EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101760/2022

**Final hearing held on the Cloud Video Platform
On 21, 22, 23, 24 and 25 August, 4, 5, 6, 7 and 8 December 2023 and 9 January 2024**

**Employment Judge A Jones
Tribunal Member A Mathieson
Tribunal Member N Quinn**

Mr E Stack	**Claimant** **In person**
Mr J Maxwell Hobbs	**First Respondent** **In person**
Mr W Howell	**Second respondent** **Represented by** **Mr Gibson, of counsel** **Instructed by BTO solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous decision of the Tribunal is that the claimant's claims fail and are dismissed in their entirety.

Introduction

1. The claimant lodged a claim on 5 April 2022 in which he complained that he had been unfairly dismissed, automatically unfairly dismissed and subjected to detriments for having made protected disclosures and in terms of unpaid wages. He also claimed that he had been subjected to discriminatory treatment on the basis that he was perceived as having a disability in terms of the Equality Act 2010.

2. The case has a long procedural history in which the claims against the Company, SuperRational Ltd ('SR') for whom the claimant worked were withdrawn when it went into liquidation and the Tribunal has also made determinations on the issues of the claimant's employment status and whether protected disclosures were made by him. The Tribunal's judgment of 15 December 2022 sets out the findings that the claimant made four protected disclosures between 5 October 2021 and 26 January 2022. These disclosures were essentially the same, that is that the claimant believed that SR was either trading insolvent or at the risk of doing so.

3. In common with previous hearings, the final hearing took place on the Cloud Video Platform. The respondents are based in England and the claimant had no objection to proceedings being conducted remotely. The claimant continued to represent himself in relation to his claims although he was accompanied by his partner during the hearing. Mr Maxwell Hobbs represented himself and the second respondent, Mr Howell, was represented by Counsel. The claimant's claims were set out in a Scott Schedule which also included the respondents' positions in relation to those claims. A joint bundle of documents was lodged, and parties had sought to agree a list of issues. It was agreed that the claimant and Mr Maxwell Hobbs could have an aide-memoire when giving evidence in chief and copies of these documents were provided to all parties. After discussion, although Mr Howell was classified as second respondent (having been added late in the proceedings), because he was the only respondent who was legally represented, it was agreed that his agent would cross examine the claimant's witnesses first and he would give evidence after the claimant's case. It was also agreed that Mr Maxwell-Hobbs would give evidence immediately after Mr Howell.

4. The claimant gave evidence on his own behalf and also called a number of former colleagues: Mr Koterwas ('TK'), who had been the Chief Technical Officer of SR; and Ms Cairns, Ms Wakefield and Mr Disley all of whom had worked with the claimant during his employment. Mr Maxwell Hobbs ('JMH') gave evidence as did Mr Howell ('WH'). Ms Houshmand-Howell ('RHH'), who

was the Chief Marketing Officer of the company and is the wife of Mr Howell, also gave evidence.

Issues to determine

5. The Tribunal was required to determine the following issues:

Protected disclosures

i. Did any of the treatment set out in paragraphs 2 and 5 of the parties draft list of issues amount to a detriment in terms of section 43B Employment Rights Act 1996 ('ERA')?

ii. Insofar as any such conduct did amount to a detriment was the sole or principal reason for the detriment that the claimant had made one of the protected disclosures set out at paragraph 42 of the Tribunal's judgment of 15 December 2022.

iii. Is either the first and/or the second respondent liable for subjecting the claimant to such detriment.

Disability discrimination

iv. Did the first respondent perceive the claimant to be a disabled person for the purposes of section 6 Equality Act 2010 ('EA') during the material time being on or around 10 November 2021?

v. If so,

i. did the first respondent subject the claimant to direct discrimination for the purposes of section 13 EA by dismissing him.

ii. Did the first respondent subjected the claimant to harassment in terms of section 26 EA by sending an email on 10 November

making reference to the claimant's medical history and making allegations regarding the claimant's alleged behaviour.

Remedy

vi. If the claimant succeeds in relation to his claims, what compensation should he be awarded?

Findings in fact

6. Having considered the evidence, the documents to which the Tribunal was referred and submissions of the parties including the authorities to which reference was made, the Tribunal found the following facts to have been established. The Tribunal would also note that the evidence led at this final hearing was far more extensive than that led at the hearing to determine whether protected disclosures had been made. Therefore, if there is any conflict between the findings in fact made at that hearing and those set out below, those set out below take precedence.

7. The claimant was the founder and Chief Executive Officer of SR from its inception until JMH took over the role of CEO in December 2015. Around the same time WH formally joined the company and both he and JMH became directors of SR.

8. SR was a limited company which sought to develop an online cloud-based networking platform to enable artists and creative industries to collaborate. It was governed by a board of directors and an advisory board.

9. The claimant was employed under a service agreement of 1 January 2016. He reported to JMH as Chief Executive. He was also a significant shareholder and statutory director of SR. WH, RHH and TK were also executive directors of SR. WH was a shareholder but TK and RHH were not shareholders. All executive directors reported to JMH and other than him, were of equal seniority.

