EMPLOYMENT TRIBUNALS

Claimant: **Mr Alan Smith**

Respondent: **InvestCloud Limited**

Heard at: **London Central**

On: **7 – 11 & 15 July 2025, 16 – 18 July 2025 (In Chambers)**

Before: **Employment Judge Brown (Sitting Alone)**

Appearances

For the Claimant: **In person**
For the Respondent: **Mr B Mukherjee, Counsel**

JUDGMENT

The judgment of the Tribunal is that:

1. **The Respondent dismissed the Claimant unfairly, under s98(4) Employment Rights Act 1996.**
2. **The Respondent did not subject the Claimant to protected disclosure detriment, nor did it dismiss him automatically unfairly on the grounds that he made any protected disclosure.**
3. **It was 50% likely that the Respondent would have dismissed the Claimant fairly, following a fair process.**
4. **The Claimant's compensation for unfair dismissal should be reduced by 10%, to reflect the small chance that he would have been dismissed for breach of clause 16 of his contract, in any event.**

REASONS

The Issues and this Hearing

1. By a claim form presented on 12 June 2024, the Claimant brought complaints of "ordinary" unfair dismissal (ss 94 & 98 Employment Rights Act1996); automatic unfair dismissal because of a protected disclosure (s103A Employment Rights Act); and detriment because of a protected disclosure (s47B Employment Rights Act) against the Respondent, his former employer.

2. Early conciliation started on 29 April 2024 and ended on 14 May 2024.

3. The issues to be decided at this hearing had been agreed between the parties. I said that I would decide any Polkey issues at this, liability stage, of the proceedings. I listed a separate remedy hearing, on a provisional basis, because the Claimant seeks reinstatement / re engagement. The parties would need time to consider the liability judgment before preparing for such a remedy hearing, because the liability judgment would be likely to have an impact on the issues arising in relation to reinstatement / re engagement and, therefore, on the necessary evidence and submissions.

4. The liability issues had been agreed as follows:

UNFAIR DISMISSAL (s.94 ERA)

Was the reason or the principal reason for C's dismissal a potentially fair reason for the purposes of section 98 (1) (b) of the Employment Rights Act 1996 ("ERA")?

1.1. R asserts that the reason or principal reason for C's dismissal was redundancy, or alternatively, some other substantial reason, namely a business re-organisation.

1.2. C asserts that the reason or principle reason for C's dismissal was that he made the protected disclosures asserted in his claim.

2. If the reason for C's dismissal was redundancy, did R act reasonably (i.e. within the band of reasonable responses) in accordance section 98(4) of the Employment Rights Act 1996 in treating the reason relied on as a reason to dismiss, having regard to the following:

1.1. Whether R consulted appropriately with C concerning his redundancy;

1.2. Whether R made reasonable efforts to find alternative employment for C; and,

1.3. Whether R adopted a fair procedure in deciding to dismiss C.

3. If the reason for C's dismissal was a business reorganisation did R act reasonably (i.e. within the band of reasonable responses) in accordance section 98(4) of the Employment Rights Act 1996 in treating the reason relied on as a reason to dismiss, having regard to the following:

3.1. Did the business reorganisation constitute a substantial reason of a kind as to justify the dismissal of an employee holding the position C held?;

3.2. if so, was R's decision to treat those reasons (or either of them) as sufficient to justify C's dismissal reasonable in all the circumstances (including as to the procedure adopted by R)?

DISCLOSURES (Part IVA ERA)

4. Did C make the disclosures PD 1 to PD8 as identified in the Schedule?

5. Were PD1 to PD8 qualifying disclosures? In particular, in each case:

5.1. Did C disclose information for the purposes of s.41B(1) ERA?

5.2. Did C believe the disclosure was made in the public interest? The public interest(s) C relies upon are set out in the Schedule.

5.3. If so, was that belief reasonable?

5.4. Did believe that the disclosure tended to show a relevant failure (i.e. one or more of subsections 43B(1)(a) to (f) ERA)? The relevant failure relied upon by C in each case is set out in the Schedule.

5.5. If so, was that belief reasonable?

6. Were PD1 to PD8 protected disclosures within the meaning of s.43A ERA? The basis on which C alleges each disclosure was protected is set out in the Schedule.

WHISTLEBLOWING

UNFAIR DISMISSAL (s.103A ERA)

7. Was the reason or principal reason for C's dismissal that C made one or more of the disclosures PD1 to PD8?

WHISTLEBLOWING DETRIMENT (s.47B)

8. Did C make a protected disclosure(s) for the purposes of sections 43A of the ERA, as set out above?

9. Did R subject C to the following treatment by any act or failure to act:

9.1. R did not disclose to him that it was seeking to recruit to the role of Chief Revenue Officer, a global role which could have been performed in the US or the UK;
9.2. Ms Bellini's refusal to consider C for that role, as stated to C on 19 October 2023;
9.3. There was no genuine consideration of alternative roles before Ms Bellini had made up her mind not to redeploy C;
9.4. R failed to embark upon consultation at a formative stage when redundancy was only a potential outcome;
9.5. The commercial rationale for a redundancy presented to C was false;
9.6. The Claimant was not invited to apply for the newly created role of Head of APL;
9.7. To the extent that remuneration was a relevant consideration in the selection for redundancy, R did not approach C to discuss whether an adjustment to his remuneration would be acceptable to him.

C contends that, by virtue of any or all of the above matters, the consultation and

redeployment exercise was a sham and unfair.

In relation to points 9.6 and 9.7 above (included by way of amendment), the Claimant's position is that these are factual additions to an already pleaded claim and therefore should be treated for time purposes as having been pleaded at the same time as the original claim.

10. If so, in each case:

10.1. did the alleged treatment amount to a detriment; and,

10.2. was R's act or any deliberate failure to act done on the ground that C had made one or more of the disclosures PD1 to PD8?

JURISDICTION

11. Does the Tribunal have jurisdiction to hear C's detriment claim against R in respect of his dismissal given the effect of s.47B(2) ERA?

12. Were C's complaints of detriment on grounds of having made a protected disclosure (or any of them) presented within time for the purposes of section 48(3)(a) of the ERA? R says that time expired on 30 January 2024 (¶39 GoR).

13. If not, should time for presentation of C's complaints of detriment on grounds of having made a protected disclosure (or any of them) be extended pursuant to section 48(3)(b) of the ERA on the basis that (a) it was not reasonably practicable for the complaint to have been presented in time, and (b) it was presented within a reasonable period thereafter?

The following remedy issue was also to be decided at this hearing:

17. If so, should this compensation be reduced because;

17.1. he would have been dismissed in any event had a fair procedure been followed.

5. There was a bundle of documents. Some documents were added to it during the course of the hearing. Page numbers in this judgment refer to pages in that bundle.

6. The Tribunal heard evidence from the Claimant. He had provided both a witness statement and a supplemental witness statement. For the Respondent, the Tribunal heard evidence from: Richard Lumb, who was interim Chief Executive Officer of the Respondent between 17 April 2023 and 10 January 2024; Heather Bellini, the Respondent's President and Chief Financial Officer since July 2023; Clare Hughes, a 'Business Solutions Architect' and later 'Product Owner' at the Respondent; and Andrew Mitchell, Director of Human Resources at the Respondent.

7. The Tribunal was provided with a Respondent's Opening Note. There was an agreed chronology and cast list. Both parties made written and oral submissions. The Tribunal reserved its decision.

8. I agreed that the names of some of the Respondent's clients, and key individuals at those companies, should be anonymised by way of cyphers because they were not relevant to any of the issues to be decided and I accepted that the identity of the Respondent's clients and its terms of dealing were confidential to the Respondent and such a derogation from the principle of open justice was justified and proportionate. I did not agree that the name of the client, in respect of whom the Claimant allegedly made protected disclosures, should be anonymised. I considered that this would be an unjustified interference with the principle of open justice and a disproportionate derogation from the right to freedom of expression, in that such an anonymity order would restrict the public from understanding the protected disclosures and their significance for the Claimant and for the Respondent. Further, the alleged protected disclosures themselves touched upon matters of public interest so that there was little room for interference with the right to freedom of expression. I gave full reasons at the time.

9. On the application of the Claimant, I requested that Ms Bellini, who was not within the jurisdiction at the time, conduct a search of her personal mobile phone, for emails, Teams messages, WhatsApp, text messages or other documents regarding: The retention or removal of the Claimant from his employment; The redeployment or non-redeployment of the Claimant. She did this and disclosed a small number of text/WhatsApp messages.

Evidence and Findings of Primary Fact

10. The Tribunal was referred to a considerable amount of detailed evidence in the Hearing Bundles, in the parties' witness statements and in written submissions. My findings necessarily focus on the evidence which was most relevant to the issues in the claim.

The Claimant's Employment

11. The Claimant was employed by the Respondent as 'Executive Vice President Business Development' from 6 July 2021, p224, to 1 February 2024. He was dismissed purportedly for redundancy.

12. The Respondent provides digital 'solutions' for the financial services industry. It is headquartered in the US. Its business was historically divided into two core software products: (i) the Digital Wealth Platform and (ii) Advanced Portfolio Logistics ("APL"). The former is a collection of tools designed to help financial institutions manage and enhance their wealth management services, similar to banking apps which consumers use, but which require complex systems implementation and integration at a financial institution. APL is a software tool which allows asset and wealth managers to interact, transact and manage investments through managed accounts.

13. The Claimant worked in the Respondent's London office.

14. The Tribunal was not shown any policy which the Respondent has, or any training materials, in relation to confidential documents, or their use.

15. The Claimant's employment contract provided, at clause 16,

> 16. Confidential Information
> 16.1 You shall not either during your employment or at any time after its termination (howsoever arising), directly or indirectly, use, disclose or communicate to any person whatsoever and, shall use your best endeavours to prevent the publication or disclosure of, any Confidential Information.
>
> 16.2 "Confidential Information" means any trade secrets or other information which is confidential, commercially sensitive and is not in the public domain relating or belonging to the Company and/or any Group Company including but not limited to:
>
> (a) information relating to the business methods, corporate plans, management systems, finances, new business opportunities, research and development projects, marketing or sales of any past, present or future product or service;
> (b) secret formulae, processes, inventions, designs, know-how discoveries, technical specifications and other technical information relating to the creation, production or supply of any past, present or future product or service of the Company and/or any Group Company;
> (c) lists or details of customers, potential customers or suppliers or the arrangements made with any customer or supplier; and (d) any information in respect of which the Company and/or any Group Company owes an obligation of confidentiality to any third party.
>
> 16.3 Clause 16.1 does not apply to:
>
> (a) any use or disclosure in the proper performance of your duties under this Agreement, as authorised by the Company and/or as required by law;
> (b) any information which is already in or comes into the public domain other than through your unauthorised disclosure; and/or
> (c) any protected disclosure within the meaning of s43A Employment Rights Act 1996."

