EMPLOYMENT TRIBUNALS

Claimant:	Mr Amar Khan	
Respondent:	(1) Novai Limited and (2) Mr James Rawlingson	
Heard at:	Reading	**On: 12, 13, and 14 February (in chambers discussions on 21 March 2024)**
Before:	Employment Judge Gumbiti-Zimuto Members: Mrs M Thorne and Mr F Wright	

Appearances
For the Claimant: In person
For the Respondent: Mr S Keen, counsel

RESERVED JUDGMENT

The claimant's complaints are not well founded and are dismissed.

REASONS

1. In a claim form presented on 29 April 2022 the claimant made complaints of unfair dismissal, automatically unfair dismissal because of protected disclosure and detriment because of protected disclosure. The respondents defend all the claims.

2. At a preliminary hearing on the 27 January 2023 the issues to be decided in this case were set out in a case summary.

3. The claimant gave evidence in support of his own case and also relied on evidence from Miss Gemma Waddington and Dr John Maddison. The second respondent Mr James Rawlingson gave evidence on his own behalf and in support of the case of the first respondent (referred to as 'the respondent') and also relied on the evidence of Professor Francesa Maria Cordeiro. We were provided with a trial bundle containing 1012 pages of documents. From these sources we made the following findings of fact which we considered necessary to decide the issues in this case.

4. The respondent, a biotechnology business, was incorporated on 12 February 2020. The claimant and Professor Cordeiro were both statutory directors from that date. Prior to 12 February 2020 the claimant and Professor Cordeiro were both directors of a company called Illustratum Limited, incorporated on 18 September 2018 and dissolved on 5 July 2022. There is no evidence given by the claimant to support his assertion that he was an employee of Illustratum, there was no document produced which showed what the claimant's role with Illustratum was or the basis on which he did any work for Illustratum, whether the claimant was an employee, there was no contract of employment for the claimant produced which referenced Illustratum.

5. The claimant was employed by the respondent as CEO and CFO. The claimant's employment with the respondent commenced on 12 February 2020. The respondent was a start-up biotechnology business and one of the most important aspects of the claimant's role involved raising finance from investors.

6. The claimant is an accountant. Professor Cordeiro has a medical degree, is a member of the Royal College of Physicians, a Fellow of the Royal College of Ophthalmologists and Professor in Retinal Neuro Degeneration and Glaucoma Studies. Professor Cordeiro has a particular research interest in retinal neuro degeneration and invented a technique known as Detecting Apoptosing Retinal Cells (DARC). The respondent was set up by the claimant and Professor Cordeiro to commercially exploit DARC.

7. Mr Rawlingson joined the board of the respondent becoming a statutory director and chairman from 1 July 2021. Over time after working with the claimant Mr Rawlingson became concerned about the claimant's suitability for the role he held as CEO and CFO for the respondent. It was Mr Rawlingson's view that the respondent had poor strategic leadership.

8. At a board meeting on 10 September 2021 a discussion about strategy took place, there was a difference of opinion between the claimant and Mr Rawlingson. The claimant wanted to press ahead with the biomarker side of the business as this would generate income. There was also the diagnostic aspect of the business which was at development stage where it generated no revenue. The strategy question turned on whether the business pressed ahead with biomarker side or whether the strategy was to pursue the diagnostic.

9. Mr Rawlingson arranged a strategy session for the board. The claimant was not enthusiastic about this, his view was that the meeting was "*very strange*" with basic conversation regarding items for which the respondent "*did not have data for or were already in the business plan*". Mr Rawlingson described the claimant as having a rant at the meeting. The claimant denied that he behaved in this way.

10. By the autumn of 2021 the claimant and Mr Rawlingson were at odds about strategy for the business. Mr Khan's view was that the role of the board was to focus "*on governance and input into strategy not drive it."* The claimant

considered that they had a *"perfectly good plan that investors had invested in".* In contrast Mr Rawlingson's view was that it was the board's responsibility to set strategy.

