CO

# EMPLOYMENT TRIBUNALS

**Claimants:** (1) Mr M Heinl
(2) Ms H Laikko

**Respondents:** (1) Moving Brands Limited
(2) Year 15 Limited
(3) Mr B Wolstenholme
(4) Mr G Wolstenholme
(5) Mr J Toppin
(6) Ms C-A Kyosti

# CORRECTED JUDGMENT

**Heard at:** London Central (by Cloud Video Platform)
**On:** 5, 6, 7, 8, 12, 13, 14, 15, 16, 19, 20, 21, 22, 23 September 2022, 10, 11, 12, 13, 16, 17, 18 October 2023, 2, 3 and 4 April 2024, 17 July 2024

**Before:** Employment Judge Joffe
Ms S Campbell
Mr A Adolphus

**Appearances**
For the claimants: Mr J Susskind, counsel
For the respondent: Mr P Strelitz, counsel

# JUDGMENT

1. The claimants' claims of ordinary unfair dismissal (section 98 Employment Rights Act 1996) are well-founded and are upheld against the first respondent.

2. The first claimant's claim of automatically unfair dismissal (section 103A Employment Rights Act 1996) is not upheld and is dismissed.

3. The following of the first claimant's claims of being subjected to a detriment for making a protected disclosure are well-founded and are upheld against the

first, third and fourth respondents, save that the **first**, third and fourth respondents are not liable for detriments 1, 7 and 11 insofar as they relate to the second respondent:

a. Detriments 1 and 2;
b. Detriment 5;
c. Detriment 6;
d. Detriment 7;
e. The following parts of detriment 8: those set out at paragraphs 18.1 18.2 and 18.3 of the list of issues, save for subparagraphs 18.2.5, 18.2.6, 18.2.7 and 18.2.8;
f. Detriment 9;
g. Detriment 10, save for the delay in providing the appeal outcome;;
h. Detriment 11.

4. The remaining claims of protected disclosure detriment are not upheld and are dismissed.

5. The following of the first claimant's claims of victimisation are well-founded and are upheld against the first and third respondents, save that the **first and** third respondent**s ~~is~~ are** not liable for detriments 1, 7 and 11 insofar as they relate to the second respondent:

a. Detriments 1 and 2;
b. Detriment 5;
c. Detriment 6;
d. Detriment 7;
e. The following parts of detriment 8: those set out at paragraphs 18.1 18.2 and 18.3 of the list of issues, save for subparagraphs 18.2.5, 18.2.6, 18.2.7 and 18.2.8;
f. Detriment 9;
g. Detriment 10, save for the delay in providing the appeal outcome;;
h. Detriment 11.

6. The remaining claims of victimisation are not upheld and are dismissed.

# REASONS

## Claims and issues

Commentary on list of issues

1. We set out below the list of issues which was developed through the case management stages. It is relevant to an understanding of this Judgment to note that ultimately the emphasis in evidence and submissions was not on many of the individual acts of alleged detriment but very firmly on the dismissal of the claimants. In relation to some of the alleged detriments we had little evidence and very limited submissions. The number of respondents and detriments created a potentially very large number of causes of action but

ultimately we heard very little as to how some of the respondents could be liable in law for some of the detriments. This was a case which could have benefitted from a careful trimming of the list of issues at some point in the proceedings.

2. It is relevant also to note that there may be other actual or future proceedings in other jurisdictions relating to the claimants' roles as directors and shareholders of the first two respondents but we were not informed about and are not concerned with any such proceedings.

3. It is finally also relevant to record that these proceedings have been unusual both in terms of the sheer volume and complexity of the evidence and in terms of the entanglement of various relationships between the claimants and individual respondents – relationships as co directors and shareholders, as friends and as employers and employees. We were asked by both sides to consider evidence about these relationships extending back a number of years. Some of that evidence was highly impressionistic and emotive.

4. A very concise summary of the issues is:
   - Both claimants claim ordinary unfair dismissal. They say that there was no potentially fair reason for their dismissals and the respondents did not act reasonably in dismissing them;
   - Mr Heinl also claims:
     - automatically unfair dismissal for making public interest disclosures;
     - Detriments (including dismissal) due to making public interest disclosures
     - Victimisation – that he was subjected to detriments including dismissal for doing a protected act.

<u>The detailed issues as agreed</u>

5. These are as follows, including acronyms and abbreviations adopted by the parties. For ease of understanding, when we refer to real or corporate respondents individually, we generally use their names but collectively call them 'the claimants' or 'the respondents'.

<u>Jurisdiction</u>

1. Whether any of Cs' claims are out of time.

2. If so, whether the matters complained of amount to a series of similar acts and/or conduct extending over a period, and/or it was not reasonably practicable for Cs to file this claim in time, and/or it would be just and equitable to extend time.

<u>Alleged Protected Disclosures / Protected Act</u>

*The Share Transfer Disclosure [protected disclosure]*

3. Whether C1 made the Share Transfer Disclosure (or any part of it), as defined in §§13-14 of the Re-Amended Grounds of Claim ("RAGOC").

4. Whether the Share Transfer Disclosure was a disclosure qualifying for protection in that it was a disclosure to C1's employer of information which, in his reasonable belief:

4.1. Was made in the public interest; and

4.2. Tended to show:

(1) That persons had failed, were failing, or were likely to fail to comply with

legal obligation(s) to which they were subject, and/or that a criminal offence had been committed, was being committed, or was likely to be committed.

(a) Tax evasion in the United Kingdom and/or United States by R3 and/or R4;

(b) Corporate offences of failure to prevent facilitation of tax evasion, contrary to the Criminal Finances Act 2017;

(c) Breaches by R3 and/or R4 of their obligations under the Companies Act 2006 (including their duties as statutory directors);

(d) Breaches by R2 of laws requiring accurate filings at Companies House;

(e) Breaches by R3 and/or R4 of their obligations under R2's Articles of Association;

(f) Breaches by R3 and/or R4 of their obligations under a Shareholders' Agreement dated 24 September 2019;

(2) That any of these matters had been, was being, or was likely to be deliberately concealed.

*The Business Conduct Disclosure [protected disclosure]*

5.Whether C1 made the Business Conduct Disclosure (or any part of it), as defined in RAGOC, §§15A-15D.

6. Whether the Business Conduct Disclosure was a disclosure qualifying for protection in that it was a disclosure to C1's employer of information which, in his reasonable belief:

6.1. Was made in the public interest; and

6.2. Tended to show:

(1) That persons had failed, were failing, or were likely to fail to comply with legal obligation(s) to which they were subject. C1 relies on:

(a) Breach of directors' and/or fiduciary duties;

(b) Personal tax/ benefit in kind evasion;

(c) Corporate obligations relating to the use of expenses by employees

and/or directors (and corporate tax obligations arising in connection with such expenses);

(d) Audit obligations;

(e) Intellectual property laws; and/or

(f) Fraud;

had been committed, was being committed, or was likely to be committed.

C1 relies on:

(a) Tax evasion in the United Kingdom and/or United States by R3 and/or R4;

(b) Corporate offences of failure to prevent facilitation of tax evasion, contrary to the Criminal Finances Act 2017;

(c) Breaches by R3 and/or R4 of their obligations under the Companies Act 2006 (including their duties as statutory directors);

(d) Breaches by R2 of laws requiring accurate filings at Companies House;

(e) Breaches by R3 and/or R4 of their obligations under R2's Articles of Association;

(f) Breaches by R3 and/or R4 of their obligations under a Shareholders' Agreement dated 24 September 2019;

(2) That any of these matters had been, was being, or was likely to be deliberately concealed.

*The Discrimination Disclosure [protected disclosure and protected act]*

7. Whether C1 made the Discrimination Disclosure (or any part of it), as defined at RAGOC, §16.

8. Whether the Discrimination Disclosure was a disclosure qualifying for protection in that it was a disclosure to C1's employer of information which, in his reasonable belief:

8.1. Was made in the public interest; and

8.2. Tended to show that persons had failed, were failing, or were likely to fail to comply with legal obligation(s) to which they were subject, namely contraventions of the Equality Act 2010 ("the 2010 Act") in relation to C2's sex and/or nationality.

9. Whether the Discrimination Disclosure was a protected act pursuant to section 27(2) of the 2010 Act.

*Detriments (C1 only)*

10. C1 brings detriment claims against each of, and all, Rs.

*Detriment 1*
11. Whether:

11.1. Rs failed to provide an agenda and/or deliberately concealed the true purpose of the meeting originally to be held on 16 March 2021 (in the event, held on 18 March 2021) (RAGOC, §§19-20)

11.2. Upon logging into the 18 March 2021 meetings, Cs were informed that the items on the agenda for the meetings included (for both R1 and R2) (RAGOC, §§21-24):

(1) The convening of a general meeting to consider a proposal to remove C1 as a director;

(2) The removal of C1 as CEO;

(3) The convening of a general meeting to consider a proposal to remove C2 as a director;

(4) The removal of C2 as Chief Business Officer;

(5) The appointment of R5 as a director; and

(6) The appointment of R6 as a director;

11.3. At the 18 March 2021 meetings:

11.3.1. R1 and R2 voted to terminate Cs' employment and convene further board meetings to consider their removal as directors (RAGOC, §23);

11.3.2. At the 18 March 2021 meetings, the directors were asked what the reason was for Cs' dismissals and nobody responded.

*Detriment 2*

12. C1 relies on two letters sent by R5 on 18 March 2021 (RAGOC, §§27-29).

*Detriment 3*

13. Whether:

13.1.On 18 March 2021, before Cs received written notice of termination, Rs sent representatives from a security company to Cs' home to retrieve their computer equipment and phones;

13.2. Despite the Covid-19 lockdown still being in place at the time, the security firm insisted on entering Cs' family home with Cs' children and C1's mother present;

13.3. Rs cut off Cs' access to Rs' systems, denying them access to personal files and documents relating to their directorships and shareholdings.

*Detriment 4*

14. Whether, on 18 March 2021, Rs caused a dishonest and unprofessional "Out of Office" message to be sent automatically from Cs' email accounts to those who contacted them.

C1 avers that:

14.1.This message was dishonest in that it stated that Cs were “on leave”.

14.2. This message was unprofessional in that it contained typographical errors and directed correspondents to a (then) non-employee as a point of alternative contact.

*Detriment 5*

15. C1 relies on the sham investigation and Investigation Report dated 17 May 2021 dated 17 May 2021 (RAGOC, §§32—38). Whether:

15.1. Cs had not been made aware of any allegations of misconduct against them, despite being employees and directors;

15.2. Cs had not been informed that an investigation into their conduct was underway;

15.3. Cs had not been given an opportunity to comment on any of the facts and matters allegedly under investigation;

15.4. The Investigation Report was a sham and/or not the product of a bona fide investigation

15.4.1. Is vague, selective, and/or misleading;

15.4.2. Is derived, in part, from data and information improperly obtained;

15.4.3. Insofar as it identifies any wrongdoing, refers to matters which are historic and/or properly attributable to others, including R3 and R4, whose conduct has not been investigated;

15.4.4. Is intended to convey substance and gravity, but in fact discloses nothing capable of justifying the dismissal of Cs;

15.4.5. Contains false allegations of wrongdoing and/or misconduct;

15.4.6. Was planned and executed not to fairly investigate any misconduct on the part of Cs, but to facilitate their departure for unlawful reasons and/or purposes.

*Detriment 6*

16. C1 relies on the following aspects of the Grievance process and Grievance dated 24 September 2021 (RAGOR, §§39A-B):

16.1. Cs were not offered a hearing;

16.2. The Grievance Outcomes were not the product of a genuine (or any) bona fide investigation;

16.3. The decision maker (R6) was not impartial or appropriate;

16.4. The Grievance Outcomes were provided following a material, unexplained, and unjustifiable delay.

*Detriment 7*

17. On 19 April 2021, Cs' directorships in the R1 and R2 were terminated at General Meetings of the R1 and R2 (RAGOR, §40).

*Detriment 8*

18. C1 relies on the commencement and conduct of the Disciplinary Process (RAGOR, §§41- 46). Whether:

18.1. By a letter dated 20 May 2021, Cs' reasonable requests for a postponement of the disciplinary hearing and the provision of a number of documents were denied;

18.2. R6's disciplinary procedure was defective in the following respects:

18.2.1 Cs were not given access to the documents and/or information which they had reasonably requested in order to address the allegations against them;

18.2.2. R6 was not an appropriate or suitably independent person to conduct a disciplinary procedure involving Cs:

(1) R6 was a fellow-director of the company;

(2) R6 was junior to C1 within the company,

(3) R6 enjoyed a close personal and business relationship with R3;

(4) R6 had worked with C2 for many years at a previous company;

(5) R6 had been personally named in the Grievances;

18.2.3. R6 had herself been present at the board meeting on 18 March 2021;

18.2.4. R6 insisted on reading the Investigation Report verbatim, causing each disciplinary meeting to run over two days;

18.2.5. R6 declined to interview anyone else at C1's request. However, she did privately discuss the matters with R5;

18.2.6. R6 shared Cs' personal data with her "family business";

18.2.7. R6 discussed the disciplinary process with unnamed business associates outside R1/R2;

18.2.8. R6 treated matters which (on their face) were properly matters of capability as matters of conduct;

18.3. The disciplinary process was not a bona fide exercise, but rather a sham, planned and executed to ratify an unlawful decision to force Cs out of the business as Bad Leavers.

*Detriment 9*

19. On 8 or 9 June 2020, Cs' employment was terminated (RAGOR, §§47-50).

*Detriment 10*

20. C1 relies on the Appeal Outcomes (RAGOR, §51). Whether:

20.1. Cs were not offered a hearing;

20.2. The Appeal Outcomes were not the product of a genuine (or any) bona fide investigation;

20.3. The decision maker (Mr Bull) was not impartial or appropriate;

20.4. The Appeal Outcomes were provided following a material, unexplained, and unjustified delay.

*Detriment 11*

21. On or after 8/9 June 2021, Cs were designated Bad Leavers under the Shareholder Agreement dated 24 September 2019 (RAGOC, §§51A-51F). C1 relies on that designation and its detrimental consequences.

*All detriments*

22. As to each alleged detriment, whether C1 was subjected to acts or failures to act which amounted to detriments:

22.1. On the ground (or for the reason or principal reason) that he made protected disclosures (whistleblowing);

22.2. Further and/or alternatively, because he did a protected act (victimisation).

*For the Tribunal's Information only (paragraphs 23 and 24)*

23. C1 brings his detriment claims under the 1996 Act

23.1.R1 as employer;

23.2. The other Rs as workers and/or agents of the R1, and/or pursuant to the law of vicarious liability.

24. C1 brings his detriment claims under the 2010 Act against:

24.1. R1 as employer;

24.2. The other Rs pursuant to sections 109-110, 111, and/or 112 of the 2010 Act and/or the law of vicarious liability.

*Whistleblowing unfair dismissal under section 103A of the 1996 Act (against R1 only)*

25.Whether C1 was automatically unfairly dismissed in that the reason or principal reason was that he made protected disclosures (brought against R1 only).

*Unfair dismissal under section 98 of the 1996 Act (against R1 only)*

26. Whether C1 was unfairly dismissed, in that:

26.1.His dismissal was not for the reason of conduct or for some other substantial reason of a kind such as to justify the dismissal of an employee holding his position; and/or

Having regard to equity and the substantial merits of the case, and the substantial merits of the case, in the circumstances, R1 acted unreasonably (procedurally and

substantively) in treating its reason for dismissal as a sufficient reason for dismissing C1.

26.2. Having regard to equity and the substantial merits of the case, in the circumstances, R1 acted unreasonably (procedurally and substantively) in treating its reason for dismissal as a sufficient reason for dismissing C1.

27. Whether C2 was unfairly dismissed, in that:

27.1. Her dismissal was not for the reason of conduct or for some other substantial reason of a kind such as to justify the dismissal of an employee holding C2's position; and/or

27.2. Having regard to equity and the substantial merits of the case, in the circumstances, R1 acted unreasonably (procedurally and substantively) in treating its reason for dismissal as a sufficient reason for dismissing C2.

**Remedy**

28. Whether Cs are entitled to:

28.1. Damages (including damages for injury to feelings and/or aggravated damages);

28.2. Interest;

28.3. ACAS Uplift of up to 25%;

28.4. Other and further relief as the Tribunal shall see fit;

28.5. Costs

29. In the event that Cs were unfairly dismissed, whether any award should be reduced by reason of:

29.1 The fact that dismissal of C1 and C2 was "inevitable and proximate in any event" due to the facts and matters at paragraph 2E-2I of the Respondents' RFI Response dated 15 September 2021 and/or that no other procedure or process would have affected the outcome of dismissal; or

29.2. Contributory fault on the part of C1 and C2.

The alleged disclosures

*The Share Transfer Disclosure*

13. In a telephone call or calls in or around July 2020, Mr Heinl disclosed the following information to Mr Ben Wolstenholme (using words to the following effect):

13.1. That Mr Guy Wolstenholme was holding shares in the Second Respondent for Mr Ben Wolstenholme in a secret and potentially illicit fashion.

13.2. That he had been told by Mr David Challenger, Senior Partner at Watts Gregory LLP that (or words to the effect that):

(1) Mr Guy Wolstenholme “didn't really own” certain shares in the First Respondent, despite appearing to hold them. Instead, “we can transfer them back to Ben at any time”.

(2) “There’s a document that they’ve signed. It’s in a safe and it can be taken out when needed, it reverses the sale.”

(3) This was for “tax reasons”.

(“the Share Transfer”)

13.3. That the Share Transfer and its possible implications had only been brought to the Claimants’ attention by Mr Challenger and/or the First Respondent's UK accountants Watts Gregory LLP and its US accountants Spott, Lucey & Wall.

13.4. That Messrs Ben and Guy Wolstenholme had not voluntarily disclosed the fact of the Share Transfer to Mr James (“Jim”) Bull, a director and shareholder of the First and Second Respondents, or to the Claimants.

13.5. That Anne Smith at Watts Gregory LLP was very uneasy about the Share Transfer.

13.6. That Mr Ben Wolstenholme’s purported explanations for the Share Transfer (to avoid personal tax; for the benefit of the business; to stop the business becoming a “US entity”) were inconsistent.

13.6A That the Share Transfer "may have put us and the company at risk".

13.7. That despite Guy Wolstenholme apparently holding all but one of Ben's shares, Ben Wolstenholme behaved as if he owned the whole company.

14. Mr Heinl told Mr Ben Wolstenholme that the secrecy around the Share Transfer was troubling and raised alarm bells; that the inconsistency of Mr Ben Wolstenholme’s explanations for the same were similarly troubling; and that the Share Transfer indicated that Messrs Ben and Guy Wolstenholme were treating the First Respondent as their own personal “family” asset (and by implication, not as a company of which they were directors and to which they owed fiduciary duties).

*The Business Conduct Disclosure*

15A. In shareholder meetings and/or telephone calls in the summer of 2020 and January 2021, Mr Heinl made the following disclosure of information to Mr Ben Wolstenholme (using words to this effect):

15A.1. That Mr Ben Wolstenholme and Mr Bull were improperly putting their personal professional services fees through the accounts of the First Respondent;

15A.2. That very high legal and accounting fees were being charged to the First Respondent without being fully itemised, but which contained significant fees for personal services provided to Mr Ben Wolstenholme and Mr Bull;

15A.3. That the fees in question were placing a huge burden on the First Respondent, particularly given the context of the COVID-19 global pandemic.

15B. In telephone call(s) in the summer of 2020 and/or January 2021, Mr Heinl made the following disclosure of information to each of Mr Ben Wolstenholme, Mr Guy Wolstenholme, and Mr Bull (using words to this effect):

15B.1. That, at the direction of Mr Ben Wolstenholme, the First Respondent had improperly paid for the business expenses of a separate company that Mr Ben Wolstenholme had co-founded and of which he was the long-time CEO, Madefire Limited ("Madefire"). Mr Heinl made this disclosure on more than one occasion;

15B.2. That Mr Ben Wolstenholme had improperly used the First Respondent's staff to do work for Madefire (including client work, business meetings, and using time in board and shareholder meetings) for no payment, while those staff were being paid by the First Respondent;

15B.3. That Mr Guy Wolstenholme in particular was being paid by the First Respondent while working for Madefire (at home and in the First Respondent's studio);

15B.4. That Mr Ben Wolstenholme had, without securing the necessary or proper permissions and/or payments, used work done by Mr Heinl for the benefit of Madefire, and that Mr Guy Wolstenholme and Mr Bull (both shareholders in Madefire) were complicit in this.

15C. In telephone call(s) and/or shareholder meetings in spring

2019 and the summer of 2020, Mr Heinl made the following disclosure of information to Mr Ben Wolstenholme and Mr Bull (using words to this effect):

15C.1. That Mr Ben Wolstenholme had required the First Respondent to pay for Mr Guy Wolstenholme's personal tax liabilities.

15D. In telephone calls in the summer of 2020, Mr Heinl made the following disclosure of information to each of Mr Ben Wolstenholme and Mr Bull (using words to this effect):

15D.1. That Mr Ben Wolstenholme had negotiated and/or received a personal payment from Norton & Sons which was properly payable to the First Respondent for work which the First Respondent had done.

("the Business Conduct Disclosure")

*The Discrimination Disclosure*

16. In a telephone call or calls in or around July 2020, Mr Heinl made the following disclosures of information to Mr Ben Wolstenholme (using words to this effect):

16.1. That he treated Ms Läikkö differently from everyone else on the board;

16.2. That he did not engage with her on strategy;

16.3. That he pushed her into stereotypically administrative and secretarial roles such as booking meetings and taking notes.

16.4. That he treated her like his secretary. Mr Heinl said words to the effect of "She's not your secretary";

16.5. That he singled her out for less favourable treatment;

16.6. That he unreasonably expected her to sort out his mistakes or omissions;

16.7. That he expected her to perform tasks which were properly his to perform;

16.8. That he only praised her administrative (as opposed to executive and leadership) work;

16.9. That he would set her tasks and then ignore her work on them;

16.10. That he would unreasonably expect her to help him with personal financial matters;

16.11. That he would ask Mr Heinl to carry messages to her;

16.12. That he spoke to Ms Läikkö as if she could not understand English, by staring, opening his mouth widely, and speaking slowly, in a disrespectful and undermining manner; further, that he would regularly say, "I don't understand you" to Ms Läikkö in circumstances where her communication was perfectly clear;

16.13. That Ms Läikkö had been treated in a discriminatory fashion in 2015 when she had been required to fund her share purchase herself while Mr Heinl received a special bonus for the same purpose (and it was agreed that other male persons would not have to "buy in");

16.14. That Mr Wolstenholme did not make the same requests of or treat male comparators in the same way; and

16.15. That Mr Ben Wolstenholme treated Ms Läikkö in this different and unpleasant way because she was a woman and/or because she was foreign.

("the Discrimination Disclosure")

## Findings of fact

<u>The hearing</u>

6. We had heard evidence over three weeks in September 2022 and the hearing was nearly complete when the claimants made an application for disclosure of documents which the respondents said were protected by legal professional privilege. The Tribunal made an order for disclosure of some of these documents. The respondents appealed that order. As a result, the final days of the hearing were adjourned and the parties did not return for submissions until after the appeal had been determined.

7. The delay was obviously very unfortunate. The Tribunal panel has had to spend a great deal of time reminding itself of the evidence.

8. There has been further delay caused by the personal circumstances of Tribunal members and difficulties in reconvening. The deliberations have been further complicated and protracted by the delays themselves.

9. The sheer volume of this case in terms of witness evidence and bundle size and the quantity of oral evidence we heard has required the Tribunal to do significant amounts of reading back in whenever there has been a delay.

10. We had a primary bundle running to 9676 pages and a supplementary bundle of 447 pages. These were electronic bundles. It perhaps goes without saying that we read only those documents in these vast bundles to which we were taken by the parties. We also had a bundle of inter partes correspondence to which reference was made as necessary.

11. We received witness statements and heard evidence from the following witnesses:
    - The claimants on their own behalf.
    - For the respondents:
        - Mr A Thapa, senior associate at Knoll Associates;
        - Mr J M Bull, director of the first and second respondents;
        - Mr J Toppin, respondent and director of the first and second respondents;
        - Mr P Worman, senior managing director at GPW Group;
        - Ms A Smith, chartered accountant and partner at Watts Greogory LLP;
        - Ms M Fortescue, chief people officer at the first respondent;
        - Mr B Wolstenholme, respondent, director and co-founder of the first and second respondents;
        - Mr G Wolstenholme, respondent, director and co-founder of the first and second respondents;
        - Ms C Kyosti, respondent and director of the first and second respondents.

12. The respondents also produced a witness statement from Mr D Challenger, who unfortunately was unable to attend to give evidence due to ill health.

13. The witness statement bundle ran to 282 pages.

14. We had written submissions which ran to 143 pages for the claimants and 65 pages for the respondents. The authorities bundle was 842 pages.

15. After submissions had concluded and we had commenced our deliberations, it appeared to us that we had not heard submissions on a particular point and the parties were written to in the following terms:

*During the course of our deliberations, it seemed to us that we had not had submissions as to why (or why not) the second respondent could be considered as acting as the first respondent's agent and indeed which detriments the first claimant was alleging the second respondent was liable for. It would be helpful to have in tabular or some other convenient form an account of which respondents are said to be liable for which detriments.*

*It also seemed to us that there might be some detriments (or sub detriments) which were no longer being pursued, given the nature of cross examination, but this was also not clear from submissions.*

16. The parties submitted further written submissions in response to this invitation and we refer to those below.

17. After our deliberations were concluded but prior to promulgation of our Judgment, the Judge became aware of a relevant further authority: Wicked Vision Limited v Rice [2024] EAT 29. It seemed to us that we should seek the parties' submissions on that authority and these were received on 31 May 2024. We were grateful for the parties' prompt response, The further delay after that in promulgating this Judgment was caused by difficulties in reassembling the Tribunal panel.

## The facts

*People*

18. It is relevant to identify the main players in the narrative that was presented to us:

Ben Wolstenholme: co founder of the respondents and chair of the board and former CEO of the first respondent and shareholder of the second respondent.

Guy Wolstenholme: the brother of Ben Wolstenholme and co founder of the first respondent and shareholder of the second respondent. His role was said to have been more on the creative than on the executive side of the business.

Mr J Toppin: He is a professional accountant who provided services to the corporate respondents and subsequently became a director of both.

Ms C Kyosti: She is a longstanding family friend of the Wolstenholme brothers. Between 2003 – 2010, she was an adviser to the first respondent. She was a vice president at Capgemini Group where she worked with the second claimant. She has been a director of the corporate respondents since 18 March 2021.

Mr J Bull is a co founder of the first responded, a shareholder of the second respondent and chief creative officer.

Ms M Fortescue: As above

Ms A Smith: As above

Philip Worman: Senior managing director at GPW Group. The firm provides services ranging from risk analysis, business intelligence and litigation support/fraud investigation and dispute resolution.

Asim Thapa: At the time senior associate cyber-risk at ITG, which was contracted by GPW to carry out services in relation to collecting devices and from the claimants and data from those devices.

Christian Davis: MD of Moving Brands US. He reported to Mr Heinl and was part of the global leadership team.

Matt Wade: Principal of experience design, based in New York City and part of the global leadership team.

Ying Miller: Global Operations director based in New York City and reporting to Ms Laikko.

Bruce Hopkins: Lawyer involved in drafting the shareholders agreement for Year 15 Limited.

Mr D Eveleigh-Evans: Global managing director from March 2021.

Mr C Dent: Chief financial officer for the first respondent between 2017 – 2017.

Mr P Richardson: The first respondent's financial controller at relevant times.

Mr E Fishman: US lawyer involved in advising the respondents on the New York lease.

Ms D Vogel: Landlord's agent for the New York premises of Moving Brands Inc / US.

Mr D Challenger: Chartered accountant, partner at Watts Gregory LLP. He advised the corporate respondents from approximately 1994 until April 2018.

Murray and Eva Eldridge: Mr M Eldridge was a non executive director of the first respondent from about April 2020 and provided guidance on board and strategy. Ms E Eldridge was involved in sessions with Mr Heinl and Mr Ben Wolstenholme in the summer of 2020 which have been described as 'mediation'.

Policies, procedures, contracts

19. There was not a great deal by way of written policies and procedures which we were taken to. We record that we saw and heard some evidence about the following.

*Time off in lieu (TOIL)*

20. We saw what we understood to be the extant staff handbook at relevant times. It did not refer to TOIL.

21. We also saw an email from Ms Fortescue to Mr Richardson and Ms Laikko dated 8 January 2019 with a proposed policy on TOIL, which we understood was never formally implemented:

*Key points to be communicated with the wider team*

*• We aim to not work outside of working hours but sometimes in our industry we have to work later or earlier in order to deliver client work*

*• TOIL is discretionary*

*• TOIL is not like for like time (apart from working on weekends)*

*• If you need to work late to deliver / complete work you should agree this with your project leads (PM, CD, Consultant)*

*• TOIL must be used within 3 weeks of being given - this time to recover / rest*

22. We also heard oral evidence about the practice in relation to TOIL which is recorded below.

*Disciplinary and grievance procedures*

23. There were no parts of the disciplinary and grievance procedures which were specifically relevant to the issues we were asked to decide.

*Shareholders agreement*

24. The shareholders agreement for the second respondent, Year 15 Limited, contained the following provisions which were relevant to the issues we had to decide:

*4. EVENTS OF DEFAULT*

*4.1 A Shareholder is deemed to have served a Transfer Notice under article 16 of the Articles immediately on any of the following events or dates, unless Ben Wolstenholme in his discretion otherwise determines:*

*(a) his death; or*

*(b) a bankruptcy order being made against him, or an arrangement or composition being made with his creditors, or where he otherwise takes the benefit of any statutory provision for the time being in force for the relief of insolvent debtors; or*

*(c) the date when he is no longer a director or employee of the Company or any Group Company; or*

*(d) he fails to remedy a material breach by him of any obligation under this agreement within twenty five Business Days of notice to remedy the breach being served by all the other Shareholders; or*

*(e) if he holds Shares as a result of a transfer to him under article 16.12(b) of the Articles, the person who transferred those Shares to him is no longer a director or employee of the Company or any Group Company.*

*4.2 The deemed Transfer Notice has the same effect as a Transfer Notice, except that:*

*(a) the deemed Transfer Notice takes effect on the basis that it does not identify a proposed buyer or state a price for the shares and the Sale Price shall be:*

*(i) subject to clause 4.2(a)(ii) below, the Fair Value of those shares, determined under article 16 of the Articles; or*

*(ii) if the Shareholder is a Bad Leaver (or the person who transferred the Shares to the Shareholder under article 16.12(b) of the Articles is a Bad Leaver), the lower of Fair Value determined under article 16 of the Articles and the price paid the Shareholder when he originally acquired the Sale Shares.*

*(b) the Sale Shares shall first be offered to the Company by such date as it considers appropriate, which shall be allowed thirty Business Days to complete the purchase of the Sale Shares (or any of them) and to defer payment of the Sale Price for a period of up to three years pursuant to clause 4.2 (d). To the extent that the Company does not purchase the Sale Shares, they shall then be offered to other Shareholders in accordance with article 16.2 of the Articles, and the provisions of article 16 of the Articles shall be amended as necessary to reflect that the Sale Shares have first been offered to the Company.*

*(c) the Seller does not have a right to withdraw the Transfer Notice at any point.*

*(d) the Company or any Shareholder who purchases Sale Shares may defer payment in whole or part for up to three years following the Event of Default which gave rise to the deemed Transfer Notice and/or may deposit some or part of the purchase money in whole or part in an escrow account, on terms that if the purchase price requires adjustment under clause 4.2(e) below the Seller shall receive a reduced amount (and any remaining amount in the escrow account shall be returned to the purchaser(s)).*

There are definitions of ‘good leaver’ and ‘bad leaver’:

*Bad Leaver: means a Shareholder on the first date when he is no longer a director or employee of the Company or any Group Company, where:*

*(a) they are not a Good Leaver and the reason for them no longer being a director or employee is:*

*(i) their voluntary resignation; or*

*(ii) the termination of their employment by the company which has employed them for reasons of misconduct, lack of capability or any reason which would not be considered as giving rise to unfair dismissal within the meaning of the Employment Rights Act 1996; or*

*(iii) any other reason in the discretion of the chairman of the Company; or*

*(b) they are within twelve months (or such lesser period as the chairman of the Company may consider appropriate) of the date of cessation of their employment found to be in breach of any of the Relevant Clauses or to have been in such breach before date of cessation.*

*Good Leaver: means a Shareholder on the first date when he is no longer a director or employee of the Company or any Group Company, where the reason is:*

*(a) injury, disability or serious or long term illness which renders him unable to continue performing his duties; or*

*(b) redundancy; or*

*(c) death; or*

*(d) any other reason in the discretion of the chairman of the Company*

Chronology

25. In order to manage the volume of evidence in this case, we set out our findings of fact in the main chronologically. At some points in these Reasons, it is necessary for the better understanding of our findings to gather some evidence across the chronology into themes. There are two appendices which summarise evidence in relation to two of the alleged misconduct matters: the New York Lease and outside work. We have separated that evidence with a view to making the chronology easier to understand.

26. In 1998, the first respondent company was founded by brothers Ben and Guy Wolstenholme, Jim Bull and other individuals who later left the company. The founders had studied graphic design together at Central St Martins. The company offered what is described as ‘digital-first’ branding. Ben Wolstenholme was (until 2013) the CEO and executive creative director. Guy Wolstenholme’s role was as creative technology lead.

27. The second respondent owns the first respondent via an intermediate company. Another entity in the group is Moving Brands Inc also known as Moving Brands US.

28. In January 2004, Mr Heinl joined the first respondent as an unpaid design intern after graduating from Central St Martins and then became a junior freelance designer. He got on well with Ben Wolstenholme and achieved rapid promotion within the company.

29. In 2007, Ms Laikko joined the first respondent as a senior account director. She had previously worked as a management consultant, including with Ms Kyosti at Capgemini. Ms Laikko had a good relationship with Ms Kyosti at this time; the latter had been a mentor to Ms Laikko and supported Ms Laikko's promotions at Capgemini.

30. In November 2007, Mr Toppin began to act as an ad hoc external financial consultant to the first respondent, a role which caried on until about 2016.

31. In 2008, the first respondent achieved a large contract with Hewlett Packard, which was felt to increase its exposure in the international marketplace. The claimants worked as co-leads on that project.

32. In 2009 the claimants started a personal relationship. They ultimately moved in together and are raising a family. Both had a good personal relationship with Ben Wolstenholme in this period.

33. Also in 2009 or 2010, Ben Wolstenholme moved to the US to open Moving Brands Inc. He opened a studio in San Francisco. Mr Bull moved to San Francisco in 2012 to take on the role of executive creative director for Moving Brands Inc.

34. At around this time Ben Wolstenholme began working on another venture, 'Madefire', which we understood was a venture which published comic books and similar content on iPad and smartphone apps.

35. In 2011, Mr Heinl became chief creative officer of the first respondent, which was the senior creative role in the company, and Ms Laikko chief commercial officer of the first respondent. Ms Laikko's role involved working with clients, operations, dealing with finance and human resources and looking at processes and contracts.

36. Mr Heinl described Ben Wolstenholme as 'stepping back' from the business at this time to concentrate on his other ventures. The other founders also had other creative interests they wished to pursue.

37. A document from 2012 describes this process: 'Over the coming year the founders will be taking a step back from the business…" Ben Wolstenholme was to be chairman of the board and a new CEO was to be appointed. The plan was described thus:

*The CEO role will report into founder, largest shareholder and current CEO Ben Wolstenholme who now lives and works in San Francisco. Ben is increasingly investing his time and energy into content creation projects outside of Moving Brands so the new CEO needs to be able to understand and translate the founders' vision through a hand-over period lasting no longer than six months. After that period the CEO will be expected to report into BW in his new role as Chairman at less frequent intervals. High levels of understanding, motivation and personal integrity are therefore required.*

*This appointment is clearly a crucial one for Moving Brands and while we recognise that it is unlikely that one persons' strengths will play to every single aspect of the role description we shall be looking to fill this position with somebody who is exceptional and inspiring but also willing to grow and develop in the areas where they are less strong.*

38. The company at that time had about 70 employees and contractors.

39. Mr Bull gave some evidence that from about this period he began feeling disrespected and disempowered by Mr Heinl. There was not a great deal by way of specifics in the evidence he gave to the Tribunal; he said that Mr Heinl made him feel stupid; he corrected his misuse of words and his pronunciation and used a passive aggressive tone. There was nothing in writing from this period about these concerns. Further evidence given by Mr Bull in his statement appeared to the Tribunal to relate to a much later period:

*MH would often take a position of "educating me" - which always felt very condescending. On at least one occasion in early 2018 MH told me that "I didn't understand my responsibilities as a board member" and he did it in a way which felt like he was saying that I shouldn't be on the board of my own business - subsequently MH asked BW and myself to attended an IoD Academy training course called "IoD Academy course (The Role of the Director and the Board)" in May of 2018. At one point MH told me that I needed to understand my own personal finances better and then shared a document with me - at the time this felt helpful - but in hindsight it continued a sense of imprinting on me that "he knew best" and that I should "listen to him". What was presented as help in fact was about control. In hindsight I now see this type of interaction with MH as his way of controlling the narrative between us - one of him knowing better than me, that his help built trust, and that I needed him to be a success - none of which was actually true.*

40. The relationship between the claimants and Ben Wolstenholme in any event appeared to remain strong and, in March 2013, Mr Heinl was appointed global CEO. Ms Laikko was now titled chief business officer, although her tasks remained the same. Mr Heinl reported to Ben Wolstenholme, now executive chair of all Moving Brands entities. The Moving Brands group at this stage had studios in London (MB), Zurich (MB GmbH), Tokyo (MB KK) and San Francisco (MB Inc). The Board created a five year strategy plan for 2012 – 2017 which Ben Wolstenholme described as his last task as CEO.

41. The claimants' evidence was that Ben Wolstenholme then ceased involvement in the leadership and day-to-day running of the company, as Mr Heinl described it: 'retaining a role that flipped between figurehead, non-executive chair of the Board, and occasional salesman, albeit this was never formalised as such. This state of affairs continued for around seven years up until 2019 when Ben began to become much more involved again.'

42. The claimants described Ben Wolstenholme as having very limited operational involvement during this period, often cancelling calls; board meetings were sporadic. When he did dip into operational matters, he could be very insistent. Mr Heinl told the Tribunal that Ben Wolstenholme remained very interested in shareholder affairs during this period. He also sometimes introduced new business. Otherwise he concentrated on Madefire and other ventures.

43. At this stage, the corporate respondents received financial advice from various consultants: Mr Toppin, Mr Bamford and Mr Challenger, all accountants.

44. The respondents' case was that the claimants had sought to divest the companies of these advisors. It was put to Ms Laikko that the claimants had put an end to this advice within a year of Mr Heinl becoming CEO. She said that was not correct, that Mr Challenger was still involved in 2018 and that Mr Toppin continued until about 2016 when he stopped for personal reasons – one of his assignments at that point was to assist in looking for a CFO for the first respondent. She did not think their involvement was substantially watered down and it was not intentionally watered down. Mr Heinl's evidence supported that of Ms Laikko. There was no documentary support for this contention made by the respondents. Mr Challenger in his (untested) witness statement was unable to recall dates but said 'I did not have the same relationship with the claimants [as he had had with Ben Wolstenholme] as the company context was different and the support and advice requested / needed was far less'. It was clear that Mr Toppin had carried on providing ad hoc advice over this period. It was his own evidence that he carried on providing such support until he helped to identify and appoint a CFO in 2016.

45. In about 2014, discussions started about the claimants becoming shareholders. The founders agreed that this should happen and a plan was developed to buy out an angel investor in order to offer the claimants share options. Mr R Postlethwaite was instructed to redraft the shareholders agreement. This process was ultimately very protracted as we discuss further below.

46. It is relevant to record here that, in 2015, Mr Heinl did a small amount of work on branding for a business called TIA Capital for which he invoiced TIA £1645. Mr Heinl told the Tribunal that TIA was an investment firm set up by some of his friends. He did a small commission for them, which he told the Tribunal was not work which Moving Brands would have been interested in. The founders of Moving Brands had met the TIA team, and Mr Heinl told the

Tribunal that he had spoken openly about the work he did for them. Ben Wolstenholme gave evidence that he did not recall meeting the TIA team, and that Mr Heinl had not spoken openly with him about the work he had done for TIA.

47. In April 2015, Moving Brands Inc entered into a lease for premises in New York City. The lease was signed by Mr Bull on behalf of Moving Brands Inc. Mr Bull signed a personal guarantee for Moving Brands Inc's obligations under the lease, known as a 'Good Guy' clause. The lease was for seven years with no break clause and represented a significant financial commitment.

48. Also in 2015, Year 15 Limited was incorporated as a new holding company for the first respondent and the angel investor's shareholding was bought out. From this point it took a further three years to reach an agreement on the shares. The respondents said that the negotiations were fraught and Ben Wolstenholme described them as a 'red flag'. He said that the claimants were not satisfied with offers which were greater than the industry benchmark for their roles. Asked about the discussions, Mr Heinl said in cross examination that 'there were a couple of conversations which were intense and had an emotional element. There were quite a lot of moving parts and it was not easy to achieve.'

49. It was clear to the Tribunal that ongoing discussions about the shareholding put at least some strain at some times on relationships between the claimants and the founders.

50. On 11 February 2015, there was a discussion between Ben Wolstenholme and the claimants about how they would pay for their shares. There were further discussions throughout the period leading to a note recording the discussions dated 21 April 2015. The gist of the discussion was that Mr Heinl had paid for his shares with sweat equity but Ms Laikko had not. Ms Laikko said she accepted at that time that she should pay for shares and her situation was different from Mr Heinl's but that she became concerned in 2020 when a further expansion to the shareholding was proposed that Mr Davies and Mr Wade were not asked to pay to buy in.

51. Ultimately Mr Heinl received a special bonus to pay for his shares.

52. In 2016, Ben and Guy Wolstenholme entered into an arrangement whereby Ben gifted Guy his shares in the second respondent.

53. Mr Heinl said that his understanding at the time was that, 'in or around 2016, Ben entered into some kind of agreement with Guy by which Ben 'gifted' his shares to Guy, but Guy would pass all dividends received on those shares back to Ben as another 'gift'.'

54. Mr Challenger's statement said that there was a problem with Ben Wolstenholme's and Mr Bull's share ownership when they relocated to San Francisco as the arrangements exposed the company to further tax liabilities

on loans and trading balances. He and Ms Smith discussed a solution where the majority of Ben Wolstenholme's shares would be gifted to Guy Wolstenholme. It was intended to be a temporary solution. Mr Challenger said that the transaction was properly notified to those who needed to know about it and properly recorded:

*anticipating that circumstances may change with respect to (a) improving performance of the SF company, (b) a return to the UK of either BW or JB (or both), (c) possible future external funding of the UK company to meet expansion plans and/or (d) possible changes in legislation in the future*.

55. He said that everyone who needed to know did. He was not aware of a document by which it could be reversed at any time. He said it was not a secret.

56. We had a statement and live evidence from Ms Smith. Ms Smith's involvement was in providing a variety of tax advice including on expat matters relating to Mr Ben Wolstenholme's move and on share options, also liaising with the respondents' US tax advisers, Spott Lucey and Wall ('SLW'). Mr Challenger retired in 2018 and the respondent had engaged Chris Dent as finance officer in 2016. Her role became more ad hoc – more focussed on personal tax compliance matters for various of the shareholders / directors. Watts Gregory then became auditors for the respondents again in September 2019 and Ms Smith was also asked to take up note taking as board secretary. She started to do that in November 2019. She said she had some involvement with the claimants' personal taxes but these were mostly managed by a colleague of hers.

57. Ms Smith's evidence about the share transfer was that it was made on the advice of SLW. She said that it was legal, for tax planning purposes, and not meant to be a secret. She said that she was not uneasy about the transfer. She denied that Guy was passing on dividends to Ben, and agreed that that would have tax implications if Ben still had beneficial ownership of the shares.

58. Mr Bull said that he knew about the transfer at the time and was not concerned about it.

59. In the first half of 2016, Mr Toppin was involved in identifying and securing a CFO, Mr C Dent. Mr Dent left the post after a few months; Ms Laikko said he had left under a settlement agreement for reasons which were confidential but had not been pushed out by the claimants. The claimants were criticised in evidence by the respondents' witnesses for not finding a replacement CFO. Mr Toppin said that the business lacked any senior financial experience and input. Ben Wolstenholme's evidence was that he was pushing for there to be a finance director due to business losses and other issues but that the claimants were pushing back and that, because he decided to pick his battles, he did not push on this issue.

60. Ms Laikko's evidence was that Ben Wolstenholme was not pushing for a financial director more than anyone else was. There was a long term plan to

have a CFO. They had a financial controller who had been appointed by Mr Dent, Mr Richardson, and other finance staff. Mr Richardson was not experienced enough to be CFO but was working towards being finance director. Mr Heinl said that it was simply a case of other topics taking priority; a possible CFO appointment only became a priority again after the pandemic started.

61. Before leaving, Mr Dent wrote a document about executive pay strategy which included the following statement about the shareholding arrangements:

*The Group is currently owned by BW (1 share), GW (459 shares) and JB (125 shares). Note that BW previously owned 335 in the Group, with GW owning 125. This was altered in order that the group was not controlled by US taxpayers (both BW and JB are based in San Francisco). It is believed that in respect of any dividends paid GW will pass to BW as a gift the level of dividends that he would have received if he had continued to own the shares. There is no written agreement in relation to this.*

62. Ben Wolstenholme said in cross examination that this was not true and he did not know where Mr Dent got the information from.

*2017*

63. Mr Heinl said that he had a discussion with Mr Challenger some time in 2017 about the company's fragility and lack of corporate governance:

*David mentioned that Guy did not really own most of his shares in Year 15, but that instead they had been transferred from Ben for tax reasons. David told me that Ben and Guy had signed a document that was deposited in a safe and could be taken out at any time to reverse the transfer.*

64. Ms Laikko gave a similar account of the conversation.

65. Mr Heinl thought the arrangement sounded 'dodgy'. Ms Laikko did not remember Mr Challenger being concerned. She said that Ms Smith was not present for the conversation. At the time Ms Laikko understood that it was a legitimate transfer for the benefit of the company and did not have concerns about it.

66. In Spring 2017, the first respondent entered into a complicated finance lease for some IT equipment with Hewlett Packard Enterprises ('HPE', sometimes referred to as 'HP'). The deal was arranged through a broker (Oak Tree Finance), with another company (Think Blue) as an intermediary.

67. On 8 May 2017, there was a planning meeting for Moving Brands Limited attended by the claimants. Ben Wolstenholme gave evidence in his witness statement that the claimants had been hostile:

*Instead of working on the planning, Mat and Hanna stormed out (Hanna first) and drove away leaving the Founders befuddled and surprised to say the*

*least. We did not even get past the agenda. This was the first time where I really felt like they were operating as a unit and not in the best interest of the company. We did regroup on the second day but the mood was unproductive and hostile and I decided to keep an eye on the evolution of the situation to determine whether this was systemic or a one-off.*

68. Guy Wolstenholme said that the claimants were aggressive and 'greedy around the shareholding'. He said that this was the first time he had seen 'their arrogant posture their aggressive tone and condescending behaviour'.

69. The claimants were cross examined about this meeting. Ms Laikko said that the claimants had been treated very unfairly and aggressively about the shareholder agreement. It got to a point where it was too much. She did not want to be subject to that level of aggression. She walked out of the room. Ben Wolstenholme later called and apologised. The other founders acknowledged that he had been unreasonable.

70. Mr Heinl said that there was a point in the meeting where no progress was being made and they felt not enough recognition of their serious issues. They just needed a pause. He felt that afterwards they had had an open, honest and real discussion and it was productive. They had established that the company needed more governance and clarity on board roles and to appoint a non executive director.

