**EMPLOYMENT TRIBUNALS (SCOTLAND)**

5 **Case No: 8000565/2023**

**Held at Aberdeen on 1, 2, 3, 4, 5, 8 & 9 July 2024**

**Employment Judge N M Hosie**
10 **Members P Hammond**
**S Currie**

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| **Mr Matthew Moore** | **Claimant**<br>**Represented by,**<br>**Mr J Frater,**<br>**Solicitor** |
| **Petrofac Facilities Management Ltd** | **Respondent**<br>**Represented by,**<br>**Ms M Stuart-Davies,**<br>**Solicitor** |

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Tribunal is that:-

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1. the breach of contract complaint, in respect of the reduction in the claimant's salary, is dismissed;
2. the breach of contract complaint, in respect of the respondent unreasonably withholding permission for the claimant to undertake secondary employment, is well-founded;

3. there is no award of damages in respect of the respondent's breach of contract;
4. the claimant was constructively and unfairly dismissed by the respondent;
5. a Remedy Hearing should be fixed, in the event that the parties are unable to agree compensation;
6. the claimant's complaint of automatic unfair dismissal, by reason of making protected disclosures, is dismissed;
7. the claimant's complaint that he was subjected to detriments, by reason of making protected disclosures, is dismissed; and
8. the respondent's application for an award of expenses/costs is refused.

## REASONS

### Introduction

1. The claimant, Matthew Moore, brought complaints of breach of contract, constructive unfair dismissal, automatic unfair dismissal on the ground of having made protected disclosures and for detriments on the ground of having made protected disclosures. His complaints were denied in their entirety by the respondent.

### The evidence

2. We first heard evidence from Mr Moore and then on his behalf from:
   - Chris Dockree, Director of Webree, a third party supplier to the respondent
   - Martin Greenbank, Senior Consultant (Condition Monitoring)
   - John Martin, Senior Consultant (Condition Monitoring)

   We then heard evidence on behalf of the respondent from:
   - Mark Kane, Operations Lead (Condition Monitoring), the claimant's direct line manager
   - Scott Gardner, HR Advisor

- Christopher Taylor, Vice-President for Human Resources (Asset Solutions)
- Brian Harding, Service Line Manager (Condition Monitoring)
- Richard Cook, Operations Director (Global Technical Solutions)
- Keith Scott, Operations Director
- Sarah Townsend, Senior HR Business Partner.

Each of the witnesses spoke to written statements.

3. Joint Bundles of documentary productions were also submitted ("P").

**Observations on the evidence**

4. By and large, we were satisfied that each of the witnesses gave credible and honest evidence. We have addressed, specifically, any material disputes in the evidence below.

**The facts**

5. Helpfully, the parties had submitted a Joint Statement of Agreed Facts. Having heard the evidence and considered the documentary productions, we were satisfied that the Statement was accurate. Accordingly, we make the following findings of fact.

6. The claimant was employed by the respondent between 14 July 2003 and 12 October 2023. He commenced in the role of Consultant, was promoted to Senior Consultant in 2005 and then to CBMnet Technical Manager in 2007. From 2012 until the termination of his employment, the claimant worked in the position of Global Subject Matter Expert - Condition Monitoring.

7. In April 2013, the claimant was asked by James Phipps (then Regional Manager - Europe) to take part in the interviews of Mark Kane and Brian

Harding, both within the Conditions Monitoring Team, for the position of Condition Monitoring Team Lead (P.386 ).

8. Mr Phipps provided feedback on the two candidates to John Morrison (copying in the claimant), following interviews having taken place in May 2013. Mr Phipps and the claimant discussed the performance of both candidates and it was recommended that Brian Harding should be appointed (P.387-389). Mr Harding was appointed into this role.

9. On 28 November 2018, Mr Phipps sent an email (P.394 -395) to the claimant and others, including Brian Harding, regarding a newly created position of Service Line Manager (job description P. 396 ). The claimant applied for this role on 30 November 2018 (P.43-439).

10. On 28 January 2019, Kevin Mackie (then Operations Director, USA) informed the claimant that the position had been given to Mr Harding. The claimant sent an email on 29 January 2019 (P. 442 ) expressing his grievance about the fairness of the selection process and compromises to his position. Mr Harding had not applied for the role of Service Line Manager and neither Mr Harding nor the claimant had been invited for interview.

11. The claimant did not proceed with a formal grievance at the time, expressing that it would likely put him through stress and anxiety at a difficult time for his family. He requested reassurance that his position and standing would be recognised in the new organisation (P.447).

12. On 22 February 2019, applicants were invited for the role of Operations Lead - Condition Monitoring (P. 448- 449) and job description (P. 450-453). It was confirmed in this email that there was no direct position enhancement at the time and it was expected the additional responsibilities would not take up more than 0.5 days per week on average. The claimant was copied into this email. Mark Kane successfully applied for this role and was promoted to

Operations Lead - Condition Monitoring. He subsequently became the claimant's line manager.

13. Kevin Mackie left his employment with the respondent on 21 June 2019 (P.454).

14. James Phipps left his employment with the respondent on 25 March 2020 (P.455).

**Reduction in Salary**

15. On 3 April 2020, the respondent initiated collective consultation in respect of proposed measures in response to the Covid-19 pandemic (see employee representative consultation session document at P.457-478). One of these proposed measures was a variation of terms which would mean a pay reduction, removal of the annual salary award and a 10% decrease in base pay (P.471). This was intended to be a permanent change to terms and conditions.

16. The respondent sent letters out to its workforce in April 2020 requesting acceptance of a salary reduction, due to deteriorating market conditions. The claimant was sent a letter on 27 April 2020 indicating that the respondent was asking for his agreement to a reduction in salary to £71,593 per annum with effect from 1 May 2020 (P.479-480). This letter asked the claimant to navigate to the change acceptance request form and agree to the change by no later than 7 May 2020. The letter stated that if the claimant chose not to accept the change then he would be putting himself at risk of compulsory redundancy.

17. On 5 May 2020, Mark Kane, Operations Lead, emailed the claimant and other individuals reminding them that if they were going to agree to the change, this needed to be done by 7 May 2020.

18. On 6 May 2020, the claimant sent and email to Mark Kane (P.483) expressing his concern that his salary had been reduced by 11.76% before he gave his consent and that this is illegal in the UK.

5 19. On 7 May 2020, HR provided comments on this email (P.483) that the decision was taken to upload the salary change for all due to payroll cut off, but that this would be reversed out for any individuals who did not accept.

20. The claimant confirmed by return email on 7 May 2020 that he wanted to
10 express the context for his acceptance to ensure no misunderstandings as the form did not allow him to do so (P.482 ).

**Remuneration Review Request**

15 21. On 18 February 2021, the claimant requested a remuneration review via email to Mark Kane (P.531), stating that he would appreciate his support in addressing the situation and ensuring it was brought to the attention of HR. Mr Kane forwarded the claimant's request to HR. The respondent's Sarah Townsend (Senior HR Business Partner) emailed the claimant in response,
20 on 25 February 2021 (P.536), requesting clarification about the claimant's reference to the Equal Pay Act and asking the claimant to fill out an attached formal grievance form (P.539).

22. The claimant advised he had not asked to raise a formal grievance at this
25 stage. He wanted to see a comparison of his remuneration across the previous six years compared with his fellow Subject Matter Experts (P.542). Ms Townsend informed the claimant she would not be able to share the information requested due to GDPR considerations. She requested the claimant to complete the grievance form and to explain the basis on which he
30 considered the Equal Pay Act applied (P.541).

23. . On 26 February 2021, the claimant emailed Ms Townsend to say he had not made reference to a formal grievance and wanted to follow what he believed to be the correct procedure. He asked Ms Townsend to advise what had been done to look into the issue raised, before requiring him to make a formal grievance (P.540-541). He did not receive a response at the time.

24. The claimant emailed Mark Kane on 16 December 2021 to ask whether a review had been carried out (P. 540). The claimant asked for an update by email on 14 February 2022 (P.539-540) and Mr Kane confirmed he would forward this.

25. On 8 March 2022, Ms Townsend emailed the claimant P.545) stating that she did not respond earlier to the claimant's email of February 2021 as the claimant was signed off sick at the time. Ms Townsend confirmed that this could be handled informally. She could not share other employee remuneration with the claimant due to confidentiality but had spoken with Martin Layfield (Director, Asset Consultancy Services). He had confirmed the respondent was satisfied that the claimant's salary met the criteria for his job role and in comparison with his peers. She advised that Mr Layfield had confirmed the Company did not operate a global SME structure any more (legacy people had either left or taken different roles within the Company). She confirmed the claimant's salary was well above others in the claimant's grade. She confirmed that if the claimant felt his concern had not been addressed, he could raise a grievance.

