant, one reason for this being the claimant's complaint on 4 November 2021.

139. The question is then whether that email materially (in the sense of more than trivially) influenced the respondent's treatment of the claimant. Whilst it was certainly not the main reason, it was not trivial. The respondent took offence at the claimant raising complaints about things that the respondent did not see as important, and felt that the claimant was making Mr Chylarecki's role uncomfortable. The 4 November 2021 WhatsApp was part of that overall picture and we conclude that it was a material part of it.

140. Therefore the claimant was subjected to a detriment because he had made a protected disclosure on 4 November 2021. However, we must also consider time limits.

Time Limits

Given the date the claim form was presented (26 July 2022) and the dates of early conciliation (11 June to 1 July 2022), any complaint about something that happened before 12 March 2022 may not have been brought in time.

141. The detriment of commencing the disciplinary process occurred on 28 February 2022, which is more than three months before the claimant started early conciliation. Although the wording in the list of issues says "from 28 February 2022", the word "commenced" shows that this allegation is about the decision to start the disciplinary procedure, which occurred on 28

February 2022. Therefore the detriment occurred more than three months before the start of early conciliation on 11 June 2022.

Were the unfair dismissals and whistle-blowing detriment complaints made within the time limit in section 111/48 of the Employment Rights Act 1996? The Tribunal will decide:

(1) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?

142. It was not, early conciliation was commenced approximately 3.5 months after (allowing for early conciliation).

If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

143. Although we have found that there was a failure to pay notice pay, that was not pleaded to be a detriment linked to whistleblowing, therefore this was not a similar act or failure.

If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

144. We have been provided with no reason to explain why it was not reasonably practicable for the claim to have been brought within the time limit. Therefore, we conclude that it was reasonably practicable for the claim to have been brought within the required time limits and the claimant's claim for detriment on the grounds of having made a protected disclosure must fail.

Conclusion

145. Therefore, the claimant's claim for wrongful dismissal succeeds, but the remainder of his claims fail (albeit that his detriment claim would have succeeded had it been brought in the required time limits).

146. A separate remedy hearing has been listed for **29 February 2024,** for half a day, to consider the appropriate amount of compensation to be awarded to the claimant. Account will need to be taken of any earnings which the claimant has from his subsequent employment during what would have been his notice period, although the claimant may raise points in relation to an alleged failure to follow the ACAS Code on the respondent's part.

Employment Judge Edmonds

Date: 29 November 2023