16. The Claimant had been invited to join the Respondent at a meeting in April 2021 by John Wise, its then CEO. The Claimant and Mr Wise had formed a close working relationship and a friendship during the Claimant's previous employment at Citibank, when he was overseeing the Respondent's installation of new digital platforms for Citibank in Hong Kong.

17. Mr Wise had envisioned a new digital product and concept which the Respondent called "Marketplace". It was intended to integrate 'back end' APL with user friendly 'front end' digital platforms, to provide a comprehensive 'A-Z' 'one-stop-shop' digital product for Asset Managers.

18. When he was first employed by the Respondent, the Claimant's role was solely to run business development and sales for Marketplace.

19. However, by May 2022, the Respondent had not made the progress it had hoped in selling the Marketplace concept to prospective buyers. At a meeting on 7 June 2022 the Claimant was therefore asked to take responsibility for managing the Respondent's relationship for its client, Rathbones.

Rathbones

20. Rathbones was the Respondent's largest UK-based client. The Respondent had signed a Service Schedule Agreement with Rathbones in October 2021, p251, to deliver Digital Wealth Products. The Respondent had not delivered the products and systems for which Rathbones had contracted.

21. The Claimant told the Tribunal that, on 19 April 2022, 5 May 2022 and 25 May 2022, he told his then line manager, Ms Schmidt, that Rathbones had been sold systems which the Respondent simply didn't have, and for which there was no realistic delivery roadmap to deliver, in line with what had been promised to Rathbones. He told the Tribunal that he had informed Ms Schmidt that the decommissioning of four CRM systems in nine months was simply not possible. The Claimant also told the Tribunal that he had explained to Ms Schmit that sales staff were being asked to go out to asset managers and sell The Marketplace whilst there was no credible roadmap to deliver the technology they were trying to sell to regulated asset managers in the UK and the US. These alleged statements were his protected disclosure 1.

22. Ms Schmidt did not give evidence to the Tribunal.

23. I noted that the Claimant had not been asked to take on the Rathbones relationship management role, either in April 2025, or before 25 May 2025. In evidence at the Tribunal, the Claimant agreed that he was 'starting from scratch' in relation to his Rathbones role at the end of May 2022 and that the first time he was sent relevant documents, including the Service Schedule Agreement for Rathbones, was 31 May 2025, p858. While the Claimant told the Tribunal that he had "heard enough noise about there being a problem" and that the person leading the project was off work sick, I did not accept that he told Ms Schmidt, during May 2022, "that Rathbones had been sold systems that the Respondent simply didn't have, or had any realistic delivery roadmap to deliver in line with what had been promised to the client", or that, "the decommissioning of four CRM systems in nine months was simply not possible." He would not have had that knowledge at that time. If he did say those things, I did not accept that he had any knowledge of what had been actually agreed or promised to Rathbones, in order to make those comments at that time.

24. However, on the balance of probabilities, I did accept that he told Ms Schmit that sales staff were being asked to go out to asset managers and sell The Marketplace whilst there was no credible roadmap to deliver the technology they were trying to sell to regulated asset managers in the UK and the US. The Claimant had responsibility, in April and May 2022, for Marketplace business development and sales, so he would have had knowledge of what was being undertaken in respect of it. There was no evidence to contradict the fact that he made these statements.

25. I accepted the Claimant's evidence that, on 25 August 2022, he said to Vincent Sos, Chief Information Officer of the Respondent, that the Respondent simply did not have the products that the client, Rathbones, had been sold and that key members of the UK team like Clare Hughes and Izzy Brown were at breaking point and their health was suffering, as the client believed they had been lied to and was getting increasingly aggressive towards the Respondent's staff. I further accepted his evidence that the

Claimant told Mr Sos that what Mr Brodie had been told in July 2022, by Brett Heinz while in London to meet with Rathbones on behalf of the Respondent, namely that delivery of the product would be by September 2022, was clearly impossible.

26. I also accepted the Claimant's evidence that, on 31 August 2022, he told Mr Wise that: the involvement of too many people could make software delivery more complex, but that the Respondent did not have enough people working on the Rathbones product for it to be able to deliver what it had agreed, within the timeline it had agreed; that the core product was still not ready; and that Ms Hughes and Ms Brown were on the verge of resigning, due to the impact which managing the Rathbones relationship was having on their health.

27. However, the Claimant also sent many emails to colleagues at the Respondent during the time he was managing the Rathbones relationship, criticising the performance of the Respondent's product team and their failure to take accountability. For example, in relation to the product team, on 6 September 2022, the Claimant messaged Becky Kirby, saying, "there is a total failure of accountability in Product" p1245. On 8 September 2022, the Claimant messaged Mark Trousdale saying, "There is NO accountability…I am speechless at this point …I do not understand how we can have taken this much time and still don't have a plan that Brett has blessed and is accountable for." P1308. On 6 December 2022, Mr Trousdale messaged the Claimant, saying, "… it is not a resourcing issue either. That's the story he got lanced for by Vincent [Sos] the other night," to which the Claimant replied, "I agree it is a lack of ownership and accountability." P2004 – 2005.

28. The Claimant agreed, in evidence, that he also considered that Rathbones, themselves, were not consistent in what they required.

Interim Agreement with Client 6

29. In December 2022 the Claimant concluded an Interim Agreement with the Respondent's client 6 for Marketplace, described as a 'Financial Supermarket Product', p2204.1. The Interim Agreement set out a payment schedule for client 6's subscription to Marketplace, to the value of $17.6 million. The Interim Agreement provided that the parties intended to, 'negotiate in good faith a definitive commercial agreement (the "Definitive Agreement").' It said that, "The Parties will use diligent efforts to execute the Definitive Agreement by March 31, 2023. The Definitive Agreement will include: (i) the commercial and other terms set forth in this Interim Agreement; (ii) a detailed description of the products and services to be made available by Vendor; (iii) a service level agreement…".

30. I accepted Mr Lumb and Ms Bellini's evidence that the Interim Agreement, being an agreement for an agreement, would not be counted as generating revenue for the purposes of the Respondent's accounts.

31. Nevertheless, in January 2023, Mr Wise mentioned the agreement in his New Year email to all staff, saying it was a great start and an area in which the Respondent anticipated major growth during 2023, p 2249.

32. A definitive agreement was never signed with client 6.

Removal of Mr Wise; Appointment of Mr Lumb and Ms Bellini

33. On 17 April 2023 Mr Wise was removed from his role at the Respondent, following concerns expressed by the Board over his operational leadership. Richard Lumb was appointed interim CEO.

34. The Claimant had previously been considered to be part of the Respondent's Executive Leadership Team ("ELT"). He was paid a bonus for the year 2022 – which was paid in 2023 – on the basis that he was a member of the Executive Leadership Team. There was no written record of who was a member of the ELT, save for the records in relation to bonus payments. After Mr Lumb became CEO, he identified 13 people (including himself) to be part of the ELT going forward. The new ELT was announced on 9 May 2023. The Claimant was not one of those 13 people. His new manager, Fred Duden was a member.

35. I accepted Mr Lumb's evidence that it was not clear to him who had been in the ELT under Mr Wise: There were 30 published senior members of the Respondent on the company website. Mr Lumb reduced that number to 13 within days of his appointment. Neither the Claimant, nor anyone else, suggested to Mr Lumb that the Claimant should be part of Mr Lumb's new ELT.

36. I accepted the Claimant's evidence that, in April 2023, Mr Lumb asked the Claimant about the Rathbones relationship and the Claimant told him that it was incredibly difficult as Mr Wise and other members of the Respondent had lied to Rathbones, selling software the Respondent did not have and that they never had a credible plan to deliver. I accepted his evidence that he told Mr Lumb said that Rathbones knew they had been lied to, and that Mr Lumb replied that that was why Mr Wise was no longer with the Respondent.

37. Around May 2023, Mr Duden asked the Claimant to move away from managing the client relationship with Rathbones and to manage the relationship with another of the Respondent's clients based in Asia .

38. In July 2023, Heather Bellini was appointed President and CFO of the Respondent.

39. The Claimant accepted, in evidence, that neither Mr Lumb nor Ms Bellini was aware of any of the protected disclosures he contends that he made before their appointments.

40. In the same month, the Claimant's manager, Mr Duden, expanded the Claimant's role to include pre-sales for both APL and Marketplace. At this time, the Claimant's role was 1/3 business development and sales for Marketplace, 1/3 relationship management and 1/3 business development and sales for APL. These responsibilities did not change before his dismissal.

41. The Claimant was working on strategic plans for Marketplace around this time, p3448.

Developments in Marketplace and APL

42. I accepted the Respondent's evidence that, also at this time, important individuals within the Respondent and within Motive Partners, the majority shareholder of the Respondent, were raising concerns with the very concept of Marketplace. In July 2023 the Claimant messaged his manager, Fred Duden, saying that Pete Hess had questioned whether distributors actually wanted the Marketplace offering, p3609.

43. On 23 July 2023, the Claimant sent Miguel Tejeda of Motive Partners "our most recent deck on the Marketplace" saying that "Door" would bring significant acceleration to the Marketplace, p4829. Mr Tajeda replied on 26 July 2023, pp4828-4829, saying that he viewed a majority acquisition of Door as highly unlikely. He set out a very large number of fundamental questions about Marketplace, such as, "Who are the primary user personas of the Marketplace within the distributor?" … "Marketplaces are notoriously difficult to monetize without significant scale / market share; what percent of Asset Manager product distribution to you believe APL would have in the near to medium term?" … How much start-up investment … would you estimate is required to execute on the Marketplace?"