## Serious Fraud Office Investigation Prosecution

26. On 24 September 2021, the Serious Fraud Office website stated that Petrofac had been charged with seven separate offences between 2011 and 2017 of failing to prevent bribery (P. 953).

27. On 4 October 2021, the Petrofac website published a public update (P.954 - 958) on the final outcome of the SFO investigation announcing the Company had been prosecuted for seven offences under Section 7 of the UK Bribery Act 2010 and imposed a penalty of GBP 77 million. Petrofac stated that all employees involved in the charges had already left the business. The Chairman Rene Medori stated "...We have taken responsibility, reformed and learned from these past mistakes, as acknowledged by the SFO and the Court. Most importantly, the extensive work that we have done since the SFO investigation began means that the Petrofac of today has a comprehensive compliance and governance regime that meets or exceeds international best practice. The past behaviour uncovered by the SFO would not be possible today....".

28. The Company Conflict of Interest procedure (P.357- 368) was put in place on 27 June 2022. The procedure is mandatory for all employees of Petrofac Limited and its operating Companies and procedures (P.360).

**Secondary Employment Requests**

29. On 21 December 2022, the claimant emailed Mark Kane following an end of year review with a request for secondary employment (P.547). Within this email, the claimant set out the information required by the Employee Handbook. On 30 December 2022, Mr Kane emailed the claimant to confirm that the respondent would not be able to provide a final decision within a 7 day time frame (P.547).

30. On 6 January 2023, Mr Kane responded to the claimant's request (P.559) stating that the claimant's request was not permitted. This was on the basis that the proposal to enter into providing consultancy/training in support of data science, AI and machine learning was the same as the role the claimant was fulfilling for the respondent. The email stated that the view of the Company

was this was a conflict of interest that would interfere with the performance of the claimant's role.

5 31. The claimant did not agree with this assessment and stated that the Company was acting unreasonably. He requested for this to be re-evaluated (P.559).

32. On 11 January 2023, a Teams meeting was held between the claimant, Mark Kane and Scott Gardner (HR Adviser) to discuss the rejection of the
10 claimant's secondary employment request. Scott Gardner took notes of this meeting (P.561 - 562). These were not provided to the claimant or agreed with the claimant.

33. The claimant followed this meeting up with an email on the same day detailing
15 his disagreements with the decision (P.557-559). It was agreed at the meeting that the request would be sent for internal review and a response would be provided to the claimant.

34. On 23 January 2023, Mr Gardner advised the claimant via email (P.555) that
20 the compliance team had advised that the claimant had to complete a conflict of interest declaration using the respondent's Conflict of Interest Tool (known as the "GAN Tool" or "COI Tool"). It was confirmed that the claimant could not engage in any secondary employment without the express, written permission of the Company.

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35. The claimant completed the Conflict of Interest declaration requested (P. 563-573). This was assigned to be reviewed by Christopher Taylor, VP for HR for Asset Solutions.

30 36. Mr Gardner emailed (outside of the COI Tool) the claimant on 24 February 2023 (P.553) confirming the findings of the review of his case, stating that "in principle having reviewed this request in detail....the Manager reviewing your case accepted that your proposal of secondary employment may not be a

Conflict of Interest based on the information provided. However, they were unable to make a full assessment due to not having detailed information from your proposal regarding your potential clients for your services". Mr Gardner informed the claimant that, by way of mitigation, he would need to disclose client, type of work (and potential timescale) for approval to his line manager. It was stated that without details of client, duration and the work, the Company would be unable to assess fully if a COI exists and no work should be proceeded with until approval had been given.

37. On 27 February 2023, the claimant emailed Scott Gardner and Mark Kane (P.552) requesting to agree some practical expectations of the mitigating action. The claimant also advised he was happy to engage with the Technical Leader who reviewed his case directly to refine any details.

38. On 1 March 2023, the claimant sent a secondary employment request to Mark Kane, informing Mr Kane that he had been offered an opportunity by Mobius Institute to review and update training materials/courses and prepare online educational content on an ad hoc basis which could range from a few hours to one or two days per month (P.574).

39. On 8 March 2023, the claimant emailed Scott Gardner and Mark Kane (P.550 - 551) chasing a response to his first client notification and identifying that the GAN Tool was still pending review. He again requested refining the mitigating action and expressed his concern that he would lose this secondary employment opportunity due to the delay.

40. On 8 March 2023, Mr Kane responded to the claimant's first request providing approval to proceed (P.574) for work which the claimant stated was on an ad hoc basis which could range from a few hours to one or two days per month.

41. Between 9 March and 10 March 2023, the claimant emailed 19 additional secondary employment client notifications to Mark Kane (P.576 -594), where each duration of work was described as being on an "ad hoc basis". The

majority of these notifications was for work within the water industry. Mr Kane forwarded these notifications to Scott Gardner, requesting escalation on 13 March 2023 (P.595).

5 42. On 16 March 2023, Mark Kane emailed the claimant asking him to re-submit his applications and to fully define the caveats in place i.e. client, workscope and duration (P.604). The claimant set out in his emails of 19 March and 27 March 2023 the ways in which he considered that the respondent had failed to follow the conflict of interest procedure (P. 596-599 and P.601-604).

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43. On 21 March 2023, Scott Gardner emailed the claimant to ask if he wished to raise a grievance as he had used the word 'grievance' in his email to Mark Kane on 19 March. The claimant stated that he wished to proceed informally at this stage and made a number of suggestions on how to proceed (P. 607),
15 including a request to speak with the Technical Leader who reviewed his case. Mr Gardner advised his understanding by return email that he considered that the options for informal resolution had been exhausted, based on the claimant's email and therefore if the claimant wished to raise a formal grievance this should be submitted (P.606).

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44. The claimant submitted another secondary employment client notification to Mark Kane on 27 March 2023 including the client, type of work and duration as ad hoc up to a few hours per week or 1 to 2 days per month. Mr Kane replied on 29 March stating that the information provided by the claimant was
25 insufficient and asked the claimant to provide further detail and additional information including whether the claimant had a Request for a Quotation ("a RFQ"), ideally a link to the client website, workscope and date when the work would begin (P. 609).

30 45. The claimant's Conflict of Interest disclosure was updated on 4 April 2023 in the COI tool (P.619). This set out the decision of the reviewer (P. 620 ) which had been provided to the claimant on 24 February 2023 by Mr Gardner (P.553).

46. The claimant attended a meeting with Mark Kane and Scott Gardner on 11 April 2023. Mr Gardner took notes of this meeting (P.622 - 623 ). The claimant did not have sight of these notes.

47. On 5 May 2023, the claimant sent emails to Mark Kane requesting a response to his secondary employment client notifications (P.624 - 642 ), but received no reply.

48. A meeting was held over Teams on 16 June 2023, attended by the claimant, Brian Harding and Scott Gardner to discuss the claimant's secondary employment requests. Scott Gardner took notes of this meeting (P.64 - 65). The claimant did not have sight of these notes. Brian Harding left the meeting part way through after the claimant had requested that he leave. Mr Gardner and the claimant discussed the claimant raising a grievance.

49. After Mr Harding had left the meeting, the claimant informed Scott Gardner he no longer wished to report to Mark Kane or Brian Harding. He also confirmed that he wished to raise a grievance. Scott Gardner emailed the claimant on 23 June 2023 to confirm he had looked into options that could be put into place whilst an investigation into any points he wished to raise via the grievance process was undertaken. Mr Gardner confirmed the claimant's request could not be agreed to (P.653). The claimant had told Mr Gardner during the meeting that it would take him some time to collate the information for his grievance. Mr Gardner informed the claimant on 27 June 2023 that it would be sufficient at this time to provide high level detail of the nature of his grievance along with the outcome sought (P.652). The claimant did not raise a grievance prior to his resignation from the respondent.

**Work Proposal**

50. On 26 June 2023, Brian Harding raised an opportunity with Joanne McBain (Proposals) for work on an SBM asset, Kikeh FPSO (P.708). The work had previously been discussed between the claimant and Mr Harding (P.700-

702). It was confirmed that the claimant would provide technical approval and Stuart Hall, Service Line Manager, would provide final approval. On 28 June 2023, the claimant was sent a link to the proposal for Kikeh FPSO SWLP Analysis and Reporting for his technical approval by Joanne McBain (P. 707).

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51. The claimant rewrote the proposal to reflect discussions with the client and amended the cost model with different rates. Following discussion between the claimant and Brian Harding, there was continued disagreement on the rates. Mr Harding advised the claimant that there were agreed rates with
10 SBM and these needed to be stuck to (P.704). The claimant asked Mr Harding for the agreed schedule of rates as they were not part of the service level agreement being used. Mr Harding did not provide an agreed schedule of rates (P.703 - 704).