10. SR achieved investment from a company called Velocity late 2019 early 2020 and this investor had a place on the Board as a result. Velocity was represented by a Mr Hirani on the Board.

11. There were tensions between the claimant and TK in 2020 regarding the product which was being developed and JMH arranged for coaching for the claimant to help manage the relationship. He did not arrange coaching for TK.

12. Tensions then arose between the coach identified and the claimant as he did not attend a pre-arranged session which she was providing free.

13. The financial performance of SR was not what had been anticipated and by 2021 was still operating at a loss. Efforts were ongoing to secure additional funding. The claimant and other directors had not been drawing their salaries by agreement and there were cash flow issues. By this time relationships between the executive team had become fractious and difficult.

14. By July 2021 relations between the claimant and RHH had become severely damaged. The claimant was unhappy with RHH's participation in a meeting on 22 July 2021 and was unreasonably of the view that she had undermined him.

15. The claimant sent RHH an email on Sunday 25 July 2021 when he knew she was on holiday with her family. RHH sought to resolve matters but the claimant indicated he was not happy with RHH's apology.

16. A meeting subsequently took place between TK, RHH and the claimant where attempts were made to improve relations between the claimant and RHH. These attempts were unsuccessful and RHH continued to find the claimant's behaviour towards her to be inappropriate. RHH was upset during the meeting.

17. A meeting took place between JMH, WH, RHH and TK in September 2021 at which concerns about the claimant's behaviour was discussed. TK informed the claimant of the discussion, and the claimant was angry that such discussion had taken place in his absence.

18. RHH continued to find the claimant's behaviour to her to be inappropriate and undermining. He wrote her long emails and slack messages. The claimant sought to exclude RHH from a meeting with a musician and criticised her for arranging a meeting without consulting him.

19. By November 2021 JMH had become involved in seeking to mediate between the claimant and RHH. By this stage it was RHH's intention to resign from her position because the relationship between her and the claimant had broken down.

20. The claimant sent an email on 28 September 2021 entitled 'worried director' raising concerns regarding the possibility of a bridging loan and the financial position of the company.

21. A meeting took place between the executive team on 5 October which became heated and was brought to a close by JMH for that reason. During the meeting the claimant sought to blame the financial difficulties being experienced by the company on others. The claimant was not responsible for the financial management of the company which was dealt with by JMH and to some extent WH. JMH and WH were of the view that the financial information being used by the claimant to argue his points at this meeting was inaccurate. While the meeting became heated and participants expressed themselves angrily on occasion, this was because the relations between the executive team had become fractious and that SR was in a difficult trading position.

22. The claimant sent a lengthy email to JMH, copied to other board members on 5 October 2021 indicating he did not want to have a discussion with JMH and would not take a call from him that day.

23. A scheduled 1:1 meeting took place between JMH and the claimant on 6 October. The claimant recorded the meeting. So far as JMH was concerned the agenda of the meeting was to discuss how to improve relations between the claimant and his colleagues. The claimant however wished to focus on the financial position of SR. JMH struggled to get the claimant to focus on wider issues of the company performance and in particular what was causing

the difficulties in the relationships between the claimant and other members of the executive team.

24. A board meeting of SR was scheduled to take place on 8 November. By this time the claimant had met with Mr Jamal Hirani who was representing the Investment Director to discuss the future of SR. That meeting had taken place without the knowledge or consent of the rest of the board other than TK who was also involved in the meeting. The claimant discussed with Mr Hirani the possibility of him (the claimant) taking over the running of SR on the basis that Velocity would make further investments to the company. Mr Hirani had not discussed these matters with those senior to him at Velocity. Mr Hirani did not have authority to make further investments in SR without seeking approvals from Velocity's investment committee. It subsequently transpired that Mr Hirani had been disqualified from acting as a statutory director at this time.

25. A remote pre-meeting took place prior to the board meeting of 8 November between the claimant, TK, and JMH. WH was not present at that meeting. At that meeting JMH instructed that no response should be given to any proposals which may be made by Mr Hirani at the meeting unless they were "immediately thrilling to us" and that there should be no answer to any proposal which should instead be discussed later. There was no dissent from this instruction from anyone present. This was a reasonable instruction given by a CEO to members of the executive management team. When JHM referred to 'us', he was referring to the board as a whole and not the specific interests of any individual. JMH had to leave the meeting in order to have a meeting with another potential investor.

26. The claimant recorded both the board meeting and the pre-meeting.

27. The claimant was agitated throughout the board meeting, knowing as he did what proposal was to be made by Mr Hirani. During the course of the board meeting, Mr Hirani made a proposal that JMH should step down from the board and as CEO, that WH should also step down and that claimant should take over the running of the business with TK. While Mr Hirani indicated that further investment would be dependent upon these steps being taken and

there was mention of the sum of £250,000, no specific guarantee of funding was provided by him and he did not have authority to make a guaranteed offer of funding.

