EMPLOYMENT TRIBUNALS

Claimant: **Mr Stephen Murdoch**

Respondent: **Cornwall Air Ambulance Trust**

Heard at: **Bodmin** **On: 26, 27, 28 and 29 June 2023**
12, 13 October 2023 (Chambers)
23, 30 November & 1 December 2023 (Writing)
9 February 2024 (Chambers & Writing)

Before: Employment Judge Midgley
Mrs R Barrett
Mrs P Skillin

Representation
Claimant: Miss Robin White (Counsel)
Respondent: Mr James Bromige (Counsel)

RESERVED JUDGMENT

1. The claimant made protected interest disclosures on the following dates: 16, 17, 18 and 30 June, and 22 July 2021.

2. The claim that the respondent subjected the claimant to detriments on 22 and 26 July and 17 August 2021 on the grounds that he had made those protected interest disclosures is well founded and succeeds.

3. The claim that the claimant was constructively unfairly dismissed is well founded and succeeds.

4. The claim that the reason or principal reason for the termination of the claimant's contract was the protected interest disclosures is not well founded and is dismissed.

5. There is a 75% chance that the claimant would have resigned had the respondent not breached his contract.

6. The remedy to which the claimant is entitled will be determined at a remedy hearing on 9 and 10 April 2024.

REASONS

Claims and Parties

1. By a claim form presented on 7 December 2021, the claimant brought claims of unfair dismissal contrary to section 98(4) and pursuant to s.111 ERA 1996, automatic unfair dismissal pursuant to section 103A ERA 1996 and of having been subjected to a detriment on the grounds of making protected interest disclosures contrary to s.47B ERA 1996.

2. By a response presented on 15 February 2022 the respondent resisted the claims.

3. The respondent is a well-known and highly visible local charity providing Cornwall's air ambulance facility from its base at Newquay Airport. The claimant was employed as the respondent's Chief Operating Officer from 2018, having worked for the respondent on a consultancy basis since 2010. The events which form the subject of these claims arise from the claimant's appointment as an Interim Chief Executive Officer, and the recruitment process for the individual subsequently appointed as the Chief Executive Officer.

Procedure, Hearing and Evidence

4. The Judge to whom the case had initially been allocated had been involved in a decision which precluded his conduct of the final hearing, and that was not identified until shortly before the first day of the hearing. It was therefore necessary for the case to allocated to EJ Midgley. The first day was therefore used to (a) hear the rule 50 application before EJ Frazer and (b) for the Tribunal to read and for the Judge to travel to the hearing centre in Bodmin and read.

5. The hearing was conducted in person. The parties produced the following agreed documents which relied upon during the course of the hearing:

   5.1. A cast list of the individuals referred to in the case (2 pages)

   5.2. A chronology of the key incidents (3 pages)

   5.3. A reading list of the most significant documents for pre reading (consisting of 123 pages of documents, the pleadings, and the witness statements)

   5.4. The bundle of contemporaneous documents (448 pages)

6. The tribunal read all of those documents, and the pages from the bundle which were referred to during evidence, in witness statements or in closing submissions (as detailed below).

7. In addition, the parties had produced detailed witness statements which the Tribunal read in advance of the evidence:

   7.1. The Claimant: the claimant's statement (28 pages)

   7.2. For the respondent, statements of:

      7.2.1. Robert Cowie (7 pages) and supplementary statement (3

pages)

7.2.2. Mark Carne CBE (7 pages)

7.2.3. Chris Pomfret OBE (6 pages) and an amended version of the same statement (6 pages)

7.2.4. Benjamin Mark (13 pages)

7.2.5. Barbara Sharples (7 pages)

8. With the exception of Ms Sharples, all of the witnesses gave evidence and were cross-examined. The Tribunal read the statement of Ms Sharples but could give it very little weight in the circumstances where she was not called to give evidence.

9. Following the evidence, the parties agreed that the best course was for the Judgment to be reserved and for the parties to file and exchange written submissions and replies. Two days in July were fixed for the Tribunal to meet in chambers to deliberate and produce Judgment. In the event, an administrative oversight led to those days being listed during the period of annual leave for one of the Tribunal. It was therefore necessary for the days to be relisted, but a combination of ill health and annual leave meant that the Tribunal could not meet again until 12 and 13 October 2023.

10. Following the conclusion of the evidence, the parties submitted the following documents:

10.1. Skeleton arguments and replies (69 pages)

10.2. An authorities bundle (283 pages)

10.3. A bundle of statutory obligations relating to the claimant's post (3 pages)

11. A draft Judgment was released to the parties on 1 December 2023 to enable them to make representations as to whether the Rule 50 anonymisation and restricted reporting Order, which EJ Frazer had ordered to apply until promulgation of Judgment, should continue and, if so, on what terms. A hearing in respect of that matter occurred on 12 December 2023 before EJ Midgley. A further chambers day was required to consider the arguments relating to Polkey, contributory conduct and whether it was just and equitable to make any reduction to the awards to the claimant.

12. We take this opportunity to record our thanks to Counsel for their very helpful and detailed written arguments, and to the parties' representatives for the cast list, chronology, reading list and the very helpfully hyperlinked bundle of documents. All have been of considerable assistance to us in reaching our decision.

Factual Background

13. The following matters represents the Tribunal's unanimous findings of fact on the balance of probabilities in light of the documentary and testimonial evidence that we read and heard.

14. It has been necessary to make particularly detailed findings in respect of some of the background events given the respondent's primary argument relating to the protected disclosures was that the claimant did not reasonably believe that the information he disclosed tended to show a criminal offence of fraud had been committed or that there had been a breach of legal obligation, and, further, that he did not reasonably believe his disclosures were in the public interest. Those challenges and the complex and difficult arguments raised in this case have delayed the finalisation of this Reserved Judgment. I apologise to the parties for that delay, and the frustration and any anxiety that may have resulted. I hope that the detail in this Judgment will demonstrate to the parties that the time was required and was fully used.

<u>The respondent's governance, regulation obligations and management structure</u>

15. The Cornwall Air Ambulance Trust (hereinafter the "respondent") is a well-known and highly visible local charity providing Cornwall's air ambulance facility from its base at Newquay Airport. It is a registered charity which is wholly funded through public donations. It provides an essential service to the people and visitors to Cornwall, operating to preserve life in what can be the most challenging and sometimes life-threatening circumstances.

15. At the time in question, the respondent had an annual income in excess of £6 million, with assets exceeding £19 million and an annual operational budget exceeding £3 million. 30% of the respondent's income is received through a lottery which it operates. In consequence, the respondent is subject to the Gambling Act 2015 and must have a license provided in accordance with the provisions of that Act.

16. The respondent's strategic direction and activities are decided by a Board of Trustees in accordance with the respondent's Articles of Association. The charity employs a number of staff who oversee and conduct the day-to-day running of its operation. Heading those employees are a Chief Executive Officer ("CEO") and a Chief Operating Officer ("COO").

17. The respondent is a limited company, and in consequence the Trustees, as the *de facto* directors of the respondent, and CEO and COO are bound by the duties in sections 173 and 174 of the Companies Act 2006 which provide insofar as is relevant:

> *173. <u>Duty to exercise independent judgement</u>*
> *(1) A director of a company must exercise independent judgment.*
>
> *174. <u>Duty to exercise reasonable care, skill and diligence</u>*
> *(1) A director of a company must exercise reasonable care, skill and diligence.*
> *(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with—*
>> *(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company,*
>> *and*
>> *(b) the general knowledge, skill and experience that the director has.*

18. Furthermore, as a charity receiving the benefit of gift aid, the respondent is bound by the obligations of the Finance Act 2010, Schedule 6, Part 1 HMRC Fit and Proper Persons. The HMRC Guidance which applies to the Fit and proper person obligation records,

    Examples of factors that may lead to HMRC deciding that a manager isn't a fit and proper person include, but aren't limited to, where individuals:
    • have been involved in other fraudulent behaviour including misrepresentation and/or identity theft

19. The parties agree that the obligations applied both to the Trustees and to the positions of the CEO and the COO, the latter of whom were registered with HMRC as Fit and Proper Persons, as a consequence of section of Part 1 of the Finance Act 2010.

20. The claimant was the sole Gambling Licence holder employed by the respondent at the material times. There is no dispute between the parties that the CEO was expected to be registered as a Gambling Licence holder for the respondent.

21. The Gambling Act 2005 includes provision for the Gambling Commission to consider the integrity of a person relevant to the application for a Gambling License. Part 5 "Operating Licenses", Section 70 (2) provides with regard to license holders, insofar as is relevant, as follows:

    (2) For the purpose of subsection (1)(b) the Commission may, in particular, have regard to—

    (a) the integrity of the applicant or of a person relevant to the application;

    (b) the competence of the applicant or of a person relevant to the application to carry on the licensed activities in a manner consistent with pursuit of the licensing objectives;

    (c) the financial and other circumstances of the applicant or of a person relevant to the application (and, in particular, the resources likely to be available for the purpose of carrying on the licensed activities).

22. The claimant was responsible for the selection, maintenance, and renewal of relevant insurances for the respondent. The Insurance Act 2015 (Part 2, sections 2 to 8) places responsibility on insured parties to make a 'fair presentation' of the risks to the Insurer. By section 3(3)(c), a fair presentation of risk is defined as one:

    "in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith."

23. Additionally, by subsection 4, a party seeking insurance is required to make disclosure of every material circumstance which the insured knows or ought to know, or which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing those material circumstances.

The Trustees

24. At the time of the events in question, the relevant trustees were as follows:

 24.1. Mr Mark Carne CBE, the Chair of Trustees from June 2020 and a member of the Nominations Committee ("the Committee"). He had formerly been the CEO of Network Rail.;

 24.2. Mr Robert Cowie, the Chair of the Finance Committee;

 24.3. Mr Benjamin Mark, the Chair of the Risk and Audit Committee, who was appointed to manage the claimant's whistleblowing complaint;

 24.4. Mrs Barbara Sharples, who was appointed to manage the claimant's whistleblowing complaint;

 24.5. Mr Chris Pomfret OBE, a member of the Committee

25. There were two further members of the committee whose roles were limited and who therefore do not require to be identified in the Judgment.

<u>The claimant's involvement and employment with the respondent</u>

25. The claimant had worked as a consultant for the respondent since 2010. In October 2018 he was employed by the respondent as its Chief Operating Officer ("COO"), the second most senior employed post, reporting to the Chief Executive Officer ("CEO"). Included in his responsibilities were the responsibility for the respondent's day-to-day operations, finances, and responsibility for liaison with the respondent's auditors, insurers, and the Gambling Commission and HMRC.

26. At that time, the CEO was Mrs Paula Martin.

27. The events that formed the subject of this claim all occurred in 2021. Consequently, that year should be assumed for all events detailed below, unless the contrary is stated.

28. During Mrs Martin's tenure as CEO, there was an occasion involving some friction between Mrs Martin and the claimant on one side and some members of the Board of Trustees on the other. Those frictions came to a head in January, following an email from Mr Carne to Mrs Martin which reported the concerns of some of the trustees about a recruitment process Mrs Martin had conducted, following a period in which a number of staff had been made redundant.

29. In consequence, the claimant wrote to Mrs Martin "it does feel like some of our trustees are not on the bus,….Perhaps it is time for some of our trustees to step away." Mrs Martin replied, sharing her view that she regarded the inquiry as "a witchhunt" and "bullying" because some trustees were "asking questions which suggest they have no confidence in the leadership." The claimant replied that "we are doing an exceptional job in difficult circumstances, if the trustees don't like that they can find another charity to annoy."

30. That email was an expression of the claimant's frustrations at the time, but had no broader application, and certainly did not reflect a general distrust of all the Trustees by the claimant at that time.

The Respondent's Policies

(a) Whistleblowing

31. The respondent operated a Whistleblowing Policy. It was not contractual policy. Under its terms the Board of Trustees, supported by the Risk and Audit Committee, had overall responsibility for the policy, its review and any actions taken in response to concerns raised under it (Clause 2.1).

32. A 'Whistleblowing Officer' was to be appointed who would have "day-to-day operational responsibility for [the] policy and must ensure that all managers and other staff who may deal with concerns of investigations under this policy receive regular and appropriate training" (Clause 2.2). Notwithstanding that clear requirement, Mr Mark, the Trustee who chaired the Risk and Audit Committee and had responsibility as Whistleblowing Officer had received no formal training in his duties and had never previously overseen a whistleblowing investigation.

33. The policy identified that any disclosure of information relating to suspected wrongdoing or dangers at work, such as "the failure to comply with any legal or professional obligation or regulatory requirements" should be reported (see Clauses 3.1 and 3.2).

34. The policy specified as follows in relation to the investigation of concerns reported in accordance with its terms and their outcome:

> *1. Once you have raised a concern, we will carry out an initial assessment to determine the scope of any investigation. We will inform you of the outcome of our assessment. You may be required to attend additional meetings in order to provide further information.*
>
> *2. In some cases we may appoint an investigator or team of investigators including staff with relevant experience of investigations or specialist knowledge of the subject matter. The investigator(s) may make recommendations for change to enable us to minimise the risk of future wrongdoing.*
>
> *3. We will aim to keep you informed of the progress of the investigation and its likely timescale. However, sometimes the need for confidentiality may prevent us giving you specific details of the investigation or any disciplinary action taken as a result. You should treat any information about the investigation as confidential.*
>
> *7.2 If you are not happy with the way in which your concern has been handled, you … may contact the chairman of the audit committee or our external auditors.*

(b) Recruitment Policy and Procedure

35. The 2020 policy specified that "Employment offers will be made subject to successful completion of pre-employment checks" and that the requisite checks were "references and employment checks, taken from a minimum of two previous employers covering a minimum of five years of employment history. At least one of which must be the most recent employer." References were

required to be in written format.

36. The policy recorded that "any false information which is provided by the applicant, which comes to light during subsequent employment, will mean disciplinary action is instigated."

The claimant's appointment as interim CEO and the recruitment of the CEO

37. On 1 March the claimant was appointed as interim CEO upon the sudden resignation of Mrs Martin in February 2021 after 12 years of service in circumstances which led to a compromise agreement being made between Mrs Martin and the respondent. That resignation coincided with the third national Covid-19 lockdown and the preparations for the forthcoming G7 summit in Cornwall. In consequence the claimant had regular weekly meetings with Mr Carne in his role as the Chair of the Trustees. Through those meetings, and through the claimant's interactions with the Trustees more generally, it was known that the claimant was interested in becoming the CEO and it was expected that he would apply for the position when the respondent recruited to it.

38. The claimant was held in very high regard at that time by the Trustees (Mr Carne described him in an email of 19 May as "an outstanding COO that we must do all in our power to keep… He has done an excellent job since Paula left*").* The claimant's particular strengths lay in his knowledge and experience in the aviation field, particularly in relation to the operation of helicopters, and in relation to day-to-day management of the respondent's operations through Newquay Airport.

39. The Board of Trustees therefore considered whether the claimant should simply be appointed as the CEO. However, they were concerned by the claimant's relative lack of experience both as a charity fundraiser and as a chief executive in the charity field, and so decided that the role should be advertised on the open market. Thought was given in making that decision to the risk of the claimant leaving if he were unsuccessful in the recruitment process; it was an outcome the Trustees hoped to avoid.

40. The respondent instructed a recruitment consultant to assist in the recruitment process. One hundred and forty applicants applied and six were shortlisted, including the claimant. As part of the recruitment process, character references were obtained for the applicants. Four trustees were appointed to form the Nominations Committee ("the Committee"): Mr Mark Carne CBE, Mr Chris Pomfret OBE, and two others.

41. On 19 May each applicant was interviewed in accordance with an agreed set of questions by the members of the Committee (save for Mr Pomfret who had withdrawn due to illness). The questions had been agreed between the members of Committee but had not been reviewed or approved by Mrs Y, an employee assigned to assist the Committee with the recruitment process.

42. Among the applicants was Mr X. He was known to Mr Cowie as both men were then trustees of the Truro School Foundation.

The CV of Mr X

43. In support of his application, Mr X submitted a CV. It contained the following

inaccuracies:

43.1. The CV stated that Mr X had been employed by a charity ("Charity 1") from April 2013 to August 2017 as Director of Fundraising and Communications. That was inaccurate and/or misleading because:

43.1.1. Period of employment: Mr X was only employed from April 2013 to 19 December 2016 when he took voluntary redundancy. He was therefore employed for eight months less than he reported. Mr X's decision to overstate the period of his employment was a deliberate because he sought to avoid making reference to a period of employment which had concluded with a settlement agreement which contained a confidentiality clause.

43.1.2. Job title and responsibilities: Mr X was Head of Fundraising and Communications between April 2013 and January 2016; he had not been appointed a Director and did not work at a Director level, although his role was in the Senior Management Team. In fact, Charity 1 had appointed a Director of Fundraising in September 2016 who became Mr X's manager until the Mr X's employment ended in December 2016. Furthermore, between January 2016 and December 2016 Mr X was employed as Head of Development (this is not a director level role but was at a lower level than Head of Fundraising and Communications). Mr X's misstatement of his job tile was negligent: Mr X was only Head of Fundraising for two years and eight months and not four years and four months as the CV suggested, and the CV made no mention of the more junior role which he had occupied for 12 months.

43.1.3. Mr X stated that he grew the income for Charity 1 from £1.1m to £2.9m in 3 years. However, in 2016 the total income was only £1.46m. Mr X therefore only grew the income from £1.1 million to £1.46 million, not £2.9 million.

43.2. The CV made no reference to Mr X's employment by a company ("Company 1") between January 2017 to August 2017. Mr X made a conscious decision not to include it.

43.3. The CV recorded that during Mr X's employment by a second charity ("Charity 2"), he was responsible for an annual income of £19m. That was the income level in the 6 months before Mr X's employment started; during his employment the income actually fell to annualised figures of £15.8m and £9.8m for the following two years. The CV did not record any information which reflected or suggested such a drop.

44. We stress that whilst it was necessary for the Tribunal to consider whether the CV was inaccurate (in order to assess whether the claimant reasonably believed at that time he made protected disclosures that its presentation constituted fraud), the purpose for which why Mr X chose to include those inaccurate or misleading statements forms no part of our enquiry, and it is not therefore appropriate to make any finding as to his motivation or whether the CV's presentation amounted to fraud. Mr X's explanation for the inaccuracies in his CV is detailed at paragraph 85 below (so as to maintain the chronology of events in our findings).

<u>The CEO's appointment</u>

45. On 19 May the Committee discussed the applicants and unanimously agreed that Mr X should be appointed. At 8pm that evening Mr Carne emailed the Trustees advising them of the unanimous decision of Committee to offer the CEO role to Mr X. His application letter and CV for reference were attached. The remaining trustees confirmed their support of the appointment in response to that information. It follows that the appointment of the CEO was a matter which (a) required a decision of all Trustees in accordance with the respondent's Articles of Association and (b) which had not been delegated to the Committee, or Mr Carne alone.

46. Mr Carne's firm opinion was that the combination of Mr X's fundraising experience and acumen and the claimant's knowledge and experience in the day-to-day operations of the respondent represented an ideal leadership team for the respondent. He wrote to his fellow trustees on 19 May 2021 that "the two of them working in tandem would be the "dream ticket," stating that he would do his best to achieve it, with the Trustee's support.

47. On 20 May Mr Carne met with the claimant to advise him of the outcome of his application. He told the claimant that Mr X was the "right man for the job" but expressed his view that together the two would form the "Dream Team". The claimant was extremely disappointed, given that he had been in post for four months and believed that he had performed well, but Mr Carne asked him to meet Mr X the following week. The claimant wanted to consider his options. The following day, he told Mr Carne that he was devastated by the decision and would be considering his future with the respondent over the weekend and so did not believe it appropriate for him to meet with Mr X. The claimant was aware that Mr Carne was shortly to meet with Mr X to give him his offer letter and a contract for him to sign.

48. On 21 May Mr Carne prepared a draft appointment letter and asked Mrs Y to put in on the respondent's headed paper and print him a copy. He had previously asked Mrs Y for a standard appointment letter, but had been told that that would not normally be the process, and that the respondent would normally email a copy of the contract and a confirmation email, before sending the contract and a standardised letter (copies of which she sent to him for his reference, the latter of which referred to employment being 'subject to suitable references.')

49. Mr Carne and Mr X met on the afternoon of that day, and Mr Carne informed Mrs Y that Mr X had been offered the position of CEO, and that he was going to meet Mr X that evening at his home for him to sign the contract. There is no dispute that the offer that Mr Carne made to Mr X and the contract in respect of it was an unconditional job offer which was not contingent on the provision of suitable references and the completion of the necessary employment checks. It therefore did not comply with the respondent's Recruitment Policy and Process. However, when Mrs Y printed the letter for Mr Carne either she did not review it and note that, or she did, but raised no concern.