71. Guy Wolstenholme referred in his witness statement to an occasion in December 2017 when Ms Kyosti visited the London office and Mr Heinl was 'arrogant and rude'. Ms Kyosti also gave an account in her statement about an encounter in December 2017. The evidence was confused and not explored in cross examination of the claimants and we have made no findings about this incident.

*2018*

72. Both Ben and Guy Wolstenholme gave evidence that the claimants were not sharing relevant information with the board / founders in spring 2018.

73. Guy Wolstenholme said that in spring 2018, at board meetings, information was shared on the fly; the claimants resisted providing information and said that the founders would not understand it.

74. There was nothing documented about this issue.

75. Ben Wolstenholme said that serious conflicts with the claimants began in 2018. He said that the claimants 'lacked vision' and that when he tried to discuss vision, Mr Heinl said things like 'We don't work like that any more' and 'I'm not like you working to a vision and that is not how I work'. He said that the claimants resisted preparing a multi year growth plan. He said that when he tried to raise issues about the company, Mr Heinl treated him with defensiveness and condescension. The claimants resisted providing him with

'vital management and financial information'. Again there were no documents which reflected this account.

76. We were taken to an email of 27 April 2018 from Ben Wolstenholme about shareholding talks in which he said:

*In summary, I believe we're all fans of each other and we want to work together long term, so my mode is - we'll work it out.*

77. On 1 May 2018, there was an all day meeting facilitated by Bruce Hopkins, a solicitor, about the share options. Discussions about the shareholding had reached an impasse so this meeting was arranged. They had not reached a resolution by the end of the day. Mr Heinl said that that the reason for the impasse was not that he and Ms Laikko holding out for greater percentages.

78. On 8 June 2018, Mr Hopkins wrote:

*Before M and H came along I was a bit sceptical about the Founders having a SH agreement. Nothing was broken, so nothing to fix. And in my experience writing things down in such a close-knit group makes everyone feel less comfortable, not more.*

*Whilst M and H are now very much part of the family (sorry for cliche) the dynamic is now a little different, and we balance Ben's history with MB (which involved many squeaky moments) and his continuing role, and M and H's obvious thought - "hold on, we are doing all the every day drudge, and coming up with brilliant ideas for the future. We need to protect ourselves." Quite right.*

*So the draft SH agreement caused a bit of angst, but once we all sat about and they talked it though, and everyone realised how much they like and respect each other, lingering worries largely fell away.*

79. In cross examination, Ben Wolstenholme agreed with this account. That account was in conflict with the view of relationships that he sought to give the Tribunal. There was no documentary support for what Ben Wolstenholme said about the deterioration of relationships in this period and, insofar as there is a documentary record, it suggests that there were tensions caused by the negotiations but they were underpinned by what was still a relationship of 'like and respect'. We considered that Ben Wolstenholme subsequently came to regard this period 'through a glass darkly'.

80. On 30 August 2018, Ms Laikko received a proposal from the broker, Oak Tree, to restructure the HPE lease. The proposal was to significantly reduce the monthly payments under an amended lease.

81. On about 30 October 2018, Ms Laikko met with the broker to discuss the deal. Mr Richardson reviewed the documents for the amended lease. Ms Laikko said she explored with the broker why there was a reduced monthly cost for taking on more equipment. The broker said that it was because it was financial year end and HPE wanted to show bigger market share in the printer

business. The broker told her expressly that the term of the lease had not changed and it would run until June 2020.

82. In the documents which the Tribunal saw, but which Ms Laikko said were not available during these discussions, there is a reference to a three year extension to the lease so that the new maturity date of the lease was 31 October 2021. Ms Laikko signed up to the lease amendment.

83. On 20 November 2018, the broker visited the office again and asked for the papers to be re-signed due to a 'template change'. On this occasion, Ms Laikko signed documents which referred clearly to the three year extension. She failed to note the extension and accepts that she, and Mr Richardson, made a mistake in this respect. The broker did not send the company a copy of the signed documents so Moving Brands Limited did not have one on file.

84. In cross examination, Ms Laikko accepted that the first respondent was worse off as a result of the lease extension. She said that she would have read the contractual documents through and could not understand how she had failed to spot the extension to the lease. Both she had and Mr Richardson had looked at the documents and failed to spot the end date. She said it was serious mistake.

*2019*

85. In 2019, it was clear that Ben Wolstenholme was seeking to have more involvement in the Moving Brands business. Mr Heinl said that it was not entirely clear what involvement he was seeking, although he was very interested in profits.

86. In September 2019, the claimants signed the shareholder agreement and articles. Mr Heinl was awarded a special bonus to pay for his shares. In his witness statement, Ben Wolstenholme said that Mr Heinl 'demanded' the special bonus. There was no document which supported that account and that angle was not pursued in cross examination of Mr Heinl.

87. Ben Wolstenholme said he still supported the agreement and thought concluding it would improve the relationships. We saw no good evidence that relationships were particularly troubled at this point and considered that this complexion was put on events by the respondents in hindsight.

88. On 25 October 2019, the shareholder agreement was executed.

89. In the autumn of 2019, there were discussions amongst the global leadership team (including the claimants and Mr Bull amongst others) about the New York lease. The team in New York had reduced from eight to four. The situation was that, absent any concession by the landlord, the respondents remained liable to pay rent on the premises until mid 2022. In initial discussion with the landlord's agent, various options were mooted including subletting the premises or assigning the lease to a new tenant. Pre-pandemic, it appeared

that the premises would not be difficult to dispose of. Efforts to find a new sub tenant continued through the pre-pandemic period but were not successful.

90. In autumn 2019, the first respondent was experiencing a downturn in cash reserves. Ben Wolstenholme said that the 'cash burn' did not make sense and that, when he asked Mr Heinl about it, Mr Heinl was unaware of its extent and unable to explain it. The claimants denied being unable to account for cash burn or unaware of it. They said part of it was accounted for by the costs of a large film production coming due.

91. Ms Laikko said that the allegation made by the respondents in the proceedings that she and Mr Heinl were opaque about the finances was baffling. She said that they prepared cash flow information for Ben Wolstenholme on a weekly basis. They had a live management information file which was regularly updated with the latest figures and forecasts. She said that prior to the pandemic, Ben Wolstenholme only sporadically engaged with the figures, but he had access to them.

92. Mr Toppin was instructed to report on the reasons for the cash burn.

93. In autumn 2019, the claimants agreed to defer bonuses they were due because of the cash flow issues. These bonuses were never ultimately paid to the claimants.

94. We saw a document entitled 'Year 15 working document' which said that it had been 'Updated Nov 2019'. There was a table of tasks. The priority numbered one in that table was 'Clarify Ben and Guy shareholding'.

95. Ben Wolstenholme's evidence was that in late 2019, he was pushing for a strategy and a multi year business plan. He said that he was met by 'resistance, condescension and derision' from Mr Heinl.

96. We noted that there were significant passages of Ben Wolstenholme's statement where he spoke in emotive terms about the relationship with the claimants, suggesting that they were treating him with contempt and disrespect and being secretive about financial information. We make reference in these Reasons to such documentary evidence as we were taken to in order to support this account, which was denied by the claimants. In summary, the documentary record does not provide support to Ben Wolstenholme's allegations about the claimants and the relationship during this period.

97. Mr Heinl gave evidence that in January 2020, he attended a meeting with Ms Smith of Watts Gregory and the US accountants, SLW, at which they discussed the share transfer between the Wolstenholme brothers. At that meeting, an accountant from SLW, Mr Friday, explained that the shares could not simply be gifted back by Guy and that Ben, Guy and potentially the company might have to pay tax on the transfer, on the basis of Ben's continued beneficial ownership of the shares. Mr Heinl described the accountants as 'looking 'terrified' and 'nervous' during this discussion. He felt

the situation was problematic. Ms Laikko was also at the meeting and referred to what Mr Challenger had previously said about a paper being in a safe. She said that Mr Friday said that it was not a reversible transaction and that it would give rise to a tax liability. She said that she asked Ms Smith what the paper Mr Challenger had told them about was. She said Ms Smith's body language suggested that she was very uncomfortable and worried and that she reluctantly said she might try to follow it up with Mr Challenger. They asked Mr Friday to record it in an email and asked Ms Smith to follow up with Mr Challenger. They were concerned that the issue could complicate the proposal to extend the shareholding.

98. Ms Smith was cross examined about this meeting. She said that there was a discussion about the tax implications of the shares being gifted back and as a result that proposal was not pursued. She agreed that Ms Laikko might have asked about the 'paper in the safe' but she, Ms Smith, did not know what was referred to. She said that she was not uncomfortable; she just did not know what paper was referred to.

99. Mr Heinl said he did not feel in a position to challenge at the time as he did not know the ins and outs but that the sense that something 'dodgy' might have occurred grew on him.

100. He said:

*I did, however, object to us spending more company time and money on Ben, Guy and Jim's personal financial, tax planning and wealth management matters which was already a big drain on our time and resources.*

101. Mr Heinl said that he spoke to Mr Bull about the share transfer situation in late 2019 or early 2020 and that Mr Bull said he did not know about it and suggested he might speak to his lawyers about it.

102. Mr Bull was not asked about this is cross examination and we formed no conclusions as to whether this discussion occurred.

Evidence relevant to the business conduct disclosure

*Madefire billing*

103. We heard some evidence about the first respondent billing Madefire for work done by Moving Brands Limited for Madefire. Ms Kyosti reviewed the invoices and payments for the purpose of the proceedings: Madefire paid Moving Brands some £460,000. Ms Laikko accepted that she and Mr Toppin had devised an inter company billing process. She accepted that the document relied on by the respondents appeared to be a sales analyser document from a system called Paprika and that the sums shown were not notional sums but sums paid. She considered that there was other work not billed and paid for but she accepted in evidence that she had not done an

analysis of the document. Mr Heinl also considered that there were other sums but he was not able to provide particulars of those sums.

104. Mr Heinl told the Tribunal that he had himself done the initial branding for Madefire. He said that he did not bill for any work he did for Madefire and that others would also often not fill in timesheets when doing Madefire work. He said that when Madefire work was billed it would be at enormous discounts. He said that he himself continued to act as an unpaid consultant to Madefire.

Madefire expenses

105. Mr Heinl said that Guy Wolstenholme, who worked four days per week at Moving Brands, would use Moving Brands' computers, film and video equipment at the Moving Brands studio on Madefire projects.

106. Ms Kyosti said in her witness statement:

*To date, having reviewed and been privy to both Madefire and Moving Brands finances, I have not seen any Madefire or Ben specific expenses being put through MBL accounts inappropriately. In addition, no MBL team members spent time in Madefire board and shareholder meetings as this would be inappropriate and unacceptable. All client work and/or business meetings were part of project work and/or MBL business development efforts. Please note that Madefire was venture funded and therefore adhered to a strict policy of financial and compliance transparency…*

Guy Wolstenholme's tax affairs

107. Mr Heinl alleged that the company helped Guy Wolstenholme out by making him loans for his tax payments. He said that the loans were to bail Guy out when he had made poor financial decisions. He said that sometimes the payments were in the form of dividends but that these amounted to something of a gift to Guy as his contribution to the business did not warrant the dividends that he received.

108. Ms Laikko said that she put in place a system by which payments for Guy Wolstenholme's tax bills were recorded as directors' loans. There had been a longstanding practice of the corporate respondents paying Guy Wolstenholme's tax bills.

109. Mr Challenger said in his witness statement that Guy Wolstenholme received dividends as well as salary but repeatedly failed to provide for the tax due on the dividends. Guy was very stressed by this situation. Mr Challenger said that Ben Wolstenholme consulted his firm about the first respondent paying the tax and the money being debited to Guy Wolstenholme's loan account, with the loan to be repaid from any future dividend payment. The financial controller was asked to break the cycle by holding back tax on dividends. Mr Challenger did not know if this had happened.

110. Ms Laikko accepted in cross examination that there was no evidence that any of these payments had not been properly accounted for.

111. There appeared to the Tribunal to be no good evidence that there was anything improper about what occurred.

112. Ms Laikko commented: *The sheer amount of energy that was expended on these matters became a drain. It was not in the interests of the company to be consistently wasting time working out how to bail Guy out, and regularly making loans, advance payments and so on – not simply as a one-off, but as a routine matter.*

Professional expenses of employees in US

113. Ms Laikko said that in the summer and autumn of 2020, Mr Richardson and Mr Davis were looking at what the company was spending on advisers in the context of costs management during the pandemic. She said that it appeared that tens of thousands of dollars were being spent on personal US tax returns.

114. Ms Kyosti's evidence was that it was agreed that accounting fees would be paid by the first respondent for mid-level and senior management, especially those moving to the US. The claimants, the founders and a number of other senior figures in the US all benefited. Mr Heinl and Ms Laikko would have had to sign off on these expenses.

115. Ms Smith said:

*There is no reason why benefits in kind may not be paid by the company on behalf of the owner directors which will normally be treated as part of their remuneration package, and I would expect this to be the case for the Year 15 Group directors. Tax relief for the benefits may be claimed by the business for the overall employment package, provided that the package is not excessive by comparison with the work and commitment given by the individuals. There is insufficient information in the Business Conduct Disclosure for me to add further comment other than to point out that the company accounts for the year ended 30 September 2020 have been audited and, in relation to the going concern status of the business, the auditors have reported that there were no issues to report in relation to the directors' use of the going concern basis of accounting in the preparation of the those Financial Statements, and the directors have not disclosed in those financial statements any identified material uncertainties that might cast significant doubt about the company's ability to continue to adopt the going concern basis of accounting for a period of at least the following 12 months from the authorisation of those accounts.*

Payment to Ben Wolstenholme from Norton & Sons

116. Norton & Sons is a Savile Row tailor and long term client of the first respondent. Mr Heinl's evidence was that in 2017 he suggested Ben

Wolstenholme do some illustration work for Norton & ons. He alleged that Ben wanted to be paid separately for the work and negotiated a fee that Mr Heinl thought was in the region of £6000 to be paid to him personally. There was no documentary evidence of any such payment. There was an email dated 4 September 2018 form Ben Wolstenholme to Norton & Sons in which he said about the work:

*As I said I can be a cheap date - but I would really like to gain some press or further coverage from this perhaps... or it can go to some clothes or something*

117. Ben Wolstenholme told us that he did not ask for payment from Norton & Sons. He did the drawings to pay off a debt created by Norton & Sons making a suit for a client and the reference in the email was banter. He did have a suit made in 2004 by Norton & Sons as part of a documentary. He could not remember if he had paid for it.

Financial reporting

118. It is convenient to summarise here some of the evidence we heard about financial reporting.

119. The first respondent did not have monthly management accounts. Ms Laikko said that what the respondents needed was continuous live real time access to the latest financial information, which they did have in the form of a Google 'live sheet' and that they had a continuous dialogue about numbers.

120. She said that balance sheets were added in summer 2020 on Mr Toppin's advice and that a cash flow forecast was submitted weekly as a separate document to the relevant people.

121. She said that the Google document included detailed profit and loss for the current financial year and a comparison with the previous year but not future profit and loss.

122. Mr Toppin gave evidence that the claimants had dismantled the previous financial tools at their disposal, in the form of a monthly financial information reporting suite he had helped to implement prior to 2016. Ms Laikko told us, and we accepted, that the changes were made by Mr Dent as CFO. Mr Richardson continued the template developed by Mr Dent but just moved it to the cloud.

123. It was put to Ms Laikko in cross examination that the Google document was an imprudent way of dealing with finances. She did not accept that. Ms Laikko said that matters such as debt were separately reported and notified to relevant people although not in the Google document. There was short visibility in this type of business of work coming in – only three months in the future.

124. What is most relevant for the issues we had to decide was whether the claimants were secretive about financial information and how they responded

to requests for further financial information and we consider those issues further below.

125. Ben Wolstenholme said in his witness statement:

*Mat and Hanna would typically provide either a deluge of information such that we had no method of deciphering the insight or pattern (for example linking us directly to financial cash worksheets versus sending monthly management information) or by sending information very late before board meetings(x-y). I had repeatedly asked them not to adopt this approach but was ignored.*

*Early 2020 and the start of the pandemic*

126. We now return to the chronology of events.

127. In early 2020, as we have recorded earlier in these Reasons, Mr Toppin was asked to do a report on where the cash reserves had gone.

128. He told us in his witness statement: *In early 2020 just after the first COVID lockdown started I was asked out of the blue by Ben to identify reasons why Moving Brands global bank balances had more than halved from £2. 2min October 2019 down to £lm in March 2020 as no one in the business seemed able to explain this sudden substantial drop in cash. This was a pressing matter as the £1. 2m unexplained drop in cash immediately preceded the lockdown with all of its uncertainty and needed to be addressed.*

129. Ms Laikko said in cross examination that that there was awareness in early 2020 of the cash reserve depletion and broad reasons for it but the pandemic created a need to look at the problem even more carefully.

130. In March 2020, Mr Toppin's services were also engaged in relation to applications for Coronavirus Business Interruption Loans ('CBILS'). Mr Heinl said that he felt they did not need Mr Toppin's expensive services in this respect but they acceded to Ben Wolstenholme's preference on the matter.

131. Mr Heinl told the Tribunal that there was significant uncertainty for the business at the start of the pandemic due to branding and marketing being a volatile industry with marketing budgets often being the first things to be cut in an economic downturn.

132. He said that Ben Wolstenholme responded to the uncertainty by proposing to let go of the majority of the employees and to consider winding down the business. Mr Heinl disagreed that this approach was necessary. The claimants and the rest of the leadership team developed an emergency Covid strategy, which involved in particular saving costs where possible, although not through redundancies.

133. He said that he and the leadership team developed an emergency strategy to navigate the pandemic. He said that Ben Wolstenholme and Mr Bull opted out of heavy planning.

134. Ben Wolstenholme gave a very different account of his discussions with Mr Heinl at that time. He related what he said was a discussion in late March 2020 with Mr Heinl:

*Mat came to the meeting with no preparation and in a very irate and aggressive manner. I could understand the stress he felt, but I was totally unprepared for the approach he took; without a plan or any discussion about ways forward he wanted to know 'what I was going to do to save the company' - his literal comment was 'it's up to you whether we get through this'. He dumped the whole issue at my feet without providing a clear context, any options or any solutions - and knowing that I had been consistently chasing clear financial and management information - including Monthly P&L, management dashboard and monthly balance sheets for many months prior.*

135. Mr Heinl denied that he said he was not aware of the cash downturn and could not explain it. He did not recall the conversation described by Ben Wolstenholme but said he did explain the factors which had caused the cash downswing as part of discussion about the pandemic. He said that he did not say to Ben Wolstenholme at any stage: 'It's up to you if we get through this'. He said that there were difficult conversations at the time because of Ben Wolstenholme's desire to preserve cash for shareholders rather than preserving the business and the jobs of the people in it. Mr Heinl accepted that this situation caused some friction with Ben Wolstenholme but said that they had previously weathered friction in their relationship.

136. Ms Laikko said that her role was to lead the pandemic planning process. There were weekly Covid meetings where the leadership team discussed finance and other issues. There were also dedicated Slack channels for these discussions.

137. Mr Heinl said in his witness statement:

*The Covid-19 planning intensified relations between us, but it also accelerated some of the longer-term discussions and agreed aims we had been having, in particular around governance.*

*The introduction of proper corporate governance had been something Hanna and I had been pushing since 2016 - we saw this as an important stage in the company's development to give it a strong foundation for growth. Finally, Ben suggested that we retain an outside advisor to assist us with planning. In an email on 26 March 2020, I introduced Ben to Murray Eldridge, and his wife and business partner Eva, for that purpose. I had met Murray at the Institute of Directors ("IoD"), where he is a senior lecturer, several years earlier. He was an experienced business executive, independent non-executive director and executive coach, and had recently worked with the senior team at Moving Brands on topics such as planning, sales strategy and team*

*performance. I suggested that we ask Murray to discuss the business's performance and pandemic-planning measures.*

138. On 24 March 2020, Mr Heinl suggested in a text message to Ben Wolstenholme that they should involve the Eldridges in the company's business. Ben Wolstenholme agreed and both of the claimants were keen to involve the Eldridges,

139. On 26 March 2020 there was a Covid strategy meeting at which Mr Heinl said the claimants presented financial information and a detailed plan for getting through the pandemic. This included saving costs in a variety of ways, accessing grants and reliefs and identifying other sources of funding.

140. Mr Heinl said in his statement:

*As an experienced CEO, I knew that reducing costs through mass redundancies would be disastrous in the long term when the company inevitably bounced back.*

*A creative company like Moving Brands is successful because of its highly talented team which we had development to be world-class over several years. The plan flagged areas such as: high overheads, including the lease on our New York City office, which (the plan noted) we had "limited options to exit" (this is relevant to one of the allegations put to us later); and challenges in bringing in new business which was something affecting the whole global industry. It set out remedial measures including a hiring freeze, tight cash control, getting in lines of credit and increasing business development efforts in certain areas. It set out detailed company financials and a studio-by-studio breakdown of sales, clients, headcount and so on. It gave detailed financial estimates and projections.*

141. Mr Heinl said that the plan included costs savings and a focussing on key market opportunities, It mentioned the New York lease liability and the fact that there were 'limited options to exit'

142. The plan included financial projections which Mr Heinl said were then borne out by a return to profit in quarter 4 of 202. Under cross examination, Mr Heinl accepted that it was not correct to say there was a return to profit at that point and said that his witness statement was in error and that he might have been thinking of 2021.

143. Ben Wolstenholme in cross examination did not agree that this was a good plan for dealing with pandemic, He said that said it was 'elaborate and ornate, slow motion and academic'.

144. We noted that this view was not expressed in a draft email of 3 April 2020 to Mr Heinl in which he thanked him for the immense amount of work he had done, expressed confidence in his ability to lead the company and said:

*Sorry for all the gloomy worst case. I actually believe you and the team, all of us, have put the business in a strong position to be able to weather this storm,*

*achieve sales to grow not shrink, and that you will have laid the ground work for a really vibrant time as we come through this crisis. I just want to make sure that we marshal our cash with extreme caution in these unprecedented times.*

145. On 27 March 2020, there were emails between the claimants, Ben Wolstenholme and Mr Toppin about his involvement. We note that these emails seem to show the claimants accepting Mr Toppin's involvement with some enthusiasm and Ben Wolstenholme accepted that interpretation of the documents in his evidence:

*Hi John,*

*Great to be connected again - been too long. I wish it were in less strange times..*

*Are you available for a video call with Hanna and I? Today could potentially work at 1330 or 1700. Or we can aim for early next week.*

*Looking forward to catching up.*

*Mat*

146. This was in some contrast with the account given by Mr Toppin in his witness statement in which he described Mr Heinl as actively resisting his involvement. His account in his witness statement suggested that the claimants resisted his involvement generally and he became suspicious that they were avoiding scrutiny of the finances.

147. When he and Ben Wolstenholme were pressed about what the documents appeared to show in cross examination, they said the claimants welcomed the input of Mr Toppin on the cash reserves issue and CBILS but not otherwise.

148. On 27 March 2020, Ben Wolstenholme wrote to Mr Toppin

*We had a very thorough status and strategy session today thanks to Mat and Hanna - and the wider teams - great work. I think we have a very good basis to take you through company outlook and plans.*

*The precise brief and remit can be evolved in conversation with you. From my perspective we would like to engage you to ensure we have the right materials and narrative and strategy as we explore (and vet) our options for commercial finance.*

*I am adding Mat and Hanna here to open the thread, they have offered to bring you up to speed - i think that is the first step, then we can strategize on our next steps. We do have some corp finance contacts in the market - i believe to run an effective process we need an experienced point person on our side so we can enable Mat and Hanna to remain business and sales focussed. My expectation is to work with you on the plan once you're up to date.*

*Please all feel free to improve on this approach*

*Great to bring the band back together ;)*

149. As part of the focus on cost cutting, the New York lease was also discussed. Ms Laikko said that the landlord's agent had previously suggested that the worst case scenario would involve exiting the lease in exchange for a payment of one year's rent. The situation was discussed at an extended board meeting in late March or early April 2020. Ms Laikko explained her understanding of the options at the time. Ms Laikko said that although she had some involvement in detailed discussions around the lease as CBO, it was primarily a matter for Mr Bull and Mr Davis, who were based in the US. Mr Davis handled all of the US commercial contracts.

150. On 3 April 2029, Mr Toppin emailed:

*Wondering when I might see a cash flow forecast so I can judge whether/how I might be able to assist.*

*It would seem the most basic and essential business report for right now.*

*Will there be a cash flow report and updated scenarios for me to look at on Monday? Also latest balance sheets for each unit and consolidated would be handy*

151. On 4 April 2020, Mr Heinl made some notes for his own use:

*Spoke with Peter Heinl [Mr Heinl's father, a psychiatrist]*

*He believes Ben is classic narcissist. Psychiatric condition. Likely to be jealous. Likely to want to destroy if he cannot control.*

*Advised to engage high powered lawyer who is expert in the field.*

*Advised to keep healthy - good diet, good sleep.*

152. We noted that this came after some difficult exchanges between Mr Heinl and Ben Wolstenholme about how to manage the company in the pandemic. Asked in cross examination about the reference to engaging a lawyer, Mr Heinl said that he spoke to a lawyer; he was not sure it was an employment lawyer. It was the same lawyer who had advised them on the shareholders agreement and he did not engage a lawyer at that time.

153. The strains in the relationship at the time are reflected in emails between Mr Heinl and Ben Wolstenholme on 5 April 2020. We saw a long email from Ben Wolstenholme following on from a phone call between the two. It appeared from this that a significant issue had been a discussion about the extent of the chair's role and also the pay Ben Wolstenholme received as chair. He referred to a difficult call they had had two weeks previously:

*We are in this together, and my goal is to get back to that understanding - and to look at this together. I can imagine you may feel that's easy for me to write and not a really accurate statement as I am not on-the-ground with you in the*

*way you are. That is fair, but we all have a lot committed to MB and YR and I do believe we're all in this together. (and on a wider note the world is all in this together of course).*

*To keep with the big stuff, I came away gutted about many things from our call - but in the end I wondered what it is that would make things better? - it seems clear to me there is an 'imbalance' in my role in the business, whether that be my role as chair, my wage as chair, the size of my shareholding, my share of dividend... perhaps it cuts across all. Each is it's own topic - but at the high level i want to ask what will re-dress this imbalance? ... I don't mind opening this up fully in conversation when we get a chance, I'd like to.*

*From a creative and entrepreneurial stand point - we're great - but there are times where I feel my involvement is deeply frustrating to you. I'd be really pleased to know where that line is - it might be ownership, roles, remit, something... if we call it out then we can see if we can get there or a long way towards it.*

154. The email goes on to address a number of topics, including the chair role and pay and a large number of financial topics. Inter alia Ben Wolstenholme was concerned about the cash burn and that shareholders were being asked to contribute. He referred to the possibility of winding the business down.

155. Mr Wolstenholme said in cross examination that he still believed Mr Heinl had the capacity to lead the company through the pandemic but he wanted to get 'round a table' with him.

156. In his reply of 7 April 2020, Mr Heinl was positive about the two working together. He agreed that they should engage Mr Eldridge. He suggested they continue with Mr Toppin's finance project and then review filling an FD/CFO role with his help and that of Mr Eldridge. He asked if they should commission another study on the issue of what the chair's pay should be.

157. In a further email that day, Ben Wolstenholme said:

*To the task at hand - Hanna and I had a good call with JT [Mr Toppin] this morning - he's suggesting a different view on Management info that includes the balance sheet which makes a ton of sense to me - and is the part of the picture that we need to round out the view of the downswing in cash.*

158. Mr Heinl replied that this was 'very helpful'.

159. Ben Wolstenholme accepted in cross examination that it did not appear in these emails that the claimants were being obstructive or resenting the involvement of others.

160. Mr Heinl told us that this was a tricky exchange but his relationship with Ben Wolstenholme had weathered a lot over the years so they were able to work through this disagreement. The crux of it had been Ben Wolstenholme looking to preserve his own shareholding value as a response to pandemic.

161. During this period, there were negotiations ongoing with the landlord's agent about the New York lease. These are set out more fully in Appendix 1.

162. Pausing to summarise the Tribunal's conclusions about the state of affairs between the claimants and Ben Wolstenholme at this stage, we considered that there were tensions but they were relatively new and appeared to be rectifiable. It was understandable that the claimants were concerned about the issue of the chair's pay and that Ben Wolstenholme was concerned about his own financial situation. These issues were very much intensified by the pandemic.

163. On 22 April 2020, Ms Laikko wrote to Mr Toppin and Mr Richardson

*How are we doing with this? Is the picture getting clearer on what the big movements have been so that we can close the loop with Ben?*

164. A series of pieces of financial information were being sent to Mr Toppin and on 23 April 2020, Mr Richardson sent Mr Toppin the cash statement.

165. In a 23 April 2020 email from Ben Wolstenholme to the other shareholders, he attached a proposal for working with Mr Eldridge in three areas:

- *Board performance*
- *Strategy*
- *Adding a NED*

166. Mr Heinl said he hoped that Mr Eldridge would bring more experience and perspective to board.

167. On 24 April 2020, Mr Toppin produced his draft report on the cash issue for comment by the claimants and Mr Richardson.

168. The same day Ben Wolstenholme wrote to Mr Toppin setting out some areas where he proposed Mr Toppin could assist Moving Brands:

*1. Company Dashboard from Phil including Balance Sheet and any KPIs you reckon we need.*

*2. Related: any insight into the 1.2M GBP downswing of cash across MB Q4 2019 and MB Q1+2 2020. When losses on P+L are more like 500k.*

*3. Narrative and possibility of raising external finance to accompany or perhaps match further inside investment from*

*YR15 account.*

*Are you getting what's needed from Phil? hope all is ok*

169. In this email, Ben Wolstenholme also discussed the fact that he and Mr Heinl had different views on what his pay as chair should be.

170. In cross examination, Ben Wolstenholme accepted that any delays to obtaining financial information at this stage were not the claimants' fault and that the claimants were cooperating with Mr Toppin on the cash report. He

said he did not think there was much else they could have done since half the reserves were gone and he said that no one could explain that.

171. On 27 April 2020, Mr Toppin presented his report :'Where did the cash go?" Ms Laikko said that the situation was not worrying; the reasons for the cash burn were clear, including a large project before Christmas where the third party costs had just landed. It was put to her in cross examination that she had not alerted the board to the cash issue. She said that it had been in the cash forecast but she did not specifically raise it with board; it was in no way hidden. The cash challenge had been discussed in a number of board meetings and was the reason the claimants had deferred their bonuses. There had been plenty of conversations about cash.

172. She said that she had explained to Ben Wolstenholme where the cash had gone but he wanted the same explanation from Mr Toppin. As a very experienced adviser he could give the explanation in greater depth and she was happy to have that further insight. She and Mr Heinl could see the cash issue coming and she said they discussed the downward trend in cash at the December 2019 board meeting and also in the February 2020 board meeting.

173. Mr Heinl said that he had not predicted that they would burn half of the cash reserves although there was an understanding about the effects of the costs of a big film production. They had identified where the cash had gone but Mr Toppin's precision was useful. There were other important topics at the time, including the pandemic and the operational situation in New York.

174. Mr Toppin made some further recommendations in his email attaching the report. He said that he did not know what the company had by way of a financial dashboard / KPIs and he would be glad to see those.

175. He saw the next steps as being to stretch cash resources by costs savings and acquiring additional funding. He proposed helping Mr Richardson to prepare an analysis of the quality of sales forecasting and to build a robust combined P & L, balance sheet and cash flow model. He said that he was hoping to get information with more urgency than he felt he had received the data about the cash.

176. In his witness statement, Mr Toppin was critical of the Google document which was in use and the lack of balance sheet data. He said:

*In all my experience since 1986 I have not encountered any business successfully run without a robust set of monthly management accounts including balance sheet and cash flow forecast data as well as profit and loss data (both historic and forward looking).*

177. Ms Laikko said that Mr Toppin did raise wanting to change the way Mr Richardson was forecasting, including in relation to cash flow and balance sheets. She said that she worked with Mr Toppin and Mr Richardson throughout this period to improve the cash flow information and balance sheet.

178. Ms Laikko's evidence was that Ben Wolstenholme was concerned about his finances during the pandemic especially because Madefire was going under. He was keen to have a very clear view of his own finances.

179. At this point, Mr Toppin was already involved in the company's CBILS application and in May 2020, Ben Wolstenholme asked Mr Toppin to look at benchmarks for chair pay. This had been looked at by outside consultants in 2017 but Ben Wolstenholme had not agreed with those recommendations. Mr Heinl said that Watts Gregory were already looking at the issue and he did not know why Mr Toppin was being involved. It appeared to him that Mr Toppin was being engaged to advocate for Ben Wolstenholme to be doing an expanded role. He said that it was this which led to some questions being raised about Mr Toppin's involvement and whether the advice was being charged for.

180. On 5 May 2020, Mr Toppin suggested some KPIs for the company.

181. Ben Wolstenholme wrote to Mr Toppin that day, not copying in either claimant, saying that he was now focussed on the chair pay issue and asking Mr Toppin to advise on the level of his pay.

182. On 6 May 2020, he wrote separately to Mr Heinl:

*To try and make this simple - because unfortunately it's not that straight forward - here's what I'm thinking.*

*I'm already all in on Moving Brands and Madefire - most everything I have is tied up in them, I've gone through savings etc in the thin times for each company. So with me as well as 4.5 dependents I'm already firmly at my hard deck with no pension or savings. Not receiving the dividend owed from 17/18 actually puts me under my hard deck.*

*At the same time I really do appreciate the work you're doing to reduce costs - and the extraordinary circumstances in the world and the MB landscape. We need MB to survive and thrive. I'm very grateful you're pushing on that.*

*Currently I am paid 5k/month in UK and 5k/month in US. Personally I am confident that I provide great value as chair at that rate. In the meantime - during this C19 crisis i believe I can manage to take a voluntary wage reduction by halving my UK wage - I think it would be a logical time to move to salary structure from current div structure. I can only make this work by punting my UK mortgage repayments during this crisis until we achieve some normality again. So this will equate to a voluntary 25% reduction in my 'wage' overall from MB during the crisis.*

*I think we can instate this for June payroll and have it in the model for the C19 period, that gives me a few weeks in May to organize putting the UK mortgage on hold which I believe is feasible.*

*I would like to know when MB can pay the outstanding div owed as all other shareholders have received theirs - it's creating a lot of challenges for me as it was allocated to tax.*

*You asked for a timeline on benchmarking the chair pay. I'll know more on timeline in coming days - am using Murray, John T, WG and SLW as reference points.*

*If the benchmarking produces a recommendation that is significantly different to what I am paid then that's a whole different ball game for me and I'll have to consider how to make ends meet. At that point I reckon I'll have to state my case for the value I bring and see what the verdict is.*

*As actions - I can connect with Phil and WG to set the div to a UK wage at half levels (it will cost a bit more for me and for MB in tax terms but will be on par with method of pay for rest of shareholders), please come back to me on the owed div timing.*

183. On 7 May 2020, Mr Toppin had a call with the claimants and Mr Richardson to discuss his suggestions for KPIs.

184. On 11 May 2020, Mr Toppin emailed Ben Wolstenholme on the subject of chair pay. He said that Mr Heinl should be involved.

185. On 28 May 2020, Mr Toppin wrote to Mr Heinl setting out a summary of work on the chair pay issue and setting out next steps.

186. On 5 June 2020, Mr Toppin chased about the next steps and Mr Heinl replied:

*Can you clarify some points before we go any further;*

*1. How is this effort interfacing with the opinions from Watts Gregory and Murray on what an SME chair is typically paid?*
*2. I understood these opinions would be shared at no cost. Is this true of what you are doing?*

187. On 8 June 2020, Mr Toppin replied*:*

*1. Ben has shared feedback he received from Watts Gregory and Murray with me.*

*2. I have no idea what MB's financial arrangements with Watts Gregory and Murray are, nor exactly what they have agreed to provide at no cost. I am absolutely not providing my services for free.*

188. On 10 June 2020, Mr Heinl wrote to Mr Toppin:

*Thank you for confirming that you will be charging for your services (which makes sense). However, I am not clear on who you intend to charge? This was never raised by Ben, discussed with me and therefore not agreed upon. From what you have written here, it appears you are advocating for Ben to have a new role (the so called 'X' role). As I understand it, this is based on his own description. I cannot recall having heard of such a role in any company I*

*have read about or worked with. Nor has an 'X' role – or anything resembling it – been discussed, suggested or requested at MB to my knowledge. The first time I heard about this concept was from you in your email (28 May). If Ben wishes to discuss a role change, this is a separate issue that would be conventionally handled within the company as any other role progression / change.*
*I have not been part of the various discussions and briefings you have received from Ben. If you wish to obtain context, I am always available to you. In brief; this topic is solely related to establishing the correct remuneration for a Chair in a company like ours. The topic of Chair remuneration was raised by Chris Dent, therefore it has been on the table for several years. MB has a longstanding pay framework which all roles are subject to, notwithstanding the Chair role which is a persistent anomaly, hence this discussion. The framework is not under review. The understanding of the Chair role and the challenges in performing it are regularly raised by Ben with me in our conversations. Thank you for sharing the link to the IoD Role of the Chair factsheet, it aligns with my previous understanding. I agree with your assessment that this role is not being performed as described at MB.*
*From MB's perspective – given the confusion here combined with the fragile economic context we are operating in, it would not be responsible for MB to proceed with any further paid activities until the scope is clear*.

189. Mr Toppin suggested in his witness statement that these emails reflected Mr Heinl resisting his involvement with Moving Brands. In cross examination, he accepted that Mr Heinl's email was perfectly reasonable. Nonetheless, at a later date, in a 4 February 2021 email to Ben Wolstenholme, he described this incident as Mr Heinl 'throwing his toys from the pram'. It was clear to the Tribunal that the problem arose because Ben Wolstenholme was corresponding separately with Mr Toppin and commissioning him to do work, whilst leaving Mr Heinl out of the loop.

190. On 20 May 2020, the first strategy planning session was held with Mr Eldridge.

191. Ben Wolstenholme described the involvement of Mr Eldridge as being to help develop business strategy and improve board practices as part of an effort by the founders in mid 2020 to make one last effort to rally around the claimants and encourage them to turn around. He said:

*The work with Murray in the six months of the second half of 2020 alone was incredibly intense and I was happy to see it happening and fully involved. It covered improving Board performance, cadence and agenda items. Working with us across 6 board meetings (one a month average) as well as two shareholder meetings to establish clear expectations for the next 5 years. it also included 5 MB 'strategy planning sessions' and Murray later joined the Year 15 Board itself in August 2020.*

192. For reasons we explore more fully, we considered that the narrative Ben Wolstenholme presented about these events was very much an ex post facto characterisation of the events.

193. On 21 May 2020, Mr Richardson became aware that HPE was saying that the IT lease had a maturity date of October 2021. Mr Richardson considered that was an error and asked the broker to sort it out. At this point the broker agreed that there appeared to be an error. Ms Laikko said in evidence that she did not believe she was informed by Mr Richardson in any detail about these discussions at the time they took place.

194. Ms Laikko said that it was still believed that the assertion of the longer lease period was an error throughout the summer, when the forecasts were submitted for the CBILS application in August 2022, and when she signed off the accounts on 20 September 2020.

195. On 9 June 2020, the first and second respondents held  board meetings. There was some discussion of shares.

196. Mr Heinl's handwritten notes record: *BW and GW shares. GW taxes. Stay with Guy, family trust, moving country*

*Passed Shares to Guy to get under 50K threshold*

197. On 10 June 2020, Ben Wolstenholme sent an email to the other shareholders in the context of emails about expanding the shareholding to other in the management team:

*My note is to write down my perspective on the conversation today.*

*Most important - I want to convey - as email can be clear, but also rather tone deaf - that I am extremely grateful to the four of you for the results you've achieved and feel very fortunate that we're working together. I believe I have some appreciation for what an immense amount of work and commitment it is to achieve what you are achieving for the company and i really sincerely appreciate it and frequently marvel at it.  This overall sentiment can be in danger of getting lost. As leaders of the company I firmly believe you should be earning further into the shareholding. Same is true for Matt and Christian and others key people, that's very important to me*

*So first and foremost, thank you, and I'm very glad we're doing this work.*

198. Ben Wolstenholme said in cross examination that this was the last time he tried to have a rallying cry and that the email was sincere. He was not thinking that Mr Heinl would not be the long term leader of Moving Brands at that point, although he had hesitations.

199. On 12 June 2020 the PPP application in the US was made.

200. In June 2020, Mr Heinl and Ben Wolstenholme had some sessions with Ms Eldridge.

201. On 18 June 2020, Ms Eldridge emailed Ben Wolstenholme and Mr Heinl and said: ‘’Following recent conversations with Murray, and given some of the key topics under discussion, it might be useful to address a few issues causing some difficulties. Both of you have expressed that you are very open to such an approach which is really great news.’ The plan was to have an initial call with each and then two joint sessions.

202. Mr Heinl did not accept that the relationship was ‘toxic’ at that point but agreed that there were some difficulties.

203. As to the reasons for the session with Ms Eldridge, Mr Heinl said in his witness statement that it was:

*suggested that Ben and I might benefit from some sessions with his wife Eva. These sessions were pitched as being a natural extension to the previous sessions Murray had led. Ben was keen to go ahead. I understood that the sessions might help clarify our respective roles as part of the efforts to bring in governance, and so I agreed. I was aware that Eva’s work is sometimes focused on mediation and so I did raise a concern with her in the meetings that I didn’t think the sessions should be framed as mediation as that implied a problem where there might not be one.*

204. On the subject of whether these sessions were in fact ‘mediation’ between him and Ben Wolstenholme, Mr Heinl was challenged in cross examination about what he said in his submission later to the disciplinary process:

*By July, the interactions between myself and Ben had become increasingly challenging. At Ben's behest we partook in mediation, led by Eva Eldridge. During these sessions, in which we were encouraged to be frank to one another, Ben and I vocalised a lot of previously unspoken thoughts about each other and how we felt each of us was viewed by the other. Ben described me as hostile, “competitive with me”, defensive, rude and condescending (all of which I refute) but at the same time ranked me "5 out of 5" in my capability as CEO, my benevolence to the company, and my integrity.*

205. Mr Heinl said he saw the sessions as clarifying roles as part of the efforts to improve governance; he said that he did not see them as mediation. Mr Heinl said these sessions led him to feeling he could confront Ben Wolstenholme about some things which were on his mind.

206. In July 2020, Mr Heinl said he raised with Ben Wolstenholme the shareholding issue and use of company resources for his own personal ends and other aspects of the alleged business conduct disclosure. He said in his witness statement that he:

*made these disclosures in an effort to protect Ben’s own interests as well as the company’s. However, I now think that Ben saw my comments as an effort to turn his potential wrongdoing to my advantage, rather than just to flag and seek to mitigate risks, as had been my intention.*

207. He raised the shareholding issue, he said, because it was taking a long time to get Mr Wade and Mr Davis into the shareholding and he was concerned they would leave. He had concern about the difficulties in getting PPP as Guy's shareholding was in the UK and he was also having discussions with Mr Eldridge about shareholder intentions.

208. The disclosures as described by Mr Heinl in his witness statement were:

*I had a number of calls with Ben over July and August (including some with Eva present) where I mentioned the issue of the share transfer between him and Guy. However, it was during a particular one-on-one call in mid-August 2020 where I raised the issue in full, and explained all of my concerns around it.*

*I told Ben that David Challenger of Watts Gregory had told me that Guy did not really own some of his shares but that instead they had been transferred from Ben for personal tax reasons. I said that David had told me that Ben and Guy had signed a document that was deposited in a safe and could be taken out at any time to reverse the transfer or indeed left in the safe. I said that the position on who held the shares was really unclear, and that Ben was behaving as the majority shareholder when on paper he only held one share. I told him that the fact the accountants were saying one thing, and he was saying another, raised alarm bells and indicated that there was a real risk for the company and people connected to it, and that the secrecy was troubling.*

*I said that the share transfer had been brought to my and Hanna's attention on a call with Watts Gregory and Spott, Lucey & Wall …and that the accountant at Watts Gregory (Anne Smith) had seemed very uneasy about the transfer of shares from Ben to Guy. I also said that I had discussed the transfer with Jim – this is the conversation I refer to at paragraph 46 above – and he had not known about it.*

*To be clear: I was not saying that I had a problem with treating Ben as the majority shareholder; I was disclosing that the position that was recorded was inaccurate, changeable depending on the context, and potentially illicit.*

*The wider context for this was that I was concerned about the company's governance. I said words to the effect that "this looks like you are behaving as though the company is your personal property but it's not". I said that this did not change Ben's relationship with the company, but that from a governance point of view we could not keep being pressured to operate as though the company was his personal property. I told him that his explanations were inconsistent.*

*On the call, I asked how the transfer benefited anyone, and Ben just could not explain. I recall Ben saying to me once, beforehand, that the only bit of advice he ever got from his dad was to play dumb. And on the call, he ended up saying something like "gosh yes this does sound a bit weird". I then asked how we were going to work the situation out, and he suggested getting Watts Gregory to do a report on it. I was pleased to hear him suggest something*

*constructive, so said "Great, please confirm how that will be done and when". I have never seen any such report, although Ben did mention in an email to shareholders a week or so after our call that "GW/BW share status" was something which needed to be reviewed*

209. Cross examined about whether he did anything further about the issue, Mr Heinl said that Ben Wolstenholme said he was going to get Watts Gregory's view and that he took him at his word.

210. Ms Laikko gave evidence that it appeared around this time that they might not qualify for PPP as the business appeared to be owned from outside the US because of the shareholding position.

211. Mr Heinl's evidence was that the disclosures were the real turning point in his relationship with Ben Wolstenholme and that and after the disclosures, Ben sought to manufacture tensions in their relationship.

212. Mr Heinl's account of his beliefs about the share transfer disclosure were that he believed that someone, probably Ben Wolstenholme, was not paying all of the tax they ought legally to be paying and that tax was being evaded.[1] He said that he also had concerns that Ben and Guy were focussing on their own financial interest at the expense of the company and other shareholders and a sense that there might be a breach of legal obligations for directors to act in the best interests of the company, although he did not have a detailed

[1] His fuller account in his witness statement was: *The basis for that belief was as follows:*

*a. First, I recalled Devan at Spott, Lucey & Wall saying to me that shares could not simply be gifted back, and that the gift counted as a transaction. As I have said at paragraph 44 above, I recall this being a potentially serious issue, that meant that Ben, Guy and/or the company might be liable to pay tax on the transfer; and I recall the accountants on the call looking nervous about discussing this matter. I also have a general sense that both HMRC and the IRS do not look kindly on behaviour that veers towards evasion.*

*b. Second, I have known Ben for a very long time and I know that he really does not like paying tax. He told me he didn't believe in paying the government money that he had earned. Anything that came with a tax liability would make Ben's blood boil – he would drop a dollar to pick up a dime when it came to tax. I remember him saying to me on several occasions, when we talked about tax, "I'm not bailing out the banks again!". I thought that the share transfer posed a general risk to the business. I also thought that there was a very real risk that Ben was not paying all the tax that he should be paying.*

*c. Third, the whole nature of the share transfer as I understood it seemed to me to be suspect – especially the idea of the letter in the safe. I am not a tax or legal expert, but I do not think that a person should write letters negating, for their own benefit, something that they have officially recorded. I understand the difference between avoiding and evading tax, with the latter being unlawful, and this struck me as likely to be the latter. I even did some research around this time into what classified as tax evasion in this context, and I made a note where I referred to the UK Criminal Finance Act 2017 and wrote "Must treat BW gift to GW as legit and complete"*

knowledge of what those legal obligations were. . He was also concerned that there might be a breach of the shareholders agreement in terms of the transfer and that whatever had occurred was being concealed.