28. The claimant indicated that he supported the proposal. This was in direct contravention of the reasonable instruction previously issued by JMH. JMH intervened to say that this was not something which could be answered in the call, but the claimant continued to voice support for the proposal. WH asked Mr Hirani whether he had spoken to the claimant on a 1:1 basis regarding this proposal and Mr Hirani said no, which was not true. The claimant did not correct Mr Hirani. The claimant indicated that he would have to work full time if he were to take over running the company. The claimant left the meeting as his son was going to hospital for a procedure. The claimant's conduct at the meeting undermined the positions of both JMH and WH. The claimant was aware of the proposal which was to be made by Mr Hirani in advance and had discussed this with him and TK in advance of the board meeting.

29. JMH did and was entitled to view the claimant's conduct at the meeting of 8 November as undermining both him and WH and amounting to gross misconduct.

30. On 9 November. WH sent an email to the other directors saying that in his view, liquidation was not the only option and that there were other possible options for investment into the company. WH and JMH had been having meetings with other potential investors around this time.

31. JMH and WH had discussions by text regarding the possible dismissal of the claimant on the evening of 9 November. JMH drafted a letter of dismissal on the evening of 9 November and/or early on 10 November having taken informal advice from contacts of his.

32. On 10 November at 7am the claimant sent an email to the other directors, the non-executive directors, Mr Hirani and Mr Weller at Evenlode, a company which had also invested in SR. This was one of the companies with whom WH and JMH had been having ongoing discussions regarding further investment. In his email, the claimant demanded an answer from WH and

JMH regarding the proposal which had been made by Mr Hirani. The reality of the position was that no firm proposal had been made by Mr Hirani, in that any firm offer of investment was subject to the approval of others at Velocity.

33. JMH did and was entitled to view the claimant's conduct at the meeting on 8 November, the content of his email of 10 November and the fact that the claimant had sent the email to investors and potential investors as amounting to gross misconduct. The claimant was attempting to affect a coup to oust JMH and WH from SR and to take over the running of the company himself. The claimant's focus on the financial position of SR was with a view to achieving further investment by laying responsibility for the company's underperformance with JMH and WH and thus requiring them to leave the company.

34. WH did not have the authority to dismiss the claimant and did not pressure JMH or anyone else to do so.

35. JMH sent an email shortly after having sent the letter of dismissal to the claimant to the recipients of the claimant's email of 7am. In that email JMH made reference to the claimant's mental health and a previous episode of illness. JMH did not believe the claimant to be suffering from any serious mental health issues or be disabled at the time of sending the email and made reference to the claimant's mental health in an effort to undermine him. JMH also set out in the email reasons for having dismissed the claimant.

36. On or around 10 November 2021, and after the letter of dismissal had been sent to the claimant, JMH began to put together statements from other members of the executive team regarding the claimant. The statement of RHH was based on a draft letter she had prepared to send the wider board and been dissuaded from so doing by JMH. The purpose of these statements was to provide justification in writing for the decision which had been taken to dismiss the claimant. The statements were not shown to the claimant although the general content of them was included in the email sent to him by JHM at 8.40am on 10 November.

37. The claimant responded to the email JHM had sent again copying in the wider group of recipients challenging the reasons for his dismissal.

38. WH and JMH sought to arrange a meeting with the claimant. They had discovered that Mr Hirani had been disqualified as a director and also wanted to discuss the future of SR.

39. The claimant emailed JMH and WH on 20 November setting out conditions for his attendance at any meeting and requesting information from them. He also stated "I believe the allegations you made about me in the emails you cc'd to the board and advisory board were defamatory. I am, however, prepared to put these questions aside, for now, to engage with you in good faith for the sake of the business." He also stated: "I look forward to pitching the business with you in the very near future." The claimant did not want to appeal against his dismissal at this time.

40. The claimant then sent an email dated 22 November to JMH and WH indicating that he was not willing to attend any meetings which were not recorded. He had not informed JMH or WH that he had already been recording meetings. He stated that "My current view is it would not be in our interests to meet as a board before 20th December."

41. JMH sent an email to the claimant and TK on 24 November, copying in WH and RHH informing them that Mr Hirani had been disqualified as a director for 10 years from 2013. He also stated that Mr Lindup, the COO of Velocity had asked for a meeting with the directors of SR and had expressed surprise that directors of the company had been asked to step down.

42. A meeting took place on 14 December between the claimant, JHM and WH. At that meeting possible investment was discussed and the claimant was informed that an exit plan had been agreed with TK. There was also discussion regarding a potential role for the claimant with SR going forward. The claimant suggested that JMH stand down as CEO and that WH become CEO or that the claimant himself could become interim CEO or chair of the company. The meeting became heated and it was suggested that a further meeting be arranged. The claimant agreed to a further meeting the following

day to discuss matters. The behaviour of all of those at the meeting was challenging and on occasion ill-tempered but did not amount to bullying or harassment. The claimant was not pressured into a further meeting. Had he not wished to take part in a further meeting, he would have refused to do so.