50. Over the weekend of the 22 and 23 May the claimant carefully considered his position and, having regard to the fact that he had relocated his family to Cornwall to take up the post of COO, he decided that the best course for his was for him to remain with the respondent as COO. Having informed Mr Carne, the claimant subsequently received emails containing messages of support from the Trustees, praising his abilities in glowing terms and expressing their delight and relief at his decision.

51. On 26 May, Mr Carne made a formal announcement of Mr X's appointment to the public, press and staff. The announcement recorded that Mr X's current role was "Head of High Value Partnerships, [for a third Charity ("Charity 3")]. Previous roles: Director of Fundraising and Communications [Charity 1] General Manager, UK Fundraising, Charity 2."

Concerns in relation to the appointment of the CEO

52. Subsequently, that same day, the claimant's personal assistant informed Mrs Y and the claimant that she recognised Mr X's name from the staff announcement because of an issue in respect of an auction prize which Mr X had offered for the respondent's summer Ball in 2017. It was never provided, requiring the respondent to refund the disappointed bidder (who was a major donor), and caused significant embarrassment to the respondent. Mrs Y was concerned and asked the claimant's personal assistant to send her any evidence she had relating to it.

53. She did so on 28 May. The email correspondence she provided showed that Mr X had communicated directly with Mrs Martin, and so the claimant searched her email account, retrieving an email in 2017 which had been signed by Mr X as "Chief Operating Officer, [Company 1]." That caused the claimant and Mrs Y further concern, as there was no reference to that employment in the press announcement, nor in Mr X's LinkedIn Profile (which the claimant had connected to, having confirmed his decision to remain as COO). Rather, the profile recorded that Mr X was Director of Fundraising and Communication at Charity 1 from April 2013 to August 2017.

54. On the same day, 28 May, Mrs Y requested Mr X's CV and personal references from the recruitment agent in order to set up a personnel file.

55. The claimant approached Mrs Y and asked to see the claimant's CV and the personal references which had been provided by the recruitment consultant. In addition, the claimant asked to see Mr X's offer letter. As detailed above, the offer letter was unconditional, and did not make the appointment conditional upon satisfactory employment checks. The claimant therefore contacted the recruitment agent, and, as a result, the agent undertook to obtain verbal references from the Charity 3 and Charity 1 over the following two weeks.

56. In requesting Mr X's CV, the claimant was requesting information which was confidential. Mrs Y was therefore placed in a very difficult position: the claimant was the *de facto* CEO and was making a request of her in relation to a process run by the respondent, but what he was requesting to see was confidential information. Whilst the claimant would, in his role of the License holder for the Gambling Act and as the individual responsible for issuing security passes, possibly have come into possession of Mr X's CV or the information reflected in it at a later stage, that point had not been reached. That legitimate reason for seeing the CV did not apply; the Tribunal is not suitably qualified (in Charities law) to be able to comment as to whether it was appropriate or not for the claimant to request to see the CV to comply with his duties under the Charities Act, the Finance Act or the Companies Act.

57. In light of those matters, the claimant called Mr Mark in his capacity as the chair of the respondent's Risk and Audit Committee ("the Risk Committee") and raised the concerns above. Mr Mark informed the claimant that in his view the

claimant was conflicted, given his application for the CEO role, and stated that the concerns would best be raised by someone else. The claimant told Mr Mark that Mrs Y was aware of the concerns and so would contact him.

58. Mrs Y contacted Mr Mark on 28 May asking for a confidential discussion about her concerns that Mr X's CV's work history did not correlate with the information she had been provided with by the recruitment agent. Mr Mark agreed to discuss them with her the following week. She therefore sent Mr Mark the emails relating to Mr X's promised auction prize (in which Mr X had signed himself as the Chief Operating Officer of Company 1). Mr Mark forwarded those emails to Mr Carne.

59. On 28 May Mr Carne spoke directly to Mr X to explore the concerns that had been raised. No note of that discussion was produced to the Tribunal, which is surprising given its importance.[1] Mr X informed Mr Carne that he had not included Company 1 in his CV because it was pro-bono work. Mr Carne had a very direct and blunt conversation with Mr X in which he set out his expectations of the need for honesty and transparency from Mr X in his role as CEO.

60. Over the following weekend, 29 and 30 May, the claimant searched the information that was publicly available in relation to Mr X's employment history from Companies House, the Charity Commission and general Internet searches. He discovered that Mr X's job role with Charity 1 was the Head of Fundraising and Communications, and that Mr X had sent the email in relation to the auction prize for the respondent in 2017, signing as 'COO' of Company 1 at a time when his CV recorded him as being the Director of Fundraising and Communications for Charity 1. In addition, the figures recorded in the audited accounts for the Mr X's role appeared to differ from those in the CV.

61. On 1 June Mr Carne telephoned Mrs Y and demanded to know why she had contacted Mr Mark regarding Mr X's employment history. He told her that Mr X had merely done some pro bono work for Company 1 and instructed her that in future she must raise all such concerns with Mr Carne himself; he stated that the recruitment agent would obtain the necessary references. Mrs Y told the claimant about that conversation because she felt that Mr Carne's approach, tone and attitude had been belittling and bullying.

62. On the same day, the claimant called the former CEO of Charity 1 who was known to the claimant because her new organisation provided support to the respondent. She confirmed that Mr X had never been Director of Fundraising but was Head of Fundraising and communications and reported that he had left Charity 1 in early 2017.

63. On 3 June Mrs Y told the claimant that Mr Mark had informed her that the recruitment agent was seeking verbal references from Charity 3 and Charity 1 for Mr X, and that she had raised concerns that such a process was not in compliance with the respondent's Recruitment Policy and Procedure, which required written references.

<u>PID1: Verbal discussion between the claimant and Mr Cowie of 3 June</u>

64. Consequently, on 3 June the claimant spoke to Mr Cowie, the Chair of the

[1] The note referenced in Mr Carne's email is not the note of this discussion, but rather the later discussion with Mr X of 15 June

Finance Committee ("the Finance Committee"), to raise his concerns about the discrepancies in Mr X's CV detailed above and the failure to follow the Recruitment Policy in relation to his appointment. The claimant chose to call Mr Cowie (in the claimant's words: 'informally and off the record, not formally blowing the whistle') because he had been a Director at Francis Clark LLP and had not been involved in the recruitment process. He wanted an independent but experienced view of the respondent's recruitment process.

65. The claimant asked Mr Cowie for advice as to how to proceed; Mr Cowie asked the claimant to provide him with the evidence which he had collated and instructed Mrs Y to request formal written references for Mr X from Charity 3 and Charity 1 as would have been the normal practice. Mrs Y made those requests on 4 June and the claimant sent Mr Cowie the information which he and Mrs Y had obtained.

66. The claimant did not suggest during the conversation with Mr Cowie that Mr X was not a fit and proper person for the purpose of the Finance Act 2010 or that any of the Trustees had breached their legal duties under the Trustees Act or the Company Act in making his appointment because they had failed to follow the respondent's processes. Rather the claimant raised the failure to adhere to the process, as he told us, in the hope that Mr Cowie would permit Mrs Y to conduct the necessary checks. That is precisely what happened; Mr Cowie advised him that Mrs Y should follow the respondent's normal process and complete the employment checks and obtain references.

67. Between the 4 and 8 of June, Mrs Y obtained written references from Company 1 and Charity 1, the latter of which clarified that Mr X had been employed from March 2013 to December 2016 and had left due to voluntary redundancy. The reference of Company 1 was very positive, rating Mr X excellent for all criteria, including the quality of his work, his attitude, teamwork and cooperation and his honesty and integrity. However, it recorded that Mr X was employed to 2010. Mrs Y queried that (on the direction of Mr Cowie) and on 10 June Company 1 confirmed that the correct date was 2017, suggesting that the inaccuracy was an error, confirming that Mr X had worked for it between January and August 2017.

68. On 9 June the recruitment agent provided the reference for Mr X from Charity 3 and Charity 1. The former was a factual reference only. The reference from Charity 1 confirmed that Mr X had been employed from March 2013 until December 2017 but did not provide a response in respect of the criteria requested. Charity 1 subsequently confirmed that it could not do so as five years had elapsed since Mr X was employed, and no one could recall working with him.

69. Mrs Y forwarded that information to the claimant who forwarded it to Mr Cowie in turn.

70. On 11 June the claimant emailed Mr Cowie in the following terms:

> *"One further thought for the paper, or perhaps subsequent board discussions. Any individual who has committed or is suspected of committing fraud would deemed 'unsuitable' to hold a Gambling Licence and should not be permitted to undertake any activities associated with licenced activities (i.e. our lottery and raffles) by the Gambling Licence holder (which is me)."*

71. It is clear that at that stage the claimant regarded the inaccuracies in the CV as deliberate, and potentially fraudulent.

72. Mr Cowie telephoned the claimant and advised him that he would be writing to all the Trustees on the following Monday to raise the concerns, which he shared, regarding the appointment of Mr X.

73. On 14 June 2021 Mr Cowie sent an email to all the trustees setting out his concerns, attaching the evidence regarding the discrepancies in the dates on the CV and the claims regarding the incomes achieved in respect of his appointments, which differed from the accounts filed at the Charity Commission.

74. In his email he noted that he was "bound to bring the …matters" to the Committee's attention in accordance with his obligations as a Trustee. He noted that when assessing candidates for any post, the Committee accepted in good faith that CVs were entirely accurate, noting that in his view that was paramount and particularly so for a senior position. He observed that a false representation could possibly put any potential candidate in a stronger position at the disadvantage of others, which in certain circumstances could be interpreted as fraud, which "may well amount to gross misconduct" in accordance with the respondent staff handbook. Lastly, he observed that as trust and integrity were absolutely paramount attributes for any CEO, his personal view was that the information that come to light had given him grave concerns surrounding the appointment of Mr X.

75. On 14 June Mr Carne contacted Mr Cowie and instructed him not to speak to any other trustee in relation to those matters until Mr Carne had had a chance to investigate. During a terse and short exchange Mr Carne, who Mr Cowie later described as "livid", expressed dismay for the fact that Mr Cowie had deemed it appropriate to raise the matter with the Board of Trustees, rather than solely with him. The Tribunal's view was that such a course (Mr Cowie's action) was appropriate given (a) Mr Carne's central role in the appointment of Mr X and the provision of the contract of employment which omitted the requisite conditional clause regarding satisfactory references and employment checks, with the result that there was a potential conflict of interest, (b) given the Articles of Association required any appointment to be made by a decision of all of the Trustees, and (c) that the Trustees would be jointly and severally liable for any losses caused by the appointment or the exercise of their duties in respect of it.

76. For the reasons detailed below, we are satisfied that during that discussion Mr Carne sought to challenge the factual basis and conclusions reached by Mr Cowie in his email of 14 June. Additionally, Mr Carne reported his anger that Mrs Y had requested references without his authority, describing it as 'gross misconduct' notwithstanding that it was an action that was mandated under the respondent's Recruitment Policy.

77. Mr Carne then emailed the Trustees that day (14 June) informing them that he had spoken to Mr Cowie and instructed them that Mr Cowie's email and the issues raised in it should not be shared or discussed 'until we have completed some checks.' The 'we' he referred to was him only; the Trustees had not met to determine who should investigate, the scope of the investigation or to agree any delegation of that process. Mr Cowie advised the claimant of that instruction.

78. The claimant noted that on 14 June Mr X's LinkedIn profile was altered so that it included reference to his employment by Company 1 in 2017.

79. Consequently, on 15 June the claimant emailed Mr Cowie expressing concern that Mr Carne was acting outside his powers and that the Trustees had certain duties which they were required to comply with; he wrote,

> "*The articles confirm my understanding in the role of the chair, see clauses 44 to 47. By instructing trustees to not discuss your email, Mark is acting outside his authority.*
>
> *Also attached is an extract from CC03* [The Charity Commissions Guidance] *about the 6 duties of the Trustees. I would draw you attention to the following duties:*
>
> *1. Duty 2 - which requires trustees to ensure the charity complies with its governing document, i.e. the Articles of Association*
>
> *2. Duty 3 - Acting in the best interest of the charity, including making balanced and adequately informed decisions*
>
> *3. Duty 5 - Acting with reasonable care and skill, using skills and experience and taking appropriate advice when necessary*
>
> *The other point would be making decisions as a Trustees where CC03 states the following:*
>
> *Charity trustees make decisions about their charity together, working as a team. Decisions don't usually need to be unanimous as long as the majority of trustees agree. They're usually made at charity meetings. When you and your co-trustees make decisions about your charity, you must:*
> *• act within your powers*
> *• act in good faith, and only in the interests of your charity*
> *• make sure you are sufficiently informed, taking any advice you need*
> *• take account of all relevant factors you are aware of*
> *• ignore any irrelevant factors*
> *• deal with conflicts of interest and loyalty*
> *• make decisions that are within the range of decisions that a reasonable trustee body could make in the circumstances*
> *Hope this helps."*

80. The claimant's view, strongly hinted at, was that the Trustees would be in breach of their duties if they did not (a) collectively consider the information provided to decide whether Mr X may have committed fraud by deliberately misrepresenting his employment history to obtain advantage in securing the role of CEO, (b) collectively determine whether Mr X was a fit and proper person such that it was in the best interests of the respondent to confirm his appointment, (c) take such advice as was necessary to permit them to make an informed decision on that issue.

81. Mr Carne was alive at least in some part to the issues at (a) and (b); that is reflected in an email he sent to two Trustees on the Committee following his discussions with the claimant and Mrs Y on 15 June in which he wrote,

> *"First, I do not think that the inaccuracies that [Mr X] is accused of, most of which are explainable, would have made any difference to the recruitment process. Had the CV been entirely accurate, I am confident that he would*

have made it through to interview and that we would have appointed him. However, does that fact that his CV contains some inaccurate information, mainly regarding the specific dates of employment and job title in a role some years ago, immediately rule him out as our next CEO?"

82. It was a 'leading' email given the direction of travel expressed in Mr Carne's thought process on the point. The question posed in the second paragraph quoted did not expressly identify the central issue for the Trustees to consider - whether the inaccuracies in the CV went to Mr X's integrity, candour and honesty which was relevant to the assessment of whether Mr X was a fit and proper person.

83. On 15 June Mr Carne contacted the claimant and asked him what he knew; the claimant said he was aware of Mr Cowie's email and was unhappy with the situation. Mr Carne then called Mrs Y and asked for the information she had obtained from Mr X's previous employers and the evidence obtained relating to the abortive charity auction item offered by Mr X. The two had a very uncomfortable and pointed exchange, during which Mrs Y expressed a distrust of the Board of Trustees because her confidential discussion with Mr Mark had been disclosed contrary to her express wishes. Mr Carne asked Mrs Y what would normally happen where an applicant's CV was shown to contain discrepancies and inaccuracies, and Mrs Y advised him that the respondent would terminate their employment in accordance with its standard contractual term that any offer of employment was subject to the provision of satisfactory references.

84. As a consequence of that discussion, on 21 June Mrs Y raised a grievance against Mr Carne in which she accused him of bullying and undermining her in her role.

85. On 15 June Mr Carne raised the discrepancies in his CV with Mr X. Mr X told Mr Carne in an email that:

85.1. In respect of his job title at Charity 1 he 'genuinely didn't think [his] job title changed but it clearly did, having checked my email from this time'

85.2. He acknowledged that 'the dates of employment ending with [Charity 1] were wrong in the CV and he should have checked them better.' He explained that the role of the Deputy CEO for Charity 1 had not been advertised, (implied that had denied him the opportunity to apply), and said he had subsequently resigned from his role and threatened to issue proceedings in the employment tribunal, before agreeing to sign a compromise agreement containing a confidentiality clause.

85.3. When he joined Charity 1 in April 2013 income for that year was £1.1 million, and £2.9 million was achieved in 2014 "Therefore, in theory, I increased income from £1.1 million to £2.9 million in less than 2 years. Whilst in my last year at [Charity 1] income was £1.46 million, this was still 25% higher than when I started."

85.4. In relation to his failure to refer to his employment by Company 1 there was 'no attempt to deceive, just that the pro bono work for a few months wasn't material enough to mention separately on the CV."

85.5. In relation to Charity 2, his CV was correct; the reason for the drop in

income was that the Haiti earthquake had occurred in 2010 which had resulted in income of £19 million, but there was no similar high-profile disaster in the following years.

86. Mr Carne then produced a note for the Committee and recorded the concerns raised by the claimant, the explanations offered by Mr X and Mr Carne's observations. He emailed that to the two Trustees on 15 June together with the references which had been received for Mr X.

87. In his evidence Mr Carne stated that he could understand that Mr X "had to keep the existence of the previous settlement agreement [with Charity 1] confidential, and that he considered Mr X's approach to that issue to be careless rather than foolish and undermining of … trust" but he "did not believe that in making [those] errors he had materially misrepresented his achievements in order to illegitimately obtain employment."

88. On 16 June Mr Cowie called the claimant and advised him that Mr Carne was "trying to pick holes" in the note he had sent to the Trustees on 14 June. During his evidence Mr Cowie denied making the remark but we accept the claimant's evidence on the point and found his diary note of the conversation to be a true account. Moreover, that Mr Carne should have sought to challenge the concerns Mr Cowie raised was entirely consistent with Mr Carne's view, formed as early as 28 May, that Mr X's errors were 'human', 'careless not foolish' and did not represent a material misrepresentation in order to gain advantage in the recruitment process. It was also consistent with Mr Carne's expressed view that Mr X was part of the dream team for the respondent.

89. Consequently, the same day the claimant and Mrs Y contacted Sekoya, HR Solicitors, seeking advice. They were advised that it would be necessary for Sekoya to speak to a specialist charity lawyer before they could provide any definitive view.

PID2 A: verbal discussion between the claimant and Mr Mark on 16 June

90. On 16 June the claimant called Mr Mark to raise his concerns confidentiality under the Whistleblowing policy. Mr Mark denied that he had received a call from the claimant on 16 June, but we preferred the claimant's evidence because the claimant had made a diary entry for both days, possibly after the two calls between the two men on 16 and 17 June, and when he was interviewed on 30 June recalled speaking to Mr Mark on two occasions across the 16 and 17 June. In comparison, Mr Mark had made no notes of the discussion, and his statement was very general about his discussions with the claimant in the period between May and June. He suggested that he was in Wales but that did not preclude a telephone call, and whilst the claimant's text message of 17 June did not refer to a call the previous day, we did not find that determinative; text messages are often a short expression of an immediate issue, rather than a fuller reflection of events that one might find in a longer email or letter.

91. During the call the claimant repeated his concerns about the inaccurate and misleading content of Mr X's CV's and the recruitment process that had been followed and which had led to his appointment which (a) included an unconditional offer and (b) had been made before written references had been obtained. The claimant believed, as he wrote to Mr Cowie on 11 June, that the misrepresentations were potentially fraudulent. We are satisfied that he expressed that view to Mr Mark using the word 'fraud' because Mr Mark's

recollection is that the claimant had raised that concern with him during the conversations they had and that the claimant had connected that concern to the need for the CEO to be a fit and proper person to be a Director of a charity or for the purposes of the Gambling license (see paragraphs 9 and 10 of Mr Mark's statement).

92. He informed Mr Mark that he had significant concerns about Mr Carne conducting the investigation into the recruitment process because that course was not good governance, and that Mr Carne should not be 'marking his own homework'. He also raised concerns the Mr Cowie was being isolated by the Trustees and that was affecting his health. Mr Mark said that he felt that Mr Carne would act reasonably, and the claimant should wait for the outcome of the investigation, but that if the complaints were established, he would have concerns about Mr X's appointment. That comment was made to assuage and pacify the claimant, rather than because it was a true reflection of Mr Mark's beliefs, as Mr Mark had been discussing the claimant's concerns with Mr Carne, and shared his view that there was nothing substantial in them, but that they jeopardised the appointment of the Committee's preferred candidate because of the risk that Mr X might withdraw.

93. Later that evening the claimant sent Mr Mark screenshots showing that Mr X had changed his LinkedIn profile to alter his title for his employment at Charity 1 from 'Director' to 'Head of.' The claimant informed Mr Mark that he suspected that that change had been made because of discussions between Mr Carne and Mr X (although he did not expressly name Mr Carne). Mr Mark was, however, aware that that was the case.