15 52. On 4 July 2023, the claimant requested his name be removed from the proposal as he had withdrawn his approval because the rate compromised his other concurrent work with the client (P.712). Brian Harding asked the claimant whether he was refusing to carry out the work scopes, copying Scott Gardner into this email (P.712). The claimant confirmed that he was not
20 refusing to carry out this work. He stated that he could not approve a proposal that he believed compromised the business (P.711-712), as he had undertaken close to £300,000 of work (P.711) with the client at the rate he had proposed. Brian Harding advised he had discussed this with commercial and he had agreed with them what rates should be applied (P.711). The
25 claimant stated that Brian Harding was not heeding his advice as the scope was different and asked if he was being relieved of his duties (P.711) to which he received no reply.

53. Brian Harding subsequently requested Mark Kane to provide technical
30 approval (P.713) which he did. This was sent to the client with the claimant's name and Subject Matter Expert position removed from the proposal (P.719). In the covering email sent to the client, Brian Harding told the client that the claimant would be supporting them with this work scope (P.719).

54. On 6 July 2023, the client emailed Brian Harding requesting clarification regarding the proposal as there was an element of the workscope missing (P.750 - 751). Brian Harding responded by email on 7 July 2023 agreeing to additions outside the proposed scope of work (P.750). The claimant challenged Mr Harding (P.749 - 750) as these additions were very complex and were not covered under the proposal putting the Company at risk.

**Claimant's Resignation and Notice Period**

55. On 12 July 2023, the claimant tendered his resignation from his position as Global Subject Matter Expert - Condition Monitoring (P.754) stating the respondent had failed to comply with its fundamental contractual obligations in respect of secondary employment and the result of that failure was that a significant income stream had been lost.

56. The claimant worked his notice period of 3 months and his final day of employment with the respondent was 12 October 2023. On the basis he had resigned from his position, the claimant was not deemed to be a 'good leaver' under the rules of the respondent's various Share Plans (P.766).

57. During the claimant's notice period, he was signed off work with fatigue in the period between 3 August and 1 September 2023 (P.783). The claimant attended an Occupational Health assessment on 13 September 2023 (P.784-785). Scott Gardner emailed the claimant on 2 October 2023 to request his attendance at a meeting to discuss his absence, to be attended by Richard Cook and Mr Gardner (P.788-789). This meeting took place on 10 October 2023, two days before the claimant left the Company.

58. During his notice period, on 5 September 2023, the claimant requested extended USB access for his work laptop (P.814-815). This request had to be re-submitted on the basis the person the ticket was submitted to had left the Company. The claimant raised another ticket on 20 September 2023

(P.818-819). On 25 September 2023, Mark Kane emailed the claimant to ask what workscopes he required extended USB access for (P.820). Mr Kane advised the claimant that he had discussed the claimant's request with Brian Harding and HR and IT had confirmed that the claimant should raise another ticket and any files would need to be removed onto the Petrofac network in the presence of an IT representative.

**Grievance**

59. The claimant emailed Mr Gardner on 3 October 2023 with the subject heading "Formal Grievance" stating it had come to his attention that someone in the Company had informed third parties that there were legal proceedings between himself and Petrofac (P.861-862). The claimant stated his belief that this was a deliberate attempt to damage his reputation and reduce his chances of obtaining future work following his whistleblowing that the Company had not followed its own procedures leading to his constructive dismissal. The claimant, when asked, confirmed that he was raising a formal grievance.

60. The claimant attended a grievance meeting on 11 October 2023 chaired by Keith Scott (Operations Director and Investigating Manager) and with Kathryn Popplewell providing HR support. The claimant was accompanied to this meeting by Mr John Martin (Senior Consultant). The claimant was not provided with the minutes of this meeting before the outcome was determined.

61. The grievance outcome (P.880-884) was sent to the claimant by Ms Popplewell on 20 October 2023 along with minutes of the grievance meeting. The claimant appealed the outcome (P.885). The claimant attended a grievance appeal hearing on 2 November 2023 again accompanied by John Martin. Martin Bavidge (Commercial Director) chaired the Appeal Hearing with Sarah Townsend (Senior HR Advisor) providing HR Support, James

Sherry (HR Administrator) taking minutes and John Martin (Senior Consultant) supporting the claimant.

5 62. The claimant was sent a copy of the Grievance appeal minutes on 9 November 2023 (email at page 939 of the bundle). The final outcome of the grievance appeal was communicated to the claimant on 13 November 2023 by Sarah Townsend (pages 941 to 944 of the bundle).

10 **Other**

63. The Grievance Appeal Outcome letter (P.941- 944 at 943) issued by Martin Bavidge stated, "I can confirm that the UK onshore contracts are governed by and construed in accordance with the laws of England and the parties
15 hereto submit to the exclusive jurisdiction of the English Courts."

64. The claimant's contract of employment makes no reference to the jurisdiction or governing law applicable to his contract of employment (P.289 - P.292).

20 **Discussion and Decision**

**List of Issues**

65. Helpfully, the parties had prepared a "List of Issues". We were satisfied that
25 it was comprehensive.

**Breach of Contract**
**Relevant Law ?**

66. There was a preliminary issue in relation to whether the law of England and
30 Wales or that of Scotland applied to the claimant's contract of employment.

67. The basis for the submission by the claimant's solicitor that the "law of England" applied, was a statement to that effect by Martin Bavidge, the respondent's Commercial Director in his Grievance Appeal outcome letter (P. 943): *"You asked at the appeal hearing if Petrofac follows Scottish or English law. I can confirm that the UK onshore contracts are governed by and construed in accordance with the laws of England and the parties hereto submit to the exclusive jurisdiction of the English Courts."*

68. However, Mr Bavidge did not give evidence at the Tribunal Hearing; the respondent Company has offices in Aberdeen, Scotland; as the respondent is domiciled in Scotland, the civil courts would have jurisdiction to hear this claim; the claimant was based in Aberdeen, Scotland; there is no "choice of law" clause in the claimant's contract of employment (P.289 - 292); nor in Part 1 of the respondent's "Onshore Employee Handbook" (P.310 - 327).

69. We were persuaded, as the respondent's solicitor submitted, that the relevant statutory provisions were s.3 of the Employment Tribunals Act 1996, together with the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 ("the Order").

70. Article 3 of the Order is in the following terms:-

***"3. Extension of Jurisdiction***

*Proceedings may be brought before an Employment Tribunal in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if –*

(a) *the claim is one to which section 131(2) of the 1978 Act applies and which a Court in Scotland would under the law for the time being in force have jurisdiction to hear and determine;*

(b) *the claim is not one to which Article 5 applies;*

(c) *the claim arises or is outstanding on the termination of the employee's employment."*

71. The claimant is not prejudiced by the application of these provisions.

## Breach of Contract Complaints

### Salary Deduction

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72. The claimant maintained that, *"contrary to the "Salary Arrangements" section of the UK Onshore Employee Handbook (P. 318, Part 1, page 7), the respondent reduced the claimant's salary on 1 May 2020 without his consent. The claimant alleges this breach was outstanding at the effective date of termination, 12 October 2023."*

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73. Due to a downturn in the oil and gas industry and the impact of the Covid Pandemic, the respondent was required to make changes, one of which was an across the board salary reduction for all employees in the UK (P.471).

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74. After consultation with Employee Representatives, the respondent wrote to all employees to propose, *"reversing out any merit increase you received in March and then applying a 10% reduction to your salary."*

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75. The respondent wrote to the claimant on 27 April 2020 in those terms (P.479-450).

76. The Tribunal was of the unanimous view that the claimant accepted this proposal. He was unhappy with the proposal and expressed his concerns (P.483), but he did accept it (P.483 and P.482). He continued to accept the reduced salary for over three years until his resignation. His acceptance meant that he was not dismissed and rehired on the same terms and conditions.

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77. As we recorded above, we were satisfied, on the evidence, and in particular that of Mark Kane, Brian Harding and Sarah Townsend, that the reduction was "across the board", which was communicated during the collective consultation process.

78. The respondent had also made it clear during consultation that the change would involve reversing the merit increase received in March before the 10% reduction was applied.

5 79. We were not persuaded, therefore, that the claimant was “misled”, as his solicitor submitted.

80. Further, as the respondent’s solicitor submitted, the claimant’s salary was subsequently increased each year and by April 2023 his pay was higher than
10 it had been in April 2020.

81. The respondent was not, therefore, in breach of contract, in this regard.

82. In any event, we were not persuaded that, this breach of contract claim was
15 outstanding on termination of the claimant’s employment.

83. It was clear he was unhappy with the reduction at the time and expressed his concerns. However, that did not continue, in any meaningful way.

20 84. He did request a “remuneration review” in February 2022, but that was on the basis of an alleged disparity with his “fellow Global Subject Matter Experts” (P.531).