43. A further meeting took place on 15 December, which was recorded by the claimant. At that meeting there was further discussion of a role for the claimant in the company. No agreement could be reached on a role for the claimant and therefore there was no discussion of salary or terms for any role. The meeting became antagonistic and was ended after the claimant indicated he viewed that they had come to an impasse and that he would have a lawyer present on the next call.

44. JMH then emailed the claimant on 21 December suggesting that a member of the advisory board act as an independent moderator for their next call. The claimant responded the following day indicating that he was open to the possibility. However, he also went on to ask for information from JMH regarding the financial situation of the company.

45. JMH responded to the claimant by email of 23 December providing information regarding forecast and the balance sheet of SR.

46. There was no further contact by the claimant with JMH or WH until 19 January 2022 when a statutory demand for payment was served by solicitors on SR on his behalf. That demand indicated that if no payment was made within 21 days a petition for winding up of SR would be presented to the Courts. The sums related to salary the claimant claimed was due to him at that time and the claimant was aware that the respondent did not have the funds to make the payment.

47. A board meeting of SR took place on 26 January 2022 to discuss the statutory demand which had been made by the claimant. The meeting resolved that SR would instruct solicitors to deal with the demand on behalf of SR.

48. Solicitors wrote on behalf of SR on the instructions of JMH and WH to the claimant's agents disputing the statutory demand on the basis that the

claimant had agreed that his salary was to be deferred until the Company's position had improved such that it could afford to make such payments. The instructions given by JMH and WH were given in good faith and there had been agreement that the directors who were shareholders would in effect convert any unpaid salary into directors' loans. While that agreement had not been recorded, the directors had not been paid any salary for some time and the claimant had no at any stage indicated that such payment was now due. There was a recognition from all concerned that there simply weren't funds available to pay the directors.

49. Around 27 January JMH had discussions with the investor director of SR, Velocity, regarding a proposal to remove the claimant as a director of SR. While the investor director's policy was to abstain on board votes, Mr Tobin of Velocity had indicated to JMH that he supported the claimant being removed as a director.

50. The claimant sought to appeal against the decision to dismiss him by an email of 31 January 2022.

51. On 1 February and entirely unrelated to the claimant's email of 31 January, notice was served on the claimant that he had been removed as a director of SR.

52. Ongoing discussions took place between the claimant and those acting on behalf of SR for some months following 31 January with a view to resolving the outstanding issues between the parties.

53. Around 28 November 2022 a winding up petition was presented to the Court of Session on behalf of the remaining directors of SR together with the appointment of a provisional liquidator.

Observations on the evidence

54. The claimant's evidence was tainted by the negative view he had of both respondents. The claimant blamed them both for the failure of the company and the financial consequences of that. His evidence had to be considered in

that light. His evidence in chief was largely read from his aide memoire and while his evidence in terms of chronology of events was generally credible, it was clear that he was not willing to accept any responsibility for the events leading to his bringing of these claims. His evidence often lacked focus and appeared to be an attempt at challenging the criticism of his conduct towards colleagues rather than answering questions directly.

55. The Tribunal found Mr Koterwas to be a generally credible and reliable witness. He gave evidence in a direct manner and was clear when he could not remember particular dates or events. He was very careful in giving his evidence and appeared at pains to ensure that his evidence was as considered as possible. The evidence of Ms Wakefield, Mr Disley and Ms Cairns while credible and reliable was of limited value in determining the issues before the Tribunal. Other than Mr Koterwas, the witnesses were relatively junior employees who were not present during most of the interactions between the claimant and the respondents.

56. The Tribunal found WH and JMH to be generally reliable and credible. It was apparent that WH and the claimant had previously been very close friends and also that the relationship between the claimant and both WH and JMH had been entirely destroyed by the events leading to these claims being made. It was clear that that there remained a high degree of animosity between the parties regarding who each thought was to blame for the difficulties faced by SR and its subsequent insolvency. The animosity between the parties was apparent when both WH and JMH were answering questions put by the claimant, and their evidence had to be considered in that context.

57. The Tribunal found RHH to be an entirely credible and reliable witness and found that while she did not suggest that she would raise a Tribunal claim against the claimant, she had intended to bring to the attention of the rest of the board of SR her genuinely held view that the claimant treated her inappropriately at least in partly because she was the only woman on the board.

58. There was little in the way of genuine factual dispute between the parties. There was a dispute as to whether a meeting had taken place between the claimant, TK and RHH to mediate between RHH and the claimant. The Tribunal preferred the evidence of RHH in that regard. The meeting may not have been arranged as a formal mediation meeting, but the Tribunal accepted that a meeting had taken place between the three of them at which the relationship between the claimant and RHH was discussed and during which RHH had become upset. The meeting, in common with most of the meetings, was remote and that may have accounted for neither the claimant nor TK recognising that RHH was upset.