The ratification of Mr X's appointment by the Committee 16 June

94. Also on 16 June, after the telephone call between the claimant and Mr Mark but before the claimant sent the screen shots above, the Committee met to discuss Mr Cowie's email of 14 June; in one sense Mr Cowie had forced Mr Carne's hand; Mr Carne did not believe that there was any significant issue effecting Mr X's appointment, and there would have been no Committee meeting were it not for Mr Cowie's email.

95. The Committee meeting was attended by Mr Carne, and the other two Trustees on the Committee. The attendees had been provided with the references received from the CEO of Charity 3 and from Charity 1. The Committee ratified the appointment of Mr X, although one Trustee expressed his view that Mr X had been unwise to fail to disclose his employment between leaving Charity 1 and starting with Charity 3, which he regarded as a lapse of judgment. Another Trustee's view was that had the discrepancies in the CV been known at the time of interview they would not have all made any difference to the outcome. Mr Carne advised the Committee that Mr Pomfret also supported the ratification of Mr X's appointment.

96. The Committee also expressed concern that Mrs Y should have disclosed the discrepancies to the claimant given the Committee's view that he was "clearly conflicted in the process and should have been isolated from any matters concerning the CEO appointment." Additionally, the minutes recorded that it was,

> *"most regrettable that [the claimant] had addressed the matter to [Mr Cowie] without discussing it first with [Mr Carne] as Chair, and that [Mr Cowie] had*

pursued the matter and raised it with all the Board Trustees before availing himself of all of the facts (such as discussions that had taken place between [Mr Carne] and Mr X and the external references)."

97. The Committee determined that it was appropriate (a) for Mr Carne to approach Mr Cowie to advise him of the Committee's decision and to require him to withdraw his email and to provide his unequivocal support to the appointment of Mr X, and (b) for Mr Carne to discuss the outcome with Mr X and to assure him of the strong support of the Committee for his appointment, notwithstanding the concerns had not been discussed by all the Trustees nor had they yet met to consider whether to ratify the appointment.

98. On 17 June Mr Carne sent Mr Pomfret a draft of the email he proposed to send to Mr Cowie in respect of point (a) above. In the email he wrote of his "disappointment at the process that you adopted for raising these concerns" before stating, "most of the points that you raised can be discounted, or seen as very minor / irrelevant. The only substantive issue concerns the difference in employment dates, that had already been flagged to me." He wrote he wished Mr Cowie to "reconsider his email and provide the Board with [his] full support."

99. Mr Carne was right that the reports had already been raised with him; Mr Mark had reported them following his 'confidential' discussion with Mrs Y and the informal report of the claimant. It is noticeable, however, that Mr Carne had not reacted with the same censure to Mr Mark's act of reporting them. He must have therefore regarded that report as being one of a genuine concern and an appropriate act. It is difficult, therefore, to see why Mr Carne should have regarded Mr Cowie's act of sharing the same concerns with the Trustees who were collectively obligated by the Articles of Association to decide how to respond to them as such an egregious act. Mr Carne's email suggests the reason: "I need hardly add that raising the concerns in the way that you did has given Mr X considerable concern and worry*."* It appears that Mr Carne's view was that by raising the concerns in a way which was visible to all Trustees, Mr Cowie had jeopardised the appointment of Mr X.

<u>PID2B: verbal discussion between the claimant and Mr Mark on 17 June.</u>

100. On 17 June the claimant sent a text message to Mr Mark advising him that he was "now taking legal advice" and that the two men needed to talk. In consequence, the two men spoke in the evening. The claimant advised Mr Mark that he did not believe that the recruitment process or the subsequent investigation of it were adequately or appropriately conducted. He pressed Mr Mark to raise those concerns with the full board of trustees, but when Mr Mark appeared reluctant to do, because he regarded the matter as already being appropriately investigated (and, we find, because it appeared to Mr Mark that the claimant had not accepted his suggestion to let that investigation run its course), the claimant said that he would raise a formal whistleblowing complaint. Mr Mark replied that he was going to ask the claimant to put his concerns in writing in any event. The claimant stated that he did not wish the fact that he would raise a formal whistleblowing complaint to be discussed generally with the Board of Trustees, particularly those who sat on the Committee, and Mr Mark asked the claimant whether he was comfortable with Mr Mark discussing the claimant's concerns with other trustees. The claimant suggested that Mr Mark might speak to Ms Sharples, and Mr Mark that he might speak to another ("Trustee 2"). It was agreed that each of those would support Mr Mark in his

investigation of the concerns.

101. Mr Mark understood from his discussion with the claimant (a) that the claimant believed that Mr X's CV was unquestionably fraudulent, (b) that the claimant was very concerned that the Trustees were not sufficiently concerned by that fact, and (c) that they were acting inappropriately by having permitted Mr Carne to investigate the alleged breaches of the recruitment process which he had spearheaded. What Mr Mark failed fully to understand, but what the claimant had specifically raised with him in respect of those matters, were the claimant's concerns, which he had expressed to Mr Cowie on 11 and 15 June, that:

101.1.(a) the effect of the perceived fraudulent inaccuracies in Mr X's CV was that he was not a fit and proper person for the purposes of the Finance Act or the Trustees Act, nor for the purposes of holding a Gambling licence for the respondent,

101.2.(b) that if the trustees appointed Mr X in those circumstances, without ratification by all the trustees, they were breaching the Articles of Association of the Trust, failing to exercise reasonable care and skill and/or to take appropriate advice in relation to the decision which was also in breach of their duties as trustees,

101.3.(c) that if the trustees permitted Mr Carne to investigate the issue of whether the recruitment process which he had conducted complied with the respondent's Recruitment Policy and the trust's general duty of due diligence reasonable care and skill, the trustees would themselves be failing to act with reasonable care and skill in the delivery and performance of those duties. The net effect of that was that the Trustees would be jointly and severally liable for any liability arising from those breaches.

102. On 18 June Mr Carne emailed Mrs Y advising her that he had investigated the discrepancies she had raised in respect of Mr X's CV and reported those to the Committee. He stated that the Committee had met, discussed the issues and were unanimous in its decision that the issues would have made no difference to the recruitment and that the appointment of Mr X would therefore stand. In addition, he directed Mrs Y that,

> *"It is vitally important that when you and I are dealing with matters concerning the CEO, that all communication is routed directly to me, as your effective 'line manager' for those issues. This bond of confidentiality is critical to our effective working relationship, but it is also critical to ensure that other, potentially conflicted, parties do not get caught up in the process before we have been able to properly discuss and resolve the issues. In this regard, sharing your concerns regarding [Mr X]'s CV with Steve Murdoch, was very unhelpful and inappropriate."*
>
> (Emphasis added)

103. He directed her to raise any concerns she might have about him with the Vice Chair of the Trustees.

104. That email was a further cause of Mrs Y's decision to raise a formal grievance complaining of bullying by Mr Carne on 21 June.

PID3 written whistleblowing complaint on 18 June

105. On 18 June, at 10:47 am, approximately an hour and twenty minutes after Mr Carne's email to Mrs Y, the claimant sent a formal whistleblowing complaint to Mr Mark. Mrs Y was so upset by the tone and content of Mr Carne's email of 18 June, that the claimant observed her in tears, and she showed him the email itself. In consequence, given that the claimant became aware that the Committee, if not the Trustees in their entirety, had ratified the appointment of Mr X notwithstanding the claimant's concerns, he sent a formal written whistleblowing complaint to Mr Mark.

106. In the complaint the claimant:

106.1.(Issue 1): alleged that the making of an unconditional offer of employment without having made appropriate employment checks was "potentially a failure by the Chair to exercise reasonable skill, care and diligence specifically breaching the duties of the Trustee/Director."

106.2.Queried whether the decision to make an unconditional offer of employment had been ratified by the Trustees;

106.3.(Issue 2): repeated his concerns about the discrepancies between Mr X's CV and the employment references and other sources of information;

106.4.(Issue 3): repeated his concerns about the investigation of those discrepancies being conducted by Mr Carne which he regarded as "wholly inappropriate";

106.5.requested that his concerns were investigated formally and independently of the Committee; and

106.6.said he would be taking legal advice in relation to all of those matters.

107. He did not expressly refer to his concern that the discrepancies in the CV were relevant to the consideration of whether Mr X was a fit and proper person for the purposes of the Finances Act or the Trustees Act. However, the letter did refer to the fact that the purpose of employment references and other checks was to consider "whether this contains information that reflects on the prospective employer's suitability for the role before formalising the offer of employment" and the claimant expressly linked his concerns about the discrepancies in the CV with the issues that had been raised by Mr Cowie. The claimant's evidence, which we accept because it was consistent with his emails of the 11th and 15th of June to Mr Cowie, was that he regarded Mr X's misrepresentations in his CV to be "very serious," and to have been made intentionally in order to secure the post of CEO.

108. Additionally, it is clear that the claimant's relationship with Mr Carne was beginning to fracture, if it was not already broken. The claimant believed that Mr Carne was acting outside the scope of his powers as Chair of the Trustees and in breach of the respondent's Articles of Association.

109. At 14:55 Mr Mark reported the fact of the whistleblowing complaint to the Trustees, and in breach of the spirit (if not the word) of his agreement with the claimant not to do so, informed the Trustees (including those that sat on the Committee) that the claimant's concerns related to "the CEO recruitment process and the associated follow-up activity." Mr Mark reminded the Trustees

that whistleblowers had the right "to not suffer any detrimental treatment as a result of raising concerns," adding "With this in mind, please do not discuss the whistleblowing submission, or the CEO recruitment process, with either Steve or [Mrs Y]."

110. Later that evening, Mr Carne emailed Mr Pomfret, referencing the claimant's decision to raise his concerns about the CEO process with Mr Mark, stating it was "Extremely frustrating and disappointing." That was in a response to an email from Mr Pomfret expressing his approval of Mr Carne's intention to speak to the claimant to discuss the issues he perceived to arise out of Mr Cowie's email of 14 June in which he noted "We may get the result we want with this approach."

111. Additionally, Mr Carne emailed Mr Mark, Mrs Sharples and Trustee 2, sending a selection of emails and a summary of events from his perspective. That included a document entitled "the process leading to the appointment of [Mr X] as CEO and the subsequent reviews into discrepancies in his CV." In that document, in addressing the CV discrepancies, Mr Carne wrote,

> *"If [Mr X] had lied about his qualifications, his employers, or the jobs he had performed, I would have considered the matter a gross misdemeanour and terminated his employment offer. However, in this case the 'crime 'was to extend the period of employment at Charity 1 by some months. It was clearly a naïve and stupid mistake… It would have made no difference to our decision to offer him the role.*
>
> *Given the above considerations I determined to respect [Mr X's] confidential disclosure to me and not terminate the offer of employment."*

112. He did not address whether Mr X had overstated the income that he had generated or been responsible for on two occasions in his CV, which had formed part of Mr Cowie's reported concerns.

113. Later, in the same document, he referred to the claimant becoming aware of the CV because it had been disclosed to him by Mrs Y and described him as "*still bitter and disruptive about not having been awarded the job*." That was an unjustified attack on the claimant's integrity and behaviour; in the period to which Mr Carne was referring (between 19 May and 14 June) the claimant had done nothing that was 'disruptive' – he had reported concerns about the content of Mr X's CV, the process followed in relation to his appointment, and the consequent issues arising in relation to the Trustees' duties, initially to Mr Mark as Head of the Audit and Risk Committee, then to Mr Cowie when they were not taken forward, and finally he had made a whistleblowing complaint when he believed the concerns had not been understood or engaged with. Nor was there evidence he was motivated by bitterness, as opposed to genuine and reasonable concerns for the respondent. The comment is however indicative that the relationship between Mr Carne and the claimant was breaking down, if not already broken, from Mr Carne's perspective, just as it was from the claimant's.

114. On 21 June, the Full Board of the Trustees met and approved Mr X's appointment, although some Trustees were, in Mr Mark's words, 'not entirely happy.' The nature of their discussion had been expressly limited by Mr Mark to consideration of whether the issues in the CV had the effect that Mr X's appointment could not stand, focussing on whether the discrepancies were

dishonest. The Trustees did not consider broader questions in relation to the recruitment process on the basis that they were going to be investigated as part of the claimant's whistleblowing.

115. Mr Cowie, together with two other Trustees who could not attend, submitted email representations. Mr Cowie noted that his experience, when acting as head of HR, was that errors in CVs relating to job titles and dates of employment were usually fatal where they were "discovered" by an employer rather than being "volunteered" by future employees. He expressed his concern that someone applying for the role of CEO should get such basic things wrong, and did not accept that the circumstances in which Mr X left Charity 1 justified extending the period of his employment by seven months, rather than disclosing the fact of the confidential settlement agreement during the recruitment process or at interview. He noted that the position of CEO required total honesty, trust and integrity, but whilst "struggling to get beyond that point" he believed that it was in the respondent's best interest to continue with Mr X's appointment.

116. On the same day, Mrs Y submitted her grievance against Mr Carne.

The investigation of the claimant's whistleblowing concerns.

117. On 22 June Mr Mark called the claimant to inform him that following the Trustees' meeting the previous day, Mr X would be appointed as CEO and that the claimant's whistleblowing disclosure would be investigated by an independent third party, Mr Richard Boniface. The claimant emailed Mr Mark suggesting that the investigator should have experience of charity governance as that formed a part of his disclosure. Mr Mark forwarded that email to Mr Boniface, noting "there is a deeper issue here, which is that [he] seems to expect to dictate the terms of the investigation and presumably be included in whatever is discovered. I will gently caution him that this is not necessarily the case."

118. On 22 June the claimant emailed Mr Mark, Mrs Sharples and Trustee 2 advising them that he had received legal advice in relation to the matters he had raised as a whistleblowing concern. He suggested that the advice he received was that the charity should seek a legal opinion as to whether the discrepancies between the CV and the employment checks amounted to genuine mistakes or fraud. He stated that he had been advised that if he was not satisfied with the outcome of the internal investigation then he should raise his concerns with the Charity Commission.

119. The claimant sent Mr Boniface his diary and a note setting out his concerns and expectations. He suggested that Mr Carne was a "dominant individual on the Board and the Trustees will not act appropriately" and that "at this point I will need to raise matters to the Charity Commission as a Serious Incident Report." He reported that he had already notified the respondent's auditors of the act of his whistleblowing as he was obligated to do. He recorded his concerns that Mr X's conduct raised issues of trust which were relevant to the claimant's duties, given the CEO's access to the respondent's bank accounts, investment portfolio and to claimant's duties in relation to the respondent's insurance. He specifically raised concerns about the Trustee's ability to act in accordance with their essential duties under the Charities Act, the respondent's Articles of Association, and the Nolan principles. He raised concerns as to whether the responsibility for the recruitment of the CEO had been appropriately delegated either to the Committee, or to Mr Carne.

120. The claimant does not rely on that note as a protected disclosure.

PID4: verbal discussion between the claimant and Mr Boniface

121. Mr Boniface interviewed the claimant on 30 June. During his interview, the claimant, whilst repeating the substance and detail of his concerns relating to the recruitment process and the content of Mr X's CV:

121.1. Stated that he took his responsibilities very seriously and believed he had duties beyond the trustees to regulators and auditors which obligated him to raise his concerns. Specifically, he referred to the Trustees' obligation to act with reasonable skill, care and diligence as required by the Company Act 2006 and the Trustees Act 2000, and to the Trustees' Duties detailed in Charities Commission Guidance for Trustees (CC03).

121.2. Stated that "from what I have seen there has clearly been misrepresentation by Mr X and it is potentially dishonest and fraud;" later adding that Mr X "has not demonstrated the appropriate level of trust and integrity during the recruitment process."

121.3. Stated that if he believed that Mr X had been dishonest, he was obligated to notify the respondent's insurers of that fact.

122. On 5 July the claimant emailed Mr Mark advising him of his belief that he was obligated to report to the respondent's insurers the risks posed to the respondent because of the discrepancies in Mr X's CV. He added that because the Trustees had affirmed Mr X's appointment in a manner which was not in accordance with the respondent's normal policy, it was "unlikely that the Trustees insurance for "Employment Wrongful Acts" would be honoured." In addition, he suggested that the discrepancies in the CV would need to be declared to the respondent's insurers because the respondent was obligated under the terms of the insurance policy "to confirm the honesty of all employees with responsibility for money or property."

123. Mr Mark replied, recommending that the claimant should not raise the issue with the insurers as Mr X's appointment was not due to commence until September, the investigation into the claimant's appointment was ongoing, and if anything came to light as a result "we can of course review the position." The claimant queried whether he was being instructed not to report the matter to the insurers and if so, warned of the Trustees' potential personal liabilities for un-insured losses. Mr Mark advised that he was not instructing the claimant not to report it and could not do so unless the Board of Trustees met and decided that approach, which would require them to have knowledge of the detail of the whistleblowing complaint, but that he did not believe that there was any circumstance which would invalidate the respondent's insurance. The claimant replied he was due to meet the respondent's insurers on 14 July.

124. Mr Mark believed that the claimant was seeking to apply pressure to the Board and improperly suggesting that the Trustees would be individually liable if they did not authorise him act in accordance with his suggestion. He regarded that entire approach as unacceptable.

125. Ultimately, the claimant agreed not to raise the issue, but he forwarded the exchanges to Mr Boniface. In the event however, on 7 July when the claimant met with the insurer and was asked a standard question of whether he was

aware of "any new circumstances that may lead to a claim or loss," he repeated his concerns about the CV and recruitment process in relation to the CEO role. The claimant emailed Mr Cowie on 15 July, informing him of discussion, but inaccurately stated that whilst he had made the insurers aware of the ongoing investigation, he had not provided any details. That was not accurate; he had provided details beyond the mere fact of his act of whistleblowing and an investigation into that and a separate grievance.

126. On 9 July, Mr Boniface interviewed Mr Cowie and Mr Carne as part of his investigation into the whistleblowing complaints. Mr Carne was concerned by some of the questions that Mr Boniface asked, believing them to stray beyond the scope of the claimant's concerns detailed in the whistleblowing complaint as he understood it. Mr Carne raised that concern during the interview and subsequently in an email to Mr Boniface on 21 July. Mr Boniface replied that day providing an explanation of why he considered that the scope of his investigation incorporated issues of the trustees' due diligence in their response to the claimant's concerns about the CEO recruitment process. What is clear from Mr Carne's emails to Mr Boniface is that he believed that the claimant was seeking to use the whistleblowing investigation to get a second opinion on the Board of Trustees' decision-making process, or to undermine it, because he was unhappy with their ratification of Mr X's appointment.

127. Mr Boniface subsequently spoke to the claimant, who on 14 July confirmed his agreement to the first three items of his whistleblowing complaint being disclosed to Mr Carne.

128. On 19 July the claimant emailed Mr Mark asking whether the Trustees had disclosed the circumstances of Mrs Martin's departure to the insurers, including the details of any grievance she raised which the claimant was not party to. In light of the men's exchange of 6 July, that message only served to worsen the relationship between the two.

129. On 20 July Mr Boniface wrote a six-page letter to Mr Mark highlighting his concerns in advance of his full report. The concerns included the extent to which the Trustees had exercised due diligence and/or whether there had been compliance with the Articles of Association in the appointment of Mr X. That last point was one which the claimant had raised with Mr Boniface during his interview on 30 June, but which had not been expressly identified in the whistleblowing report that the claimant had sent on 18 June.

130. Mr Boniface's provisional conclusions in the draft report were that:

130.1. Mr X had "deliberately misled" the respondent in relation to the errors on his CV relating to Charity 1 "in order to gain an advantage at the shortlisting and interview stages;"

130.2. Mr X might be regarded by some as having deliberately attempted to mislead in his CV in relation to the income growth that he had achieved for Charity 1 during his employment, again in order to boost his chances of being shortlisted and offered the position. It is unclear from the draft report whether Mr Boniface had reached that conclusion, because he pointed to mitigation and potential explanations for the errors;

130.3. Mr X's CV was misleading insofar as it made no mention of his employment by Company 1 at all, and if Mr X had described that work as pro

bono that was a further misleading description;

130.4.Mr X's CV was misleading in relation to his employment by Charity 2 insofar as he stated that he was responsible for an annual income of £19 million.

130.5.The combination of the number of misleading comments and/or statements had to be considered together, and in the circumstances of all the other concerns raised in the draft report, "the chances of none of his comments being intentional untruths/lies becomes extremely small in my opinion."

131. On 21 July Mr Boniface emailed Mr Mark a slightly amended copy of the letter which he had first sent on 20 July. Mr Mark emailed Ms Sharples and Trustee 2, forwarding the letter, noting,

> *"You'll see Richard's concern. I respect his opinion, but I politely disagree with it. However, Mark has not taken too kindly to it, having inferred Richard's viewpoint from his interview questions, and there is now a fairly lengthy email back-and-forth in progress between the two of them.*
>
> *Frustrating to have to seek expensive advice from another solicitor when we should be getting this for the money we already pay to Sekoya, but I don't feel we are getting 100% impartial service from them*."