44. On 7 August 2023 the Claimant spoke with Ms Bellini. Ms Bellini did not dispute that the Claimant said words to the effect that Marketplace needed to be funded with a roadmap that had been signed off, to avoid repeating the awful and highly stressful experience he had had with Rathbones, who had been lied to by Mr Wise and others.

45. The Claimant told the Tribunal that Ms Bellini reacted with hostility towards him when he made that statement, replying that she had heard about Marketplace 'ad nauseam'. He said that he had only been spoken to in that manner on one other occasion in his whole career, despite having worked in the US and in banks in New York, where very abrupt and direct interactions were commonplace.

46. I accepted Ms Bellini's evidence that she is often told that her tone is direct. I also accepted her evidence that the Respondent was losing money at the time and she considered that, "we needed to slow down our cash burn and we needed to prioritise investments".

47. On all the evidence, including my findings that Ms Bellini and Mr Lumb both already believed that the Respondent had previously overpromised and underdelivered (see further below), I found that Ms Bellini was indeed challenging and abrupt to the Claimant in this meeting and did say that she had heard about Marketplace 'ad nauseum'. However, this was in the context of many people questioning the whole concept of Marketplace and in the context of the Respondent losing significant amounts of money at the time.

48. Mr Lumb did not dispute that, on 12 September 2023, the Claimant commented to him that the Respondent needed to keep standards high in relation to sales and to ensure that clients were not lied to again, as Rathbones had been, and that the Respondent needed to build credibility to generate new sales.

49. In about September, Fred Duden and Heather Bellini proposed to Richard Lumb that a new "Head of APL Sales" role should be created. It was intended to address weakness in Digital Wealth sales and to increase sales in APL. The Respondent's APL business was a US-based business, and all its salespeople assigned to the APL

business were based in the US, so the new Head of APL Sales was intended to be based in the US. The "Head of APL Sales" role would be accountable for all APL sales, and have a team of sales executives.

50. Mr Duden suggested to Mr Lumb and Ms Bellini that the Claimant should be appointed to the role. They were all aware that the Claimant was willing to relocate to the US for this purpose.

51. At the end of their conversation on 12 September 2023, Mr Lumb told the Claimant that he would need to convince Ms Bellini of his suitability for the Head of APL Sales role, by showing her his strong track record in consultative sales. I accepted Mr Lumb's evidence that he did so in order to help the Claimant understand what he needed to demonstrate, in order to show that he had the skills and experience for that role.

52. Mr Lumb was candid in his evidence that senior managers had been considering employee remuneration around that time, because the Respondent was not generating profit and was running short of operating cash. Mr Lumb was working on a cash flow plan to raise new capital from investors to keep the Respondent operating. He established that there were a few employees whose compensation was significantly higher than others at the same level of seniority. The Claimant was one of these employees. Mr Lumb was frank in his evidence that the Claimant's high salary was an impediment to him being appointed as Head of APL Sales, because the market salary for the Head of APL Sales role was lower than the Claimant's existing salary.

53. The Claimant emailed Mr Lumb and Ms Bellini on 26 September 2023, p4277, saying that he believed that his experience in consultative sales to asset managers and wealth managers in the US and internationally was "very relevant to transforming sales for APL and the Marketplace". He asked for a one to one meeting with Ms Bellini.

54. The same day, Ms Bellini held a conference call with the Claimant and Luis Ruiz. During that call, the Claimant and Mr Ruiz presented their plans and vision for Marketplace. After the call, Ms Bellini messaged Mr Duden saying, " had a call with jose luis and alan… their plan needs a ton of work… and i am concerned on many assumptions which I shared with him". Mr Duden asked, "did you get to have your 1 x 1 with Alan? Ms Bellini replied, he added jose luis to the call… I will tell you fred – I do not think he is the right person to run a sales team based on my call with him". Mr Duden replied, "please have a 1 x 1 with him". Ms Bellini agreed to, but said "but based on what I have seen he has major gaps - and is not a sales leader … both he and jose don't know what good looks like based on the assumptions they showed me", p4280.

55. The Claimant emailed Ms Bellini on 4 October 2023, again asking for a 1-2-1 discussion, and saying that he believed that his "25 plus years' experience of Consultative sales in asset and wealth management" put him "in a strong position to lead sales for our APL and Marketplace offerings". He said that he had a strong track record of closing very large deals in the US and internationally, p4278

56. On 9 October 2023 Cheryl Nash told the Claimant and Mr Duden that the Respondent had approved hiring 2 additional APL salespeople, p4444. It was intended that they would report in to the new Head of APL Sales.

57. Mr Lumb and Ms Bellini agreed that the Claimant and others working on Marketplace should undertake a roadshow with APL clients in October and November 2023, to establish whether they would be interested in Marketplace and what features they would like from it. The feedback they received was that clients did not want Marketplace, but would be interested in an alternative to APL.

58. On 19 October 2023, the Claimant had a one to one discussion with Ms Bellini, during which he told her that he wanted to be considered for the new Head of APL Sales role because of the huge value he had delivered to the Respondent by managing the extremely difficult relationship with Rathbones after the client had been lied to repeatedly. She said that his appointment to the Head of APL Sales role was 'not going to happen'.

59. On 24 October 2023, Pete Hess, who was responsible for all the Respondent's sales in North America, messaged Cheryl Nash saying that he wanted to discuss "sales staff planning going forward and where Alan Smith fits in", p4502. Ms Nash responded that Mr Duden wanted the Claimant to run APL sales, but that Ms Nash and Ms Bellini agreed with Mr Hess that the Claimant running sales "would not work".

60. The Claimant was not offered the opportunity to be formally interviewed for the new Head of APL sales role. There was no structured selection process for choosing between the Claimant and Adam Pollak, an APL sales executive, who reported to Ms Hess and whom Mr Hess had in mind for the new 'Head' role.

61. Mr Lumb did not dispute that, on 24 October 2023, the Claimant commented to Mr Lumb that, unlike the sale to Rathbones, which had knowingly not been realistic or achievable, there needed to be a clear roadmap and timeline to deliver and that he was being asked to pitch to the CEO of a public company.

62. I accepted both Mr Lumb and Ms Bellini's evidence that they themselves never said, or would have said, that Mr Wise had "lied". I accepted their evidence that they believed that the Respondent, under Mr Wise, had "over promised and under delivered", but not that it had 'lied', to clients.

63. I also accepted their evidence that, as Mr Lumb put it, saying that clients 'should not be lied to' was "like saying the sky is blue" and that Mr Lumb, as CEO, was trying to issue in a new culture at the Respondent which was: "promises made, promises kept." I also accepted both Mr Lumb and Ms Bellini's evidence that it was widely known, within the Respondent company and in the market, that the Respondent had customer delivery problems with many clients, and not just Rathbones. I accepted their evidence that the content of the Claimant's alleged protected disclosures was not new to them.

64. In October 2023 the Claimant took screenshots of e-mails on the Respondent's computer system, pp4277-4278, 4444, 4464-4465, 4526, 4656 and 4657.

65. On 15 November 2023, following the unfruitful consultation with APL clients on Marketplace, Mr Duden emailed Mr Lumb, proposing that Marketplace should be "paused".

66. Mr Lumb and Ms Bellini decided to stop all work on Marketplace. I accepted Mr Lumb's evidence that the Digital Wealth team had already been lobbying for work on Marketplace to stop and that Mr Lumb and Ms Bellini had concluded that the Respondent was losing money and draining cash and that Marketplace was an area where savings could be made.

67. In about November 2023, Adam Pollak was appointed to the role of Head of APL Sales. He had previously been the most senior salesperson assigned to APL and was based in the US. I accepted the Respondent's evidence that he had been carrying out at least some responsibilities of the proposed new "Head of" APL role already. However, I was not shown any documents relating to this, or any comparison of his old and new roles. As a result. the extent of the overlap between his old and new roles was not clear.

68. On 6 December 2023, Ms Bellini emailed Mr Duden saying, "Alan flying, even in economy, is a misuse of $ in my opinion given in 1 month he won't be here…" p4641.4. On the same day she told Mr Duden that she had informed a colleague that the Claimant was being laid off, because the Respondent had to make arrangements in relation to the Claimant's company car. She said, "I think it's … weird that he leads a meeting for something he won't be involved with in 30 days." P4641.3.

69. I accepted Ms Bellini's evidence that she sent these emails because a decision had been made to discontinue Marketplace. The decision to terminate Marketplace was formally ratified by the Respondent's Board on 14 December 2023. However, Ms Bellini made clear in her evidence that the decision to terminate Marketplace had been made earlier than that formal ratification of it. She said that discontinuing Marketplace was " a proposal but we were certain they [the Board] would agree, given the financial situation."

70. I also accepted her evidence that, when she sent these emails, HR had already been gathering names of people who would be on a "termination list", which was 'finalised' in December 2023. Finalising the list meant that names were no longer being added to, or removed from, that list. The process of gathering names for the "termination list" clearly started before December 2023. Ms Bellini confirmed, in evidence, that the process for deciding on redundancies started earlier than December 2023.

71. It was not clear, on the evidence, when Ms Bellini and Mr Lumb had decided to stop all work on Marketplace and when the "termination list" was initiated. However, from Mr Lumb's evidence, Mr Lumb was already reviewing employee salaries and identifying those on anomalously high salaries when appointment to the Head of APL Sales role was being discussed in September and October 2023.

72. Ms Bellini told the Tribunal that Mr Duden had put the Claimant's name on the termination list. She agreed that he had done so, despite the fact the Claimant was also responsible for relationship management and for APL business development and sales.

73. On 10 January 2024, Mr Jeff Yabuki replaced Mr Lumb as CEO of the Respondent.

Formal Redundancy Process

74. In January 2024, Dena Andre, the Respondent's Global Head of HR, told Andrew Mitchell, Director of Human Resources, that all three employees in Mr Duden's team - the Claimant, Ms Wang and Mr Ruiz - were at risk of redundancy.

75. On 16 January 2024, Mr Mitchell sent a draft script to Mr Duden containing an explanation for the Claimant's redundancy, p4699.2. The explanation was 'The reason your role has been identified is due to a company reorganisation and lower work volumes in the European organisation.' It was not in dispute that this was inaccurate. Mr Mitchell told the Tribunal that the reason was the discontinuation of Marketplace. I will return to this below.