11. Mr Rawlingson arranged for a second strategy day. There was an exchange of emails between Mr Rawlingson and the claimant in which Mr Rawlingson provided the claimant with a proposed agenda for the strategy day. In communicating about this Mr Rawlingson saw the claimant's conduct as a "*blatant challenge to him as chairperson".* Mr Rawlingson considered the claimant's behaviour *"was so bad that he might be ill."* Mr Rawlingson and Professor Cordeiro were concerned about the claimant's behaviour and considered that his health or stress might be the reason for it.

12. The claimant communicated in emails with different members of the board. The claimant in one email to members of the board stated of his relationship with Mr Rawlingson that it has *"irretrievably broken down"* and that he needed to have *"trust in the chair and a positive working environment".*

13. During December 2021 Mr Rawlingson told the claimant not to pursue fund raising activities until a settled strategy and approach was approved by the board. The claimant however ignored this instruction and continued to contact potential investors acting in contravention of his instructions.

14. On 13 December 2021 the claimant wrote to board members criticising Mr Rawlingson in very strong terms.

15. As a result of the email of the 13 December 2021 the board agreed that they would take advice on removing the claimant from his post. A decision to dismiss the claimant appears to have either been made or was being considered subject to advice from lawyers. The claimant was due to be attending a conference in Hawaii in January 2022 and the board decided that the claimant should attend this as planned with any dismissal only taking effect after his return.

16. A board meeting, at which the claimant was present, took place on 15 December 2021. We were provided with a Teams recording of this board meeting. The Tribunal were unable to draw any conclusions about the competing positions in respect of the issues in the case from viewing this recording. The conduct of the meeting does not betray the intention of the board to dismiss the claimant.

17. Before the claimant went to Hawaii Mr Rawlingson contacted the claimant in an email on 5 January 2022 instructing him not to speak to shareholders or third parties about funding or to sign contracts that bind the respondent regarding fund raising.

18. The claimant reacted to the email of 5 January by contacting a solicitor. The claimant's email was not seen by the board at the time. The email indicates an intention on the part of the claimant to ignore the instructions given by Mr Rawlingson.

19. The claimant, in disregard of Mr Rawlingson's instructions, contacted investors making clear his intention to seek shareholder approval to remove Mr Rawlingson *"in the best interests of the company".* The claimant was very critical of Mr Rawlingson in his email communications with investors. Mr Rawlingson's position is that the claimant was *"lying"* about him. It is to be emphasised that the board was unaware of this communication at the time.

20. The claimant states that in January 2022 he became aware that test data failed a third-party review. The respondent denies that the data failed. Professor Cordeiro denied that the data failed she said the relevant results were based on a small number and that funding was sought to get more results to get the data.

21. The Tribunal have not attempted to resolve the dispute about data. Our conclusion on the data is that Professor Cordeiro and Mr Rawlingson did not accept as a fact that the date failed and further the evidence that was given by those with knowledge of the data, other than the claimant did not support a suggestion that the data failed. Only the claimant asserted that the data failed at various times to board members and investors.

22. On 17 January 2022 the claimant wrote to Mr Karl Keegan, a board member.

23. On 19 January 2022 the claimant wrote to the solicitor asking *"can I have documents drawn up for a shareholder vote so that I can remove the chair"*.

24. The claimant took steps on 26 January 2022 to remove directors access to the Novai Drop Box and deactivated Professor Cordeiro's access to the respondent's LinkedIn account. These actions were insubordinate and indicated an intention ignore instructions from the board.

25. The claimant wrote to the solicitor in the following terms on 25 January 2012:

> "Can you draft a legally binding document that basically says that if there was a vote on removal of the chairman, the party X has guaranteed to vote in favour of this.
>
> These will be sent to the three main investors who will sign, provide to the rest of the board who will agree to then vote James off avoiding shareholder vote."

26. On 27 January 2022 the claimant emailed Mr Rawlingson, in his email the claimant set out his concerns about strategy, the need to pursue fund raising and his intention to continue to present to potential investors. The letter concludes:

> "I will write to you next week having discussed with the other board members and major investors as the best course of action. This is quite a serious situation form your perspective as you had no authority to make some of those interactions in your email

> dated the 5th January based on the legal framework that this company operates under."