132. In essence therefore, Mr Mark did not accept that Mr Boniface's concerns recorded in his letter were accurate or justified, largely, as he recorded in his witness statement, because he did not believe that it was in the scope of Mr Boniface's investigation to consider the Board's ratification of Mr X's appointment on 21 June and but also because he believed that Mr Boniface's conclusions in relation to the CV were largely conjecture. Consequently, he was prepared to seek further legal advice. Given the content of the letter of 20 July Mr Mark and Mr Carne were determined that the claimant should not see it because it would merely add fuel to the fire of his criticisms of and his challenges to the appointment of Mr X.

<u>PID 5: email from claimant to the respondent's auditors on 22 July</u>

133. On 22 July the claimant emailed the respondent's auditor setting out Mr X's CV discrepancies, the requirement in the Finance Act 2000 and the HMRC guidance that charity managers are fit and proper persons. He alleged that "given I have no evidence to the contrary" he believed they were fraudulent or negligent misrepresentations, and, in consequence, Mr X was unsuitable to be the CEO. Additionally, he alleged that the Trustees who had supported the decision to appoint Mr X had been negligent in their duties and had not acted in the best interests of the respondent. He ended by stating that if the new CEO began work in September, he would be obligated to report the matter to HMRC for further investigation which would result in HMRC's notifying the Charity Commission.

<u>Detriment 1: discussion between the claimant and Mr Mark on 22 July</u>

134. On 22 July the claimant and Mr Mark spoke by telephone to discuss the progress of the whistleblowing complaint following the claimant's request by email on 20 July. The claimant pressed to have the terms of reference and the

full details of Mr Boniface's report disclosed to him. Mr Mark indicated that he, together with Mrs Sharples and Trustee 2, would consider whether the report in some form could be disclosed to the claimant, on the grounds that personal information in the report could not be disclosed and it was therefore unlikely that the claimant would receive a full copy and would be more likely to receive a redacted version or a summary. His wariness was for the reasons we have indicated above.

135. The claimant was deeply unhappy with that approach. The conversation became heated; and there is a dispute as to exactly what was said:

135.1. The claimant's account is that Mr Mark told the claimant that he "[had not done] what he asked" and that Mr Mark was "personally disappointed" by the claimant's act of raising concerns through the formal whistleblowing process, that the claimant had made "erroneous assumptions" and should have "waited for the process to play out." He said that there was a breakdown in trust between the two men and reiterated his personal disappointment at the claimant's actions.

135.2. Mr Mark's account was that when he had resisted the claimant's suggestion that the terms of reference in full report should be disclosed to him, the claimant became agitated and hostile, saying that the Trustees "didn't know what they were doing" and that they were personally financially responsible for any liability in the event that the insurance was void. Mr Mark told the claimant he respected his right to bring the complaint, pointed out that he was working hard to make sure it was investigated fairly, and that the claimant's thinking depended on a number of assumptions, and they were not all definitely correct.

136. We resolve that dispute in our conclusions below, but the two men agree that Mr Mark told the claimant that the claimant's view of Mr X's appointment and the Trustees' subsequent investigation of it was based on a number of erroneous assumptions, and, at the end of the conversation, the claimant told Mr Mark that the discussion and its tone had felt like a threat.

137. After the call, the claimant's wife messaged Mrs Sharples to let her know that the claimant and Mr Mark had had "quite a heated discussion" and that she would try and do her best to calm the claimant down. She encouraged Mrs Sharples to see whether she could ameliorate matters with Mr Mark.

138. A little later that evening, the claimant emailed Mr Mark summarising the call from his perspective. He recorded that Mr Mark had told him that he "did not do what you asked", that Mr Mark had referred to being "personally disappointed" by the claimant's actions and twice referred to Mr Mark making a comment about a breakdown in their relationship. Mr Mark responded only to say that he would be away for a few days, he did not entirely agree with the claimant's summary, but agreed it was not worth any further discussion.

139. Subsequently, (on 26 July), the claimant emailed Mrs Sharples and Trustees 2 about the discussion, forwarding his email to Mr Mark of 21 July, and reporting,

> *"Toward the end of the call, I had a difficult conversation with Ben where he indicated that he was 'personally disappointed' that I had raised my concerns formally and that there had been a 'breakdown in trust' between*

us."

Detriment 2: verbal discussion Mr Pomfret and the claimant on 26 July

140. On 23 July Mr Pomfret asked to meet with the claimant in person at the respondent's Head Office to catch up on events prior to the forthcoming Board meeting and Annual General Meeting.

141. The two met in person on 26 July. Mr Pomfret asked about a contract for the respondent's helicopter, how the team and Mrs Y were doing, and there followed a brief discussion about Mrs Martin's departure and about Mrs Y's grievance. The claimant informed Mr Pomfret that he had made a whistleblowing complaint, Mr Pomfret said that he knew nothing about it. There is a direct dispute of fact as to what followed in their discussion, the two men describing two entirely different discussions:

141.1. Mr Pomfret's account was that he listened carefully but silently to the claimant whilst he raised his concerns, the claimant said that he was a man of principle, would stand by those principles, but that might lead to him leaving the respondent. Mr Pomfret said that he would be very sad if the claimant were to leave because he was an exceptional COO and Mr Pomfret wanted him to stay, and that he hoped that he would find a way to work with Mr X as the two would form the dream team.

141.2. The claimant's account was that Mr Pomfret told him that the Charity Commission did not mandate any processes for recruitment and therefore suggested that his complaint was unlikely to be upheld. Mr Pomfret told the claimant that if Mr X were not to take up the post, the claimant would not become CEO in any event. The claimant said that that was not his concern, but he felt that the Board did not fully understand the implications caused by the manner of the CEO's recruitment. Mr Pomfret said that the claimant's whistleblowing could lead to a breakdown in trust and confidence between him and the Board, and his consequent departure from the charity. He then suggested that the two men could speak in confidence if the claimant wished, and the discussion would not leave the room. The claimant declined.

142. We resolve that dispute in our conclusions below.

143. Following the meeting, on 26 July the claimant emailed both Mrs Sharples and Trustees 2. Reporting the conversation, the claimant set out the matters we have detailed above as his account, before writing,

"This 'breakdown in trust' has now been mentioned by two Trustees, in this latest case in conjunction with my departure from the charity. I note that our whistleblowing policy states that "You must not threaten or retaliate against whistleblowers in any way" and whilst I am sure Chris will say that this was not his intention, from my perspective this feels like an attempt to intimidate me.

Please note, the Whistleblowing policy states that I should raise this as a concern to the Whistleblowing Office. However, given this is Ben and the call that we had last week then I do not feel this is appropriate. I am therefore raising this with both of you, as the other two Trustees involved in the investigation.

Could we discuss this when you are available?"

144. There is no dispute between the parties that neither Mrs Sharples or Trustee 2, nor any other trustee contacted the claimant in relation to the concerns that he had raised in this email on either 26 or 27 July, but that on 27 July Mrs Sharples forwarded the email to Mr Mark.

145. Between the 26 and 27 July the claimant had two telephone discussions; the first with the former CEO of Charity 1, and the second with a former Chair of that charity, both in relation to their views of Mr X's performance during the time that he worked for them. The claimant's record of those discussions, which he shared with Mrs Sharples on 29 July was (if accurate) damning of Mr X's character and performance whilst at Charity 1. Mrs Sharples took legal advice and suggested that the claimant should raise those reports with Mr Boniface, who could investigate them if he wished. (Consequently, on 31 July, the claimant emailed Mr Boniface detailing the discussions.)

146. On 27 July Mr Pomfret emailed the claimant in relation to their meeting the previous day, writing "As I said, I will not discuss the details of our conversation as I presume you will not either."

147. On 29 July, the claimant forwarded that email to Mrs Sharples and Trustee 2, stating that in light of those comments, and to a lesser extent Mr Marks', he was "now finding it hard to see a future… with the charity, which is extremely depressing."

<u>The Boniface whistleblowing investigation report 4 August</u>

148. On 4 August the respondent received Mr Boniface's report and appendices, and Mr Mark e-mailed the claimant to confirm that it had been received. In the introduction to the report, Mr Boniface noted that:

148.1. it was no part of his function to determine whether any action or inaction represented negligence or failure to follow due diligence, but only to highlight the facts, so as to enable the subjective decision to be made on that point by the Trustees;

148.2. there was insufficient evidence to reach any conclusion that any trustee or group of trustees intentionally acted in contravention of their duties as trustees;

148.3. similarly, there was no conclusion that the claimant had made false allegations maliciously or that his allegations were made purely for potential personal gain. Rather Mr Boniface concluded that "any senior leader who had the concerns [the claimant] had over Mr X's CV and employment history would have had a duty to raise those concerns; as indeed Trustee Robert Cowie also did."

149. On 7 August Mr Cowie emailed Mr Mark stating "there is only one simple question which I should like the lawyers to give an opinion on 'do the "misrepresentations" in the CV amount to fraud or not? If not, we are in the clear…"

150. On 11 August Mr Mark emailed the claimant to ask whether his whistleblowing concerns could be shared with the Board. The claimant agreed

and repeated his request for the result of the report to be shared in as much detail as possible.

151. On 12 August the Trustees had an 'emergency' meeting. The minutes reflect that no decision on either the appointment of Mr X or the acceptance or otherwise of the Boniface report was taken at that meeting. However, the minutes record that:

151.1. Mr Mark reported that the claimant had told Mr Mark that Mr X was dishonest and therefore uninsurable, and that the claimant had informed the respondent's insurance company about that.

151.2. Mr Mark informed the Trustees that the claimant had alluded to sharing his concerns with the Charities Commission.

151.3. One of the Trustees felt that the draft letter to the claimant [detailing the outcome of the Boniface investigation] was overly long in the circumstances where the conclusions in respect of the whistleblowing were concise, and that he felt the "length of the letter will create more rabbit holes for [the claimant] to go down."

151.4. It was agreed that the respondent's solicitors would be approached and instructed to provide more succinct response which could be given to the claimant.

151.5. Another of the trustees stated that the claimant's behaviour was vexatious and should be addressed under the respondent's disciplinary policy.

151.6. Mr Mark suggested that the claimant didn't care what the process was "doing to the Board and the charity."

151.7. A trustee suggested that his view was that the claimant's act of whistleblowing was not vexatious, but his subsequent behaviour was of a different character and had made his position untenable.

151.8. Mrs Sharples expressed her view that the claimant no longer respected the board, was saddened by his approach and his view that Mr X was a fraudulent candidate, and was concerned that the claimant was seeking to create an environment which he could leave as he was "planning to retire in a couple of years."

151.9. Mr Cowie raised the concerns that the conclusion of the Boniface report raised the issue of whether Mr X was a fit and proper person. He asked whether the respondent's solicitors had advised that they were not entitled to make the decision to appoint Mr X or had otherwise advised against it.

152. It was agreed Mr Mark would approach the solicitors to seek their advice in relation to the Board's appointment of Mr X, which would then be forwarded by email to the Board, with the exception of Mr Carne, to permit an email vote on the appointment.

153. The respondent subsequently obtained legal advice, which Mr Cowie stated was 'pivotal' to their decision making, and, following an exchange of e-mails between the Trustees, as had been envisaged, Mr X's appointment was

confirmed.

154. During cross examination, Mr Mark stated that at meeting the Trustees had decided to provide the claimant with a shortened summary of the Boniface report because of the ‘web of chaos’ he had spun over the organisation by taking his concerns to multiple Trustees and making them plain to the insurance broker and auditors. He said that it was feared that providing more detail would only lead the claimant to repeat such behaviour and/or an escalation of it. Given that the claimant had already reported his concerns to the Trustees, the respondent’s Auditor and insurer, the only remaining organisation to which he could escalate his concerns was, as he had indicated to Mr Boniface, the Charity Commission.

155. On 17 August the claimant received a letter from Stone King in respect of the Boniface investigation. Whilst the letter set out the conclusions that Mr Boniface had drawn in respect of (a) whether Mr Carne had failed to exercise reasonable skill, care and diligence breached his duties as a Trustee by making an unconditional offer to Mr X, and (b) whether Mr Carne had failed to exercise reasonable care and skill in drafting the offer letter, in relation to the claimant’s primary concern, namely Mr X’s CV, the letter did not report Mr Boniface’s clear conclusions, but rather stated,

> *“To the extent issues raised relate to the personal information provided by the successful applicant in his CV, the conclusions of the investigation are not included due to personal data confidentiality issues.”*

156. The claimant was informed that Mr X’s appointment was unanimously confirmed at a board meeting on 12 August. That of course, was not strictly true, as no decision was made on that day.

<u>The claimant’s resignation</u>

157. The Claimant telephoned Mrs Sharples on receipt of the letter and declared his unhappiness and his intention to resign. During the conversation he said that he could not trust the Board, did not trust Mr X and was not prepared to work with him, and that he would resign following his holiday, on Monday.

158. On 18 August, the claimant e-mailed a response to the Stone King letter to the Trustees. In the letter he insisted that an unintentional breach of best practice and the respondent’s recruitment and selection policy was a breach of the duties of a Trustee or director, that since the Chair of Trustees did not have authority to make an unconditional offer, and that he was not acting in accordance with the charity’s policies and procedures, that was a further breach of his duties, as was his failure to take advice prior to making an unconditional offer. He complained that the summary relating to the CV failed to explain the nature of the investigation or how or why the Trustees had been able to ratify the appointment on 21 June notwithstanding the misrepresentations in the CV. The claimant argued that the lack of information had done nothing to dissuade him that Mr X had not made false representations. The claimant therefore confirmed that he would notify the Charity Commission of his concerns, and that as he would not “compromise his integrity by working with the dishonest CEO,” he would resign.

159. The letter was written with the assistance of the solicitors who have represented the claimant in these claims.

160. On 20 August Mr Carne e-mailed the claimant seeking a meeting with him and Mr Pomfret to reconsider his resignation. The claimant replied that he would not meet with Mr Pomfret under any circumstances, stating “I am sure Chris will be able to explain why this is the case.” Furthermore, he said he would not meet with Mr Carne unless the full report was provided.

161. On 22 August the claimant emailed another solicitor reporting that he felt the information he had received from Stone King relating to Mr Boniface’s report was wholly unsatisfactory, and that he had notified the auditors and raised a serious complaint with the Charity Commission. He stated his views that the Trustees had ‘presided over a failure of governance’ (meaning the alleged breach of their duties relating to the recruitment process and appointment of Mr X) and that they had thereby allowed an ‘evidentially dishonest’ individual to be appointed CEO. He ended by recording that his position was untenable and he would be resigning the following morning when he returned to work.

162. On 23 August the claimant emailed a letter of resignation to the Trustees. That letter recorded that having considered the Stone King letter, and the fact of the Trustees’ unanimous confirmation of Mr X’s appointment on 12 August, and in light of the fact that the Stone King letter was (in the claimant’s view) wholly inadequate as a response to his whistleblowing concerns, because it provided no objective justification that the Trustees had not breached their duties, and no evidence demonstrating the honesty of Mr X, the claimant was not prepared to work with a CEO who did not meet the respondent’s standards for honesty and integrity. He stated that he had consequently been placed “in an untenable position” requiring him to compromise his integrity by working with someone that he regarded as dishonest and for a Board of Trustees in whom he had no trust and confidence.

163. Both Mr Carne and Mr Pomfret stated in evidence that they thought the relationship was rescuable until the resignation letter was received.

<u>The meeting of 23 August 2021</u>

164. A staff meeting was scheduled for 23 August at 9:00am. The claimant directed that it should be an all staff meeting and would be held at the respondent’s buildings at Newquay Airport. That was because it was his intention to announce his resignation at the meeting and he had prepared a written statement which he intended to read. Mr Pomfret and Ms Sharples learned of the meeting being an all staff meeting and agreed that they should attend in person; the claimant was unaware of that.

165. In the event there were about 30 attendees, some in person and a few remotely. When the claimant saw Mr Pomfret, he became infuriated, stating that he would say nothing whilst Mr Pomfret and Mrs Sharples were present, save that he was resigning and that they could explain to those present why that was, before leaving the meeting. Both Mr Pomfret and Mrs Sharples describe that part of the meeting and the meeting they conducted with the staff which followed as one of the worst and most hostile they have ever attended in their years in business.

166. Mr Pomfret told the staff that he was there to represent the Board of Trustees and would answer their questions. Amongst the questions asked,

both in the general meeting and in later one-to-one discussions held by Mr Pomfret, were whether there were discrepancies in Mr X's CV and whether they should be regarded as fraudulent. Mr Pomfret formed the view that many had googled Mr X's CV and compared it with the email sent in relation to the auction prize. Mr Pomfret confirmed that there were discrepancies in the CV but said they related to dates only, a clear explanation had been given, and the dates were not material to the Trustees' decision to appoint Mr X. He made the point that many CVs contain small errors.

167. He was asked whether there was any link between the departure of Mrs Martin and that of the claimant, and said that there was not, and that he had not had notice of claimant's intention to resign. (He meant by that the Trustees had only been informed of the claimant's final decision on 23 August). The claimant who had left the room but remained outside, overheard this, and burst back into the room, shouting that the staff should not "believe a word" the Trustees said, and that none of them could be trusted, and the claimant would never communicate with Mr Pomfret again. In an irate tirade, the claimant levelled allegations of incompetence and untrustworthiness at the Board and Trustees, and openly called them liars, before demanding that Mr Pomfret and Mrs Sharples should leave the meeting. When they refused, he invited the staff to a private meeting at a different venue and left, slamming the door.

168. Both Mr Pomfret and Mrs Sharples were deeply affected by the claimant's actions and the hostility and blame directed towards them at the meeting. After the meeting a number of the paramedics and air crew came to check on Mrs Sharples because they had observed how distressed and shocked she was.

169. On 24 August, Mr Carne had a further meeting with the shop staff and volunteers, which again was a deeply uncomfortable meeting, where he sensed a great degree of distrust, anger and unease amongst those attending. He was also asked questions about Mr X's CV. The paramedics and aircrew were more professional in their approach; their only concern was that they should be able to continue to provide the critical service the charity offered.

170. Later that day, he met with the claimant which Mr Carne regarded as professional and productive. The men discussed several operational matters and the claimant agreed to take his 3 months' notice as garden leave, but to remain as the Gambling License Holder for that period and beyond until a license was obtained for Mr X.

171. Mr Carne then met with Mrs Y. Again, that meeting was positive and constructive, and Mrs Y helped Mr Carne to draft a memo to the staff concerning the claimant's departure.

The tribunal proceedings

172. The claimant commenced early conciliation through ACAS on 29 September and a certificate was issued on 9 November 2021.

173. The claimant's employment ended on 23 November 2021, and he issued this claim on 7 December 2021.

The Issues

174. The issues were agreed and recorded in the Order of EJ Roper of 2 August 2022. They will not be repeated here but are attached as Appendix 1 at the end of the Judgment.

The Relevant Law

175. The concept of "protected disclosure" is defined by section 43A of the 1996 Act:

> "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."

165. A qualifying disclosure is in turn defined by section 43B:

> "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, is being or is likely to be deliberately concealed."

Disclosure of information

166. The qualifying disclosure must be a disclosure of information. In practice, many whistle-blowing disclosures raise concerns, or complaints, or make allegations. This does not, however, prevent them from falling within the terms of the section. As Sales LJ observed in <u>Kilraine v London Borough of Wandsworth</u> [2018] EWCA Civ 1436, CA; [2019] ICR 1850 at para. 35, the question is whether the statement or disclosure in question has "a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the subsection". He added that whether this is so "will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case" (para. 36). A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so.

167. <u>Kilraine</u> was confirmed as a correct statement of the law in <u>Simpson v Cantor Fitzgerald Europe</u> [2021] IRLR 238. An expression of opinion can also convey information (see <u>McDermott v Sellafield Ltd</u> [2023] IRLR 639).

168. Whether a document or a statement is to be regarded as making a "disclosure of information" depends on the context and the circumstances in which they are spoken (<u>Eiger Securities LLP v Miss E Korshunova</u> [2017] ICR

561 EAT at para 35).

Breach of Legal Obligation

169. The legal principles relating to the qualifying ground are myriad and not wholly consistent. In Babula v Waltham Forest College [2007] ICR 1045 at [80], the Court of Appeal observed as follows:

> "The purpose of the statute, as I read it, is to encourage responsible whistle-blowing. To expect employees on the factory floor or in shops and offices to have a detailed knowledge of the criminal law sufficient to enable them to determine whether or not particular facts which they reasonably believe to be true are capable, as a matter of law, of constituting a particular criminal offence seems to me both unrealistic and to work against the policy of the statute."