85. Moreover, he declined the suggestion by Sarah Townsend that he should
25 raise a grievance (P.536).

86. So far as his request for a "remuneration review” was concerned, he was advised by Sarah Townsend, by email on 8 March 2022, that his salary, *"meets the criteria for the job role and in comparison with your peers within*
30 *the service area you work in* (P.545).” She also confirmed in that email that his salary, *"is well above others in your grade"*

87. Our finding that the alleged claim was not outstanding on termination of the claimant's employment meant, of course, that it did not satisfy the criteria in Article 3 of the Order. It also meant that the claim was not presented within the three month time limit for bringing such claims, in terms of Article 7 of the Order. The reduction was made in May 2022 and the claim form was not submitted until 3 November 2023.

88. We were also of the unanimous view that, in all the circumstances, the claimant could not avail himself of the so-called "escape clause", by establishing that it had not been reasonably practicable to submit the claim in time, in terms of Article 7(c). He had ample time to do so; he was able, by reasonable enquiry, to ascertain the time limit; he was well able to articulate his claim and submit a claim form in time; there was no impediment to him doing so.

89. We were of the unanimous view, therefore, that this complaint was not made out and it is dismissed. We were satisfied that, by and large, the submissions by the respondent's solicitor, in this regard, were well-founded.

## Secondary Employment

90. This was permitted by the respondent. The relevant provision, which was a contractual term, is in its "Onshore Employee Handbook" under the heading "Other Employment" (P.323). It is in the following terms:-

***"Other Employment***

*If you wish to take another (second) job whilst employed by Petrofac, you must, before commencing the second job, request and be granted written permission. The Company does not prohibit employees from taking secondary employment and will not unreasonably withhold permission for an employee to work in a second job, provided that the second Job does not interfere, and is not likely to interfere, with the performance of the employee's job with Petrofac.*

*To request permission to take a second job, you should speak to your line manager and inform them as to:*

- *the name of the second employer;*
- *the type of business in which the second employer is engaged;*
- *the type of work involved;*
- *the proposed hours of work; and*
- *the proposed location of the work*

*The line manager will in conjunction with HR give the employee a decision on whether or not permission is granted. The decision will be given within one week of the request and will be confirmed in writing"*

91. The issue in the present case was whether the respondent had withheld its consent "unreasonably". In our unanimous view, it did withhold its consent unreasonably. The respondent procrastinated and was unnecessarily obstructive when responding to the claimant's various requests for secondary employment.

92. The claimant's first request was made to his line manager, Mark Kane, Operations Lead, on 21 December 2022 (P.547).

93. We accepted the submission by the respondent's solicitor that a conflict of interest was part of the secondary employment process. That was clear from the wording of the "Other Employment" provisions in the Handbook (P.323-324).

94. By email on 6 January 2023, Mr Kane advised the claimant that his application was refused (P.559):-

*"Thank you for submitting your request for secondary employment and your patience for me to get back to you. Upon review of the information you have provided and consultation with HR, your request is not permitted.*

*Your proposal to enter into providing Consultancy/Training in support of Data Science AI & Machine Learning is the same role as your are currently fulfilling for Petrofac. In the view of the Company, engaging in these activities on a self-employed basis would place you in competition with Petrofac, creating a conflict of interest and prejudicing Petrofac's business interest. In the opinion of the Company, this conflict of interest, would interfere with the performance of your role at Petrofac."*

95. However, there was clear evidence, in particular from the claimant himself, that his role as "Global Subject Matter Expert - Condition Monitoring" did not include, "Data Science, AI & Machine Learning". Nor was this work included in his Job Description (P.294-296). His evidence in this regard, which was not disputed, was measured, consistent, credible and reliable.

96. The claimant brought this to Mr Kane's attention in his emails of 7 and 11 January 2023 (P.559 and P.557-558). This was not disputed by Mr Kane when he replied (P.557).

97. In our unanimous view, therefore, this initial request was unreasonably refused by the respondent.

98. However, the respondent agreed to re-evaluate the claimant's request. A prolonged process then ensued, despite the claimant providing further details in support of his request (P.557-559).

99. The respondent required him to complete a conflict of interest declaration using the designated Petrofac "COI tool" (P.357-368).

100. The claimant complied with this request. However, the respondent was still of the view that he had provided insufficient information. On 27 February 2023, Scott Gardner HR Advisor, sent an email to the claimant in the following terms (P.552):-

*"Please take the below email and the outcome of the conflict of interest tool, as approval that your request for secondary working has been approved with the caveat explained below i.e. in each instance, prior to the commencement of any work, you will need to disclose information regarding client, work and duration, and have this approved by Mark Kane."*

101. Those "caveats" ("mitigating actions deemed necessary to manage the COI"), which were set by Chris Taylor, Vice-President for HR, were not agreed with the claimant as required by the COI Procedure (P.364, para. 1.7).

5 102. In any event, subsequently, Mr Kane approved the claimant's request for secondary employment with Mobius Institute on 8 March 2023, subject to these mitigating actions (P.550).

103. The claimant had advised Mr Kane on 1 March that, *"this will be on an ad-*
10 *hoc basis for a few hours to one or two days per month"* (P.574).

104. On 9 and 10 March 2023, the claimant submitted a further 19 requests for secondary employment (P.576-594). 17 of these were for UK Water Companies, a sector in which the respondent had no interest, something
15 which Chris Taylor, the respondent's Vice-President for HR, confirmed when he gave evidence at the Tribunal Hearing.

105. For each of his requests, the claimant provided the criteria set out by Mr Gardner as mitigating actions which Mr Taylor had determined.

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106. We did not accept the submission by the respondent's solicitor that the level of information provided was insufficient for Mr Kane to make an assessment. The claimant had advised him that the secondary employment would range from, *"a few hours to one or two days per month."*

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107. Although the claimant had complied with the mitigating actions, Mr Kane's response was to request that, in addition, he should provide a "workscope". This greatly expanded the required mitigating actions. A workscope is only required at an advanced stage in contractual discussions. It would take a
30 considerable amount of time to prepare and could run to several pages (P.663-668).

108. In our view, this was an unnecessary and unreasonable request by Mr Kane.

109. The respondent's solicitor submitted that this was necessary as the claimant had only stated that the work would be "ad hoc" and Mr Kane could not assess the total amount of time the claimant would be spending on secondary work. However, the claimant had made it clear that it would only range from, *"a few hours to one or two days per month".* Further, as the claimant's solicitor submitted, *"the reference to ad hoc was per the CO! GAN tool (and uploaded file attachments), a reference to a few hours to two days a month".*

110. Had Mr Kane properly and reasonably considered the information provided, in writing, by the claimant he would have been satisfied that this was the full extent of the claimant's involvement in proposed secondary employment, that the great majority of the potential clients were water industry Companies which funded "UKWIR" projects and there was no risk of any conflict of interest.

111. But Mr Kane then made it a further condition of a secondary employment request that the claimant should provide a Request for a Quotation (a "RFQ") from any prospective client (P. 600). This also greatly expanded the mitigating actions which had been put in place by the respondent, with which the claimant had complied, as to get to the stage of an RFQ there would have to be significant contact with the prospective client. This additional condition was also unnecessary and unreasonable.

112. It appeared to us that the respondent was resistant to the claimant engaging in any form of secondary employment at all. As the claimant's solicitor put it in his written submissions, *"Mr Kane and Mr Harding simply sought to find a reason why the claimant could not undertake this work, putting obstacles in the way and changing the goalposts."*

113. We arrived at the unanimous view, therefore, that the respondent acted unreasonably in withholding permission for secondary employment. The respondent was, therefore, in breach of contract.

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114. We should add, for the sake of completeness, that we were satisfied that the breach of contract complaint relating to secondary employment was presented within the three month period beginning with the effective date of termination, in terms of Article *1* of the relevant Order.

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## Damages

115. The claimant is entitled to an award of damages as a consequence of the respondent's breach of contract. A claim for damages is a claim for pecuniary

15 compensation caused by the breach. The claimant's claim for damages was set out in considerable detail in his Schedule of Loss at para. 3.2 under the heading **"Other Employment".**

116. However, the onus was on the claimant to prove not only the breach of

20 contract, but also the consequent loss or damage and the extent and value of that loss.

117. We were of the unanimous view that, on the evidence, the claimant failed to prove that he had incurred any loss as a direct consequence of the

25 respondent's breach of contract.

118. We only had the claimant's evidence about the financial loss he allegedly incurred. We heard no evidence from any of the Companies he hoped to contract with about the likelihood of him securing work with them.

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119. The claimant's quantification was speculative. He had not concluded any contracts with these Companies. There was insufficient evidence to make a

finding that he probably would have, let alone on what the terms and conditions of the contract were likely to be.

120. The work with Mobius Institute which was approved by the respondent might still be available for the claimant but he still does not have a contract with them. If he is able to secure work with them he will not have incurred any loss.