76. On 18 January 2024 the Claimant attended his first redundancy consultation meeting with his manager, Fred Duden, and Andrew Mitchell, HR Director, p4708-4709. the Claimant asked what would happen to his 2023 bonus and his share options and whether there were any open roles for which he could be considered.

77. On 18 January 2024 Ms Bellini and Mr Duden both told Mr Mitchell that there were no open roles for the Claimant. Me Bellini said that the roles available "are all much more junior", p4716.

78. On 19 January 2024 Dena Andre wrote to the Claimant, confirming that his role was at risk of redundancy. She said that there would be a 2 week consultation period before the company made its decision.

79. On 19 January 2024 the other "level two" leaders assigned to Marketplace, Jose Luis Ruiz, Head of Product Engineering, and Jennie Wang, Head of Product Management, who were both based in Florida, USA, were dismissed for redundancy.

80. On 20 January 2024, Shawn Donovan was appointed as the Respondent's Chief Revenue Officer.

81. On 25 January 2024 at 10.00, the Claimant attended a second redundancy consultation meeting with Mr Mitchell. Mr Mitchell informed him that the Respondent did not have any open positions in either Europe or North America at a suitable level, p4708-4709.

82. On the same day, at 14.00, Mr Mitchell met with the Claimant to tell him that he would not be receiving a bonus for 2023, as no employees would be, including members of the ELT, p4709.

83. On 25 January 2024 at 15:30, the Claimant attended a further meeting with Mr Mitchell, who confirmed that the Respondent had decided to make his role redundant and that his medical benefits would be stopped immediately.

84. On 1 February 2024 the Claimant attended a final consultation meeting with Mr Mitchell. Mr Mitchell confirmed that the Claimant would be dismissed by reason of redundancy. At 5pm that day, Mr Mitchell wrote to the Claimant, confirming his dismissal with effect from 1 February 2025, with his notice paid in lieu, p4758.

85. Mr Duden was later dismissed in March 2024.

Other Potential Roles at the Respondent

86. Shawn Donovan had worked for a Company called Fiserv as Chief Sales Officer, where he managed teams with more than 400 sales executives, p6105.1.

87. In evidence, the Claimant agreed that Mr Donovan was 'most definitely a well-qualified candidate' for the Chief Revenue Officer role at the Respondent. The Claimant agreed that Mr Donovan had more experience in digital sales than the Claimant. The Claimant said, "I have no reason to doubt his track record. But no one told me that the role was open and no one interviewed me. It may be that he has more experience – but I have led businesses which generated more revenue than the Respondent ever has."

88. I accepted Ms Bellini's evidence that the Respondent's new CEO, Jeff Yabuki, had decided to bring Mr Donovan, with whom he had worked before at Fiserv, into the Respondent, to replace the existing CRO.

89. There was no documentary evidence before me as to what volume of sales Adam Pollak had generated in 2023. The Claimant gave evidence that there had not been any significant APL sales in 2023. There was little evidence to contradict this. The Claimant cross examined Mr Lumb as to whether there were any APL sales in 2023 and Mr Lumb replied, "I think there were but not hugely significant." Mr Lumb suggested that there might have been some up sales to existing clients, but no new bookings. I therefore found that there were no significant APL sales in 2023 – the area in which Mr Pollak was employed.

90. I accepted Mr Lumb's evidence that the Claimant had, "not run a sales team with quotas and targets." I also accepted his evidence that neither Heather Bellini, nor Pete Hess, considered that the Claimant should be appointed to the Head of APL sales role, to which Adam Pollak was appointed in about November 2023.

91. Mr Mitchell, who conducted the redundancy consultation exercise, told the Tribunal that he was not aware that the Claimant had been responsible for APL; he was only aware that the Claimant had been working on Marketplace and he therefore believed that its discontinuance was the reason the Claimant was at risk of redundancy. I accepted his evidence on this.

92. Mr Mitchell gave evidence that, in his view, it would have been appropriate for there have been redundancy consultation while the Respondent was considering recruitment to the Head of APL sales role, and roles reporting into that position, and before a final decision on Marketplace had been made in December 2023.

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93. I accepted Mr Mitchell's evidence that the Claimant did not suggest, during his consultation meetings, that he would accept a job at a lower salary. I also accepted Mr Mitchell's evidence that Mr Mitchell raised Business Analysts roles in London, paying about £85,000, which were available, but that he and the Claimant agreed they were not suitable.

94. The Claimant told the Tribunal, and I accepted, that he had 700 sales people working for him when he was employed by Citibank.

Confidentiality at the Respondent

95. In his witness statement, Mr Lumb told the Tribunal that the Respondent has a 'zero tolerance' policy regarding its confidential information. However, when asked about this in evidence, he said that the policy not written down. He explained that, generally, in the Fintech industry, there is a zero tolerance approach regarding sharing client confidential information and client details and information which has not been released. Mr Lumb agreed that the duties by which the Claimant was bound were set out in his contract of employment.

96. Mr Lumb said, in his witness statement, that the Claimant's retention of some of the Respondent's information was a breach of confidentiality, which the Respondent would consider to be a very serious disciplinary matter, "amounting to gross misconduct, leading to an immediate dismissal if we had known about this at the time." However, in evidence, Mr Lumb accepted that the Claimant retaining information which he did not disclose other than in Tribunal proceedings was less serious. He said that the issue of whether the Respondent would dismiss in such circumstances was 'hypothetical' and that such retention of confidential information , "… is less offensive than the example when the person who had kept and shared information."

97. Mr Mitchell told the Tribunal that the Respondent gave its employees information security training and yearly training on retention of emails. The Tribunal was not shown the content of that training.

98. In the course of these proceedings, the Claimant gave disclosure to the Respondent on 21 February 2025, which included photographs he had taken of material on the Respondent's IT systems. In evidence, the Claimant accepted that some of that material was confidential. In particular, he accepted that the contents of an email he had sent on 12 December 2023, detailing the Respondent's 'partnership' with a company and including an 'Initial description of Joint Product offering', 'Target Clients and Prospects' and 'Initial technology integration diagram', were confidential information, p 4656. P4657, part of the same email chain, must also have been confidential.

99. In evidence, the Claimant said of this photograph, "This is me taking a photo of an email where Heather is criticising me for not involving my team or involving her team. It is to evidence how she is treating me. … I accept this email contains confidential information which I took only to be shared with my legal advisers and which I have never shared with anyone other than my lawyers. …". The Claimant gave a similar explanation in relation to other photographs which he took and/or information he retained.

100. I accepted the Claimant's evidence that he took photographs of this material for the purpose of retaining evidence for these proceedings only. There was no evidence that he intended to, or did, use this information for any other purpose.

Relevant Law

Protected Disclosures

101. An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, because he has made such a protected disclosure.

102. "Protected disclosure" is defined in *s43A Employment Rights Act 1996*: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

103. "Qualifying disclosures" are defined by *s43B ERA 1996*,

"43B Disclosures qualifying for protection

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
…

(d) that the health or safety of any individual has been, is being or is likely to be endangered,
…

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

104. The disclosure must be a disclosure of information, of facts, rather than opinion or allegation (although it may disclose both information and opinions/allegations). Although there is no strict dichotomy between an allegation and the disclosure of information, a bare assertion, devoid of factual content, such as, "You are not complying with health and safety requirements", will not constitute a valid protected disclosure, *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR 325 [24] – [25].

105. In order for a statement to be a qualifying disclosure for the purposes of s43B(1) ERA, it had to have sufficient factual content and specificity capable of tending to show one of the matters listed in paragraphs (a) –(f) of that section*, Kilraine v LB Wandsworth* [2016] IRLR 422.

106. In *Simpson v Cantor Fitzgerald Europe*, both the EAT ([2020] ICR 252) and the CA ([2021] IRLR 238) held there is also no such rigid dichotomy between information and queries: EAT at [para 42] and CA at [para 53]. The key question is whether the

statement carries information of sufficient factual content and specificity to satisfy the *Kilraine* threshold.

107. It is possible to aggregate more than one communication to collectively amount to a protected disclosure, *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, *Robinson v Al Qasimi* [2020] IRLR 345.

108. In *Kraus v Penna plc* [2004] IRLR 260, the EAT held [para 24] that where the word 'likely' is used, it means that the information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation.

109. A disclosure remains a qualifying disclosure even if the person receiving the information is already aware of it, and references to "disclosure of information" are to be read as references to "bringing the information to his attention": s.43L(3) ERA 1996.

110. A qualifying disclosure is a protected disclosure if it is made to the employee's employer, or other responsible person, *s43C ERA 1996.*

Automatically Unfair Dismissal

111. A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed, *s103A ERA 1996*, "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

112. A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee; Cairns LJ in *Abernethy v Mott, Hay and Anderson* [1974] IRLR 213, at [13]:

Detriment

113. Protection from being subjected to a detriment is afforded by s47B ERA 1996, which provides:

"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.
(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer…."

114. A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may apply for compensation to an Employment Tribunal under *s48 ERA 1996.* On such a complaint, it is for the employer to show the ground upon which any act was done, *s48(2) ERA 1996.*

115. The term 'detriment has been explained by Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at 34:" .. [the] tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. …….. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment."

Protected Disclosure Detriment – Causation

116. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." Per Elias J at para [45].

117. Simler J, in *Osipov v Timis* UKEAT/0058/17/DA agreed with counsel for the appellant that the "proper approach" to inference drawing and the burden of proof in section 47B ERA cases is as follows [115]:
"(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see London Borough of Harrow v. Knight at paragraph 20.
However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found."

Ordinary Unfair Dismissal

118. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

119. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*, "or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held." Redundancy and "some other substantial reason" are both potentially fair reasons for dismissal.

Redundancy

120. Redundancy is defined in *s139 Employment Rights Act 1996.* It provides so far as relevant, " ..an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—… (b) the fact that the requirements of that business— (i) for employees to carry out work of a particular kind, or (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish."

121. According to *Safeway Stores plc v Burrell* [1997] IRLR 200, [1997] ICR 523, 567 IRLB 8 and *Murray v Foyle Meats Ltd* [2000] 1 AC 51, [1999] 3 All ER 769, [1999] IRLR 562. There is a three stage process in determining whether an employee has been dismissed for redundancy. The Employment Tribunal should ask, was the employee dismissed? If so, had the requirements for the employer's business for employees to carry out work of a particular kind ceased or diminished or were expected to do so? If so, was the dismissal of the employee caused wholly or mainly by that state of affairs?