213. Ben Wolstenholme denied that there were any such disclosures. He said in cross examination that the only discussions about risk related to bringing in new shareholders, Mr Davis and Mr Wade; these were the risks for shareholders of coming under the US jurisdiction.

214. It is relevant to set out what some of Mr Heinl's handwritten notes recorded around this time.

215. In notes of a meeting with Ben Wolstenholme and Ms Eldridge on 19 August 2020, Mr Heinl wrote:

*Risk (tax, unilateral decision) Blow back*

*Long term involvement*

*Support CEO*

*Reflect value I've given…*

*Value for himself and Guy only – sharedealing*

- *Blowing MW / CD down*

216. Further relevant notes from a shareholder meeting dated 27 August 2020 are recorded below.

217. In some handwritten notes to himself from that summer, Mr Heinl wrote:

*Actions*

*-what is structure for/*

*Voluntary reduction?*

*-should be fair….what is*

*The % cut everyone is taking?*

*Does it restore.*

*How can I agree to a voluntary*

*reduction without knowing what everyone doing?*

*- Gift tax return to Guy*

*How much. Share transfer form*

*-Phantom income*

*No gift issue in US*

*But phantom take explodes*

*-think through rights +*

*SHA…..check*

*-If sell then corp tax*

218. In July 2020, Mr Heinl said he made what is described as the discrimination disclosure:

*I was having a discussion with [Ben Wolstenholme] about his behaviour in the company, generally, and I gave this as a concrete example. I talked through in some detail how he was treating [Ms Laikko] as his secretary by pushing her into stereotypically administrative roles such as booking meetings and taking notes, setting her tasks and then ignoring her work on them, and expecting her to sort out his mistakes. I told him that he treated her differently to others on the board, expected her to perform tasks which were clearly his to perform, singled her out for criticism and did not engage with her on strategy. I complained about the fact that she had been forced to finance the purchase of her shares herself, when others (including myself had had this paid for by the company. I also complained about how he would often expect her to help him with his own personal financial matters. I told him that he only praised her administrative work and ignored her substantive contribution to the business. I remember telling him "she's not your secretary" and said that Hanna was her own person, and that he could talk to her directly (not just through me).*

219. Mr Heinl said that he was concerned that this was sex discrimination towards the company's most senior female executive and that it was being normalised. He also told the Tribunal that he was concerned about nationality discrimination.

220. On 2 July 2020 there was a strategy meeting including the claimants, the Eldridges, Guy Wolstenholme, Mr Bull, Mr Wade and Mr Davis. Guy Wolstenholme said in his witness statement that the claimants asked him to leave the leadership team in this meeting and that derogatory remarks were made about Ben although no details of these were given to the Tribunal.

221. Ben Wolstenholme said that after the meeting, Guy rang him and was upset that the claimants had been openly rude and disrespectful to him. He said that he had left the meeting as he was upset  He said that Guy was in tears.  Mr Bull gave evidence about a strategy meeting which he said was on 2 July 2020 facilitated by the Eldridges. Mr Bull said that Mr Heinl was aggressive to Guy and Guy left the call. Mr Bull did not say what the aggressiveness consisted of.

222. Mr Heinl said in evidence that Guy Wolstenholme was not on the leadership te. He had not made derogatory comments or asked Guy to butt out. It was well understood that the next stage of the strategy work would be led by the executive;  the leadership team and board had different tasks, some collaborative. He did not believe he asked Guy Wolstenholme to leave the leadership team. He accepted that his relationship with Guy, which had been

good, deteriorated in summer 2020 after a call, not this one, where Guy seemed upset and hung up. That had followed a discussion of Guy's tax situation. He did not message Guy about the call as Guy was not much of a user of written communications.

223. Over all, the respondents' account of this meeting was unclear and was not clearly put to the claimants. Guy Wolstenholme described the Eldridges at this meeting as being part of Mr Heinl's supporting team whereas Ben Wolstenholme suggested that Mr Heinl was resistant to Mr Eldridge's involvement. We noted that whilst the respondents' statements were full of adjectives describing Mr Heinl's behaviour – rude, condescending, intimidating - they were very short on particulars of what Mr Heinl was alleged to have said. There were no documents recording any of this, save for the reference below in Ben Wolstenholme's email to Ms Eldridge. We considered that if something significant had happened, it was very surprising there were no further documents referring to it.

224. Mr Heinl's handwritten notes from 2 July 2020 record *BW + GW share dealing NO BLOWBACK ON OTHER SHAREHOLDERS*

225. Generally, Mr Bull and Guy Wolstenholme supported Ben Wolstenholme's account that the claimants were behaving disrespectfully and aggressively to the founders for a substantial period and causing the relationships to break down, although that account lacked particulars. The claimants disputed this account of events.

226. It was put to Mr Heinl that he did not respect Mr Bull and thought he should not be a director. Mr Heinl said that he liked Mr Bull very much and had been close to him; they had worked on projects together. It was Ben Wolstenholme who had criticised Mr Bull and raised issues about whether he should be on the board.

227. Ben Wolstenholme said of this period that the claimants were running the company with a command-and-control approach which led to 'talent flight' and a culture of 'burn-outs of fear and of reproach', leading to grievances about 'bullying and hostile work environment situations'. He said that he discussed these issues with Mr Heinl. We noted that there was a paucity of documentary evidence about this alleged situation or about it being raised with the claimants.

228. Mr Heinl denied that that situation existed or that Ben Wolstenholme raised a concern about talent flight. He said that people came and went over the lifetime of the business and that he did not remember Ben worrying about that situation more at that period than any other. He denied that Ben had spoken to him about being aggressive or bullying to staff. In the absence of any documentary evidence, we did not believe Ben Wolstenholme had had discussions with Mr Heinl about these allegations. It is not reflected in what Ben Wolstenholme was saying to the Eldridges at this time; if there were real issues of this sort, it seems inconceivable they would not have been raised

during those discussions. We note that the later GPW investigation found no evidence of these issues and they did not form part of the later conduct allegations against the claimants. We do not accept that there were genuine issues of this sort.

229. On 7 July 2020, Ben Wolstenholme again corresponded with Mr Toppin about chair compensation.

230. On 8 July 2020 Ben Wolstenholme sent an email to Ms Eldridge in preparation for their session:

*I planned to answer these [questions] as if at the end of last year - end of 2019 - at that point I felt an unshakeable foundation was in place that we could always build on top of - a foundation of mutual respect and values. This year i really feel I've really lost my bearings and calibration as a lot of those aspects have been shaken.*

*I have spent a big chunk of this year trying to understand what is happening in the dynamic between Mat and I. We don't have to agree on everything of course - I'm sure we can both live with that... but this feels different - aggressive, defensive, disrespectful, frankly rude and unnecessary.*

*My anchor thinking has always been that Mat (and Hanna btw) are extremely capable and talented individuals, with excellent values. They're big picture people and will grow - both themselves - everyone around them - and the company.*

*I'm not feeling that growth, outlook and perspective from Mat. I feel fear, diminishment, condescension, antagonism... it seems we're in competition. Can that lead the system effectively going forward? Is this just a window of extreme fear in the world - an eeriness that obscures the normal judgement? hope so.*

*…*

*I hope Mat will continue to lead the company, it's vision and it's distinct place in the world. I also hope to work with Mat long term and conquer many fronts - either within MB or multiple companies and journeys. It is most often a powerful combo, when it's good it's remarkable.*

*…*

*Personally I feel unseen, undermined and woefully undervalued - not fun. I wonder if others feel the same.*

*And I can't honestly abide by the disrespectful behaviour in the group, it rocked me, mainly because I never expected it from Mat, it's below him. I know it was noticed as Guy called me that evening to say what a strange feeling he got and how spurned he'd felt as well. (I can't remember in 23 years Guy ever calling me like that)*

231. Ben Wolstenholme told the Tribunal that on 16 July 2020 Mr Heinl removed Mr Eldridge from further strategy and planning sessions. Mr Heinl said in evidence that it was not up to him to say who attended but he thought it was a good idea. The work was in a series of stages and the next stage was the leadership taking the work forward. He said that this was Mr Eldridge's approach. He denied that he rejected Mr Eldridge's further input and said that they had regular conversations. He said that he did not agree with everything Mr Eldridge proposed but that was normal.

232. Ben Wolstenholme gave evidence that he realised at this point that the claimants were rejecting any experienced executives who might challenge them

233. Mr Heinl's personal notes from 16 July 2020 refer to *share dealing no more inter family deals – s/holders may sell back shares via overpayments – historical too*

234. Another handwritten note records: *gift to Guy has to be rectified*

235. In a further note from this period, Mr Heinl wrote:

*UK Criminal Finances Act 2017*

*2 new criminal offences*

*"Corporate Criminal Offences"*

*Failure of corps / partnerships to prevent the facilitation of the evasion by an 'associated person' whether the tax evasion is of UK tax or non UK tax*.

*Must treat BW gift to GW as legit and complete*

- *Need statement to board / shareholders*
- *May need to review / reverse payments…*

236. An arrow from the words 'associated person' led to the words 'employee supplier agent or controller'.

237. On 30 July 2020, Ben Wolstenholme wrote to the other shareholders and the Eldridges about a variety of topics including chair salary and bringing Mr Eldridge in as a NED, board composition more generally, and shareholder expansion.

238. Ms Laikko in reply said: 'My view is that it would be beneficial to look at the board composition more broadly, and perhaps all shareholders should not be on the board, and we could try to achieve a little more distinction between the roles as shareholder, directors and executives.'

239. In cross examination she said that this was about improving governance and not about wanting the founders to step aside and let her and Mr Heinl run the business. Her evidence was that the strategy discussion with Mr Eldridge had not progressed because the Wolstenholme brothers and Mr Bull did not have a good grasp of the day to day aspects of running the business, Mr Eldridge

therefore suggested that the discussion be refocussed on shareholder expectations so the strategic options could be lined up and a strategy worked out from there.

240. Ms Laikko said that they were having unprecedented levels of interaction with Ben Wolstenholme at this time because of the long strategy sessions with Mr Eldridge. Ben Wolstenholme was keen to have a financial dashboard and wanted Mr Eldridge to lead on it as he would know what information was useful for the board to see. Ms Laikko said that this was not a question of providing additional information to the board but of presenting existing information in a board friendly way.

241. Mrs Kyosti gave evidence that in the summer of 2020 she had discussions with the Wolstenholme brothers. Her evidence was that they made similar complaints about the claimants to those which the Wolstenholme bothers have made to the Tribunal.

242. Ben Wolstenholme said that although relations with the claimants were not good, at this time he was waiting to see what the five year business plan due from Mr Heinl and his team would look like. He said that he needed the plan by the end of October 2020.

243. At some point in August 2020, Mr Eldridge was appointed as a non executive director.

244. On 21 August 2020, Mr Toppin emailed Ben Wolstenholme about the CBILs application. He said that he had enjoyed working on it with Mr Richardson and Ms Laikko:

*Thanks Phil for producing the numbers. Hanna thank you especially for your view on the business, revenues and cost projections.*

245. Mr Wolstenholme wrote to Ms Smith that day:

*One key area related to the current status - Mat and Hanna have asked me specifically to look at RISK in the system - are there risks to Guy and I but I think mainly they're concerned - are there risks to them in the current status of the shares - If I move to payroll I assume that tidies up dividend issues until a potential end of year dividend which will go to Guy anyway - and we'll sort through anything after that between us inter-personally as family.*

246. Neither Ben nor Guy Wolstenholme could explain in cross examination what 'sorting inter-personally as a family' meant, although they denied it involved transferring dividends between themselves.

247. Ms Smith was also cross examined on this email; she said there was no need to discuss redistribution and there would have been implications of doing that. There was no need to, as they could vote for dividends on different classes of shares:

*Each of the shareholders had a different class of preference shares, A B C D E. Ben and Guy had A – C and Matt and Hanna D and E. They had one*

*each. You can vote a different dividend on each class. …The ordinary shares not used. They did not vote dividends on ordinary shares in my recollection.*

*Other disclosures*

248. Mr Heinl gave evidence that he made the other business conduct disclosures during summer 2020 during meetings and calls.

249. On the topic of the use of company advisers for personal advice, his evidence was that he said during summer 2020 and also on a call with Ben Wolstenholme in January 2021:

"*the way in which you guys spend money through the company on accountants and lawyers should be looked at, because clearly significant amounts of that spending is on your personal tax positions – no-one else is doing that, so why should you?". Ben would have known very clearly, in view of the matters set out above, what I was referring to.*

250. On the use of company resources for Madefire, he said that he said during the summer of 2020 and during a call in January 2021:

*that Moving Brands had been paying for Madefire's business expenses, and I specifically referred to his travel to LA. I said that Ben had been improperly using Moving Brands - its staff and its time – to do work for free for Madefire, and that he shouldn't be doing this. I mentioned that Guy seemed to be doing work for Madefire using Moving Brands' equipment and resources, whilst at Moving Brands. I reminded him of all the free work I had to done for him without any credit, by which I implied that he was using my intellectual property for his own benefit.*

*Because Ben and I spoke regularly about Madefire, he had extensive context for what I was saying to him. I also told Jim about the fact that Ben was demanding that our one-on-one time was spent focused on Madefire, not Moving Brands.*

251. On the subject of Guy Wolstenholme's tax liabilities, he said that during the summer of 2020 he referred to the company covering Guy's tax payments in conversations with both Ben Wolstenholme and Mr Bull:

*When I referred to these facts with Ben, he would react in a mixed way. I could tell he knew it was not OK but he ultimately defended Guy because he relied on him at Moving Brands and Madefire. He would turn the issue around to be somehow a question of Guy not being paid enough (which was ridiculous since he was already paid well over the going market rate).*

252. Mr Heinl said that during these calls he also told Ben Wolstenholme that he had improperly charged for the Norton & Sons work. [2]

[2] His account of his belief about these disclosures was as follows:
*What concerned me the most about the matters covered by the Business Conduct Disclosure was the tax angle – Guy's tax, and the comingling of professional and personal resources around tax advice. I am aware generally that tax evasion is serious, and that we could get into real trouble with HRMC, or the IRS in the US, if the company was involved in anything like that.*

*132. It also struck me that it was totally inappropriate, and unnecessary, to comingle personal and company tax matters, and to put persistent demands on company advisors to give personal advice. This was an anchor on the business from an operational point of view, and the resulting complexity appeared to raise governance, legal and potentially tax-related risks that did not need to be taken. The extent of the behaviour went beyond innocence and naivety – it looked intentional and systemic.*

*133. I also understood generally the notion of good governance and fiduciary duties meaning that it was wrong to use company resources for personal benefit. What was happening was that Ben and Guy were disguising the fact that they were spending large amounts of money consistently via the professional services guys, ostensibly for the benefit of the company but in reality in a way that only benefited them. It seemed to me that where Moving Brands was helping out Madefire, the transactions should be transparent and traceable and that Moving Brands should not be transferring a huge amount of value to Madefire at rock-bottom (or nil) prices. I believed that this was improper.*

*134. I knew that there were corporate obligations on directors to act in the best interests of their company and not to use it for personal gain (other than through properly issued dividends or a sale). I also knew that the company owed obligations to HMRC in terms of what expenses could be put through its accounts. I knew that the company's accounts were audited and that this was a serious process that required accurate reporting and proper governance. I was worried that the things I have set out above, that formed the Business Conduct Disclosure, could cause the company to fall foul of an audit in that we would be providing inaccurate information.*

*135. I was also aware, and concerned about the implications, of Moving Brands (and its employees, including myself) giving away intellectual property with commercial value for the benefit of Ben, and Madefire.*

*136. I thought that there was a wider interest in my raising all these matters with Ben – I certainly was not doing so solely for my own purposes. I felt that there was the potential for these things to become legally challenging and create risks for us all – the company getting into trouble, or having to pay to fix matters up which would be a waste of time and money. There was also a reputational risk to the company if it got drawn into Ben and Guy's tax affairs and those ended up being found to be improper. I know that clients run checks on what has been written about us when we go through their procurement processes. I also knew that Madefire was not doing well financially. Moving Brands had invested money in Madefire, and I was keen to keep the relationship proper and arms' length in case Madefire went bust and we ended up exposed to legal processes in the US. I also know that Jim had similar concerns which he expressed in a meeting with me and Hanna.*

*137. The concerns that I have set out in the preceding paragraphs went to the company, its employees, and its clients. I was worried about the impact of any 'wide' behaviour would have on my team mates. We were wasting time and money, and being exposed to further risks in that regard from e.g. potential audit issues. We were saying that we were a serious international company, but all these governance issues undermined that and, to my mind, created a lot of legal risk.*

253. On 22 August 2020, Ben Wolstenholme wrote to Mr Postlethwaite on work to be done on the shareholders agreement and articles:

*The main thrusts are:*

*— Ensuring the SHA and ARTICLES have the right capture of existing shareholder status.*

*— Mitigate any risk or liability across system*

*— Bringing additional key people into the Shareholding*

254. On 26 August 2020, there were Slack messages about the New York lease. In order to keep the chronology of matters relating to the New York lease clear, we have included the further narrative about the New York lease in Appendix 1 below.

255. On 26 August 2020, Ben Wolstenholme included the following in the board meeting agenda:

*3 b) Shareholder Agreement and Articles*

*Murray has recommended we use a specialist advisory firm for the go forward Shareholder expansion as it is a specialist subject. This makes sense as our SHA and ARTICLES will need taking a look at again, Hanna and I discussed and felt it made sense to use Robert Postlethwaite again. HL and BW are speaking to RP tomorrow (wed 26th) about the SHA and ARTICLES.*

***Three main areas to review:***

***—GW/BW share status***

*—Review of any Risk and liability across the team (key person cover, insurance, valuation)*

*—Expansion of Shareholding for MW, CD, others.*

[Emphasis added]

256. On 27 August 2020, Mr Heinl wrote to Ben Wolstenholme, the other shareholders, and the Eldridges:

*Ben - in your first message - which I note is draft - you raise the topic of risk (below):*

*Three main areas to review:*

*—GW/BW share status*

*—Review of any Risk and liability across the team (key person cover, insurance, valuation)*

*—Expansion of Shareholding for MW, CD, others.*

*In our call last week we discussed a wider scope of risk analysis. It included concerns (hopefully unfounded) about the impact on all shareholders,*

*directors and company of actions relating to share status / dealings. This is potentially what you are indicating in your first bullet?*

257. In cross examination, Ben Wolstenholme denied that the reference to 'risk' related to the matters the subject of the share transfer disclosure; he said that it referred to reviewing risk and liability across the team with the expansion of the shareholding. He said that he did not know what the reference to 'hopefully unfounded' concerns related to.

258. That day Ms Smith wrote to Ben and Guy Wolstenholme:

*Further to my email of yesterday confirming the date on which we have recorded the share transfer (18 January 2016), I attach a copy of the blank share transfer form. It appears that we have not received back a copy of the signed form.*

259. Also that day Mr Postlethwaite wrote to Ben Wolstenholme and Ms Laikko and amongst other matters said that the numbers of shares held by Ben and Guy was incorrectly recorded in the shareholder agreement.

*Actions:*

*• Anne Smith is to confirm what the correct numbers are (ie what they actually were when the agreement was signed and still are)*

*• We can then amend/update the agreement (and any other shareholding records) to reflect the actual position*

260. In Ben Wolstenholme's handwritten notes, he recorded some time during the period June – August 2020 discussing with Mr Heinl 'SHA + Articles – Postlethwaite' and 'Tax/Anne/Risk + implications'

261. On 27 August 2020, there was a shareholder meeting of the second respondent. Amongst the notes made by Mr Heinl is the following: 'BW + GW shares sorted by Watts…} A family matter'.

262. On 28 August 2020, there was correspondence between Ben Wolstenholme and Ms Smith about whether the earlier transfer between the brothers had been actioned, given that the form could not be found. Ms Smith thought it had been.

263. On 10 September 2020, there was an 'all hands' meeting to discuss ways of reducing business costs. Employees were asked to volunteer for part-time working or salary reductions. TOIL was not discussed explicitly as an option. Ms Laikko and Ms Fortescue then had discussions with employees; some offered to go part-time, others offered salary cuts. Some said they were unable to do either. Very junior people were exempt from cuts.

264. Ten employees took a straight salary cut, about eight reduced hours and salary and one person gave up annual leave.

265. So far as director level employees were concerned, Ms Laikko said Ben Wolstenholme proposed that everyone be in lockstep or it might cause trouble between members of the senior team but there was not an agreement for all to reduce their salaries by the proposed 20%.

266. Ms Fortescue says that she did not discuss with Mr Davis, Ms Laikko, Mr Wade or Ms Miller what their plans were and had to chase Ms Laikko to find out what the arrangements were. Of the three most senior employees other than the claimants, only Ms Miller took a salary reduction but she also reduced her hours and accumulated TOIL.

267. On 11 September 2020, Mr Richardson updated the board and senior management on financial information including details of cash reserves.

268. On 14 September 2020, Mr Toppin offered to assist Mr Richardson in reporting cash flow in an email responding to Mr Richardson's update on cash reserves. Mr Toppin said in his witness statement that Mr Heinl declined his help, citing costs.

269. We could see that on 15 September 2020, Mr Heinl replied:

*Thanks for offering guidance on this topic.*

*I just want to confirm this is part of wrapping up the loan application project or has this been requested separately?*

270. Mr Toppin then responded:

*Phil kindly copied me the cash report when he sent it out to your team last Friday.*

*I wasn't specifically asked to comment and I hadn't asked for the report.*

*However, on reading the report, I thought you would all benefit from it including forward looking information, so I made that suggestion.*

*Now that MB will have an obligation to the bank for the £400k, it would be sensible anyway, to be looking at forecast cash flows going forwards.*

*I enjoyed working with Hanna and Phil on this and like you guys very much. So I am happy to lend experience and support*

271. Mr Heinl then wrote:

*Thanks for the clarification John and good to hear it was a good experience.*

*I appreciate the offer of help, it's valuable to us.*

*The thing I want to avoid is us (MB) drifting from your kind help to sleep walking into a meaningful commitment for you and the costs that entails for us.*

*In the summer you communicated to me very clearly about your fees which I agree with and want to respect.*

*With that in mind, I would ask that you raise with me directly any requests you deem might breech this. I'm happy to discuss projects that might be necessary of course.*

*Let me know if that works for you*.

272. Mr Toppin's response was:

*You are right to be watching costs and of course I respect and endorse that.*

*Always and especially at times like these.*

*I agree with you re necessary projects and there are areas where I know I can help MB that would add value in excess of the cost.*

*Working with Phil, I can see he is good but inexperienced and, for example, not sufficiently focused on the balance sheet for needs right now.*

*It would help Phil and MB if we were able to have a some level of dialog – perhaps a monthly trigger level beyond which not to go without your approval.*

*The trigger level would NOT be a retainer so not a commitment.*

*You, Hanna and Phil perhaps to have access up to the trigger so you can control things?*

*The road ahead is going to be rocky and I'd like to help you anticipate and circumvent problems so you are ready to take advantage of opportunities.*

*What do you think?*

273. Mr Heinl did not respond further in writing to this offer of help. In cross examination he could not remember what response he had made – he said that he might have discussed it with Mr Toppin or handed it back to Mr Richardson.

274. Mr Toppin in cross examination said that this was an example of Mr Heinl very nicely trying to keep him at arm's length. He said that it was clear that the company did not have the kind of financial reports it needed to work its way through Covid and he couldn't understand why Mr Heinl didn't want to do something about it.

275. In September 2020, there was an extended board meeting about pay cuts. Ms Laikko said that the other directors had not agreed what they were going to do and that she said she was thinking of taking a 20% reduction based on a 20% time reduction but continuing to work full time and taking the time off later. Guy Wolstenholme said he would drop to four days and take a 20% cut. Ms Laikko said that he had been doing four days for years and had not had a salary cut but recently had been working five days a week. Ben Wolstenholme and Mr Bull each took a 20% pay cut. It was a voluntary exercise and no one gave approval of anyone else's approach, Ms Laikko told the Tribunal.

276. On 23 September 2020, there were emails about the HPE lease. HPE demanded payments for the past three months, which Moving Brands had not been paying, and said:

*Please see the first stage of our legal collections process attached*

277. Mr Richardson replied:

*I am surprised to receive this as I have been in regular communication with HPE with regards to the lease agreement which we have fully repaid as per what we agreed via our broker Think Blue.*

*…*

*We have paid back the money owed plus interest.*

*Have you been in contact with Think Blue to sort this out?*

278. Ms Laikko said that this correspondence was brought to her attention. Mr Richardson mentioned he had received the email and was working to rectify the situation. At the time they both believed the bills were an error.

279. On 24 September 2020, Mr Richardson wrote to HPE saying they had been told multiple times by Think Blue that the term was not changing. HPE wrote to say: 'I understand there has been confusion and miscommunication on how these deals were structured.' They said that the documents showed the maturity date was extended to 31 October 2021 and 'we must move forward with the dunning process.' They sent through a copy of the signed lease extension.

280. 28 September 2020, Mr Richardson wrote to HPE, 'I didn't have these documents. It looks like what was explained to us in person and via email at the time differs vastly from the paperwork that was presented to us and what has been signed. We need to discuss this internally and with our legal representatives to determine the next course of action.'

281. Ms Laikko's evidence was that she was not fully aware of this correspondence until she and Mr Richardson had a meeting on 2 October 2020 and went through the documents. They discussed how they had made a mistake and could not understand how they had failed to see the lease extension, as the documents were clear. Ms Laikko decided that they should pay the invoice but explain to HPE that they believed this was not what had been agreed and that they would be investigating further. Mr Richardson then wrote to HPE in those terms. He said they would be making payment for July – October because although Think Blue had misrepresented the agreement, the documents seemed consistent. They would continue investigating the misrepresentation by Think Blue.

282. Ms Laikko was sure that was the date they discussed the HPE lease as she knew that the email to HPE was sent the same day.

283. Ms Laikko denied in cross examination that in not immediately highlighting the issue to the board, she was seeking to conceal it. She said that it was still being investigated at that point.

284. She was also cross examined about why she did not contact the auditors at this point and say that the accounts were wrong. She said it did not occur to that there would need to be adjustments at that time. It did not occur to her until Mr Toppin's later email on the subject. She said that when the auditors were informed by Mr Richardson, the auditors said that it was not a problem to correct it. She denied she had not told auditors as she was trying to sweep it under the carpet.

285. She also said that she did not make the connection at the time to the issue of whether the CBILS loan application needed to be adjusted.

286. Meanwhile on 25 September 2020, Mr Toppin emailed Ben Wolstenholme and the claimants. He said that he had to correct some of the finance documents Mr Richardson sent to him. Ms Laikko in evidence thought those were errors in moving information to a new format, not in the underlying information. Amongst other things, Mr Toppin said that Mr Richardson 'now has a format for building a cashflow forecast that is more acceptable to funders than the one that has been in use'.

287. On 30 September 2020, Ms Laikko signed off the consolidated accounts. Ms Laikko said that there was a meeting with the auditors and she consulted the Board before signing. Watts Gregory had attended the audit meeting and not flagged any concerns. It was later said by Mr Toppin that the surrender of the New York lease should have been included in the accounts as a material post balance sheet event. Ms Laikko said that Mr Richardson was aware when he prepared the accounts that there had been a surrender notice and a plan to surrender the lease. She did not mention to the auditors that there was an ongoing liability but did not realise that she should have done. It was not a secret. Mr Richardson was aware of it. In the financial year to which these accounts pertained she did not believe that there had been any change to ongoing liabilities as the surrender notice took effect after the end of the financial year.

288. She did not know that the surrender of the lease was a significant post balance sheet event at the time although was subsequently told so by Mr Toppin.

289. She was cross examined about why she did not include reference to the threat of litigation by HPE. She said she was not considering there might be legal action at that point and was only aware that they had been presented with invoices which they felt were not due. She was unaware at that point that the terms of the lease had been amended although she believed she found that out a few days later. Mr Richardson had not filled her in on the threat of legal action at that point. She had a conversation with Mr Richardson about that on 2 October 2020 at the point when they discussed the lease and

discovered that they had signed up to an extension of the lease. At this point she accepted she should have brought it to the board's attention.

290. It was also put to her that the accounts were not correct as they assumed the HPE lease had ended in June 2020. She said that Mr Richardson did remove the rent from the Google document and she told him to put it back in as they did not know whether they could get out of the liability.

291. On 3 October 2020, Ben Wolstenholme wrote to Mr Wade an email which inter alia records that the claimants, Mr Bull and the Wolstenholme brothers had agreed to a 20% wage reduction and that Guy Wolstenholme would be dropping to four days per week.

292. On 5 October 2020, Guy Wolstenholme wrote to the claimants:

*Hope you both had a good weekend, even though the weather was miserable.*

*I know we are all spending a lot more time thinking/worrying about finances in this strange time, I wanted to come back with some more thoughts on the salary reduction. As you know since before lockdown I have been working a full five days a week.*

*Recently you asked us all to consider a wage reduction with a target of 20%. I have been going through my finances and as I think you know it would be a struggle for me to make a 20% reduction and cover my family living costs.*

*The 10% reduction I was thinking would be over a shorter two to three month period, I think this is going to be difficult to maintain for the next six months but can see this is important to the business. I am also keen to help the company lower its overheads during this strange time, it makes sense for me to move to 4 days a week so my salary can drop to 80% getting it to the 20% target saving the business was after.*

*My intention is to work 1 day a week with Madefire to make up the income loss.*

*I have spoken to Ben, Madefire could use the help, and he is happy to support me for that day.*

*Hope this makes sense and is a good solution for all of us.*

293. Also that day the claimants were copied in to Ben Wolstenholme's earlier email in which he outlined the pay cuts directors were taking

294. Ms Laikko said that Mr Wade was uncomfortable with the approach and wanted reassurance but she had also discussed with him what she would be doing (ie taking TOIL) and he was comfortable with that. She said that the point of the exercise was to reduce expenditure at the time and the taking of TOIL by the claimants achieved that goal.

295. The claimants decided that they would take a 20% cut in salary but continue to work five days per week. They planned to accumulate TOIL to be taken at a later time.

296. Ms Miller also had similar arrangement for TOIL. Ms Laikko denied that was just because she was a close friend of the claimants. She was going to reduce her salary by 20% but it did not make sense for her to reduce her hours so Ms Laikko was happy for her to take TOIL. Another employee, Ms C Jensen, built up TOIL so that she could later take an extended period of leave in New Zealand.

297. Ms Laikko and Mr Heinl signed each other's letters of variation. Ms Fortescue was aware at the time that the claimants and Ms Miller would be accruing TOIL and prepared the relevant paperwork

298. Mr Bull said that he did not recall the board being told that the claimants were taking TOIL.

299. His oral evidence to the Tribunal about the practice in relation to TOIL was:

*This was if a team worked exceptionally hard in a project, someone on team might bring to HR's attention and could use a break. There was a system where a person or team could be avoided TOIL. It was a way of giving them like an afternoon back or maybe an extra day to say thank you for working so hard. In my mind it was never done at executive level. I did not know of anyone at executive level doing it, as directors put all time and effort into the business. To me it seems entirely different to the way the claimants perverted that into some kind of like for like hours and days. That was never my understanding or anyone else's understanding - finding that out my trust left my body, I got very upset, I get upset now. When people junior taking cuts. It was outrageous to me; I cannot add up in my head why that is OK.*

300. The Tribunal felt that there was an element of exaggeration by both Mr Bull and other witnesses in describing their emotional responses to the claimants' arrangements as to TOIL. In the context of all our findings in this case, we considered that there was a component of the witnesses manufacturing their responses.

301. In October 2020, Mr Wade and Mr Davis were formally invited to be shareholders.

302. On 13 October 2020, Ben Wolstenholme wrote to Ms Laikko and Mr Richardson and the accountants:

*HI Phil, hi Hanna, hi Anne, hi Devan,*

*I've put this in other emails but want to make sure it is tracked and explicit here.*

*This email is to confirm that as per other leadership in the system i am moving to a 20% wage reduction to help MB cashflow during this pandemic period. I believe this commitment is being asked to be made for a 6 month term.*

*As such please can you note that my new Non Exec Chair wage level of 80k GBP will now be reduced by a further 20% in time for the end of September 2020 payroll please.*

*Phil, Hanna - please can you kindly send me the required paperwork for make this change. Also is there a terms of employment that i can review, so i know what the period is and what the triggers are in order to revert back to full wage? In general my questions are around how this will be reviewed - along with the rest of the company - when the time comes. In fact, please can you send the current employment contracts for me in MB Ltd and MB Inc so I can review them? - i'd like to insert the new Non Exec Chair role description, many thanks.*

*Devan and Anne please can you kindly note the reduction- I suggest this is applied equally across UK and US income unless you advise otherwise?*

303. On 16 October 2020 Mr Richardson sent an email with a financial update including an update as to cash flow. Ben Wolstenholme then emailed the claimants and Mr Toppin raising concerns that the company was burning through cash faster than anticipated and asking various questions about the finances:

*I have added John as some of my questions relate to the CBIL loan and our projections around it.*

*Just writing to the four of you, as I don't want to unduly flag anything to the wider team when some of my data points and observations may well be poorly founded. I'm hoping you can help me interpret the management information and feedback on my view in a few areas.*

304. On 17 October 2020, Mr Toppin wrote*: Ben, I will have a chat with Hanna/Phil on Monday so I can get context and then a look at the numbers.*

*I note Phil's comment about doing the cash report fortnightly for the next 6 months due to his workdays changing. I suggest that the report is done weekly not fortnightly by reverting to Thursdays rather than Fridays for producing it.*

*Two week gaps I report gaps [sic] in reporting cash data are too long at this time.*

305. On 19 October 2020, Mr Toppin emailed Ms Laikko to ask when he could meet with her and Mr Richardson to talk about Ben Wolstenholme's email about cash flow. Mr Richardson suggested possibly meeting Wednesday but Ms Laikko asked whether it was an efficient use of time to cover old ground; she had responded to Ben Wolstenholme on most of the points she had a view on.

306. Mr Toppin then wrote:

*Phil, lets keep our meeting in the diary on Wednesday.*

*I think you and I need to find a simple mechanism so that the need for Ben to enquire and Hanna to respond are minimised.*

*Saving them both valuable time.*

*Thanks Hanna for your previous email responding to Ben. No need for you to join in the meeting with Phil and I.*

307. Mr Heinl then became involved in the correspondence and wrote: *Thanks for offering this help. Is your intention to do this work as a favour?*

308. Mr Heinl denied in cross examination that this showed resistance to scrutiny by him.

309. There were separate emails between Ben Wolstenholme and Ms Laikko about what the monthly financial information should look like. Ms Laikko wrote to him to say that that 'seemed to be closely linked to the new board cadence and communication planning that Murray [Eldridge] is working on'. She said that her understanding was that Mr Eldridge would design a new dashboard which was at the appropriate level of detail for the board, lifted from the data they already generated where possible. '*Therefore, my recommendation is we move forward with the plan you and Mat agreed with Murray last Friday.'*

310. Ms Laikko was cross examined to the effect that Ben Wolstenholme had been pushing for the information and it had not been provided. She said that she knew the information was not presented in a way he found satisfactory. He found it difficult to engage with or understand it. However they had made the improvements suggested by Mr Toppin and were now working with Mr Eldridge to create a dashboard. She said the information was available but the board members struggled to engage with it.

311. She said that she was not resistant to working with Mr Toppin and had been doing so.

312. Mr Toppin replied to Mr Heinl:

*Thank you for emailing.*

*Ben added me to his email to all four of us all last Friday.*

*In response to Ben's email, I was simply being proactive by suggesting setting up a call with Hanna and Phil – as they and I had worked together on cash flows.*

*Crossing with my suggestion yesterday was Hanna's explanation to Ben. Resulting in the suggestion I made to Phil. This would be paid work of course.*

*I've since seen Ben's response of earlier today to you and Murray. So Phil, I think there is no need for our call tomorrow.*

313. On 20 October 2020, Ben Wolstenholme replied separately to Mr Toppin:

*My apologies you get these strange replies about working for free. It is unnecessary in my view but an ongoing routine. Ultimately I'm not confident in the materials MB are producing and the visibility and insight I get – or don't get – hence my email, but Mat and Hanna are intent on handling this with Murray – to me it made more sense to continue with you since you've just done all of the work ! but hey ho, I know there is a cost aspect as times are tight.*

*This is a wrangling around role playing - they don't like my inquiries but I feel as a founder, shareholder and chair I'm within my right to interrogate and state if I'm uncomfortable with financial information... I assume that's correct?*

*Ultimately I think this comes down to a question I've tried to clarify with Murray - who hires an FD/CFO... and how is their relationship between management and Board, between CEO* and Chair? *any insights you're willing to share here will be great for my learnings*

314. Mr Toppin said in his witness statement that he believed Mr Heinl was seeking to stop him from interrogating how the company was being run by the claimants.

315. In cross examination Ben Wolstenholme suggested that nothing had been done about the KPIs and dashboard recommended by Mr Toppin in April 2020. It was Ms Laikko's responsibility to make sure it happened and now she was passing it on to Mr Eldridge. Ms Laikko said that Ben Wolstenholme was keen for Mr Eldridge to design the dashboard because, as an experienced NED, he would know what the board wished to see. She said that she and Mr Richardson had a few calls with Mr Eldridge to discuss the dashboard and that they had left the ball in Mr Eldridge's court. She did not recall whether he had prepared the dashboard by the time she and Mr Heinl were dismissed although there was no board meeting between that in December 2020 and the one at which the claimants were dismissed at which Mr Eldridge could have presented the dashboard.

316. Ms Laikko said that she was never accused by Ben Wolstenholme of being secretive or not transparent. There was certainly a great deal of correspondence we saw which showed Ms Laikko and Mr Richardson readily engaging with Ben Wolstenholme about the figures.

317. On 21 October 2020, Ms Laikko signed a temporary variation to her terms and conditions reducing her working days and salary but providing for TOIL if she worked her days off.

318. Mr Toppin also wrote to Ben Wolstenholme that day: *I'm very grateful that you have picked up on Mat's behaviour towards me and have taken the time to write to me. Your email means a lot.*

*This has been going on since the very beginning in April when he decided he would rather not sign my Engagement Letter – which is how you came to sign it.*

*Re quality of financial information, I wrote to Mat on September 15th offering to help MB as I think that although Phil might well be good, he is inexperienced and not necessarily focusing on the right things. I will copy you the email. I never expected to hear back from Mat re my offer and of course didn't.*

*You are absolutely right that as a founder, shareholder and chair you are within your right to interrogate and state if you are uncomfortable with financial information. It is your legal duty as a director to satisfy yourself in this regard.*

*The relationship between Chair/CEO and CFO is a very important one. I would say it is usual for the Chair and the CEO to be jointly involved in the hiring of a CFO. They (all 3) have to be able to work together effectively and to trust and be confident in each other.*

*It seems that there are problems at MB between the Chair and CEO. The CEO and the Chief Business Officer are a couple.*

*There is no CFO, Phil is a Financial Controller who I suspect would find it difficult to place himself in conflict with Mat or Hanna over a disagreement. So this is an unusual situation.*

*As I said way back (July 7th) when we were trying to find a way forward with your pay, you should not give up the Chair role as you know the business and the characters and have bags of experience to draw on and offer and you are invested in MB in every way. No one else should be chairing the board meetings. How else will you have the information share and influence with what is going on?*

*I would also now advise you to resist completely the CEO appointing a CFO of his sole choosing. Then you would likely find the CEO, CBO and CFO all lined up against you. So you must be involved in any CFO hiring.*

*I've attached a helpful sheet from the Institute of Directors in Ireland on the normal respective roles of the Chair and the CEO.*

*But it's for information only Ben as there are problems I allude to above that need to be addressed first.*

*My advice in this email is of course for the benefit and in the best interests of the company.*

319. This email seemed to the Tribunal to be revealing about Mr Toppin's role in stoking a negative perception of the claimants and/or currying favour with Ben Wolstenholme at the expense of the claimants.

320. Ben Wolstenholme wrote back to say: 'It's been going on a long while – and despite working hard on it on coaching sessions and various other ways – I'm still not comfortable – and sensing lots of resistance and hostility frankly… I take your points on board and very glad to hear them.'

321. On 23 October 2020, Ms Fortescue emailed the claimants with the paperwork about the TOIL hours they would accrue.

322. Ms Fortescue said that some employees who reduced hours and pay and then worked the odd day anyway were given TOIL. She commented in evidence that the claimant's arrangements for regular TOIL did not sit right with her. She said that she was not aware that at beginning of pandemic they had deferred their bonuses.

*Five Year Plan*

323. Ben Wolstenholme gave evidence that a five year business plan was due by the end of October 2020, to be prepared by Mr Heinl and his team. He said that they asked for more time and he pushed Mr Heinl to have it ready for the 19 November 2020 board meeting.

324. Mr Heinl's evidence was that the original arrangement architected by Mr Eldridge had not been to deliver a plan at this stage. The first stage would be about the context of the market and delivering options for discussion. The board would engage with the options, take time to refine them and agree.

325. Mr Heinl denied Ben Wolstenholme's suggestion that he was resisting the idea of a five year plan. They had been working on it since the summer and agreed it was a good idea.

326. Ben Wolstenholme said that at the beginning November 2020 Mr Heinl said he wanted to present twelve potential directions for the company; he said that he told Mr Heinl that this was not acceptable and he asked for a firm recommendation for the board. Mr Heinl said he needed longer.

327. Mr Heinl said that they had been guided by Mr Eldridge and this seemed like a good idea at the time. They had discussed exploring multiple options initially, diverging then converging; the plan was to have a lot of things on the table which would then filter out. Ben Wolstenholme was aware that this is what had been discussed with Mr Eldridge. It had been planned that the work would be done in three stages and Ben Wolstenholme had not asked at this stage for a single firm recommendation for the board. They were not behind timetable despite being very busy.

328. He accepted that Ben Wolstenholme had become impatient but said that it was not suggested that one firm recommendation should be presented to the board.

329. On 1 November 2020, Ben Wolstenholme emailed Mr Toppin about 'visibility' and being able to interrogate performance. He said he was feeling 'blocked on this'.

*2. I was away for a few days last week. and the MB situation is really keeping me up at night as I don't have clear reporting - as per my note from 16Oct... the latest cash figure pr Phils email, has a downswing of £300k... I find this v*

*alarming and believe we should be keeping burn within much smaller swings of £50-100k MAX... but I am a bit blind to the real factors - as such I want to send this email below - please can you advise me if this is following the right lines in order to obtain a pertinent dashboard?*

330. He attached a draft email he was proposing to send to the claimants asking for various types of financial information and asking for an ETA on the dashboard.

331. Mr Toppin replied:

*The note you intend to send looks an entirely reasonable request from the founder/owner/Chair/director.*

*Is Murray your guy or Mat/Hanna's guy? I've not been given a clear steer on that.*

*I could of course help re the dashboard – information and insight especially on financial issues are my bag (though the principles around clarity etc apply to non-financial stuff too).*

*Your question on Strangeness of the Chair engaging FD help directly?*

*The strangest thing here Ben, to be honest, is in having a founder/owner/Chair/director and the CEO with such a dysfunctional relationship. Ordinarily the senior party (owner) would lose their patience by now and ask the CEO to leave.*

*You have a complete right to have whatever financial information you want, whenever and always.*

*The company should have a competent financial person ensuring that you are receiving whatever information and explanations you feel you need to carry out your duties.*

*As I said in my previous email: "The relationship between Chair and CEO and CFO is a very important one. I would say it is usual for the Chair and the CEO to be jointly involved in the hiring of a CFO. They (all 3) have to be able to work together effectively and to trust and be confident in each other."*

332. We note that the role Mr Toppin was playing at this point was very much encouraging a sense of a rift between Mr Heinl and Ben Wolstenholme and indeed the removal of Mr Heinl from the business. He however denied in cross examination that he was on Ben Wolstenholme's 'side'.

333. On 2 November 2020, Ben Wolstenholme wrote to Mr Toppin:

*This is a huge help thank you very much for taking the time to give me your perspective.*

*Murray was brought in by Mat and Hanna.- he trained them in board responsibilities at the IoD, he is a really steady and experienced guy - honestly for my liking too traditional - but I can see there's merit in the*

*counterbalance... I just find it all based on public company benchmarks, slow vs agile - and too burdened with process... but I tend towards little process so it is a shade of grey.*

*I'm thinking to flag the need for CFO/FD to Murray again as it's clearly needed.*

*Were my requests for P&L, Balance sheet and Sales temperature a fair capture of what you'd suggest (in essence)?*

334. Mr Toppin then wrote to Ben Wolstenholme:

*RE your question please see the next email I am sending you re KPIs*

*If you manage to make progress on the CFO front, I'd really like to be able to work with you more closely again as the grey hair that guides Phil and the board on the finances in these challenging times.*

335. Mr Toppin accepted in cross examination that this email read like he was pitching to be the CFO. It appeared to the Tribunal that he discerned opportunities for himself in a split between the claimants and Ben Wolstenholme.

336. Mr Toppin's account in his witness statement was that:

*Throughout this time I was becoming increasingly alarmed that Mat, the CEO of Moving Brands, a group with cash flow challenges, in the midst of the business turbulence of the Pandemic, without any in house senior financial resource, would continually turn away offers of assistance from a Chartered Accountant with decades of experience in marketing services businesses, experienced in all of the economic turmoil and recessions since the mid the 1980's and with a history of years of prior knowledge with the company. Nor did Mat suggest in that time recruiting the services of any alternative similarly experienced financial executive, nor seek assistance from the company's existing external accountants in the USA or UK.*

*I believe that Mat's resistance to my involvement with Moving Brands in 2020 which I outline above was not personal to me, rather it was a symptom of the breakdown of his relationship with Ben. The less I was involved, the easier it would be for Mat and Hanna to manage the flow of information available to the rest of the Board. This would in turn make it easier for Mat and Hanna to exclude the Board from involvement in the running of Moving Brands.*

337. On 3 November 2020, Ben Wolstenholme wrote to the claimants and Mr Richardson in the terms he had discussed with Mr Toppin.

338. He said that the latest cash downturn was a big concern. He said that he would like a much clearer monthly view and for the dashboard to be in place as soon as possible. He wanted to look at October and the previous six

months via the management accounts to get a better sense of the performance trajectory.

239. On 4 November 2020, Ben Wolstenholme also wrote to Mr Eldridge. He said that he had been pushing for clear monthly reporting information for many months and 'it's getting really tiresome''. He suggested that there had not been a response to Mr Toppin's suggestions for monthly reporting and Mr Toppin's offers to assist. He said that he nudged again in mid October as he had such poor visibility: 'Hence you'll see my note requesting management accounts meanwhile. We have a ton of information, but really feel like we need to get back to basics on Balance sheet / P & L etc."

240. He also referred to the 5 year Executive Plan due for completion at the end of October being presented at the November board meeting.

241. Mr Eldridge responded that day, agreeing on 'visibility of key issues'. 'I was surprised by my first formal board meeting – hence my offer to work on a board calendar to try and introduce a little more structure that would also require provision of more detailed, specific reporting.'

242. Ms Laikko said that Ben Wolstenholme had access to the same Google live document she had. He had the same level of information. The dashboard was about simplifying it and presenting it at a higher level.

243. On 12 November 2020, Ben and Guy Wolstenholme met with their old friend Ms Kyosti in Switzerland.

244. Guy Wolstenholme said in his witness statement:

*I felt increasingly disappointed with MBL and wanted to have time with Christina and Ben to discuss where we were. I felt that in the last 5 years the business had not moved on, that it had lost its 'creative at the heart' energy and a lot of good people. MBL lacked vision and Mat and Hanna's management style of soft intimidation and the "we know, you don't " attitude was really exhausting and counterproductive*.