59. The only other significant issue of factual dispute was whether or not there had been agreement amongst the directors for their salaries to be deferred until such time as the company could afford to pay. While no agreement was committed to writing or recorded in minutes of any meeting, the Tribunal was of the view that there was clearly a tacit agreement between the executive directors who were also shareholders that when there wasn't enough money to pay their salaries, these would be deferred. The Tribunal formed the view that all concerned recognised that as investors in the company as well as employees, the parties had a responsibility to ensure that staff who did not have a financial interest in the company were paid first. It seemed to the Tribunal that if the claimant had not been willing to defer his salary, he would have raised this matter well before the serving of the statutory demand for payment. Reference was made in meetings to the amounts owed to individuals and by the claimant in particular that he was experiencing financial difficulties. However, it was never suggested by the claimant that the company was withholding payment from him deliberately against his wishes. Rather the Tribunal formed the view that the claimant was seeking to rely on the failure to explicitly agree to defer salary as indicative of no agreement ever having been reached. The Tribunal preferred the evidence of JMH and WH in this regard.

60. Therefore, the case did not revolve round factual disputes, but rather it was the perception of parties of the conduct of each other which was at issue. The

claimant blamed the respondents for the failure of SR and believed that they did not run the company effectively and treated him unfairly. The respondents were of the view that it was the claimant's conduct which led to the breakdown in relationships which ultimately resulted in the insolvency of the company. It was particularly notable that the ideas behind SR were that of the claimant, and he did not have the commercial experience of the respondents. His expectations and approach to the running of SR were very different to that of WH and JMH (and RHH) all of whom had extensive commercial experience prior to their involvement in SR. The Tribunal wishes to make clear it does not make any findings as to who was right or wrong in their perceptions, merely highlight that there was a clear disconnect in the approaches and expectations of the claimant on the one hand and the other members of the executive team on the other (possibly with the exception of TK) as to how the business should be taken forward.

Submissions

61. The parties provided detailed written submissions. They were also all given an opportunity to comment on the other parties' submissions. An oral hearing took place on 9 January to give a final opportunity for comment although no further comment was made.

Discussion and decision

Was the claimant subjected to any detriments?

62. The Tribunal accepted the claimant's submission that a detriment for the purposes of section 47B(1A) ERA is the same as that for the purposes of discrimination legislation. The leading authority is **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337**. A detriment will occur when a worker suffers a disadvantage in comparison to other real or hypothetical workers. The bar for establishing what amounts to a detriment

is relatively low and need not involve a physical or economic consequence for the worker.

63. The claimant argued that he had been subjected to the following detriments for having made protected disclosures:

i. WH's conduct towards him at the meeting of 5 October 2021;

ii. JMH failure to defend him against that conduct and his shutting the meeting down;

iii. JMH dismissing the concerns being raised by the claimant at the meeting on 6 October 2021, devaluing his disclosures and undermining him by questioning his domain expertise;

iv. JHM using bullying and offensive language towards him at the meeting on 6 October in particular making reference to 'assholes';

v. JHM dismissing the claimant on 10 November and making spurious allegations of gross misconduct against him;

vi. WH relying on JMH to dismiss him;

vii. JMH sending the executive team and board a copy of the dismissal letter which included spurious reasons for his dismissal and breaching his confidentiality in relation to his mental health;

viii. JMH failure to respond to the claimant's email of 12 November;

ix. The conduct of JMH and WH at the meeting of 14 December which amounted to bullying, harassment and intimidating conduct;

x. The conduct of JMH and WH at the meeting of 15 December by failing to allow the claimant to appeal against his dismissal, harassing him to accept the role of "Special Advisor to Special Projects", intimidating him with allegations of misogyny said to have been made by RHH and alleging he had broken the law in his dealing with Mr Hirani;

xi. The conduct of JMH and WH causing agents instructed by SR to dispute the claimant's statutory demand on the basis of bad faith arguments; and

xii. The conduct of JMH and WH in failing to deal with the claimant's appeal against his dismissal dated 31 January and

xiii. The conduct of JMH and WH causing him to be removed as a director from SR.

64. In the first instance, it is necessary to determine whether any of the matters outlined above amount to detriments. In this regard, it is important to put the events into context. The claimant was the founder of SR and a director of the company. He was a member of the board as well as an employee of the company. He was a senior employee and only JMH was more senior in an employment context. SR was a start-up operation, in which the claimant, WH and JMH had invested money and their time. WH was a childhood friend of the claimant. The claimant is a highly intelligent and capable individual. From at least September 2021, relations between all the executive team had come under strain and become fractious. This was primarily because the company was not performing as well as had been expected. However, it was also because of a breakdown in relations, whereby the claimant had a particular view of the how the company should be run, and this view was not shared by JMH and WH or RHH although she was less involved in the day to day running of the company.