170. That the same principle was applied in Babula to breaches of legal obligation is apparent from paragraph [58].

171. Subsequently, the Employment Appeal Tribunal held that were a claimant argues that the information tended to show a breach of legal obligation "Save in obvious cases, … the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. …" (see Blackbay Ventures Ltd v Gahir [2014] IRLR 416 per HHJ Serota QC at paragraph 98).

172. In a later decision of the Employment Appeal Tribunal, the Tribunal held that the identification of the legal obligation "does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation" (see Eiger at paras 46 to 47 respectively). The EAT in that case observed that the decision of the Tribunal as to the nature of the legal obligation the claimant believed to have been breached is a "necessary precursor to the decision as to the reasonableness of the Claimant's belief that a legal obligation has not been complied with."

173. However, the EAT was not referred to the Court of Appeal's observations at para 80 of Babula in either Blackbay or in Eiger Securities, and although Babula was referred to the case in NASUWT v Harris (2019) UKEAT0061/19, Soole J did not address the potential inconsistency and tension between Blackbay and Babula (see para 62 for Soole J's analysis). Blackbay was relied upon by the EAT in Harris and applied by Soole J to allegations of the commission of criminal offences.

174. Most recently, in Twist DX v Armes UKEAT/0030/20/JOJ (V) Linden J returned to the issue of disclosures of information. He concluded that it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

Reasonable belief

175. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in Chesterton Global Ltd v Nurmohamed [2017] EWCA

Civ 979; [2017] IRLR 837 at para [8], "if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable."

176. It does not matter in that context whether the worker belief is wrong, if objectively the belief that a breach has or is likely to occur, as detailed above, is reasonable (see Babula per Wall LJ at para [79] and Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73, CA per Elias LJ at para 21.)

177. In conducting the assessment of reasonableness, all the circumstances known to the worker at the time of the disclosure are relevant (Darnton v University of Surrey [2003] IRLR 133 at [29]). That may require the Tribunal to make a factual assessment of the accuracy of the disclosure,

> "It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false, unless there may somehow have been an honest mistake on his part….
>
> The more the worker claims to have direct knowledge of the matters which are the subject of the disclosure, the more relevant will be his belief in the truth of what he says in determining whether he holds that reasonable belief" (emphasis added).

178. The worker's subjective belief that the disclosure is in the public interest does not need to be his predominant motive in making it – see Chesterton at [30], Ibrahim v HCA International Limited [2020] IRLR 224, CA at [26]. Ibrahim was followed in Dobbie v Felton (t/a Feltons Solicitors) [2021] IRLR 679; in that latter case the EAT observed at [27] that whilst motive may be relevant to the assessment of a claimant's subjective belief, it is not determinative, in the words of the Court of Appeal "it does not dispose of [the issue] altogether."

179. Having reviewed the law we conclude that the following propositions apply when considering whether a claimant has made a protected disclosure:

179.1. First, there must be a disclosure of information. That may include information, complaints and allegations, and expressions of opinions provided the combined effect has a "sufficient factual content and specificity" (Cavendish Munro Professional Risk Management Ltd v Geduld [2010] ICR per Sales LJ at para 35; which principle was not overturned in Simpson)

179.2. Secondly, that information must objectively tend to show, in the claimant's reasonable belief that one of the qualifying grounds exists. The Tribunal's task is to assess the information in context and against the prevailing circumstances. Those circumstances:

179.2.1. Permit a higher objective test where the individual is a professional (see Korashi v Abertawe Morgannwg University Local Health Board [2012] IRLR 4 per HHJ McMullen at para [62]);

179.2.2. Permit the Tribunal to read across documents and consider statements to create an objective picture of what would reasonably have been believed to have been understood from a written or verbal

statement;

179.2.3. May involve an assessment of the factual accuracy of the information in the disclosure, to assess whether the claimant knew or believed that information was false (Darnton).

179.3. Thirdly, where the qualifying ground relied upon is a breach of legal obligation:-

179.3.1. *Either* the information must identify the legal obligation, although the "identification of the obligation does not have to be detailed or precise, but it must be more than a belief that certain actions are wrong" (Eiger at paras 46-47; Twist DX).

179.3.2. *Or*, if the obligation is not identified it must be objectively "obvious" from the information disclosed (Blackbay per HHJ Serota QC at para 98);

179.4. Fourthly, the articulation of the breach of legal obligation in that sense is a "necessary precursor" for a claimant to establish a *reasonable* belief that the information tends to show that there had been such breach (Eiger).

179.5. Lastly, the fact that a claimant may have other motives for making the disclosure does not operate of itself to displace his subjective belief that it was in the public interest to make it, but it is relevant to the assessment of the subjective belief (Ibrahim)

Public Interest

180. In Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA, the following factors were identified by the Court of Appeal as being relevant to the degree of public interest:

180.1. the numbers in the group whose interests the disclosure served

180.2. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

180.3. the nature of the wrongdoing disclosed, and

180.4. the identity of the alleged wrongdoer.

Detriment

181. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. In Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841 paras. 67-68 Lord Neuberger described the position thus:

"67. … In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable

worker would or might take the view that the [treatment] was in all the circumstances to his detriment".

68. That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065 , para 53. More recently it has been cited with approval in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

182. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

"On the ground that"

183. There must be a link between the protected disclosure or disclosures and the act, or failure to act, which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. In Manchester NHS Trust v Fecitt [2011] EWCA 1190; the meaning of this phrase was considered by Elias LJ (at para.45):

"In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

184. As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Khan [2001] UKHL 48; [2001] ICR 1065 at para. 28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:

"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

185. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act

which gives rise to a detriment (see London Borough of Harrow v Knight [2003] IRLR 10 EAT at [16]:

> "It is thus necessary in a claim under s.47B to show that the fact that the protected disclosure had been made caused or influenced the employer to act (or not act) in the way complained of: merely to show that 'but for' the disclosure the act or omission would not have occurred is not enough (see Khan)."

186. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B.

187. It is for the worker to show a prima facie case before the burden of proof shifts to the employer (see Serco Ltd v Dahou [2017] EWCA Civ 832).

188. For something to be an 'intervening act' which breaks the chain of causation, it must become the sole effective cause of the loss, damage or injury suffered such that the prior wrongdoing, whilst it might still be a 'but for' cause, has been eclipsed so that it is not an effective or contributory cause anymore (McNicholas v Care and Learning Alliance [2023] EAT 127).

Causation:

(i) Distinguishing between the content and manner of disclosures / protected acts

189. "Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. …" (see Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 per Mr Justice Lewis at paragraph 49). However, the following principles apply:

189.1. The tribunal "should be slow to recognise a distinction between the complaint and the way in which it is made, save in clear cases" (Martin v Devonshires, per Underhill P at 1122); and "a tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself" per Lewis J at 1150, in the context of protected disclosure detriments, citing Bolton School v Evans [2007] ICR 641, per Buxton LJ at 18).

189.2. Intemperate language or inaccurate statements in a complaint are not sufficient to distinguish between a complaint and the manner of its making and "An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself" (Martin v Devonshires, per Underhill P at para 22).

189.3. "The employment tribunal will ... need to ensure that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did" (Panayiotou, per Lewis J at para 52).

189.4. Where "a material part of the reason" for detrimental conduct is the

employer's "objection to the substance of the disclosures themselves" then a claim is "in principle meritorious", subject to issues of limitation, etc (Kong v Gulf International Bank (UK) Limited EA-2020-00035740J (unrep. 10.09.21), per Auerbach J at 1187, in the context of protected disclosure detriment claims; see also Panayiotou, per Lewis J at 49 in the same context).

189.5. Where an employer asserts that there has been "a loss of confidence and trust" which is based upon or arises out of "the fact that the [employee] had made complaints of... discrimination", the breakdown of trust and confidence will not be "properly separable" from the doing of the protected acts (Panayiotou, per Lewis J at para 53, citing Woodhouse v West Northwest Homes Leeds Ltd [2013] IRLR 773).

190. In Kong v Gulf Bank International [2022] EWCA Civ 941 (when the case progressed to the Court of Appeal), the term used for the issue identified in Devonshire Solicitors and Shinwari v Vue Entertainment UKEAT/0394/13 was the "separability" of the claimant's conduct and protected disclosures. The Court held that separability is not a specific legal concept or defence, but rather "it is simply a label which identifies what as a matter of fact was the real reason for impugned treatment" – para [57] per Simler LJ. The Court added:

> "Were this exercise not permissible, the effect would be that whistle-blowers would have immunity for behaviour or conduct related to the making of a protected disclosure no matter how bad, and employers would be obliged to ensure that they are not adversely treated, again no matter how bad the associated behaviour or conduct."

S.103A

191. Section 103A provides:

> "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."

192. "This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, … that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law" see Kurzel v Roche Products Ltd [2008] ICR 799 per Elias J at para 44.

193. The principle reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

194. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, Royal Mail Group Ltd v Jhuti [2019] UKSC 55, SC.

> "by S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. In searching for the reason for a dismissal, courts need generally look no further than at the reasons given

by the appointed decision-maker. …[however] If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination."

195. Where the claim is that the worker was constructively unfair dismissed, the Tribunal must first determine whether the claimant was constructively dismissed, applying the established principles, and if so, identify what conduct breached the implied term of trust and confidence. Having established the breach(es) the tribunal should then determine whether the reason or principal reason which was operating on the respondent's mind, whether consciously or unconsciously, was the protected disclosure(s) (see Salisbury NHS Foundation Trust v Wyeth UKEAT/0061/15/JOJ at paragraphs 44 to 45). In those circumstances, the burden rests upon the respondent in accordance with Kurzle v Roche to establish the reason.

196. The principle of separability applies equally to claims under section 103A as it does to those under section 47B (see Page v Lord Chancellor [2021] EWCA Civ 54 at paragraph 52).

Constructive unfair dismissal

197. It is trite law that a constructive dismissal within the definition in section 95 (1)(c) ERA 1996 may be in unfair dismissal applying the principles within the definition in section 98(4) ERA 1996.

198. A determination within the definition section 95 (1)(c) ERA 1996 requires the claimant demonstrate that the respondent has committed a reputed tree breach of the contract (see Western Excavating (EEC) Ltd v Sharp [1978] ICR 221.)

199. Where the repudiatory breach is a breach of the implied term of trust and confidence, the test to be applied is whether the employer "without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee." (Malik v BCCI [1979] IRLR 462). Where an employer reaches that term, the breach is "inevitably" fundamental (see Morrow v Safeway Stores plc [2002] IRLR 9.)

200. It makes no difference to the question of whether or not there has been a fundamental breach either that:

200.1. the employer did not intend to end the contract (see Bliss v South East Thames Regional Health Authority [1987] ICR 700, CA.)

200.2. the employer acted in breach of contract because of the circumstances at the time; the circumstances are irrelevant to the issue of whether a fundamental breach has occurred (see Wadham Stringer Commercials (London) Ltd v Brown [1983] IRLR 46, EAT);

200.3. The respondent's conduct, although unreasonable was within a range of reasonable responses open to a reasonable employer. That is not the test, it is the test in Malik above (see Bournemouth University Higher Education

Corporation v Buckland [2010] if ICR 908, CA); or

200.4. That the employer had remedied the breach (see Buckland above).

201. The breach of contract must be *an* effective cause of the claimant's decision to resign, it need not be *the* effective cause (see Wright v North Ayrshire Council [2014] ICR 77, EAT. As Mr Justice Elias, then President of the EAT, stated in Abbycars (West Horndon) Ltd v Ford EAT 0472/07, 'the crucial question is whether the repudiatory breach played a part in the dismissal', and even if the employee leaves for 'a whole host of reasons', he or she can claim constructive dismissal 'if the repudiatory breach is one of the factors relied upon'.

202. A worker must not wait too long before accepting the breach and resigning, or they may be deemed to have affirmed the contract (see Western Excavating (EEC) Ltd above); although the law looks very carefully at the facts before deciding there has been such an affirmation in the context of employment (see the comments of Lord Justice Jacob in Buckland above).

203. Where a claimant argues that the decision to resign was caused by a course of conduct and he or she resigned in relation to a last straw, the guidance in Kaur v Leeds Hospital NHS Trust [2018] EWCA Civ 978 applies; it does not apply where there is no reliance on the last straw doctrine; a point expressly made by LJ Underhill at paragraph 42; it is the first of his four points.

Discussion and Conclusions

Protected Disclosures

PID 1: The conversation with Mr Cowie 3 June 2021

204. The parties agree that the disclosure made no reference to fraud or other criminal activity.

205. The respondent argues this was not a qualifying disclosure because the claimant did not disclose information that suggested that the Trustees had breached any legal duty, rather his concern was that an internal HR recruitment policy had not been followed, and he was merely asking for further investigation and further employment checks to be made in accordance with the policy.

206. The claimant argues that Mr Cowie admitted in cross-examination that the information provided to him was that there was 'wrongdoing' in the manner in which Mr X had secured the CEO role.

207. Our finding was that the claimant was raising concerns that the Recruitment Policy had not been followed in the hope of getting guidance and authorisation for further checks in accordance with the policy to be conducted. That was confirmed by Mr Cowie in his evidence and was consistent with the events that followed (Mrs Y made requests for written references). The information the claimant disclosed to Mr Cowie did not tend to show that Mr X had committed fraud, or that the trustees were in breach of their duties under the Trustee's Act or Company Act in failing to follow the recruitment process. Miss White, for the claimant, argues that the claimant had that necessary belief. However, the claimant did not reach that tentative conclusion himself in respect of Mr X's CV until 11 June (see his email of that date to Mr Cowie) or in respect of the

Trustee's conduct until 15 June (see his email of that date to Mr Cowie). He cannot therefore have had the necessary subjective belief that the information he disclosed tended to show a breach of legal obligation on 3 June, and it follows objectively he cannot have done so.

208. There was therefore no qualifying disclosure made.

PID2 A & B the telephone conversations between the claimant and Mr Mark on 16 and 17 June 2021

209. The respondent argues that no discussion occurred on 16 June as Mr Mark was at work in Wales, and the contemporaneous message of 17 June sent by the claimant to Mr Mark does not reference the earlier discussion. Mr Bromige further argued the claimant's account was not credible and that it should be disbelieved and rejected because the claimant's diary entry for the 17 June was inconsistent with his account in his statement, and that the statement made no reference to Mr Mark's suggestion that the claimant should put his concerns in writing. For the reasons given in our findings above, we have rejected those arguments and concluded that on balance there was a discussion on 16 June as the claimant suggested.

210. The respondent accepts that the conversation which occurred on 17 June contained a disclosure that there was a breach of the "recruitment process and the investigation was not adequate" and concedes that the claimant reasonably believed that the information he disclosed tended to show that a criminal offence had been committed or that a breach of legal obligation had occurred, but denies that objectively the claimant could have believed that there was any public interest in those matters. The basis of that argument was that the claimant was not at that time alleging that the breach was deliberate, and he knew that the respondent, through the Committee, was investigating the concerns, and therefore taking steps to remedy or rectify any identified wrongdoing. The point he drove at was that the fact of an appropriate response to a breach which was not regarded as deliberate was an everyday occurrence where grievances or complaints are made and would not, without more, objectively attract or be in the public interest. Consequently, the claimant cannot, he argues, objectively have held the belief that it was in the public interest to make the disclosure.

211. The claimant argues that he did objectively believe that the information disclosed was in the public interest; he asserts it was in the public interest because as CEO, Mr X would have substantial control over charitable funds and would head the operation of a significant charity. Additionally, the claimant argues he reasonably believed that Trustees were failing in their duty imposed by the Companies Act 2006 to act with reasonable care, skill.

212. We concluded that the claimant's disclosure to Mr Mark on 16 June was broader than Mr Bromige sought to argue. The claimant's email of 11 June to Mr Cowie demonstrates that the claimant (a) believed that Mr X's CV contained inaccuracies and misrepresentations, (b) thought they were potentially fraudulent, and (c) advised Mr Cowie implicitly that if the Board concluded that they were fraudulent, Mr X would 'unsuitable' to hold a gambling license, and therefore there would be issues in relation to his ability to act as CEO. Secondly, the claimant's email of the 15 June to Mr Cowie demonstrates that the claimant did not regard the missteps in the recruitment process and their subsequent

investigation as 'inadequate' (as Mr Bromige seeks to categorise it), but rather regarded Mr Carne's actions as being *ultra vires* and in breach of the Articles of Association and the Trustees' broader duties under the Companies Act 2006 and the Charity Commission Guidance CC03.

213. In our view, the claimant's belief that disclosing those matters was in the public interest was objectively reasonable because the disclosures related to the recruitment of the CEO of a charity serving the population of Cornwall and many visitors to the county and the conduct of the Chair and/or Trustees of that charity when concerns were raised about it. We also had regard to the fact that Mr Boniface concluded that "any senior leader who had the concerns [the claimant] had over Mr X's CV and employment history would have had a duty to raise those concerns." That must raise a strong prima facie case that the matters were in the public interest, since the obligations to which Mr Boniface refers derive from the Charity Commission's Guidance and statute.

214. Our view, having consider the <u>Chesterton</u> factors as detailed below, was that the prima facie case became a strong factual case because:

214.1. *the numbers in the group whose interests the disclosure served*: They were extensive; and included the resident population of Cornwall, the many hundreds of thousands of visitors to the county each year, each of whom might have need to rely on the respondent's services, and the respondent's employees who were interested in the proper running of its affairs.

214.2. *the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed*: The CEO would have access to and control of the respondent's funds and capital estate which were extensive, the former of which were solely derived from charitable donations. The position holder therefore consequently had to comply with the duties and satisfy the standards derived from the Charities Act 2005 and the Company Act 2006, the Finance Act 2010, and the Gambling Act 2005, in circumstances where the CV submitted to support the appointment was objectively inaccurate and misleading. Secondly, the Trustees were responsible for that appointment and had failed to follow the respondent's procedure in making it.

214.3. *the nature of the wrongdoing disclosed:* There is a real issue in the case as to whether the claimant could reasonably have believed that those errors in the CV could, objectively viewed, be regarded as fraudulent. The respondent argued not only that they could not, but adopting an aggressive stance to the litigation, that the claimant's true motivation for his actions was in fact "bitterness" and sour grapes because he was not appointed CEO and regarded himself as superior to the Trustees.

214.4. The difficulty for the respondent is that the claimant was not alone in his views about the CV and its consequences, rather two individuals (who the respondent largely advanced as being reasonable and objective), Mr Cowie and Mr Boniface, each separately formed the same view. Mr Cowie entirely agreed with the claimant's views initially and he still held genuine concerns on the point on 21 June after Mr Carne proffered explanations for Mr X's conduct (as reflected in Mr Cowie's email to the Trustees of that date).

214.5. We are satisfied therefore that the claimant's belief that the

misrepresentations and inaccuracies in the CV were negligent or deliberate was objectively reasonable, as were his concerns that they called into question whether Mr X was a fit and proper person to be appointed CEO of the respondent. (We are not here, however, expressing the view that Mr X is or was not a fit and proper person; that is beyond the remit of our necessary enquiry, we are only recording that the claimant's beliefs were objectively reasonable).

214.6. Similarly, we are persuaded that the claimant's beliefs that the Trustees had failed to follow an appropriate process both in the recruitment and investigation of that process, and may in so doing, have been in breach of their duties as Trustees, was objectively reasonable. The claimant had raised reasonable concerns, in circumstances where he was in possession of evidence demonstrating (a) that the CV was inaccurate and could be regarded as misleading and (b) that the Trustees had failed to follow their own or a reasonable recruitment process, in so far as they had made an offer of employment before obtaining references in circumstances where the offer was not conditional upon the references being satisfactory. It was not objectively unreasonable to form the view that in failing to obtain references, prior to the unconditional offer of employment, the Trustees may have failed to act in with due care and diligence and may have exposed the respondent to an avoidable risk. That was the matter which required investigation and remedy, if necessary. The claimant only knew that Mr Carne was 'investigating' and, quite reasonably on an objective basis, regarded Mr Carne's investigation of a process which he had led as being potentially inappropriate so as potentially to amount to a further breach of the Trustees' duties. That Mr Boniface concluded that there had been no breach does not alter the status of the claimant's reasonable belief (applying <u>Babula</u> and <u>Jesudason</u>).