*On 12 November 2020, Ben, Christina and I met in Switzerland to discuss life, way forward, our projects and MBL. Before we started our discussions about MBL, I went for an early walk with Ben and I told him that I had had enough and was considering walking away from this business that we had put so much into starting up and bringing on. I was comforted and also sad when Ben told me that he had been having the same thoughts.*

*Our discussions later that day was the first time we really had an in-depth conversation about my recent feelings as a three. I told Ben and Christina that 'I had had enough' and 'I did not want to continue this way'. It felt to me as though despite all of us working remotely and trying to work as hard as possible to ensure the success of our company, Mat and Hanna were becoming even more resistant to answering questions and engaging with the Founders and therefore I could not see a way out of the MBL mess. I did not want to join Board meetings in which Mat and Hanna were not answering*

*questions or deliberately brushing questions aside. It was very frustrating to me and even more so to watch Ben's continued struggle to get answers. I could not see how we would move forwards or how to fix it.*

*I also felt that we were letting our employees down and hurting them and their careers. I was also embarrassed at the way we were treating our team members and I felt responsible as a Founder for them and the state of the company. There had always been a strong creative energy and exploration of technology that attracted interesting, talented people who loved what we were doing. They were a team that I was excited to be a part of. However, at this point in time, I felt not only the energy was missing, but combined with huge cash outflows, rapid reduction in employees and the six months of continuous financial losses, it was getting impossible to recover the company and get it back to our values and DNA.*

*Mat and Hanna had made it impossible for me to make a clear decision about how I could best support the business. I wanted to speak with Ben and Christina about this….*

*As we continued our discussions in Switzerland, we started finding solutions and exploring getting the support from people such as David EE with his fearless creative drive that inspired designers around him and his borderless creative energy, John with his financial and accounting experience, and of course Christina. Ben and I asked Christina whether she would come back and support us globally with her management and strategy experience. For the first time, I felt that with this support we could save the business and move it to the next level - a thought that up to that point I felt was impossible. I was genuinely excited about the thought of bringing in this experienced and trusted team to help us grow the business and recreate a studio that people wanted to be part of. At that stage, we were not discussing dismissing Mat and Hanna. We ended our discussions with a stronger commitment to closely support each other through life in general and the potential changes involved in saving MBL. Between November 2020 and February 2021, we spoke most days about all our projects and frequently about the latest from MBL*

245. Ben Wolstenholme gave a similar account in his witness statement. He said that the business was 'in peril'. Ms Kyosti said that she returned to her old role of adviser to the company and spoke daily with Ben and Guy from then until March 2021.

246. Ben Wolstenholme said in his witness statement that: *As a part of mapping out our options we began seeking legal advice from Lawrence Stephens from end of November 2020 (the privilege in respect of which is not waived*).

247. From 16 November 2020, Ben Wolstenholme began forwarding emails from Mr Heinl to Ms Kyosti with critical comments appended to them as well as other emails about the business such as emails from Mr Eldridge.

248. Mr Heinl wrote to Ben Wolstenholme that day setting out the approach he said had been agreed for the business plan and that the stage they were working

on at the moment was forming alternative strategic options. He recorded that in their last call, Ben had changed the approach and said that he expected a recommendation to be delivered at the 19 November board meeting instead.

249. Also that day there were emails between Mr Eldridge and Ben Wolstenholme which Ben Wolstenholme then forwarded to Ms Kyosti. Mr Eldridge's account of what had been planned was similar to what Mr Heinl told us in evidence had been discussed. It appeared that Ben Wolstenholme was impatient with this approach.

250. On 17 November 2020, Mr Toppin became aware of the issue with the HPE lease. He said in his witness statement:

> …*as I was reviewing a draft document prepared by Phil for Barclays Bank in support of the CBIL I discovered a reference to an incorrect understanding concerning payments under a lease. I called Phil on 18 November 2020 who explained to me that Hanna and Phil thought that the final payment under the lease which was from HP was made in June 2020, however the lease agreements did not correspond with this understanding. On further inspection of the lease agreements Phil and Hanna realised that the lease payments were to be made until October 2021… at this point I was not aware that Hanna had signed the lease.*

251. Ms Kyosti was also informed about the HPE lease issue.

252. In her witness statement, she said that she was genuinely shocked at what she said was a misrepresentation in the CBILS loan application and worried about whether there might be wider financial misconduct. We discuss below whether we accepted that evidence or the alternative narrative that the respondents were looking for material to use against the claimants.

*18 November 2020*

253. On this date Mr Richardson updated the forecasts to Barclays for the CBILS loan to take account of the situation with the HPE loan, after revising the figures with Mr Toppin. Ms Laikko commented that she was not an accountant and that she would rely on Mr Richardson to update these figures as necessary.

254. Ms Laikko also said that historically the balance sheet had not formed part of the operational reporting but was added in to the live management information around November 2020 at Mr Toppin's suggestion. This was to make the file more useful for cash flow forecasting and for the CBILS application, which required balance sheet information. There are emails on this date showing Ms Laikko asking Mr Richardson about the changes to the figures caused by accounting for the new understanding of the HPE lease.

255. Ms Laikko shared financial information for the following day's board meetings. Ben Wolstenholme criticised her in his evidence for not circulating these documents earlier.

256. Mr Toppin emailed Ms Laikko and Mr Richardson at 17:36 that day about the HPE loan:

'You and Hanna may need to explain how it happened that you thought the loan was paid off only to find that the loan agreement paperwork did not correspond to your understanding as informed to you by your broker.

As an aside, I am surprised your auditors did not pick this up.'

257. Ms Laikko said she did not read this email before the board meetings; she had seen it come in and then opened the email and scanned it at the start of the board meetings.

*19 November 2020*

258. Mr Toppin sent an email of concerns about the HPE lease to Ms Laikko and Mr Richardson, copying in Ben Wolstenholme and Mr Heinl:

*This issue of the equipment loan further down this email trail is rather serious. That is why I have copied Ben and Mat.*

*As Phil explained it to me on the phone yesterday, MB thought the final equipment loan was paid off in June 2020 only to find that the equipment loan agreement paperwork did not correspond to MB's understanding of it as informed to MB by its broker.*

*It was only on further inspection of the documentation by MB that the equipment loan end date of November 2021 was noticed.*

*I'm not sure when it was realised at MB that the loan wasn't paid off in June 2020 but needed to run to November 2021.*

*Fifteen extra months. The amount I think is circa £170k of additional payments July 2020 to Nov 2021.*

*As I understand from Phil there is some internal discussion happening around whether or not MB has any recourse against the broker.*

*1. Barclays*

*This is an important problem vis a vis Barclays because:*

*a. Barclays CBIL loan was approved based on management accounts presented to Barclays that showed no loans outstanding.*

259. He made the point that it was a problem that the audited accounts were not correct nor were the management accounts. He finished the email: *For good order, how this issue has happened, when it was realised and the impact of it on the numbers and on third parties (Bank, Auditors, Broker) etc… needs to be looked at properly and explained at Board level so it can be resolved.*

*Year 15 Limited board meeting*

260. Prior to the board meetings, Mr Heinl circulated a document entitled 'MB Strategic Options'; this was a version of the five year plan.

261. We saw minutes prepared by Anne Smith of the board meeting, with Ms Laikko's comments. This was the first time Ms Smith had been asked to be minute taker at these meetings. The detail of what was said at the meeting was significantly contested between the parties as we discuss further below.

262. During the board meeting, Ms Laikko went through financial concerns; she reviewed the previous six months and the forecast; she said that there had been good sales performance in recent months and she expected sales and cash to improve.

263. Ben Wolstenholme expressed the need for a dashboard. Ms Laikko told the Tribunal that he wanted different information / information differently presented but it was not an issue of insufficient information. She said in cross examination that she tried to explain the limited utility of forecasts given that visibility for cash and sales was very short in their business. She denied that she was resistant to providing Ben Wolstenholme with financial information.

264. Mr Heinl and Ms Laikko said that Ben Wolstenholme berated Ms Laikko in the meeting about the HPE lease issue; he said she had messed up. His manner was aggressive and he kept saying to Ms Smith that he was making a comment 'for the record'. Mr Heinl described the behaviour as 'brutal', 'shocking' and apparently premeditated; Ms Laikko accepted in cross examination that there was no shouting or swearing. Mr Heinl said Ben Wolstenholme's behaviour was in stark contrast to other occasions when the company had sustained losses due to negligence or mistakes had been made. He felt that Ben Wolstenholme thought he had found a smoking gun and was using it to present Ms Laikko as a wrongdoer.

265. Ben Wolstenholme said in cross examination that he wanted to ensure what he had to say was heard and 'crystal clear'.

266. Ms Laikko had not read Mr Toppin's email at that point and she agreed to have a call with Mr Toppin, Mr Richardson and Ben Wolstenholme to go through the issue in detail.

267. She denied in evidence that she had been suppressing the information in relation to CBILS and the accounts; she said that when Mr Toppin drew the issues to her attention, she acted on these matters. She said that if she had realised the implications, she would have raised it with the auditors and Barclays earlier. She said that she had not subsequently minimised the issue. The risks which Mr Toppin raised did not in fact materialise.

268. Also discussed at the meeting was the five year plan. Ben Wolstenholme said that what they had needed was a strong recommendation with no more than three options; what they got was an analysis of the landscape of agencies, which the claimants said was foundational for the next part of the plan. They

agreed that at a board meeting 3 December 2020 they would present three options and a recommendation.

269. Mr Heinl said that they presented the strategic options documents into which a lot of work had gone; Ben Wolstenholme had not engaged with it in advance of the meeting. Ben Wolstenholme had changed his mind about what he wanted a number of times. Mr Heinl accepted that at this meeting Ben Wolstenholme probably had said he wanted three options and a recommendation for the next meeting.

270. That evening, Mr Eldridge, who had been at the board meeting, wrote to Mr Heinl: 'I think we need a call – I was somewhat surprised with today'.

271. After the meeting, Ms Laikko sent her comments on Ms Smith's minutes. She challenged some sections of the minutes which arguably exaggerated the situation with the HPE lease. She corrected a section which said there would be rent savings on the New York lease: 'This is incorrect. NY rent savings are still projections because the landlord has not confirmed acceptance of termination.' She corrected what appeared to her to be misstatements about finance and financial reporting. She queried a section which described as essential a type of management report which she described as unrealistic and not what had been discussed. One view of the minutes prepared by Ms Smith is that they were designed to paint Ms Laikko in particular in a poor light.

272. Ben Wolstenholme promptly sent the minutes with Ms Laikko's comments to Ms Kyosti (who at the time had no formal role with either corporate respondent or their boards) saying: 'Predictable minutes contention – I need to read – love your view'. Of course any view from Ms Kyosti would have been from the perspective of someone who had not attended the meeting.

273. Ms Kyosti was nonetheless happy to provide her detailed comments on Ms Laikko's comments. She dismissed as 'not relevant' many of Ms Laikko's comments. It was by no means clear to the Tribunal that the comments were 'not relevant'.

274. Ms Smith accepted in evidence that her minutes might need amendment as she did not have knowledge of the day to day running of the business and she said that at the meeting Ms Laikko had gone through her slides quickly and Ms Smith had not wanted to hold the meeting up to ensure she had understood. She said that she had attempted to arrive at a revised version but that Ms Laikko had not had time to speak with her before the December meeting. In any event it appeared to the Tribunal that Ben Wolstenholme decided to proceed on the basis of Ms Kyosti's comments.

275. In relation to further development of the strategic plan, Ms Laikko said that she subsequently suggested board meetings to further discuss the strategic plan so that they could receive feedback and address feedback but the meetings would be cancelled by Ben Wolstenholme.

276. Mr Heinl's evidence was that after that after this board meeting, Ben Wolstenholme did not have further one-to-one meetings with him; when they spoke, Ben was antagonizing and bullying

277. On 20 November 2020, Ms Laikko sent an email to Mr Toppin in response to his email about the HPE lease:

*Thank you for flagging this very clearly and comprehensively. As you say, it is very important that we review this properly, and make sure that all the necessary corrections are made and communicated clearly to the relevant parties.*

*We touched upon this at the board meeting yesterday, and I have a next step to organise a meeting for us as soon as possible regarding this in order to get to clear next steps. John, could you please let me know a few possible times early next week.*

278. Mr Toppin said that he understood from Mr Richardson that the broker had approached them to sign agreements which were said to lead to a savings of £90,000 but Moving Brands had ended up with two printers which were not being used and making extra payments of £161,882.72

279. On 22 November 2020 Mr Eldridge sent his proposed dashboard to Ben Wolstenholme and the claimants.

*I have set out in the attached some ideas for the dashboard – the Introduction sets out the rationale. I look forward to comments, amendments, additions, etc.*

*The document reflects my poor charting skills but is meant as a guide as to what could be included. Someone with better Excel skills can turn whatever we agree into a neat, standardised board pack I hope*.

280. Two days later, Ben Wolstenholme forwarded the email to Mr Toppin and Ms Kyosti to obtain their views.

281. Mr Toppin commented:

*Dashboards can be very insightful and helpful. But only if they measure the right things at the right cadence and are presented correctly…and get looked at and acted on.*

*They need to be tailored to the sector and business. For Christina, I've listed below under A, B and C KPIs that I think would help MB and which I emailed to MB in May.*

*A next 12 month approach would usually be good to have – but only if revenue can sensibly be forecast out that far. I do this with some clients.*

*NB 1 sometimes tables of data are better than graphs at showing what is happening.*

*NB 2 Google's charting software is inferior to excel and may not be able to deliver what is desired.*

*I'd be delighted to help MB with this area*

282. In evidence to the Tribunal , he said that Mr Eldridge's dashboard was very 'generic'.

283. The respondents' case on the dashboard was that the claimants had failed to finish it or implement Mr Eldridge's dashboard by 18 March 2021. Mr Heinl said, and this correspondence tended to support that view, that Ben Wolstenholme was driving the work in conjunction with Mr Eldridge. He received Mr Eldridge's dashboard and then submitted it to Ms Kyosti and Mr Toppin, who seemed to have identified a further project for himself. It appears to have been in their hands.

284. On 23 November 2020, Ms Smith sent the board minutes to Ben Wolstenholme (and no other director). This was also the date Ben Wolstenholme first forwarded the minutes to Ms Kyosti. Ms Kyosti responded that she would edit them. Ms Kyosti's evidence in cross examination was that she would offer input as had done over many board minutes over time. She believed she had added comments to the minutes. She could not recall if she added the comment about the lease debt challenge not having been brought to the attention of the board, which was of course a criticism of Ms Laikko.

285. On 24 November 2020, Mr Richardson provided Mr Toppin with the documents about the HPE lease and Mr Toppin, Ms Laikko and Mr Richardson had a call about the lease.

286. Mr Toppin commented in his witness statement:

*Prior to this call I reviewed the two loan agreements that Hanna had signed. During the call, Hanna and Phil explained that they felt that they had been mislead by the broker and the agreements were not what they thought they had entered into. However, in my view the agreements that Hanna had signed were very clear. She had also initialled every page and so presumably must have read the documents. I had previously thought that Hanna was very familiar with contractual matters in her role as CBO and it was her role to review contracts with clients and suppliers. However, the HP Lease Issue showed that Hanna had been incompetent and reckless and my confidence in her had been misplaced.*

287. Mr Toppin said the matter was serious because of the significant additional liability for lease payments, the facts that Barclays had approved CBILS based on incorrect information, the fact that the auditors needed to be informed and the accounts might need to be amended and the fact that the financial information used to run the group had been incorrect.

288. The outcome of the discussion was that Ms Laikko would approach Lewis Silkin for advice on being misled by the broker and Ms Laikko, Mr Toppin and Mr Richardson would explain the change in figures presented as part of the

CBILS application. They did that on 3 December 2020 and Barclays accepted the explanation.

289. On 24 November 2020, Ben Wolstenholme wrote to Mr Richardson, saying he had not heard back on his request from 3 November for management accounts. Mr Richardson's response was that they did not prepare monthly accounts but had a live file showing P & L performance, which he thought had already been shared with board. He attached the file he had sent to Ms Laikko to prepare information for latest board meeting. He said that he could prepare a monthly management account report until the dashboard which he understood Mr Eldridge was driving to establish was ready.

290. At the end of November 2020, Be nWolstenholme became a client of Lawrence Stephens solicitors, having been introduced to the firm by Mr Toppin. He was seeking advice on the claimants.

291. On 26 November 2020, Ms Laikko sent the board, Ms Smith and Mr Eldridge part 2 of the strategic options plan, which she said outlined and evaluated a shortlist of three options and made a recommendation for a preferred option. Ben Wolstenholme forwarded it to Ms Kyosti.

292. Also on 26 November 2020, Mr Toppin sent Ben Wolstenholme an email into which he copied Ms Kyosti. He attached the financial report from Mr Richardson and the discussion paper presented by Mr Eldridge. He said that the financial report included a number of the KPIs he, Mr Toppin, had suggested in May 2020. He said:

*The narrative was sloppy and could be improved.*

*Rather than start afresh with a dashboard from Murray, I would suggest a limited number of changes to the data and presentation of the report sent by Phil would be preferable.*

293. Neither claimant was included in this correspondence.

294. In cross examination, Ben Wolstenholme asserted that this was the clearest information they ever had and that they had never received information in that form again. He alleged that there were inaccuracies on every page. He denied that Mr Toppin was saying that the information was all there and that it was just changes in presentation which were required. He said Mr Eldridge was not an accountant and suggested that Ms Laikko was just passing it around and not taking responsibility. He accepted that Mr Richardson was sending weekly cash slides.

295. 26 November 2020 was also the date Ben Wolstenholme sent version 4 of the board minutes to Ms Smith. Ms Kyosti had added commentary including an assertion that the HPE lease issue was 'not brought to the attention of the board'.

296. On 27 November 2020, Ms Smith sent the final version of the board minutes to Ben Wolstenholme and on 30 November 2020, Ben Wolstenholme sent the minutes to the rest of the board including the claimants.

297. On 1 December 2020, Ms Laikko consulted Lewis Silkin about whether the company had any redress for the HPE lease issue. She clearly set out her own role in signing the relevant contract. She spoke with the lawyers a number of times; the process was slowed down by the fact that the original documentation had been handled by Mr Dent and also by the holiday period. Also on 1 December 2020 she updated Ben Wolstenholme and Mr Toppin, inviting Mr Toppin to be involved in a subsequent call with the lawyer.

298. On 3 December 2020, during the call with Barclays about the CBILS loan, Barclays offered to increase the loan.

299. Also on 3 December 2020, there was a board meeting to discuss the five year business plan. Ben Wolstenholme was highly critical of the plan in his evidence. He said that the options presented involved shrinking the business or going back to a shadow of its former success:

*None of them met the clearly defined Shareholder expectations that had been requested as a key input to the planning (x-y) and were organized in just two weeks. None of the three options appeared sufficiently ambitious and none of them had the level of detail that would be expected from a five-year plan for a multi-million pound business, they were 'lifestyle' business plans.*

*There were about two visual slides for each option. I was absolutely stunned. None of those superficial options was viable or even logical, much less did they build on the 20+ years of working credentials. The Founders wanted Mat, Hanna and the team to grow the asset and they well knew that. I had no idea how they could ever think that any of these could be investable business plans and I recall that Murray was as shocked as I was and commented the same.*

300. Mr Heinl accepted that one of the options involved the company returning to a similar size to what it had been in 2018. He disagreed with the points put to him by counsel in cross examination about whether the plans were likely to create adequate revenue and/or expose the company to more risk. These were issues which the Tribunal was not in a position to form a view on, where there was disagreement between the parties. Mr Heinl said that the team presented a range of options. He accepted that Ben Wolstenholme conveyed that he was 'not taken' by the work and also conveyed his view that the plans lacked ambition. He denied that Ben Wolstenholme raised any issue about the amount of information / detail provided.

301. Mr Heinl accepted that in an email dated 10 December 2020, Mr Eldridge was critical of the options and said two were well below average and one was average. However it seems clear that Mr Eldridge was also saying in that email that there had been a deviation from the approach he had recommended, which would have involved the board engaging with and

debating the material presented at the 19 November board meeting. This seemed to support Mr Heinl's contention that the brief arbitrarily had been changed by Ben Wolstenholme. Mr Heinl said that Ben Wolstenholme never organised a meeting to follow up. The respondents' case was that the claimants did not progress the plan. Mr Heinl said it was an ongoing conversation and they were not asked to produce a further plan / document.

302. During this period, as described earlier, Ms Laikko sent her comments on the 19 November minutes. She said that she was seeking to correct the minutes where they were unfair and add detail and context.

303. On 7 December 2020, Ms Kyosti drafted a reply for Ben Wolstenholme to send to Ms Laikko about the minutes:

*Hi Hanna,*

*Thank you for the input on the notes.*

*The notes reflect what the rest of us heard and discussed. Therefore, I will note your opposition to them in the new meeting meetings [sic] and approve them.*

304. There was no real explanation as to how Ms Kyosti was able to make assertions about what had been heard and discussed at a meeting she had not attended. She told the Tribunal that the draft was a 'suggestion' and what she would have said in his position. She struggled to explain in cross examination how it been appropriate or fair for her to characterise as 'not relevant' many of Ms Laikko's comments.

305. Ultimately the Tribunal did not consider there had been a satisfactory explanation by Ms Kyosti about the extent of her input into the minutes of a meeting she was not at.

306. She denied that she was helping to engineer the notes to help Ben Wolstenholme and harm the claimants.

307. On 9 December 2020, Mr Eldridge wrote to Ben Wolstenholme and Mr Heinl about the NED role, expressing disappointment about how he been used: 'I am still enthused and optimistic but there are clearly significant challenges at board and shareholder level. These tend to dominate almost every top level interaction to the detriment of MB as a business.'

308. He said that the executive directors rejected the first attempt at strategy facilitation and chose to undertake the strategy formulation process themselves. He had not been involved in that strategy work.

309. In terms of readiness to learn and readiness to change: 'There appear to be significant challenges in these areas for MB, exacerbated by the relationship issues between the Chair and CEO.'

310. Mr Heinl responded that day: 'I have to say the amount of energy being spent on these topics is out of kilter with the effect I was hoping for at this stage. It

really runs the risk of becoming rather self indulgent and far away from the realities and needs of the business, Moreover, I'm filled with a sense of dread that this topic of the board and shareholders is really being encouraged to be completely out of proportion. It needs its proper place for a business like ours.'

311. He said that the tone and behaviour he was subject to at the board was disheartening; he said he was subject to a lack of support, blame and undermining.

312. On 14 December 2020, Ms Smith sent Ms Laikko and Ben Wolstenholme draft minutes for the 3 December 2020 board meetings.

313. On 15 December 2020, Ben Wolstenholme responded to Mr Eldridge's 9 December 20201 email, inter alia:

*Challenges between CEO and Chair*

*Yes, I agree, despite coaching with Eva (which was a very kind gesture) the relationship between Mat and I has not improved. It seems it is not likely to be resolved this way.*

314. He was critical in this email of the strategic options presented at the board meeting:

*None of the 3 options met the shareholder baseline expectations. Option 1 was short on revenue targets by a long way and suggested that it would take 5 years to build back to 2018's (or even 2012's) scale of revenue. The other two options involved shrinking the company considerably over the next 5 years. None considered non-organic growth, or other paths to success. I found them all missing the mark and mostly unappealing as investment cases. The strategic approach to thinking was based on existing scale versus looking at the market opportunity and how to grow the business to meet the opportunity.*

315. On the subject of financial integrity, he said that he had been very vocal about the need for strong financial and performance reporting, the need for a finance director and the need for better clarity and insights weekly and monthly. He said that he would have expected Mr Eldridge to be more vocal about that '…from your recommendation it looks like we still have a lot of work to do to establish a dashboard.'

316. We noted that both Ben Wolstenholme and Mr Henil were expressing dissatisfaction with and to Mr Eldridge at this point.

317. On 30 December 2020, Mr Eldridge wrote to Ben Wolstenholme. It is clear from this email that he was trying to understand what it was the shareholders wanted so this could feed into the strategy and why there had been a rapid collapse in the chair / CEO relationship.

318. On 6 January 2021, Ben Wolstenholme emailed Mr Eldridge: *I am due to speak with Mat tomorrow - though he's asked to keep it to half an hour monthly (!)*

319. In this email, Ben Wolstenholme suggested that the deterioration in the relationship between the chair and the CEO had started around early 2019 and 'compounded through 2020'. He suggested that it was down to the 'chair benchmarking point'.

320. Mr Heinl denied in evidence that he had sought to reduce their discussions to half an hour monthly. He said that Ben Wolstenholme had requested that they speak less.

321. Mr Toppin wrote to Ben Wolstenholme and Ms Kyosti on 6 January 2021:

*There are some loose ends from last year which I thought may be helpful to summarise (as far as I know them).*

*a. Barclays CBIL loan £400k MB to complete security documents before drawing down.*

*b. HP equipment loan £170k issue - MB (Hanna!) to receive advice from Lews Silkin.*

*c. Barclays additional £170k CBIL - subject to completion of a) likely position on b) and a to be completed revised assessment of cash need.*

*d. Auditor view on reissue of 2019/20 accounts or adjustment in 2020/21 for HP issue in b).*

*e. Ongoing financial reporting.*

*f. Dividends.*

*g. Management issues.*

*Also, wondering how things are progressing with Andrew Conway?*

322. Andrew Conway is the employment solicitor ultimately involved in representing the respondents in these proceedings but at that time instructed by Ben Wolstenholme. Mr Toppin said he was not party to those discussions. Ms Kyosti in evidence said that she could not recall if she was in touch with Mr Conway at that time.

323. On 8 January 2021, Ben Wolstenholme sent a long email to Mr Heinl in which he said inter alia:

*For speed, and to give you a heads up on what I was wanting to cover in our call:*

*The strategic options presented were underwhelming. Option #2 and #3 were plans to further shrink the company (to 20 people in one case) these are not compelling business cases. Option #1 was the only tenable option and felt like the only real option presented. Option one - planned for minimal growth, taking 5 years to get back to the revenue line of 2018/19 - or even 2013. And it built to an EBITDA margin that has not been unattainable to date.*

*As we've discussed for some years, Option one has real strength in it's market positioning - I see that as a market opportunity - I am not sure why the plan is so conservative and not focussing on the commercial addressable market ... vs internal / sideways at smaller competitors. It also strikes me as a reduced offering to where we currently are.*

*I don't see enough merit in option #1. There are a few things that continue to worry me: As CEO you're used to doing very little ground work to bring the Chair, shareholders and board up to speed, including moments like our minimal half an hour monthly window today. Overall it is part of a CEO's core role to bring the shareholders with them, I believe you should consider this one of your priorities, it is a big part of succeeding in the role and getting everyone behind the strategy*.

324. He also said that he thought that there would be a majority no vote on the business plan.

325. On 9 January 2021, Mr Heinl responded to this email. He challenged the criticisms including the suggestion that he had reduced their one-to-one meetings. He asked if Ben Wolstenholme wanted more time with him.

326. On 12 January 2021, Ben Wolstenholme wrote to Mr Heinl after their call:

*It was important we spoke but unfortunately it becomes circular.*

*What I need is your feedback and clear next steps as CEO on the following four topics:*

*1. That none of the options presented met the shareholder expectations.*

*2. That only one option even involved growth.*

*3. That option #1 plans to take 5 years to bring MB back to levels of revenue seen many years ago... 2013 onwards.*

*4. Our working relationship going forward.*

*From my last note the only aspects you responded to were asking for clarifications on my suggestions in ways of working, for clarity:*

*1. Yes, I am criticising you on your CEO priorities and your lack of effort in bringing me as Chair and other shareholders along on the strategy. And yes, to clarify, I do not think you have considered this work as one of your priorities to date, hence my recommendation.*

*2. In terms of our meeting cadence - let's be accurate: I suggested we move from weekly to every other week for an hour. You said you'd prefer monthly and that you only had half an hour.*

*Until we have clarity on the above, the Board meeting should be postponed. We need to align as a Board before bringing more people into the discussion.*

327. It was obvious that by this point that the relationship between Mr Heinl and Ben Wolstenholme was very strained.

328. In early January 2021, Ms Kyosti became involved in the drafting of the new shareholder agreements for Mr Davis and Mr Wade. She corresponded with Ben Wolstenholme and Ms Smith. The claimants were unaware of Ms Kyosti's involvement.

329. On 23 / 24 January 2021, Mr Eldridge and Ben Wolstenholme exchanged emails about the strategy plan. Ben Wolstenholme said that he thought that Mr Eldridge would be getting Mr Heinl to do what Ben Wolstenholme wanted with the strategy plan as Mr Heinl was not listening to him.

330. Mr Eldridge wrote:

*Clearly, very different understandings and I am sorry this is the case.*

*For the past six months or so I have worked beyond the normal role of an Independent Non-Executive Director. This has been in the hope that I could assist with the relationship challenge between Mat and yourself. As an INED I believed this was in the interests of MB as a company and I was happy to give it my best shot.*

*It is clear that I am not helping with the fundamental challenge – but I hope you will see that I have tried very hard and in good faith. I have expended a huge amount of energy, thought and time to this subject, hoping to assist MB in moving forwards. I am really sorry I have been unable to help in this particular aspect.*

*Once the Chair/CEO situation is resolved I have a lot to offer- practically, commercially and experientially - in many areas of MB board and business activity. I very much look forward to doing so. However, given that I am not helping either you or Mat with the current impasse it makes no sense that I continue as an informal 'mediator'. Consequently I will revert to being simply an iNED and contribute where I can have the most positive effect on the more formal aspects of MB's.*

*Just to note – there was nothing in our discussion to suggest you should write the strategic plan.*

331. Mr Heinl was cross examined to the effect that the relationship with Ben Wolstenholme was broken at this stage and he was doing nothing to repair it. Mr Heinl said that in fact he worked closely with Ben Wolstenholme during this period. It was also put to him that Ben Wolstenholme had raised with him allegations that he had been responsible for bullying of staff and 'talent flight'. He said that Ben Wolstenholme had not raised these matters.

332. On 24 January 2021, Ben Wolstenholme chased Ms Laikko for a summary of salaries of senior management. On 26 January 2021, Ms Laikko sent him a salary sheet, showing the voluntary changes made due to the pandemic.

333. For both claimants, the sheet says:

*20.00% Reduced from 5 days to 4 days. Working 5 days and gaining TOIL*

334. Ben Wolstenholme wrote back: *What is TOIL?*

335. On 27 January 2021, Ms Laikko replied: *Time Off in Lieu*

336. On 29 January 2021, Lewis Silkin provided advice about the HPE lease issue. The solicitor made further enquiries which were discussed in emails to Ms Laikko and Mr Richardson into February 2021. In summary, investigations as to whether there might be a claim of some sort were ongoing.

337. On 4 February 2021, Ben Wolstenholme wrote to Mr Toppin and Ms Kyosti in the early hours of morning;

*Giving you visibility on this email below from Hanna re: CBIL and a few board decisions.*

***Christina and I will be going through Andrews recommendation and your comments to give combined feedback in the morning tomorrow pst.***

[Emphasis added]

338. He then asked Mr Toppin about developing the dashboard, which he said was overdue:

*I am very conscious of your point about 'ways-of-working' in the immediate term .i.e. a preference not to engage directly in the current MB leadership - so if it's amenable perhaps we can commission you on the family side and I can essentially put the requests, recommendations and findings in as Chair*

*Always open to discuss the right approach to this if I have misread your interest or prefered [sic] way of working - just putting down the short terms activities/needs as I see them*

339. Mr Toppin said in cross examination about this email that he did not entertain working ‘for the family’ and had not said he did not want to work with the current leadership.

340. Mr Toppin then wrote to Ben Wolstenholme and Ms Kyosti, an email in which he said inter alia:

*Ancillary to this is the HP loan issue. Its clear the company was bound by Hanna in a contract that was unnecessary and costly. It certainly involved poor attention and administration on Hanna’s part in my opinion, as she has acknowledged signing the documents. The question of whether there is any potential for recompense from the broker involved is open – being considered by Lewis Silkin. Hanna is leading this with the lawyers which is not ideal. Might be worth keeping this as leverage for discussions with Andrew*.

341. Mr Toppin said in cross examination that it was completely false that he didn’t want the HPE lease issue resolved via Lewis Silkin as he hoped to use it as ‘leverage’ against Ms Laikko. ‘Andrew’ is a reference to Mr Conway, the

employment solicitor from whom advice about the claimants was being sought.

342. In an earlier email he sent that day, Mr Toppin reflected on some of the earlier work he had done for the company and said:

*With those 2 tasks my involvement was at least acknowledged, even if resented by some.*

*The toys were thrown from the pram by Mat regarding my involvement with finding an equitable solution re your remuneration. Perhaps this was too close to the bone, too personal, for Mat.*

*NB: It's probably worth discussing with Andrew Conway the time at which it would make sense, tactically, for you to have me appointed to the board (pre or post leadership change).*

343. Ben Wolstenholme said in cross examination that no decision had been made about terminating the claimants' employment; they were looking at options, working with Mr Conway and considering all kinds of paths. They had not yet decided there would be a 'leadership change'. He did not challenge that description in subsequent correspondence with Mr Toppin.

344. Mr Toppin said in evidence that the claimants leaving the business was only one option being looked at. There was a possibility that Ms Kyosti and he would just join the board with the claimants. It was put to him that if 'leadership change' included him and Ms Kyosti joining the board, the sentence was incoherent. He said it was what he had meant and he was 'not a wordsmith'.

345. Ms Kyosti said 'leadership change' only referred to the board. Again that seemed to the Tribunal to make the sentence incoherent. It was obvious to the Tribunal that 'leadership change' meant change to the executive.

346. On 5 February 2021, Ben Wolstenholme replied to Mr Toppin's email:

*This is great - thank you – excellent feedback as ever*

*I'm literally feeling my way into it to make sure that you, Christina and I are aligned and don't put you into any unwanted role in the near term when we have greater plans in the mid and long.*

*Board idea is good one or me to raise with AC.*

*I agree of course a direct instruction from me on these specific 4 areas is a natural extension of the prior work - it's tough times and we have to have a cold analytical look at it - for everyone's good ultimately.... we may have missed something - as 'we' have before (i mean the loan and the 'royal we' being Mat and Hanna)*

*This week has been a big one on Madefire end - so I'll leave it there to keep this thread alive - I'll sync with Christina in the morning again and we'll revert…*

347. On 11 February 2021, Ben Wolstenholme emailed Ms Laikko to check his understanding of the senior management salary arrangements:

*Seems Matt and Christian chose not to take any reduction in wage? Matt Wade was clear with me that reductions should be in place at the top of the company before asking team members to consider reductions - did any of the NY or SF team working into them take reductions?*

*Re: TOIL, I'm not sure I follow. Does this mean you and Mat moved to 4 days/week instead of wage reductions and are opting to work the fifth day but will take it off later in lieu?*

348. Ms Laikko did not respond to that email.

349. Ben Wolstenholme forwarded the email to Mr Toppin and Ms Kyosti:

*For reference John, Christina*

*I've been checking in on C19 procedures re wages*

350. Ms Kyosti denied that the respondents were already contemplating an investigation into the claimants' conduct at this stage.

351. On 12 February 2021, Ms Kyosti suggested in an email to Ben Wolstenholme and Mr Toppin that it was time to 'retire' Mr Eldridge. Ben Wolstenholme agreed.

*17 February 2021*

352. The evidence of Guy and Ben Wolstenholme was that this was the day on which they decided to dismiss the claimants as employees and as directors of the two corporate respondents. They said that they made the decision with input from Ms Kyosti. Mr Eveleigh-Evans, Ms Kyosti and Mr Toppin agreed that they would be the interim executive team and that Ms Kyosti and Mr Toppin would join the boards of the first and second respondents.

353. In his witness statement, Ben Wolstenholme said that the decision was made to 'put the company in a position to survive'. He said that the claimants had got the company into the mire and blocked most of their efforts to find out about the finances. They had no ambition or vision for the company. Ben Wolstenholme said that they also had suspicions of misconduct relating to the TOIL issue and the HPE loan issue.

354. The Wolstenholme brothers and Mr Bull gave evidence about what they said was the effect on them of finding out about the claimants taking TOIL. Ben Wolstenholme said that he was disgusted and knew they had no future in the company. Mr Bull said he had been very upset about it and was still upset. We have commented on our impressions of this evidence above.

355. We noted that no witness appeared to dispute that the claimants had worked very hard in the past, had foregone holiday and had not taken their bonuses that year. They had not historically been greedy.

356. We accepted Ms Laikko's evidence that she had in fact told the board about what she would be doing in relation to TOIL. Ben Wolstenholme simply said he could not remember that happening. We accepted that there was no attempt by the claimants to conceal the position, Ms Fortescue, the HR professional, understood the position and the letters were openly available on the Bamboo HR system. Ms Laikko referred openly to the position in correspondence with Mr Wolstenholme in January 2021

357. The respondents' further evidence was that subsequent to the decision to dismiss the claimants, there was a zoom meeting between Ms Kyosti and Mr Toppin. It was said that Ms Kyosti informed Mr Toppin that the claimants were being removed. Mr Toppin agreed to be part of the management team up to December 2021 with Ms Kyosti and Mr Eveleigh-Evans. This meeting was not documented. Mr Toppin said in evidence that he suggested at this meeting that he joined the boards of the corporate respondents. It was clear from the documents we saw, however, that this was not the first time this had been mooted.

358. Mr Toppin said that in non pandemic times, they would have dismissed the claimants in the office and asked them to hand over company property including mobile phones on the spot. Because the dismissal fell in a lockdown period, they had to retrieve the property from the claimants' home. He said that because the claimants had been excluding board colleagues from access to information they also had to take action to protect the company from potential unlawful handling of company information.

*Project Phoenix*

359. 'Project Phoenix' is the name the respondents gave to what Ms Kyosti characterised as a transformation programme to put Moving Brands back to its growth path and leadership position.

360. Ms Kyosti described the genesis of Project Phoenix in her witness statement:

> *The plan for Project Phoenix was co-designed by the Board with my input along with David and Tung (however, as I say above, David was not involved in the dismissals and neither was Tung).*
>
> *The inputs were gathered using video calls, 1-2-1 discussions and work sessions using Miro Boards, a software that works as a virtual whiteboard and allows for collaboration on a 'live' document. The final Phoenix programme consisted of four phases: Stabilisation, Gap Closure, Growth catalysts and BAU over a period of 12 months with extensions of another 9 months if needed. Based on our experience and capabilities, we divided our focus across what became four streams (the fourth being formally added post our 19 March 2021 Board meeting at my insistence):*

*a) Board, transformation, governance, strategy 2022-2027 and finance - led by Ben and I with support from John;*

*b) MB Group operations incl. sales, creative leadership, delivery & clients - led by David with support from Guy, Anthony, Madeleine, Ben and I;*

*c) MB Labs business model & US rebuild - led by Ben, Guy and I supported by Jim, David and Madeleine;*

*d) Addition based on Board meeting 19 March 2021: Board investigation into the concerns (discussed below) about Mat and Hanna - led by John.*

361. Mr Eveleigh-Evans was said to have designed the Miro board. He did not give evidence; Ms Kyosti agreed in her evidence that Mr Eveleigh-Evans could have been called as a witness.

362. Ms Kyosti said that the team all met daily with management meetings three times a week.

363. On 19 February 2021, Mr Toppin emailed Ms Kyosti:

*We spoke on Wednesday of a potential requirement for some forensic analysis.*

*I've just spoken to Philip Worman the Managing Director of GPW a leading UK based risk and investigations firm.*

*I've known Philip since he and I worked at Kroll Associates in the 1990's and also GPW was a client of mine for a number of years (it was a spin-off from Kroll).*

*Philip would be delighted for GPW to help. I have not disclosed MB or Ben's name to him but did mention your name.*

*Would you like me to send an introductory email to you and he, so we can set up a zoom or teams meeting?*

*It may be helpful for this meeting to happen before Ben's discussions with the 2 as Philip may suggest some mitigation actions in advance of suspensions.*

364. He then sent a further email, copying in Ms Kyosti and Mr Worman:

*Hi Christina and Philip*

*I am pleased to introduce you to each other.*

*Philip how are you fixed for a zoom or teams on Monday 22nd?*

*Christina Philip is the Managing Director of GPW a leading UK based risk and investigations firm.*

*I've known Philip since he and I worked at Kroll Associates in the 1990's and also GPW was a client of mine for a number of years.*

*Philip Christina is a Board Advisor to my client which is a UK headquartered international creative agency.*

*I've known Christina since 2008 via my client.*

*FYI Philip: My involvement with the client was since 2008 but with a gap between the end of 2015 and mid 2020.*

365. On 22 February 2021, Ms Kyosti and Mr Toppin had the zoom meeting with Mr Worman.

366. Mr Worman then wrote to Ms Kyosti and Mr Toppin:

*Christina and John – good to speak today*

*I have attached our NDA, but am happy to operate under an alternative document.*

*One issue I mentioned to John is that we often find it useful to operate under privilege via a law firm (this protects our investigation from attack from the other side to some extent). Something to consider at any rate – and it would be useful to know which external firm you are using.*

367. Ms Kyosti replied:

*Thank you for the note and for the conversation today.*

*I will do a quick review with our legal on this document and circle back with John and the family re: working under our legal team in the UK. I should be able to turn this around by tomorrow and then we can release all the information you need*.

368. On 26 February 2021, Ms Kyosti wrote to Mr Worman:

*My apologies for not getting back to you sooner.*

*I needed to check with Andrew, our lawyer, re: putting you under them as you suggested and what their recommendations are on the timeline in the coming weeks.*

*If you give me until Monday/Tuesday, I should have all the paperwork in order*

369. On 5 March 2021, a meeting to plan the claimants' dismissals was held via Teams. Ms Kyosti drafted the agenda and Mr Eveleigh-Evans had prepared the Miro board which Ms Kyosti and Mr Toppin had added to.

370. The attendees included Guy Wolstenholme, Mr Toppin, Ms Kyosti and Tung Wong.

371. Mr Eveleigh-Evans sent an email with a plan for 'Domino Day' (the day when the claimants were to be told they were dismissed), which included a timeline for removing the claimants as employees and directors. This included the following passage:

*Priority ordered based on John's A-L list*

*E.*

*Conducting a forensic on their transactions (or lack thereof) to access "Bad Leaver status" using an external firm. GPW*

*…*

*H Establish the valuation of shares and payment terms in case of "Good leaver"[3] status Watts Gregory (auditors)? From Tuesday 9th March*

*…*

*K. After this, and based on the forensic report, terminate their employment.*

372. Ben Wolstenholme's explanation for why the email referred to 'accessing' bad leaver status was that Mr Eveleigh-Evans was dyslexic and must have meant to say 'assess'. Ms Kyosti echoed that evidence. It was puzzling that Mr Eveleigh-Evans was not called as a witness if this was the explanation. It was also puzzling that this phrase recurred without correction a number of times in the Project Phoenix planning documents.

373. It also appeared that the phrase was likely to have originated from Mr Toppin, the apparent author of 'John's A – L list'. Mr Toppin also said it should say 'assess'. Mr Toppin said it was not his list, and had no explanation for the description 'John's A – L list'. He denied being the architect of these plans or endorsing them. He said he helped with the practical arrangements for getting the claimants out of the business. No one suggested that Mr Toppin was also dyslexic.

374. On 6 March 2021, in an email Mr Toppin thanked Mr Eveleigh-Evans for his email and the Miro board. He did not correct 'access' to 'assess'.

375. He said that the private investigator needed to be engaged and assigned that role to Ms Kyosti.

376. The Miro board used at the meeting also refers to 'accessing' bad leaver status

*E - Conducting a forensic on their transactions (or lack thereof) to access "Bad Leaver status" using external firm. To be done by GPW. From Tuesday 9th March.*

[3] We note from the documents that in fact there was no valuation by 23 August 2021 although the valuation process appears to have started in May 2021. It seemed to us that the conducting of a valuation was equally consistent with the respondents having an open mind at that point as to whether the claimants would be good or bad leavers (the respondents' position) as it was with them having determined that the claimants would be declared bad leavers. The valuation could be used for any negotiations which might be held with the claimants.

377. When Mr Wolstenholme replied to Mr Eveleigh-Evans' email, he did not correct 'access' to 'assess'. He said in cross examination that he did not see the error.

378. Guy Wolstenholme said in cross examination that he did not know about the forensic investigation to be done by GPW and that he 'did not read the email in detail'.

379. For the reasons we set out above and because of the larger conclusions we reached about credibility and reliability below, we did not accept that the intention was for the document to say 'assess' rather than 'access'. It was clear that the description in fact emanated from a list prepared by Mr Toppin and no one corrected it because the word 'access' was what was intended.

380. We were provided with a document from around this time which read as follows:

*SUGGESTED SCOPE OF INVESTIGATION*

*FINANCIAL*

• *Expenses*

• *Company loans – specifically personal loan to Hanna to buy shares*

• *Renumeration – preferential treatment on salaries and benefits*

• *Procurement - conflicts of interest, favors, kickback schemes or diversion of corporate assets for personal use.*

• *Tracing of funds – YR15 versus MB*

• *Accounting – errors and pledges of assets*

*OPERATIONAL*

• *Wrongful dismissal of staff*

• *Bullying and verbal abuse in all forms (incl. sexual harassment, privacy violations,*

*professional impropriety or conflicts of interest by individuals in positions of trust)*

• *Confidentiality breach*

• *Mismanagement of company funds and assets*

381. We were told that that was the document given to GPW by the respondents' solicitors as to the scope of the investigation into the claimants. Cross examined on this document, Ben Wolstenholme thought he had seen it before. He stood behind a decision to investigate whether the claimants had engaged in all of these types of potential misconduct. Mr Toppin denied drafting the document as discussed further below.

382. On 8 March 2021, Ben Wolstenholme wrote to others involved in Project Phoenix:

*Thank you all for this thorough plan, and for your support in this big moment in MBs history. I'm honoured and grateful.*

*As Christina mentioned, we'd like to move on this as soon as possible, but believe we will need this week to get organized so we suggest D Day being Monday 15th March please. Sorry for the change.*

*I've been through the plans a few times and David's builds.*

383. He added a private email address 'so I can pick this up there as we evolve this'.

384. On 10 March 2021, Mr Toppin emailed Ben Wolstenholme and Ms Kyosti:

*As promised, a workplan for finance/hr/investigation/legal for tomorrow and Friday and next week in detail and then up to EGM in outline.*

*Please comment or add*

*Tomorrow I will build a draft list of known target areas for GPW to share with you so we can brief GPW.*

*It would be great if we could speak with GPW before Domino day – they may have some advice for things we should do to protect the company that we have not thought about.*

385. Mr Toppin told the Tribunal that he did not draft the document set out above at paragraph 381 which appears to be the 'target areas'. This email said that he would be working on the target areas. He attached a workplan / table of actions which also suggested that he would be working on the target areas.

386. We noted that in Mr Toppin's workplan, Ms Kyosti was to be involved throughout Project Phoenix, including being involved in discussing the target areas for the investigation with Mr Toppin and briefing GPW on those target areas. Ms Smith was to be asked to confirm the claimants' current address.

387. Ms Kyosti said in cross examination that her briefing of GPW involved suggesting a list of search terms based on her experience of previous circumstances where there was suspicion of key executives.

388. Ms Kyosti replied to Mr Toppin's email*: Of course and Ben and I were planning a wider session to get everyone up to speed and scripts rehearsed for tomorrow afternoon GMT/morning PST*.

389. In relation to the commissioning of the investigation by GPW, Mr Toppin said in evidence that he, Ben Wolstenholme, and Ms Kyosti had agreed that a forensic investigation of the company's systems and devices should be carried out for two reasons: because they suspected misconduct by the claimants and to understand the state of the business better so Project Phoenix could be better informed.