Fairness

122. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof and applies a broad band of reasonable responses *Iceland Frozen Foods v Jones* [1982] IRLR 439, (confirmed by the Court of Appeal in *Foley v Post Office* [2000] IRLR 827.

123. *Williams v Compair Maxam Ltd* [1982] IRLR 83, set out the standards which guide tribunals in determining the fairness of a redundancy dismissal. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters.

124. In *Langston v Cranfield University* [1998] IRLR 172, the EAT (Judge Peter Clark presiding) held that so fundamental are the requirements of selection, consultation and seeking alternative employment in a redundancy case, they will be treated as being in issue in every redundancy unfair dismissal case.

125. "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information, adequate time in which to respond, and conscientious consideration of the response*, R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ, applied by the EAT in *Rowell v Hubbard Group Services Limited* [1995] IRLR 195, EAT; *Pinewood Repro Ltd t/a County Print v Page* [2011] ICR 508.

126. In *Samels v University of Creative Arts* [2012] EWCA Civ 1152 at [4], the Court of Appeal stated that "The courts have emphasised that tribunals must not substitute their own view [on what pool is appropriate]. The tribunal has to consider whether the pool chosen by the employer falls within the range of reasonable responses from the employer". At [5] of *Samels* the Court of Appeal cited with approval the judgment of Mummery J in the EAT in *Taymech v Ryan* [1994] EAT/663/94), "… The question of

how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind the problem."

127. It is not for the Tribunal to substitute its view for the employer's assessment of criteria, or to subject the Respondent's assessment of criteria to minute examination, *British Aerospace plc v Green* [1995] IRLR 433, [1995] ICR 1006.

128. In order to act fairly in a redundancy dismissal case, the employer should take reasonable steps to find the employee alternative employment, *Quinton Hazell Ltd v Earl* [1976] IRLR 296, [1976] ICR 296; *British United Shoe Machinery Co Ltd v Clarke* [1977] IRLR 297, [1978] ICR 70.

129. The Tribunal should, however, look at the whole process in deciding whether a redundancy dismissal is fair. In *Haycocks v ADP ROP UK Ltd* [2024] IRLR 178 the EAT set out the following guiding principles at [22]:

" (a) The employer will normally warn and consult either the employees affected or their representative; *Polkey*.
(b) A fair consultation occurs when proposals are at a formative stage and where adequate information and adequate time in which to respond is given along with conscientious consideration being given to the response; *British Coal*.
(c) Whether in collective or individual consultation, the purpose is to avoid dismissal or ameliorate the impact; *Freud*.
(d) A redundancy process must be viewed as a whole and an appeal may correct an earlier failing making the process as a whole reasonable; *Lloyd v Taylor Woodrow*.
(e) The ET's consideration should be of the whole process, also considering the reason for dismissal, in deciding whether it is reasonable to dismiss; *Taylor v OCS*.
(f) It is a question of fact and degree as to whether consultation is adequate and it is not automatically unfair that there is a lack of consultation in a particular respect; *Mugford*.
(g) Any particular aspect of consultation, such as the provision of scoring, is not essential to a fair process; *Camelot*.
(h) The use of a scoring system does not make a process fair automatically; *British Aerospace*.
(i) The relevance or otherwise of individual scores will relate to the specific complaints raised in the case; *British Aerospace***.**

Polkey

130. If an employer has dismissed an employee in a way which is unfair, the ET can then consider what is the likelihood that the employer would have dismissed the employee fairly, had a fair procedure been adopted – *Polkey v Dayton Services* [1987] 3 All ER 974.

Confidentiality

131. In *Brandeaux (Advisers) UK Ltd v Chadwick* [2011] IRLR 424 at [23]-[24], Jack J said, "[23] In my judgment the two cases relied upon fall a long way short of establishing that Ms Chadwick was entitled to act as she did. I should not get drawn into any wide

statements of principle which are unnecessary to my decision. I am doubtful if the possibility of litigation with an employer could ever justify an employee in transferring or copying specific confidential documents for his own retention, which might be relevant to such a dispute. If such a dispute arises, in the ordinary course the employee must rely on the court's disclosure processes to provide the relevant documents: even if the employee is distrustful whether the employer will willingly meet its disclosure obligations, he must rely on the court to ensure that the employer does. But on any view there can be no justification for the exercise which Ms Chadwick carried out here. Nor, in the absence of a specific issue, was Ms Chadwick entitled to transfer documents to protect her own position in case a regulatory dispute might arise. If she wished to use confidential information to make a report to the regulator, a situation which has not arisen, she would not be prevented from using confidential information for that purpose: but whether that would entitle her to copy documents onto her private computer would be doubtful. [24] I conclude that Ms Chadwick was not entitled to do what she did and that her conduct was in breach of her contract."

132. In *Tokio Marine Kiln Insurance Services Ltd v Yi Yang* [2013] EWHC 1948 (QB) at [20] Coulson J said that "as a matter of common sense" that "it cannot be right for a defendant to retain information in breach of contract simply so as to bolster its claim in the Employment Appeal Tribunal. If there are documents to be disclosed in that dispute, they will be disclosed in the normal way. This sort of pre-emption is not therefore valid," going on to conclude that "I am doubtful if the possibility of litigation with an employer could ever justify an employee in transferring or copying specific confidential documents for his own retention, which might be relevant to such a dispute."

Misconduct Discovered After Dismissal

133. *Boston Deep Sea Fishing v Ansell* (1888) 39 ChD 339 (CA) established that: (1) where an employee is guilty of gross misconduct, he may be dismissed summarily, even before the end of a fixed period of employment; (2) dismissal may be justified by reliance on facts not known to the employer at the time of the dismissal, but only discovered subsequently, even after the proceedings began; and (3) the dismissed employee is not entitled to any wages or salary for the broken period of employment immediately preceding his dismissal, because his entitlement had not accrued by then: *Cavenagh v William Evans Ltd* [2013] 1 WLR 238 (CA) at [5].

134. The overriding duty imposed on the Tribunal is to award what is just and equitable in the circumstances in compensation for dismissal. The Tribunal can award no compensation if it would be unjust or inequitable for the employee to receive it. In *W Devis & Sons Ltd v Atkins* [1977] IRLR 314, [1977] ICR 662, Viscount Dilhorne said, "Section [123(1)] does not … provide that regard should be had only to the loss resulting from the dismissal being unfair. Regard must be had to that but the award must be just and equitable in all the circumstances, and it cannot be just and equitable that a sum should be awarded in compensation when in fact the employee has suffered no injustice by being dismissed'.'

135. In *Devis*, no compensatory award was made because it was discovered after the dismissal that the employee had committed acts of misconduct . Those acts had not caused or contributed to the dismissal, because they had not influenced the employer

when the decision to dismiss was taken, as they did not know about them. However, the conduct made it just and equitable for the Tribunal to award no compensation as he was liable to be fairly dismissed for the conduct (unknown at the time of the dismissal) anyway.

Decision

136. I took into account all my findings of fact, and the relevant law, when reaching my decision. For clarity, I have stated my conclusion on individual allegations separately.

Alleged Protected Disclosures

137. The Respondent did not dispute that, if the Claimant made his alleged disclosures, in his reasonable belief, the disclosures were made in the public interest.

PD1-3
PD1 April – May 2022 to the Claimant's line manager, Ms Schmidt.

138. On my findings of fact, I did not accept that the Claimant told Ms Schmidt, "that Rathbones had been sold systems that the Respondent simply didn't have, or had any realistic delivery roadmap to deliver in line with what had been promised to the client", or that, "the decommissioning of four CRM systems in nine months was simply not possible." He would not have had that knowledge at that time. If he did say those things, I did not accept that he had any knowledge of what had been actually agreed or promised to Rathbones, in order to make those comments at that time.

139. I therefore decided that the Claimant did not make that part of the alleged disclosure 1, at all. Alternatively, I decided that, if he did, the Claimant did not have a reasonable belief that the information tended to show any of the matters in s43B ERA, because he had no rational or credible basis for that belief – he had no knowledge of the relevant matters.

140. However, on the balance of probabilities, I did accept that he told Ms Schmit that sales staff were being asked to go out to asset managers and sell The Marketplace whilst there was no credible roadmap to deliver the technology they were trying to sell to regulated asset managers in the UK and the US. The Claimant had responsibility, in April and May 2022, for Marketplace business development and sales, so he would have had knowledge of what was being undertaken in respect of it.

141. I decided that, in doing so, he did disclose information to Ms Schmidt: he relayed facts, rather than allegations, about the content of instructions to sales staff and the lack of a roadmap for Marketplace.

142. However, I decided that, in the Claimant's reasonable belief, that information did not tend to show any of the matters in s43B (a),(b), (d), or (f). The information did not relate to any actual sales of Marketplace which were contemplated; nor to any specific terms of sale, including dates for delivery. On the facts available, the Claimant could not have made any reasonable assessment that it was "likely" that any of the matters in s43B were occurring, or would occur.

143. Alleged protected disclosure 1 was not a protected disclosure.

PD2 to Vincent Sos on 25 August 2022

144. On my findings of fact, on 25 August 2022, the Claimant told Vincent Sos, Chief Information Officer of the Respondent, that the Respondent simply did not have the products that the client, Rathbones, had been sold; and that key members of the UK team like Clare Hughes and Izzy Brown were at breaking point and their health was suffering, as the client believed they had been lied to and was getting increasingly aggressive towards the Respondent's staff. The Claimant also told Mr Sos that what Mr Brodie had been told in July 2022, by Brett Heinz, while in London to meet with Rathbones on behalf of the Respondent, namely that delivery of the product would be by September 2022, was clearly impossible.

145. I decided that, in doing so, the Claimant disclosed information to Mr Vos: he relayed facts, rather than allegations, about the lack of a product which had been sold, facts about the state of employees' health, and facts about the content of a statement to Mr Brodie about the timing of product delivery.

146. I accepted that the Claimant believed the truth of the information he disclosed. I therefore concluded that, in the Claimant's reasonable belief, the information tended to show that Ms Hughes and Ms Brown's health was or was likely to be endangered. That was precisely what he was relaying. I also concluded that, in the Claimant's reasonable belief, the information tended to show that the Respondent was, or would be, in breach of legal obligations to Rathbones – he was saying that the Respondent did not have, and would not deliver, the product for which Rathbones had contracted.