65. While bad behaviour at meetings including board meetings such as individuals losing their temper or saying inappropriate things may amount to detrimental treatment (within the scope of section 47B) this will very much depend on the overall context of the situation. It may depend for instance of the seniority and experience of the individuals concerned and the exact nature of the conduct and interactions around the specific matters complained of. It will almost always be possible to take out of context particular words or phrases which might on the face of it seem unacceptable, but when

considered in their wider context do not amount to detriments in the terms of the legislation.

66. It was not for the Tribunal in the present case to say whose fault it was that relations between the executive team of SR had broken down. However, it was clear that relations had broken down. The tone and content of the meetings at which the claimant says he suffered detriments must be considered in that context. To put it colloquially, in the Tribunal's view, the claimant gave as good as he got at meetings. He was perfectly capable of dealing with any treatment he believed unacceptable and responding appropriately. He could expect board meetings to be challenging and while it is unfortunate that relations between the directors of SR deteriorated in the way that they did, the Tribunal was of the view that the way in which JMH and WH interacted with the claimant at the meetings of 5 and 6 October and 14 and 15 December did not at any stage amount to detrimental treatment. Had the claimant been a junior member of staff who was spoken to in the way in which the claimant was spoken to, that may of course be a different matter. However, the claimant was a founder, director, and member of the executive team. While the Tribunal does not go so far as to suggest the way in which the participants at these meetings conducted themselves was acceptable, it does not accept that anything said or done to the claimant at these meetings amounted to a detriment for the purposes of section 47B. The claimant is in reality seeking to cherry pick specific words or phrases, take them out of their context and seek to present himself as someone who was taken aback or otherwise adversely effected by what was said to him. Rather, the meetings in question were ill tempered on all fronts, where all the participants challenged each other, and no doubt said things they wish in retrospect they had not said. That, however in the view of the Tribunal does not amount to detrimental treatment of the claimant. In these circumstances, the Tribunal is of the view that the allegations set out at paragraphs i, ii, ii, iv, ix and x did not amount to detriments in terms of section 47B. These matters amounted to no more than an unjustified sense of grievance as outlined in **Shamoon**.

67. The Tribunal accepts however that the dismissal of the claimant did amount to a detriment. It was the position of JMH that he could not be liable for the decision to dismiss the claimant as this was a decision taken by him in his capacity as CEO of SR rather than as an individual. However as highlighted by the claimant **Timis and another v Osipov (Protect intervening) 2019 ICR 655**, CA is authority for the proposition that an individual can be liable for the detriment of dismissal. The Tribunal accepts therefore that the dismissal of the claimant was a detriment and that JMH is potentially liable in that regard in his capacity as a fellow worker if it could be shown that the claimant's protected disclosures were a cause of that treatment.

68. However, the Tribunal did not accept that the claimant was subjected to a detriment in relation to WH relying on JMH to dismiss him. The Tribunal was of the view that it had been JMH's decision to dismiss the claimant and that there was no evidence advanced to support the allegation that WH had relied upon him to do so. WH did not have the authority to dismiss the claimant. He did not take the decision and indeed as was demonstrated in the text exchange with JMH the previous evening, he had suggested that the claimant should not in fact be dismissed at that point.

69. The Tribunal then considered whether the actions of JMH in sending the letter of dismissal to a wider audience amounted to a detriment. The Tribunal was of the view that the wider board was entitled to know that the claimant had been dismissed. They were also entitled to know why the claimant had been dismissed. The essence of the claimant's concern appeared to be the content of that letter given that he disputed the reasons given. Although the Tribunal had some reservations regarding whether this amounted to a detriment in the particular circumstances of the case, (particularly given that JMH was sending the letter to those to whom the claimant had already sent his earlier email) given what is said above about the requirements for something to amount to a detriment, the Tribunal accepted that the sending of the letter of dismissal to the wider audience did amount to a detriment, particularly given the entirely unnecessary reference to the claimant's mental health history.

70. The Tribunal then considered whether the failure to respond to the claimant's email of 12 November amounted to a detriment. It concluded that it did not meet even the low requirements of detriment. The claimant was not appealing against his dismissal. Indeed, the email itself did not ask for a response. Rather it was the claimant responding to the letter of dismissal. There was no detriment to the claimant by JMH not responding specifically to that email.

71. Turning then to the claimant's claim that he was subjected to a detriment because JMH and WH caused the statutory demand which was served by him to be resisted on grounds of bad faith, the Tribunal could not accept that this was a detriment. JMH and to some extent WH were involved in giving instructions to agents on behalf of SR to defend a statutory demand which in effect sought to force the insolvency of SR if payment was not made. As directors of the company, they were entitled to take steps to defend the company's position. In any event, the Tribunal finds as a matter of fact, that there was an agreement between the executive directors to defer salary until such times as the company was in a position to meet those payments. Therefore, the instructions given to the agents were not given in bad faith, but reflected the understanding of JMH and WH. It was the claimant who started the process of serving a statutory demand and he should reasonably have expected that this would be defended. There was nothing in the way in JMH and WH were involved in defending the company against the demand which was unreasonable, unexpected or in any way inappropriate. In these circumstances, there was no detriment to the claimant.