121. It was significant that in his Schedule of Loss there is reference, in only speculative terms, to each of the individual Companies concerned: *"this work was **expected to be**……."*; ***"should the** claimant secure one day's work per month"', "He had been in conversation with……"*; ***"potential** work'.*

122. This was insufficient to make a finding that he probably would have secured this work and what the value of that work was likely to have been.

123. Nor was there sufficient evidence to enable us to conclude that the claimant probably incurred losses in excess of the statutory maximum of £25,000, as his solicitor submitted.

124. We arrived at the unanimous view, therefore, that there should be no award of damages, to the claimant as a consequence of the respondent's breach of contract. The written submissions by the respondent's solicitor to that effect, at paras, j) and k) were well-founded.

**Constructive Unfair Dismissal**
**Discussion and Decision**
**Relevant Law**

125. Having resigned, it was for the claimant to establish that he had been constructively dismissed. This meant that under the terms of s.95(1)(c) of the Employment Rights Act 1996 ("the 1996 Act") he had to show that he terminated his contract of employment (with or without notice) in

circumstances such that he was entitled to do so without notice by reason of his employer's conduct. It is well established that means the employee is required to show that the employer is guilty of conduct which is a fundamental breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee, in those circumstances, is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

126. The correct approach to determining whether or not there has been a constructive dismissal was discussed in ***Western Excavating (ECC) Ltd v. Sharp*** [1978] ICR 221, the well-known Court of Appeal case, to which we were referred by the claimant's solicitor. According to Lord Denning, in order for an employee to be able to establish constructive dismissal, four conditions must be met:-

*"(1) There must be a breach of contract by an employer. This may be either an actual breach or an anticipatory breach;*
*(2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous interpretation of the contract by an employer will not be capable of constituting a repudiation in law;*
*(3) He must leave in response to the breach and not for some other unconnected reason; and*
*(4) He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."*

127. Accordingly, whether an employee is *"entitled'* to terminate his contract of employment, *"without notice by reason of the employer's conduct"* and claim constructive dismissal, must be determined in accordance with the law of contract. It is not enough to establish that an employer acted unreasonably. The reasonableness, or otherwise, of the employer's conduct is relevant but the extent of any unreasonableness has to be weighed and assessed and a

Tribunal must bear in mind that the test is whether the employer was guilty of a breach which goes to the root of the contract or shows that the employer no longer intends to be bound by one or more of its essential terms.

**Trust and confidence**

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128. So far as the present case was concerned, we were mindful that it is implied into all contracts of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee.

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129. In ***Malik v. BCCI*** [1998] AC20, to which we were also referred, Lord Steyn stated that, in assessing whether or not there has been a breach of the implied obligation of mutual trust and confidence, it is the impact of the employer's behaviour on the employee that is significant - not the intentions of the employer. Moreover, the impact on the employee must be assessed objectively.

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130. When we considered the authorities, we recognised that a wide range of behaviour by employers can give rise to a fundamental breach of the implied term of mutual trust and confidence.

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131. We were also mindful that the claimant in the present case relied upon the so-called "last straw doctrine" which was set out in ***London Borough of Waltham Forest v. Omilaju*** [2004] EWCA (Civ) 1493. The Court of Appeal explained that the act constituting the last straw does not have to be of the same character as the earlier acts, nor need it constitute unreasonable or blameworthy conduct, although in most cases it will do so. But the last straw *"must contribute something'* to the breach of the implied contractual terms of trust and confidence, *"although what it adds may be relatively insignificant. The test of whether the employee's trust and confidence has been undermined is objective and while it is not a prerequisite of a last straw case*

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*that the employer's act should be unreasonable, it will be an unusual case where the conduct which is perfectly reasonable and justifiable satisfies the last straw test"*

5 132. In ***Kaur v. Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 the Court of Appeal reviewed cases on the "last straw" doctrine and formulated an approach to "last straw" cases, referring to the implied term of trust and confidence as "the ***Malik*** term". The Court listed the question that it will normally be sufficient to ask in order to decide whether an employee was
10 constructively dismissed:

*"In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*

*(1) What was the most recent act (or omission) on the part of the employer*
15 *which the employee says caused, or triggered, his or her resignation?*
*(2) Has he or she affirmed the contract since that act?*
*(3) If not, was that act (or omission) by itself a repudiatory breach of contract?*
*(4) If not, was it nevertheless a part (applying their approach explained in **Omilaju)** of a course of conduct comprising several acts and omissions*
20 *which, viewed cumulatively, amounted to a (repudiatory) breach of the **Malik** term? (if it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above).*
*(5) Did the employee resign in response (or partly in response to that*
25 *breach)?*

**Present case**

133. The claimant intimated his resignation by email to Scott Gardner on 12 July 2023. His email was in the following terms (P.754):-

30 *"I am writing to inform you that I am resigning from my position as Global Subject Matter Expert - Condition Monitoring. This letter is to be taken as my formal resignation and the termination of our contract of employment. I feel that I am left with no choice but to resign from Petrofac Facilities*

*Management Ltd ("Petrofac") and I understand that the notice period is currently three months.*

5 *I do not believe that Petrofac will be surprised by this resignation and I do not feel it necessary or appropriate to set out in detail the reasons for my resignation as Petrofac is more than aware of the same. I do wish however to note that it is highly disappointing that Petrofac completely failed to comply with its fundamental contractual obligations in respect of secondary employment and the result of that failure has been a significant income* 10 *stream has been lost.*

*<u>Conclusion</u>*

15 *I am very disappointed that Petrofac has acted in this way given my almost twenty years of unblemished service however as noted above, unfortunately I am in a position where I have no choice but to resign not least given that I have now lost faith and confidence in Petrofac"*

20 134. It was significant, in our view, that the claimant chose to only make specific reference to secondary employment in his resignation email. While he did say that he did not consider it necessary or appropriate to detail all the reasons for his resignation, it was clear from the extensive and very detailed communications which he had with the respondent, for some considerable 25 period of time, that he was well able to articulate his position and he normally did so, at some length. We were of the view, on the evidence, and having regard to the terms of the resignation email, that the failure by the respondent to approve his request for secondary employment was the principal reason for his resignation. While he was undoubtedly aggrieved at other aspects of 30 the way he had been treated by the respondent, in our view the other allegations of breach of contract which he founded upon in his claim, (apart from the allegation that his role had been undermined with a client (see 9 f) below), were something of an afterthought, designed to enhance his complaint that he was constructively and unfairly dismissed.

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135. We address, in turn, each of the allegations of breach of contract as set out at paragraphs 9 a) to 9 f) in the List of Issues.

**"9 a) Failed to promote the Claimant into the position of Service Line Manager (Condition Monitoring) on 28 January 2019"**

136. The claimant was the only applicant for the Service Line Manager ("SLM") position. However, the respondent decided to offer the position to Brian Harding which he accepted. As the respondent's solicitor submitted, *"the respondent was entitled to appoint somebody else".* It was in their gift. There was no evidence to suggest any ulterior motive on the respondent's part. They simply decided that Mr Harding was a better appointment for their business. Mr Harding and the claimant were both Grade 19s at the time. The fact that the claimant was the only applicant did not entitle him to be appointed. We were not persuaded that this was a breach of contract by the respondent. It was a business decision.

137. Further, and in any event, the appointment was made in January 2019, over 4 years before the claimant's resignation. He chose not to raise a grievance, although, clearly, he was someone who was well able to do so. He continued to work for the respondent for a number of years and engage with Mr Harding as his SLM. Even if there was a breach of contract on the part of the respondent, the claimant had affirmed the contract. Nor could this be considered as part of a series of breaches of contract which entitled the claimant to resign years later.

**"9 b) Reduced the Claimant's Salary without his consent between 1 May 2020 and 12 July 2023"**

138. The claimant's salary was reduced in May 2020. There was a business need to do so, mainly due to the impact of an "oil price slump" and the effect of the Covid Pandemic (P.479- 480). The reduction followed weeks of consultation with Employee Representatives on behalf of all the respondent's employees in the UK. The claimant was not alone. There was an across the board reduction. The salary reduction was necessary "to protect the future" of the respondent's business.

139. Unsurprisingly, the claimant was unhappy with the salary reduction but he agreed to accept it. He did not raise a grievance. His salary was increased in the following years.