390. On 11 March 2021, Ben Wolstenholme sent an email inviting the directors and Ms Smith to a board meeting:.

*I'd like to get together as Directors for a Moving Brands Limited Board Meeting on Tuesday 16th March at 8am PST/4pm UK,*

*I've added Anne also for help with the minutes. This will be prior to a Year 15 Ltd Board meeting half an hour later - which I'll send by separate email.*

*Here's a link to the MB Board meeting for Tuesday - the same link can be used for both board meetings*

391. On 12 March 2021, Ms Laikko asked for an agenda. Ben Wolstenholme responded to her without dealing with the request for an agenda.

392. Also on 12 March 2021, GPW set out their suggested approach and fees in a long letter addressed to M Kyosti and Mr Toppin. The scope of the work was described as follows:

*You are representing Moving Brands, an international branding and design agency that is majority owned by two brothers: Ben and Guy Wolstenholme (the 'owners'). The owners of Moving Brands are concerned that the company's Chief Executive Officer – Matt Heinl ('Heinl'), and the Chief Business Officer – Hanna Läikkö ('Läikkö') (together, 'the subjects'), have been working together over a number of years to obfuscate the facts as it pertains to the performance of the business. The owners deem the behaviour of the subjects as suspicious, and perhaps indicative of malpractice and fraud. It is notable that the subjects are in a relationship, and are themselves minority owners of Moving Brands*

*We have divided our approach into appropriate phases as follows.*

*Phase One – 'Domino Day'*

*Our first phase of work will take place on the day the subjects are dismissed from Moving Brands*.

*Immediately after this decision is made, Moving Brands will block their access to the company's IT systems. Shortly after the board meeting, we suggest that our computer forensics partner, IT Group, will collect the subject's computers, tablets, mobiles and any other electronic devices (as well as all other company property). This will be done in-person, and will require a Chain of Custody to be signed by both parties.*

*IT Group will image the subjects' devices and all the native files (e.g. emails, documents, etc.) will be loaded onto a proprietary document review platform (we discussed Intella but now would recommend Relativity, a similar platform), where they will be hosted for an agreed period of time (initially for one month, but this could extend depending on the course of the investigation).*

*During this period our role will be in managing the process and liaising with you and John.*

*Phase Two – GPW investigation*

*Once the subjects' devices have been imaged, we will undertake a targeted and evidence-based review (e.g. using key word searches) of the subjects' files held on Relativity to identify any suspicion or evidence of wrongdoing. This would include, for example, reviewing email traffic between the subjects to determine whether the two discussed the performance of the business, their respective bonus packages, and/ or their use of company credit cards. Documents we may look for would include potentially suspicious supplier invoices, dubious expense claims or evidence of other inappropriate behaviour.*

*In addition to this, you want to perform ongoing monitoring of email traffic between the subjects and the red list, who you believe may attempt to contact one another after Domino Day. You will make clear to all Moving Brands' staff that contact with the subjects after their dismissal via their work email addresses is not permitted. To keep costs down, we recommend that an alert system is set-up on Moving Brands email exchange (assuming you are using Outlook). This does not provide real-time monitoring, but will provide daily updates which can be checked by us or your team (e.g. an alert can be set-up to show if one of the red list email one or both of the subjects). The IT Group will provide a 'playbook' to show how this is done, and work with your IT team to ensure this is organised*.

*GPW will manage the Relativity database, although you and John (and other trusted individuals) would be able to access the data.*

*Phase Three – Further Investigation*

*When we report our Phase Two findings, we will also provide you with recommendations for any further work, should we identify additional leads which we believe warrant further investigation. We would then agree a budget and scope with you. Such work might include:*

*• Analysis of the subjects' lifestyles, assets, personal connections or corporate activities after Domino Day.*

*• Interviews or off the record discussions with staff members who we identify during the second phase as having interacted closely with the subjects (e.g. by reviewing email traffic between the parties).*

*• Other investigative work (such as surveillance) as appropriate*

393. The respondents' witnesses agreed that Mr Toppin and Ms Kyosti suggested that the claimants might be guilty of 'malpractice and fraud'; they said that the suspicions of suspicion of fraud came from a conversation with Ben and Guy Wolstenholme. In his witness statement, Ben Wolstenholme said that 'GPW was instructed to collect all company property to ensure that no further

obfuscation of information could take place'. This was certainly an economical account of GPW's role.

394. Ben Wolstenholme said phase 3 did not take place. The cost of the work was estimated as being something over £40,000. Ultimately we heard evidence that the cost of the external investigations in total was in the region of £100,000.

395. On 15 March 2021, Mr Thapa and his colleague Mr Yung were given instructions about collecting equipment from the claimants' home on 18 March 2021.

396. That day Mr Toppin had corresponded with Mr Worman, accepting the GPW proposals:

*Christina and I are comfortable with your proposal.*

*As mentioned, with effect from about 4pm on Thursday 18 March, Christina and I will be appointed to the board and will be able to sign for the company.*

397. On 16 March 2021, Mr Worman sent some advice on matters Mr Toppin and Ms Kyosti should raise with their IT provider:

*From a data preservation point of view for leavers we would advise the following*

*If there is a criminal aspect suspected and law enforcement or regulators are expected to be involved we would go to the 'nth degree' to secure all data, if not the below works as a middle ground:*

398. On 17 March 2021, Ben Wolstenholme declined to provide Ms Laikko with an agenda for the board meetings:

*Thanks Hanna*

*To respond Re agenda there is no prep needed we will cover future planning*

*See you all on Thursday*

399. Late that evening Ms Kyosti sent Ben Wolstenholme an updated run-sheet and script for the following two days. The script involved motions to dismiss the claimants, motions to remove them as directors at a subsequent shareholder meeting and a motion to appoint Ms Kyosti and Mr Toppin as directors. The claimants were to be placed on garden leave for their notice periods.

400. The script for an 'all hands' meeting was written by Ms Kyosti:

*I want to personally reassure you all that we have put in place a very strong management team with previous MB experience to ensure that we continue operations as usual. This team will be led by David Eveleigh-Evans, who was our former Creative Director in MB London. Over the years, we have all worked very closely together with David and he is someone I have always*

*admired as a leader and creative. David was the former Managing Director and Chief Creative Officer of Method and teaches at RCA. The new management team also includes our long term ally John Toppin, who has worked with MB since 2007 and will take on the role of CFO, and Christina-Anne, who spent 9 years with MB in its growth years, who will join us at Board level and as Strategy lead. This team comes alongside James, who remains CCO, Guy as Creative Director and I will be stepping back in as Executive Chairman.*

*18 March 2021*

401. Before the board meetings, Mr Toppin emailed Ms Kyosti, Ben Wolstenholme and Ms Smith:

*I would suggest Anne is careful to confirm each vote orally so there is no later allegation of mistake.*

402. Ms Kyosti wrote to Ben Wolstenholme:

*Updated run-sheet and script for today. In case of "noise", you can say. "I hear your comments, but we shall proceed with the meeting."*

403. Ms Kyosti denied in cross examination that 'noise' meant the claimants asking why they were dismissed. She said that it was 'any noise' and could have come from anyone. We considered that answer to be evasive. It was clear to us that Ms Kyosti was managing the process, and indeed micromanaging it.

404. Guy Wolstenholme gave the following account in his statement of the board meetings:

*At the MBL Board meeting, Ben opened the meeting as Chair and establish quorum. The agenda was read out and three motions were voted on: first, the removal of Mat and Hanna as employees of MBL with immediate garden leave; proposal to remove Mat and Hanna as Directors of MBL at a shareholder meeting on 19 April 2021; the appointment of John and Christina as Directors of MBL. The first and second motion were passed with a 3-2 majority. The votes to appoint Christina and John were passed by majority with two abstentions. Hanna asked a question as to why this was happening, and the Board chose not to answer. The meeting was then closed.*

*In the Year 15 Board meeting, Ben opened the meeting as Chair and establish quorum. The agenda was read out, Murray's resignation was announced, and he was thanked for his work.*

*Two motions were then announced: the resolution to remove Mat and Hanna from the Board at a shareholder meeting on 19 April 2021 on my request; the appointment of Christina and John as Directors. The motion was passed with a 3-2 majority. The votes to appoint Christina and John were passed by majority with two abstentions. The meeting was closed*.

405. Ms Laikko asked why the claimants were being dismissed and received no answer.

406. Ben Wolstenholme said that he chose not to answer; he did not want to discuss it and wanted to move to a vote on dismissal. He was not able in his evidence to explain why there was no contemporaneous written record of the reasons for the dismissals.

407. The claimants received letters confirming their dismissals the following day. These did not provide any reasons for the dismissals.

408. Mr Bull told the Tribunal that the way he voted had nothing to do with any of Mr Heinl's alleged disclosures and that he was not aware of any disclosures at the time of the vote.

*Collection of claimant's work devices*

409. Later that day, Mr Thapa and Mr Yeung arrived to collect the claimants' work devices. This was during a Covid lockdown. The claimants' children and Mr Heinl's mother were present at their home.

410. Mr Thapa gave evidence that he attended with Mr Yeung at about 16:45. He said they were wearing medical face mask coverings. Both claimants answered the door; the items were handed over in an iterative fashion. They waited a further 1.5 hours for the mobile phones, knocking two or three times during that time to ask if the phones were ready.

411. In oral evidence Ms Laikko said that the security personnel were mostly polite. At some point one of them stepped into the house to sign something and she asked him to step out. Mr Heinl's evidence was similar; a person stepped in with a clipboard. He said that they were not always wearing their masks properly.

412. Asked about this in evidence, Mr Thapa said it could have happened that Mr Yeung stepped inside the house although he had no specific memory of that occurring or of them being asked to leave the house. He said that he had always been wearing his mask so as to cover his nose and mouth.

413. We accepted that Mr Yeung had stepped into the house on one occasion and that he had not always worn his mask so that it fitted correctly.

414. We heard evidence about Ms Laikko's mobile phone. She had thousands of personal photos on the phone and wanted to remove them. She needed to delete her personal information so asked Mr Thapa and Mr Yeung if she should factory reset the phone. She told the Tribunal that she did not want to wipe anything else but did not trust the respondents with her personal data.

415. Mr Toppin said in evidence that:

*There had been traffic on the GPW WhatsApp thread on 18 March 2021 that Hanna had wanted to wipe data off her mobile phone and she wanted to factory re-set it and didn't want to hand it over until she had done that.*

416. We saw the WhatsApp messages. Although Mr Worman initially reported that Ms Laikko was refusing to give her phone back without a factory reset, he

later said that she had asked to remove her photos from the phone and then return it.

417. Removing the photos took Ms Laikko a long period of time and about 7:30 pm Mr Thapa and Mr Yeung called for guidance and were told to come back another time for the phone.

418. Ms Kyosti wrote to Ben Wolstenholme and Mr Toppin: *Hanna being complicated and wiping data from her phone. We will see if we can recover it. Straight disciplinary action for her.*

419. In cross examination, Ms Kyosti said that she did not know if anything else was deleted from the phone. She had not asked GPW / ITG to investigate if there were deletions. Yet she said in her witness statement that Ms Laikko's conduct in erasing data constituted destruction of company data.

420. Mr Worman said in his evidence to the Tribunal that Mr Thapa reported Ms Laikko as having assured him that she would not reset the phone to factory settings and would not touch any other company related data including contacts.

421. Ms Kyosti arranged for out of office replies to be sent from the claimants' work email accounts. Ms Laikko's read as follows (spelling and grammar errors as per the original:

*Out of office*

*Thank you for your message. I am on leave, so please contact David Everleigh-Evans for all UK matter and Jim Bull for all US matter.*

422. The claimants said that the message falsely implied they were on holiday.

423. Mr Toppin wrote that evening to Ben Wolstenholme and Ms Kyosti on a number of matters including:

*Salaries and bonuses*

*Mat and Hanna were due to be paid some historic bonuses with the March payroll. I instructed Phil not to pay these bonuses until he gets the go ahead from a director.*

424. When asked in cross examination why he gave this instruction, Mr Toppin suggested that the bonuses might not have been payable if the claimants were under a disciplinary process and that he wanted to check the terms of bonus scheme. These were of course bonuses for a previous year and the respondents have not pointed to anything in the bonus scheme which would allow the respondents to retain them. Mr Toppin accepted that 'horse trading' might have been part of the reason for not paying.

425. In other emails between the three that evening, Ms Kyosti remarked, 'It will be bumpy, but it shall pay off'. Ben Wolstenholme thanked Ms Kyosti for being

the ‘drill sergeant’. Ms Smith said she admired Ms Kyosti for ‘orchestrating the procedure so calmly and effectively’.

426. In cross examination Ms Kyosti said that this was flattering but she could not take credit. Ben Wolstenholme replied to Ms Smith: ‘Couldn't agree more on Christina's leadership - put everything into form and clarity’.

427. In cross examination, Ms Kyosti continued to maintain that she had not played a part in the claimants’ original dismissals.

428. After the board meetings, Ben Wolstenholme held an all hands meeting with senior management and told them about the changes. Some people who had been close to the claimants such as Mr Wade expressed their disapprobation.

429. On 19 March 2021, Ms Laikko corresponded with Mr Toppin about difficulties she was having removing all of her photos from her mobile amongst other topics. She also asked about TOIL she had accumulated. Mr Toppin in his statement gave an account which suggested that he then investigated the position and concluded that the claimants had abused their positions by agreeing TOIL arrangements which they had not disclosed to the other directors.

430. Mr Toppin was also corresponding with GPW about further stages of the work to be carried out by GPW and ITG. GPW’s ‘computer forensics partner’ ITG would be uploading emails and attachments and data from phones to the Relativity platform (a document review platform) and possibly other data at a later stage.

431. Mr Worman wrote to Mr Toppin:

*GPW’s fees are separate to this – we have our hours to add for co-ordinating this week’s work – we will revert with a breakdown and fees to date*.

*Our main spend will be on the investigation once the data is uploaded etc*

*We will get ITG to invoice you directly.*

*Also look forward to receiving any breakdown of targets/strategy for the email search next week*

432. Mr Toppin wrote to Mr Worman:

*Thank you, understood.*

*We have a draft of key issues for the search we can share with you once finalised.*

*Will the ITG invoice be really discrete [sic]?*

433. Mr Worman responded: *Hi John – yes we can get them to make it very bland indeed – collection of assets or similar (although their letterhead will have the IT Group website link).*

434. Mr Toppin was cross examined on his involvement in commissioning this investigation. The Tribunal found him very cagy on this subject. He was asked about Mr Worman's proposal to make the investigation privileged by involving a law firm. He said that he did not write that suggestion, however he then instructed GPW via a law firm.

435. Also on 19 March 2021, there was a board meeting of the second respondent. Guy Wolstenholme said in his witness statement:

*We also held our first Board meeting as a new team. During this meeting, Christina asked for a proper investigation into the state of the company to get clarity on where the business was at and to understand if the suspected disciplinary issues were true. The Board agreed that John should lead the investigation and that Christina should lead disciplinary hearings later if needed. We also discussed our roles and responsibilities, decisions needing to be made, client follow-up, team follow-ups during the four phases of the Phoenix transition.*

436. Ben Wolstenholme said:

*At the further request of Christina, it was decided that John would lead a thorough investigation into two areas; the financial and operations of MB, and into Mat and Hanna's conduct as executives of the business. Christina felt uncomfortable with the level of information available for the Board to make decisions and for the Directors to properly execute their fiduciary duties.*

*The Board further agreed that, should disciplinary proceedings become necessary, these would be chaired by Christina in light of her experience and prior absence of involvement*.

*The Chairman reported that the purpose of the meeting was to authorise a person or persons to act as the Company's representative for the investigations into the conduct of Matheus Heinl and Hanna Laikko during their time as CEO and COO/CBO respectively to address the severe lack of transparency and accurate information to the Board of Directors regarding all Year 15 holdings including Moving Brands Limited (of which the Company is a shareholder), to address potential misconduct and to determine if a Disciplinary Hearing process should be initiated based on the evidence uncovered.*

437. Neither of the Wolstenholmes mentioned in their statement that an external investigation had already been commissioned. The board minutes are also silent on that issue.

438. Mr Toppin was cross examined as to why there was no reference in the minutes to the investigation being into the company more generally (as he had asserted in his witness statement). He did not have an explanation for this omission.

439. In a letter dated 21 May 2021 from the respondents' solicitors to the claimants' solicitors, genesis of the investigation into the claimants' condcut

was described in this way: 'Following the events of 18 March 2021, our client took the opportunity to interrogate your clients' work phones and computers, principally in order to try to find the information which the majority shareholders had repeatedly been requesting. However in so doing, our client has uncovered evidence on which it now seeks to rely in support of the current allegations of misconduct.' It appears that the instructions give to the respondents' solicitors did not accord with what documents at the time said about the genesis and purposes of the investigation.

440. Ms Kyosti said that when she attended her first board meeting she became aware that there were several incidents not being reported to the board, causing concerns about misconduct; she therefore recommended that the board launch a formal investigation into the operations of the business and the conduct of the claimants. That evidence is impossible to square with her involvement in the instruction of GPW.

441. 19 March 2021 was also the date that the first respondent became a client of Lawrence Stephens solicitors.

442. Over this period, the claimants received communications from various Moving Brands employees expressing shock and concern about what had occurred and support for the claimants.

443. On 23 March 2021, the remaining devices were collected from the claimants' home.

444. Mr Heinl wrote to Mr Toppin about his phone:

*One point of clarification re the phone number - the agreement with MB was that the phone number would be returned to me*. He said that this had been agreed with Geoff Linsell.

445. Mr Toppin wrote to Ms Kyosti and Ben Wolstenholme to say that they needed to check with Mr Linsell to see if that was true:

*We need to ensure that clients that call this number are redirected to MB at least for the first month. That means he will not get the number back until after April 19th*

446. On 30 March 2021, Mr Toppin wrote to Mr Heinl:

*Geoff did confirm that [number] was transferred to a company phone and onto the company phone contract from you, but that is all.*

*This is a company phone number, used for client calls for many years and will be retained by the company for its use.*

*The SIM card, which you insisted on holding back last Tuesday during the collection of the phone remains company property and we would be grateful if you would retain it securely until it can be collected from you*.

447. However, it was only later on 30 March 2021 that Mr Toppin wrote to ask Mr Linsell if there had been any such agreement.

448. In cross examination, Mr Toppin eventually agreed he had told Mr Heinl he would not get the number back before he investigated with Mr Linsell whether there had been an agreement. He agreed that it looked like he kept the number for potential 'horse trading'.

449. In the 23 March 2021 correspondence, Mr Heinl also asked for personal files from his devices to be returned. Mr Toppin said they would be but accepted in evidence that they had not been.

450. Mr Toppin also wrote that day to finance staff and Ms Kyosti:

*Mat and Hanna should be receiving their normal salary and not a penny more. In particular there is no payment of bonus to either of them. They are on 12 weeks' notice.*

451. 23 March 2021 is also the date Mr Toppin told the Tribunal he commenced his investigation into the claimants.

452. On 24 March 2021, he wrote to Ms Kyosti making the motivation behind some of the treatment of the claimants explicit:

*I agree that it would be preferable to keep the number [Mr Heinl's mobile number] – certainly at least for the coming months for migration.*

*Let's add this to the list with Andrew Conway. There will almost certainly be letters coming from Mat and Hanna's solicitors at some stage soon and this issue will be raised. At the end of the day there will be some horse trading to resolve the matter.*

*I'm very keen we sort the GPW situation so the investigation can be triggered. If we want legal privilege, Andrew must be the person to trigger the investigation according to his email.*

*The investigation will determine the strength of our hand in the horse trading.*

453. In evidence Mr Toppin tried to distance himself from efforts to cloak the investigation in legal professional privilege. He did not accept in cross examination that it was a ruse.

454. On 30 March 2021, Mr Conway of Lawrence Stephens took over instruction of GPW. He wrote to GPW:

*My client, Moving Brands Limited, wishes to investigate the conduct of its former employees, Mat Heinl and Hanna Laikko and, in that regard, you are instructed to interrogate the company's systems and information (as well as devices used by Mat and Hanna, including for example, laptops, iPads and mobile phones) for potential wrongdoing, whether wilful or negligent.*

*Your investigation should include, but not be limited to, to the following areas:-*

*FINANCIAL*

*• Expenses*

*• Company loans – specifically personal loan to Hanna to buy shares*

*• Renumeration – preferential treatment on salaries and benefits*

*• Procurement - conflicts of interest, favors, kickback schemes or diversion of corporate assets for personal use.*

*• Tracing of funds – YR15 versus MB*

*• Accounting – errors and pledges of assets*

*OPERATIONAL*

*• Wrongful dismissal of staff*

*• Bullying and verbal abuse in all forms (including sexual harassment, privacy violations, professional impropriety or conflicts of interest by individuals in positions of trust)*

*• Confidentiality breach*

*• Mismanagement of company funds and assets*

455. 7 April 2021 is the day on which Mr Toppin said he had a discussion with Ms Fortescue about the claimants' holiday leave and TOIL and discovered that they had accumulated substantial balances of TOIL and untaken holiday.

456. On 8 April 2021, Mr Toppin chased Mr Davis for emails about the New York lease and on 10 April 2021, Mr Davis sent Mr Toppin a link to the emails. After a Google meet, Ms Davis suggested that Mr Toppin speak with Mr Fishman, the US lawyer who had been involved with the lease.

457. Mr Toppin characterised his findings on this in his witness statement:

*It was not until my exchange of emails with the US lawyer, Eric Fishman, who had advised the company on the surrender of its NY lease that I understood that in reality the lease had not been surrendered at all and that the company continued to be liable for all rents under the lease until expiry of the lease term without being able to occupy the space or have the opportunity itself to find an alternative replacement tenant. I believed that Mat and Hanna had, by excluding their board colleagues from full transparency of and any involvement in this matter, caused the company to have entered into a completely unnecessary lease surrender and which was a very costly commercial error. The cost of this write off to the Year 15 Ltd group's profits for the year ended 30 September 2020 amounted to £430,000. It seemed to me that this commercial outcome was extraordinary in the context of what was presumably intended and against the backdrop of the economic uncertainty brought upon by COVID.*

458. We consider Mr Toppin's findings further in our Conclusions.

459. On 16 April 2021, the claimants sent in written representations before the meeting convened to remove them as directors. In Mr Heinl's submissions he asserted that he had made the various protected disclosures and that this had caused deterioration in his relationship with Ben Wolstenholme. He invited the company to enter into discussion to settle his potential claims and purchase his shares. In her submission, as part of the narrative, Ms Laikko referred to the fact that she and Mr Heinl had dropped to 80% salary while working full time and accruing TOIL. She would not have been aware that this was a matter subject to a disciplinary investigation at the time.

460. At the 19 April 2021 board meetings, the claimants' directorships were terminated.

461. On 21 April 2021, Mr Toppin contacted Lewis Silkin for correspondence about the HPE lease and was provided with that correspondence.

462. On 22 April 2021, in email correspondence with Mr Toppin, Ben Wolstenholme, Ms Smith and Mr Bull, Ms Kyosti suggested the use of private emails for anything board related and Ben Wolstenholme agreed.

463. Ms Kyosti's email was curiously worded:

*As we are all involved in the day-to-day operations of the business, it may be good to separate what we do as Directors from MB operations. Also, we will now begin Phase 2 legal process with M&H. As such, I suggest we keep private emails for Board related issues*.

464. Ms Kyosti said in cross examination that she always follows this course to separate out board and operational matters. She denied she was seeking to conceal emails from disclosure in litigation.

465. Also on 22 April 2021, GPW sent its investigation report to Mr Conway who passed it on the following day to Ben Wolstenholme, Mr Toppin and Ms Kyosti. The report related to a forensic analysis of 330,607 emails downloaded from the claimants' devices using keyword searches and by focussing on groups of emails such as emails the claimants sent to each other and all emails from the last three months of the claimants' employment. They found no good evidence to support the various types of misconduct, for example:

*To date – and given we have reviewed a small proportion of the total emails – we have not found any strong evidence that Mat or Hana have acted fraudulently while at Moving Brands, nor have we seen any significant indicators that either have acted in a way that has brought operational challenges to the firm (e.g. through mismanagement, workplace bullying etc.), although there are hints of tension between Mat and some female employees through one email. .*

466. Ms Kyosti said that these findings were not shared with the claimants at the time or during the course of their disciplinary proceedings as she asserted that they were legally privileged.

467. On 23 April 2021, Ben Wolstenholme wrote to Mr Toppin and Ms Kyosti about a series of emails with Ms Laikko on the TOIL issue:

*I've added this thread also into the Exhibits folder.*

*In short - M and H opted for Time of[f] in Lieu vs wage reductions in spite of an agreed leadership policy of 20% (minimum) wage reductions which Jim, Guy and I all took. I will find that email also of course.*

*Here I was asking Hanna for a position on Director agreements and wages and reductions during C19. after over a month chasing the line goes dead when pushed - see below.*

468. Ben Wolstenholme said in evidence that the 'exhibits folder' was where he put anything he thought pertinent to Mr Toppin's investigation. He accepted that he was not putting positive / exonerating documents into the folder.

469. There were further emails that day between Ben Wolstenholme and Mr Toppin relevant to Mr Toppin's investigation:

Mr Toppin: *You mentioned Mat's disparaging comments about you in front of Guy.*

*Do you have anything on that. Guy, witnesses etc..?*

Ben Wolstenholme: *This came last year, apparently during a meeting where Mat and Hanna were disrespectful/rude about the founders/me.*

*We've had meetings in zoom where they've been smiling and quietly laughing that we didn't 'know' something - but it's always a pretty subtle thing - like an in joke.*

470. Mr Toppin (forwarding the above email to Guy Wolstenholme and Ms Kyosti) wrote: *Hi Ben Guy and Christina*

*In case this leads somewhere between useful would you mind racking brains on it. There must have been reasons???*

471. On 24 April 2021, Ben Wolstenholme was sending more emails to Mr Toppin and others:

*Hi John and Christina (Jim, Guy, Anne)*

*As I trawl through emails this one relates to go forward Shareholder expansion.*

*This is the latest communication with Christian Davis and Matt Wade (sending next) regarding their earning into the Shareholding.*

*This stalled as we could not get the 5 year plan into any agreeable shape*

*Will forward MW version of this also*

472. On 4 May 2021, Mr Conway wrote to GPW: *The client has asked for access to the information which you have uploaded onto Relativity, in order to carry*

*out its own interrogation based on foreign languages that may have been used.*

*Is it possible to arrange this?*

473. We heard in evidence that this interrogation was to be done by Ms Kyosti. She agreed that she had investigated the disciplinary allegations through the documents on Relativity.

474. On 11 May 2021, Mr Toppin asked Mr Davis, Ben Wolstenholme and Mr Bull for internal emails about the NYC lease. Mr Davis said he had already provided the emails.

475. On 12 May 2021 Mr Toppin pressed for more documents, suggesting that: 'Otherwise all we have is Christian going off on his own to surrender the lease with no authority and no consideration of the legal / financial impact which I don't believe is true.'

*I need to have an internal communication between the senior team of MB that gets to who requested/approved/agreed/instructed Christian to proceed with*

*the NY lawyers to surrender the NY lease. The surrender document was*

*served on August 28 2020.*

476. Mr Davis replied:

*You have not been clear as to what you have been looking for relating to the NY studio, so I have shared information that I think is helpful, but I'm concerned by this note. I want to use the first part of our strategy session*

*today to clarify what you are looking for, why and why you have chosen the*

*specific scenario below, which is untrue and an incredibly damning and unfair representation of my conduct.*

477. Mr Toppin responded:

*Thank you and of course we can discuss and in fact I am very clearly saying*

*the opposite of what you fear I've said.*

*See... " which I don't believe is true." at the end of the sentence.*

*I apologise to you if what I wrote appears anything other than endorsing that I don't believe for a minute you would have been anything but professional and correct.*

478. This was at a point when the investigation into the claimants' conduct was supposed to be ongoing. Ms Kyosti and Ben Wolstenholme were copied in.

479. Mr Toppin said that he raised the issue of the New York lease at a weekly strategy meeting on 12 May 2021 attended by the founders, Ms Kyosti, Mr Toppin, Mr Davis and Mr Eveleigh-Evans. That led Mr Toppin to look at a Slack channel which included conversations about the surrender of the New

York lease. Mr Bull, Mr Wade, Mr Davis, Mr Heinl and Ms Fortescue were all copied in to this chat.

480. Between 11 and 13 May 2021, Mr Toppin asked Ms Fortescue to send him summaries of the amendments to the working conditions of the employees related to the pandemic and copy documents. Mr Toppin told the Tribunal that he concluded from these materials that the claimants had treated themselves favourably in relation to salary and TOIL and 'abused their positions'.

481. On 13 May 2021, Mr Toppin told the Tribunal that he had investigated documents relating to private work done by Mr Heinl. He found two chains of emails, one about a company called TIA Capital. There was a discussion in these emails partly about Mr Heinl's designs and an invoice for £1645 for a logo, stationery etc. There was also a folder called Hanways including a draft agreement for Mr Heinl to become a shareholder and take on a role with Hanways one day per month. These documents dated back to December 2015. Mr Toppin said he investigated whether there was any written evidence of permission being given for this work and could find none.

482. On 13 May 2021, there was an update from GPW:

*General findings*

*From our initial review, we have not found any indication (even less evidence) to suggest that Mat or Hanna were involved in any fraudulent activity, workplace bullying, or other improper conduct. Nor have we identified any suspicious lines of communication between Mat or Hanna and other members of MB.*

*As with our review of the emails, we have undertaken targeted key word searches to give us the best chance of identifying relevant messages. Additionally, we have analysed direct messaging histories of Mat and Hanna, with a number of their colleagues.*

*New York lease*

*We have not found any indication of wrongdoing based on our analysis of conversations between Matt/Hanna and MB employees or any other individuals regarding the New York lease. Our review of emails and Slack data indicates that Hanna sought to end MB's lease for the NY office in June 2020. Similarly, on 17 June 2020, Matt contacted Alexander Rhodes, a lawyer at Mischon de Reya LLP, to ask for professional contacts who could assist MB with exiting its NY lease agreement.*

*In July 2020, Mat exchanged emails with John Sinclair – a friend of Mat's and an employee from Ustwo – who suggested that MB's NY-based employees move to Ustwo's NY office (under the assumption MB can exit their original lease). They subsequently scheduled a call with another Ustwo employee – Carsten Weirwille – though it is not clear what was ultimately discussed.*

*In January 2021, Christian Davis (MB) emailed Eric Fishman from Pryor Cashman LLP, who was assisting MB on the NY lease matter. Christian explained that the landlord of MB's NY office had continued to send MB invoices. Eric responded: "It's not surprising that the landlord is sending you these invoices – even though we have extinguished the Guaranty, Moving Brands still has potential liability under the lease for non-payment. The good news is that commercial eviction proceedings in NY are stayed until at least the end of January. There's always a chance that the landlord could file a regular civil lawsuit (as opposed to a quick eviction proceeding), but that seems unlikely in this climate."*

*Next steps*

*Given the lack of promising results from our recent searches, we suggest pausing our investigation into Mat and Hanna's direct Slack messaging history pending client direction.*

*ITG has worked on parsing the wider Slack channels – there are technical issues to storing it in an easily useable format – and informs us that to go further will entail additional spend.*

483. Mr Conway commented that day: *It seems that we may have reached the end of the line here.*

*Would you and ITG put a halt to any further work, pending further instructions from me? However, please leave Christina's access to Relatively in place until further notice.*

484. Ms Kyosti in cross examination denied that in not mentioning the report or her Relativity involvement in her statement she was seeking dishonestly to distance herself from the investigations. She said that she looked in Relativity as part of investigating the disciplinary allegations.

485. On 14 May 202, Mr Peacock of GPW said that he would tell ITG to halt further work and would maintain Ms Kyosti's access to Relativity.

486. Ms Kyosti emailed Mr Davis, Mr Toppin and Ben Wolstenholme, following up on Mr Davis' email in which he expressed concern that he was being blamed for the surrender of the New York lease:

*Just to follow up on the information request below.*

*We are validating times and dates concerning the NY studio lease as part of*

*The ongoing audit. Christian – thank you for*

*the information you provided. With your inputs, we now have all the*

*necessary information.*

487. On 17 May 2021, the claimants were sent copies of Mr Toppin's investigation report.

488. Mr Toppin said in his witness statement that he did not speak to the claimants during the investigation because, he said, they had a history of obfuscating and he was concerned that they would obfuscate and delay matters. The claimants were not aware that the investigation was taking place until they received the report.

489. He said that he approached the role diligently and with an open mind. He said that he was not aware of the alleged disclosures until 23 April 2021.

490. In answer to Tribunal questions, Mr Toppin first revealed that the investigation report was in fact drafted by the respondents' solicitors based on the documents he had gathered and conversations he had had with them.

491. Another example of other individuals being involved in the investigation was Ben Wolstenholme placing documents he said he considered suspicious or worrying into the common 'exhibits' folder and sending these on to Mr Toppin and Ms Kyosti, amongst others documents he had found during what he described as 'trawls' of emails.

492. In the report, Mr Toppin / the respondents' solicitors described how they said that the investigation had come about:

*C. Arousal of suspicion*

*10. Whilst I have for some time had some concerns about the conduct of HL and MH (as set out in Part C of this Investigation Report), it was as a result of an email exchange that took place with Eric Fishman, an American lawyer and partner at the firm of Pryor Cashman, on 14 and 15 April 2021, that my suspicions were truly aroused.*

*11. Consequent upon my discovery that HL had inexplicably represented to the board of directors something which did not appear to be true, I engaged in further enquiries in order to check on behalf of MB and its parent company whether there was anything so serious that it required it to take steps to protect its interests. This report is the product of those enquiries and in the manner set out in Part D, implicates each of HL and MH; albeit that in many respects this is by reason of them enjoying the post of the two most senior employees of MB with a considerable degree of autonomy.*

493. This is inconsistent with what Mr Toppin said in cross examination, which is that the events he describes led to a 'redoubling' of efforts already started. He was certainly not candid in this report as to the real genesis of the investigation. There was a lack of candour here and elsewhere about the involvement of GPW. The report did not refer to the GPW investigation or its exculpatory contents.

494. It is worth summarising here, as counsel for the claimants did in submissions, some of the different accounts of the reasons for / genesis of the investigation report:

- Mr Toppin's account, above;

- The board meetings and minutes described at paragraphs 436 - 438 above;
- Lawrence Stephens' explanation on 21 May 2021 at paragraph 440 above;
- Ms Kyosti's evidence in chief that: 'The objectives of the investigation were to understand and investigate the lack of proper management information, visibility of decision-making, the state of the business, and suspicions of wider gross misconduct.'

495. In the letters enclosing the investigation report, the claimants were invited to disciplinary hearings to take place on 25 May 2021.

496. On19 May 2021, Mr Toppin made inquiries to payroll staff about pay arrangements for the claimants:

*To check my understanding, if Sharon sent you the usual payroll details re Mat and Hanna with her submission of all employee data, you would hold Mat and Hanna's pay but pay everyone else.*

*On Friday 28th May, say, if we emailed you revised payroll details for Mat and Hanna (which might include final pay to that date, bonus, pay for untaken holiday and deduction of loans) you could then process that and pay it that day and produce form P45? I'm also noting in all this that Monday 31st May is a Bank Holiday*

*Happy to have a call if it's easier for you to explain to me that way.*

497. Mr Toppin refused to accept in cross examination that these plans were made in anticipation of summary dismissal of the claimants before the expiry of their notice periods.

498. On 20 May 2021, the claimants' solicitors wrote inter alia requesting a number of additional documents to enable the claimants to prepare for the disciplinary hearings, an independent chair of the disciplinary hearings and a grievance investigation based on the written representations made by the claimants on 19 April 2021 and postponement of the disciplinary proceedings pending the grievance investigation.[4]

[4] The documents seemed to the Tribunal to be in the main documents which should reasonably have been provided to the claimants. They included:
Email from Donna (landlord manager) outlining the cost of exit as one year rent + rates (w/o replacement tenant)
- Any email correspondence and minutes between Christian, Jim Bull and the US legal advisers
- 26 March and 2 April 2020 Covid planning papers for extended board (and email and messages forwarding this to John Toppin)
- Email exchanges between Ben Wolstenhome, Hanna Laikko, Phil, auditors and the rest of the directors about any questions and answers with regards to the accounts
- MB Inc. company registration certificate
- MB group companies directors and signatories Google-doc
- Folder of documents collected by Hanna Laikko in relation to this (the CBILS folder on her laptop)
- Any email correspondence between Phil and Think Blue and Oak Tree (both before

499. On 23 May 2021, the respondents' solicitors wrote on their behalf refusing to provide further documents and disputing that the written representations were intended to be a formal grievance:

*The majority shareholders have long held concerns with regard to the way in which the Company has been run and the way in which it had been haemorrhaging cash at an alarming rate. Your clients have repeatedly failed to provide the majority shareholders with sufficient accounts or management information to enable them to understand the true financial position of the Company. Ultimately, it was this lack of communication and/or transparency which led to their removal as directors and dismissal as employees.*

*Following the events of 18 March 2021, our client took the opportunity to interrogate your clients' work phones and computers, principally in order to try to find the information which the majority shareholders had previously been requesting. However, in so doing, our client has uncovered evidence on which it now seeks to rely in support of the current allegations of misconduct.*

500. On 24 May 2021, Ms Laikko wrote to Mr Kyosti asking to put the hearings back to 27 May 2021 so that Mr Wade could attend as their companion. Ms Kyosti acceded to that request but wrote:

*I am very conscious of the fact that your solicitors have made a request for certain documentation/information in advance of the hearing. As you know, that request has been refused. Please note that you are specifically prohibited from trying to circumvent this refusal by having any other employee else provide this documentation for you. Should we find that you have asked any other employee to do this, further disciplinary action may be taken (as against you and any other implicated employee)*

501. At some point Ms Kyosti investigated with Ms Fortescue, who described the conversations in her witness statement:

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signing the amendment and after finding out about the term extension)
- Email correspondence between Hanna Laiko and Lewis Silkin instructing them to advice on HPE lease
- Email correspondence between Hanna Laiko and John Toppin and other directors updating them on Lewis Silkin's advice
- Chloe's and Ying's temporary variation of terms for reference (a similar sort of statement should be in theirs)
- TOIL / 'Time in Lieu' records going back beyond 2019 and for recording other people's holiday carry over / TOIL accrual
- Maddie Fortescue's capture of the meetings with the team members to discuss voluntary pay/time reduction
- Hanna Laiko email response to John Toppin of 19 November 2020 email
- Hanna Laikko email correspondence with Luc Arama and Charlotte (MB relationship managers) at Barclays about the HPE lease
- Copy of the Company business plan and workshop documentation, dated in or around 2014 regarding the Company's "Strategy to engage in Advisory Roles"
- Copies of any and all written declarations of interests by the other directors or board minutes containing such declarations

*Christina asked me to discuss in further detail the conversations that I had with John - explaining what happened in September 2020 regarding salary reductions and TOIL accrual.*

*In all the meetings and interviews we had, Christina asked me to explain what I knew in my own words. She captured and replayed what I had said. Her questions were open and clear. I felt comfortable with the questions Christina asked me and we discussed the position objectively and factually. My role in these conversations was to provide objective and factual information and to supply copy documents as appropriate.*

502. On 27 May 2021, Ms Kyosti held disciplinary hearings with the claimants. She started each hearing by reading out the investigation report verbatim. This caused the hearings to overrun to the following day. Mr Heinl said that it seemed the action of someone behaving in a performatively formal way. Ms Smith, who attended as an 'independent witness', said the meetings ran long because Mr Heinl in particular interrupted when Ms Kyosti was reading out the investigation report.

503. The hearings were recorded and we were provided with transcripts.

504. One section of the transcript which was relevant to us was the following:

*Mat: Well I very much hope that you can uphold that throughout this entire process, not just whatever it is left (55-minute period) that we're interacting. But I think you'll see, and I think you're aware, that the way in which all of this has been handled is certainly not fair and is certainly not aligned with what you've just said.*

*Christina: I'm afraid that I have to tell you I wasn't around at the time to be honest, and as you well know I sort of inherited this.*

*Mat: That's not…well, let's break that down. First of all, you were because you were appointed on the same day we were dismissed: in the same moment. So through this whole process… you've been party to it. Secondly, you have a very close relationship with Ben, as we both know, and are involved in his different businesses.*

*Christina: I have said… once again…*

*Mat: Sorry to interrupt. So, for you to say that you're not aware, is not actually correct.*

*Christina: perhaps if I can specify what I meant. I didn't say I wasn't aware. I said I wasn't involved at the time that all this happened. So, what I'm trying to do…*

*Mat: No, no. That's not correct because what happened was – as you know – the board meeting happened, you were appointed, we were dismissed, everything happened subsequent to that.*

*Christina: After that, absolutely I have known what's going on.*

*Mat: Thank you for confirming that.*

*Chrsitina:…This is the only report  have seen by the way…*

…

*Christina: I knew that he was asked to produce this report, and I didn't oppose it – no. Because I wanted to understand what has happened, like you. Unlike the other members of the board, you must understand that I come to this from many, many years of not being part of this group. So, for me this is a little bit new too.*

*Mat: So there was a board meeting and he raised wanting to do this, or the whole board raised that they wanted to do this investigation – and then they appointed him to do it? Is that what you're saying.*

*Christina: Pretty much. According to this, that is exactly what happened.*

*Mat: But which of the two was it?*

*Christina: He was asked by the board of Year 15 and of MB to do an investigation into the conduct of both you and Hanna.*

*Mat: And you're saying you were there, but you didn't oppose it. Do you mean there was a vote?*

*Christina: There was no vote, I just didn't have a comment on it. I didn't comment either way.*

*Mat: And at that point, were you already appointed in this disciplinary manager role?*

*Christina: No because I didn't know that this was gonna be a disciplinary hearing. Usually you need…generally in my experience you need a report or a set of allegations to determine whether there is a disciplinary or not. If you have no evidence then why would you have a disciplinary?*

505. This is of course at odds with the evidence we heard from Guy and Ben Wolstenholme, Mr Toppin and Ms Kyosti herself that Ms Kyosti proposed there be a disciplinary investigation.

506. In cross examination Ms Kyosti accepted that she did comment on the proposal to conduct a disciplinary investigation and that the statement that she did not was untrue. She accepted that she was one of the people suggesting an investigation (and that Ben Wolstenholme's statement said she proposed the investigation and the board agreed) but said she did not remember that at time she was discussing the matter with the claimants.

507. We found it was not correct for her to say that she had inherited the matter or to suggest that she came fresh to it when she had been involved in discussing investigations since February 2021. It was also not true that Mr Toppin's report was the only report she had seen; she had also seen the GPW reports.

508. In Ms Laikko's disciplinary hearing, the following exchange took place:

*Hanna: So who suggested that there should be an investigation?*

*Christina: To be honest, I don't remember. I know that it was on that call that he was asked to do an investigation but to be super honest I don't remember who asked. I know that it was agreed. I had no comment either way. So, from then on there has been an investigation obviously that produced this [Christina gestures to investigation report]. I have looked at this, I've tried to be super dispassionate about this, and try not to have an opinion either way. I've read this [report].*

*Christina: I agreed to be disciplinary officer because I think I have an ability to keep some kind of objectivity in this and read both sides of the story. From what I have heard – and now you can correct me if I am wrong – on allegation 1 (which is the New York Lease), you are telling me that Jim and Christian were in charge of the New York lease; that the person who signed this lease was Jim on behalf of MB Inc. That the slack conversation that is in there was just you being referred to and giving commentary, but that you didn't speak to the lawyers directly and you were not involved with Donna directly in any other conversations and that, at the end, Christian was the one that led it.*

509. We saw a table of follow up questions Ms Kyosti drafted. She told us she interviewed a number of people including Mr Friday and Ms Smith

510. On 28 May 2021, Mr Heinl submitted a disciplinary statement. He raised concerns about the adequacy of the amount of time they had had to prepare and the refusal to provide them with further documents. He criticised Mr Toppin's investigation, in particular the fact that the claimants had not been involved in it, and the fairness of the hearing in front of Ms Kyosti. He made detailed submissions about the various allegations.

511. Ms Kyosti said that she deliberated on her findings and took time to assess the severity of the misconduct. She decided that the claimants should be dismissed, primarily for gross misconduct, although she said she also considered capability. She said that a desire to render the claimants 'bad leavers' had no influence on her decision.

512. Ms Kyosti said that the claimants had adequate time to prepare and they did not require additional documents. She felt that she was an appropriate and suitably independent person to hearing the disciplinaries. She said that the fact she had worked with the Wolstenholmes for many years did not mean she had prejudged the matter; she had also known Ms Laikko at Capgemini. Although she had been named in the grievance, all of the other statutory directors had also been involved in the process; because of her significant experience of investigating disciplinary issues, the board decided that she was the most appropriate person to hear the disciplinaries.

513. On 7 June 2021, Ms Kyosti says she shared the outcome with the board on a video call. She said that it was a long meeting at which the board asked lots of

questions about the evidence for gross misconduct and the reasons for summarily dismissing the claimants. One interesting feature of the findings against Mr Heinl is that Ms Kyosti accepted that Mr Heinl did not know about the HPE lease problem until 18 November 2020 but concluded that he was guilty of gross misconduct *because of* his limited awareness and involvement in the matter.

514. On 8 June 2021, the claimants were dismissed summarily. That was the day before their notice periods would have expired. Guy Wolstenholme said in evidence that it was a coincidence that the dismissals took place the day before the date on which they believed the claimants' notice periods expired. Of course the effect of dismissing the claimants before their notice period sexpired was that the respondents were able to argue that they were 'bad leavers'.

515. Ms Kyosti told the claimants during their disciplinary hearings that they would get transcripts of the disciplinary hearings; she eventually said that these would not be provided, only the recordings.

516. It was put to her in evidence that transcripts would be much more useful than seven to eight hours of recordings; Ms Kyosti said that to her they were one and the same.

517. It seemed to the Tribunal that it was much harder for the claimants to analyse what had happened or draw specific parts to the attention of the appeal manager without transcripts.

518. On 25 June 2021, the claimants submitted appeals against their dismissals. They alleged the findings were perverse and that the procedure had been unfair. They had had no input into the investigation, they had not been provided with documents they had asked for. They had insufficient time to prepare. Ms Kyosti was not independent or appropriately experienced to decide the disciplinaries. No transcripts had been provided.

519. On 12 and 20 July 2021, the claimants' solicitors chased for responses to their appeals and grievances.

520. On 22 July 2021: Year 15 Limited, Guy Wolstenholme, Ms Kyosti. Mr Toppin and Mr Bull became clients of Lawrence Stephens.

521. On 24 September 2021, the claimants received written grievance outcomes from Ms Kyosti. These are less than two sides of A4 each and rejected the claims that protected disclosures were made or led to detriments. Ms Kyosti said in evidence that she was not influenced by any alleged protected disclosures or protected acts in reaching her conclusions.

522. Ms Kyosti said in her witness statement that the claimants had read their written representations which included their grievances during their disciplinary hearings so no further hearing was necessary

523. Ms Kyosti said that she investigated the grievances with all members of the board, Mr A Dale, Mr G Linsell and Ms Fortescue.

524. She said that she asked for and looked at other documents, including cash reports and performance reviews / 360s although there is no written record of exactly what she looked at.

525. As to her impartiality, she said:

*my role as the disciplinary manager did not preclude me from being impartial and objective in making a judgement based on the grievances. As an executive, objectivity in heuristics (being able to evaluate a situation from a neutral position, to listen carefully to all inputs and views and be able to see both sides of an issue when making decisions) and impartiality when considering an issue is part of the daily job. After two decades in leadership positions presiding over many grievances, mediations, and worker's council issues, I approached the grievances in this case with the same impartiality and rigour as I would any other matter. In addition, I spent over 4 hours with Mat and Hanna during the disciplinary investigation listening to their side of the story.*

526. On 4 October 2021, the appeal outcomes were sent to the claimants. The appeals had been heard by Mr Bull. Initially Guy Wolstenholme had been selected to hear the appeals but then the claimants initiated Tribunal proceedings in which Guy Wolstenholme was named as a respondent so Mr Bull was substituted. The claim forms were submitted on 9 July 2021.