72. The Tribunal then went on to consider whether the failure to deal with the claimant's appeal against his dismissal amounted to a detriment. The claimant's position is that this was a detriment caused to him by both WH and JMH. The Tribunal was of the view that WH had no power to deal with the claimant's appeal against his dismissal and therefore could not subject him to a detriment by failing to do so. However, the Tribunal did accept that the failure of JMH to deal with the claimant's appeal amounted to a detriment.

73. The Tribunal then went on to consider whether the removal of the claimant as a director was a detriment for which JMH and/or WH could be liable. Both

voted in favour of the claimant being removed as a director, and therefore this amounted to a detriment in respect of which both JMH and WH could potentially be liable.

Was the claimant subjected to a detriment because he made a protected disclosure?

74. Having determined that the claimant had been subjected to some detriments, it was necessary to consider whether he had been subjected to any detriments on the ground that he had made a protected disclosure. The claimant had invited the Tribunal not to seek to link each protected disclosure to each particular incident. The Tribunal approached the matter in the widest possible sense by considering whether any of the detriments to which the claimant was subject were because he had raised the issue of possible insolvency of SR internally or externally.

75. In considering the issue of causation, the Tribunal had regard in particular to **Aspinall v MSI Mech Forge Ltd EAT891/01** where the EAT found that there required to be a causal nexus between the fact of making a protected disclosure and the decision of the worker to subject a claimant to the detriment. Regard was also had to the judgment of the Court of Appeal in **Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372** where Elias J found that the test of causation requires consideration as to whether the protected disclosure materially (in the sense of more than trivially) influenced the treatment of the compliant. As was reflected in these cases, the Tribunal is required to draw inferences from the established facts as to the reason for the treatment of a claimant.

76. In terms of paragraphs 60 i, ii, iii, iv, ix and x above which set out the detriments alleged by the claimant, the Tribunal was of the view that if it was wrong in its findings that these matters did not amount to detriments, the reason for any detriment was in no sense whatsoever connected to the claimant having made any protected disclosures. The way in which the claimant was treated by JMH and WH at these meetings reflected was as a result of the deteriorating relationships of the executive team. It is true to say

that this was caused at least in part by the poor financial position of the company, but that is different from having been caused by the claimant making a protected disclosure. Both JMH and WH were well aware of the poor financial position of the company, they had invested their time and money in it as had the claimant. However, relations had been deteriorating for some time due to the tensions within the executive team, which while in part caused by concerns at the financial position, were also at least in part caused by the claimant's conduct towards others. The breakdown in relationships was not caused by the claimant making protected disclosures.

77. Turning then to the dismissal of the claimant. The Tribunal determined that the reason for the claimant's dismissal was that he had sought to stage a coup to unseat JMH and WH by enlisting the assistance of Mr Hirani. His conduct clearly amounted to gross misconduct in that regard. At that time JMH and WH were not aware that the claimant had met with Mr Hirani and had planned what would be proposed at the board meeting on 8 November although it is clear that they had suspicions that they were being ambushed. Nonetheless, the claimant's actions at that meeting were in direct opposition to the reasonable instruction given by JMH. When JMH sought to intervene to stop the claimant from voicing his support for Mr Hirani's proposal, the claimant persisted in the face of JMH's intervention. The Tribunal accepts that JMH sought to add substance to his reasons for dismissing the claimant by making reference to other matters, including the way in which the claimant had treated RHH, however the principal reason for the claimant's dismissal was his undermining of JMH and WH by acting in direct opposition to an instruction given by JMH in his capacity as the claimant's line manager and the claimant's attempt to stage a coup against them. The protected disclosures did not play any part whatsoever in the decision to dismiss the claimant.

78. While the Tribunal accepted that the email which was sent to the board setting out the reasons for the claimant's dismissal and making unnecessary reference to his mental health was inappropriate, and amounted to a detriment, that had to be seen within the wider context of JMH seeking to take steps to counter the claimant's attempts at a coup. JMH candidly admitted in

evidence that he should not have made reference to the claimant's mental health in correspondence and the Tribunal accepted that he regretted having done so. However, the fact of sending the correspondence to the wider board and the terms of that correspondence were in no way whatsoever related to the fact that the claimant had made a protected disclosure. Rather it was an ill-advised attempt at regaining control of the situation by raising questions in the minds of others as to the reasons for the claimant's conduct. It had nothing at all to do with the claimant making any protected disclosures.

79. The Tribunal considered the issue of the failure to deal with the claimant's appeal against his dismissal. The Tribunal took into account that this was not lodged until 31 January almost 3 months after the claimant's dismissal. In addition, the Tribunal accepted the evidence of JMH that there were ongoing discussions with the claimant regarding resolution of his position with SR. Therefore, the Tribunal concluded that the failure to deal with the claimant's appeal was in no sense whatsoever related to any protected disclosures he had made. It was because other efforts were being made to resolve matters. The Tribunal was of the view that the claimant's appeal itself was performative, rather than a genuine appeal against dismissal. The failure to deal with it was not related at all to any protected disclosures which had been made by him.