140. In our unanimous view, there was no breach of contract by the respondent in this regard.

**"9 c) Failed to review the Claimant's salary between 18 February 2021 and 12 July 2023"**

141. On 18 February 2021, the claimant sent an email to Mr Kane with a request that his salary be formally reviewed (P.531). The claimant declined to raise a formal grievance, as suggested by Sarah Townsend, Senior HR Advisor (P.536). However, a review was carried out and on 8 March 2022 Ms Townsend sent an email to the claimant in the following terms (P.545):-

*"Thanks for your recent email attached, I hope you are well. I did not respond following your email in February 2021 (below) as shortly afterwards you were signed off work and I did not feel it was appropriate to respond whilst you were off sick.*

*In response to your email, we can handle this informally, from what you are saying below is that you only wanted this raised with HR because you*

*required the salary data, as already stated we can't breach confidentiality and provide salaries of employees.*

*The Equal Pay Act is an Act to prevent discrimination as regards terms and conditions of employment between men and women. It prohibits any less favourable treatment between men and women in terms of pay and conditions of employment.*

*I can confirm that I have spoken with Martin Layfield on your concerns and he confirmed that we are satisfied that your salary meets the criteria for the job role and in any comparison with your peers within the service area you work in. He also confirmed - and something I believe you have acknowledged yourself - that we don't operate a Global SME structure anymore (legacy people have either left or taken on different roles in the business). I can also confirm your current salary is well above others in your grade.*

*Onshore employees are not unionised, if you still felt that your concern has not been addressed, then the next process would be to follow the grievance process and have your concerns heard at a grievance hearing."*

142. The claimant still did not raise a grievance.

143. We heard evidence from Ms Townsend at the hearing. She gave her evidence in a measured, consistent and convincing manner. She presented as credible and reliable. We were satisfied that the claimant's concerns were properly addressed by the respondent and that the terms of Ms Townsend's email were accurate. In our view, it was reasonable for the respondent to compare the claimant's salary against other Grade 19s, within that part of the business. We were satisfied that the respondent found that his salary was fair. Indeed, the conclusion was that his salary was, "well above others in his grade".

144. We were of the unanimous view there was no breach of contract by the respondent in this regard.

**"9 d) Unreasonably withheld permission for the Claimant to undertake secondary employment between 6 January 2023 and 12 July 2023"**

145. For the reasons detailed above, in relation to the claimant's stand alone breach of contract complaint, we were of the unanimous view that the respondent was in breach of contract in respect of its failure to approve the claimant's secondary employment requests. It withheld permission unreasonably, delayed processing his applications and imposed conditions which were unreasonable having regard to the nature of the secondary employment in which he proposed to engage and the time he said he would spend on it. This was a fundamental breach of an express term of the claimant's contract of employment.

**"9 e) Refused to change the Claimant's Line Manager on 23 June 2023"**

146. We were satisfied that the submission by the respondent's solicitor that there was insufficient evidence to justify a change in line management was well-founded.

147. The evidence of Scott Gardner, HR Advisor, was significant in this regard. He gave his evidence in a measured, consistent and convincing manner and presented as credible and reliable. He sent an email to the claimant on 23 June 2023 in the following terms (P.653):-

*"I hope you are well.*

*As per our conversation on Friday 16 June 2023, during which you stated to me that you did not wish to report to Mark Kane or Brian Harding, I advised you the purpose of the call on Friday 16 June 2023 with you, Brian Harding and myself was to explain the way forward on your secondary work request and for all other matters, Mark would remain your Line Manager. At your request, I advised that I would look into potential for any alternative arrangements that could be put in place while investigation into any points you wish to raise via the grievance process was completed. I advised you that I would provide an update on this by no later than Friday 23 June 2023.*

*Your request has been reviewed and I confirm that changes in reporting lines and organisational structure are driven by business requirements, rather than inter-personal relationships. As a result your direct Line Management remains as Mark Kane.*

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*……………………………………………………..*"

148. Mr Gardner had a discussion about this with Richard Cook, the respondent's Operation Director and he took the decision to deny the claimant's request. As he put it, "a *change In line manager is not a personal request. Line management should generally only be changed to suit business needs. If it is a personal issue, a conflict of personalities, we would need to understand what that conflict is and follow the process."*

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149. Mr Gardner expected the claimant to raise a grievance, as he had suggested, but he did not do so.

150. We were of the unanimous view that the respondent was not in breach of contract in this regard. We reached this view mindful of the poor relationship Mr Harding had with the claimant, but he was not his immediate line manager. That was Mark Kane. While a meeting was arranged with Mr Gardner and Mr Cook on the claimant's return to work, after he had been signed off due to ill health, rather than with Mr Kane, that was not because the respondent believed the claimant's request was justified. It was decided, in light of the claimant's resignation and the adverse impact on Mr Kane's health, allegedly because of his interactions with the claimant, it would be preferable for Mr Cook to meet the claimant. This was explained to the claimant. In all the circumstances, we were of the view that this was a reasonable course of action.

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**"9 f) Brian Harding (Service Line Manager) undermined the Claimant's role by deliberately changing a proposal to the Claimant's client contrary to his objection and professional judgement on 4 July 2023 (the "last straw").**

5 151. We were also of the view that the submissions by the respondent's solicitor in this regard was well-founded. In particular, it was not for the claimant to determine the charge rate for a contract. This was a matter for Mr Harding, the respondent's SLM, to determine in discussion with the respondent's Commercial Department and the Operations Director. The claimant's salary 10 was not affected. He advised Mr Harding that he would still be carrying out the work for SBM (P.711-712). We were not persuaded that the reduction in the claimant's daily rate undermined him or damaged his reputation with the client.

15 152. We were of the unanimous view that the respondent was not in breach of contract in this regard. It was a commercial decision and one for Mr Harding to make, not the claimant.

153. It was clear that the claimant felt undermined and compromised. That was 20 understandable in the circumstances and bearing in mind the history of his relationship with the client. However, Mr Harding appeared to be insensitive to and dismissive of his concerns, although genuinely held. Having regard to the guidance in ***Omilaju,*** although there was no breach of contract by the respondent, we were persuaded that this was indeed the "last straw, so far 25 as the claimant was concerned.

**Conclusion**

154. The breach of contract by the respondent in respect of its failure to approve 30 the claimant's requests for secondary employment was a breach of an express term of the claimant's contract of employment. He was entitled to request secondary employment. The respondent was required to consider

any request promptly and in a reasonable manner. The claimant's requests were against a background of a previous significant reduction in the claimant's salary and an understandable desire on his part to supplement his income, notwithstanding a subsequent increase in his salary. He had made it very clear to the respondent how important this was for him. The breach had a significant effect on the claimant. The respondent was intransigent and obstructive. This resulted in extensive correspondence and discussions which were unnecessary and resultant delays, all of which had an adverse effect on the claimant's health.

155. In our unanimous view, it was a fundamental breach of contract, sufficiently important to justify the claimant resigning. In other words, the breach was repudiatory.

**Trust and confidence**

156. It is well established that the parties in an employment relationship owe a duty to conduct themselves in a way to preserve trust and confidence in the relationship ***(Malik).*** In ***Courtaulds Northern Textiles Ltd v. Andrew*** [1979] IRLR 84, the EAT held that it was a fundamental breach of contract, for the employer, without reasonable and proper cause, to conduct itself in a manner "calculated or likely to destroy or seriously damage the relationship of confidence and trust between the parties".

157. In ***Sawar v. SKF UK Ltd*** [2010] UKEAT 0355/09/2101, the EAT confirmed that the particular circumstances of the case are important in determining whether or not there has been a breach of the implied term. The respondent was aware of the reason why the claimant wished to engage in secondary employment. He needed to supplement his income following the wage cut. He had made it clear that this was very important to him. He was a valued and trusted employee, of some 20 years' standing with an impeccable record, employed in a senior position. It was clear, so far as the type of secondary work he would do and the time he undertook to devote to that work, that the

secondary employment he proposed was not in conflict with his contractual obligations with the respondent and yet the respondent unreasonably delayed addressing his request and then placed obstacles in his way in the form of "caveat/mitigating actions" which were unreasonable.

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158. While the reduction in the claimant's charge rate Mr Harding made to the proposal to SBM, despite the claimant's objection, did not amount to a breach of contract, it *"contributed something"* ***(Omilaju)*** to the breach of the implied term of trust and confidence. It was the "last straw" for the claimant. It triggered his resignation. When we considered this along with the circumstances of the breach of contract in relation to the claimant's secondary employment requests, we arrived at the unanimous view that the respondent was also in breach of the implied term of trust and confidence.

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159. The implied term of trust and confidence is regarded as being so fundamental that its breach will invariably repudiate the contract.

160. In arriving at this view we were mindful that in **Woods *v. WM Car Services (Peterborough) Ltd*** [1981] ICR 666 confirmed the ***Courtaulds*** case. Mr Justice Browne-Wilkinson said this:

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*"To constitute a breach of this implied term it is not necessary to show that the employer intended any breach of the contract: the Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that it's effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."*

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161. The legal test entails looking at the circumstances *objectively* - i.e. from the perspective of a reasonable person in the claimant's position ***(Tullett v. BGC Brokers LLP and Ors*** [2011] IRLR 420, CA). In our unanimous view, in the particular circumstances of the case, that was the position in which the claimant found himself. - he *"could not be expected to put up with it".*

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162. There was no doubt that the claimant resigned in response to the respondent's breach. He said as much in his letter of resignation (P.754).