527. The explanations for the delay in the appeal outcomes put forward in Mr Bull's witness statement were that the claimant's proceedings had been submitted and amended and the respondents were dealing with the claimants' DSARs. None of these appeared to the Tribunal to be matters which Mr Bull would have been centrally involved in or to explain the delay.

528. Mr Bull said of his process:

*I approached my task diligently and reviewed the documents pertaining to the disciplinary process and the arguments raised by HL and MH in their appeals.*

*I conducted a review of the appeal process as opposed to a complete re-hearing. As such I did not consider that there was any need to offer MH and HL a hearing.*

529. Mr Bull was asked various questions about the appeal in cross examination which he seemed somewhat at a loss to answer. He was asked why he did not obtain the documents the claimants had asked for and make sure they had a chance to see them. He said he did not recall looking for the documents so did not know how to answer the question. He had never done an appeal process of this sort before. Ultimately he had no cogent reason to proffer as to why he had not sought out further documents.

530. Mr Bull accepted that Lawrence Stephens had been involved in drafting the response to the appeal. Mr Bull did not consider at the time whether there was a conflict of interest in circumstances where Lawrence Stephens were already acting for Ms Kyosti, Ben Wolstenholme and Mr Toppin in the claimants' Tribunal proceedings.

531. In respect of the New York lease, Mr Bull found:

*I have seen no evidence to support the suggestion that surrender of the NY lease was delegated to Christian Davis and I can confirm that I have no recollection of any such delegation to me. The allegations of double-standards are far too wide to reasonably form part of this appeal.*

532. Cross-examined about the lease, Mr Bull accepted that he was involved with it and its surrender but suggested that he had not understood what was happening. It was entirely opaque to the Tribunal what it was he was seeking to suggest he had not understood. He was of course judging the claimants' culpability in a matter he himself had been significantly involved in.

533. Mr Bull further found in relation to Ms Laikko:

*Furthermore, the surrender resulted in a write-off in the Year 15 Limited consolidated accounts for y/e 30 September 2020 in the sum of circa £430,000 which represented 100% of the liability under the lease's natural termination date of September 2022, but all written off in the 2019/20 accounts. Despite this, Moving Brands Inc remains liable to pay rent until September 2022 with no ability to occupy the same. This preposterous state of affairs was known to you and therefore certainly to MH as well, before the lease was 'surrendered' but without first putting it to the board of Year 15 Limited who, on balance, would have been extremely unlikely to have ever sanctioned such an illogical course of action.*

*1.4*

*I note that paragraph 1.3 of the Grounds accepts that from John Toppin's report even you do not seek to maintain that an irregularity had occurred. However, I find that your knowledge of this irregularity was far sooner, with the Grounds being your latest attempt in this disciplinary process to distance yourself from such misconduct/negligence, whether gross or otherwise.*

*1.5*

*At best, you failed in your role as the second most senior employed person in MB to have a handle on such a serious course of conduct adverse to MB and Y15 Limited's interest that this amounts to gross negligence. At worst, you were dishonest by deliberately failing to fully, honestly and accurately account to the respective boards on all relevant matters. Now seeking in your Grounds to say that it was the fault of two others does you no credit either in respect of this allegation or generally in your position that your employment with MB could possibly have continued. This allegation was a fundamental breach of*

*the trust placed in you by MB, Y15 Limited and your respective fellow board members.*

*1.6*

*I therefore conclude that the decision reached in the disciplinary outcome document dated 8 June 2021 ("the Disciplinary Outcome") was very far from perverse as you complain; indeed, and for the avoidance of doubt, I would have concluded the same.*

534. In light of Mr Bull saying he had not understood about the lease at the time, it was put to him that this was the language of someone who understood accounts and would have understood the New York lease situation; Mr Bull said that the lawyer drafted the findings to ensure they were sound.

535. Another section of the appeal outcome which did not have a feel of something Mr Bull actually wrote was this:

*7.4 Having now read JT's investigation report, the detailed lawyerly representations submitted on your behalf (including immediately after the two day disciplinary hearing), the Disciplinary Outcome and your Grounds, it is clear to me that you likely well knew of the seriousness of misconduct that the report revealed. You therefore had, and continue to have, every interest in seeking to draw matters out until on or after 9 June 2021, at which point you would have been held to be a Good Leaver (under the Shareholders Agreement) and would have been entitled to an ordinary fair valuation for your shares. It seems to me that any such payment would have been something of a windfall, given the serious misconduct for which you have subsequently been found guilty.*

536. In due course, having said he wrote the first draft, Mr Bull accepted that various parts of the appeal outcomes were not his work and eventually said he wrote a list of points for the lawyers to make sound; these were 'brief notes'.

537. As we have said above Mr Bull had never conducted an appeal before and he received no training. He told the Tribunal that he watched the 'two hours' of video hearings. In fact the hearings ran to a total of eight hours.

<u>What did Guy Wolstenholme know about the disclosures?</u>

538. It was relevant to our findings to consider what Guy Wolstenholme knew about the alleged disclosures not made to him, in particular the share transfer and discrimination disclosures. Guy Wolstenholme was cross examined about his knowledge of the share transfer disclosure. It seemed clear to us that Guy Wolstenholme was aware of the issues raised by Mr Heinl. He was for example copied in to the 21 August 2020 email in which Ben Wolstenholme alluded to Mat and Hanna asking him to look into the risk in the system, in

particular to himself and Guy. It seemed inconceivable to us given the nature of the issues raised and the closeness of Ben and Guy that Ben Wolstenholme would not have told Guy Wolstenholme about the share transfer disclosure. We were not persuaded however that there was evidence that he had been told about the discrimination disclosure.

Did anyone else know about the disclosures?

539. It was not suggested and there was no evidence that Ms Kyosti, Mr Bull or Mr Toppin were aware of the disclosures prior to Mr Heinl raising them in his written representations after the dismissals on notice.

**Law**

Protected disclosures

540. Section 43B(1) ERA 1996 defines a qualifying disclosure as a disclosure of information which in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one of a number of types of wrongdoing. These include '(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject'.

541. To be a protected disclosure, a qualifying disclosure must be in circumstances prescribed by other sections of the ERA, including, under section 43C, to the worker's employer.

542. Guidelines as to the approach that employment tribunals should take in whistleblowing detriment cases were set out by the EAT in Blackbay Ventures (trading as Chemistree) v Gahir (UKEAT/0449/12/JOJ):

542.1 each disclosure should be identified by reference to date and content

542.2 the basis upon which the disclosure is said to be protected and qualifying should be addressed

542.3 if a breach of a legal obligation is asserted:

each alleged failure or likely failure to comply with that obligation should be separately identified; and

the source of each obligation should be identified and capable of verification by reference for example to statute or regulation

542.4 the detriment and the date of the act or deliberate failure to act resulting in that detriment relied upon by the claimant should be identified

542.5 it should then be determined whether or not the claimant reasonably believed that the disclosure tended to show the alleged wrongdoing

and, if the disclosure was made on or after 25 June 2013, the claimant reasonably believed that it was made in the public interest.

543. There is a number of authorities on what a disclosure of 'information' is. It must be something more than an allegation; some facts must be conveyed: Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. There is no rigid dichotomy between allegations and facts. A statement must have sufficient factual content and specificity such as is capable of showing one of the matters listed at s 43B(1): Kilraine v Wandsworth LBC [2018] ICR 1850.

544. There is little authority on the issue of what 'likely' means in the various limbs under s 43B(1). In Kraus v Penna plc [2004] IRLR 260, the EAT interpreted 'likely' as meaning 'probable or more probable than not' and said that there must be more than a possibility or risk that an employer might fail to comply with the relevant legal obligation. We note that more recent authorities on the meaning of the word 'likely' in other employment law contexts such as in the context of the definition of disability under the Equality Act 2010 have adopted a lower test for likelihood; in respect of the definition of disability, 'likely' means 'could well happen' but accept that for these purposes we must apply the guidance in Kraus v Penna.

545. The burden of proof is on the worker to show that he or she held the requisite reasonable belief. The tribunal must look at whether the claimant subjectively held the belief in question and objectively at whether that belief could reasonably be held. The allegation need not be true: Babula v Waltham Forest College [2007] IRLR.

546. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the decision to disclose is made: Darnton v University of Surrey [2003] IRLR 133.

547. Factors relevant to the issue of whether a worker reasonably believed that a disclosure was in the public interest include:

547.1 the number in the group whose interests the disclosure served (the larger the number, the more likely the disclosure is to be in the public interest);

547.2 the nature of the interests affected (the more important they are, the more likely the disclosure is to be in the public interest);

547.3 the extent to which those interests are affected by the wrongdoing disclosed (the more serious the effect, the more likely the disclosure is to be in the public interest);

547.4 the nature of the wrongdoing disclosed (the disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing);

547.5 the identity of the alleged wrongdoer (the larger and more prominent the alleged wrongdoer, the more likely the disclosure is to be in the public interest):

(1) Chesterton Global (2) Verman v Nurmohamed [2017] IRLR 837.

Detriment

548. A worker has a right not to be subjected to a detriment by any act or deliberate failure to act on the part of his or her employer done on the ground that the worker has made a protected disclosure under s 47B ERA 1996.

549. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

550. For the purposes of section 47B Employment Rights Act 1996 and section 39 Equality Act 2010, the detriment must be in the employment field: Tiplady v City of Bradford Metropolitan District Council [2020] 3 All ER 928. In Tiplady, the claimant was a local authority employee but also a property owner within the authority's metropolitan area. The claimant was unhappy about the conduct of the local authority staff in relation to two episodes connected with the property. She raised a grievance and subsequently resigned. She brought protected disclosure detriment claims and claims of constructive unfair dismissal, both ordinary and automatic under section 103A. The detriments relied on were all related to the episodes connected with the property and not to Mrs Tiplady's employment.

551. In London Borough of Waltham Forest v Martin [2011] UKEAT 0069/11 a decision by the employer as prosecuting authority to prosecute the claimant for benefit fraud was not a decision made in the employment field in respect of which the claimant could pursue a claim of discrimination in the employment tribunal.

Causation of detriment / burden of proof

552. Where the employee complains of detriment under various provisions of the ERA 1996, including section 47B, the tribunal will consider the complaint under section 48. Section 48(2) provides that it is for the employer to show the ground on which any act or deliberate failure to act was done.

553. The worker must show:

553.1 that he or she made a protected disclosure; and

553.2 that he or she suffered less favourable treatment amounting to a detriment caused by an act, or deliberate failure to act, of the employer;

553.3 a prima facie case that the disclosure was the cause of the act or deliberate failure to act which led to the detriment.

(International Petroleum Ltd v Osipov & others 2017 WL 03049094, EAT and Serco Ltd v Dahou [2017] IRLR 81, CA)

Once the worker has done that, the employer must show:

553.4 the ground on which the act, or deliberate failure to act, which caused the detriment was done;

553.5 that the protected disclosure had no material influence on the treatment in the sense that it played no more than a trivial part in the application of the detriment (Fecitt v NHS Manchester [2012] ICR 372, CA).

554. In the absence of a satisfactory explanation which discharges the burden a tribunal may but is not required to draw an adverse inference: International Petroleum Ltd v Osipov & others 2017 WL 03049094, EAT.

555. The question for the Tribunal is whether the protected disclosure was consciously or unconsciously a reason or ground in the mind of the person inflicting the detriment: International Petroleum Ltd v Osipov & others 2017 WL 03049094, EAT.

556. Unfairness which is unexplained or inadequately explained may be relevant to drawing inferences as to the reason for treatment: University Hospital of North Tess & Hartlepool NHS Foundation Trust UKEAT/0150/20/VP.

557. The Court of Appeal has said that it is open to a claimant to bring a claim against a co-worker for subjecting the claimant to the detriment of dismissal (proposition 1) and to bring a claim against the employer for vicarious liability for that act (proposition 2): Timis and anor v Osipov (Protect intervening) [2019] ICR 655.

558. The Employment Appeal Tribunal in Wicked Vision Limited v Rice [2024] EAT 29 considered Osipov to be binding authority for the proposition that a claim can be brought against a co-worker under section 47B(1A) Employment Rights Act 1996 even where the detriment caused by the co-worker is dismissal.

559. However, the EAT in Wicked Vision concluded that the employer could not be vicariously liable for the detriment of dismissal as the employer's liability for whistleblowing dismissals is limited to claims under section 103A Employment Rights Act 1996. This was contrary to what the Court of Appeal said in

Osipov. Bourne J said that that part of the Court of Appeal's decision was obiter and not binding precedent.

560. In further submissions on this authority, Mr Susskind submitted:

- The EAT in Wicked Vision was in error in concluding that the relevant conclusion in Osipov was obiter. He relied on case law on the scope of the term ratio decidend, in particular the following passages from the judgment of Leggatt LJ in R (Shimei Youngsam v Parole Board [2019] EWCA Civ 229:

*… In looking for the ratio decidendi of a case, the starting-point is always the rulings and reasons given in the judgment(s) to justify the court's decision, read in the light of the facts of the case and the issues that arose. Generally, this is also where the inquiry ends. But where there is scope for argument that a rule or ruling stated in the precedent case was framed too broadly, or that the decision is for some other reason better explained on a different basis which would enable it to be distinguished, the search for the ratio will also involve an evaluation of the strength and persuasiveness of the reasons expressed in the judgment(s) or otherwise advanced or available for the ruling. Such an evaluation will require consideration of a wider legal context in order to assess whether and to what extent the reasoning and the result reached in the precedent case are consistent with other authorities and legal principles (including subsequent authorities and developments in the law).*

*59. Whether it is permissible for a later court to engage in such an assessment depends on a variety of factors. Without seeking to be exhaustive, relevant considerations include: (1) the degree of unanimity or consensus among the judges (assuming there was more than one) who decided the precedent case;*

*(2) the clarity or otherwise of the ruling and of the supporting reasoning; (3) whether or to what extent the point on which the court ruled was in dispute and/or the subject of argument; (4) whether or how clearly the court evinced an intention to establish a binding rule; (5) whether and to what extent prior relevant authorities were considered by the court; (6) whether the court would, or sensibly could, have reached the same result if it had not ruled as it did; (7) whether the court's ruling has been applied or approved in later cases; (8) whether the ruling or its underlying reasoning has been criticised by commentators or by judges in later cases; (9) whether the court considered or contemplated the factual situation that has arisen in the current case; and*

*(10) the level in the court hierarchy of the court which decided the precedent case in comparison with the level of the court deciding the current case.*

561. We concluded that proposition 2 of Osipov was indeed part of the ratio. Although Osipov was concerned with an appeal about the individual liability of directors (and thus primarily with proposition 1), the issue of individual liability under section 47B for dismissal could not properly be determined without an analysis of the whole statutory scheme in respect of liability for whistleblowing dismissals. Section 47B on this issue could not be considered in isolation from

section 103A and the relationship between the potential liability of an employer under section 47B and that under section 103A was an essential part of the Court of Appeal's reasoning in reaching the conclusion we have called proposition 1. We concluded that what we have called Osipov proposition 2 is binding on us.

Automatic unfair dismissal

562. In a case where a claimant says that the dismissal is automatically unfair, the Court of Appeal gave guidance on the approach to be taken in Kuzel v Roche Products [2008] ICR 709, per Mummery LJ:

*the unfair dismissal provisions, including the protected disclosure provisions, presuppose that, in order to establish unfair dismissal, it is necessary for the tribunal to identify only one reason or one principal reason for the dismissal.*

*… the reason or principal reason for a dismissal is a question of fact for the tribunal. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.*

*…the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employers knowledge.*

*…There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant….*

*I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures.*

*This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*

*58 Having heard the evidence of both sides relating to the reason for dismissal it will then be for the tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.*

*59 The tribunal must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the tribunal that the reason was what he asserted it was, it is open to the tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find*

*that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily* so.

Cases on mental processes

563. In a section 103A case where a decision to dismiss is made in good faith by an employee who is unaware of the whistleblowing but is fed false information by an employee who has constructed that information as a response to the claimant's whistleblowing and the employee who has constructed the false information is in the hierarchy of responsibility above the claimant, the state of mind of the constructor of the information is attributed to the employer when considering the reason for the dismissal: Jhuti v Royal Mail Group Limited [2019] UKSC 55.

564. Per Lord Wilson:

*if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.*

565. The EAT in Kong v Gulf International Bank (UK) Limited [2021] 9 WLUK ( HHJ Auerbach) reviewed Jhuti and subsequent case law:

*I note the following points. First, the general rule that the motivation that can be ascribed to the employer is only that of the decision-maker(s) continues to apply. Secondly, there is no warrant to extend the exceptions beyond the scenario described by Underhill LJ, which will itself be a relatively rare occurrence, and the surely highly unusual variation encountered in Jhuti.*

*Thirdly, whether in the scenario contemplated by Underhill LJ, or in the variation described by Lord Wilson, two common features are that (a) the person whose motivation is attributed to the H employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their motivation to be attributed to the employer.*

566. As to whether, in a detriment case, the motivation of another employee can be attributed to a decision maker who does not share that motivation, there is conflicting authority at EAT level:

- In Western Union Payment Services UK Ltd v Anastasiou EAT 0135/13, HHJ Eady said that 'there may be cases where there is an organisational culture or chain of command such that the final actor might not have personal knowledge of the protected disclosure but where it nevertheless still materially influenced her treatment of the complainant'.

- In Malik v Cenkos Securities plc EAT 0100/17 Choudhury P considered that it was impermissible to import the knowledge and motivation of another party to the decision-maker for the purpose of establishing liability under section 47B. He cited the Court of Appeal's decision in Reynolds v CLFIS (UK) Ltd and ors 2015 ICR 1010, CA, an age discrimination case, in which the Court of Appeal held that the acts of those who had provided 'tainted' information to the decision-maker for unlawful reasons had to be considered separately from the actions of the innocent decision-maker. Choudhury J disagreed with the comments in Western Union Payment Services UK Ltd v Anastasiou, which he said were obiter, and distinguished the Court of Appeal's decision in Royal Mail Group Ltd v Jhuti on the basis that Jhuti was a claim for unfair dismissal rather than detriment. He said that it is permissible to attribute the motivation of someone other than the dismissing officer to the employer in a dismissal case in some circumstances because the liability for the dismissal lies only with the employer. However, the same does not apply in a detriment case, where provision is made for individual liability of the workers. Malik was decided between the Court of Appeal and Supreme Court decisions in Jhuti.

567. The respondents argued that Malik was wrongly decided as it was decided before the Supreme Court's decision in Jhuti. We concluded that there was nothing in the Supreme Court's decision in Jhuti (on unfair dismissal) which was inconsistent with Choudhury P's judgment in Malik (on' detriment) and that the approach in Malik was correct.

Ordinary unfair dismissal

568. The test for 'ordinary' unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

569. Under s 98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.'

570. Tribunals must consider the reasonableness of the dismissal in accordance with s 98(4). However, in misconduct cases, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the respondent genuinely believe the claimant was guilty of the

alleged misconduct?
(2) did the respondent hold that belief on reasonable grounds?
(3) did the respondent carry out a proper and adequate investigation?

571. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

572. We have reminded ourselves that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for us to substitute our own decision.

573. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA).

574. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

SOSR dismissals

575. A breakdown in the relationship between employer and employee may constitute some other substantial reason potentially founding a fair dismissal.

576. The procedure to be adopted in respect of a dismissal where breakdown of the relationship is the reason for the dismissal will depend on the nature of the breakdown, the prospects for repairing the relationship and the existence of alternatives to dismissal: Jefferson (Commercial) LLP v Westgate EAT 0128/12.

Victimisation

577. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.

578. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done 'any other thing for the purpose or in connection with' the Equality Act.

579. Under section 27(2)(d), an allegation whether express or not that a person has contravened the Equality Act may be a protected act. It is not necessary that the allegation refers to the Equality Act but the facts asserted must be capable of being a breach of the Equality Act. This is a fact sensitive question and the context in which the complaint is made is likely to be relevant: Fullah v Medical Research Council and anor EAT 0586/12.

580. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRC Employment Code, paras 9.8 and 9.9.

581. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.

582. A claim for victimisation will fail where there are no clear circumstances from which knowledge of the protected act on the part of the alleged discriminator can properly be inferred: Essex County Council v Jarrett EAT 0045/15.

583. In a victimisation or discrimination case, the individual employee who has done the act complained of must be motivated by the protected characteristic or act: CLFIS (UK) v Reynolds [2015] IRLR 562, CA.

Liability of non-employers in victimisation and discrimination cases

584. There is a number of potentially relevant sections of the Equality Act 2010 so far as the complaints of victimisation are concerned:

*109 Liability of employers and principals*

*(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.*

*(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.*

*(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.*

*111 Instructing, causing or inducing contraventions*

*(1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 112(1) (a basic contravention).*

*(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.*

*(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.*

*(4) For the purposes of subsection (3), inducement may be direct or indirect.*

*(5) Proceedings for a contravention of this section may be brought—*

*(a) by B, if B is subjected to a detriment as a result of A's conduct;*

*(b) by C, if C is subjected to a detriment as a result of A's conduct;*

*(c) by the Commission.*

*(6) For the purposes of subsection (5), it does not matter whether—*

*(a) the basic contravention occurs;*

*(b) any other proceedings are, or may be, brought in relation to A's conduct.*

*(7) This section does not apply unless the relationship between A and B is such that A is in a position to commit a basic contravention in relation to B.*

*(8) A reference in this section to causing or inducing a person to do something includes a reference to attempting to cause or induce the person to do it*

*112 Aiding contraventions*

*(1) A person (A) must not knowingly help another (B) to do anything which contravenes Part 3, 4, 5, 6 or 7 or section 108(1) or (2) or 111 (a basic contravention).*

*(2) It is not a contravention of subsection (1) if—*

*(a) A relies on a statement by B that the act for which the help is given does not contravene this Act, and*

*(b) it is reasonable for A to do so.*

*(3) B commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (2)(a) which is false or misleading in a material respect.*

*(4) A person guilty of an offence under subsection (3) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.*

*(5) For the purposes of Part 9 (enforcement), a contravention of this section is to be treated as relating to the provision of this Act to which the basic contravention relates.*

*(6) The reference in subsection (1) to a basic contravention does not include a reference to disability discrimination in contravention of Chapter 1 of Part 6 (schools*).

585. For 'knowing' helping to have taken place, 'it is enough that, on the evidence, the conclusion can be drawn that discrimination as the probable outcome was within the scope of his [the helper's] knowledge at the time. It would not need to be in the forefront of his mind nor would he need to have specifically addressed his mind to it': Allaway v Reilly and anor [2007] IRLR 864, EAT.

586. Liability of agents in whistleblowing cases is covered by section 47B of the Employment Rights Act 1995:
*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 W'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.*

Relevant agency principles

587. A corporate body may act through its board of directors as agents (operating as a body of co-agents); in some circumstances a shareholder may act as the company's agent: see *Bowstead on Agency*, chapter 1, para 1-028.

588. As Lord Diplock said in Tesco Supermarkets Ltd v Nattrass 1971 UKHL 1:

'A corporation is an abstraction. It is incapable itself of doing any physical act or being in any state of mind. Yet in law it is a person capable of exercising legal rights and of being subject to legal liabilities which may involve ascribing to it not only physical acts which are in reality done by a natural person on its behalf but also the mental state in which that person did them. In civil law, apart from certain statutory duties, this presents no conceptual difficulties. Under the law of agency the physical acts and state of mind of the agent are in law ascribed to the principal…'

Polkey reduction

589. Section 123(1) ERA 1996 provides that
'…the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in the all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.'

590. A tribunal will be expected to consider making a reduction of any compensatory award under section 123(1) ERA where there is evidence that the employee might have been dismissed if the employer had acted fairly (see Polkey v AE Dayton Services 1988 ICR 142; King and ors v Eaton (No.2) 1998 IRLR 686).

591. The authorities were summarised by Elias J in Software 2000 Ltd v Andrews and ors [2007] ICR 825, EAT. The principles include:
in assessing compensation for unfair dismissal, the employment tribunal must assess the loss flowing from that dismissal, which will normally involve an assessment of how long the employee would have been employed but for the dismissal;

if the employer contends that the employee would or might have ceased to have been employed in any event had fair procedures been adopted, the tribunal must have regard to all relevant evidence, including any evidence from the employee (for example, to the effect that he or she intended to retire in the near future);

there will be circumstances where the nature of the evidence for this purpose is so unreliable that the tribunal may reasonably take the view that the exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on the evidence can properly be made. Whether that is the position is a matter of impression and judgement for the tribunal;

however, the tribunal must recognise that it should have regard to any material and reliable evidence that might assist it in fixing just and equitable compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence;

a finding that an employee would have continued in employment indefinitely on the same terms should only be made where the evidence to the contrary (i.e. that employment might have been terminated earlier) is so scant that it can effectively be ignored.

592. As Elias J said in Software 2000:

‘The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice. It may not be able to complete the jigsaw but may have sufficient pieces for some conclusions to be drawn as to how the picture would have developed. For example, there may be insufficient evidence, or it may be too unreliable, to enable a tribunal to say with any precision whether an employee would, on the balance of probabilities, have been dismissed, and yet sufficient evidence for the tribunal to conclude that on any view there must have been some realistic chance that he would have been. Some assessment must be made of that risk when calculating the compensation even though it will be a difficult and to some extent speculative exercise.’

Assessment of evidence

593. The Tribunal panel bore in mind the reflections of Leggatt J in Gestmin SGPS SA v Credit Suisse [2013] EWCA 3560 (Comm):

*While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.*

*Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*

*Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly*

*vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.*

*The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegiances created by the process of preparing a witness statement and of coming to court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.*

*Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she is being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.*

*It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.*

*In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary*

*evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth.*

**Submissions**

594. As indicated earlier in these Reasons, we received detailed written submissions from both parties, supplemented by oral submissions.

595. It would not be possible to refer to all of those submissions without rendering these Reasons longer than would be sensible. We considered, however, that it was useful to set out the very broad themes of those submissions. We have of course, taken the submissions into account in their entirety.

Claimants

596. The claimants' case was that almost every aspect of their dismissals was dishonest / conducted in bad faith. We were asked to find that many if not most of the respondent's witnesses were unreliable.

597. The argument for the claimants is that the unusually poor treatment of the claimants could only be explained by Mr Ben Wolstenholme in particular feeling threatened by Mr Heinl's protected disclosures.

598. Mr Heinl's primary case on causation was that the decision to dismiss him summarily, ostensibly made by Ms Kyosti, was in fact made by Mr Ben Wolstenholme with the support of Mr Guy Wolstenholme and Mr Bull long before the dismissal itself.

Respondents

599. The claimants were dismissed because of a fundamental and irretrievable breakdown between the claimants, the two most senior executives of the first respondent, and the board of the first respondent. The relationship had broken down over a period of time and by late 2020 the first respondent was in peril. In February 2021, information came to light which brought their integrity into question and a decision was taken on 17 February 2021 to remove the claimants from the business. They were dismissed with notice on 18 March 2021. The respondents suspected the claimants to have been guilty of serious misconduct. Those suspicions turned out to be well-founded and the claimants were summarily dismissed for gross misconduct on 8 June 2021 by Ms Kyosti. There were no protected disclosures or protected acts, as

evidenced by the fact that there were no references in documents to the alleged disclosures.

**Conclusions**

General observations about reliability of evidence

600. Both sides invited us to make findings about credibility and reliability.

Respondents' credibility and reliability

*Respondents' approach to documents*

601. The claimants said that the respondents made efforts to hide documents during the claimants' employment with a view to future litigation. We considered that there were numerous examples of this activity, including the following:

- The respondents instructed their lawyers to instruct the corporate intelligence firm, GPW, in the belief that legal professional privilege would thereby attach to the investigation carried out by GPW. That belief was incorrect;
- One of the respondents' solicitors was added to a WhatsApp group about 'Phoenix' with the express purpose of claiming privilege for the discussion;
- Mr Toppin asked GPW to produce an invoice which was 'really discrete [sic]';
- Ms Kyosti on 22 April 2021 in an email to the other individual respondents suggested Board matters be moved to private emails as 'we will now begin Phase 2 legal process with M & H'.

602. This lack of candour and desire to hide documents continued into the proceedings themselves.

603. The claimants described the respondents' approach to disclosure as 'scandalous'. We concluded that the respondents had not complied willingly with their duties of disclosure; after specific requests they voluntarily made some further disclosure; some documents had had to be the subject of (successful) applications for specific disclosure[i].

604. There were occasions where statements in correspondence were at best economical with the truth. In a skeleton argument on behalf of the respondents for a hearing on 24 June 2022 to determine a specific disclosure application by the claimants, counsel stated, no doubt on instructions:
*ITG is a forensic company that was engaged by Moving Brands to upload data for the purposes of the disciplinary process and is a subcontractor to GPW. Pebbles is the previous name for Optimity, who manage Moving Brands' IT infrastructure. Far from being involved in the "plan to terminate" the Claimants' employment, Mr Worman was simply coordinating the practical steps required to affect their removal from Moving Brands' business.*

605. GPW were said to have been engaged ‘to obtain company property from Cs’.

606. That repeated a statement previously made by the respondents’ solicitors in correspondence. It was an untrue statement as has become clear after the documents in respect of which the respondents resisted disclosure were ordered to be disclosed. Mr Worman and GPW were not just involved in coordinating practical steps such as obtaining company property from the claimants. They were involved in forensic investigation designed to obtain evidence of misconduct.

607. The GPW report and related documents were only disclosed after the claimants said they would make an application during the course of the hearing. The respondents continued to assert that the documents were privileged but submitted that they had disclosed them to avoid a satellite litigation sideshow. It was difficult to see how that assertion could properly be supported when the evidence did not appear to the Tribunal to suggest that the dominant purpose of the report and associated documents was to be deployed in litigation.

608. It was clear to us from considering correspondence and orders that a number of relevant documents had had to be extracted from the respondents, who gave untrue instructions to their lawyers in resisting the applications. This was not a case, as was submitted on behalf of the respondents, of some documents being missed in a complex disclosure exercise. These were omissions based on instructions which were not true rather than oversight in a large exercise carried out on the basis of instructions given in good faith. Whilst it may be correct that the claimants also pursued some applications which were unsuccessful and/or too broad, it is unsurprising that they felt the need to challenge the respondents’ disclosure exercise. And of course challenging a complex disclosure exercise is itself complex and requires a significant amount of detailed work. Although the application made during the full merits hearing for allegedly privileged material did not ultimately lead to the disclosure of any documents which were relied on by the claimants, we could not criticise the claimants for making the application given the striking lack of candour on the part of the respondents, including, by the stage of the application, the performance of the respondents’ witnesses whilst giving evidence. We discuss that aspect further below.

609. Ultimately the Tribunal was not able to be confident that the respondents had disclosed all relevant documents. That was a feature of the respondents’ conduct we had to take very seriously and which necessarily affected the rest of our decision making, particularly having regard to the important factual disputes in these proceedings and our consciousness of the Gestmin guidance.

610. We concluded that there was a sustained and troubling effort by the respondents to keep material from the Tribunal and a flouting of our expectation that parties will deal with the proceedings in good faith.

*Respondents' witnesses*

*Mr Toppin*

611. We concluded that Mr Toppin made statements in his witness statement which were at best partial truths, for example: *GPW were not involved in the decision to dismiss Mat and Hanna. The firm simply coordinated the practical steps required to affect the Mat's and Hanna's dismissals (e.g. collection of physical devices and data).*

*GPW had also been engaged on 30 March 2021 to conduct a forensic examination of the company's systems and information and also devices used by Mat and Hanna, including for example, laptops, iPads and mobile phones. They were engaged to gain further understanding of how the company was being run and whether there were any matters that would inform the disciplinary investigation*.

*612.* This conceals the fact that the proposal to involve GPW in investigating possible misconduct by the claimants significantly predated 30 March 2021.

613. Other areas where we considered that Mr Toppin had not been truthful with the Tribunal, included:

- In his witness statement he denied having a role in matters concerning the claimants 18 March dismissals when it was clear from documents that his involvement had been extensive;
- He concealed the fact that discussion about removing the claimants predated 17 February 2021 when documents disclose that is the case; see in particular his email of 4 February 2021 referring to 'leadership change';
- We concluded that evidence he and others gave about a reference in Mr Eveleigh-Evans' email of 5 March 2021 to 'access[ing] Bad Leaver status' was untrue. It was clear the list in the email emanated from what was described as 'John's A -L list'. The suggestion made in evidence that this list was drafted by a dyslexic employee who wrote 'access' when he meant 'assess' was simply incredible in the face of the evidence that it was the work of Mr Toppin and bearing in mind the repetition of the statement without correction in other documents;
- Mr Toppin said he did not draft 'target' areas for GPW when it appeared to us from documents that he did. He was tasked with doing it and no else one took ownership;
- He attempted to minimise his own role in the instruction of GPW and was involved in trying to obtain the cloak of privilege for GPW's work;
- He gave evidence that the GPW investigation was also about state of the company; that was clearly not true and was contradicted by board meeting minutes;
- He suggested in evidence that Mr Bull did not understand the dealings with the New York lease, which assertion we found incredible;

- He said that Mr Heinl was copied into all correspondence on the New York lease; in cross examination he was taken to many documents where Mr Heinl was not copied in.

614. We found that Mr Toppin's investigation report was knowingly misleading:
- Mr Toppin's description of how his suspicions were aroused about the claimants' conduct is essentially a fiction:
*Arousal of suspicion*
*10. Whilst I have for some time had some concerns about the conduct of HL and MH (as set out in Part C of this Investigation Report), it was as a result of an email exchange that took place with Eric Fishman, an American lawyer and partner at the firm of Pryor Cashman, on 14 and 15 April 2021, that my suspicions were truly aroused.*
*11. Consequent upon my discovery that HL had inexplicably represented to the board of directors something which did not appear to be true, I engaged in further enquiries in order to check on behalf of MB and its parent company whether there was anything so serious that it required it to take steps to protect its interests. This report is the product of those enquiries and in the manner set out in Part D, implicates each of HL and MH; albeit that in many respects this is by reason of them enjoying the post of the two most senior employees of MB with a considerable degree of autonomy.*
*12. I understand that the original decision to dismiss HL and MB, as set out in paragraphs 4 and 5 above, was one that was predicated upon a fundamental breakdown of the working relationship as between them and the other directors at the time (at which point I was not even on the board).*
- His findings on the HPE loan issue have to be observed against a background where he had earlier described the issue as 'leverage for discussion with Andrew Conway'. He made no mention of a possible legal action against HPE in the investigation report ;
- Nothing in Mr Toppin's witness statement revealed that the report was actually drafted by the company's solicitors on the basis of access to the underlying documents and some discussion with Mr Toppin, the extent of which is unclear. That fact fully emerged in questions from the Tribunal.

615. Mr Toppin, like some of the other respondent witnesses, gave the impression of a man so steeped in untruths or partial truths, that it was easier to keep wading through them rather than return to the shore of actual facts.

616. Regrettably we concluded that Mr Toppin was not a credible or reliable witness.

*Mr Worman*

617. Mr Worman described the involvement of GPW in his witness statement:

*Our involvement in this matter was limited to a) the liaison with ITG on the collection of IT equipment; b) instructing ITG to host recovered data on*

*Relativity; c) the review of the material obtained during the e-discovery process*

618. Mr Worman disagreed in oral evidence that this gave a misleading impression but it is so limited and cagy as to be unhelpful, particularly in a context when other witnesses were misleading about GPW's role.

*Mr Ben Wolstenholme*

619. Some examples of unsatisfactory evidence from Ben Wolstenholme were the following:
- He had no satisfactory explanation for the statement by Mr Dent that 'GW will pass to BW as a gift the level of dividends that he would have received if he had continued to own the shares. There is no written agreement in relation to this.'
- He misrepresented the extent of GPW's involvement and must have been involved in efforts to conceal GPW's role and documents relating to GPW from the Tribunal;
- He made assertions designed to impugn Mr Heinl as to matters such as bullying and talent flight which were unevidenced;
- His criticisms in oral evidence of Mr Heinl's 'elaborate and ornate' Covid plan contradict what he was saying in contemporaneous documents;
- What he says about the relationship with the claimants at earlier points is contradicted by documentary evidence;
- There was extensive documentary contradiction of his case that there had been no share transfer disclosure, including his own notes, particularly when read with Mr Heinl's, which we found credible and reliable. His persistence in denying he knew about the disclosure in the face of the record was concerning. He could not explain the 21 August 2020 email and other clear references to the issue in his own documents and emails sent to him by Mr Heinl;
- His responses in cross examination to questions about the emails referring to 'risk in the system' and 'GW/BW share status' were evasive. He denied that they related to any protected disclosure but was unable to say what they did refer to;
- He tended to give hyperbolic accounts of his relationship with the claimants which were unsupported by particulars and unevidenced by documents. He shared a tendency with other of the respondents to paint an impressionistic picture of events unanchored in facts.

620. We also bore in mind the findings we made about his behaviour to the claimants, ie the levels of subterfuge in which he engaged by making an elaborate plan behind their backs, forwarding documents to Ms Kyosti without their knowledge and ultimately seeking to hide materials not just from the claimants but also the Tribunal.

*Ms Kyosti*

621. Ms Kyosti in her witness statement misrepresented the role of GPW.

622. Another disturbing feature of Ms Kyosti's evidence was the fact that in her witness statement she made a number of further allegations against the claimants which had not been the subject of any investigation and which were unsupported by any documents. When asked in evidence whether she had looked at mitigating features when conducting the disciplinary, she took the opportunity to launch into a list of unevidenced allegations against the claimants. It appeared to the Tribunal that she thought she could poison our minds, that she lacked any sense of objectivity or fairness in her dealings with the claimants and by this point that lack of objectivity or fairness had become sustained animosity towards them.

623. Ms Kyosti in her witness statement said:

*Hanna's conduct in erasing data from her phone, which constituted the destruction of company data, was in my view enough to start a disciplinary hearing and I informed the team immediately of my views. Given the severity of the other 4 allegations in the investigation report, the destruction of company data did not form its own stand-alone issue.*

624. This was not correct, as the documents showed, but Ms Kyosti continued to repeat the allegation.

625. Ms Kyosti repeatedly misrepresented to the claimants at the disciplinary hearings the extent of her previous involvement in the processes leading to their dismissals: 'I sort of inherited this'. She said that she had no comment on the decision to do an investigation when she was the person who proposed that there be an investigation (as a number of witnesses stated in their witness statements). She told Mr Heinl that the only report she had seen was Mr Toppin's when in fact she had also seen the GPW report. She repressed that report, which did not find any evidence for wrongdoing by the claimants.

626. Ms Kyosti was not candid with the Tribunal about her role in the dismissals of the claimants on notice.

627. Like Mr Toppin, she misrepresented to the Tribunal the genesis of the disciplinary investigation:

*Later, as the Board investigations began yielding insights into the conduct and behaviours of Mat and Hanna, it became clear that information had indeed been obfuscated and misstated by them to the Board. The core concerns were financial reporting internally and externally, preferential financial treatment of Mat and Hanna as well as their core associates with respect to salary reductions and TOIL without consent of the Board, their behaviour in repeatedly ignoring Board requests from the Chair, to mention a few. A*

*disciplinary process was therefore initiated to understand the extent to which gross misconduct and/or gross negligence and/or gross incompetence had occurred.*

628. There were numerous other occasions when we felt that Ms Kyosti's evidence was lacking in candour. A small example was her suggestion that 'noise' at the meeting where the claimants were dismissed might have been 'any disruption to the meeting' when it was clearly a reference to the claimants expressing concern / asking questions about their dismissals.

629. Regrettably, we were generally unable to find Ms Kyosti to be a credible or reliable witness given her willingness to mislead on important issues.

*Mr Bull*

630. Mr Bull and other witnesses on his behalf made assertions about what Mr Bull knew or understood which were simply not credible.

631. We considered that he was misleading as to the level of his actual involvement in the claimants' appeals.

632. Mr Bull suggested that he did not understand the dealings with the New York lease when it was apparent from documents that he had been intimately involved in those dealings and had a good understanding of how the lease worked. He adopted the Mr Toppin account that he somehow lacked the technical or commercial nous to understand what were not terribly difficult concepts or be involved in what was essentially a commercial decision. That account was inconsistent both with the role he occupied and the documentary evidence as to his involvement with the lease.

*Guy Wolstenholme*

633. Guy Wolstenholme also tended in evidence to rely on a rather histrionic narrative about the relationships with the claimants which was heavy on adjectives intended to be descriptive of the claimants and relatively short on detail. We did not consider that he was frank with the Tribunal about what he knew about the share transfer disclosure.

<u>The claimants' credibility</u>

634. The respondents submitted that the claimants were dishonest witnesses and that Ms Laikko's credibility was 'in tatters'.

635. Ms Laikko was said in general not to have made any or any reasonable concessions. She was said to have been evasive and to have come equipped with pre-prepared answers.

636. It was suggested that Ms Laikko would say anything to prejudice the respondents' case and that the best example of that was a flippant comment she made about the commissioning of Mr Toppin's report, 'Where did all the cash go?'. She said that Mr Ben Wolstenholme 'required an older man to say the same thing' she had said.

637. We reviewed Ms Laikko's performance overall as we were invited to; although she was at times cagy, we did not consider she was any more cagy than witnesses typically are in cases which are important to them when under pressure. We did not find her evasive; she was sometimes longwinded or answered a question off point and had to be redirected but that seemed to us to be consistent with being nervous. We found her evidence to be largely straightforward and considered. The one example raised by counsel for the respondents did not seem to us to be very meaningful. It was one mildly flippant or ill-considered answer in a number of hours of challenging cross examination. We considered that there were examples of her honestly putting her hands up to errors during her employment by the first respondent – the HPE lease being a case in point. We also note GPW's failure to find any evidence against Ms Laikko in its review of over 330,000 emails.

638. Mr Heinl was described by respondents' counsel as evasive. It was said that he had adopted 'untenable positions'.

639. One example given was that Mr Heinl did not accept that he had been gifted the shares in the second respondent in respect of which he was awarded a one off special bonus to pay for the shares. A further example was that he did not accept that he and Ben Wolstenholme had been engaged in 'mediation' with Ms Eldridge.

640. We accepted that Mr Heinl was at times guarded and concerned about whether answering in a particular way might damage his case. The very small number of examples of this we detected did not cause us to have any significant concerns about the reliability of his evidence as a whole.

641. Overall we considered that both claimants were trustworthy witnesses doing their best to give truthful evidence.

642. We have in all cases made factual findings based on the totality of the evidence we had including in particular documentary evidence and have not simply preferred any witness' evidence over any other's, whatever our findings on credibility and reliability overall.

<u>Protected disclosures</u>

643. We consider each alleged disclosure in turn.

644. We note that whilst the pleadings rely on particular disclosures, Mr Heinl's case was that he raised the matters of concern on a number of occasions over time. Mr Heinl told us in evidence that after the claim form was presented he had found, during a house move, some contemporaneous notes he had made and that had helped refresh his memory as to the dates of some disclosures.

645. The respondents relied heavily on a lack of documents containing or evidencing the disclosures. As to that, Mr Heinl said that he did not typically write emails in that way, Slack was quite a public forum, and it had seemed more appropriate to raise these matters in one-to-one discussions.

646. For each disclosure, broadly, and making sure to apply the tests from the authorities:
- We have looked carefully at what evidence we have about the disclosure being made, including any documentary evidence, and decided what we think was said and when we think it was said;
- We have considered whether Mr Heinl had a reasonable belief in the wrongdoing he asserts the information disclosed tended to show;
- We have considered whether he had a reasonable belief that the disclosure was in the public interest.

*Share transfer disclosure*

647. The parties were in agreement that there had been a transfer of shares from Ben to Guy Wolstenholme by way of a gift and that the transfer was in some sense tax-related.

648. Ben Wolstenholme's evidence was that there were no disclosures. The 2016 share transfer was open knowledge for many years amongst the leadership team and the respondents' professional advisers. The arrangements were made to avoid the second respondent being a US owned company. He said that the transfer was properly recorded and declared as a gift. Guy Wolstenholme also denies having any awareness of such discussions.

649. Against that evidence, we set Mr Heinl's account that he made the disclosures and the following documentary evidence in particular:
- Mr Heinl's notes of meetings with Ben Wolstenholme and Ms Eldridge on 2 July 2020 and 19 August 2020. The notes refer (first meeting) to 'BW + GW share dealing' and comment 'NO BLOWBACK ON OTHER [SHAREHOLDERS]' and (second meeting) 'Risk (tax, unilateral decision). Blow back…value for himself + Guy only – share dealing – blowing MW/CD down'.

- Ben Wolstenholme's email to Ms Smith and Guy Wolstenholme of 21 August 2020 in which he says that Mat and Hanna have asked him to look at risk in the system – 'are there risks to them in the current status of the shares – if I move to payroll I assume that tidies up dividend issues until a potential end of year dividend which will go to Guy anyway – and we'll sort through anything after that between us inter-personally as a family.'
- Correspondence between Ben Wolstenholme and Mr Heinl on 26 / 27 and August 2020 as described at paragraphs 255 – 256 above.
- Assorted notes of Mr Heinl's described above.
- Ben Wolstenholme's notes above.
- 22 August 2020 advice sought from Mr Postlethwaite (para 253 above).

650. The respondents submitted that the timing of the disclosures made no sense. If the claimants had known about the share transfer and had concerns about it since 2017, why would Mr Heinl only have been raising those concerns in 2020? The reasons put forward by Mr Heinl were:
- That at this point two new shareholders were being brought in;
- The business was in difficulty securing approval for the US paycheck protection scheme because the business was controlled outside of the US due to the shareholding arrangements;
- There were discussions around shareholder aims with Mr Eldridge.

651. The respondents submitted that Mr Heinl was inconsistent as to when he knew about the share transfer. In evidence he said that he found out in spring 2017 but in cross examination he was taken to an email showing he was aware in January 2017. The respondents said that if he had seriously believed there were issues about the transfer, it made no sense that he took three years to raise it, given his statutory and fiduciary duties. His answer in cross examination that he thought it was being dealt with by Ben Wolstenholme or long term advisers was implausible. Ultimately we concluded that the documentary record tended to support the disclosures and the fact that the record was somewhat bitty made them more rather than less credible. The fact of the share transfer itself was not a secret but the implications were, ie that Ben might be continuing to benefit from shares which he had transferred to Guy.

652. We did not consider that Mr Heinl's credibility was damaged by the fact that he did not recall when in 2017 he became aware of the transfer. It seemed to us unsurprising that he would not have a clear memory at this distance in time, particularly if he had not reviewed every document in the many thousands in the bundle.

653. Nor did we think that the failure to raise the issue in 2017 meant that the claimant had not raised it in 2020. In 2017 the relationship between Ben Wolstenholme and Mr Heinl seems to have been much closer and more

trusting than it was in 2020. There appeared to Mr Heinl to be external advisers involved, in particular accountants. In 2020, the claimant had reason to be concerned that the situation had not been regularised and was likely to affect the business. The Janaury 2020 meeting would not have allayed concerns.

654. It was also a factor in our conclusions that the credibility of Ben and Guy Wolstenholme had been damaged in the ways we describe above.

655. However the most important factor in our conclusions was the significant support Mr Heinl's account received from the documentary record. The most important documents in this respect were the 21 August 2020 email, the 26/27 August 2020 correspondence, the shareholder meeting agenda of 27 August 2020, and, underpinning these, Mr Dent's original memorandum.

656. We accepted that in the course of a number of calls in July / August 2020, Mr Heinl raised his concerns about the share transfer and that on one call in mid-August 2020 he made in substance the disclosure he described in evidence having made.