214.7. Additionally, by 17 June the claimant knew the decision to appoint Mr X had been ratified but was concerned that if the appointment or the subsequent ratification were not made by the full Board it would breach of the Articles of Association. That view was objectively reasonable because the claimant had not seen any minutes of the Board indicating that the initial decision had been delegated to the Committee or Mr Carne.

214.8. *the identity of the alleged wrongdoer*: these were respectively the CEO, the Chair of Trustees and Board of Trustees; in essence those with control and responsibility both of the strategic and day to day operation of the respondent.

PID3 the whistleblowing complaint of 18 June 2021

215. The respondent accepted, as with PID 2, that there was a disclosure of information referencing a breach of legal obligation, and accepted that the claimant provided more detail and specifics of those breaches, but argues that there was no reference to criminal activity or fraud by Mr X, only to discrepancies in his CV. Further, the respondent argues that the claimant could not have reasonably believed it to be in the public interest for the same reasons as it argued in relation to PIDs 2A & B above, praying in aid the claimant's comment in his whistleblowing complaint relating to the breach of recruitment policy that "was the drafting of the offer letter a simple error?" and "what advice was provided by the external specialist recruitment consultant?" Mr Bromige argued

that indicated that the claimant regarded it as a potential inadvertent or accidental breach of the recruitment policy, rather than a deliberate one.

216. The email clearly identifies the breach of legal obligation as the “failure by the Chair to exercise reasonable skill, care and diligence specifically breaching the duties of a Trustee/Director.” The source and nature of those duties had been identified by the claimant in his emails to Mr Cowie and in his discussions with Mr Mark. The email further referenced the inaccuracies in the CV, which the claimant had identified in his email of 11 June and in his discussion with Mr Mark as potential fraud (by the 17 June the claimant was firm in his view that it was), and given the interaction (if not direct collaboration) between the claimant and Mr Cowie which resulted in the latter’s email of 14 June, which included the legal basis for the claimant’s concerns that Mr X was not a fit and proper person for the purposes of the CC03 and therefore that his appointment would be a breach of the Trustees duties under the Company Act, it is reasonable to attribute that knowledge and belief to the claimant. The source of the legal obligation and the nature of its affect which the claimant was referencing was therefore objectively obvious to the respondent when the email was received.

217. For the same reasons as we have given above in relation to PIDs 1 and 2, we are satisfied that the claimant’s belief that the disclosure was in the public interest was objectively reasonable. It is noticeable that the respondent does not argue that the claimant could not objectively have viewed this disclosure as being in the public interest because he knew the concerns were being investigated. It is right not to: the claimant knew that the investigation was being led by Mr Carne, whom he believed was conflicted and further believed had acted in breach of the Articles of Association in Mr X’s appointment and so should not therefore have been involved in the investigation, let alone leading it on an apparently solo basis (as it seemed to the claimant at that stage). For the reasons we have given above, that was objectively a reasonable view to take. Put simply, *how* the respondent was investigating the concerns was a further cause of the claimant’s reasonable belief; it did not operate to undermine it.

218. We are satisfied therefore that the claimant objectively reasonably believed that the disclosure of information was in the public interest and the disclosure is a qualifying disclosure and hence a protected one because it was made to the claimant’s employer in accordance with s.43C.

PID4: the claimant’s interview with Mr Boniface on 30 June 2021

219. It is not entirely clear from Mr Bromige’s skeleton arguments, but it appears that the respondent accepts there was a disclosure of information and that the claimant reasonably believed that it tended to show a breach of legal obligation and/or that an offence of fraud had been committed, but the respondent denies that the claimant objectively reasonably believed it to be in the public interest. The arguments Mr Bromige developed in relation to that point were (a) the claimant was aware that the Trustees had confirmed Mr X’s appointment on 21 June 2021, (b) Mr Boniface had been appointed to investigate, and (c) repetition of the information “in the context of an external investigation does not make it in the public interest.”

220. As the information disclosed to Mr Boniface was largely the same as that detailed in the earlier disclosures, we adopt as a start point our earlier conclusion that objectively the claimant’s belief that the disclosure was in the public interest

was reasonable. We therefore consider whether the respondent's arguments 'rebut' that view. (That is not to say we are operating as though the burden of proof falls on the respondent to show that was not the position, we recognise the burden falls on the claimant in that respect, but only that having previously concluded in relation to largely the same factual matrix that the claimant had discharged the burden, we consider whether the respondent's arguments alter that conclusion here.)

221. In our view, the fact that the Trustees had confirmed the appointment of Mr X was not a matter which objectively either served to diminish the claimant's reasonable belief, whether subjectively or objectively, in the breaches of legal obligation or in the public interests in those potential breaches. Rather, the claimant was subjectively more concerned, and objectively it was reasonable for him to be so, because the appointment had been confirmed before the respondent had received the benefit of the independent report relating to those concerns, which act might itself constitute an additional failure to act with reasonable care and skill. The claimant had not been told that Mr X had been appointed subject to ratification of that decision after the report was received; he was told that the decision had been made *and it was final.*

222. Secondly, whilst the claimant's concerns might objectively reasonably have been partially allayed when he was told of the investigation, the mere fact that the investigation was being conducted was not sufficient objectively or subjectively to allay the underlying concern relating to the appointment of someone who there was evidence to suggest had knowingly and deliberately omitted matters from his CV, in circumstances where the explanation for that omission had not been disclosed to the claimant. As we already stated, the fact that the appointment of that individual had been confirmed before the outcome of the investigation into those matters was of itself a further cause of concern and operated to undermine any reassurance represented by the act of the investigation itself. Indeed, the claimant did not know what the terms of reference for that investigation were.

223. Lastly, if the respondent were right that it could not objectively be regarded as being in the public interest to repeat concerns in the context of an investigation into matters which were objectively believed to be in the public interest by the person being interviewed, it would drive a coach and horses through purpose and effect of the legislation. An employer would be able to take no action in relation to an initial disclosure which caused an investigation, but then act as detrimentally as it wished against an employee who repeated those concerns in an investigation (and therefore gave evidence to support them) without sanction or recourse for the affected employee. Conceptually, it is an unattractive argument, and we reject it.

PID5 the claimant's email to the respondent's auditor on 22 July 2022

224. The claimant argues (in accordance with section 43G(1) ERA 1996), that it was reasonable for him to make a disclosure to the auditor because he had previously made a disclosure of substantially the same information to the respondent, and the respondent had confirmed the appointment of Mr X, and the claimant believed his allegations were substantially true.

225. The respondent argues that it was not reasonable for the claimant to have made the disclosure because he initially made the same disclosure in an email

to Mr Cowie, before withdrawing it. Essentially the respondent argues from those facts that because the claimant could make the disclosure to his employer, it was not reasonable for him not to so, and by extension it was unreasonable for him to make the disclosure to the auditor. We were not provided with any legal authority for the proposition it will not be reasonable for the purposes of s.43G(1)(e) to make a disclosure to a third party if it were physically possible to make one to the employer in accordance with s.43C. The test of reasonableness in that section is, we believe, an objective test having regard to all the relevant circumstances.

226. The relevant circumstances were as follows: (a) the claimant had made the disclosure previously to the respondent, (b) there is no dispute that when he did so the claimant reasonably believed that the information tended to show a breach of legal obligation (c) the respondent had initiated an investigation into those disclosures but (d) prior to the outcome of that investigation had confirmed the appointment of Mr X, and (e) had not explained to the claimant the basis on which it had concluded that he was a fit and proper person and (f) how the respondent had therefore complied with its legal obligations in relation to his appointment.

227. In those circumstances, we find that it was reasonable for the claimant to seek to report his concerns to a person who was outside the Board of Trustees and whose role involved providing advice to that Board and who had responsibilities to report to the Risk and Audit Committee.

228. Separately, the respondent argues that the claimant did not reasonably believe that the allegation was substantially true. That, conceptually, is a difficult argument to run in circumstances where the respondent has conceded that in relation to earlier disclosures of the same information, albeit in less truculent terms, the claimant reasonably believed that the information tended to show a breach of legal obligation. As detailed, its challenge to those earlier disclosures, was to the reasonableness of the claimant's belief that that it was in the public interest to make such disclosures. That the claimant became more intransigent and definitive in his assertions both as to the wrongdoing of Mr X and the Trustee's negligence in investigating those matters, and therefore in their breach of their legal obligations, and the fact that his approach was less measured or balanced does not operate, we conclude, to render his belief in them less reasonable nor does it establish that he knew his allegations were not substantially true.

229. *Summary of PIDs*: we have therefore concluded that PIDs 2A and 2B, 3, 4 and 5 were qualifying and protected interest disclosures.

<u>Section 47B detriments on the grounds of protected interest disclosures</u>

Conversation between Mr Mark and the claimant on 22 July

230. There was a dispute as to exactly what was said, and it is helpful to repeat it here:

230.1. The claimant's account is that Mr Mark told the claimant that he "did not do what he asked" and that Mr Mark was "personally disappointed" by the claimant's act of raising concerns through the formal whistleblowing process, that the claimant had made "erroneous assumptions" and should have "waited for the process to play out." He said that there was a breakdown in trust between the two men and reiterated his personal disappointment and the

claimant's actions.

230.2.Mr Mark's account was that when he had resisted the claimant's suggestion that the terms of reference in full report should be disclosed to him, the claimant became agitated and hostile, saying that the Trustees "didn't know what they were doing" and that they were personally financially responsible for any liability if the insurance was void. Mr Mark told the claimant he respected his right to bring the complaint, pointed out that he was working hard to make sure it was investigated fairly, and that the claimant's thinking depended on a number of assumptions, and they were not all definitely correct.

231. During cross-examination Miss White focussed the claimant's arguments about detriment on Mr Mark's alleged comments that the claimant had not done what Mr Mark asked, and that he was personally disappointed in the claimant's actions in raising his concerns in the manner he had [the whistleblowing complaint] and that he said there was a breakdown in trust between the claimant and him.

232. Mr Bromige argues that we should prefer Mr Mark's account because the diction in the claimant's email to the respondent's auditor shortly before the discussion occurred suggests that the claimant was in a heightened state of frustration and was aggressive towards the Trustees, and therefore that it is more likely than not that he would have said, as Mr Mark suggested, that the Trustees 'did not know what they were doing.' Secondly, he argues that the fact Mr Mark was frustrated with the claimant because he had not followed his advice to distance himself from the process of reporting concerns relating to Mr X's appointment because he was conflicted (when the claimant had not made a protected disclosure), demonstrates that his response to the claimant's comment about the Trustees was born out of frustration with the claimant's prior actions and was not connected to the protected disclosure itself. Lastly, he argues that even on the claimant's account, the conversation was not capable of constituting detrimental treatment, but was at its highest a robust conversation between two senior employees.

233. We address those arguments in turn. First, we are not persuaded by the suggestion that it necessarily follows from the diction in the claimant's email to the auditor that he was in a heightened state of frustration and anxiety. Whilst the claimant's diction increased in its censure of the respondent, and whilst it was robust and direct, it was not inappropriate or aggressive. Secondly, both Mr Mark and the claimant agreed that their conversation was <u>not</u> initially a heated one. Whatever the claimant's state of emotional control at the time of his email to the auditor, it does not follow therefore that he was in a heightened or uncontrolled state at the start of the conversation with Mr Mark.

234. Mr Bromige is right that the claimant's firmer expression of his belief that the Trustees had been negligent is supportive of the fact that the claimant may have said that the Trustees did not know what they were doing. However, it is equally consistent with the claimant's assertion, which he recorded in his email that day, that he said that he "felt that the trustees did not understand the full implications" of what they were doing. It is entirely conceivable that the claimant said those words, and that given the conversation had become heated, Mr Mark only heard or recalled the shorter form that the "trustees did not know what they were doing". He made no note. Critically, given the claimant's contemporaneous accounts

(both in his email to Mr Mark on 22 July, and in his email to Trustees 1 and 2 on the 26 which referred back to his conversation with Mr Mark on the 22) was that Mr Mark had referred to a "breakdown in trust," we are persuaded on balance that those were the words that Mr Mark used.

235. For the same reason we concluded that the claimant stated that the Trustees did not understand the full implications of what they were doing, which was a reference to the appointment of Mr X who would hold the gambling license in the circumstances of Mr X's provision of an inaccurate (and the claimant believed dishonest) CV. Mr Mark took umbrage, believing the claimant to have said that the Trustees did not know what they were doing and being uncertain as to whether the claimant was suggesting that he did not know what he was doing. Mr Mark therefore said that there was a breakdown in trust between the claimant and him and repeated how personally disappointed he was in the claimant's actions. The claimant said that he felt that was a threat, as Mr Mark recalls him saying.

236. Furthermore we concluded, because of the content of the claimant's contemporaneous accounts, that Mr Mark told the claimant that he was personally disappointed in the claimant's actions in raising his concerns in the manner he had, and that when the claimant asked what he meant by that Mr Mark said he had not waited for the investigation into his informal concerns to 'play out' and instead had made a formal whistleblowing complaint. That was entirely consistent with the view that Mr Mark held and the frustrations that he had and had expressed previously to other trustees which is detailed in our findings above.

237. The reference to "not doing as I have asked" was, we have concluded, broader, and included the claimant's actions in: (a) not following Mr Mark's advice to distance himself from the investigation of Mr X's CV, because he was to an extent conflicted, (b) taking independent legal advice, and (c) informing the insurers of the fact of his whistleblowing concerns and the basis of them, which was in direct contravention of Mr Mark's suggested course, and which actions Mr Mark believed represented the claimant's attempts to try and direct or control the investigation into his whistleblowing complaints.

238. Each of those was a source of frustration to Mr Mark and a partial cause of his reaction to the claimant during their discussion. Mr Bromige's argument that part of Mr Mark's reaction related to a matter that was not a protected disclosure is correct, but with the limitation that the protected disclosures of the 16, 17 and 18 of June were more than a trivial influence on Mr Mark's comments. The protected disclosure of 18 June, the formal whistleblowing complaint, was directly referenced by Mr Mark. His attitude to the claimant's act of raising a formal complaint was consistent with Mr Carne's expressed concerns about Mr Cowie's email of 14 June: each of the claimant's and Mr Cowie's concerns was highly visible, each necessitated a formal process, and each would have the effect of causing Mr X (in Mr Carne's words) "considerable concern and worry," thereby jeopardising the appointment that the Trustees wished to make.

239. The claimant has therefore raised a prima facie case that the protected disclosures of 16, 17 and 18 June were more than a trivial influence on Mr Mark's decision to make the remarks, and the burden therefore transfers to the respondent to demonstrate in accordance with <u>Fecitt</u> that they were in no sense whatsoever a cause. As Mr Mark's remarks as we found them, referenced the

claimant's action in making protected disclosures, particularly that of 18 June, the respondent has not discharged that burden.

240. In light of our findings as to the comments made, we unhesitatingly conclude that they were detriments and that any reasonable employee would regard them as such. That the claimant did is reflected in his comment to Mr Mark that he regarded them at a 'threat.' Whilst the claimant did write that he recognised that Mr Mark was under a lot of pressure and that he would "let it go for the moment," that does not alter their status as a detriment, it merely indicates that the claimant did not seek to pursue them at that stage. Indeed, by 26 July (in his email to Mrs Sharples), the claimant referred to it in the context of the whistleblowing policy's prohibition on "threatening or retaliating against whistleblowers in any way," and by 29 July referenced it again when writing that he was then finding it "hard to see a future" with the respondent. That, we conclude, demonstrates that he regarded it as a detriment.

241. This claim of unlawful detriment is well founded.

<u>The conversation between Mr Pomfret and the claimant on 26 July 2021</u>

242. There is a direct dispute of fact as to what was said after their agreed initial discussion about the business concerning the helicopter contract and a general discussion about the morale of the team and Mrs Y. Again, it is helpful to repeat the competing accounts here:

242.1. Mr Pomfret's account was that he listened carefully but silently to the claimant whilst he raised informed him that he had made a whistleblowing complaint in relation to the appointment of Mr X and the process followed in respect of it. The claimant said that he was a man of principle, would stand by those principles, but that might lead to him leaving the respondent. Mr Pomfret said that he would be very sad if the claimant were to leave because he was an exceptional COO and Mr Pomfret wanted him to stay, and that he hoped that he would find a way to work with Mr X as the two would form the dream team.

242.2. The claimant's account was that Mr Pomfret told him that the Charity Commission did not mandate any processes for recruitment and therefore suggested that his complaint was unlikely to be upheld. Mr Pomfret told the claimant that if Mr X were not to take up the post, the claimant would not become CEO in any event. The claimant said that that was not his concern, but he felt that the Board did not fully understand the implications caused by the manner of the CEO's recruitment. Mr Pomfret said that the claimant's whistleblowing could lead to a breakdown in trust and confidence between him and the Board, and his consequent departure from the charity. He then suggested that the two men could speak in confidence if the claimant wished, and the discussion would not leave the room. The claimant declined.

243. Mr Bromige argues that the claimant's account is not credible because he did not reference the earlier discussion, which he accepted occurred regarding the helicopter contract, in either the ET1 or in his statement. He suggests that it is more likely than not that the claimant said that he was unwilling to compromise his principles (which was consistent with his resignation letter) and that led Mr Pomfret to make his remark that he would be sorry if he were to leave (etc.) Secondly, he argues that Mr Pomfret did not know the detail of the protected disclosure, and therefore as a matter of law his actions cannot be said

to be "on the ground of the protected disclosure" because s.47B must be read in conjunction with s.43A which defines a protected disclosure, although he identified no authority for that proposition.

244. Again, we address each argument in turn. First, the fact that the claimant did not reference other parts of his discussion with Mr Pomfret did not operate to undermine his credibility in our view: it is neither proportionate nor appropriate to detail all of a conversation in pleadings; it is sufficient and prudent to focus on those factual events about which complaint is made. Mr Bromige's point has more force in relation to the claimant's statement; it is concerning when a witness does not address "the whole truth" as the oath and affirmation require. In the Southwest region that obligation is balanced against the desire to case manage cases in a manner which means that it is possible (or at least conceivably possible) to read the statements and the key documents in the limited time permitted for that task (it was not in this case). That requires limits on statements. In many instances, the claimant's statement was brief on detail, opting to reference supporting documents, rather than providing full accounts. We concluded that this was such a case.

245. Secondly, in the absence of authority on the point, we rejected Mr Bromige's submission on causation in s.47B claims. First, there is nothing in the wording of s.47B which suggests that knowledge of the detail of the protected disclosure is required, it prohibits conduct "done on the ground that the worker had made a protected disclosure." Fecitt makes clear that it is for the respondent to show that the protected disclosure was not a material factor, whether consciously or unconsciously, in the decision to subject that worker to detriment. As the Court of Appeal noted at paragraph 43 in Fecitt (approving the EAT's finding), that requires the respondent to show that the protected disclosure was in no sense whatsoever a cause of the detriment.

246. Furthermore, we reject the argument on policy grounds: if Mr Bromige's construction were right, it would again drive a coach and horses through the purpose of the legislation, providing a license for employers to subject workers whom they knew had blown the whistle to detriment with impunity in circumstances where they did not know the detail of disclosure. In the words of Lord Justice Mummery in ALM Medical Services Ltd v Bladon [2002 ICR] 1444, 'the self-evident aim of the provisions is to protect employees from unfair treatment (i.e. victimisation and dismissal) for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace.' Consider that policy and the effect of Mr Bromige's proposed interpretation of section 47B in the context of disclosures made in accordance with section 43F to regulators; section 43A applies to such disclosures as the section expressly states. Often such disclosures are made through online portals operated by the regulators which permit the regulator to know the detail of the complaint, but even the worker does not retain a record. If Mr Bromige's statutory construction were right, if the worker told the employer that they had made a report to the regulator and was then subjected to a detriment because of the fact that they had made the report, they would be without remedy.

247. In any event, the construction argued for is inconsistent with the line of authority represented by Co-Operative Group Ltd v Baddeley 2014 EWCA Civ 658, CA, which was relied on by the EAT in Ahmed v City of Bradford Metropolitan District Council and ors EAT 0145, and approved by Mrs Justice Eady as she now is in Western Union Payment Services UK Ltd v Anastasiou EAT 0135/13,

which suggest that knowledge of the detail of the disclosure is not required, given it is sufficient for the individual who subjects a worker to a detriment to be acting on the basis of information tainted by discriminatory action caused by the protected disclosure, even if they were not aware of it themselves.

248. In summary, the point seems to us to be contrary to the policy of the Protected Interest Disclosure Act, contrary to the statutory regime in the ERA which gives effect to that policy, and contrary to the principles of established authorities. We therefore reject it.