27. The claimant contacted investors and board members setting out his complaints about Mr Rawlingson and his disagreement about strategy.

28. On 30 January 2022 the claimant wrote to Ms Natalie Pankova, a board member, stating that the data presented to shareholders in June 2021 was materially different to what was published in ARVO and that the data did not pass a "*third party review".* The respondent contends that the claimant is wrong about this.

29. Professor Cordeiro explains that ARVO stands for Association of Research in Vision and Ophthalmology. ARVO invites "abstracts" for submission to its publications. An Abstract is not the same as a research paper. A scientific research paper unlike an abstract is fully peer reviewed. An abstract is a "*much smaller piece in which a hypothesis is stated, the method of data collection is explained, and a report is produced to show the data unequivocally tests the hypothesis".* Professor Cordeiro states that the claimant *"is completely wrong"*: misunderstanding of the ARVO abstract has led him to the flawed conclusion that the data is failed.

30. Professor Cordeiro refutes any suggestion that the data was false, manipulated or misrepresented. She explains the ARVO data was good, it was not weak it presents preliminary data.

31. The claimant relies on email exchange on 30 January 2022 with Ms Pankova which was copied to Mr Keegan in which he again references failed data. The email exchange also shows that the claimant is aware that he is to be dismissed when he writes, *"it should not be me who goes, I was right all along but normally it is the person who is right who leaves to protect the group who were wrong."*

32. Mr Rawlingson sent the claimant a letter dismissing him with immediate on 31 January 2022. The claimant received the letter of dismissal on that day.

33. On 9 February 2022 the claimant was declared a bad leaver at the board meeting where his dismissal with immediate effect on the 31 January 2022 was ratified.

34. An employee has the right not to be unfairly dismissed (section 94 Employment Rights Act 1996 (ERA)). Section 108 (1) ERA provides that section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination. Section 108 (2) ERA provides that sub-section (1) does not apply if section 103A ERA applies.

35. Section 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

36. Section 43A ERA provides that a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

37. 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.

38. There is a relevant transfer when there is a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity or a service provision change (Regulation 3(1) of The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)). A relevant transfer shall not operate to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, that would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferor (Regulation 4 (1) TUPE).

39. The claimant states in his evidence that there was a TUPE transfer from Illustratum Limited to the respondent. There is no evidence to support this assertion by the claimant. There is no other evidence that the claimant was an employee of Illustratum. The claimant gave evidence that he had a shareholding in Illustratum but did not state that he was an employee or produce any contract of employment or other evidence to show that he was an employee of Illustratum. In his evidence the claimant said that his employment contract with the respondent “was the same contract that transferred from Illustratum”.

40. This is clearly wrong, and we reject this assertion, not only is it unsupported by other evidence it does not appear in the claimant’s witness statement and emerged as a spontaneous piece of evidence during the claimant’s questioning. The document purporting to be the claimant’s contract of employment, drafted by the claimant, states that the claimant’s employment commenced on 1 February 2020. The document was created some time after that date it was not established when, the document is unsigned and no signed copy exists. It was never signed. It is not clear whether the claimant’s contract was ever specifically agreed with the board and if so when that agreement was made.

41. Professor Cordeiro makes no mention of Illustratum. TUPE transfer of the claimant from Illustratum to the respondent is not something identified in the claimant's ET1 claim form or particulars of claim (a document prepared by solicitors). It is not a matter referenced anywhere in the case summary or the list of issues discussed with the Employment Judge on 27 January 2023. In the case summary it specifies that the *"the dates of employment are not agreed"* and it specifies that there was an issue between the claimant and the respondent as to whether the claimant had 2 years continuous employment and further issues identified included "*when did the claimant's continuous employment commence?"* and *'when did the claimant's employment terminate?"* If it was the claimant's case that he was subject to a TUPE transfer it is surprising that it does not appear in the ET1, particulars of claim or the case summary produced after discussion with the Judge at preliminary hearing.