Reasonable belief in wrongdoing

657. The significant wrongdoing Mr Heinl says he believed the information relied on tended to show was that someone, probably Ben Wolstenholme, was evading tax. He said that he believed that was the case because of what had been said by the accountants, the fact that he knew Ben Wolstenholme disliked paying tax and the research he did in relation to the UK Criminal Finance Act 2017. He was also concerned that the Wolstenholmes might not be acting in the best interests of the company as directors and raised concerns about whether there might be a breach of the shareholders' agreement and a lack of consent of other shareholders. We were not persuaded he had a reasonable belief in the latter concern as we did not see anything in the documents which really supported such a concern.

658. Looking at what Mr Heinl perceived to be concealment (the reference to documents being locked in a safe, Ben Wolstenholme's discomfort when the topic was raised) and the lack of clear answers from Ben Wolstenholme, we concluded that he believed and reasonably believed that the information he disclosed tended to show the types of wrongdoing he described. Factors which tended to support that belief as being reasonable included the lack of answers in the January 2020 meeting with the accountants, the fact that the questions around the issue had been dragging on since 2017, the fact that Ben Wolstenholme was not able to give a clear answer when the matter was raised, and most significantly the document from the previous CFO, Mr Dent, saying that dividends would pass from Guy to Ben as a gift.

659. The respondents pointed to Mr Heinl's failure to seek legal advice on the issue. It seemed to us that in the context of the relationships within the company at the time, it would have been very difficult for him to have sought separate legal advice and then presented that to the Wolstenholmes or to have insisted that the company obtain legal advice. The more likely as being a less hostile and more prudent first step was to do what Mr Heinl did and initially raise the issues with Ben Wolstenholme.

Reasonable belief in public interest:

660. The respondents did not submit that if such disclosures were made Mr Heinl could not reasonably have believed they were in the public interest. We considered that the effects of the alleged wrongdoing were broad enough to satisfy the test – wrongdoing which potentially put the companies in peril was of interest to all of the employees in the group and also to clients of Moving Brands.

*Business conduct disclosure*

661. This was something of a ragbag of different concerns allegedly made and repeated on a number of occasions and we have had to consider them individually as well as collectively.

662. Ben Wolstenholme denied that any of these alleged disclosures were made.

663. We accepted that Mr Heinl over this period of time raised issues with Ben Wolstenholme about the following matters:
- The company accountants providing services to the Wolstenholmes for their personal tax affairs;
- The payment of Guy Wolstenholme's taxes by the company;
- The work done by Moving Brands for Madefire.

664. All of these were areas which a costs conscious CEO at a time of financial difficulty during the early months of the pandemic was likely to have brought up and they were topics likely to arise when reviewing the governance of the company.

665. There was also some limited documentary support for some of these disclosures in the form of Mr Heinl's notes.

666. As to the issue of whether there was a disclosure about Mr Ben Wolstenholme being paid personally for work done by Moving Brands, we were not persuaded that we had sufficient evidence to make a finding that there had been any such disclosure. We were not clear as to what underlying facts were said to support such a disclosure. The pleading referred to payment and Mr Heinl's witness statement asserted that Ben Wolstenholme had wanted to be paid an extra fee of £6000. What was put to Mr Wolstenholme in cross

examination was that he had received a free suit and that this was supported by an email from 4 September 2018.

667. We accepted that Mr Heinl had raised some issues over this period about how the founders were doing business. He was concerned with what was financially prudent at a difficult time. He had concerns about saving money and more generally about accountability.

*Was it reasonable to believe in the wrongdoing alleged?*

668. In the case of these disclosures, the wrongdoing pleaded was breach of directors and/or fiduciary duties, personal tax / benefit in kind evasion, breach of corporate obligations relating to the use of expenses by employees and/or directors and corporate tax obligations arising in connection with such expenses, breach of audit obligations, intellectual property laws and/or fraud.

669. As to the accountancy services, the evidence we had and accepted was that professional services bills were being paid for all senior staff and were properly included in the audited accounts as benefits in kind. The claimants themselves received this benefit and Ms Laikko signed off the accounts yearly which recorded these payments.

670. Whilst we accepted that Mr Heinl might have had concerns about whether in financially straitened times it made sense for the company to be providing these benefits to senior employees, we were not satisfied that he believed or had grounds for a reasonable belief that these payments represented any of the types of wrongdoing pleaded.

671. As to the allegation about Moving Brands paying Madefire expenses, it was not clear what evidence Mr Heinl relied in in support of a belief that this was taking place.

672. So far as the allegation that Moving Brands was doing free work for Madefire is concerned, it was clear from the documentary evidence that Moving Brands had paid nearly USD650,000 to Moving Brands over its lifespan. This was recorded in documents which Mr Heinl could have accessed. We accepted that Mr Heinl had done some work himself for Madefire for which Moving Brands had not been paid. His evidence that this had gone on for a significant period of time suggested to the Tribunal that he had not thought at the time that there was any wrongdoing.

673. As to the work done by Guy Wolstenholme, Mr Heinl accepted that Guy Wolstenholme had rented a separate studio space. The respondents' case was that this was to carry out Madefire work when he went down to four days a week for Moving Brands. Mr Heinl did not accept that but did not have an alternative explanation for the studio space. Overall we were not

persuaded that Mr Heinl could have had adequate facts on which to base a belief that there was any relevant wrongdoing.

674. So far as Guy Wolstenholme's tax liabilities were concerned, Mr Heinl accepted that when these were paid by the company, they took the form of a director's loan, special dividend or advance on salary. That would have been apparent from documentation available to Mr Heinl. We could see no basis on which Mr Heinl could reasonably have believed that this amounted to any of the pleaded types of wrongdoing.

675. So far as the suggestion that Ben Wolstenholme was charging separately for work done for Norton & Sons was concerned, we considered that the allegation had shifted shape in the course of the hearing from an allegation that money was asked for to an allegation that Ben Wolstenholme obtained a free suit. The lack of consistency as to what the substance of the allegation was and the historic nature of the allegation led us to conclude that we were not satisfied that Mr Heinl reasonably believed there was any relevant wrongdoing.

676. In relation to the business conduct disclosures as a whole, our conclusion is that Mr Heinl raised these issues as costs issues at the time but that the suggestion that they constituted some relevant form of wrongdoing is an ex post facto one.

677. We accordingly did not find that the business conduct disclosure was a protected disclosure.

*Discrimination disclosure*

678. So far as this disclosure is concerned, we were very much weighing the account of Mr Heinl against that of Ben Wolstenholme without the assistance of any contemporaneous documentation. Ultimately we concluded that we accepted Mr Heinl's account:

- His credibility and reliability as a whole were greater than those of Ben Wolstenholme. Mr Wolstenholme had also denied that other disclosures were made where there was significant support in the documents (the share transfer disclosure(s));
- Mr Heinl referred to having made these disclosures to Mr Wolstenholme in his written submission of 16 April 2021;
- A witness deliberately fabricating an allegation of discrimination would, we think, probably have put the discrimination aspect more forcefully. Mr Heinl's account which raises it more obliquely seemed to us to be inherently unlikely to be a fabrication or indeed something he was engineering to obtain some sort of advantage.

679. The respondents submitted that in any event the timing suggested a lack of reasonable belief in breach of a legal obligation. If the behaviour had been going on for some time, why would Mr Heinl only have raised in in July 2020? It was suggested that the answer was he was seeking to protect his position at a time when the relationship with Ben Wolstenholme had reached rock bottom.

680. It seemed to us that this was a contrived explanation. What seemed to us more likely is that the issues were becoming significant because of Ben Wolstenholme's increased involvement in the business since 2019. The fact that the relationship between Ben Wolstenholme and Mr Heinl was deteriorating probably made Mr Heinl more willing to confront Ben. The work with Ms Eldridge was encouraging both Mr Heinl and Ben Wolstenholme to think about their relationship and articulate concerns.

681. The respondents also pointed to the fact that the issue was not raised with the board. It seemed to us unsurprising that the issue was not raised in this very busy period with a board which included the other founders, Guy Wolstenholme and Mr Bull.

*Is it a protected act?*

682. There was no mention in the disclosure of Ms Laikko's nationality or anything which could be understood as a proxy for nationality.

683. We considered that there was simply insufficient information in the disclosure to be an allegation of race discrimination.

684. So far as sex was concerned, there was no explicit reference to sex but Mr Heinl said in his evidence that sex was 'implicit and I think explicit in the conversation I had with him…It was obvious in the conversation that I was talking about her as a woman and the only woman in the group.'

685. We considered that the reference to treating Ms Laikko, the only woman on the board, as a secretary, would made it clear to Ben Wolstenholme that this was an allegation of sex discrimination. The role of secretary is historically and stereotypically a role performed by women. Ms Laikko was the senior woman in the company and the only female member of the board. In context, we consider that this was a protected act.

*Was it also a protected disclosure?*

686. We accepted Mr Heinl's evidence that he believed that there was sex discrimination involved in Ben Wolstenholme's treatment of Ms Laikko as described by him and that it was reasonable to put that construction on the treatment. The fact that Ms Laikko herself did not identify her treatment as sex discrimination or make a complaints about sex discrimination does not

mean that Mr Heinl's interpretation was unreasonable. Two people with different vantage points may put different and reasonable constructions on the same information. The person who is the object of discrimination may be reluctant to see it.

687. In terms of public interest, although this disclosure only concerned the treatment of Ms Laikko, given the seriousness of sex discrimination and the seniority of Ms Laikko, it seemed to us that it would affect and have been of interest at least to the employees of the Moving Brands group, and of concern to female employees in particular, that the chair was said to have been discriminating against the most senior female executive. We considered that Mr Heinl could reasonably believe the disclosure was in the public interest.

Findings relevant to the dismissals

*Respondents' allegations about the claimants' behaviour and breakdown of relationships with the rest of the board*

688. We note that because of our significant concerns about the reliability and credibility of some of the respondents' witnesses we have been particularly reliant on the documentary record.

689. For reasons we have outlined above we did not accept the respondents' account that there were any serious issues before 2019. We did not accept Ben Wolstenholme's evidence that the deterioration started in 2018 in ways which were poorly particularised in his witness statement and not supported by documentary evidence. That account was inconsistent with the documentary evidence of what occurred during the earlier period, including the welcoming of the claimants into the shareholding on 26 October 2019, which was itself inconsistent with serious fractures in the relationships. We considered that there was much in Mr Eldridge's description of 30 December 2020:

*Given the prior seven years relaxed approach to running MB, and the apparent acceptance by the board of the performance, what changed in 2019 (the company's best ever year)? What has caused the recent and rapid collapse in the Chair/CEO relationship*?

690. At that point, even Ben Wolstenholme was not saying that issues arose earlier than early 2019 and he was ascribing them to the 'Chair benchmarking point'.

691. It appeared to the Tribunal that issues between the claimants and Ben Wolstenholme developed as he sought to become more involved in the business again and to justify his salary as chair. These tensions were apparent certainly by April 2020, when the pandemic and the financial threat

that presented both to the business and to individuals such as Ben Wolstenholme would have been apparent. This is evident from Ben Wolstenholme's email to Mr Heinl of 5 April 2020 when he wrote:

*To keep with the big stuff, I came away gutted about many things from our call - but in the end I wondered what it is that would make things better? - it seems clear to me there is an 'imbalance' in my role in the business, whether that be my role as chair, my wage as chair, the size of my shareholding, my share of dividend... perhaps it cuts across all. Each is it's own topic - but at the high level I want to ask what will redress this imbalance?*

692. The note that Mr Heinl made about consulting his father about Ben Wolstenholme on 4 April 2020 shows that this was a moment of considerable strain on the relationship at a period which predates the disclosures.

693. These issues seemed to us to be intensifying into the summer period, hence the involvement of Ms Eldridge in facilitated conversations. The issues certainly revolved around what role Ben Wolstenholme should perform in the business and how much he should be paid for it. Ben Wolstenholme seems to have begun to see resistance to him having the level of input he had begun to desire as disrespect by Mr Heinl.

694. At the same time, however, the claimants were working to navigate the business through the pandemic and Ben Wolstenholme was (at the time) full of praise for their efforts, On 10 June 2020 he was writing to the claimants in positive terms and indicating that he wanted them to earn further into the shareholding.

*Allegation that the claimants were establishing a fiefdom / disposing of advisers*

695. As we have said, we accepted that Ben Wolstenholme had stepped back from the business and then was seeking to become more involved again in 2019.

696. Mr Toppin suggested in his evidence that the claimants were responsible for a situation in which there was no CFO, as part of their desire to run the business without scrutiny. This was not supported by the facts. Mr Dent was appointed as CFO but left after a few months under a confidential settlement agreement, for reasons which were not shared with the Tribunal. Mr Toppin did not know why he left. It is correct that he was not replaced and Ben Wolstenholme suggested in his evidence that this was because of resistance by the claimants.

697. The claimants denied that assertion and there was not a single piece of documentary evidence which supported it. Mr Richardson was in place as

financial controller. So far as other advisers were concerned, Mr Toppin stepped back when a CFO was appointed; Mr Bamford, who had been a volunteer leadership adviser, stepped back over time, but not because he had been asked to do so by the claimants. Mr Challenger continued to be involved until after 2017.

698. We did not accept that there was evidence of the claimants disposing of advisers. They were responsible for introducing Mr Eldridge to assist with strategy and governance in 2020; he was an external expert albeit not an accountant.

699. So far as the suggestion that the claimants were evading financial scrutiny is concerned, the respondents' position was that the claimants were obstructive. There was real concern about the fact that the cash reserves had been dissipated but the claimants resisted Mr Toppin's involvement and the creation of a dashboard / other financial reporting which would have enabled the board to see the state of the finances.

700. We accepted the claimants' account that the information had essentially always been accessible. They had continued to use a system introduced by Mr Dent. When Ben Wolstenholme raised concerns in 2020, they introduced a monthly balance sheet and KPIs under the guidance of Mr Toppin. Ben Wolstenholme continued to insist that the information was not sufficient and to press for a dashboard. Mr Toppin's email of 26 November 2020 suggests that by this point Mr Toppin himself did not think there was anything radically wrong with the information being provided. It was clear that Ms Laikko was cooperating with the introduction of KPIs, the introduction of a monthly balance sheet and the development of the dashboard.

701. There are numerous emails which show that Ben Wolstenholme was agitated and unhappy with the financial information he was receiving and concerned about the dashboard, although it is by no means clear that his dissatisfaction was rational. This was in the autumn of 2020 at a point when Ben Wolstenholme also seemed hostile towards Mr Eldridge and critical of his work. We accepted the claimants' evidence that the dashboard was about the presentation of the information not what types of information were being provided. Ben Wolstenholme wanted information presented in a simpler and more high level way. By this point in the chronology, the protected disclosures had been made.

702. The expressed dissatisfaction was ramping up during a period when for reasons we discuss more fully below, we concluded that the respondents were already working towards the claimants' dismissals. In those circumstances it seemed to us that Ben Wolstenholme's complaints were at least partially performative.

703. We have set out the facts relating to Mr Toppin's involvement with the business in 2020. It seemed clear to us that the claimants had not resisted his involvement when there were tasks he could help with such as the CBILS application. Mr Heinl was watching costs and was understandably concerned when Ben Wolstenholme started instructing Mr Toppin directly and involving him on work on the chair's pay issue and what appeared to be advocacy on behalf of Ben Wolstenholme. Mr Toppin himself accepted in cross examination that he had not been rebuffed by the claimants in relation to the cash reserves work or the CBILS application. As Mr Heinl said:

*I did question some of the things that Ben did or attempted to do in the pandemic, like retaining John to advise the company and advocate for him personally at enormous expense at a time when we were asking people to take pay cuts.*

704. This was not in our finding a resistance to financial scrutiny but a concern about the roles of the board and the executive.

705. We considered that at this point Ben Wolstenholme was agitated about his own and Madefire's financial position.

Alleged failure to deliver 5 year business plan

706. We accepted the evidence of Mr Heinl that Ben Wolstenholme significantly changed the originally discussed plan (to work through a number of possibilities) to a plan with a limited number of firmer proposals. We accept that the documentary evidence shows that Ben Wolstenholme was not happy with the proposals, although we are in no position to comment on them as business proposals.

707. We note that by November 2020, Ben Wolstenholme was more generally aggrieved with the claimants and would not have been approaching their work in a positive frame of mind

Project Phoenix and how the respondents went about dismissing the claimants

708. It was important for our conclusions to consider when a decision had been made to dismiss the claimants. We concluded that it was well before 17 February 2021, which was the date put forward by the respondents.

709. As early as November 2020, Mr Toppin was writing to Ben Wolstenholme as if the claimants were in a different camp from Ben Wolstenholme.

710. The evidence seemed to us to demonstrate that the dismissals were at least seriously in contemplation in November 2020. After the Wolstenholmes' visit to Switzerland to see Ms Kyosti, there were a number of activities which suggested that a case was being built against the claimants. There was hostility to Ms Laikko at the November board meeting, the forwarding of

documents to Ms Kyosti, the amendment of the notes to highlight criticisms of Ms Laikko. By 24 November 2020, Ben Wolstenholme was taking legal advice from an employment solicitor about the claimants.

711. It was difficult to say when a final decision was made but we concluded it was certainly by 4 February 2021 when Mr Toppin was referring to leadership change and 'leverage for discussions with Andrew'. As to exactly when the decision was made between November 2020 and 4 February 2021, we are unable to say but we considered that the involvement of the solicitor and the ramping up of hostilities suggested that it was earlier rather than later in the period.

712. The fact that dismissals were in contemplation from at least November 2020 was an important factor for us to bear in mind in reading documents over this period where Ben Wolstenholme was critical of the claimants.

713. So far as what occurred after that, as we have outlined above, there was rapidly a move to involve GPW in an investigation to find material on the basis of which the claimants could be disciplined and by no later than 5 March 2021 a settled plan to try to achieve 'bad leaver' status for the claimants to deprive them of the value of their shares.

714. It was clear to the Tribunal that the respondents did not want to give the claimants a reason for their dismissals in March 2021 because they wanted to give themselves flexibility, as they did not wish to commit themselves to reasons which they did not later rely on.

715. It was relevant to our conclusions on the fairness of the dismissals to make further findings in the matters the subject of the disciplinary proceedings.

Dismissal - Ordinary unfairness

Reason for dismissals

*The dismissals on notice*

716. Since the summary dismissals were the operative dismissals, the fairness of the dismissals on notice may ultimately be primarily a Polkey matter; however the reasons for these dismissals were highly relevant to understanding the reasons for the summary dismissals and assessing the fairness of these.

717. The respondents' case was that the reason for these dismissals was a 'systemic and irretrievable breakdown in the working relationship between

the claimants and the board.' This was set out in detail in the respondents' submissions and had, in brief, the following component parts:

- A period when there were red flags from 2014: the claimants' behaviour in relation to the shareholding and the claimants' allegedly turning Moving Brands into their personal fiefdom by removing external and internal advisors;
- Deterioration in the relationships from 2018 onwards;
- The claimants being resistant to financial scrutiny against a background of a deteriorating financial position in 2019;
- Continued financial deterioration in 2020 and a lack of strong leadership from the claimants in 2020 and continued deterioration in the relationship between the board and the claimants;
- An inadequate 5 year business plan;
- By 17 February 2021, information about TOIL which Ben Wolstenholme considered to be 'lies about wage reductions'.

718. Mr Heinl's case is that his dismissal was because of his protected disclosures.

719. In deciding what the reasons for the dismissals were, we were conscious that the parties had adduced evidence of the relationships between the claimants and the respondents over a number of years. We were presented with quite different narratives as to what was said to have occurred over that period of time and we have had to make such careful factual findings as we can, leaning heavily on the documentary record where that was available.

720. The story the respondents told was one of relationships which deteriorated over a number of years. The negotiations about the claimants becoming shareholders were said to have been fraught. The respondents blamed Mr Heinl in particular for being excessively demanding.

721. The respondents' case was that after the claimants were promoted to being the most senior executives in the first respondent, they began to evade scrutiny by dispensing with senior external advisors and resisting the appointment of an FD or CFO. The years between 2018 and 2021, on the respondents' case, were ones of deterioration.

722. We bore in mind the guidance in Kuzel v Roache Products and considered whether the first respondent had proved the reason it put forward. We also bore in mind that if we did not find that reason made out, we were not bound to find that Mr Heinl was correct in saying that the reason or principal reason for his dismissal was protected disclosures.

723. Contrary to what was submitted by the respondents, we did not conclude that there were serious issues between the claimants and the rest of the board prior to 2019, although there clearly were tensions around the shareholding negotiations.

724. Both sides blamed the other for those tensions and we did not have good enough evidence to decide whether one side or another was at fault.

725. We concluded that there was some conflict about Ben Wolstenholme's role in the business which was balanced at least for a time by his perception that the claimants were helping to navigate the business through the pandemic.

726. We did not accept that the respondents genuinely believed that the claimants were establishing a 'fiefdom' or evading financial scrutiny or that they were responsible for or not responding adequately to financial deterioration of the business.

727. We considered the role TOIL was alleged to have played in the dismissals. Because we concluded that plans to dismiss the claimants were already well developed if not finalised by the time the TOIL issue arose, we concluded that the issue was fastened on opportunistically by the respondents, rather than actually forming part of the reason for a breakdown of relationships / the dismissals.

728. We also looked at what conclusions we could draw from the timing of the decision to make dismissals and the way in which the respondents went about them. Our findings as to timing are as set out above. Also of relevance to our conclusions was the fact that the respondents had no reason to give the claimants at the time of the original dismissals and the clandestine nature of what was done. The timings in particular contradicted the respondents' narrative about the chronology of the alleged breakdown in relationships. The failure to give a reason for the dismissals seemed to us to be evidence of a consciousness of a lack of a justifiable reason for the dismissals and a desire to leave open the possibility of producing such a reason at a later date.

729. Whilst we were satisfied that the reasons put forward by the respondents, if made out on the facts, could have constituted a substantial reason capable of founding fair dismissals, we concluded that the respondents had not satisfied us that the substantial reason relied on existed and was the reason for the claimants' dismissals in the minds of the decision makers. We were not satisfied either that the claimants were behaving in the ways described or that the respondents genuinely believed that they were behaving in that way, for the reasons we have outlined above. It is true to say that some limited parts of the reasons survived scrutiny – we accept, for example, that Ben Wolstenholme was not happy ultimately with the business plan - but too many other parts did not survive for the first respondent to establish its case as to the substantial reason for the dismissals. We accepted that Ben Wolstenholme's desire to have a greater role in the business and his perception of resistance to that desire, formed some part of the reason for dismissals but there were clearly other factors, including, as we find below,

the protected disclosures / protected act. The respondents' exaggerations as to the levels of breakdown in relationships and as to the period over which such breakdown occurred and the general unreliability of the witnesses described above left us unable to accept the reason put forward by the respondents. Also relevant to our conclusions was the fact that we rejected their evidence as to the timing and manner of the decision to dismiss.

Section 103A Employment Rights Act 1996: Whistleblowing dismissal

730. Did we conclude that the protected disclosures were the sole or principal reason for Mr Heinl's dismissal?

731. We were mindful of the fact that some significant tensions between Mr Heinl and Ben Wolstenholme predated the disclosures and that those tensions were not apparently ameliorated by the facilitated conversations with Ms Eldridge. Those conversations were occurring during the same period when the disclosures were made.

732. It did not appear to us that we could conclude that the disclosures were the sole or principal reason for dismissal. There was too much evidence which in our view showed that a significant issue for Ben Wolstenholme was the conflict over his role as chair and his remuneration.

Reason for the summary dismissals

733. We considered that the reason for the claimants' dismissals remained essentially the same throughout – that Ben Wolstenholme in particular wanted to be rid of the claimants for a number of reasons including the disagreement about the chair's role and pay and the deterioration of his relationship with the claimants, which the making of protected disclosures was a partial cause of. The added incentive to dismiss the claimants again before the end of their notice period was to 'access bad leaver status'; that in our judgment was a significant reason for the further dismissals, although another reason was no doubt to seek to legitimise the original dismissals.

734. None of these were potentially fair reasons under the Employment Rights Act 1996.

735. Our reasons for concluding that these were the reasons for the summary dismissals should be apparent from our findings to this point but to summarise them:

- The genesis of the dismissals themselves;
- The evidence as to how and why a disciplinary process came to be instigated;
- The secrecy with which the investigation was conducted;

- The conduct of the investigation, the disciplinary and appeal processes including:
    - The selection of Mr Toppin to conduct the investigations when he was clearly not impartial;
    - Mr Toppin's approach to the evidence, which showed him trawling widely for damaging material on the claimants and being involved in providing terms of reference for GPW which involved looking broadly for types of misconduct there was no hint of the claimants being involved in and, for example, immediately absolving Mr Davis when there was a suggestion he might bear any blame for the New York lease issue;
    - Ms Kyosti's dishonesty to the claimants about her role in proposing the disciplinary investigation;
    - Ms Kyosti's lack of impartiality including her secret involvement in the run up to the dismissals;
    - Ms Kyosti's unfair approach to the hearings including not allowing the claimants further materials they requested and not providing transcripts as she had said she would;
    - Mr Bull not being in any way an impartial person to hear the appeals, given his involvement in Project Phoenix and the New York lease issue;
    - The evidence that Mr Bull in fact played little role in determining the appeals.

*Procedural fairness of the dismissals on notice*

736. Had we concluded that there was some other substantial reason for the dismissals as described by the respondents, it is unlikely that we would have considered them to be procedurally fair. Even for employees of this seniority, some discussion about what the likely effects of ongoing perceived performance issues and behaviours detrimental to trust and confidence was likely to have been appropriate.

<u>Misconduct dismissals:</u>

737. Even if the respondents had shown that misconduct was genuinely the reason for the dismissals, we concluded that the dismissals would in any event have been unfair under the other limbs of the <u>Burchell</u> test: the first respondent did not have reasonable grounds to conclude that the claimants were guilty of misconduct, having conducted such investigation as was reasonable. We have already found that misconduct was not the genuine reason for the dismissals.

738. In general terms the investigation and overall procedure were unfair for reasons we have already described but which we repeat here for clarity. Mr Toppin was not impartial. His purpose, like that of all the individuals involved,

was to access 'bad leaver' status for the claimants. He did not look for exculpatory evidence but was seeking to gather as much evidence as he could to support any allegations he could find and to use in 'horse trading'. The claimants were not involved in the investigation and did not know it was happening. The GPW report was kept entirely secret from them.

739. Ms Kyosti was not impartial. She was not honest with the claimants about her lack of impartiality and her role in instigating the investigation and then participating in the search for material which could be used against the claimants. She refused reasonable requests for documents and did not provide a transcript of their hearings to the claimants.

740. Mr Bull was simply the instrument of the decision already made to dismiss the claimants to access bad leaver status. He would not have been an impartial choice, given in particular his involvement in the New York lease issue, but in any event we concluded that he played no real role in deciding the appeal or drafting the outcome.

741. Although we concluded that the misconduct dismissals were essentially a sham, we went on in the alternative to consider each charge in accordance with the Burchell test.

*TOIL and holiday carryover*

742. In his witness statement, Mr Toppin described how he says he came to investigate the TOIL issue; he said he began to look into it after 19 March 2021 when Ms Laikko wrote to ask about her agreed TOIL and holiday carryover. He said that he then started making enquiries with Ms Fortescue and this led to his discovery that the claimants had accrued substantial TOIL and holiday carryover and agreed changes to their contracts more favourable than those of junior employees. This seems to be utterly at odds with the evidence that Ben and Guy Wolstenholme gave about their previous concerns about TOIL and we concluded it was untrue. Ben Wolstenholme said that by 17 February 2021, information had come to the surface about the claimants' 'lies about wage reductions'. Guy Wolstenholme said that by February 2021 the respondents had suspicions about misconduct relating to the TOIL issue. It is simply incredible to suggest that they would not have mentioned the TOIL issue to Mr Toppin. Mr Toppin's willingness to give an untrue account of the genesis of this issue in a report he put his name to did not instil confidence in the investigation he claims to have carried out.

743. Ms Kyosti concluded that there was no informal or formal TOIL policy as part of her disciplinary findings; that was inconsistent with Mr Bull's evidence about TOIL. A reasonable investigation would have turned up that information. We also concluded that a reasonable investigation would have found or confirmed all or most of the following :

- That Ms Laikko had told the board of her intention to take TOIL and the claimants had done nothing subsequently to hide the arrangements which had been shared with Ms Fortescue and recorded on HR systems;
- That there was in general no expectation that the details of these arrangements would be shared with the board. In a company that was not very heavy on procedure, there was no specific obligation the claimants could be said to be in breach of;
- There was nothing in any of the discussions about the voluntary arrangements to be made to achieve immediate costs savings which precluded the TOIL arrangement and the claimants were not the only employees to take TOIL in this way – Ms Miller and Ms Jensen also had TOIL arrangements. There had been no agreement that the executive should take any particular approach. Guy Wolstenholme dropped a day and took an equivalent pay cut but worked the remaining day per week for pay at Madefire, so similarly made no financial sacrifice.
- That the claimants had a history of taking little leave and deferring bonuses.

744. No reasonable employer could have concluded that the claimants' actions were gross misconduct in circumstances where the claimants had been entirely open about their plans and there was no agreed approach for senior staff. Moving Brands benefitted from short term savings and the claimant's full time attention. The fact that it would have been more admirable for the claimants to take actual pay cuts like some junior staff had elected to did not make it misconduct in the circumstances that they did not do so.

745. The issue of holiday carryover was also raised mentioned in Mr Toppin's report:

*Clause 7.4 of their contracts of employment (Annexures A and B) provide that HL and MH have no right to carry over annual leave. Notwithstanding this, it appears that they had systematically done so for a number of years. In a document provided to me by Maddie Fortescue ("MF"), compiled on the basis of information given to her by HL and MH (at Annex T), it appeared that they had each accrued a staggering amount of carried over 'unused' holiday coupled with TOIL.*

*5 As the CBO and CEO of the company respectively, I consider it likely that (a) they each knew and understood the terms of their contracts of employment (b) they well knew that they could require MF to record matters however they directed because of their seniority and (c) they have therefore knowingly for some time abused their position concerning the calculation and recording and TOIL and holiday.*

746. This did not form part of Ms Kyosti's stated reasons for dismissal and we did not consider it further.

*HPE lease*

747. Ms Laikko was frank with the Tribunal, as she had been with the respondents, that she made an error in signing the printer lease agreement without observing that the agreement extended the term and hence the financial liability. The evidence available to Mr Toppin and subsequently Ms Kyosti showed that the representations made by the broker were misleading (there were written communications saying there would be substantial savings) and that there might be a merit in legal action against the broker.

748. It was also clear from documentary evidence that Mr Richardson only realised that there was a problem in late September 2020.

749. Mr Toppin's actual attitude to what had occurred is revealed in his email of 4 February 2020 to Ben Wolstenholme, and Ms Kyosti:

*Ancillary to this is the HP loan issue. It's clear the company was bound by Hanna in a contract that was unnecessary and costly. It certainly involved poor attention and administration on Hanna's part in my opinion, as she has acknowledged signing the documents. The question of whether there is any potential for recompense from the broker involved is open – being considered by Lewis Silkin. Hanna is leading this with the lawyers which is not ideal. Might be worth keeping this as leverage for discussions with Andrew*

750. What he really thought was that Ms Laikko was guilty, put at its highest, of poor attention and poor administration but the issue was one they could use as 'leverage'. The delay in seeking to take action against Ms Laikko between November 2020 and May 2021 also illustrates how the matter was stored up to use against Ms Laikko, particularly when viewed against the evidence that the minutes of the November board meeting were being manipulated to enhance the impression of her guilt.

751. In Mr Toppin's report, however, he is critical of Ms Laikko for allegedly not making the board aware of the problem, for not recording the issue properly in the accounts and not appreciating the risk to the CBILS loan application and suggests that summary dismissal of both Ms Laikko and Mr Heinl should be considered in respect of this issue.

752. Mr Toppin's report did not mention Mr Richardson's evidence about how he and Ms Laikko had been misled by the broker. It did not mention the legal advice which had been received showing that there might be a claim against the broker.

753. Mr Toppin's report suggested that Ms Laikko had sought to play down her role and that she had failed to be candid with the board. That account was not supported by the evidence which he had which showed that in late November and early December 2020, Ms Laikko was updating Ben Wolstenholme and Mr Toppin on the issue and inviting Mr Toppin to join a

call with the lawyer. She put her hands up immediately when Mr Toppin identified the issue on 19 November 2020.

754. Ms Kyosti concluded in relation to the HPE lease issue that Mr Richardson had known about the problem since June 2020 and that Ms Laikko had taken no action between then and 18 November 2020. In fact the documentary evidence clearly showed that Mr Richardson believed until 28 September 2020 that there was no liability. At that point he realised there was an issue but the nature of the problem was not clear until he received the paperwork in October 2020. Ms Kyosti had no good explanation in cross examination of why she nonetheless concluded that there had been knowledge and a failure to act from June 2020.

755. Ms Kyosti also made no mention in her conclusions of the possible claim against the broker or the evidence that Ms Laikko and Mr Richardson had been misled by the broker. This was a significant mitigating factor which both she and Mr Toppin ignored. Also a mitigating factor was the fact that, on a fair view of the evidence, Ms Laikko had owned up to her responsibility for the problem when she became aware of it and was open with the board. Both Mr Toppin and Ms Kyosti unreasonably found the opposite.

756. In the circumstances, Mr Toppin's investigation was not reasonable and Ms Kyosti did not have reasonable grounds to conclude that Ms Laikko was guilty of gross misconduct / negligence / incompetence.

757. We did not conclude that Mr Bull had in any real sense engaged with the claimants' appeals nor were the outcomes materially his work so his appeal did not have the power to change our conclusions on the dismissals.

758. That is not to say that there was no fault by Ms Laikko. She herself accepted both internally and to the Tribunal that she had made a mistake in signing the lease without appreciating that there was an extension to the term. She was not aware at the point when she signed off the accounts that that is what had occurred. However, there may also be fault in her failure to appreciate that both the accounts and the CBILS loan application needed to be revisited. The difficulty the Tribunal had was assessing how significant these mistakes were in context in circumstances where the respondents had fastened on the whole issue to use as leverage against Ms Laikko (and Mr Heinl). The respondents made it very difficult for us to trust any of their evidence. One indication to the Tribunal of how actually serious the issue was perceived to be by the respondents was the fact that no action at all was taken against Mr Richardson, who remained in place as financial controller.

759. What Ms Laikko herself said seemed to us to reflect how the matter would have appeared to a reasonable employer:

*With the benefit of hindsight, I could have handled the HPE lease differently. But in businesses, there are sometimes misunderstandings or mistakes, even when (as here) there was no lack of diligence. The loss on the finance lease was not in any way disastrous or existential for the business, and this was an isolated error in my 14-year career at Moving Brands. No fair-minded employer would have dismissed me for it.*

760. It seemed to us that a reasonable employer could have investigated the matter and found a degree of fault but would have also made fair findings as to the mitigating factors.

761. So far as Mr Heinl is concerned, Ms Kyosti accepted that he had no knowledge of the implications until 18 November 2020 but concluded that he was guilty of gross misconduct in not understanding and correcting the issue between June 2020 and 18 November 2020: 'I conclude that you as the CEO had limited awareness and management involvement of the financial transactions of the company and that you had no concern for the accuracy of its financial statements.' She concluded that this was gross misconduct and/or negligence and/or incompetence. In circumstances where she had accepted that he did not in fact know about the issue, it was difficult to understand how Ms Kyosti reached this conclusion. It was put to Mr Heinl in cross examination and repeated in the respondent's submissions that Mr Heinl had failed to take control of the matter in November 2020 and discipline Ms Laikko. This was not, however, the reason why Ms Kyosti concluded Mr Heinl was guilty of gross misconduct.

762. In the circumstances it seemed to us that the respondent had no reasonable grounds for concluding that Mr Heinl was guilty of misconduct.

*New York Lease*

763. Mr Toppin described the New York lease issue in his witness statement in this way:

'Once the surrender had been executed at the end of August the true nature of the surrender had still not been openly disclosed by Mat or Hanna to their board colleagues… By the 'true nature' I mean that the company retained all the financial obligations under the lease but would not be able to occupy the space or seek a subtenant, I could only conclude that this was not only incompetent management but negligent and shows a complete lack of candour to the board.'

764. In his report Mr Toppin had said that Ms Laikko was responsible for a situation in which MBL remained liable to pay rent under the New York lease, for vacating the premises without a prior agreement have been reached as to further rental liability and for concealing the position from the board and for signing accounts which were not correct.

765. Ms Kyosti on the other hand said about Ms Laikko that she was responsible for not being sufficiently involved in the surrender of the lease, reviewing the liability and actively participating in the process. This is of course rather different from what Mr Toppin has said in his report. She concurred with him that Ms Laikko had failed to keep the board properly informed.

766. An examination of the evidence shows that Mr Toppin's conclusions were not ones which could reasonably be drawn from the documents available to Mr Toppin and subsequently to Ms Kyosti. That probably explains why Ms Kyosti's findings are of a different type of misconduct from that put forward in the investigation report by Mr Toppin. The documents make clear that Mr Bull and Mr Davis were primarily responsible for the handling of matters to do with the New York lease and that what was done was done with the assistance and advice of New York lawyers, advice which nothing the Tribunal was told suggested was flawed. Nonetheless, Mr Toppin suggests in his report that Ms Laikko was guilty of misconduct for action taken by those others on the basis of that legal advice. The view he takes of the strategy is in opposition to the advice which was being received from the New York lawyers at the time.

767. Mr Toppin in his report suggested that the actual position in relation to the lease was wholly at odds what Ms Laikko said at the 19 November 2020 board meeting. In the uncorrected minutes, Ms Laikko is recorded as saying that they were hoping to surrender the lease by the end of the month and, if so, there would be a six month cost savings of '£144K'. Ms Laikko had of course corrected the minutes and had in any event already shared the position with the Wolstenholmes in her email of 19 October 2020. Although in submissions the respondents suggested that even the amendments did not reflect the true position, we did not conclude there was any material inaccuracy in circumstances where, in any event, she was clear that the liability might or might not be mitigated. She was just trying to say that whether there was a savings was dependent on the landlord. Mr Toppin's criticisms of what she said were baseless pedantry.

768. It was put to Ms Laikko in cross examination that she had not told the board about the liability but the liability was not a new one and we accepted that she discussed it with the board and that was the evidence available to Mr Toppin and Ms Kyosti, contrary to their findings.

769. Mr Toppin could not explain why a similar allegation was not made against Mr Bull, who also attended that board meeting, and who was also an employee as well a director and a shareholder.

770. Mr Toppin also said that Ms Laikko had signed off accounts without including the surrender of the lease as a material post balance sheet event. The

accounts were audited by Mr Richardson and Ben Wolstenholme before being signed. It is difficult for the Tribunal to judge whether a reasonable employer would have considered that Ms Laikko culpably failed to report a post balance sheet event in circumstances where there was so little about Mr Toppin's evidence which we felt we could rely on and we were not satisfied that there were reasonable grounds to believe that Ms Laikko was guilty of misconduct in that respect.

771. Mr Toppin said in cross examination that the course of action taken in relation to the New York lease was the wrong strategy commercially, notwithstanding the legal advice received and notwithstanding the fact that the decision made had led to Moving Brands Limited being relieved in the short term of the monthly rent payments and not to date having been sued for the liability. We were not persuaded that Mr Toppin and Ms Kyosti subsequently genuinely believed that the approach was commercially incorrect.

772. Mr Toppin criticised Ms Laikko in his report for not seeking her fellow directors' approval before authorising service of the surrender notice. That criticism was incoherent in circumstances where Mr Bull, another director, signed the notice.

773. The explanation given by Mr Toppin and Ms Kyosti as to why no action at all was taken in relation to Mr Bull or others closely involved in the New York lease issue, but the claimants were dismissed, was that the claimants in their positions were the most responsible for ensuring correct commercial decisions were made. It seemed to the Tribunal that the lack of even the mildest of action against the others closely involved in the dealings with the New York lease was further evidence that the respondents did not genuinely believe that there was any misconduct on the part of the claimants in this respect. That impression was reinforced by Mr Toppin's lack of impartiality during the investigation when he reassured Mr Davis that he did not believe 'for a minute you would have been anything but professional and correct' in relation to the New York lease.

774. Similarly we could not conclude that there were reasonable grounds for Ms Kyosti to conclude that Ms Laikko was guilty of misconduct in relation to the New York lease on the alternative basis that she did not participate sufficiently actively in the process and blamed her direct reports in circumstances, where the evidence was that those reporting to Ms Laikko and Mr Bull, another director, were, with Ms Laikko's oversight, acting in accordance with advice given by the US lawyers which does not appear to have been reasonably impugned. There does not appear to be any good evidence that Ms Laikko should properly have intervened.

775. Mr Bull in the appeal decision he put his name to said that: 'I have seen no evidence to support the suggestion that the surrender of the NY lease was delegated to Christian Davis and I can confirm that I have no recollection of any such delegation to me'. He appears to be reverting to Mr Toppin's criticism that Ms Laikko was responsible for making decisions in relation to the New York lease rather than upholding Ms Kyosti's finding that Ms Laikko was insufficiently involved and exercised insufficient oversight. In doing so, either he would have to have both entirely forgotten his own involvement in the surrender of the New York lease and failed to look at the documentary evidence of that involvement.

776. In his report, Mr Toppin said that Mr Heinl was copied into all relevant correspondence about the surrender of the New York lease and was present at the 19 November 2020 meeting. Mr Heinl was said to have had ample opportunity to correct the board's understanding but chose not to do so. Mr Bull was also on the board of course and Mr Toppin was incorrect; Mr Heinl had not been copied into a large number of the relevant documents about the surrender of the lease.

777. Ms Kyosti conversely said about Mr Heinl that he had no knowledge of the discussions about the New York lease and was negligent in not continuously reviewing such a significant potential liability and leaving it to his direct reports to manage without direction or proper insight.

778. Either of these findings against Mr Heinl are predicated on findings for which we concluded the respondents had no reasonable and/or genuine grounds: that the board was not being informed or was being misled and that the decision to surrender the lease was erroneous.

779. The result of the surrender of the lease was that Moving Brands stopped paying a significant sum monthly on the lease. Although it retained the liability, that was a liability which it would have had in any event. The landlord was under a duty to mitigate its losses by seeking a replacement tenant. The decision, taken on legal advice, could be said to have an element of gamble in it since the landlord might sue for the monies no longer being paid, although the advice of Pryor Cashman was that that was unlikely. The evidence before the Tribunal was that as a matter of fact any gamble appears to have paid off in that the landlord has not commenced or threatened legal proceedings. The consequence of not surrendering the lease would have been that Moving Brands Limited retained liability for the premises for which it had no use in any event unless, in difficult circumstances during the pandemic, it could have found another tenant. No one on behalf of the respondents put forward a plan that was on its face commercially superior to that pursued on advice.

780. In the circumstances, even if this had been a genuine reason for dismissal, we would have concluded that the respondents did not have reasonable grounds on the basis of a reasonable investigation for concluding that either claimant was guilty of misconduct in relation to the New York lease.

Undertaking other employment (Mr Heinl only)

781. There is a summary of relevant evidence in Appendix 2 below.

782. Mr Toppin's account of what he investigated was set out in his witness statement:

*On 13 May 2021 as a continuing part of my review of documents held in the Leadership directory of the Moving Brands computer system during my investigation, I followed a chain Leadership (w)/Mat to sort/desktop/Mat H/Mat/private work/com panics which took me to a folder called Hanway. I also found another chain Leadership (w)/Mat to sort/desktop/MalH/Mat/private work/consulting & design which took me to a folder called TIA capital Within these folders I discovered the documents included within the Investigation Report at annexures V to Z which show Mat working for other entities in and round December 20 15 whilst not only an employee of MBL but its group CEO.*

*I reviewed Mat's personnel files in the Moving Brands computer system and found no evidence of any note either requesting permission to work for other entities nor any note acknowledging this or granting permission. I reviewed Mat's contract of employment and the Company Handbook for references to working for others. The Company Handbook states that*

*"Whilst working for the Company you may not engage in any other business activity or employment without seeking permission, in writing, from the Company and providing full disclosure of the proposed business."*

783. In his report, Mr Toppin concluded that Mr Heinl had carried out work and raised an invoice for that work for TIA Capital and proposed to take an equity stake in Hanways. He found that Mr Heinl had not disclosed these activities to the board nor sought consent for the work. He advised that summary dismissal be considered as a sanction.

784. At the disciplinary stage, Ms Kyosti concluded that there were no records confirming that Mr Heinl had declared his involvement with TIA Capital and Hanways and that he had been paid for the work without informing his fellow directors. She said: 'That is work which might otherwise have been carried out by Moving Brands.'

785. In cross examination, Ms Kyosti accepted that there were no records of other employees and directors obtaining permission to do outside work. She was presented by Mr Heinl with a great deal of evidence that outside work was common and was openly discussed. The very obvious example was Ben Wolstenholme's development of Madefire whilst CEO of Moving Brands Limited. Mr Heinl's evidence was that he had spoken openly about the work he did, including work he was asked to do by Ben Wolstenholme on Madefire. The Hanways concept never led to any work or earnings for Mr Heinl, in much the same way as businesses Mr Bull flirted with did not lead to him making 'a dime.'

786. Ms Kyosti could only have rejected that evidence if she accepted uncritically the evidence of the Wolstenholmes and Mr Bull. We did not accept that she had taken into account Mr Heinl's representations or fairly evaluated the evidence. It seemed apparent to the Tribunal from the evidence we had heard that there was a practice of doing outside work and that such work was openly discussed. A fair investigation would have uncovered that evidence (which in any event was raised by Mr Heinl) and no reasonable person could have concluded that Mr Heinl was guilty of misconduct in this respect.

787. There was no evidence in front of Ms Kyosti that there was any conflict of interest in relation to the work Mr Heinl had done or that he had spent any time on that work which he should have been devoting to Moving Brands.

788. Ms Kyosti in evidence accepted that this charge would not have merited dismissal on its own.

789. As to Mr Bull's findings on appeal, without repeating our overall conclusions on Mr Bull's appeal, we note that there is a material error in Mr Bull's account of the work proposed to be done by Mr Heinl for Hanways:

*There you reach agreement that you will work one full business day for them a week (structured in that way at your request)*

790. The proposal was of course for Mr Heinl to work one day a month for Hanways.

791. It follows from the above that, for the reasons set out, the ordinary unfair dismissal claims of both claimants against Moving Brands Limited, the first respondent, are upheld.

<u>Whistleblowing detriment claims: Mr Heinl only</u>

*Issue: Which detriments occurred*

792. We observe that there was a very long list of detriments. Although there were eleven numbered detriments, many of these were in fact headings for numerous subsidiary detriments. We felt that the list could sensibly been culled at some point. There were some detriments we heard little or nothing about, either in cross examination or submissions. It is not helpful for parties to leave issues on the table which they in fact have not pursued. It added to the Tribunal's already difficult task in this case.

793. Although neither party expressly addressed us on this issue, we noted that, although this claim was brought by Mr Heinl only, the pleadings and list of issues refer to detriments caused to both claimants. We do not understand Mr Heinl to be suggesting that he has claims in respect of detriments caused to Ms Laikko and our findings are on the detriments as they relate to Mr Heinl.