249. We turn to consider the credibility of the competing accounts. We did not find Mr Pomfret to be a credible or persuasive witness insofar as he suggested in his witness statement either that he was not really engaged in any of the matters we have detailed between 27 April and 18 August because of a health condition, or that that his reference in his email of 17 June to Mr Carne that Mr Cowie should "rescind or retire" was a "tongue in cheek" form of words for requiring Mr Cowie to 'reconsider and give the Board his support for Mr X's appointment.'

250. In relation to the former, although we accept that Mr Pomfret was far less involved than he might have been because of his necessary focus on his health, we do not accept, because it is not in any way reflected in the contemporaneous documents, that he was involved at the minimum level that he seeks to suggest. He had discussions with Mr Carne in relation to the significant and important concerns raised by Mr Cowie on 14 June and what should be done about them; those were discussions of a strategic nature between the two key players on the Board.

251. Furthermore, on 18 June, Mr Carne forwarded his email to Mr Cowie to Mr Pomfret. In that email Mr Carne detailed the issues raised in relation to Mr X's appointment and his CV, and shortly afterwards wrote "Sadly, Steve's decision to raise a concern re the CEO process to Ben has at least delayed my talk with him. Extremely frustrating and disappointing." Given that Mr Mark had informed the Trustees a few hours earlier in the day that the whistleblowing complaint related to the CEO recruitment process and the associated follow up activity, we are entirely satisfied that Mr Pomfret was aware of the basic detail of the complaint and the facts relied upon in support of it. Indeed, on 20 June Mr Pomfret wrote an email addressing them for consideration by the Trustees at their meeting on 21 June, and said "Mark has involved me in the subsequent issues and we have had a number of discussions."

252. Mr Carne knew that the source of much of Mr Cowie's complaint was the claimant and Mrs Y because they had first raised their concerns with Mr Mark who had reported them to Mr Carne, and Mr Carne had then spoken to Mrs Y and the claimant directly. It is implausible that those matters were not discussed between Mr Carne and Mr Pomfret, and that he had no knowledge of the basic detail of the claimant's whistleblowing complaint. Mr Pomfret's statement that he did not know of the details of the protected disclosure is, therefore, we concluded, disingenuous and not the whole truth. It is right that he had not seen the complaint itself, but he knew the claimant had raised concerns (a) that Mr X's CV was inaccurate, (b) that Mr X was therefore not an appropriate candidate to be appointed CEO, (c) that the process followed for his appointment was flawed, and (d) that it had to be investigated and (e) lastly, that any appointment had to be by the full Board, not merely the committee.

253. Similarly, the diction used in Mr Pomfret's email of 17 June is stark and clear in its meaning; the ordinary English usage and meaning of the words in the phrase 'rescind or retire' is in no way equivalent to 'reconsidering and offering support' for a motion. To seek to place that interpretation on them is to torture the words beyond recognition and their ordinary day-to-day meaning. 'Reconsidering' involves no action consistent with 'retirement' at all, and to 'rescind,' carrying its meaning of to revoke, cancel or repeal, is far more definitive and final than to 'reconsider' or to 'offer support'. Mr Pomfret's suggestion that the comment was tongue in cheek was, we found, simply not credible in the context of the pointed and specific language he chose. It caused us significant concern.

254. Consequently, where there was a direct dispute of fact between the claimant and Mr Pomfret, we were less likely to accept Mr Pomfret's account unless it were corroborated by contemporaneous documents or other witness evidence. In fact, the contemporaneous documents did not support Mr Pomfret's account, but rather undermined it and supported the claimant's. The claimant's email to Mrs Sharples and Trustee 2 after the meeting is such a document. Indeed, the fundamental difficulty with accepting Mr Pomfret's version of events is that had matters unfolded as he suggests there would have been nothing that would have caused the claimant to have emailed those Trustees as he did or to reply to Mr Carne's request for a meeting in July saying that he would not meet with Mr Pomfret "under [any] circumstances," and that "Chris will be able to explain." Something must have happened; it is simply inconceivable that the claimant would have felt the need to email in the form that he did if all that Mr Pomfret had done was to listen carefully but silently to the claimant as he raised his concerns, said that he would be very sad if the claimant were to leave because he was an exceptional COO and Mr Pomfret wanted him to stay, and ended by saying that he hoped that he would find a way to work with Mr X as the two would form the dream team.

255. We preferred the claimant's account and found his contemporaneous note to be accurate. The discussion occurred as follows: when the claimant referred to his whistleblowing about the inaccuracy in Mr X's CV and to the consequent problems from the claimant's perspective with the process followed during the recruitment of the CEO, Mr Pomfret was already aware of the specifics of detail, even though he was not party to it directly, because they had formed part of the briefing note for the board meeting of 16 June which had been sent to him by Mr Carne. Mr Pomfret viewed those concerns as specious and entirely without basis, such that he was content that Mr Carne should require Mr Cowie to "rescind or resign." He was further aware that the claimant's whistleblowing had been the cause of the need for a full board meeting on 21 June.

256. Mr Pomfret suggested that there was no mandated process for recruitment (which was Mr Carne's view, which the two men were likely to have discussed), that if Mr X were to leave the claimant would not be appointed CEO (which was consistent with Mr Pomfret's recorded view that Mr X was the outstanding candidate), and that a consequence of the claimant's whistleblowing could be a breakdown in trust and confidence between him and the Board. The claimant was alert and particularly sensitive to that language and recorded it in his email to Mrs Sharples and Trustee 2 because it was precisely the language that Mr Mark had used in his discussion with the claimant on 22 July, four days earlier.

257. For the reasons we gave in relation to the first detriment, we are satisfied that Mr Pomfret's comments would be regarded by a reasonable worker as a detriment.

258. On the basis of our factual finding that the comments were made as the claimant alleges, we are satisfied that he has raised a prima facie case that the protected disclosure was a material cause of Mr Pomfret's decision to speak to him in those terms, given that Mr Pomfret made express reference to the disclosures as a cause of the breakdown in trust. The burden has transferred to the respondent to show that the comments were in no sense whatsoever influenced by the protected disclosure. The respondent does not advance a positive case as to an alternative to the protected disclosure being the cause of the comments alleged. It has denied that they were made. The respondent has therefore failed to discharge the burden.

259. The claim for unlawful detriment in this respect is therefore well-founded.

Detriment 3: *The content and nature of the Stone King letter of 18 August being "an inadequate and partial response to the claimant's whistleblowing concerns."*

260. Miss White has articulated with more specificity the precise complaints of inadequacy and shortcoming in respect of what we shall refer to as "the Letter."

260.1. First, the claimant was not provided with a copy of the Boniface report, redacted or otherwise, instead he was provided with the Letter which contained insufficient summary statements.

260.2. Secondly, the information contained in the Letter did not address the claimant's concerns in relation to the content and effect of Mr X's CV, the process adopted in his recruitment (specifically whether Mr Carne had breached his duties as a Trustee or director in making an unconditional offer before references were obtained), and/or whether the trustees had ratified the decision to appoint Mr X.

261. The first argument in so far as is the claimant complains that the respondent failed to disclose the Boniface report is not truly germane as that is not the pleaded complaint of detriment. The complaint that the Letter contained insufficient summaries is a facet of the second argument.

262. The respondent's argument in relation to that detriment was twofold: first, the respondent was not obligated, whether under its own policy (clauses 6.1, 6.3) or the government guidance on whistleblowing to disclose the report or any part of it which reflected Mr Boniface's conclusions or the outcome of the investigation to the claimant; the claimant's remedy if he were unhappy was to raise his concerns externally in accordance with clause 7.2 of the policy. Secondly, the respondent acted reasonably in determining that it would not disclose confidential matters relating to Mr X's CV or sections of the report that were not directly connected to the claimant's complaints, such as the recommendations made to the Trustees.

263. This matter was finely balanced. The relevant circumstances were, we concluded, as follows:

264. the respondent's whistleblowing policy did not require the respondent to provide the claimant with the investigation report, but only "an outcome."

That 'outcome' was limited by clause 6.1 which requires the respondent to provide an employee with an "outcome in relation to the initial assessment of the scope of any investigation," which would explain the later requirement in the policy for employees to attend further meetings or provide more information where the respondent requested it. Clause 6.3 requires the respondent to keep an employee informed of progress of the investigation and the relevant timescales. It does not include a right to receive an outcome or to receive an outcome addressing the whistleblowing concerns or an outcome in any specific format. That is consistent with the government guidance.

264.1. Furthermore, the policy is not contractual.

264.2. Nevertheless, the respondent had chosen to provide information to the claimant about the conclusions reach by Mr Boniface and therefore to act outside the policy.

264.3. The claimant was a very senior employee who had raised concerns in relation to the CEO, and the Trustees and the Chair's compliance with the duties under which they operated. Those concerns impacted upon the claimant's performance of his own duties in his role as COO and the obligations placed upon him by acts and regulations such as the Company Act, the Trustees Act and other associated guidance.

264.4. Mr Boniface had concluded that the claimant was obligated in accordance with those duties to raise the concerns that he had, and that he had not done so with any malice or otherwise improper motive.

265. The tribunal were hesitant therefore to conclude that an act which was neither a breach of contract nor a breach of the respondent's policy or government guidance might be viewed as a detriment by a reasonable worker. However, we concluded that in the circumstances where the respondent had chosen to provide a response addressing aspects of the conclusions of the report, and had therefore placed itself outside its own process and the government guidance, and in the context of the seniority of the individuals involved, and the statutory and equitable duties and obligations which had both informed the claimant's complaint and which would have had repercussions on his future compliance with those duties, the manner in which the respondent chose to disclose aspects of the report's conclusions and not to disclose any of its rationale could in principle constitute a detriment if a reasonable employee would have formed that view of the Letter.

266. It was clear to the respondent that the claimant's primary concern was the content of Mr X's CV, and its implications in relation to the need for the CEO to be a fit and proper person and to hold various licences. The letter provided no detail and no outcome in respect of that concern. It raised the issue of confidentiality as a shield in that regard. However, in the circumstances where the claimant had seen the CV and had produced the information that demonstrated inaccuracies within it, confidentiality in those matters had long been lost. The only new matter to which confidentiality might attach was Mr X's explanations for those inaccuracies. There was no good reason why the respondent could not have shared Mr Boniface's conclusions in relation to the fact of whether there were inaccuracies in the CV; it could have redacted or kept hidden Mr Boniface's analysis of the nature and effect of the explanations for

those inaccuracies which had been provided at various times to Mr Carne. The claimant did not know of those, save for the explanation in relation to the Company 1 work being "pro bono." They could not and did not form part of his concern.

267. Similarly, there was no good reason, having chosen to disclose the conclusion of the report in relation to the allegations concerning Mr Carne, why the basis of those conclusions could not have been shared. There was no issue of confidentiality connected to them. The explanations were what the claimant sought, and it was the explanations which would, or at the very least could, have assuaged the claimant's expressed concerns. That it was apparent that it was exceedingly unlikely that any explanation would be accepted by the claimant if it did not result in a finding consistent with his views, did not alter the position that the claimant was seeking the explanations as much as the conclusions of the report about those issues.

268. Although there is a risk of conflating the issue of causation with the issue of detriment, the two (as it seemed to us) are linked in the context of this case. The nature of the assessment is whether a reasonable worker would have regarded the respondent's decisions in relation to what was disclosed in the Letter as being to his or her detriment in the circumstances. In our view, a reasonable worker in circumstances that we have set out above could reasonably have regarded those decisions and hence the contents of the Letter as being to their detriment. To suggest that an employee could only be acting reasonably if they accepted that their concerns were without basis because the Trustees had agreed unanimously to proceed with the appointment of Mr X in light of the outcome of the report, whether on the suggested basis that the Trustees must have been acting in good faith (as Mr Bromige implicitly suggested in paragraph 53 of his skeleton) or otherwise, is to overlook that the very nature of the concerns raised in the complaints was that the Trustees had either not been acting in good faith, or had acted in breach of their duties, and did not appear to appreciate that that was the case. The claimant was in essence being asked to accept there was nothing wrong or untoward because the Trustees had concluded there was not on the basis of the report, the rationale for which was not shared with the claimant; that was unreasonable, and the reasonable worker would regard it as a detriment.

269. We turn then to consider whether the protected disclosures were more than a trivial influence, whether consciously or unconsciously, on the Trustee's decision to send the Letter in the form it was to the claimant.

270. Miss White argues that a number of other factors show that it was:

270.1. First Mrs Y received an outcome to her grievance from the respondent which went beyond that given to the claimant in relation to the underlying reasoning for the conclusions reached by Mr Boniface in respect of her grievance allegations. That must be contrasted, Miss White argued, with the Letter. The distinguishing feature between the claimant and Mrs Y was that the claimant had raised a whistleblowing complaint, Mrs Y a grievance complaint. The difficulty with that argument is that the grievance policy required that the outcome should be shared with the employee, the whistleblowing policy did not.

270.2. Secondly, Miss White places reliance on some of the comments made

by the Trustees at the meeting on 12 August which are detailed in our findings. There is more force in those arguments.

271. Conversely, Mr Bromige relies upon those same comments as demonstrating that it was not the claimant's actions in making a whistleblowing complaint, but rather his subsequent actions after 18 June which were the cause of the respondent's documented concerns. Those actions were described by Mr Mark as a "web of chaos" during his evidence. It is helpful to set out the claimant's actions which the respondent relies upon here:

271.1. the claimant had adopted an immediately defensive position to the issues he had raised, telling the respondent that he would take legal advice and, critically, stating that it would only be shared with the Trustees "where appropriate;"

271.2. the claimant intimated that he might raise a formal grievance about the recruitment process; by that, the respondent argues, the claimant was seeking to place improper pressure upon the Trustees;

271.3. the claimant's emails of 2 and 5 July regarding the need to make disclosures to the respondent's insurance company, which the respondent argues was a further act intended to place improper pressure upon Mr Mark or the Trustees;

271.4. the claimant's email of 20 July by which he sought confirmation that he would receive a full copy of Mr Boniface's report, despite the clear wording of the policy which did not provide for such a disclosure;

271.5. The claimant's email on 26 July to Mrs Sharples and Trustee 2 reporting the comments made by Mr Mark and Mr Pomfret to him on 22 and 26 July;

271.6. That Trustee 2 had taken sick leave and had ceased to act as a trustee on or about 26 July because of the pressure of managing the claimant's concerns and his conduct.

272. There were, however, other events which formed part of the Web of chaos as Mr Mark described it. They included:

272.1. the act of making a formal whistleblowing complaint, in the context where on 16 June Mr Mark had encouraged, if not instructed, the claimant not to do so but to await the outcome of Mr Carne's investigation of his concerns, and had told him that he was sure that Mr Carne would act reasonably.

272.2. The claimant's email to Mr Cowie on 22 July seeking to raise concerns in relation to the respondent's position with insurance at the Finance Committee meeting as an AOB.

272.3. The claimant's email to the auditor on 22 July which was a protected disclosure;

272.4. The claimant's reference to raising matters with the Charity Commission if he was not satisfied with the outcome of the whistleblowing complaint.

273. We must consider those matters to determine whether the claimant has established a prima facie case that the protected disclosures were more than a

trivial influence, whether conscious or unconscious, on the Trustees' decision to send the Letter in the form it was.

274. The majority of those events are unconnected to any protected disclosure. Insofar as the minutes of 12 August reference the claimant's intention to raise matters further with the Charity commission, they are of no avail to the claimant: a threat to make a protected disclosure is not a protected disclosure within the meaning or definition of s.43A, which requires a worker to have made a disclosure of information, it is not enough that they threaten to do so. Mr Bromige is right that the claimant's emails insinuating his intention to take legal advice and/or to raise a formal grievance and/or making a threat of blowing the whistle by reporting the matter to the Charity Commission are properly separable from the protected disclosures in the case, here because they do not constitute protected disclosures (for the reasons we have outlined). The same is true of the claimant's email of 20 July to Trustees 1 and 2 and his email of 22 July to Mr Cowie; they related to a protected disclosure but were not protected disclosures themselves.

275. We had some hesitation in concluding that the claimant's email of 26 July, which in effect is a complaint that he has been subjected to a detriment for making a protected disclosure, should or could properly be regarded as being separable from the protected disclosure itself, but having carefully considered the authorities detailed above, we are satisfied that it can be. Their focus is on preventing improper separations between the manner in which a protected disclosure is made and the protected disclosure itself. This instance is in effect a further protected disclosure (asserting a breach of the obligation under s.47B and/or asserting that statutory right) but was not pleaded as a protected disclosure nor referenced in a claim under s.104 ERA 1996.

276. Furthermore, the comments of the Trustees at the meeting 12 August were strongly indicative that it was not the claimant's whistleblowing complaint which informed their decision, but rather his subsequent and separable conduct: one trustee expressly stated that the claimant's conduct in raising a whistleblowing complaint was not vexatious, but his subsequent conduct was. That was a view shared by Mr Cowie, who had been a supporter of the claimant previously.

277. However, two of the events were protected disclosures: the whistleblowing complaint itself and the claimant's email to the auditor on 22 July. In so far as the respondent seeks to argue that the manner in which the claimant raised those complaints should be regarded as genuinely separable from the disclosures and their content, we reject that argument. We reminded ourselves of the guidance in <u>Martin</u> that "a tribunal should look with care at arguments that say that the dismissal was because of acts related to the disclosure rather than because of the disclosure itself", and in <u>Kong</u>, that where "a material part of the reason" for detrimental conduct is the employer's "objection to the substance of the disclosures themselves" then a claim is "in principle meritorious", subject to issues of limitation.

278. In that context, there was evidence that it was the fact of the protected disclosure and its context, rather than the manner of it having been made against Mr Mark's advice to wait, that was a cause operating on the mind of the respondent. On 18 June, Mr Carne had described the claimant's actions in making a formal complaint as "extremely frustrating and disappointing" and on the same day stated that the claimant was "still disruptive and bitter" because

he had not been appointed CEO. The reference to his disruptive conduct was a reference (a) to the claimant's action of raising his concerns with Mr Cowie, rather than with Mr Carne, and (b) subsequently raising them under the whistleblowing procedure at a time when he knew that Mr Carne was investigating them.

279. Similarly, we have found that Mr Mark told that claimant that he was personally disappointed in the claimant for choosing to raise a formal whistleblowing complaint, and that his complaint was based on erroneous assumptions and that he had said that those matters had caused a breakdown in trust between him and the claimant. During the meeting on 12 August Mr Mark had said that the claimant did not care what the effect of his whistleblowing complaint on the trustees or the respondent was, which is partly consistent with that remark. Furthermore, we have found that Mr Pomfret expressly stated that the claimant's whistleblowing "could lead to a breakdown in trust and confidence between the claimant and the Board;" Mr Pomfret was one of the Trustees who ratified the decision to send the Letter.

280. The claimant has therefore raised a prima facie case that the protected disclosures of the 18 June, 30 June (because the claimant's interview with Mr Boniface formed an appendix to his report) and 22 July were more than trivial influences on the decision not to send the Letter in the form that it was. The burden therefore transfers to the respondent to show that those disclosures were in no sense whatsoever part of the conscious or unconscious reason for their decision.

281. Critically, in describing how the 'web of chaos,' as he described it, had influenced the Trustees, Mr Mark told the Tribunal, "the fear was that every time we conceded or gave information to him he would use it; he was not prepared to let us do things." He said, referring to a trustee's comment at the 12 August meeting, that that trustee had been concerned that revealing information from the Boniface report to the claimant would have "triggered more questions from the claimant and created more rabbit holes for him to burrow down."

282. In those circumstances, the respondent has not discharged the burden which had transferred to it, and we conclude that the claim is well founded.

<u>Constructive unfair dismissal</u>

283. We must assess whether the acts, which we have found to be unlawful detriments, individually constitute a breach of the implied term in <u>Malik</u>. The focus must be on the nature of the conduct, and it is not sufficient simply to consider that because the conduct is a detriment it necessarily follows that it was a breach of the implied term.

284. However, we are satisfied that in the context of the case each of the matters complained of constitute such a breach. In relation to the comments made by Mr Mark and Mr Pomfret, the former was the Head of the Risk and Audit Committee, the latter was the Deputy Chair of Trustees. They were very senior figures who told the claimant in clear terms that his acts of whistleblowing had damaged or destroyed the trust and confidence they and/or the Board had in him in his role as COO. There was no reasonable and proper cause for doing so. The comments were made in circumstances where the independent investigator commissioned by the respondent had concluded that the claimant was duty bound to make to raise the concerns and did not act maliciously in

doing so, which was the claimant's view. The claimant specifically referenced the comments of Mr Mark and Mr Pomfret in an email stating that he did not see a future for himself with the respondent, which demonstrates that they destroyed or seriously damaged the relationship of trust and confidence which he had in the respondent. Objectively, they were likely to do so for the reasons we have given.