42. We have concluded there was no TUPE transfer of the claimant's employment from Illustratum to the respondent. The claimant's employment with the respondent commenced when the respondent came into existence on 12 February 2020.

43. The claimant's employment ended on the 31 January 2022 when the claimant was dismissed by Mr Rawlingson. The board meeting on the 9 February 2022 endorsed the action that had been taken by Mr Rawlingson and declared the claimant a bad leaver.

44. The claimant does not have two years continuous employment and therefore because of section 108 ERA he does not have the right to bring a claim for ordinary unfair dismissal pursuant to sections 94, and 98 ERA.

45. The claimant's contentions of what the protected disclosures were that he relied upon was a developing concept during the hearing. Towards the end of his evidence the claimant was asked to identify the matters that he relied on as the qualifying disclosures. The claimant identified a number of matters.

    a. On 17 January 2022 email to Mr Keegan (p364): There is no disclosure of information tending to show one of the matters specified in section 43B (1) ERA. In this email the claimant set out his opinion of Mr Rawlingson.

    b. On 26 January 2022 an email to Mr Keegan (p750): In this email the claimant set out a number of matters which reflect his dissatisfaction with the approach taken by Mr Rawlingson there is no qualifying disclosure contained in this email.

    c. On 27 January 2022 email to Mr Rawlingson copied to other members of the board and employees of the respondent (p693): This was the claimant's response to the direction given to him by Mr Rawlingson on 5 January 2022. There is no disclosure of information here, there is set out by the claimant his perspective of matters, an indication of how he

intends to act and an assertion that Mr Rawlingson "*had no authority to make some of those interactions in email dated 5th January".*

d. On 27 and 28 January 2022 emails to Mr Keegan (p685): In the email of 27 January the claimant says: "*We don't have the data it does not exist. I cannot raise on this abstract. We do not have any possibility of proper publication to support the planned raise. So we need to pivot back to the biomarker and collect data to enable a further raise on the diagnostics via two sponsored trials."* In the email of the 28 January the claimant asks: "*do you this think data set is sufficient to raise £6m plus raise – would be interested to get both your views on this*". There is no disclosure of information tending to show one of the matters specified in section 43B(1) ERA.

e. On 30 January 2022 email to Ms Pankova (p441-443): In this email to Ms Pankova, a member of the board, the claimant says that he is being asked to *"raise money on data which does not agree to the hypothesis".* In this the claimant's understanding of the data is set out. It is not an understanding shared by Professor Cordeiro. We are satisfied that there is no disclosure of information here at all. This email is part of a discussion about strategy for the respondent which at this stage was not agreed upon and the claimant is expressing his position to a member of the board. This discussion is at the heart of the dispute between the claimant and Mr Rawlingson, the claimant has an understanding of the data which he uses in his argument against Mr Rawlingson.

46. The conclusion of the Tribunal is that there is no qualifying disclosure made by the claimant. There was no protected disclosure.

47. The claimant has not made a protected disclosure and so could not have been dismissed because of making a protected disclosure. The claimant could not have been subjected to a detriment because of making a protected disclosure.

48. Had we concluded that there was a protected disclosure we would in any event have concluded that the protected disclosure was not the reason for the claimant's dismissal. The decision to dismiss the claimant was made before the 15 December 2021 board meeting. The board then sought legal advice and had prepared a draft letter of dismissal. All of which occurred well before the claimant' supposed discovery about the data and any alleged disclosures in January 2022.

49. We consider that had the claimant been able to show that there was a protected disclosure and that it was the reason for the claimant being declared a bad leaver it is arguable that this was a detriment for which he would be entitled to a remedy if the benefit of the shareholding arises from his employment contract. We have not grappled with such issues to try and reach a conclusion as it does not arise because there was no protected disclosure.

50. The claimant's complaints are not well founded and are dismissed.

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Employment Judge Gumbiti-Zimuto
Date: 9 April 2024

Sent to the parties on:
15 April 2024 .....

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For the Tribunals Office

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