*Detriment 1*

*11. Whether:*

*11.1. Rs failed to provide an agenda and/or deliberately concealed the true purpose of the meeting originally to be held on 16 March 2021 (in the event, held on 18 March 2021) (RAGOC, §§19-20)*

*11.2. Upon logging into the 18 March 2021 meetings, Cs were informed that the items on the agenda for the meetings included (for both R1 and R2) (RAGOC, §§21-24):*

*(1) The convening of a general meeting to consider a proposal to remove C1 as a director;*

*(2) The removal of C1 as CEO;*

*(3) The convening of a general meeting to consider a proposal to remove C2 as a director;*

*(4) The removal of C2 as Chief Business Officer;*

*(5) The appointment of R5 as a director; and*

*(6) The appointment of R6 as a director;*

*11.3. At the 18 March 2021 meetings:*

*11.3.1. R1 and R2 voted to terminate Cs' employment and convene further board meetings to consider their removal as directors (RAGOC, §23);*

*11.3.2. At the 18 March 2021 meetings, the directors were asked what the reason was for Cs' dismissals and nobody responded.*

794. There was no dispute about these detriments taking place. It did not seem to us to be reasonably arguable that these were not detriments.

*Detriment 2*

*12. C1 relies on two letters sent by R5 on 18 March 2021 (RAGOC, §§27-29).*

795. Again there was no dispute that these letters were sent. They clearly amounted to detriments.

*Detriment 3*

*13. Whether:*

*13.1.On 18 March 2021, before Cs received written notice of termination, Rs sent representatives from a security company to Cs' home to retrieve their computer equipment and phones;*

*13.2. Despite the Covid-19 lockdown still being in place at the time, the security firm insisted on entering Cs' family home with Cs' children and C1's mother present;*

*13.3. Rs cut off Cs' access to Rs' systems, denying them access to personal files and documents relating to their directorships and shareholdings.*

796. These matters occurred. The area of dispute was whether the security firm entered the claimants' home; we find that one security firm employee stepped into the hallway briefly. Again all of these matters were detriments.

*Detriment 4*

*14. Whether, on 18 March 2021, Rs caused a dishonest and unprofessional "Out of Office" message to be sent automatically from Cs' email accounts to those who contacted them.*

*C1 avers that:*

*14.1.This message was dishonest in that it stated that Cs were "on leave".*

*14.2. This message was unprofessional in that it contained typographical errors and directed correspondents to a (then) non-employee as a point of alternative contact.*

797. The out of office messages did state that the claimants were on leave and did contain some typos. We did not include that they were 'dishonest'; the claimants were on garden leave at this point, although no doubt some readers would have understood the reference to be a reference to annual leave. We were doubtful as to whether they amounted to a detriment but in any event our findings below meant we did not have to resolve that doubt.

*Detriment 5*

*15. C1 relies on the sham investigation and Investigation Report dated 17 May 2021 dated 17 May 2021 (RAGOC, §§32—38). Whether:*

*15.1. Cs had not been made aware of any allegations of misconduct against them, despite being employees and directors;*

*15.2. Cs had not been informed that an investigation into their conduct was underway;*

*15.3. Cs had not been given an opportunity to comment on any of the facts and matters allegedly under investigation;*

*15.4. The Investigation Report was a sham and/or not the product of a bona fide investigation*

798. The claimants were not informed of the investigation into their conduct prior to the report being produced. We have concluded, for the reasons already stated, that the purpose of the disciplinary investigation was to 'access' bad leaver status in respect of the claimants; we therefore accept that Mr Toppin did not conduct a bona fide investigation and that the term 'sham' is a fair one. This was clearly a detriment.

*Detriment 6*

*16. C1 relies on the following aspects of the Grievance process and Grievance dated 24 September 2021 (RAGOR, §§39A-B):*

*16.1. Cs were not offered a hearing;*

*16.2. The Grievance Outcomes were not the product of a genuine (or any) bona fide investigation;*

*16.3. The decision maker (R6) was not impartial or appropriate;*

*16.4. The Grievance Outcomes were provided following a material, unexplained, and unjustifiable delay.*

799. The claimants were not offered a hearing. We conclude, for reasons we have already elucidated, that the plan, of which Ms Kyosti was a part, was to deprive the claimants of good leaver status and seek to justify their dismissals by finding that they were guilty of gross misconduct. In the circumstances she was far from being an impartial person to hear the grievances and she did not carry out any genuine or bona fide investigation into the grievances; not offering the claimants a hearing was part and parcel of the lack of bona fide investigation. Again, this was clearly a detriment. So far as delay is concerned. Ms Kyosti said that the in depth grievance investigation was conducted in September. She did not explain why there was something like a three month delay between the dismissals and this investigation. We concluded that this delay 'was material, unexplained and unjustifiable' and also constituted a detriment.

*Detriment 7*

*17. On 19 April 2021, Cs' directorships in the R1 and R2 were terminated at General Meetings of the R1 and R2 (RAGOR, §40).*

There is no dispute that this occurred. It was clearly a detriment.

*Detriment 8*

*18. C1 relies on the commencement and conduct of the Disciplinary Process (RAGOR, §§41- 46). Whether:*

*18.1. By a letter dated 20 May 2021, Cs' reasonable requests for a postponement of the disciplinary hearing and the provision of a number of documents were denied;*

*18.2. R6's disciplinary procedure was defective in the following respects:*

*18.2.1 Cs were not given access to the documents and/or information which they had reasonably requested in order to address the allegations against them;*

*18.2.2. R6 was not an appropriate or suitably independent person to conduct a disciplinary procedure involving Cs:*

*(1) R6 was a fellow-director of the company;*

*(2) R6 was junior to C1 within the company,*

*(3) R6 enjoyed a close personal and business relationship with R3;*

*(4) R6 had worked with C2 for many years at a previous company;*

*(5) R6 had been personally named in the Grievances;*

*18.2.3. R6 had herself been present at the board meeting on 18 March 2021;*

*18.2.4. R6 insisted on reading the Investigation Report verbatim, causing each disciplinary meeting to run over two days;*

*18.2.5. R6 declined to interview anyone else at C1's request. However, she did privately discuss the matters with R5;*

*18.2.6. R6 shared Cs' personal data with her "family business";*

*18.2.7. R6 discussed the disciplinary process with unnamed business associates outside R1/R2;*

*18.2.8. R6 treated matters which (on their face) were properly matters of capability as matters of conduct;*

*18.3. The disciplinary process was not a bona fide exercise, but rather a sham, planned and executed to ratify an unlawful decision to force Cs out of the business as Bad Leavers.*

800. The claimants were denied documents which they had reasonably requested. They had no way of accessing documents, having been cut off from the first respondent's IT systems. We heard no reasoned account from Ms Kyosti as to why she refused the documents. She said in her witness statement: 'The appendices to the report were detailed and contained the

evidence upon which John reached his conclusions. No additional information was needed to have their responses to the allegations'. There is no evidence she engaged with the particular requests and this statement seems to ignore the requirement to consider exculpatory as well as inculpatory material. As to the requests for a postponement; there were ten days between the claimants receiving the reports and the hearing. Given the complexity of the allegations and the lack of involvement by the claimants in the investigation, this was inadequate. It appeared to the Tribunal that the haste in convening the meetings was because the respondents were anxious to dismiss the claimants for gross misconduct before their notice periods expired in order to render them bad leavers.

801. Ms Kyosti was not a suitable person to hear the disciplinary primarily because she was committed to finding reasons for dismissing the claimants and rendering them bad leavers. She did read the investigation report out loud at each hearing. She said that this was to ensure that the claimants understood the allegations against them and to set the scene for the subsequent response and questions. It did not seem to us that this made sense in circumstances where the claimants had read the report themselves and we considered they could reasonably have felt disadvantaged by the process in this respect. Reading the report aloud would have done nothing to address the claimants' concern about having had insufficient time to prepare for the disciplinary hearing.

802. We did not hear sufficient evidence or submissions on the point to form a view as to whether Ms Kyosti refused or failed to interview material witnesses proposed by Mr Heinl. She did speak with Mr Toppin but given that neither was conducting a fair process and both were committed to the outcome of dismissing the claimants to access bad leaver status, we did not conclude that that amounted to a separate detriment.

803. We did not hear evidence that Ms Kyosti had shared the claimants' personal data with her family business or that she discussed the disciplinary process with business associates outside of Moving Brands.

804. We were not persuaded that capability matters had improperly been treated as conduct matters since at a certain level of severity and in particular circumstances there is an overlap between these categories; but in any event the categorisation of the offences was moot since we concluded that the whole process was predetermined. This issue was in any event not the subject of cross examination.

805. We have already found that the whole disciplinary process was effectively a sham.

806. In the circumstances, we concluded that these matters were made out on the facts and amounted to detriments, save for 18.2.5, 18.2.6, 18.2.7, 18.2.8.

*Detriment 9*

*19. On 8 or 9 June 2020, Cs' employment was terminated (RAGOR, §§47-50).*

807. There was no dispute that the claimants' employment was terminated. This was undoubtedly a detriment.

*Detriment 10*

*20. C1 relies on the Appeal Outcomes (RAGOR, §51). Whether:*

*20.1. Cs were not offered a hearing;*

*20.2. The Appeal Outcomes were not the product of a genuine (or any) bona fide investigation;*

*20.3. The decision maker (Mr Bull) was not impartial or appropriate;*

*20.4. The Appeal Outcomes were provided following a material, unexplained, and unjustified delay.*

808. There was no offer of an appeal hearing. We have concluded that Mr Bull was simply carrying out his part in the ongoing plan to justify the claimants' dismissals and ensure their bad leaver status so he was not impartial or appropriate and there was no bona fide or genuine investigation.

809. Mr Bull's explanation in his witness statement for the delay was:

> *MH and HL signed their respective grounds of appeal on 25 June 2021. I sent the outcome letter on 4 October 2021. In the intervening period, these proceedings were commenced and then amended. MBL was also dealing with substantial Data Subject Access Requests. My response was therefore provided at the first reasonable opportunity I had.*

810. Since there was no suggestion that Mr Bull was materially responsible for those matters, this did not seem to the Tribunal to be an explanation for the delay.

811. These matters clearly constituted detriments.

*Detriment 11*

*21. On or after 8/9 June 2021, Cs were designated Bad Leavers under the Shareholder Agreement dated 24 September 2019 (RAGOC, §§51A-51F). C1 relies on that designation and its detrimental consequences.*

812. The claimants were designated bad leavers. That was undoubtedly a detriment.

<u>Issue: were the detriments materially caused by the protected disclosures?</u>

813. In looking at this issue, the Tribunal was required to apply the case law we have set out above on the issue of whose mental processes we need to

consider when deciding whether a case of whistleblowing detriment is made out.

814. The claimants' primary case was that the decision to dismiss the claimants was made by Ben Wolstenholme with support from Guy Wolstenholme and Mr Bull. The role of Mr Toppin and Ms Kyosti was to execute a decision made essentially by Ben Wolstenholme and those others. It was not the claimants' case that Ms Kyosti, Mr Toppin and Mr Bull knew about and were motivated by the protected disclosures. The case as put was that these individuals were acting as they were because that is what 'Ben wanted'.[5]

815. The respondents do not dispute that the initial decision to dismiss on notice was made by Ben and Guy Wolstenholme.

816. The respondents' evidence was that Ms Kyosti made the decision to summarily dismiss the claimants. We have rejected that account and accepted that Mr Toppin and Ms Kyosti were acting in accordance with an aim conceived by the Wolstenholmes and elaborated by Mr Toppin and Ms Kyosti into a detailed plan designed to access bad leaver status.

817. As these decisions were decisions made by Ben and Guy Wolstenholme, we considered that we did not have to consider the mental processes of those who carried out the decisions. This was not a Jhuti style case of an independent decision maker making a decision on the basis of tainted information.

818. The question was whether we were satisfied that Ben Wolstenholme and to a lesser extend Guy Wolstenholme, made the relevant decisions.

819. Looking at the range of detriments made out, we considered that there was a distinction between those which were a result or inevitable part of the decisions made primarily by Ben and Guy Wolstenholme and those which involved independent agency by others who were not aware of the protected disclosures.

820. We considered first whether there was a prima facie case that the first category of detriments were caused by the protected disclosures. Was there material from which we could reasonably draw that inference?

821. The claimants relied on a number of themes, of which the following seemed to us to be persuasive:

[5] The respondents said in submissions that it had not been put to Ms Kyosti that she decided to dismiss because that was what Ben Wolstenholme wanted. We looked carefully at our notes of cross examination and concluded that the case had been sufficiently put. In the context of the grievance, it was explicitly put to Ms Kyosti that 'her only concern was making sure [the claimants] were out of the business because that was what Ben wanted'. It was clear elsewhere in questions that the case being put was that the dismissal were part of a predetermined plan of which Ben Wolstenholme was largely the architect to remove the claimants from the business and access bad leaver status.

- the chronology of events. In particular there was a deterioration in Ben Wolstenholme's attitude towards Mr Heinl over the summer of 2020 and in the run up to the trip to Switzerland in November 2020. There was still a positive attitude and apparent desire to mend relationships even going into the facilitated discussions with Ms Eldridge. There were other factors relevant to the deterioration, but the protected disclosures were a significant and inherently inflammatory event of that summer;

- the lack of any contemporaneous explanation for why the claimants were dismissed. A lack of any cogent reason provided at the time is certainly material from which, in conjunction with other factors, we could reasonably draw relevant inferences;

- the fact that we have rejected the respondents' account of why the claimants were dismissed, for reasons we have set out more fully above;

- The manner in which the claimants were dismissed. The fact that the claimants, who had been family friends with the Wolstenholmes, were dismissed so suddenly and in a way which would reasonably have felt shocking to them, after some theatrical plotting conducted in secret required some explanation. We could see that removing the most senior executives in a business might involve a somewhat covert process where those employees were perceived to present a commercial threat to the business if there was not a decisive removal after a process which was conducted covertly. The respondents did not present any credible evidence that the claimants were such a threat. On the other hand removing the claimants suddenly and unexpectedly and cutting off their access to documents was one way of seeking to shut down the threat presented by the share transfer disclosure;

- the lack of evidence that anyone else was treated in a similar way. Mr Richardson faced no consequences for his role in the HPE lease issue and Mr Davis and Mr Bull faced no consequences in respect of the New York lease;

- the respondents' dishonesty. We considered that this was certainly a feature which properly should be added to the factors pointing towards the protected disclosures having played a material role. Whilst dishonesty might be a cover for some other discreditable reason for detriments having been inflicted, or simply might be employed in service of the respondents' objectives (in this case the objective of succeeding in the proceedings), the extent and nature of the dishonesty in this case seemed to us to be some material from which an inference could properly be drawn. We were very careful to bear in mind that individuals who are not honest on one point may be honest on others; however, the difficulty created by witnesses we find to be not truthful on a number of points is that it leaves us in very great difficulty knowing what parts of their evidence can be relied on;

- the fact that the making of the disclosures was denied by the respondents altogether. We disbelieved Ben Wolstenholme on this point. The resistance to admitting that the disclosures had been made could reasonably seen as an

implicit recognition of how inflammatory Ben Wolstenholme found them. We also considered that once we accepted the disclosures had been made, it was understandable why they would be perceived as a real threat. The disclosures about the share transfer in particular had the potential to be serious, affecting as they did Moving Brands' tax affairs and the legitimacy of its activities in the US. The discrimination disclosure in the context of the previous friendship between the Wolstenholmes and the claimants was no doubt highly offensive to Ben Wolstenholme and contrary to his perception of himself.

822. In line with Fairhall, we also bore in mind the extreme unfairness which we have found characterised the treatment of the claimants and the sham disciplinary processes. The conclusions reached by Ms Kyosti in the disciplinary are so hard to reconcile with the evidence that it is clear that there is some other motive at work. In circumstances where that unfairness was not otherwise properly explained, we considered it properly formed part of the material from which we could appropriately draw inferences that the protected disclosures formed part of the reason for such treatment.

823. A feature relied on by the claimants which did not seem to us to point to the protected disclosures as playing a role in the dismissals was the fact that both claimants were dismissed, despite Ms Laikko not having made any disclosures and despite their positions in the company and their interactions with the Wolstenholmes being quite different. We considered that removing Ms Laikko at the same time as her partner was something that could as likely have happened in circumstances where there were no protected disclosures but there had been a breakdown between Mr Heinl and Ben Wolstenholme. Retaining the CEO's partner in a senior role in such circumstances would no doubt have been very uncomfortable and her dismissal would be explicable (if unfair) even in the absence of protected disclosures made by Mr Heinl.

824. Even bearing in mind that we have found other factors which were souring the relationship between Ben Wolstenholme and Mr Heinl (in particular tension over the nature of Ben Wolstenholme's role as chair) we considered that the factors we have identified were sufficient to cause the burden of proof to shift, particularly because, in our view, what was done to the claimants was so out of proportion to the other issues between Mr Heinl and Ben Wolstenholme. It seemed to us that the reason for the total loss of good will towards the claimants simply could not be found in other evidence.

825. We were not satisfied that the respondents had discharged the burden of showing that the protected disclosures played no more than a trivial role in the decision to dismiss Mr Heinl and in relation to the associated detriments including the decisions to deprive him of his directorships and access bad leaver status. There was so much of the respondents' evidence we did not accept as an explanation for the treatment of the claimants, in particular the suggestion that they were running Moving Brands as their own fiefdom, disposing of advisers and being secretive about financial information and their entire account of the genesis, rationale and reasons for the outcome of the

disciplinary process. Once those planks of the respondents' supposed explanation were stripped away, there simply was not enough left to explain the claimants' treatment. We concluded that both Ben and Guy Wolstenholme were materially influenced by the relevant disclosures (in Guy's case limited to the share transfer disclosure).

Which detriments occurred because of the disclosures?

826. We looked at which detriments were so inextricably part of the decisions made materially by Ben Wolstenholme and Guy Wolstenholme that they could be regarded as having been decided by the Wolstenholmes. We concluded that detriments 1 and 2 were essentially the implementation of the decision to dismiss and necessary parts of implementing that decision.

827. So far as detriment 3 was concerned, the decisions to send the security company to collect equipment and to cut the claimants off from the IT systems were decisions we were told were made by the board to implement Project Phoenix. When we looked at the detail of how the dismissals were carried out in these respects, it appeared that all of these were decisions made by Ms Kyosti, Mr Toppin and Mr Eveleigh-Evans. We could not ascribe Ben and Guy Wolstenholme's motivations to these individuals and the actions were not a necessary part of the decision to dismiss. The decision by one of the security company staff to step inside the claimants' home was clearly not motivated by protected disclosures.

828. Detriment 4 in its objectionable aspects was the work of Ms Kyosti, who was not influenced by protected disclosures.

829. Detriment 5 in all its aspects we considered was a function of the decision, materially made by Ben and Guy Wolstenholme that the claimants should be dismissed for misconduct to render them bad leavers. Mr Toppin was simply the agent who carried out that decision.

830. As to detriment 6, so far as Ms Kyosti's handling of the grievance was concerned, we considered that she was acting in accordance with the Wolstenholmes' plan to dismiss the claimants for misconduct to access bad leaver status. It was necessary to that plan that concerns they raised by way of grievances which could have derailed the dismissals were rejected. Ms Kyosti was, as was suggested to her in cross examination, concerned to do 'what Ben wanted.' What Ben wanted was to maintain the claimants' dismissals and add dismissals for gross misconduct. What Ms Kyosti did was not for independent motives of her own but to implement the Wolstenholmes' decisions. We concluded that detriment 6 was materially caused by the protected disclosures.

831. So far as determined 7 was concerned, we concluded that the removal of the claimants as directors was part and parcel of the plan to remove them from Moving Brands Limited / Year 15 Limited, which was materially Guy and Ben

Wolstenholmes' decision and materially influenced by the protected disclosures.

832. The respondents argued that we could not find for Mr Heinl on this issue because what happened did not happen in the employment sphere but in the company law arena. We should apply the approach in Tiplady.

833. We considered that argument carefully. We could see that in both Tiplady and Waltham Forest, the claimants had other relationships with their employers by virtue of those employers being public bodies, which relationships / rights and obligations lay alongside of and were entirely separate from the employment relationships.

834. On the facts in front of us, Mr Heinl's directorships were conferred on him as adjuncts to what had commenced as and remained an employment relationship. It seemed to us that it would be surprising if parliament had intended that there should be no remedy for the removal of a reward or status which was conferred on an individual pursuant to an employment relationship.

835. Insofar as a similar argument was made that detriment 11 lay outside the employment sphere because the detriment was inflicted on Mr Heinl *qua* shareholder rather than *qua* employee, we considered that similar arguments applied. The shares were in essence rewards attaching to the employment relationship rather than a function of an unconnected relationship. The decision to ensure that the claimants were designated as bad leavers was materially a decision of Ben and Guy Wolstenholme, materially because of the protected disclosures. Again we could not see that parliament would have intended that decision to remove what may be the most significant part of a reward package should be outwith the reach of the whistleblowing legislation. We note the description which came from the respondents of employees 'earning into the shareholding' which captures the extent to which the shares were remuneration for work done; similarly an individual could be deprived of the full value of the shares as a result of things which happened in the employment relationship and caused the employee to be designated as a bad leaver.

836. The shares were shares in Year 15 Limited rather than shares in the employer, Moving Brands Limited, but Year 15 Limited owned all of the shares in Moving Brands Limited and the award of shares in Year 15 Limited was as a reward for the employment by Moving Brands Limited.

837. As to detriment 8, as to those parts we found made out, we considered that Ms Kyosti was acting in pursuance of the decision materially made by Ben and Guy Wolstenholme, materially because of the protected disclosures.

838. As to detriment 9, the decision to terminate had been made materially by Ben and Guy Wolstenholme, materially because of the protected disclosures.

839. As to detriment 10, Mr Bull was again simply acting to carry out a decision materially made by Ben and Guy Wolstenholme materially because of the protected disclosures. The outcome of the appeal was the inexorable and

foregone conclusion of that original decision. We exclude the delay from that account as we could see no evidence that that was a necessary part of the carrying out of Ben Wolstenholme's decision and seemed likely to have arisen simply from a lack of urgency.

Victimisation

840. Were the detriments materially caused by the protected act? In essence we had to consider whether we found that the discrimination disclosure on its own materially contributed to the detriments we found had occurred. We bore in mind that the share transfer disclosure carried with it much more by way of potential commercial risk. The discrimination disclosure however had reputational implications and was likely to have been more personally offensive to Ben Wolstenholme. In a passage of his statement where Ben Wolstenholme described the growth of Moving Brands, he said the following: 'We are growing faster than we have in the past 10 years, we are more diverse and majority female and we have closed the gender wage gap. I am both humbled and proud of where MB Group and Year 15 Ltd are now and honoured to be part of the future journey.' That seemed to us to be some evidence of how offensive the discrimination allegation might have been to Ben Wolstenholme.

841. Ultimately we did not conclude that we could disentangle the causative effects of the different disclosuresm and we concluded that the discrimination disclosure was likely to have had a materially causative effect. We therefore upheld Mr Heinl's victimisation claims in relation to the detriments we found made out and where we found a causative element made out in relation to the whistleblowing claims.

Liability of the various respondents

842. Mr Heinl's case in respect of the liability of the various respondents would have benefitted from being rationalised at an earlier stage. As indicated above, we had to request further submissions on the issue and ultimately it appeared to us that we had not heard evidence supporting some of the bases on which various respondents were said to be liable, nor did we have fully developed submissions on some of the assertions.

843. Mr Heinl's case as against the various respondents was set out ultimately in a table which is reproduced here:

| Detriment | Cause of action | R1 | R2 | R3 | R4 | R5 | R6 |
|---|---|---|---|---|---|---|---|
| **1** [18 March 2021 Board meeting] | Whistleblowing [s.47B] | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | ✓ | ✓ | ✓ | | |
| **2** [notice of termination] | Whistleblowing [s.47B] | ✓ | | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | | ✓ | ✓ | | |
| **3** [security co. at house; cut off access to systems/ files] | Whistleblowing [s.47B] | ✓ | | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | | ✓ | ✓ | | |
| **4** [out of office] | Whistleblowing [s.47B] | ✓ | | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | | ✓ | ✓ | | |
| **5** [sham investigation and Toppin Report] | Whistleblowing [s.47B] | ✓ | | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | | ✓ | ✓ | | |
| **6** [Grievance response] | Whistleblowing [s.47B] | ✓ | | ✓ | ✓ | | ✓ |
| | Victimisation [s.27] | ✓ | | ✓ | ✓ | | |
| **7** [termination of directorships in R1 and R2] | Whistleblowing [s.47B] | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | ✓ | ✓ | ✓ | | |
| **8** [disciplinary process] | Whistleblowing [s.47B] | ✓ | | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | | ✓ | ✓ | | |
| **9** [summary dismissal] | Whistleblowing [s.47B] | ✓ | | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | | ✓ | ✓ | | |
| **10** [appeal process] | Whistleblowing [s.47B] | ✓ | | ✓ | ✓ | | |
| | Victimisation [s.27] | ✓ | | ✓ | ✓ | | |
| **11** [Bad Leaver designation] | Whistleblowing [s.47B] | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| | Victimisation [s.27] | ✓ | ✓ | ✓ | ✓ | | |

844. So far as whistleblowing detriments were concerned, in terms of the claims against individuals,, Mr Heinl's case was that:

- Ben and Guy Wolstenholme were sufficiently directly motivated by the disclosures and were materially decision makers in respect of detriments 1, 2, 3, 5, 7, 8 and 9 and 11 so as to be directly liable in respect of these detriments;
- As against Mr Toppin and Ms Kyosti, Mr Heinl argued that they were liable under the agency and/or worker limbs of section 47B. Mr Heinl's case against Mr Toppin and Ms Kyosti depends on the argument advanced by Mr Susskind that the Supreme Court decision in Jhuti means that it is permissible to look at the motivation of others in the chain of command in detriment claims.

845. So far as the victimsiation claims were concerned, Mr Heinl limited his claims against individuals to Ben and Guy Wolstenholme in recognition of the fact that CLFIS requires the detrimental acts to have been done by a person with the proscribed motivation.

846. In respect of the liability of the Wolstenholmes for the matters which they were said not to have been direct decision makers in respect of, Mr Heinl argued as follows:

- Detriments 6 and 10 were said to have arisen as a result of contingencies for which the respondents had not originally planned. As to detriment 6 (the grievance response) Mr Heinl said that Ms Kyosti dealt with the grievance in a manner which was congruent with the plan instigated by the Wolstenholmes and instructed, caused, induced or knowingly helped by them (for the purpose of sections 111 and 112 Equality Act 2010);
- As to detriment 10, the appeal process, Mr Bull was said to have dealt with the appeal in a manner which was congruent with the original plan and instructed/caused/induced or knowingly helped by the Wolstenholmes.

847. So far as the second respondent, Year 15 Limited, was concerned, Mr Heinl claimed in respect of detriments 7 and 11 on the basis that the second respondent acted as the agent for Moving Brands Limited or the Wolstenholmes and / or is liable under sections 111 and 112 of the Equality Act 2010 in respect of the victimisation complaints.

848. The respondents' case in respect of Year 15 Limited was that:

- It had never been pleaded that Year 15 Limited was the agent of Moving Brands Limited or the Wolstenhomes and there was no application to amend;
- Section 47B(1A)(B) ERA 1996 attaches liability to the agent of an employer. The Wolstenholmes were never Mr Heinl's employer;
- Mr Heinl had adduced no evidence or argument to show why Year 15 Limited had actual or ostensible authority to act on behalf of the Wolstenholmes or Moving Brands Limited. As shareholders and directors, the Wolstenholmes were agents for Year 15 Limited not the other way around;

- Looking at detriments 1 and 7 relating to the process of removing Mr Heinl as a director, this was an act carried out by Year 15 Limited in its own right, not in any sense on behalf of the Wolstenholmes or Moving Brands Limited;
- Looking at detriment 11, designation of Mr Heinl as a bad leaver, that was not treatment by Year 15 Limited;
- So far as section 111 Equality Act 2010 is concerned, for the section to apply, the relationship between the instructor of the discrimination and the instructee must be such that the instructor is in a position to commit a 'basic contravention' in relation to the instructee. Year 15 Limited is not in a relationship with Moving Brands Limited or either of the Wolstenholmes such that it would be unlawful for Year 15 Limited to discriminate against, harass or victimise Moving Brands Limited or either of the Wolstenholmes;
- For section 112 Equality Act 2010 to apply, there would have to be a basic contravention by the Wolstenholmes or Moving Brands Limited and Year 15 Limited would have to have knowingly helped that contravention. Detriments 1 and 7 were acts of Year 15 Limited itself and detriment 11 was not an act done by Year 15 Limited but was a consequence of the Shareholder's Agreement.

849. So far as Mr Toppin and Mr Kyosti were concerned, the respondents said:

- There was no evidence that they were workers for Moving Brands Limited for the purposes of section 47B(1A)(a) Employment Rights Act 1996;
- They were capable of being agents for Moving Brands Limited at the material time but not relevantly for the Wolstenholmes as the Wolstenholmes were not Mr Heinl's employer
- They made individuals submission in respect of each detriment which we discuss below.

850. So far as the Wolstenholmes were concerned, the respondents' position was:

- In relation to detriments which were properly justiciable under the relevant statutory provisions. Mr Heinl had standing to bring a claim against the Wolstenholmes where it could be shown that they were relevant decision makers.
- Section 111(1) of the Equality Act 2010 did not apply in relation to the grievance response and appeal process because there was no evidence that Ms Kyosti and Mr Bull were workers for Moving Brands Limited and so the relationship between Ben Wolstenholme and Ms Kyosti and Mr Bull was not such that Ben Wolstenholme was in a position to commit a basic contravention in relation to either of those individuals. There was no claim that Mr Bull and Ms Kysoti victimised Mr Heinl so it was not open to him to argue that Ben Wolstenholme had instructed them to do so.
- Section 112 Equality Act 2010 did not apply because there was no argument that Ms Kyosti and Mr Bull had victimised Mr Heinl. Mr Heinl had not in any event said what the Wosltenholmes had done to knowingly help Ms Kyosti and Mr Bull victimise him.

851. Our conclusions as to the liability of the various respondents were as follows:

Year 15 Limited

*Whistleblowing liability for detriments 1, 7 and 11*

852. For liability to attach, the agent must be the agent of the employer. The Wolstenholmes were not Mr Heinl's employer so liability could only attach to Year 15 Limited if it was acting as agent for Moving Brands Limited. The orthodox analysis is that shareholders and directors may act as a company's agents but the company is not the agent of the directors and shareholders. Year 15 Limited was Moving Brands Limited's sole shareholder so it is arguable that it could act as Moving Brands Limited's agent in that role.

853. In calling a board meeting to remove the claimants as directors, it appeared to us that Year 15 Limited was acting on its own behalf as principal and not as agent for Moving Bands Limited. There was no coherent argument to the contrary. The same is true of detriment 7. As to detriment 11, our attention was not drawn to what it was said Year 15 Limited did which caused the detriment. The designation of Mr Heinl as a bad leaver was treatment by other respondents which had an effect on his shareholding in Year 15 Limited but Year 15 Limited had no active role in the matter.

854. So far as whether Year 15 Limited as the sole shareholder of Moving Bands Limited could have been acting as Moving Brands Limited's agent in actions taken to remove the Moving Brands Limited directorship, we simply did not hear submissions on this point and it did not seem to us that we could properly reach any conclusions.

*Liability of Year 15 Limited under the Equality Act 2010*

855. So far as liability under section 111 Equality Act 2010 is concerned, we concluded that Year 15 Limited was not in a relationship with the Wolstenholmes or Moving Brands Limited such that it could discriminate against those other respondents. There could therefore be no liability of Year 15 Limited under section 111.

856. So far as section 112 was concerned, we did not consider that it could properly be said that Year 15 Limited was 'knowingly helping' any of the other respondents to do things which it was in fact doing itself and on its own behalf – calling a meeting to consider removing the claimants as directors and then removing the claimants as directors.

857. In relation to detriment 11, there was no relevant activity by Year 15 Limited in relation to the bad leaver matter. We had no evidence that Year 15 Limited as a corporate entity caused, instructed or induced Mr Heinl's dismissal for gross misconduct.

858. For the above reasons, we did not conclude that the second respondent, Year 15 Limited, was liable for any of the detriments we have found made out and we dismissed the claims against Year 15 Limited.

Mr Toppin and Ms Kyosti

859. We agreed that there was no good evidence or argument to suggest that Mr Toppin and Ms Kyosti were workers for Moving Brands Limited although Mr Toppin was doing some paid work for Moving Brands Limited from time to time.

*Whistleblowing liability*

860. The respondents accepted that Mr Toppin and/or Ms Kyosti acted as agents for Moving Brands Limited in carrying out various activities such as their respective roles in the disciplinary processes against the claimants. They did not accept that there was any agency relationship in respect of some of the other matters; for example in relation to the termination of the claimant's directorships, which was a decision by shareholders not Mr Toppin or Ms Kyosti.

861. It was not alleged that Mr Toppin and Ms Kyosti were themselves motivated by the protected disclosures. As we set out above, Mr Heinl's case against Mr Toppin and Ms Kyosti depended on the argument advanced by Mr Susskind that the Supreme Court decision in Jhuti means that it is permissible to look at the motivation of others in the chain of command in detriment claims. We have rejected that analysis for reasons we have set out above and accordingly we have not found that Mr Toppin or Ms Kyosti were individually liable for any of the protected disclosure detriment claims.

The Wolstenholmes

*Whistleblowing liability*

862. We concluded that Guy Wolstenholme was aware of the share transfer disclosures for the reasons we have outlined above. Guy Wolstenholme was an employee of Moving Brands Limited and both Wolstenholmes were directors of Moving Brands Limited and capable of acting as its agents.

863. Our conclusions above were that various of the detriments occurred because of decisions made by the Wolstenholmes which were materially caused by the protected disclosures. We concluded that they were liable as agents as follows:

*Detriment 1*

864. The Wolstenholmes' role in causing these various detriments to happen seemed to us to be a role they were performing as agents for Moving Brands Limited, save that actions taken in relation to removing the claimants as directors of Year 15 Limited were not actions taken or caused to be taken by the Wolstenholmes as agents of Moving Brands Limited but as agents of Year 15 Limited and there is no liability of the Wolstenholmes for those matters.

*Detriment 2*

865. We concluded that Mr Toppin was essentially the instrument for a decision taken by Ben and Guy Wolstenholme in their role as directors / agents for Moving Brands Limited. The Wolstenholmes are liable as agents.

*Detriment 3*

*866.* We did not find that there was any liability of Moving Brands Limited or that these were decisions made by the Wolstenholmes. They are not liable for this detriment.

*Detriment 4*

867. We found no liability on the part of Moving Brands Limited and there is none, it follows, on the part of the Wolstenholmes for the reasons we have set out above.

*Detriments 5 and 6*

868. The analysis in relation to detriments 1 and 2 applies and we found that the Wolstenholmes were liable as agents.

*Detriment 7*

869. The claimants were removed as directors by votes of the shareholders at the relevant board meetings. We concluded that in acting as shareholders for Year 15 Limited, the Wolstenholmes were not acting as agents of Moving Brands Limited and therefore no liability attached to them for that matter but they did act as agents for Moving Brands Limited in the removal of the claimants as directors of Moving Brands Limited.

*Detriments 8 – 11*

870. The analysis in relation to detriment 1 and 2 applies and we found the Wolstenholmes were liable as agents.

*Victimisation liability*

871. We considered that the agency argument applied equally to the detriments when considered as victimisation, however we have not found that Guy Wolstenholme was aware of the protected act / discrimination disclosure, so only Ben Wolstenholme is liable for the detriments as victimisation.

**Conclusions**

872. We have found for the claimants in the respects set out above. If the parties are not now able to resolve matters between themselves, there will be a remedy hearing. A case management hearing will be arranged to set a date for the remedy hearing and give any necessary directions.

873. We considered that we had received only limited submissions on the issues of contribution and Polkey and concluded that it would be fair to the parties to hear further submissions at the remedy hearing made with the benefit of our findings on liability.

Employment Judge Joffe

22 July 2024

Corrected on 11 November 2024

Sent to the parties on:

25 July 2024

…….

For the Tribunal Office:

……..……..

Appendix1: Facts and documents relating to the New York lease

On 13 April 2015, a lease was entered into between the landlord of the premises and Moving Brands Inc, signed by Mr Bull. The lease had a seven year term with no break clause and rental of over $20,000 per month. Mr Bull signed a 'good guy' guarantee, which made him guarantor for a period limited to three months after notice of termination was given, provided rent was paid for the period and the premises were vacated. Mr Bull was a director of Moving Brands Inc unlike the claimants. He had day-today operational control of the New York studio.

At its height the New York office had eight employees; that number had reduced to four by 2019. By 30 September 2019, Ms Miller was exploring an exit from the lease with the landlord's agent, Ms D Vogel.

On 25 March 2020, in a discussion over Slack about the US business, Mr Bull said that New York did not need a physical studio and might never need one:

*Lastly – I've been thinking about the NY rental/lease. We should consider paying to get out of the NY lease over subletting. We previously agreed it wasn't the best option for very good reasons, those reasons still exist (and put us at risk). Subletting in this period of Covid-19 is going to be very hard, in my view (near impossible) and is likely to end up costing us money for good part of the remaining lease (while we find a sub-let candidate). Therefore, I think we should discuss offering the landlord an immediate reduced cash offer (at a level that can be considered palatable by them – something like half of the remaining rent value) and see if its high enough for them to cut there potential losses over this period overall (they will be dealing with other renters, properties, potentially us not being able to pay, getting legal etc, etc). A decent offer might work to get us out without further risk*.

The Covid planning papers of 2 April 2020 which were shared with the board indicated that there were 'limited option to exit' the studio space and that the worst case scenario for liability on the New York lease was up to £203,000. That would be in circumstances were no subtenant was found and the landlord did not accept a deal.

On 2 April 2020, Mr Bull wrote directly to the landlord's agent to propose a rent reduction of 50% until the end of the year. Neither claimant was copied into this email.

The agent replied on 15 April 2020 asking for financial details and saying that rent relief was being considered on a case by case basis and was generally taking the form of deferrals.

On 28 July 2020, Mr Richardson asked in the Slack group whether the full amount was being paid for the New York studios. Mr Bull said that he had asked the landlord and was trying to find out now.

On 24 August 2020. Mr Davis engaged US lawyers, Pryor Cashman, to assist. He provided Mr Fishman, the lawyer dealing, with Mr Bull's correspondence with Ms Vogel. They had a discussion on 26 August 2020 and Mr Davis reported the conversation on Slack, highlighting to Mr Bull that he should read the message:

*I spoke to the lawyers today re: MB NYC . In their opinion:*

*– the lease is straightforward and simple*

*– our security deposit is low (NB the security deposit will come off any fee owed.*
*Next steps*

*– they draft a note to send to the landlord*

*– they will use the offer from the landlord as the starting point for negotiation to exit – the landlord is technically owed c.$400k if we exit, but have offered 1 year of rent and rates c.$270k to exit the lease*

*– by Friday 28th August, we need to decide whether we serve notice or halt payment of rent. (edited)*

He then wrote:

*(@Jim PLEASE READ because this relates to you personally.)*

*So, do we go with:*

*a): We serve notice:*

*+ at the end of the 3 months @Jim is free of the good guy guarantee*

*– we will be paying c$90k that could come off the overall amount owed*

*b) We stop paying:*

*+ we avoid spending money unnecessarily*

– we *get swiftly into negotiating out with some % of rent due to April 2022*

*– @Jim has good guy guarantee until we agree the settlement amount*

*Thoughts @here*

On 27 August 2020, Ms Laikko wrote:

*thanks @Christian, great to progress this and have clarity on the options. I think the priority is to hear from @Jim's opinion first as the options have an impact on him. Nevertheless, we should go ahead with the step 1 (AND we should use the offer as a starting point for our 'counter proposal' for exit w/o replacement tenant but I think apply some sort of 'discount' to it, because we have not been given any discount for the time that we have not been able to use the premises - 6 months).And then we still have the two possible options for step 2.*

Mr Davis subsequently wrote:

*Makes sense, and I agree. I'm reconvening with the lawyers at 9:30 PT as they think that the best next step is to call the landlord based on the previous exchanges from us to the landlord re: our options for moving to a smaller space or exiting.*

On 27 August 2020, Mr Davis asked the lawyer, Mr Fishman, if they should stop paying rent, serve notice or reach out to the landlord. Mr Fishman said that he was leaning towards approaching the landlord to open a negotiation. Mr Davis then updated the Slack group as to the advice.

Later that same day, Mr Davis wrote

*Hi @here I had a follow up with the lawyers today.*

*Agreed next steps are:*

*1. Christian to reach out to Donna to give her a heads up that we are likely to serve notice*

*This is done by email as Donna is OOO until 8/31, so didn't pick up cell or desk phone2.*

*Lawyer to call Donna to discuss exit from agreement*

*This will happen on Monday as Donna is OOO until 8/313. We serve notice tomorrow*

*This is being written now and will be sent to me to approve. Once approved it will be issued tomorrow*

*From this moment, we will enter negotiations and the lawyers suggested opening position is:*

*– we've served notice*

*– we've payed September (first month of notice)*

*– we will pay October and November (second and third month of notice) on the landlord retaking possession*

*– and will forfeit the deposit to be out of the agreement entirely So, this would be c. $54k to cover October and November and $40k loss of deposit. A total of $94k if they accept.*

Ms Laikko replied:

*Hi @Christian Thanks for the update. All sounds good to me.*

Mr Davis then wrote:

*This may require us being out of the studio very quickly, so I will post into the #financing_covid channel to Phil to ensure that he can get movers and storage lined up*

*@Hanna let me know if you want to chat through the opening offer.*

Still later he wrote:

*Brief update @here: the signed notice is with the lawyer and will be with the landlord*

Mr Davis then pursued the plan as outlined and advised by the lawyers. Mr Brasile from Pryor Cashman sent a surrender notice which was signed by Mr Bull on behalf of Moving Brands Inc. The notice said that Moving Brands Inc would be vacating the US premises.

Ms Laikko explained the thinking in her witness statement. No one wanted to rent offices at this point in the pandemic. Not paying the rent would address the problem of cash flow. They had heard that other tenants were taking a similar course at this time. The surrender would engage the landlord's duty to mitigate loss and might result in savings which would not be achieved if they continued to occupy the space

On 4 September 2020, Mr Brasile from Pryor Cashman sent an offer to Ms Vogel whereby Moving Brands Inc offered to pay its obligations under the lease until 30 November 2020 and waive all rights to the security deposit as well as promptly delivering possession of the premises.

There was no response to that offer.

On 11 September 2020, Pryor Cashman informed Mr Davis that they had not heard from the landlord. They said that if an agreement could not be reached, Moving Brands Inc should be prepared to move out of the premises prior to the three month deadline.

On 24 September 2020, Mr Davis started a Slack channel relating, amongst other things to the New York studio exit. Mr Bull was actively involved in this channel and in the arrangements for leaving the New York premises.

On 29 September 2020, Mr Fishman contacted Mr Davis and said he had not heard anything from the landlord.

On 17 October 2020, Mr Davis relied to Mr Fishman, explaining that they were working to exit the premises and asking if Mr Fishman had heard from the landlord

On 19 October 2020, Pryor Cashman advised, in view of Mr Bull's guarantee, that Moving Brands Inc should pay rent until the end of November 2020.

Ms Laikko emailed Ben Wolstenholme, copyng in Mr Toppin:

*We have served notice on the NY studio in order to free Jim from the Good Guy Clause, and are planning to surrender the space as soon as possible and latest by the end of November. We don't have a response from the landlord on the offer yet (i.e. the final forecasted costs on this may vary)*

Ms Laikko's unchallenged evidence was that she asked Mr Richards at about this time to ensure that the rental liability was included in the live management accounts document.

On 22 November 2022 Mr Wade updated the Slack group on the progress made in exiting the New York office and Mr Bull sent thanks.

The premises were vacated by 30 November 2020. The landlord continued to send rental invoices but was otherwise unresponsive.

On 1 December 2020, Mr Davis wrote to Pryor Cashman copying in Ms Laikko asking, in the absence of any contact from the landlord's agent whether they should stop paying rent from that point. Mr Fishman replied that if they had done what they had been advised, they were 'covered'. In a further communication. Mr Fishman said there as nothing more they needed to do under the lease.

On 11 January 2021, copying in Ms Laikko, Mr Davis asked Pryor Cashman if any action was needed. He said they had continued to receive invoices from the landlord but no default notices.

Mr Fishman replied on 12 January 2021. He said that commercial eviction proceedings in New York were stayed at that time. He said that there was a chance the landlord could file a regular civil lawsuit but that seemed 'unlikely in this climate.'

When Mr Toppin later investigated, in April 2021, Pryor Cashman told him that landlord was marketing the premises and any losses would be mitigated by payments from any replacement tenant.

Appendix 2: Facts and evidence about outside work

As part of the disciplinary proceedings the respondents conducted, Mr Heinl was accused of engaging in 'outside work' without appropriate permissions. This related to two organisations. Mr Heinl's evidence was as follows:

TIA Capital was an investment firm set up by two friends of Mr Heinl's. He did a small-scale deign job for TIA. It was not a job Moving Brands would have done and was the kind of small scale commission designers do via friendship networks. His friends had brought some work to Moving Brands for another organisation. Mr Heinl talked about his friendship and the work he did openly.

The other allegation was about a concept for an umbrella brand to be called Hanways:

*In November 2015, the two of them asked if I could do some design work for them but I didn't think I could, and so the conversation then became about whether I could give some ongoing advice about brand topics and they would engage local designers. I was offered equity in the venture if it ever got off the ground. In fact, it did not, and I never got anything in return for my involvement.*

*If I recall, I said that I wanted a limited role and the intention was for me to be a minority shareholder. Again, the kind of work that I was doing here was not of the scale that Moving Brands would have been interested in. The type of advisor role that was on offer was also fully in line with the strategic ambition of Moving Brands to enable team members to take up those sorts of positions to grow their networks and experience of business. I probably did not refer to Hanways by name because it was so early-stage at the time.*

In an email about the potential agreement, Mr Heinl wrote*: I will need to inform my employer about this holding. I do not envisage any issues as there are no conflicts or competitive issues.*

Mr Heinl also gave evidence about the culture in the industry. He said that it was common for employees to take on side projects. He was unaware of any agencies enforcing a rule against outside work and could not recall any suggestion that anyone's outside work gave rise to a conflict of interest. He said that there was a strategy of encouraging employees, particularly the senior team 'to develop their capabilities by taking formal and informal roles at other entities'. There was no practice of requiring permission or notification of outside work.

Mr Heinl said that many of the team had private clients and the projects would be discussed at work including at meetings such as 'lunch and learns'. He said about the particular outside work the subject of the charge: 'Given the small scale of these two projects, and the fact that they date back to 2016, it is hard for me, and may well also be hard for others, to remember precisely what I said about them to people at Moving Brands at the time.'

Mr Heinl said that Ben Wolstenholme had started Madefire whilst CEO of Moving brands. Many of the Moving Brands team were involved in work for Madefire.

Mr Bull was cross examined about an erotic products business he had considered starting. He said that he had bought a url but the idea was just an idea. Similarly he had considered starting a business to make watches but had not yet made any watches. He said that he talked about these ideas openly but had not 'made a dime'.

In his statement for the disciplinary, Mr Heinl listed a number of private projects or types of private project performed by Moving Brands employees.

[i] See Employment Judge Spencer's order of 27 June 2022:

*The Respondent shall conduct a search of its documents using the keyword "Phoenix" for the period 1 January 2021 to 30 June 2021.*
*2. The Respondent shall conduct a search of all documents mentioning, and communications with, Mr Philip Warman from 1 March – 30 June 2021.*
*3. The Respondent shall conduct a search of all communications between Ms Anne Smith and the Custodians (defined as the 4 individual Respondents and Mr John Bull) between 1 March 2021 to 30th June 2021 using the keywords Mat, Hanna, Heinl, Laikko, CEO, COO, CBO, MH, HL, H&M, M&H.*
*4. By consent the Respondent will search the "Exhibits" folder.*
*5. All disclosable documents resulting from the above searches shall be disclosed to the Claimants no later than 1 July 2022.*
*6. The Excel spreadsheet described as "Project Phoenix team contact details" shall be disclosed forthwith.*