285. We have no hesitation is concluding that in those circumstances, the comments were a breach of the Malik term.

286. Turning to the Letter, initially we were of the view that there could be no breach of the implied term because the respondent's whistleblowing policy created no obligation to produce any report to the claimant and therefore that the respondent had reasonable and proper cause for its actions, even if they were likely to destroy or seriously damage the relationship of trust and confidence. Before we resolve that issue, it is clear that the Letter did seriously damage or destroy the claimant's trust in the respondent. Immediately upon receipt of the Letter he called Mrs Sharples and was exceedingly angry and expressed his intention to resign. His letter of resignation expressly states that he had no trust or confidence in the Board and explains his rationale for that.

287. We return to the more difficult issue of whether the respondent had reasonable and proper cause for its actions. Ultimately, we concluded that it did not: first it had stepped outside its policy and the government guidance; it had chosen to reveal parts of the Boniface report but not others. Secondly, the reason for so doing was on our finding tainted by unlawful discrimination because it was materially influenced by the fact that the claimant had made protected disclosures.

288. For the same reason we concluded that the respondent did not have a fair reason for dismissal. The cause of the breakdown in trust and confidence were the unlawful detriments. We remind ourselves of the relevant legal principles: where an employer asserts that there has been "a loss of confidence and trust" which is based upon or arises out of "the fact that the [employee] had made complaints of... discrimination", the breakdown of trust and confidence will not be "properly separable" from the doing of the protected acts (Panayiotou, per Lewis J at para 53, citing Woodhouse v West Northwest Homes Leeds Ltd [2013] IRLR 773). Whilst the authorities are directed at the scenario where a respondent dismisses a claimant, they must be of equal application to a scenario where a claimant resigns in circumstances where the resignation is brought about because of a breakdown of trust and confidence caused by the respondent's reaction to the whistleblowing, and where the respondent relies upon that breakdown as a fair reason for dismissal.

289. Whilst the claimant's evidence was that the first and second detriment of themselves may not have caused him to resign, he was firm in his account that taken together and cumulatively, and in light of the Letter, they caused his resignation. There is no viable argument for affirmation in the circumstances where the claimant raised complaints about the first two detriments which demonstrate that he had not waived the breaches, and then resigned directly in response to the third.

290. The claim of constructive unfair dismissal is therefore well founded.

S.103A ERA 1996

291. Since we have concluded that there was a breach of the Malik term, we must next consider whether the reason or principal reason in the respondent's mind for that conduct was the protected disclosures (applying Wyeth). We remind ourselves that the burden is on the respondent to show its reason. Our analysis above in relation to the detriments is pertinent and will not be repeated here. It should be understood that it is adopted in respect of this claim.

292. Whilst at first blush it might appear that that since the claims in respect of all three detriments succeeded, it would inevitably follow that the principal reason for dismissal was the protected disclosures, we have concluded on reflection that it does not. That is because the claimant's evidence was that he would not have resigned in relation to the first or second detriment, and manifestly, they did not immediate cause him to do so (although he did not waive them). The principal reason for his resignation, i.e. the principle reason why he accepted the respondent's repudiatory breach of contract and therefore brought the contract to an end, was because of the third detriment, the Letter. In relation to that, as our analysis shows, there were a myriad of reasons for its form and content, only two of which were protected disclosures. Consequently, whilst we have found that the respondent has failed to show that the protected disclosures were no influence whatsoever on the decision which caused that detriment, we did not conclude that they were *the* reason, or the principal reason, for the content of the Letter. The evidence shows that they were not.

293. The claim is therefore not well founded and is dismissed.

Reductions to the award: Just and equitable reductions and contributory conduct

Just and equitable reductions

294. The Tribunal's power to order compensation for unfair dismissal are addressed in sections 118 to 126 inclusive of the ERA 1996. Potential reductions to the basic award are addressed in section 122. Section 122(2) provides:

> "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

295. The compensatory award is dealt with in section 123. Under section 123(1)

> "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

296. In determining the loss sustained, as was observed in Software 2000 Ltd v Andrews [2007] ICR 825 at para 31 "it is plainly material for a tribunal to consider what would have happened had no dismissal occurred." This is sometimes referred to as the 'counterfactual position.'

294. Guidance as to the approach to be taken in constructive unfair dismissal

cases was provided in Shittu v South London & Maudsley NHS Foundation Trust [2022] IRLR 832 when Mrs Justice Stacey noted at 78-79 that where there are multiple reasons for a resignation, the Tribunal's task is to

> *"disaggregate the reason(s) for resignation that were in response to a repudiatory breach by the respondent from reasons for resignation that were for other reasons… to seek to identify what losses were attributable to unlawful conduct - whether discrimination or unfair dismissal - and what were not."*

297. S.123(6) ERA 1996 permits a Tribunal to make a reduction to the compensatory award to reflect the likelihood that a claimant would have been fairly dismissal had a fair process been followed (see Polkey v A.E Dayton Services Ltd [1988] ICR 142, HL). It is not an "all or nothing" question but permits degrees or percentage chances (see para 96 of the Judgment).

298. The Polkey approach requires a predictive exercise, focusing on the employer's likely thought processes: Attrill v Granchester Construction (Eastern) Ltd (2013) UKEAT/0327/12/LA, [2013] All ER (D) 364 (Feb).

299. The burden is on the employer, not to prove any fact on the balance of probabilities, but to satisfy the tribunal that that future chance of dismissal would have happened: Grayson v Paycare (a company limited by guarantee) (2016)UKEAT/0248/15, [2016] All ER (D) 31 (Jul), [2016] ICR D13 per Kerr J at [17], [32], [46], [48], [51].

300. Furthermore, the Tribunal may alternatively consider whether the claimant's employment would have ended for some other reason at a certain point, and so limit compensation to a period during which the claimant's employment would have continued but for the unfair dismissal (O'Donoghue v Redcar & Cleveland BC [2001] EWCA Civ 701 at paras 44 and 53).

301. However, if it adopts that approach, the Tribunal must be 100% certain that a dismissal would have occurred within that period (Zebrowski v Concentric Birmingham Ltd [2017] UKEAT/0245/16/DA per Mrs Justive Laing at para [34).

302. Where there is uncertainty as to whether employment would have continued, the percentage approach is the appropriate one to adopt in making any Polkey reduction (see Laing J in Zebrowski at paragraph 54:

> "In other words, in my judgment, the approach of the Court of Appeal in O'Donoghue, properly understood, is that it is only open to an ET to limit compensation to a period as opposed to making a percentage deduction where the ET is 100 per cent confident that dismissal would have occurred within that period…."

303. The approach to be taken in respect of both of those issues was set out in Software 2000 Ltd v Andrews and ors [2007] ICR 825. In essence,

303.1. A tribunal must assess the loss flowing from a dismissal, using common sense, experience and a sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

303.2. If an employer asserts that the claimant might or would have been fairly dismissed had a fair process been followed, or would not have been employed indefinitely, it must adduce relevant evidence to establish the chance that a future dismissal would have occurred. The Tribunal must assess that evidence against all the evidence available on the point, including the claimant's own evidence.

303.3. The Tribunal may conclude that the evidence is insufficient to determine when a fair dismissal would have occurred had a fair process been followed, however, it must still make an assessment of whether there was a realistic chance that a fair dismissal would have occurred. It must do so on a percentage basis, and cannot elect to avoid the issue because it is difficult - "the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

303.4. The Tribunal must assess the question of whether a fair dismissal would have occurred had a fair process been followed separately from the assessment on a percentage basis of whether the employment would have ended for some other reason. It cannot conflate the two processes.

303.5. Having considered the evidence, the Tribunal may determine:

303.5.1. That there was a chance of dismissal in which case compensation should be reduced accordingly;

303.5.2. That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

303.5.3. The employment would have continued indefinitely. (However, this last finding should be reached 'only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.')

304. An Employment Tribunal may take different approaches to a Polkey reduction under s.123(6) ERA. It can apply a percentage reduction to the compensatory award or it can limit compensation to a particular point in time; it cannot do both. Zebrowski.

Contributory conduct

305. Potential reductions to the compensatory award are addressed in section 123(6) which provides:

> "where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

306. A similar power is contained in relation to the basic award in s.122(2) ERA (as quoted above) in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the

basic award where it considers that it would be just and equitable (see Optikinetics Ltd v Whooley [1999] ICR 984, EAT).

307. Three factors must be satisfied if the Tribunal is to find contributory conduct (see Nelson v BBC (No.2*)* [1980] ICR 110, CA):

307.1. the conduct must be culpable or blameworthy

307.2. the conduct must have caused or contributed to the dismissal, and

307.3. it must be just and equitable to reduce the award by the proportion specified

308. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (Audere Medical Services Ltd v Sanderson EAT 0409/12).

309. In determining whether conduct is culpable or blameworthy, the Tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR56, EAT).

The Arguments

295. The respondent argues that the tribunal should reduce any award of loss of earnings caused by the claimant's dismissal on the grounds that it would not be just and equitable to award his full loss for three distinct reasons:

295.1. First, that the claimant would have resigned even if the respondent had not committed the repudiatory breaches represented by the unlawful detriments (the comments of Mr Mark and Mr Pomfret and the manner in which the Letter was sent to the claimant). Mr Bromige argues that the claimant would have resigned either on or shortly after Mr X took up his post as CEO because he could not consider working with someone he regarded as dishonest (and therefore unfit for the role of CEO) and secondly because he no longer had trust and confidence in his employer as he indicated in his email of 22 July to the auditor.

295.2. Secondly, the claimant had committed misconduct on two occasions (a) on 15 July in untruthfully telling Mr Cowie that he had not informed the insurers of the details of Mr Boniface's investigation when he had, and (b) in his conduct at the meeting on 23 August 2023[2]. The first Mr Bromige categorised as serious misconduct, the second as gross misconduct.

295.3. Lastly, Mr Bromige argues that the respondent's approach to the disclosure of the Letter was caused by the claimant's conduct, which he argues was culpable, in the manner in which he made separate reports to the respondent's insurers and auditors whilst the Boniface investigation into his whistleblowing complaints was ongoing. In advancing that argument he suggested that Atkinson v Community Getaway Association [2015] ICR 1 was authority for the proposition an employee's conduct can be taken into account (so as to reduce compensation) in a constructive unfair dismissal if it was causative of the employer's breach of contract.

[2] This was put to the claimant in cross examination although not addressed in the written submissions.

295.4. In fact, the ratio of Atkinson which is of application here is set out at para [34] - If an employee has committed a repudiatory breach of contract, unknown to the employer, which would have entitled the employer to dismiss, but the employee resigns because of the employer's own repudiatory breach of contract, which they accept through their resignation, the employee (a) is not precluded from bringing a constructive unfair dismissal claim by his own breach of contract, but (b) any award of compensation should reflect the likelihood that the employee would or could have been fairly dismissed for their breach.

296. Miss White argues first that if there had been a fair disclosure of the relevant parts of the Boniface report the claimant would not have resigned. Secondly, she argues that there is no prospect that the respondent would have dismissed the claimant for misconduct because the respondent still regarded the claimant as part of the dream team and wanted to prevent him from resigning even after 15 July.

Discussions and conclusions on reductions to the award

297. Applying the guidance in Shittu. We first identify the breaches of contract which were the cause of the claimant's resignation; they were the three detriments. Next, we consider the other causes, which were not repudiatory breaches of contract; the first was the claimant's belief that Mr Carne and/or the Committee had breached their duty as Trustees to act with reasonable care and skill in the conduct of the recruitment process, the second that Mr X had been dishonest and was not a fit and proper person to hold the position of CEO.

Polkey

298. It seems to use that this case gives rise to precisely the sort of difficult counterfactual situation which Elias P considered in Software 2000. We have to consider what would have happened if Mr Mark and Mr Pomfret had not made comments about the claimant breaching trust and if the respondent had disclosed the rationale of the Boniface report relating to its determination of whether the Trustees had breached their legal duties in the conduct of the recruitment process and its investigation, and in relation to Mr X's explanations for his CV.

299. Against that counterfactual background, the respondent must either identify evidence which would lead us to conclude that we are certain that the claimant would still have resigned on a specific date because he could not work with Mr X and because he did not and could not trust the Trustees in that scenario, if compensation is to be limited to a particular point in time, or identify evidence that there was a chance of his resignation taking place, so as reduce the compensation by that percentage.

The claimant's evidence on the counterfactual scenario

300. In his evidence, the claimant stated that:

300.1. he might have been persuaded to continue in post and to work with Mr Carne as chair of the Trustee's, notwithstanding his belief that Mr Carne had overseen a failure of policy, 'marked his own homework' in investigating that, and overseen the appointment of an individual whom the

claimant regarded as dishonest. The claimant suggested that in order for that to have happened, there would have had to have been a great deal of apology and actions in relation to the concerns he had raised.

300.2. In relation to Mr X, the claimant stated his view that the explanation for the inaccuracies in the dates in the CV (to avoid disclosing a termination covered by a compromise agreement) was not credible, that he would still have considered the CV to contain deliberate misrepresentations, and that he would have resigned because he could not have worked with him.

300.3. Lastly, the claimant stated that he could not have worked with the Trustees if the reason for their confirmation of Mr X's appointment was that they had accepted Mr X's explanation for the inaccuracies. He explained that he would have required the Trustees who were involved in the process to have stepped down before he could have continued in his post.

301. That evidence, it seems to us, is consistent with the claimant's allegations of negligence and breach of trustees' duties which the claimant levelled at the Trustees in his correspondence with them and in his resignation. Whilst allowing for the fact that the tone and force of those beliefs would inevitably have been amplified by the conduct we have found to be unlawful detriments, the beliefs themselves were formed prior to those events; on 18 June the claimant had described his relationship with the Trustees as 'starting to fracture', and by 22 July the claimant had concluded that Mr X's actions constituted fraud and the Trustees had been negligent in appointing him. Given that the Trustees had ratified the decision to appoint Mr X on 12 August, the effect of the claimant's evidence could be regarded as indicating that he could not work with any of the Trustees.

302. However, we have to consider whether that approach would have altered if the claimant had been provided with the sections of the Boniface in which Mr Boniface considered that there was insufficient evidence to demonstrate that Mr Carne or any of the Committee had breached their trustee's duties in the manner of the appointment of Mr X. The short answer is that it would probably not have changed, because the claimant regarded Mr Boniface as lacking the necessary specialist knowledge of charities law to make that assessment. However, the evidence clearly demonstrated how passionate and committed to the respondent and its charitable purposes the claimant was; they were matters which were deeply embedded in him through his long service to the respondent and his profound belief in its values and purpose. We note in that regard that he continued to hold the gambling license until November 2021 so as to assist the respondent, notwithstanding the deeply acrimonious nature of his departure. Similarly, even as late as 20 August both Mr Carne and Mr Pomfret remained convinced of the value the claimant offered to the respondent and sought to persuaded him not to resign.

303. Standing back and assessing that evidence in the round, we cannot be certain that the claimant would have resigned shortly after Mr X took up his post on 22 September, as the respondent argues. We reject the respondent's argument that compensation should therefore be limited to that point. However, we are persuaded that there was a high probability the claimant would have resigned, even were the respondent to have disclosed the full Boniface report and the Stone King advice to him, and entreated him to remain as COO. The claimant simply could not see past his unshakeable conclusion that Mr X had

been dishonest if not fraudulent in completing his CV; the claimant's evidence on that point was heartfelt and cannot be ignored. In those circumstances we have concluded that there is a 75% chance that the claimant would have resigned even if the breaches of contract had not occurred, and therefore the appropriate Polkey deduction is 75%.

Misconduct dismissal

304. The difficulty with the respondent's argument that it would or could have fairly dismissed the claimant for misconduct is more binary and less an issue of nuance. Mr Bromige characterised the first act of alleged misconduct (the claimant's inaccurate description to Mr Cowie of the detail he had shared with the respondent's insurers on 15 July) as misconduct. The claimant accepted that a disciplinary investigation would have occurred in relation to that matter. However, given that the respondent was desperate to retain the claimant in his post, as is evidenced by their efforts to persuade him to reconsider his resignation, we conclude that at most the claimant would have received a firm reprimand or a written warning. We were not persuaded that there was any chance that he would have been dismissed for that matter alone.

305. The second incident of alleged misconduct was the claimant's conduct on 23 August. Whilst the claimant accepted that it would reasonably have been investigated through the disciplinary procedure had he not resigned, we have to consider whether the claimant would have acted as he did, had the discussion with Mr Pomfret on 26 July not occurred. That is the relevant counterfactual situation. We are not persuaded that the claimant would have reacted as he did in that circumstance; the evidence of both parties was that it was the sight of Mr Pomfret that was the catalyst for the claimant's unattractive tirade. There was no evidence that the claimant had ever acted in such a way before; it was entirely out of character for him. In consequence, we are not persuaded that the claimant could or would have been fairly dismissed - the misconduct would not have occurred but for the respondent's breaches of contract.

Contributory conduct

306. The claimant's evidence was that he would not have resigned if the only detriment to have occurred were his discussion with Mr Mark on 22 July, and that it was unlikely that he would have resigned if the respondent's breaches of contract were limited to that detriment and that represented by his discussion with Mr Pomfret on 26 July. However, the claimant was clear that the Letter was the key reason for his resignation. We accepted his evidence on each of those matters. As it was the Letter that brought about his resignation, we must consider whether the claimant committed culpable or blameworthy conduct which caused or contributed to the respondent's decision to send the Letter in the form it did.

307. Mr Bromige argues that the respondent's decision in that regard was caused or contributed to by the claimant's conduct which is detailed in paragraph 271 above. He therefore argues that such conduct can and should be taken into account for the purposes of assessing remedy, placing reliance on Atkinson v Community Gateway Association [2015] ICR ICR.

308. We do not agree that Atkinson is authority for the proposition that Mr Bromige argues for in paragraph 83(d) of his submissions. It is authority for the

proposition (contained at paragraph at [34]) that (a) the fact that an employee has committed a repudiatory breach prior to his acceptance of his employer's repudiatory breach of contract does not prevent him pursuing a claim for constructive unfair dismissal in relation to that breach, because the obligations under the contract (including the Malik implied term of trust and confidence) subsist until a party accepts repudiation of them, and that (b) in those circumstances, the Tribunal would be entitled to reduce any award to reflect the percentage chance that the employee could have been fairly dismissed for his breach of contract, had the respondent known of it.

309. It was unclear to us whether Mr Bromige was seeking to argue, whether on the basis of Atkinson or more broadly under the just and equitable principle, that a Tribunal could reduce an award to reflect the extent to which a claimant's conduct had caused the respondent to act in repudiatory breach of his contract, even if that conduct was not culpable or blameworthy in the BBC v Nelson sense. If that was his argument, we reject it, because that is no authority to support that approach. If his argument was in fact that contributory conduct is a principle of law which applies equally to both dismissals by an employer and resignations, we accept that argument.

310. We therefore considered whether the conduct Mr Bromige had identified as having caused the respondent to write the Letter in the form it did, which is recorded at paragraph 271 above was blameworthy or culpable. We do not find that it can properly be characterised in that way – for an acting CEO of a charity who may be personally liable for losses flowing from a breach of his fiduciary and/or charitable duties to indicate that he intends to take legal advice and/or to raise a grievance about matters of governance which affect the charity and relate to his performance as its acting CEO and COO is neither blameworthy nor culpable. Similarly, suggesting that information relating to those governance concerns, including the fact that a formal whistleblowing complaint had been made, should be disclosed to the insurers is not culpable; it may be that the claimant was adopting the most stringent and exacting approach to his duties under the Insurance Act, and that caused frustration, but that is a far stretch from misconduct or culpable action. In the same vein, whilst the claimant's desire to be provided with a full copy of the Boniface report caused the respondent concern, that was because of the content of the report (which the claimant did not know) and the likelihood that it would inflame the claimant's objection to the CEO's appointment, and not because of the nature of the request. It is not, in our view, (as a matter of general principal) misconduct to ask to see a report which a policy does not provide a right to see, and it was certainly not culpable or blameworthy in the context of this case. Lastly, it is absurd to suggest that it was culpable or blameworthy to report the unlawful actions of two trustees to a third trustee, where those actions were in breach of s.47B ERA.

311. We therefore decline to make any reduction to the award on the basis of contributory conduct.

312. The compensation to be awarded to the claimant will be determined at a remedy hearing listed on 9 and 10 April 2024, if not agreed between the parties beforehand.

Employment Judge Midgley

Date 22 February 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

22 February 2024

Mr R Hulbert
FOR THE TRIBUNAL OFFICE