163. He did not wait too long either in terminating the contract in response to the respondent's breach. The issue of secondary employment was an ongoing one. The claimant did not waive or accept the breach. He continued to seek to address it up to and including his resignation letter (P. 754); the "last straw" was only a matter of days before he resigned.

164. We arrived at the unanimous view, therefore, that the claimant was constructively dismissed
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165. We were also of the unanimous view, with reference to s.98(4) of the Employment Rights Act 1996, that the claimant's dismissal was unfair.

**Compensation**

**166.** The claimant is entitled to a **Basic Award.** As we understand it, it is not disputed that the Award should be £17,040, as detailed in the claimant's Schedule of Loss.

167. We are also of the view that it would be just and equitable to make a **Compensatory Award.** However, this is complicated as there are several aspects to this detailed in the Schedule of Loss, and we found ourselves unable to quantify this without hearing further evidence and submissions. So far as a "standard" unfair dismissal complaint is concerned, there can be no award for injury to feelings or for personal injury. However, it would appear that, provided the claimant has taken reasonable steps to mitigate his loss, and once the Compensatory Award is "grossed up", it is likely to exceed the statutory cap of one year's pay.

168. Parties are directed, therefore, to endeavour to agree the award of compensation, failing which a Remedy Hearing will be fixed.

**Protected Disclosures ("Whistleblowing")**

169. The claimant brought complaints that he had been subjected to detriments and automatically unfairly dismissed by reason of making protected disclosures.

**Relevant Law**

170. This is to be found in the Employment Rights Act 1996 in the following sections.

***"43A Meaning of "protected disclosure"***

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

***43B Disclosures qualifying for protection***

*(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following –*

*(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
*(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
*(d) that the health or safety of an 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 the information tending to show any matter falling within any of the preceding paragraphs has been, or is likely to be deliberately concealed………"*

***47B Protected disclosures***

*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*

*[(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done -*
*(a) by another worker of* IV's *employer in the course of that other worker's employment, or*
*(b) by an agent of* W's *employer with the employer's authority,*

*on the ground that W has made a protected disclosure.*

*(IB) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*
*(IC) For the purposes of sub-section (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer..........................................................................*

***103A Protected Disclosure***

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

171. Helpfully, the parties' solicitors made reference to some of the relevant case law in their written submissions.

## Claimant's submissions

172. The claimant's solicitor made the following submissions, with reference to the relevant case law in his "Skeleton Argument":-

***"Information"***

*In* ***Cavendish Monroe Professional Risk Management v. Geduld*** *[2010] IRLR 38 at para. 21 Information was stated as:*

*"In order to fall within the statutory definition of protected disclosure, there must be a disclosure of information. There is a distinction between "information" and an "allegation" for the purposes of the Act. The ordinary meaning of giving "information" is conveying facts.*

*In* ***Learning Trust & Others v. Marshall*** *UKEAT/2012/0107/11, it was held, at para. 102 that:*

*"information in each of those letters "tends to show" failure to comply with a legal obligation".*

*Thus **Cavendish** was diluted and instead there must be some form of information which tends to show a failure to comply with a legal obligation.*

***Simpson v. Cantor Fitzgerald** [2020] EWCA Civ 1601 which followed the seminal decision in **Kilraine,** noted at para. 51 that:*

*"We now know from the judgment of Sales LJ in **Kilraine** that it is erroneous to gloss section 43B(1) of the 1996 Act to create a rigid dichotomy between "information" on the one hand and "allegations" on the other. In order for a communication to be a qualifying disclosure it has to have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub-section (1)"*

*And at para. 53 that a Tribunal following Cavendish was:*

*"applying too rigid a distinction between a query and information"*

*Thus the question of what constitutes "information" for the purposes of s.47 can be stated as that which has:*

*"sufficient factual content and specificity such as is capable to show one of the matters listed in sub-section (1)"*

*It is of note that multiple communications can, taken cumulatively, be considered a qualifying disclosure as per **"Norbrook Laboratories (GB) Ltd** v. Shaw UKEAT/0150.*

***Public Interest***

*The question of what may constitute public interest was set out in the seminal case of **Chesterton Global Ltd (t/a Chestertons) v. Nurmohamed** [2017] EWCA Civ979 which set out a two-stage test namely:*

**(a)** *Whether the worker subjectively believed that the disclosure was in the public interest,*
**(b)** *If so whether that belief is objectively reasonable.*

*The Judgment, at para. P.37 also says this:*

*"In my view the correct approach is as follows. In a whistleblowing case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker."*

C notes ***Babula v. Waltham Forest College*** *2007 IRLR 346 CA and in particular "there is nothing in section 43B(1) which requires the whistleblower to be right" (paragraph 79)."*

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173. The claimant's solicitor then went on in his submissions to refer to "Detriments". He referred to ***Shamoon v. Chief Constable of the Royal Ulster Constabulary*** [2007] UKHL 11 and ***Woodward v. Abbey National Pic*** [2006] EWCA Civ 822.

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174. Finally, he addressed the issue of the "causal link" with reference to ***NHS Manchester v. Fecitt and ors*** [2012] IRLR 64 and ***Royal Mail v. Jhuti*** [2019] UKSC 55.

15 **Respondent's submissions**

175. The respondent's solicitor also made the following submissions, with reference to the relevant case law: -

*"The Tribunal is referred to* ***Williams v. Brown*** *UKEAT/0044/19. In*
20 *considering the definition of the qualifying disclosure, the EAT noted:*

*"9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the*
25 *disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held".*

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*As per* ***Blackbay Ventures Ltd t/a Chemistree v. Gahir*** *UKEAT/0449/12, other than in obvious cases, where a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference, for example, to statute or regulation.*

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*It is, of course, necessary to consider the case of Chesterton Global Ltd* ***(T/A Chestertons) v. Nurmohamed*** *[2017] EWCA Civ* ***979*** *when considering whether the public interest test has been met. In doing so, it is useful to consider the full factors described in that Judgment:*

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(a) ***The numbers in the group whose interests the disclosure served.***

*Tribunals should be cautious about finding the public interest test satisfied purely based on the number of affected employees, because of the "broad intent" of the legislators was that private workplace disputes should not attract whistleblowing protection. In practice, however, the larger the number of persons whose interests are engaged by a breach of their contracts of employment, the more likely it is that there will be other features of the situation which will engage the public interest.*

(b) ***The nature of the interests affected and the extent to which they are affected by the wrong doing disclosed.***

*Disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, or where the effect of the wrongdoing is marginal or indirect.*

(c) ***The nature of the alleged wrongdoing disclosed.***

*Disclosure of deliberate wrongdoing is more likely to be in the public interest by the disclosure's inadvertent wrongdoing affecting the same number of people.*

(d) ***The identity of the alleged wrongdoer.***

*The larger or prominent wrongdoer (in terms of the size of its relevant community, that is, its staff, supplies and clients), the more obviously a disclosure about its activities could engage the public interest, although this principle "should not be taken too far".*

*We would refer you specifically to Lord Justice Underhill's warning at paragraph 36 of this Judgment:*

*"I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v. Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect the Employment Tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers - even, as I have held, where more than one worker is involved. But I am not prepared to say never."*

*We would refer the Tribunal to the comments of Judge Hendry during the Preliminary Hearing on 6 February 2024 at page 190. Here it states:*

*"We discussed the nature of whistleblowing and I gave some simple examples of whistleblowing situations. There is a danger in "shoehorning" concerns of unhappiness with decisions into a statutory framework."*

*The respondent avers that such shoehorning is exactly what has happened here."*

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## Discussion and Decision

176. The claimant relied upon three alleged protected disclosures, as set out in paragraph 17 of the List of Issues. We deal with each in turn, as the EAT said we should do in ***Blackbay.***

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### First alleged protected disclosure

### Claimant's email of 27 March 2023 (P.596-599)

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177. The claimant's email was a complaint about the respondent's failure to approve his request for secondary employment. We were satisfied that the claimant disclosed a failure to comply with a legal obligation relating to his contract of employment, as submitted by his solicitor. In ***Parkins v. Sodexho Ltd*** [2002] IRLR 109, the EAT ruled that a breach of legal obligation arising under a contract of employment falls within the ambit of s. 43B (1)(b) of the 1996 Act, in the same way as any other type of legal obligation

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### Public interest

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178. However, a disclosure only qualifies for protection if the worker reasonably believes that it is made in the public interest

179. In his submissions, the claimant's solicitor referred to para. 55 of the claimant's witness statement and alleged that the claimant, *"was concerned about investors losing money as a result of the respondent failing to follow the very compliance processes that he understood had been created as a result of the SFO prosecution. The claimant was also concerned that these failures would be applied to other members of staff, several thousand*

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*individuals whom had been impacted by a reduction in salary and it follows may require secondary employment.*

*Mr Kane also confirmed that he lost a significant sum in respect of the company's shares which cements the claimant's assertion that numerous employees (most) would be impacted. The claimant was mindful of both these people (and the claimant shared that loss) are members of the public who could also be affected."*

180. Notwithstanding this submission, we were not persuaded that it was in the reasonable belief of the claimant that he was making the alleged disclosure in the public interest. It seemed to us that he was trying to establish that the alleged disclosure was in the public interest *after* the event. He made no mention of this in any of his very extensive correspondence. In our view, he was only raising concerns about his private employment rights. His concerns related to a purely personal matter: his wish to supplement his income by engaging in secondary employment.