80. Finally, the Tribunal considered the actions of JMH and WH in voting to have the claimant removed as a director of SR. The Tribunal accepted the evidence of the respondents that there had been discussion with the Investor Director regarding this possible course of action. Moreover, by this stage, it had not been possible to agree with the claimant a role for him with the company going forward. In addition, JMH having suggested mediation as a way forward, the next contact from the claimant was to serve a statutory demand for payment with threats of insolvency of the company when the claimant was well aware that there was no money to pay the sums sought. The respondents were entitled to come to the view that by this stage relationships were beyond repair and that the claimant was taking action to secure his own position, even though he remained a director of the company. The respondents voted to

remove the claimant for those reasons and the protected disclosures played no part whatsoever in the decision making.

Disability discrimination

81. The Tribunal then went on to consider the claimant's allegations of disability discrimination.

82. All parties recognised that the claimant was not seeking to argue that he was a disabled person at the material time, but that the JMH perceived him to be so. It was also recognised that the only appellate authority is that of **Chief Constable of Norfolk Constabulary v Coffey 2020 ICR 145**. In that case, the Court of Appeal determined that in order to find that a person has been subjected to disability discrimination by perception, a Tribunal requires to be satisfied that the alleged discriminator must believe that all the elements of the statutory definition of disability are present. That judgment also noted the provisions of paragraph 8 of Schedule 1 to the Equality Act 2010 which makes special provision in respect of progressive conditions. Paragraph 8 provides that where a person has a progressive condition that results in an impairment which has an effect on his or her ability to carry out day-to day activities, but the effect is not a substantial adverse one, it will still be treated as such if the condition will result in a substantial adverse effect in future.

83. ***Coffey*** concerned a police officer with a hearing impairment who sought a transfer. The Court of Appeal accepted that the Tribunal had made sufficient findings to conclude that while the employer in that case did not perceive the claimant to have a disability at the time it refused her transfer, it believed that the impairment may in the future render the claimant a disabled person.

84. In the present case, the claimant argues that the JMH perceived him to be disabled by reason of his mental health. He did not seek to indicate what specific condition he was said to be perceived to have, and just referred to the vague term 'mental health' as an impairment. He relies in particular on the references made to his mental health in the letter of dismissal and

accompanying correspondence. Simply believing that a person has or has had mental health issues falls well short of the test set out in **Coffey**. There was no evidence that either respondent believed that the claimant had an impairment at the relevant time. The only evidence was that they were aware that the claimant had previously had an episode related to his mental health when he was at university. There was no evidence presented to suggest that either respondent believed that any mental health condition, if such amounted to an impairment, impacted upon the claimant's ability to perform normal day to day activities or might do so in the future. It is true that the claimant and the respondents were under a high degree of stress related to the underperformance of the company and their own financial exposure. It is also true that the respondents were of the view that the claimant was a difficult person to deal with at times and could behave in inappropriate ways. However, all that falls well short of a perception that the claimant was a disabled person around November 2021.

85. The claimant submitted that JMH had made reference to his mental health 'with cynical intent' and the Tribunal agreed with that framing. JMH indicated that he now regrets making such references and accepts that they were inappropriate and unnecessary. The Tribunal agrees with this assessment. However, simply making reference to someone's mental health falls well short of the requirements of demonstrating that the claimant was perceived to be a disabled person. For instance, there was no evidence led regarding which day to day activities JMH was said to believe had been affected by any condition. There was vague reference to the claimant's conduct in meetings and providing him with support. By comparison, in the **Coffey** case, the respondent was found to have perceived that the claimant's hearing would deteriorate such that she would become a disabled person.

86. Therefore, the Tribunal concluded that there was no evidence whatsoever to demonstrate that JMH perceived the claimant to be a disabled person at the material time. His claim of disability discrimination is therefore bound to fail.

Conclusions

87. This case has been complex and long running and for most part all three respondents have not been professionally represented during the process. The Tribunal wishes to express its thanks to the parties for conducting the proceedings at the final hearing in a professional and restrained manner. The Tribunal is also grateful to Mr Gibson who bore with the weight of being the only professional representative in the final hearing with patience and good grace.

88. It is clear that relations between the parties have irretrievably broken down. As mentioned above, it is not for the Tribunal to make an assessment of who is to blame for that breakdown. The Tribunal recognises that all parties attach blame to each other for the under performance of the company which led to these proceedings being raised. However, the Tribunal can only make determinations in respect of the matters before it and in respect of which it has jurisdiction. It however expresses the hope that this judgment can bring a finality to the matter and that all parties are able to move on from these events.

A Jones

Employment Judge

16 January 2024

Date of Judgment

Date sent to parties 18/01/2024