PD3 to Mr Wise, the Respondent's CEO, on 31 August 2022

147. On my findings of fact, the Claimant told Mr Wise on 31 August 2022 that: the involvement of too many people could make software delivery more complex, but that the Respondent did not have enough people working on the Rathbones product for it to be able to deliver what it had agreed to within the timeline it had agreed; that the core product was still not ready; and that Ms Hughes and Ms Brown were on the verge of resigning, due to the impact which managing the Rathbones relationship was having on their health.

148. Again this included some information, rather than allegations, about the state of readiness of the product and the state of employees' health.

149. Once more, I accepted that the Claimant believed the truth of the information he disclosed. I therefore concluded that, at the least, in the Claimant's reasonable belief, the information tended to show that Ms Hughes and Ms Brown's health was or was likely to be endangered. That was precisely what he was relaying. I also concluded that, in the Claimant's reasonable belief, the information tended to show that the Respondent was, or would be, in breach of legal obligations to Rathbones – he said that the Respondent did not have, and would not deliver, the product for which Rathbones had contracted.

150. As noted above, the Respondent did not dispute that, if the Claimant made his alleged disclosures, then, in his reasonable belief, the disclosures were made in the public interest.

151. PDs 2 and 3 were made to the Claimant's employer in accordance with s43C ERA 1996 – they were made to senior company officers.

152. I therefore decided that the Claimant made his alleged disclosures PD2 and PD3 and that they amounted to protected disclosures, as they fulfilled the requirements of s43B and were made in accordance with s43C ERA 1996.

153. On my findings of fact, neither Mr Lumb, nor Ms Bellini knew about any of these protected disclosures.

PDs 4 – 7

PD4 to Mr Lumb in April / May 2023

154. On my findings of fact, in April 2023, Mr Lumb asked the Claimant about the Rathbones relationship and the Claimant told him that it was incredibly difficult, as Mr Wise and other members of the Respondent had lied to them, selling software the Respondent did not have and which they never had a credible plan to deliver. The Claimant also said that Rathbones knew they had been lied to.

155. I decided that, in doing so, the Claimant disclosed some information to Mr Lumb: he relayed facts, rather than allegations, about the lack of software which had been sold.

156. I accepted that the Claimant believed the truth of the information he disclosed. I therefore concluded that, in the Claimant's reasonable belief, the information tended to show that the Respondent was, or would be, in breach of legal obligations to Rathbones – he said that the Respondent did not have and would not deliver the software for which Rathbones had contracted.

157. PD4 was made to Mr Lumb, CEO, and therefore to the Claimant's employer. It was a protected disclosure which satisfied the requirements of s43B and was made in accordance with s43C ERA 1996.

PD5 to Ms Bellini on 7 August 2023

158. On 7 August 2023 the Claimant spoke with Ms Bellini. He said that Marketplace needed to be funded with a roadmap that had been signed off, to avoid repeating the awful and highly stressful experience he had had with Rathbones, who had been lied to by Mr Wise and others.

159. I decided that, in doing so, the Claimant made broad assertions and allegations, devoid of factual content, rather than disclosing any information. There was a mere assertion that Mr Wise lied, without saying what the lie was – there was no factual content about the alleged misrepresentation at all. Insofar as the Claimant asserted conclusions, he did not give any factual content which justified such conclusions.

160. This was not a protected disclosure. There was no disclosure of information.

PD6 Mr Lumb on 12 September 2023

161. On 12 September 2023 the Claimant commented to Mr Lumb that the Respondent needed to keep standards high in relation to sales and to ensure that clients were not lied to again, as Rathbones had been, and that the Respondent needed to build credibility to generate new sales.

162. I decided that, in doing so, the Claimant made broad assertions and allegations, devoid of factual content, rather than disclosing any information. There was a mere assertion that Mr Wise lied, without saying what the lie was. There was also an expression of opinion as to the best general future approach to client relationships, without any factual content.

163. This was not a protected disclosure. There was no disclosure of information.

PD7 to Ms Bellini on 19 October 2023

164. On 19 October 2023, the Claimant told Ms Bellini that he wanted to be considered for the new Head of APL Sales role because of the huge value he had delivered to the Respondent by managing the extremely difficult relationship with Rathbones after the client had been lied to repeatedly.

165. I decided that, in doing so, the Claimant again made broad assertions and allegations, devoid of factual content, rather than disclosing any information. There was a mere assertion that the Respondent lied, without saying what the lie was. There was also an expression of broad opinion as to the Claimant's handling of the Rathbones relationship, without any detail or factual content.

166. This was not a protected disclosure. There was no disclosure of information.

PD8 to Mr Lumb on 24 October 2023

167. On 24 October 2023 the Claimant commented to Mr Lumb that, unlike the sale to Rathbones, which had knowingly not been realistic or achievable, there needed to be a clear roadmap and timeline to deliver and that he was being asked to pitch to the CEO of a public company.

168. I decided that, when he made this comment, the Claimant again made a broad assertion and allegation, without any factual detail, rather than disclosing any information. There was a broad assertion about a previous sale not being "realistic" or "achievable", without any detail or factual content. There was also an opinion regarding how best to sell to a CEO of a public company.

169. This was not a protected disclosure. There was no disclosure of information.

Alleged Protected Disclosure Detriments

170. The Claimant's alleged protected disclosure detriments were also components of the Claimant's case on unfair dismissal. It would therefore have been both artificial and impractical to consider the detriments entirely separately from the unfair dismissal complaint. I was, nevertheless, mindful that a different burden of proof applied to the detriment complaints and I have set out my conclusions on them first.

171. The allegations of detriment were as follows:
9.1. R did not disclose to him that it was seeking to recruit to the role of Chief Revenue Officer, a global role which could have been performed in the US or the UK;
9.2. Ms Bellini's refusal to consider C for that role, as stated to C on 19 October 2023;
9.3. There was no genuine consideration of alternative roles before Ms Bellini had made up her mind not to redeploy C;
9.4. R failed to embark upon consultation at a formative stage when redundancy was only a potential outcome;
9.5. The commercial rationale for a redundancy presented to C was false;
9.6. The Claimant was not invited to apply for the newly created role of Head of APL;
9.7. To the extent that remuneration was a relevant consideration in the selection for redundancy, R did not approach C to discuss whether an adjustment to his remuneration would be acceptable to him.

C contends that, by virtue of any or all of the above matters, the consultation and redeployment exercise was a sham and unfair.

172. (It was accepted that detriment allegation 9.2 was inaccurate as Ms Bellini told the Claimant on 19 October 2023 that his appointment to the Head of APL Sales role was 'not going to happen' – she was not talking about the Chief Revenue Officer role.)

173. The Claimant contended that there had been a continuum of detrimental treatment towards him, starting under John Wise, because he made protected disclosures about Mr Wise (and others) having mis-sold a product which they did not have, and could not deliver, to Rathbones.

174. I have found that the Claimant did make protected disclosures of this nature to Vincent Sos on 25 August 2022, to Mr Wise on 31 August 2022 and to Mr Lumb in April 2023.

175. However, I did not accept the Claimant's characterisation of a deterioration in the Respondent's treatment of him thereafter.

176. For example, the Claimant relied on his removal from the ELT as demonstrating deteriorating treatment of him. However, he was part of the Executive Leadership Team under Mr Wise. He remained in the ELT throughout Mr Wise's tenure. Mr Wise did not remove him or treat him detrimentally in this regard. I accepted Mr Lumb's evidence that it was not clear to him who had been in the ELT under Mr Wise: There were 30 published senior members of the Respondent on the company website. Mr Lumb reduced that number to 13, within days of his appointment. The Claimant was not one of the 13 people retained in the ELT. However, neither the Claimant, nor anyone else, suggested to Mr Lumb that the Claimant should be part of Mr Lumb's new ELT.

177. I was satisfied that the Respondent had shown that the Claimant's removal from the ELT was nothing to do with his protected disclosures. Mr Lumb slimmed down the ELT and removed many people - who had not made protected disclosures – as well as the Claimant. The Claimant was removed because no one, including the Claimant, considered that he should be part of this reduced ELT.

178. I did not consider that the Claimant's role was reduced, or that he was side-lined, at any time before September 2023.

179. By way of illustration, in around May 2023, Mr Duden asked the Claimant to move away from managing the client relationship with Rathbones, to managing the relationship with another of the Respondent's clients based in Asia. Mr Duden made this decision, before Ms Bellini was ever appointed. The Claimant retained responsibility for client relationships.

180. In addition, in July 2023, the Claimant's manager, Mr Duden, expanded the Claimant's role, to include pre-sales for both APL and Marketplace. From then on, the Claimant's role was 1/3 business development and sales for Marketplace, 1/3 relationship management and 1/3 business development and sales for APL. This was an expansion of his role, which occurred after he had made all his protected disclosures.

181. I did not accept that Ms Bellini reacted negatively to the Claimant commenting that Mr Wise and others at the Respondent had lied to Rathbones, during a meeting on 7 August 2023. In fact, Ms Bellini and Mr Lumb both already believed that the Respondent had previously overpromised and underdelivered to many clients, including Rathbones. Ms Bellini was challenging and abrupt to the Claimant in this meeting and said that she had heard about Marketplace 'ad nauseum'. She did so because many people were already questioning the whole concept of Marketplace and the Respondent was losing significant amounts of money. The Respondent urgently needed to reduce its losses and Ms Bellini and others believed that Marketplace was an unnecessary drain on resources. Ms Bellini's challenge to the Claimant in this meeting was nothing to do with his protected disclosures.

182. Rather than there being a background of deteriorating treatment of the Claimant, I found that the Respondent's decision-making from September 2023 was driven by its poor finances and doubts about the viability of Marketplace. As Ms Bellini put it, "we needed to slow down our cash burn and we needed to prioritise investments".

183. Mr Lumb was already reviewing employee salaries and identifying those on anomalously high salaries in September and October 2023.