181. With reference to the two-stage test in ***Chesterton,*** the factual content of the claimant's email of 27 March 2023 is such that, when considered in all the circumstances, is not capable of tending to show that it is likely that he had a reasonable belief that the alleged disclosure was in the public interest.

182. Further, even if we are wrong and the claimant did believe the disclosure was made in the public interest, when viewed objectively it was not reasonably held.

183. We found favour with the following submissions by the respondent's solicitor in this regard: *"The claimant has sent an email about his own secondary employment for the sole purpose of having such secondary employment requests agreed to. This is not the intention of section 43B of the Employment Rights Act 1996. It does not affect the interests of anyone else."*

184. In our view, this was a private employment dispute that did not engage the public interest.

185. Accordingly, his complaints that he was subjected to detriments and dismissed as a consequence of his email of 27 March 2023, which he claimed was a protected disclosure, were not well-founded and must be dismissed.

Second alleged protected disclosure

"The claimant stated verbally during a Teams meeting with Brian Harding and Scott Gardner on 16 June 2023 the following:

***/ expressed the stress and loss of income I had suffered regarding the respondent's handling of my secondary employment request and that company procedure had not been followed for six months and I was being treated with contempt. How the company had failed in every single timescale. How the respondent was changing what the compliance team had asked in making assumptions. That the respondent was asking for information that was not required by the Conflict-of-interest procedure and would breach client confidentiality. Then I needed to speak with the compliance team and to hear it from the horse's mouth."***

186. We accepted, that, by and large, this was what the claimant said and was the essence of his complaint. We were satisfied that this was a complaint that the respondent had failed to comply with a legal obligation in relation to his contract of employment.

187. However, this complaint also related to the claimant's application for secondary employment. For the same reasons we gave above in relation to the first alleged protected disclosure, we were of the unanimous view that the claimant had failed to demonstrate he subjectively believed that this "disclosure" was in the public interest; and even if he did, viewed objectively it was not reasonably held.

188. It was a private employment dispute.

189. In this regard, the following submissions by the respondent's solicitor was persuasive: -

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*"When asked how such a disclosure could be in the public interest the claimant stated, "secondary employment request is an entitlement of 8,500 people. If you breach it with me you breach it with all of them". That cannot possibly be sufficient to demonstrate that the claimant had a reasonable belief this disclosure was in the public interest. There is nothing to suggest that this is the case. The claimant was referring to his own situation only and it is clear from the terms of this disclosure that this was his concern. The words of Lord Justice Underhill* (in ***Chesterton)*** *are particularly relevant here."*

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190. This was not, therefore, a "disclosure" qualifying for protection.

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191. The complaints of detriment and automatic unfair dismissal on this basis is dismissed.

**Third alleged protected disclosure**

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**" The claimant stated verbally during a Teams meeting with Scott Gardner on 16 June 2023 the following:**

***"Said I needed a change in line management as there was no trust and I had been treated with contempt and ignored. I stressed how a line manager should be there to support and solve issues not create problems. How my line manager had been apathetic and procrastinating. This was an extension to the meeting where I had already expressed the stress and loss of income I had suffered as a result of my line manager's handling of my secondary employment request."***

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192. Although, as the respondent's solicitor submitted, the exact wording of what the claimant said Mr Gardner was not established in evidence, we were satisfied that he did complain about his line managers, Mark Kane and Brian Harding and wanted them replaced. He also complained that their treatment of him had caused him stress.

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193. Albeit with some hesitation, we decided, on balance, that this was a disclosure of information that the claimant's health was being damaged (s. 43B(1)(d) of the 1996 Act).

5 194. However, in our unanimous view, on the evidence, the claimant did not subjectively believe that this "disclosure" was in the public interest; and even if he did so, viewed objectively it was not reasonably held.

195. It was a private matter between the claimant and his two line managers. Put
10 simply, there had been a souring in their relationships which the claimant alleged had affected his health adversely. It did not affect the wider interests of the respondent's employees generally.

196. Again, we found favour with the submissions by the respondent's solicitor in
15 this regard: -

*"The claimant was requesting a change in line management due to his own personal circumstances. Any such disclosures serve the interests of no other individual. When questioned on this, the claimant stated that "all line managers in a company of 8,500 people" are responsible for health and*
20 *safety. This is not the disclosure the claimant was making. The claimant also averred that if he had a car accident as a result of stress, this would impact the general public. Respectfully to the claimant, this is illogical.*

197. This was not, therefore, a disclosure qualifying for protection. As the
25 respondent's solicitor put it: -

*" It cannot be the case that any disclosure of information about a worker's own personal circumstances could amount to a qualifying disclosure on the basis that it is possible that an employer could treat other people the same way".*

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198. The complaints of detriment and automatic unfair dismissal on this basis are dismissed.

199. We might add, that, in reaching this view, we were mindful of the guidance in ***Chesterton*** and the four factors to be considered when considering whether or not the public interest test had been met.

5 200. In our unanimous view, the claims based on all three "disclosures" were something of an afterthought. They had been made for purely personal reasons. This was indeed a case, as Judge Hendry cautioned, of " *shoehorning concerns or unhappiness with decisions into a statutory framework".*

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**Causation**

201. For the sake of completeness, we also wish to record our unanimous view that even if we were wrong and the claimant had made protected disclosures
15 and even if the claimant was treated by the respondent in the way he alleged, there was no basis, on the evidence, to conclude that the way he was treated, was because he had made protected disclosures. There was no evidence of a causal link.

20 202. In arriving at this view, we were mindful that the test for detriment is a lower one i.e. "more than trivial" ( ***Fecitt v. NHS Manchester*** [2012] ICR 372), than for dismissal where the protected disclosure must be the reason or the principal reason for the dismissal

25 203. By and large, we were satisfied that the submissions by the respondent's solicitor in this regard, at paras. F and G, were well-founded.

204. Also, it was significant that some of the alleged "acts or omissions" took place
30 before the first "disclosure" relied upon by the claimant; were diverse in nature; and a number of different individuals were involved.

205. We might add, that we reached this view, well aware of the clear relationship difficulties between Brian Harding and the claimant which were evident at the Hearing, in particular from Mr Harding's demeanour when he gave evidence, which was unnecessarily defensive, uncooperative and bordered on the evasive at times when cross-examined. We also wish to record that we accepted the evidence of Mr Dockree about the telephone conversations he had with Mr Harding when Mr Harding was critical of the claimant. Mr Harding said that he could not "recall" making these comments. However, Mr Dockree presented as unbiased and entirely credible and reliable and he spoke to contemporaneous handwritten notes he took at the time which were consistent with his evidence (P. 759-760 and P.762)

**Respondent's expenses/costs application**

206. The respondent's solicitor made an application for expenses/costs, under Rule 71 of the Tribunal Rules of Procedure. The application was opposed by the claimant. The parties' written submissions are referred to for their terms.

207. While the claimant's pleadings were lengthy, required specification and extensive case management was required and while we were mindful of the ***Chandhok v. Tirkey*** case, we were not persuaded that the claimant acted "vexatiously/abusively/disruptively or otherwise unreasonably". Some allowance had to be made for the fact that, for the most part, the claimant was a litigant in person, unfamiliar with employment tribunal procedures, whereas the respondent had the benefit of legal representation throughout. The "overriding objective" in the Tribunal Rules of Procedure also had to be borne in mind. This requires the Tribunal, amongst other things, to "ensure the parties are on an equal footing". The claimant prepared the claim form himself, albeit, we understand, with the benefit of some legal advice. It is understandable that he wished to detail all his complaints about the way he felt he had been treated by the respondent. He had been employed, after all, for some 20 years and was a high earner but was so aggrieved by the way

he had been treated by the respondent, he felt he had no option other than to resign. His difficulty, legally, was pursuing all his complaints within a statutory framework. While we have only found favour with one of his complaints, the others were at least stateable. Judge Kemp refused the respondent's application for strike out and for a deposit order. He was not persuaded that the claims had, "no reasonable prospect of success" or even "little reasonable prospect of success".

208. We had little difficulty, therefore, in arriving at the unanimous view that the respondent's application should be refused.

**Employment Judge: N M Hosie**
**Date of Judgment: 16 August 2024**
**Entered in register: 16 August 2024**
**and copied to parties**