184. It was clear to me that, on the facts, in September and October 2023, Ms Bellini and Mr Lumb were considering stopping work on Marketplace, at the same time as Restructuring APL. As early as July 2023, important individuals within the Respondent and within Motive Partners, the majority shareholder of the Respondent, were raising concerns and issues with the very concept of Marketplace. In July 2023 the Claimant messaged his manager, Fred Duden, saying that Pete Hess had questioned whether distributors actually wanted the Marketplace offering, p3609. With this in mind, Mr Lumb and Ms Bellini instructed the Claimant and others to undertake a roadshow with APL clients in October and November 2023, to establish whether they would be

interested in Marketplace and what features they would like from it. At the same time, Ms Bellini was discussing with Mr Hess, Head of US Sales, who should be appointed to a new Head of APL Sales role.

185. Ms Bellini, Mr Hess and Cheryl Nash all favoured the appointment of Adam Pollak to the new Head of APL Sales role. On 24 October 2023 Pete Hess, who was responsible for all the Respondent's sales in North America, messaged Cheryl Nash, saying that he wanted to discuss "sales staff planning going forward and where Alan Smith fits in", p4502. Ms Nash responded that Mr Duden wanted the Claimant to run APL sales, but that Ms Nash and Ms Bellini agreed with Mr Hess that the Claimant running sales "would not work".

186. I make clear that I found that Ms Bellini's opinion of the Claimant's capabilities was genuine, and not irrational, and was based on the meetings she had with him. In contemporaneous messages and email exchanges, she explained her dissatisfaction with his presentations to her. On 26 September 2023 she said of the Claimant, "but based on what I have seen he has major gaps - and is not a sales leader … both he and jose don't know what good looks like based on the assumptions they showed me", p4280.

187. On 19 October 2023, Ms Bellini told the Claimant that his appointment to the new APL role was 'not going to happen'.

Detriment 9.6 and 9.2

188. The Claimant was not offered the opportunity to be formally interviewed for the new Head of APL sales role. On 19 October 2023 Ms Bellini told him that his appointment to that role was 'not going to happen'. There was no structured selection process for choosing between the Claimant and Adam Pollak, an APL sales executive, who reported to Ms Hess and whom Mr Hess had in mind for the new 'Head' role.

189. As I have made clear, at the same time, there was a real doubt as to whether Marketplace would be continued at all.

190. I therefore found that the failure to undertake any structured consideration of the Claimant for the Head of APL sales role was a detriment. Discontinuation of Marketplace would be likely to result in consideration of redundancies. Failure properly to assess the Claimant for a potentially suitable and available new role, at that same time, would put the Claimant at a disadvantage, because it would make his dismissal more likely.

191. However, I found that the Respondent had shown that the failure to undertake any structured consideration of the Claimant for that role was not because the Claimant had made protected disclosures.

192. Mr Lumb and Ms Bellini were not aware that the Claimant had made any protected disclosures before they were appointed. They were not aware of PDs 2 and 3.

193. On all the facts, I accepted that Mr Lumb and Ms Bellini, if she became aware of PD4, did not have any negative view of the Claimant's PD4. I accepted their evidence that,

as Mr Lumb put it, saying that clients 'should not be lied to' was "like saying the sky is blue". Mr Lumb, as CEO, was trying to issue in a new culture at the Respondent which was: "promises made, promises kept." I also accepted both Mr Lumb and Ms Bellini's evidence that it was widely known, within the Respondent company and in the market, that the Respondent had customer delivery problems with many clients, not just Rathbones. I accepted their evidence that the content of the Claimant's alleged protected disclosures was not new to them.

194. As I have found, Ms Bellini genuinely had a negative view of the Claimant's capabilities, based on her interactions with him. I found that that was the reason she did not consider him for the Head of APL sales role. The failure to consider him in any structured way may not have been fair (see further below), but it was not because he had made any protected disclosures.

Detriment 9.1. R did not disclose to him that it was seeking to recruit to the role of Chief Revenue Officer, a global role which could have been performed in the US or the UK; 9.3. There was no genuine consideration of alternative roles before Ms Bellini had made up her mind not to redeploy C; 9.7. To the extent that remuneration was a relevant consideration in the selection for redundancy, R did not approach C to discuss whether an adjustment to his remuneration would be acceptable to him There was no genuine consideration of alternative roles before Ms Bellini had made up her mind not to redeploy C.

195. I accepted Ms Bellini's evidence that the Respondent's new CEO, Jeff Yabuki, had decided to bring Mr Donovan, with whom he had worked before at Fiserv, into the Respondent, to replace the existing CRO.

196. I did not find that the failure to consider the Claimant for this role was a detriment. The role was not available for appointment, in that it already had an incumbent. Mr Yabuki simply decided to replace the existing incumbent with his own appointee. An employee would not reasonably consider himself disadvantaged in not being considered for a role which was not actually available. Alleged detriment 9.1 was not a detriment.

197. In any event, this failure to consider the Claimant for the Chief Revenue Officer role was nothing to do with his protected disclosures. It was because the new CEO wanted to bring in a specific person, with whom he had previously worked at a different Fintech company, to undertake this very senior role at the Respondent. Noone else was considered for the role, whether they had made protected disclosures or not. Alleged detriment 9.1 was not because the Claimant made protected disclosures.

198. On the evidence, there were no other suitable roles available for the Claimant during the formal 2 week consultation process. The Claimant has not shown any evidence that there were. Mr Mitchell asked both Ms Bellini and Mr Duden about available roles in January 2023, but was told that there were none, p4714-4717. Alleged Detriment 9.3 was not established on the facts.

199. I did not find that the Respondent failed to raise adjustment to the Claimant's remuneration. I accepted Mr Mitchell's evidence that, during the consultation, Mr Mitchell raised Business Analysts roles in London, paying about £85,000, which were

available, but that both he and the Claimant agreed they were not suitable. Alleged Detriment 9.7 was not established on the facts.

Detriment 9.4. R failed to embark upon consultation at a formative stage when redundancy was only a potential outcome.

200. I have found that the Respondent did fail to embark upon consultation at a formative stage, when redundancy was only a potential outcome. As I have found, in September and October 2023, Ms Bellini and Mr Lumb were considering stopping work on Marketplace, at the same time as considering restructuring APL and appointing a new Head of APL sales. As early as July 2023, important individuals within the Respondent had been raising concerns and issues with the very concept of Marketplace. With these doubts in mind, Mr Lumb and Ms Bellini instructed the Claimant and others to undertake a roadshow with APL clients in October and November 2023, to establish whether they would be interested in Marketplace. At the same time, in September and October 2023, Mr Lumb was compiling a list of employees whose remuneration was anomalously high. The Respondent was urgently looking at ways to reduce its losses.

201. On the facts, therefore, from September 2023, the Respondent was considering redundancies and stopping work on Marketplace. By October 2023, it was starting to implement a changed structure for APL, by considering appointing a new Head of APL sales role. Mr Pollak was not appointed until November 2023, which was the time the Respondent decided to stop all work on Marketplace. As Ms Bellini acknowledged, the November 2023 decision to stop work on Marketplace was the effective decision to shelve Marketplace – the Board decision in December 2023 was simply the formal ratification of that November 2023 decision.

202. The formative stages of the proposals were therefore, at the latest, in October and November 2023, when the Respondent was considering restructuring APL, appointing the new Head of Sales role, and discontinuing Marketplace.

203. Indeed, Ms Bellini confirmed, in evidence, that the process for deciding on redundancies started before December 2023. The Respondent had started gathering names for the “termination list” before December 2023.

204. The December 2023 finalisation of the termination list and the formal ratification of the decision to terminate Marketplace therefore both took place after the major decisions on the company’s APL/Marketplace strategy and the new APL roles had been concluded.

205. The Head of APL sales role was the one role which was likely to be available at the Claimant’s level, if the decision was made to terminate Marketplace.

206. The failure to undertake consultation at the formative stage meant that the Claimant was unable, at the time when appointment to the Head of APL sales role was being considered, to be consulted on fair selection criteria, and/or application of those criteria, for that role.

207. I decided that that was a detriment – as a result, there was no attempt at a structured, objective assessment of the Claimant and Adam Pollak for that role. The Claimant

would reasonably have considered that he was disadvantaged in the workplace by the failure to consult at that stage, because he was much more likely to be dismissed when fair consultation on the one available role was not afforded to him.

208. Detriment 9.4 was therefore established, as a matter of fact.

209. I have found that the failure to consult at a formative stage was unfair – see further below. However, I did not find that the Respondent's failure to consult at a formative stage was because of the Claimant's protected disclosures. I was satisfied, on the Respondent's evidence, that the Claimant's protected disclosures did not play any part in Ms Bellini or Mr Lumb's thought processes. Ms Bellini and Mr Lumb's contemporaneous emails and messages were made available to the Tribunal and there was no suggestion that the protected disclosures were in their minds at all. On the facts, they were making rapid assessments regarding costs and resources, without considering UK employment law and fairness to UK employees.

210. Alleged Detriment 9.4 was not done on the grounds of the Claimant's protected disclosures.

Detriment 9.5. The commercial rationale for a redundancy presented to C was false

211. On 16 January 2024, Mr Mitchell sent a draft script to Mr Duden, containing an explanation for the Claimant's redundancy, p4699.2. The explanation was 'The reason your role has been identified is due to a company reorganisation and lower work volumes in the European organisation.' It was not in dispute that this was inaccurate. I accepted Mr Mitchell's evidence that the commercial rationale for redundancy was the discontinuation of Marketplace, on which the Claimant had been engaged.

212. I accepted that being given a false rationale for redundancy would be a detriment. A reasonable employee would consider themselves disadvantaged by being misled, in that their consultation could be on the wrong matters and therefore ineffective. However, on the evidence, this was nothing to do with the Claimant's protected disclosures. There was no link between the protected disclosures and the wording of the rationale. In any event, the Claimant was aware that Marketplace had been discontinued and that his 2 colleagues in the US working on Marketplace had been dismissed, so he was well aware of the circumstances of the redundancy.

213. The Claimant was not subjected to any protected disclosure detriments.

Unfair Dismissal

214. I considered, first, whether the Respondent had shown the reason for dismissal and that it was a potentially fair one.

The Reason for Dismissal

215. The Respondent contended that the Claimant was dismissed for redundancy and/or because of a business reorganisation, in the circumstances that the Respondent decided to stop work on Marketplace.

216. I addressed the question of what was the reason, in the Respondent's mind, for dismissing the Claimant?

217. On the facts, I decided that the Respondent had shown that it had made a decision to stop all work on Marketplace and that it decided that the Claimant and the two U.S. employees, who had been engaged on Marketplace, should be dismissed for that reason.

218. I decided that the Claimant's protected disclosures were not any part of the reason for his dismissal. I refer to my findings regarding detriment, above. I did not find that any of the Respondent's decisions leading up to the Claimant's dismissal – its failure to consult at a formative stage and its failure to conduct any structured selection exercise for the APL role - were because of his protected disclosures.

219. There was an abundance of evidence that Marketplace was, as yet, undeveloped, that it was not wanted by clients and that the Respondent was losing money and needed to reduce costs. The Respondent therefore decided, formally, to stop work on Marketplace in December 2023. The Claimant was working on Marketplace. Both he and the 2 US-based employees working on Marketplace were dismissed. It was clear that the cessation of work on Marketplace was the reason for the Claimant's dismissal, in the Respondent's mind.

220. I considered whether that was that a potentially fair reason – either redundancy or SOSR?

221. Regarding redundancy, I decided that the Claimant's dismissal was wholly or mainly attributable to the Respondent's requirement for employees to carry out work of a particular kind ceasing or diminishing. The Respondent no longer had any requirement for employees to carry out work on Marketplace.

222. I therefore concluded that the Respondent had not shown that its reason for dismissal was a potentially fair one.

S98(4) ERA Fairness

223. I went on to consider whether the Respondent acted reasonably in dismissing the Claimant for that reason, under *s98(4) ERA.*

224. I reminded myself that I must not substitute my own view for that of the Respondent and that the Respondent has a wide range of reasonable responses. I should also look at the process as a whole.

225. I reminded myself that there is a neutral burden of proof at the fairness stage of an unfair dismissal claim. However, I concluded that the Respondent failed to carry out a fair process before dismissing the Claimant.

226. First, I decided that the Respondent did not consult fairly with the Claimant, even applying a wide range of reasonable responses. "Fair consultation" means consultation when the proposals are still at the formative stage, adequate information,

adequate time in which to respond, and conscientious consideration of the response, *R v British Coal Corporation ex parte Price* [1994] IRLR 72, Div Ct per Glidewell LJ. The basic requirements of a fair redundancy dismissal are fair selection of pool, fair selection criteria, fair application of criteria and seeking alternative employment, and consultation, including consultation on these matters, *Williams v Compair Maxam Ltd* [1982] IRLR 83,

227. I decided, on the facts, that the formative stages of the proposals were, at the latest, in October and November 2023, when the Respondent was considering restructuring APL, appointing a new Head of APL sales, and discontinuing Marketplace. Ms Bellini confirmed, in evidence, that the process for deciding on redundancies started earlier than December 2023.

228. The December 2023 finalisation of the termination list and the formal ratification of the decision to terminate Marketplace took place after the major decisions on the company's APL/Marketplace strategy and APL structure, including appointment to the Head of Sales role, had been already concluded.

229. The fact that the effective decisions had already been concluded by early December 2023, so that consultation thereafter would not be meaningful, and the Claimant's dismissal was almost an inevitability, was reflected in Ms Bellini's emails of 6 December 2022. Her words reflected the reality of the situation: "Alan flying, even in economy, is a misuse of $ in my opinion given in 1 month he won't be here…" p4641.4, "I think it's … weird that he leads a meeting for something he won't be involved with in 30 days." P4641.3.

230. Ms Bellini's words illustrated that the failure to consult at a formative stage was outside the band of reasonable responses – the relevant decisions had been made and the Claimant was presented with a fait accompli, rather than any meaningful consultation.

231. As I have explained, the Head of APL sales role was the one role which was likely to be available at the Claimant's level, if the decision was made to terminate Marketplace. That role was clearly potentially suitable alternative employment for the Claimant. His manager, Mr Duden, considered that he was a good candidate for the role. The Claimant was working one third of his time on business development and sales for APL. The Respondent knew that he was prepared to relocate to the USA for that role.

232. The failure to undertake consultation at the formative stage meant that the Claimant was unable, at the time when appointment to the Head of APL sales role was being considered, to be consulted on fair selection criteria, and/or application of those criteria, for that role. There was then no attempt at a structured, objective assessment of the Claimant and Adam Pollak for that role.

233. I accepted that Mr Mitchell himself acted fairly during the short consultation period in January 2023, in that he met with the Claimant, answered his questions and looked for available alternative roles at that point. However, that consultation was too late to be meaningful.

234. In evidence, Mr Mitchell conceded that it would have been appropriate for there have been redundancy consultation while the Respondent was considering recruitment to the Head of APL sales role, and roles reporting into that position, and before a final decision on Marketplace had been made in December 2023

235. Looking at the process as a whole, the lateness of the consultation was outside the band of reasonable responses and made the Claimant's dismissal unfair. The failure to adopt any fair process for the appointment to the Head of APL Sales role, which was made when redundancies were being considered in October/ November 2023, and would have been suitable alternative employment for the Claimant, was also outside the band of reasonable responses and made the Claimant's dismissal unfair.

236. The Respondent dismissed the Claimant unfairly.

237. For completeness, I decided that the failure to consider the Claimant for the CRO role did not additionally make the dismissal unfair. That role was not available for appointment to it. It already had an incumbent, whom Mr Yabuki replaced with his own appointee. (Whether the replaced incumbent was treated fairly is not relevant to the Claimant's claim for unfair dismissal.)

Polkey

238. I then considered what was the likelihood that this employer would have dismissed the Claimant fairly, in any event, for redundancy.

239. Clearly, the work on Marketplace had disappeared and there was a redundancy situation. Acting fairly, however, I decided that the Respondent would have conducted a fair selection process between Mr Pollak and the Claimant, for the Head of APL sales role.

240. Doing my best, I had to consider what was likely to be the outcome of such a process, assuming it was a fair. I reminded myself that I had to consider what this Respondent, acting fairly, would have decided – it was not for me to make my own assessment.

241. The following factors were relevant:

a. One third of the Claimant's role in 2023 was business development and sales for APL;
b. Ms Bellini had a negative view of the Claimant's capabilities, from her experience of his presentations to her, during meetings – she considered that he "did not know what 'good' looks like";
c. Ms Bellini did have an informal meeting with the Claimant about the APL sales role, but did not favour his appointment;
d. Adam Pollak was carrying out at least some responsibilities of the proposed new "Head of" APL role already;
e. Pete Hess, Cheryl Nash and Ms Bellini all favoured the appointment of Mr Pollak;
f. They had not undertaken an objective assessment of the Claimant and Mr Pollak for the role;

g. The Claimant had secured an Interim Agreement with client 6 at the end of 2022, which was not a binding agreement, but did indicate that he was capable of concluding lucrative sales agreements;
h. There were no significant APL sales in 2023 – the area in which Mr Pollak was exclusively employed;
i. Mr Pollak was therefore unlikely to be able to present objective evidence of recent strong APL sales performance;
j. There were no performance development reviews, or other objective contemporaneous performance assessments, available for the Claimant or Mr Pollak;
k. I accepted Mr Lumb's evidence that the Claimant had, "not run a sales team with quotas and targets";
l. The Claimant, however, had had 700 sales people working for him when he was employed by Citibank;
m. Mr Lumb viewed the Claimant's high salary as an impediment to him being appointed to the role, but the Claimant was still interested in the role, despite its lower salary.

242. There was little reliable and objective evidence of the Claimant and Mr Pollak's performance in APL. Both already had responsibilities for APL.

243. Realistically, the Claimant had not impressed Ms Bellini and she had a genuinely negative view of his ability, based on meetings with him.

244. Equally, there was no reliable evidence that Mr Pollak had performed well in his APL role in 2023. On the other hand, the Claimant had proven ability to conclude, at least, a major interim agreement.

245. The factors were, therefore, objectively, finely balanced.

246. Given this, I concluded that it 50% likely that the Claimant would have been selected by this Respondent for the Head of APL sales role, following a fair and objective selection process.

247. If the Claimant had not been appointed as Head of APL Sales, he would inevitably have been dismissed for redundancy.

248. I therefore concluded that there was a 50% likelihood that the Claimant would have been dismissed, in any event, for redundancy.

Reduction of Compensation on Just and Equitable Basis?

249. The Claimant's contract included the following provision regarding confidential information: "16. Confidential Information. 16.1 You shall not either during your employment or at any time after its termination (howsoever arising), directly or indirectly, use, disclose or communicate to any person whatsoever and, shall use your best endeavours to prevent the publication or disclosure of, any Confidential Information."

250. The Claimant conceded that he had taken a photograph and retained, for the purposes of this litigation, some of the Respondent's confidential information. I found that he was in breach of his contract, not to "use" that confidential information, in doing so.

251. I accepted, following *Brandeaux (Advisers) UK Ltd v Chadwick* [2011] IRLR 424 and *Tokio Marine Kiln Insurance Services Ltd v Yi Yang* [2013] EWHC 1948 (QB) at [20], that retaining this confidential information could amount to a breach of contract.

252. However such 'use' was, on any view, at the very lower end of seriousness of misconduct / breach of contract. Mr Lumb conceded that such use was very different to confidential information being disclosed to a third party, for example. There was no evidence that the Claimant intended to, or did, 'use' the confidential information, other than in these proceedings.

253. There was no evidence that the Respondent gave any specific training or guidance to employees not to retain information, confidentially, for use in relevant litigation. There was no evidence that the Respondent applied a 'zero tolerance' approach to retention of confidential material in this way.

254. Mr Lumb accepted that it was not inevitable that the Claimant would have been dismissed in relation to such use of confidential material – he said the matter was 'hypothetical'.

255. On all the evidence, I considered that there was very little prospect that the Claimant would have been dismissed for gross misconduct for this use of confidential information. However, given that he was in breach of the terms of his contract in retaining this information, I considered that it was just and equitable to reduce his compensation by 10%, to reflect the small chance that he would have been dismissed for this breach of contract in any event, following the principle in *Boston Deep Sea Fishing v Ansell* (1888) 39 ChD 339 (CA) and *W Devis & Sons Ltd v Atkins* [1977] IRLR 314, [1977] ICR 662.

Remedy

256. A remedy hearing will take place **on 7 and 8 October 2025.**

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Employment Judge Brown

28 August 2025

Sent to the parties on:

29 August 2025

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For the Tribunal: