EMPLOYMENT TRIBUNALS

Claimant: Mr J Moretti

v

Respondents:

1st Respondent: Davide Leone & Partners Investment Company Limited
2nd Respondent: Mr D Leone
3rd Respondent: Ms K Elliott
4th Respondent: Mr S O'Flaherty
5th Respondent: Mr A Di Celso
6th Respondent: Mr P Wilkin

Heard at: London Central On: 7-9 May, 12-13 May, 16 May, 19-20 May, 22-23 May, 27-30 May and 3 June 2025 and Tribunal deliberations in Chambers on 18-27 August 2025

Before: Employment Judge Nicolle sitting with Non-Legal Members: Mr P de Chaumont-Rambert and Mr F Benson

Representation:

Claimant: Mr A Robson, of Counsel
Respondents: Mr D Reade KC, of Counsel and Ms G Leadbetter, of counsel.

JUDGMENT

1. The claim for ordinary unfair dismissal succeeds and the Claimant is awarded a basic award which would have been £2572 but is reduced to £1286 in accordance with S 122 (2) of the ERA. The claimant is not entitled to receive a compensatory award given the hundred percent deduction we have applied pursuant to Polkey.

2. The following claims fail and are dismissed:

Automatic unfair dismissal on the grounds of the protected disclosure pursuant to S103A of the ERA;

Dismissal for making health and safety disclosures pursuant to S 100 of the ERA;

Detriment on the grounds of protected disclosures pursuant to S 47B of the ERA;

Detriment for making health and safety disclosures pursuant to S 44 (1) (c) of the ERA;

Harassment related to race, religious belief, sex, of a sexual nature, sexual orientation and disability pursuant to S 26 of the EQA;

Direct race discrimination pursuant to S 13 of the EQA;

Direct disability discrimination pursuant to S 13 of the EQA;

Discrimination arising from disability pursuant to S 15 of the EQA;

Failure to make reasonable adjustments pursuant to sections 20 and 21 of the EQA; and

Victimisation pursuant to S 27 of the EQA.

3. The 1st Respondent is awarded the sum of £39,181.14 in accordance with Rule 74 (2) (a) of the Employment Tribunal Procedural Rules 2024 (the Rules) together with a further sum of £9897.84 in respect of fees incurred by the Respondents' solicitors in the period since 27 March 2025 in seeking recovery of the Claimant's share of the costs pertaining to the transcription/translation work undertaken by Acolad.

REASONS

The Hearing

4. The case had been listed for a 21 day hearing from 6 May – 4 June 2025. This included Tribunal deliberation time. As result of the non-availability of the Judge and one of the non-legal members the Tribunal was unable to sit on 14 and 15 May, 21 May and 2 June. The Tribunal did, however, utilise the non-sitting days to complete the reading of the substantial reading list. It was therefore possible to complete the evidence and submissions within the available time and the Tribunal listed up to 8 days from 18 August 2025 for its deliberations.

5. A significant number of attendees were present on most days. This included members of the press. Their attention was drawn to the Rule 49 Order which was on the Tribunal door. Interested parties were provided with the opportunity to access hard copies of documents as the Tribunal viewed them.

The documentation

6. The Tribunal was provided with a very substantial volume of material. This included six bundles of the transcripts of approximately 65 conversations covertly recorded by the Claimant totalling circa 3000 pages. They were provided in both the original Italian and the translated English versions.

7. The Tribunal was asked to read/was taken to several thousand pages of documents. Nevertheless, there was inevitably much of the material which was not referred to during the hearing.

The witnesses

8. The parties' expectation was that the Respondents' witnesses would go 1st which was arguably contrary to the normal expectation given the burden of proof on the multiple discrimination, detriment and victimisation claims being pursued by the Claimant. However, the parties agreed that this was their preferred approach given their expectations.

9. The Respondents' witnesses comprised:

Mr Davide Leone, the 2nd Respondent, Founder and Majority Shareholder of Davide Leone and Partners Investment Company Limited (the 1st Respondent) and now Chief Investment Officer (Mr Leone). His statement comprised of 446 paragraphs.

Mrs Karen Elliott, the 3rd Respondent, Chief Operating Officer and Director of the 1st Respondent (Mrs Elliott)

Mr Stephen O'Flaherty, the 4th Respondent and non-Executive Director of the 1st Respondent and Chair of the Board (Mr O' Flaherty)

Mr Andrea Mazziotti, the 5th Respondent and Director of the 1st Respondent (Mr Mazziotti)

Mr Peter Wilkin, the 6th Respondent non-Executive Director of the 1st Respondent from 3 January 2019 until 31 December 2023 (Mr Wilkin)

Ms Angela Warrener, Mr Leone's former Personal Assistant (Ms Warrener); and

Mr Michael Stein, an Associate Portfolio Manager at Balyasny Asset management (Mr Stein) who did not attend.

The Claimant's evidence

10. The Claimant provided the Tribunal with a primary statement comprising of 302 paragraphs together with two short additional witness statements.

11. The Claimant gave evidence over three days. Given his health issues the Tribunal agreed to adjustments so that he gave his evidence in tranches not exceeding 45 minutes with 15 minute breaks. Typically the Tribunal heard no more than five tranches of 45 minutes in a given day. Further, as a result of the Claimant experiencing migraines/headaches and visual auras the Tribunal sat with the lights out. The Tribunal was satisfied that with these adjustments the Claimant was able to give his evidence satisfactorily and it was apparent that he had a high level of familiarity with the documentation as he was frequently able to take the Tribunal to specific documents within the bundles and provided long and coherent responses to cross examination.

Opening submissions

12. The parties provided opening skeleton arguments. The Claimant's comprised 104 paragraphs and the Respondents' 114 paragraphs.

Procedural history

13. The Claimant initiated ACAS early conciliation with the certificate being issued on 31 October 2023. His claim was issued on 30 November 2023. The Respondents filed their original grounds of resistance on 4 March 2024 and amended ground of resistance on 10 January 2025. The Claimant issued a second claim form on 17 October 2024. Following a case management hearing before Employment Judge Leonard-Johnston on 14 February 2025 a restricted reporting order and anonymisation order were promulgated on 21 February 2025.

14. At paragraph 14 of Employment Judge Leonard-Johnston's case management order of 20 February 2025 she encouraged the parties to narrow the focus of the claim. In particular the Claimant was encouraged to identify and specify the key protected disclosures and detriments he relied. The parties were strongly encouraged to agree a concise list of issues without the need for further involvement by the Tribunal.

15. In a letter from the Tribunal dated 18 March 2025 Employment Judge Leonard-Johnston ordered that the claims under case numbers 2216895/2023 and 2225880/2024 should be consolidated.

The agreed List of Issues

16. As this runs to 32 pages it is not appropriate to set it out in full. However, notwithstanding the recommendation made by Employment Judge Leonard-Johnston the Claimant did not narrow the scope of his claims and specifically those involving alleged protected disclosures and detriments.

The structure of the judgment

17. Given the length of the hearing, volume of documentation, existence of substantial transcripts and the multiple allegations within the list of issues this will inevitably be a very long judgment. Nevertheless, in the interest of proportionality and consistent with the overriding objective the Tribunal will endeavour to create an appropriate balance between documenting relevant evidence but not incorporating every conceivable document or extract from transcripts which could arguably support or contradict any individual element of the claim. Further, the Tribunal will adopt an appropriate balance between repeating material in its findings of fact and setting out relevant material in support of its conclusions. The parties should take account of the fact that a particular evidential point not being referred to in the findings of fact does not necessarily mean it was not given consideration in the Tribunal's evaluation of the totality of the evidence. It does, of course, follow that where the Tribunal considered an evidential point had a high level of cogency in its assessment of the evidence, discussions and determinations on that point will have been documented.

18. It is also relevant that there are multiple incidences of serious allegations/counter allegations being made by the parties, which whilst they go to credibility, and potentially if substantiated could be reputationally damaging, are not relevant to the issues. It is not the role of the Tribunal to reach findings on all matters which are not relevant to its assessment of the evidence which is germane to the allegations which need to be determined.

Findings of Fact

The 1st Respondent

19. The 1st Respondent was incorporated on 9 February 2011. It operates as an investment firm, offering investment advisory and portfolio management services and is known as a hedge fund. Whilst the amount varied depending on investor inputs/withdrawals and investment performance Davide Leone Partners (DLP) had funds under management of between one and two billion pounds. It had up to 20 employees but typically approximately 15.

The Claimant

20. The Claimant was the 1st Respondent's lead analyst. Throughout his time with DLP he held governing or Senior Manager functions for DLP under the FCA Senior Manager and Certification Rules regime ("SMCR"). The Claimant held CF4 (Partner) and CF30 (Customer) positions under the approved persons regime from the incorporation of DLP in 2011. After the reorganisation on 3 January 2019 he held CF1 (Director) and CF30 (Customer) positions, at which point the approved persons regime ceased to apply to hedge funds and was replaced by the SMCR.

The relationship between the Claimant and Mr Leone

21. Given that there is a significant evidential dispute between Mr Leone and the Claimant regarding the nature of their professional and personal relationship it is relevant to set out more background evidence than would typically be required. This is particularly the case given that multiple allegations made by the Claimant relate to comments made by Mr Leone in covertly recorded conversations most of which took place outside the office/core working hours. It is therefore necessary for the Tribunal to consider the overarching context to such conversations to include the nature of the professional and personal relationship between the parties.

22. In short Mr Leone maintains that he had a very close personal and professional relationship with the Claimant which had a familial/brotherly element. He considers that the Claimant has been at best disingenuous, and arguably dishonest, to contend that their relationship was purely professional.

23. Mr Leone and the Claimant are from the same town in Northern Italy, Saronno, and attended the same high school, but not contemporaneously, with Mr Leone being eight years older than the Claimant. Their mothers knew each other but did not work together as colleagues as had been suggested.

24. Mr Leone says that when the Claimant first came to London he in effect took him under his wing and provided him with guidance and mentoring in respect of a career in financial services. He says he was responsible for hiring the Claimant at Farallon Capital Management (Farallon) in 2007. He says he was instrumental in this hire given that the Claimant did not have sufficient experience with JP Morgan, where he was working, to have been recruited by Farallon without his input.

25. Mr Leone says that he recruited the Claimant as his "right hand man" on research shortly after the formation of DLP in the Autumn of 2010.

26. Mr Leone says that he has always provided support and guidance to the Claimant. He says that their relationship transcends the purely professional and that a close personal relationship existed which was demonstrated by the Claimant's involvement with Mr Leone's family, time spent at Mr Leone's homes in London and Ibiza and the overarching frequency, nature and familiarity of their relationship.

27. The Claimant contends that their relationship was purely professional. He says that there was never a day when he was in the company of Mr Leone when there were not multiple work related conversations. When it was put to him in cross examination that he watched the 2021 European Championship Final between England and Italy at Mr Leone's home in Ibiza he said that this was not the case and that they had watched the game at a client's home in the company of other individuals within the financial services industry. He therefore disputes that this was a purely personal event.

28. The Claimant refers to there having been a massive imbalance of power between him and Mr Leone. He refers to a specific occasion on 1 March 2007 when Mr Leone said they could not be friends given the amount of time that they would otherwise spend together.

29. The Tribunal was struck by the very substantial amount of time during which Mr Leone and the Claimant were in each other's company. This is demonstrated by the frequency and duration of the recorded conversations. The Claimant says that these conversations were in effect a drop in the ocean given the multiple dialogues/communications between them over the duration of his engagement/employment with DLP. However, we consider that the content, scope and level of abstract digression and discussion within the recorded conversations indicates a level of familiarity going beyond the purely professional. This is particularly the case when the conversations, in some instances, took place in Mr Leone's home and involved the consumption of up to two bottles of wine.

30. We acknowledge that there is inevitably a substantial professional element to business related meetings and socialising. Therefore, we accept the Claimant's evidence that watching a football match in the presence of clients and other financial industry professionals could not be seen as a purely personal non work related event. Nevertheless, we consider that the Claimant has deliberately sought to distance himself from Mr Leone in the context of the various litigation he is pursuing. We reach this decision for the following reasons:

- The Claimant's career chronology demonstrates the significance he placed on Mr Leone as a mentor and career influence;
- As indicated above the very substantial amount of time spent in each other's presence which in our opinion went beyond the purely professional;
- The evidence of other witnesses, to include Mr Mazziotti, as to the nature of their personal and professional relationship; and
- the opinion of the medical experts that the Claimant had an unusually dependent relationship with Mr Leone. In particular we note the following comments from the report of Dr William Badenhorst (Dr Badenhorst) dated 25 February 2023:

  "In 2004 when he was 19, Mr Moretti met the founding partner of his current employer, whom he thought of as a mentor and "older brother" figure"; and
  "Mr Moretti has been unable to separate from the founding partner – most likely because of the behind – the – scenes (in fact, unconscious) fear that a separation would lead to Mr Moretti finding himself lost and disorientated – in a terrifying state of emotional vacuum".

<u>The corporate structure of DLP</u>

31. DLP initially operated through a limited liability partnership, Davide Leone & Partners LLP (the LLP). The business was transferred to the 1st Respondent on 3 January 2019.

32. The LLP and the 1st Respondent were incorporated and registered at Companies House on 9 February 2011 and Articles of Association were filed on the same day. On 28 March 2011 Mr Leone

entered into a limited liability partnership agreement with the 1st Respondent, Mr Mazziotti, Mr Mion and Mr Wall (the LLP Agreement). The Claimant was admitted as a new member of the LLP on 6 April 2011

33. Mr Leone had full control of the distribution of Income Profits to each Member depending on their performance and contribution. Mr Leone had in effect full control of DLP with effective voting rights at 97%.

34. From 2011 to 2019, when DLP operated through the LLP, Mr Leone and the Claimant were both members of the LLP, not employees. Neither took any fixed monthly drawings.

The 2019 reorganisation of the DLP business

35. The business of the LLP was transferred to the 1st Respondent under an Asset Transfer Agreement. The 1st Respondent, which had been incorporated in 2011 under the name of Davide Leone & Partners Limited, then became the Investment Management Company in place of the LLP, and was renamed Davide Leone & Partners Investment Company Limited. The employed staff were already employees of the 1st Respondent and it was therefore only agreements in relation to the operation of the Fund and the business that were in the name of the LLP.

The Shareholders' Agreement dated 28 February 2019

36. The 1st Respondent, David Leone & Partners (Cayman) Limited, Mr Mazziotti, Mr Mion and the Claimant were parties to the Shareholders' Agreement dated 28 February 2019 (the Shareholders' Agreement).

37. Clause 21.4 provides that each party confirms that it has received independent legal advice relating to all the matters provided for in the Agreement. The Claimant said in evidence that he did not take legal advice and that he felt that he was being pressurised to sign the Agreement with Mr Leone threatening to close the company if he did not. He says that he was not going to risk going head to head with Mr Leone.

38. Mr Leone says that the Claimant had the opportunity to request changes and make input to the corporate reorganisation. For example, he asked for the name of a class of shares to be changed from "ordinary" to "founder". Mr Leone denies that the Claimant was coerced to sign, and could have declined to do so.

The Claimant's contention that he had a substantial "economic interest" in DLP which is not reflected in the Shareholders' Agreement

39. A significant issue in the Claimant's conversations with Mr Leone, but also with Mr Glasper and Mr Wilkin is that he had been assured by Mr Leone that he was in effect a joint partner with a 40% share in the equity. At paragraph 33 of his witness statement he says that the promise was clear and that he and Mr Leone would be "broadly equal partners" both in strategy and economic interest. At paragraph 34 he says that Mr Leone repeatedly promised him that he would regularise the documents to reflect the factually long standing relationship between them. He says that at the time of DLP's formation Mr Leone even talked to him about renaming the firm "DLJM" with his initials being added within a few years.

40. Mr Leone denies having given the Claimant any such verbal assurances. Mr Leone denies that there was a discussion about renaming the firm DLJM. He says that his name was essential given the nature of his relationships with key investors and his reputation within the industry.

The Claimant's contract of employed dated 11 July 2019

41. As part of the 2019 reorganisation the Claimant and Mr Leone entered into employment contracts with the 1st Respondent. In the context of this claim relevant provisions are:

14.5.12 Which concerns circumstances in which the 1st Respondent is entitled to terminate the employment to include the employee being prevented by illness from fully performing his obligations to the Employer for an aggregate of at least 130 working days in any period of 12 months.

8.2 You do not have a contractual right to any sick pay over and above SSP.

8.3 The Employer may ask you to submit to medical examinations. You will be asked for consent for the results of the examination to be disclosed to the Employer

Mr Mazziotti's evidence

42. Mr Mazziotti was candid that he is a close personal as well as professional friend of Mr Leone. He is a lawyer and has provided advice to DLP. He has also been a member of the Italian Parliament.

43. He says that he is cognisant of the legal/business issues pertaining to DLP given his involvement save for the period between 2013 and 2018 when he stepped back given his Parliamentary role.

44. At paragraph 54 of his witness statement he says that it is "absolutely inaccurate" for the Claimant to suggest that he was somehow compelled to enter into the Shareholders' Agreement against his will. More generally he rejects the Claimant's contention that he and Mr Leone were in effect equal partners. He considers it to be incontrovertible that Mr Leone was always senior and that this was known to be the case by the Claimant and more generally within the business and by its key clients. It was for this reason that the Fund was eponymously named to reflect Mr Leone's name.

The Claimant's renumeration

45. The Claimant received aggregate renumeration exceeding 18 million US dollars for the period 1 January 2013 until 30 June 2022. His annual renumeration varied significantly depending on individual and Fund performance from a high of $4,550,000 in the year until 31 December 2017 to a low of $510,270 in the year until 31 December 2020.

46. Whilst the purpose of the schedule which appears at D4712 in the bundle was to demonstrate that the Claimant had been "generously" renumerated he nevertheless referred to alleged disparities within the renumeration data. For example, he referred to the $1 million allocated to him in the DLP Capital Investment Incentive Plan (the Incentive Plan) for the year until 31 December 2021 as not having been paid to him. The Incentive Plan was set up for the benefit of the analysts and he said he did not exercise his right to take the payment before it lapsed. He contends that he was concerned that Mr Leone would have been very angry had he sought to do so as he would have interpreted it as the Claimant being disconnected and wanting to leave.

The Personnel Handbook

47. The bundle contained various versions of the DLP Personnel Handbook (the Handbook) but the relevant provisions remained substantially unaltered.

48. The Handbook provides that if an employee has a whistleblowing concern they should contact the Whistleblowing Officer. Until his departure in February 2023 this was Mr Glasper. It then became Andrew Storey on his joining in May 2023. There was some uncertainty as to who covered the role in the interim but the Respondents believe it to be Mr O'Flaherty.

Disability clause 5.1.1

49. This provides that the 1st Respondent will discuss with an employee reasonable adjustments to their working conditions or duties in respect of any disability and may also wish to consult with their medical advisors.

Clause 7.2.3

50. This provides that employees are not permitted to make recordings of colleagues or others (including, without limitation, voice recordings). Covert recording is strictly prohibited.

51. The Claimant acknowledged that he was subject to the terms of the Handbook.

Diversity training

52. Mr Leone acknowledges that he has not received formal diversity and equal opportunities training. However, he discussed the 1st Respondent's policies with Mr Glasper as they were introduced and updated.

The Claimant's medical evidence and disability

53. . The Claimant contends that he had a disability from April 2021 or if not this date that he fulfilled the definition under s6 of the EQA from 22 February 2023. The 1st Respondent acknowledges that the Claimant had a disability on account of his mental health with effect from 22 February 2023 and that they had knowledge of this from 2 May 2023 following the receipt of Dr Badenhorst's report

The Claimant's disability impact statement dated 2 August 2024

54. Where this statement refers to the opinions of experts they will be referred to separately and I will confine this section to those comments which are personal to the Claimant. He contends that his mental health issues, and the various physical manifestations of mental health, were caused or exacerbated by the behaviour of Mr Leone. He sets out an A-Z list of symptoms he considers attributable to his mental health and there is no need for me to set them out in full. He says that Mr Leone's behaviour escalated and begun to have a more significant and long-lasting impact on his mental health in around early 2019. He says that he was regularly bullied, abused and manipulated by Mr Leone and became "on edge" every time he called or texted him.

55. He says that from 8 April 2021 he had 42 sessions with Phillip Dravers, a psychoanalyst, (Mr Dravers) of which 30 were in 2021.

Psychiatric Report of Professor Neil Greenberg dated 18 February 2025

56. Professor Neil Greenberg is the Claimant's expert witness (Professor Greenberg). At paragraph 21.10 he expressed the view that from April 2021 the Claimant had experienced adjustment disorder initially causing him to experience poor sleep and nightmares, decreased ability to focus, reduced concentration, rumination on his relationship with Mr Leone, a degree of irritability, physical symptoms including muscle aches and gastro intestinal symptoms, reduced energy and over time a decreased ability to carry out his day to day activities. He says that in his view from March 2022, the impact on his day to day activities was substantial in that he was not able to attend work. He expresses the view that the impact on the Claimant's day to day activities from March 2022 until 22 February 2023 remains substantial.

Psychiatric Report on the Claimant by Doctor Gregory Shields, Consultant Psychiatrist (Doctor Shields) as instructed by the 1st Respondent, dated 19 February 2025

57. At paragraph 12.18 Doctor Shields expresses the opinion that the Claimant was experiencing significant psychiatric symptoms for some time prior to April 2021 and that led him to seek the help of Mr Dravers and that he is likely to have met criteria for a diagnosis of anxiety disorder by the time he was prescribed sertraline and propranolol (treatments for anxiety and mood disorder) by Doctor Aziz on 9 May 2022.

Memorandum of agreement/disagreement between Professor Greenberg and Dr Shields dated 2 April 2025

58. They agreed that by the time the Claimant began seeing Mr Dravers in April 2021, he had been experiencing a considerable degree of psychiatric symptoms. Further, that they were highly unlikely to have emerged suddenly and that there had been a period of gradually increasing symptoms prior to April 2021. They agreed that the retrospective letter from Mr Dravers, regarding the care he provided for the Claimant between April 2021 and October 2022, should be given due weight. They agreed that there was no evidence of clearly false beliefs justifying a diagnosis of delusional disorder.

Preventicum Report dated 21 April 2021

59. Preventicum in effect undertake full body health assessments at a cost of circa £10,000. The Claimant says that he was referred to Preventicum by Mr Leone who uses their services. As such he says that he was initially reluctant to fully report the mental health trauma he contends is attributable to Mr Leone's conduct. He was concerned as to the independence of the medical staff and their commitment to obligations of patient confidentiality.

60. Relevant extracts from the Preventicum report dated 21 April 2021 are:

> In summary the Claimant was found to be in good health. Significant findings included stress.
>
> Under the heading personal lifestyle and occupation the report states:
>
> "Your life is intense, with a career that takes up most of your time and a home life which currently has its own challenging dynamic".

The report references the Claimant's home life taking a toll on his emotional health and refers to his relationships with his mother and brother. The Claimant disputes having made such references.

61. The report refers to the Claimant having a family history of complex mental health. The Claimant says that whilst he may have said this he subsequently made inquiries of his mother and found this to be an incorrect statement.

62. Under the heading present complaints the Claimant said he had no specific medical concerns.

Preventicum Report dated 28 February 2022

63. This records the Claimant being in good physical health today but under tremendous pressure and at risk of significant burn out. The significant findings included excessive working hours and high stress levels.

Email from the Claimant to Doctor Guy O'Keefe of 14 April 2022

64. The Claimant said that tachycardia seemed to be present with a resting heart rate of around 100 bpm and light headiness. He says that this was a private GP who had been recommended by Mr Leone.

Letter from Doctor Aziz dated 9 May 2022

65. In a letter from Dr Aziz to whom it may concern dated 9 May 2022 she referred to having had a video consultation with the Claimant and that he had been feeling extremely overwhelmed and stressed. She said: "He displays signs of acute anxiety which is affecting his sleep which is disturbed and also his eating pattern. He is unable to function on a day to day basis because of the anxiety which is related to work issues". She recommended a two week break from all work and made a referral to a cardiologist, as a result of the Claimant experiencing dizzy spells with a tachycardia, and recommended he see a psychologist regarding the acute mental anxiety he was experiencing.

Letter from Dr Valentina Ferrari, Psychiatrist (Dr Ferrari) to whom it may concern dated 15 July 2022

66. Dr Ferrari referred to the Claimant having an adjustment disorder with anxiety and depressed mood due to prolonged stresses in his work environment. The clinical picture impairs global functioning and occupational functioning and she recommended a further four weeks off work.

Letter to whom it may concern from Dr Ferrari dated 12 October 2022

67. Dr Ferrari repeated her previous reference to adjustment disorder with anxiety and depressed mood.

Letter from Dr Ferrari to no specified recipient dated 13 January 2023

68. The Claimant accepts that this letter was not sent to the 1st Respondent. The 1st Respondent contends that the letter was prepared as part of the briefing of Professor Elliott. Her letter included:

> The Claimant felt that his occupational life and global safety were threatened to the point that his symptomology resembles the core symptoms of PTSD.
>
> Moreover, the stresses were clearly prolonged and repeated over the years, and I am concerned with the Claimant potentially developing PTSD.

> He presents feelings of hopelessness and post-traumatic flash backs and nightmares of especially the more harmful memories, avoidance of things related to stock markets, negative self-belief and avoidance of further occupational relationships.

Preventicum Report dated 17 January 2023

69. This reports the Claimant being in good health except for his mental health. Under the heading mental health issues the report refers to a discussion of the Claimant trying to terminate the "toxic" situation and that "you are fortunately busy with a proactive plan to end the situation. In cross examination the Claimant denied that the proactive plan involved a financial settlement and the prospect of legal proceedings as formally set out in Mishcon de Reya's the Claimant's Letter before Action (the Claimant's Letter before Action). The Claimant contended that the "toxic" situation concerned toxicity in his health rather than the toxicity of his work relationship with Mr Leone.

70. We do not consider that the Claimant's interpretation of this element of the report is reflective of the clear and obvious meaning and the chronology of events.

71. Under the section of present complaints it was recorded as follows:

> You are currently experiencing various symptomatic symptoms like headaches, muscle aches, migraines with auras, lack of libido, social withdrawal, lack of appetite and sometimes overeating, recurrent herpes flares, alternative bowel movements with abdominal pain, shortness of breath and dizziness. This is most probably due to your emotional state as discussed above.

Report of Doctor Badenhorst dated 25 February 2023

72. The chronology pertaining to the Claimant attending this consultation will be referred to in the chronological findings of fact and at this stage it is only the summary of the Claimant's mental health which will be referred to. Dr Badenhorst said that the Claimant had told him that he was "a shattered version" of himself. He referred to the Claimant's account of his relationship with Mr Leone having a "tortured quality". He records the Claimant's account being confusing. He says that the Claimant's thoughts showed a rigid preoccupation with his relationship with Mr Leone.

73. He said that an alternative diagnosis of F23 delusional disorder should be considered. He said that the prognosis of the Claimant's current psychological state has to be somewhat guarded. He referred to his employment relationship being conflictual and damaged beyond repair and having no realistic chance of reparation. He says that the requirements for disability would be met. He set out a series of recommendations to include the Claimant receiving six sessions of specialised psychotherapy with an occupational focus. The purpose of this intervention would be to help the Claimant confront psychological obstacles that get in the way of his capacity to engage in a dialogue with his employer.

Email from Doctor Ferrari to Doctor Badenhorst dated 17 March 2023

74. She referred to what the Claimant considered to be errors in his report. This included the Claimant's aunt not having died. She disputed that any delusion existed. She also disagreed with his presumed underlying psychological fragilities/vulnerabilities and hypothesising about the Claimant's childhood and upbringing. She agreed with Doctor Badenhorst that the Claimant was not fit to work or to participate in employment related processes such as meetings with the employer. She agreed that the relationship appears to be damaged beyond repair with no realistic chance of

reparation. She said that the Claimant ought to keep the furthest possible distance from the circumstances and the person who caused his suffering.

Letter from Preventicum dated 13 March 2023

75. The Claimant had requested amendments to the April 2021 report to remove references to a "family history of complex mental health" and his home life taking a toll on his emotional health. He was advised that Preventicum would not be able to retrospectively amend medical reports.

76. The Claimant says that he did not have time on receipt of the April 2021 Preventicum report to properly consider its contents. He says that he was extremely busy at work. We do not accept this explanation. The Claimant had the time, inclination and willingness to spend £10,000 to attend the Preventicum full health assessment. We do not consider it creditable that he would not have taken the time to digests its contents. It is a relatively short report and it is apparent that the Claimant places considerable significance on his health and is willing to spend significant time and money attending multiple health appointments.

77. Further, we do not consider it credible that medical experts would have recorded circumstances pertaining to the Claimant's personal life having an impact on his mental health had the Claimant not referred to them. Whilst we acknowledge that a doctor's report could include an error, for example, referring to the death of the Claimant's aunt rather than her serious illness, we do not consider it likely that they would have simply created content not based on the substance of what they were told by the patient regarding important issues concerning their mental health.

78. We consider it far more likely that in consultation with Mischon de Reya LLP that the Claimant would have realised that references to personal issues, delusional disorder and a family history of mental health would be unhelpful to a high value High Court claim for personal injury as result of what he contends to have been the unreasonable behaviour of Mr Leone.

Email from the Claimant to Doctor Badenhorst dated 31 March 2023

79. The Claimant sent Doctor Badenhorst a markup of his draft report together with a document setting out a series of amendments he wanted to be made. This included his wish for the reference to "stresses in his personal life" to be removed as he says that no such stresses existed and he did not mention them to Dr Badenhorst.

80. It was put to the Claimant that the document setting out changes was likely to have been prepared on his behalf or at least in conjunction with his legal advisors. We accept the Claimant's position that he was responsible for this document. Nevertheless we consider that the knowledge that a substantial personal injury claim was in preparation, and Professor Elliott had already been instructed, had a bearing on his wish for such changes.

Expert witness report of Professor Tony Elliott (Professor Elliott) dated 15 April 2023

81. This report was prepared in the context of a potential High Court claim for personal injury and was appended to Mischon de Reya LLP's the Claimant's Letter before Action dated 15 June 2023. In the opening section of the report Professor Elliott refers to having seen the letters and reports from Doctor Ferrari and Doctor Giuseppe Russo, Clinical Psychologist-Psychotherapist.

Letter to whom it may concern from Mr Dravers dated 10 February 2025

82. Dr Dravers did not provide any contemporaneous reports or notes from his 42 sessions of psychoanalytically orientated psychotherapy with the Claimant. He referred to the Claimant initially presenting with significant stress relating to the unrelenting pressures at work. During the sessions, it became clear how much the stress was linked to events in his work environment and more specifically to interactions with his business partner. He says that his sessions with the Claimant came to an end in October 2022.

The Claimant's evidence regarding Mr Leone

83. The Claimant says that Mr Leone ran DLP as his personal fiefdom. He asserts that Mr Leone projected an image of a powerful, mobster-like figure with access to mafia and criminals if needed.

The Claimant's Jewish ancestry

84. The Claimant says he is of Jewish ethnic origin having several generations of Jewish ancestors, going back to the 1300s in Italy. He says that both his forename and surname have Jewish origins. His paternal ancestors were Jewish by birth and practising Jews by faith.

85. In cross examination it was established that the Claimant's paternal great grandfather was Jewish which from a genetic perspective makes him one eighth Jewish. However, the Tribunal does not consider that this is a significant factor in whether the Claimant is able to establish that he self-identified as being Jewish.

86. The Claimant said that he does not go to the Synagogue every week or month but he practises the Jewish faith from a cultural and secular perspective. He says that he visits his ancestors at the Jewish cemetery in his father's home town in Italy, visits relatives still living in the Jewish "ghetto" in Ferrara and his family had a bible and a Torah in the house.

Mr Leone's knowledge of the Claimant's Jewish ancestry

87. Mr Leone denies any such knowledge. The Claimant says that he repeatedly explained to him his heritage especially when he would remark on his name, travels, Jewellery, interest/hobby (painting) or appearance. He referred to a conversation with Mr Leone regarding his Jewish heritage and a response from Mr Leone where he said that it was on "the wrong side" (referring to his father's lineage).

88. The Claimant says that he showed Mr Leone a ring with Aramaic inscriptions (ancient Jewish script), explaining its cultural importance for him and explaining that it was not an aesthetically driven choice.

89. The Claimant refers to leaving the office early on Fridays, but not within core working hours, to attend Shabbat dinners with practising Jewish friends which he says he told Mr Leone about.

90. Mr Leone acknowledged that at some point he and the Claimant had discussed the matrilineal principle of Judaism but not with specific reference to the Claimant. Mr Leone denies any knowledge of a ring with Aramaic Jewish writings.

The Claimant's evidence regarding Mr Leone's attitude to Jewish people

91. The Claimant asserts that Mr Leone regarded Jewish people as being somehow different. He says he acted as if they exercised particular power or control in the finance sector, and as if they were connected to each other as part of a small powerful group.

92. There was a dispute between the parties regarding the extent to which Italian words translated to English would be considered to be offensive. For example, Mr Leone suggested that "giudeo" is not offensive whilst the Claimant submits that in Italian it constitutes the derogatory term for a Jew. The Tribunal does not have the benefit of expert evidence but rather the evidence given by Mr Leone, Mr Mazziotti and to a lesser extent Mr Wilkin, who had worked in Italy for several years, regarding colloquiums in Italian. Ultimately the Tribunal is not in a position to form a view on specific words but rather addresses this subject based on context and the totality of the evidence and the overall interpretation of innumerable recorded conversations and other communications

Irina Thesleff (Ms Thesleff)

93. Ms Thesleff was employed as a Marketing Manager for DLP from 2013-2016. Her promotion to partner was announced by Mr Leone on 17 April 2015.

94. There is considerable uncertainty regarding the events which culminated in Ms Thesleff's departure from DLP and her entering a settlement agreement in September 2016 (the Settlement Agreement). Ms Thesleff received substantial consideration for entering the settlement agreement albeit Mr Leone says that the overall figure of £8 million is misleading as it included renumeration she had received during her employment and deferred compensation.

95. The Respondents' witnesses indicated that Ms Thesleff left as a result of taking on additional caring responsibilities for her husband who had been diagnosed with cancer. However, the reality would appear to be that the relationship between Mr Leone, and other representatives of the 1st Respondent, and Ms Thesleff had become increasingly acrimonious prior to her departure. This is reflected in the evidence of Mrs Elliott and Mr Mazziotti in particular.

96. Despite repeated references to Ms Thesleff throughout the hearing the circumstances of her departure remained opaque. In the context of Mr Leone's subsequent repeated and serious allegations pertaining to Ms Thesleff's potential involvement in criminal activities directed towards him we do not consider it likely that her departure was in any way amicable and consider the most likely explanation is that there had been a serious breakdown in the relationship between her and Mr Leone.

Security incidents

97. Mr Leone refers to a series of security incidents in the period from 2016 to 2018 to include:

- The DLP phone system being compromised;
- His passport being stolen;
- In July and December 2017, two burglaries at his London home;
- His car charger exploding; and
- His note book disappearing one day and reappearing the following day on a table at his home and then discovering that two penises had been drawn on it.

The Claimant's personal investments

98. The Claimant says that he paid very little time or attention to his personal investments. He says that once he had purchased shares the investments did not require any active role from him. He says

that all of his personal investments were disclosed twice a year to the 1st Respondent, and repeatedly discussed with Mr Glasper and/or Mr Leone before they were made, and sometimes thereafter if Mr Glasper and/or Mr Leone asked him to provide updates to them. He says that throughout his career he had made a total of approximately 14 investments in private companies and all of them were passive and that he had not direct involvement in the operation of the companies nor a Board seat. He says that most of his investments, approximately 12 out of 14, took place between 2016 and 2020 with only one or two investments in 2021 and 2022.

99. Mr Leone says that the Claimant's personal investments were actively managed ones with which he engaged on a regular basis and spent a considerable amount of time to include during his working hours. He was concerned about a potential conflict of interest.

100. Mrs Elliott said that she and Mr Glasper became frustrated and annoyed by the Claimant's focus on numerous personal investments and what they saw as his abuse of DLP's resources to include Mr Glasper's legal advice.

Further specific allegations made by the Claimant concerning Mr Leone

Mr Leone's alleged references to the Claimant's former girlfriend as being his "Romanian teddy bear"

101. On various occasions between 2013 and 2022 the Claimant contends that Mr Leone referred to his then girlfriend as his "Romanian teddy bear". Mr Leone accepts that he may have used this expression but says that it was reflective of the physical relationship between them and not in any way intended, and nor did he believe, was it interpreted as negative.

Mr Darko Matovski (Mr Matovski)

102. The Claimant alleges that Mr Leone rarely referred to Mr Matovski by his name, and instead repeatedly made references to "the Bulgarian" after the Claimant had told him that he was not Bulgarian in 2015 and 2016. Mr Leone acknowledges that he would on some occasions refer to employees by their nationality as he is poor at retaining names and the company has employees from multiple nationalities.

103. In a letter before action from Slater Gordon dated 14 June 2016 they alleged that during their client's dismissal meeting Mr Leone had stated: "If you appeal this then you will really see what we can do to you. We will keep digging deeper and deeper until we find something".

104. It is further alleged that Mr Leone made offensive comments about Mr Matovski almost on a daily basis such as "we will deal with this bastard".

105. Mr Leone says that the 1st Respondent believed that Mr Matovski had misappropriated funds. Mr Wilkin accepted that there had been no formal investigation.

Mr Leone's alleged comments regarding penis size

106. The Claimant alleges that Mr Leone made comments about the penis size of individuals. Mr Leone denies having done so, and says that his occasional use of the phrase, or words to the effect of "big swinging dick," concerned someone's business status and was not of a sexual nature.

Aisha Edwards

107. The Claimant alleges that between 2016 and 2020 Mr Leone falsely accused him of sleeping with Aisha Edwards (Ms Edwards). Mr Leone acknowledges that he may have asked the Claimant such a question but only in the context of a history if his having a relationship with a colleague in previous employment. The Claimant denies this.

Mr Leone calling the Claimant a sophist

108. The Claimant alleges that on multiple instances between 2020 and 2022 Mr Leone called him a "sophist" a term suggesting he was a "know it all". Mr Leone acknowledges using this word, indeed it is shown on various occasions in the transcripts, but says that it was in the context of a debate they were having regarding various schools of philosophy. It was not intended to be insulting of the Claimant.

Chronological findings of fact other than as already referred to thematically above

Liz Tidy

109. Between January and March 2016 the Claimant alleges that Mr Leone referred to an ex-employee, Liz Tidy, as a "piece of shit" for allegedly hiding that she was pregnant when interviewing with the 1st Respondent. Mr Leone denies this.

Message exchange between Mr Leone and the Claimant of July 2016.

110. This included Mr Leone saying:

> *"Rather than putting your life on the line in this country where a whore can do whatever she wants to you*".

Mr Leone acknowledges that he was referring to Ms Thesleff. He says that he regrets this use of language but was concerned regarding serious security issues. However, the burglary at his home had not yet taken place.

The Claimant appoints Mr Leone as executor of his will

111. On 8 September 2017 the Claimant appointed Mr Leone as executor of his will. This remained the case until 2022.

The Claimant's calendar entry of 28 September 2017

112. During the hearing the Claimant submitted additional evidence of a calendar entry entered on his behalf by his PA, Aisha Edwards (Ms Edwards) for Yom Kippur (Jewish holiday) between 28 and 30 September 2017. The Claimant did not take holiday. Nevertheless, he says this is relevant in demonstrating his observance of Jewish religious festivals. He says that this calendar entry would have been accessible by Mr Leone and other DLP employees.

Signal message exchange between Mr Leone and the Claimant of 3 July 2019

113. This included Mr Leone saying: "My fear is that whore is conducting terrorism against us with this", this was a further reference to Ms Thesleff. Mr Leone said that he was referring to "reputational

terrorism". He placed this comment in the context of what he described as an escalation of security events.

The Claimant's handwritten note of 8 July 2019

114. This includes a reference to Mr Leone linking Ms Thesleff with "terrorism" and saying, "at war daily". There is also a reference to "Jewish connections?!" and further "they believe a Jew's accusations".

115. Mr Leone does not remember the above comments. Nevertheless, whilst not recognising the words as his own he accepted that it was possible that they were said.

Mr Leone's alleged threat to the Claimant to shut the company in late 2019

116. At page D3843 the Tribunal was referred to communications between Mr Leone and the Claimant in Italian. The Claimant contends that this included a threat to shut the company in the context of the business reorganisation. Mr Leone says it was a reference to shutting the process pertaining to the corporate reorganisation. He says that the FCA was informed at the end of 2019 of the transformation. He places this in the context of the Claimant's delay in signing the documentation and raising his economic interest with Mr Leone. He says that no Italian speaker would reasonably read the communication as referring to shutting the company. Mr Mazziotti reiterated this opinion.

Message exchange between Mr Leone and the Claimant on 1 January 2020

117. This included Mr Leone saying: "You maintain to me that you have not spoken to any other people, I think you should reflect on whether that is true".

118. Mr Leone accepted that this was probably a reference to Ms Thesleff in the context of a number of security incidents. He says that he did not want speculation regarding Ms Thesleff and her involvement in the security incidents in the outside world.

Claimant's handwritten note of 9 February 2020

119. This included a reference to "burn-out?" Mr Leone accepts that he may have used such words.

The Claimant's 2020 bonus

120. It is not in dispute that the Claimant received a bonus of $1.5 million in 2020. It is, however, disputed whether he was awarded, and not paid, an additional $1.5 million.

121. Mr Leone denies that any part of the Claimant's 2020 bonus was invested in Sentcell. In any event Sentcell has not generated any profits.

122. The Claimant's position is that he had an unconditional entitlement to $3 million and Mr Leone had verbally advised him of this. There is uncertainty regarding Mr Leone's position as to whether he originally referred to $3 million, but that 50% was conditional on subsequent satisfactory performance, or alternatively whether it was always intended that the bonus would be limited to $1.5 million.

123. Mr Mazziotti and Mrs Elliott gave evidence that their 2020 bonuses were reduced as a result of poor DLP financial performance in 2021. They said that bonuses were paid at Mr Leone's sole absolute discretion and that the absolute figure advised was subject to partial withdrawal in the event

of adverse performance. Mr Leone says that this is in accordance with common sense as if bonuses were awarded based on the performance fee obtained from investors, but subsequent performance was unsatisfactory, the payment of the full amount would create financial problems and not be viable or commercially sensible.

124. We accept Mr Leone's position in this respect. Whilst we consider that on the balance of probabilities the Claimant may generally have anticipated a 2020 performance bonus of up to $3 million we do not accept his evidence that this was unconditional. That would be inconsistent with the prevailing practice and the evidence of Mr Mazziotti and Mrs Elliott.

125. Mr Leone refers to the "high water mark" principle meaning that any employee would need to get the Fund back to the level it had been before losses were incurred before they may be eligible for a bonus. The Claimant denies knowledge of such a principle but we consider this to be highly improbable given his seniority and industry specific knowledge. We accept that this principle is well established and is consistent with commercial good sense.

DLP accounts dated 28 February 2021

126. They state that the highest paid director received £1,384,898 in renumeration for his services to the Group during the year ending 28 February 2021. This being the Claimant

127. Mr Wilkin was concerned that if the Claimant had an absolute entitlement to $3 million the accounts would have been erroneous. Further, the Claimant as a director, and an approved person from a FAC perspective, would have approved the accounts and would have had an obligation to highlight any error or oversight.

128. For the first time during cross examination the Claimant sought to argue that the figure of £11,187,760, as other unlisted investments for 2021, must have included his $3 million bonus. Further, in this context he made a serious allegation that Mr Leone had lied in stating that DLP only had one fund. However, when questioned on this by the judge he accepted that there was only one fund and his reference to "lying" pertained to Mr Leone's lack of familiarity with his witness statement rather than a dishonest statement regarding the fund structure.

129. We did not consider that the Claimant's attempt to explain that his full $3 million must have been included within the unlisted investments to be credible. This is particularly the case given that it was not referred to in his witness statement and nor was it put to Mr Leone in cross examination. We therefore conclude that in this instance the Claimant was seeking to grasp at any available explanation during cross examination.

The Claimant's financial performance in 2021

130. Mr Leone referred to losses attributable to the Claimant being as high a £86 million (US$90 million).

131. Whilst not directly an issue we need to determine there was significant dispute between the parties as to the extent of the Claimant's poor financial performance during 2021. The Claimant submitted a relatively detailed third witness statement dealing solely with his financial performance. That statement sought to challenge the overarching contention that he had performed poorly with specific contentions in relation to individual investments, a contention that DLP cherry picked a timeframe to provide their analysis of his alleged performance, and that the figures had been manipulated to present a misleading picture. He concluded by saying that had Mr Leone been present

and “tuned-in” to follow his recommendations, the outcome for DLP investors and his contribution to DLP’s profits would be very different.

132. He says that has not been appropriate contextualisation from the sector, the market, the DLP fund size, historical DLP fluctuations and actual events. In any event, he says that swings of the magnitude alleged ($86 million) would not be abnormal in the context of the industry, sector or fund size and/or past history. He says that a $1 billion to $2 billon fund can witness performance swings of between 5 to 20% in any given year. He says that in the years he worked at DLP, the Fund had worked through much bigger losses than $86 million and made much larger profits.

133. The Tribunal was surprised by the Claimant’s apparent attempt to recast the narrative regarding his poor performance. When asked by the Judge he acknowledged that there had been losses in respect of some of his investment positions but not to the extent which the Respondent sought to portray. He also accepted that his investment performance had been compromised as a result of his increasing mental health issues. He did not, however, consider it necessary to step down from his investment role or notify the FCA of such concerns.

134. We consider it self-evident from the recorded transcripts that the Claimant acknowledged that he had had a very bad financial year in 2021. Many of the conversations are predicated on Mr Leone referencing that poor performance. We also consider that had the Claimant genuinely believed that there were no issues regarding his performance, and that it was solely a case of incorrect attribution of investments, time periods and a failure to follow his investment recommendations, that he would have said so. There is no evidence that he did. This is significant in the context of the discussions the Claimant had with Mr Leone and others and particularly those pertaining to his purported economic interest/entitlement to share in the equity.

<u>The Claimant’s recordings</u>

135. From 12 July 2021 to 20 April 2022 the Claimant recorded 66 conversations amounting to approximately 75 hours. These primarily involve conversations with Mr Leone but also included Mr Glasper, Mrs Elliott and Mr Mazziotti. It was not until a letter from Grosvenor, his solicitors, dated 30 April 2024 that he mentioned the existence of such recordings.

136. Some of the conversations were extremely long to include one of 4 hours 57 minutes with Mr Leone. They were recorded on the Claimant’s iPhone. Whilst in relation to a recording in a restaurant the Claimant initially appeared to suggest that the phone may have been left on the table, he retracted from this, and we consider the overwhelming probability, given covert recording, is that his phone would have been concealed and covertly activated to avoid raising suspicion.

137. The Claimant says that the reason for his recording Mr Leone was that he was being “gaslighted” and this was causing him to question his memory of events and sanity. The Claimant asserts that from late 2020 Mr Leone systematically gaslighted and psychologically abused him. He therefore made the recordings as a record to protect his position. The Claimant says that the makings of the recordings was closely interrelated with his mental ill health. He says that he did not think these recordings would become evidence required to rebut Mr Leone’s manipulation and lies. He says that he did not know what was going to be discussed in the conversations.

138. It is apparent that all of those recorded were particularly upset by what they regarded as an egregious breach of trust. This was particularly evident in the evidence of Mrs Elliott who considered the Claimant a personal friend. She believed that she had been badly betrayed by his enticing her

into conversations and particularly one in a crowded bar when she had proposed that they could have a discussion in the Board room. We accept the genuineness of the Respondents' sense of betrayal.

139. We will comment in more detail on our views regarding the recordings and the weight to be placed on their content, and specifically the overarching context in which they were made, in respect of the Claimant's multiple allegations of harassment on account of various protected characteristics. For narrative consistency we will at this stage refer to relevant extracts from the transcripts in chronological sequence. As previously mentioned we will keep our reference to specific sections relatively brief, but in our deliberations are mindful of the overarching context, given that we have read much, but not all, of those transcripts.

The Claimant's allegation that Mr Leone made a homophobic comment

140. On 25 August 2021 the Claimant alleges Mr Leone described Professor Alessio Lanna as the "faggot scientist" who comes from "Frosinone". Mr Leone says that Frosinone is close to Rome but the Claimant produced evidence from Google maps showing that it is a 74 minute drive.

Conversation between Mr Leone and the Claimant of 12 July 2021

141. This included Mr Leone making a reference to Ms Thesleff as "the Finn". He made various references which the Claimant seeks to portray as him adopting a conspiracy theory involving Ms Thesleff. This included:

> *"But what, in my opinion, they do, they infiltrate all the funds, everything, all the banks, there is always someone inside who is an infiltrator. Why?"*
>
> *"This one's a whore, once it is revealed that this is her job, you think, fuck it, whose her pimp? At first you say: no, she is the one who went crazy because she is a woman, she feels aspirations, betrayals and listens to phone calls, recorded phone calls".*

142. Mr Leone accepted that he had no evidential basis to suspect Ms Thesleff as being involved, or orchestrating, criminality. He says there was insufficient evidence to go to the police but he was merely speculating based on circumstantial evidence and exploring all potential hypotheticals and scenarios.

143. Mr Leone went on to say in respect of Ms Thesleff:

> *"When she was inside it is evident that for a period she passed out information, of course, they got rich, they all ate from our recipe, because at the same time, we were setting up a fund".*

144. He referred to an incident where six years of his emails were put on the general server. He went on to refer to Mr Wall as, in his opinion, being the first infiltrator.

145. He went on to say:

> *"For years the father of this guy did that stuff, corrupt cases, deaths, suicides, serious stuff".*

And further:

> *"But for them and for those who helped this bitch, when she took the money, they said 30% of his money, she gave them 30% of her bonus".*

And further:

> *"He has to keep the girl sweet so that she does not talk, and he gives money to that girl, so much so that he does not give a damn about giving millions to this company? In Dubai, I also know the account where the money comes in".*

146. Mr Leone said he did not know Ms Thesleff's bank account details merely that she had a Dubai account.

147. And further:

> *"Look there is a mad woman who caused a hell of a mess by involving a lot of people, she locked herself in there, and nobody has a problem with this guy".*

And:

> *"I was fighting for my life with people who can kill at 6 in the morning".*

Mr Leone added:

> *"It's not the same thing if you risk your life and your children's lives with made people on the street and you".*

148. The conversation then progressed to matters pertaining to the Claimant's performance. Mr Leone said: "If you were doing it on purpose, we would already have thrown you into a river". The Claimant has construed this comment as a physical threat to him. He says that this is typical of Mr Leone's language and he made reference to horses heads being left on people's porches as evidence of Mr Leone's allegedly intimidatory behaviour. This is denied by Mr Leone and he says it is a reference to the godfather film and never intended to be taken seriously.

149. Further, in the call Mr Leone is recorded as saying: "Why do you want to have a bitch like the one I live with". This was a reference to his wife. Mr Leone acknowledges making this comment, and others of a similar nature, which he regrets, but puts in the context of his communicating with a close personal friend and confidant where he had an expectation of confidentiality.

<u>Conversation between the Claimant and Mr Glasper on 14 July 2021</u>

150. This includes the Claimant making reference to Mr Leone having issues with him working from Italy. Mr Glasper says that Mr Leone asked him to try and find regularity problems with it, which he refused because there weren't any in his opinion.

151. We consider that this needs to be placed in context. The Claimant was aware that Mr Glasper had a personal issue regarding his wish to work from home in the context of his family situation and therefore was a receptive audience to a similar issue pertaining to the Claimant's preference to work from Italy.

<u>Conversation between Mr Leone and the Claimant of 15 July 2021</u>

152. This included Mr Leone saying:

"But he's a Jew, like all Jews, he has a tendency to save. It fits, there are people when they're in trouble like my father, right? He consumes nothing, he saves everything, because he has seen poverty, difficulties".

153. Mr Leone says that this is a positive comment regarding Jews like his father knowing the value of saving and prudence. He respects the trait of saving. The Claimant contends that this represents an anti-Semitic trope that Jewish people are misers and tight with their money.

154. During the call the Claimant said: "I am convinced that we are building something together and I think you have also shown it in the fair way you have treated me over the years. Comp and everything else".

155. The Claimant stated: "I think I told you that you always renumerated me and shared in a super fair way. Super generous". He explained this in evidence as trying to keep conversations with Mr Leone positive.

156. The Claimant subsequently in evidence sought to backtrack from "everything else" and said that this was incorrect. He says he had been very worried as to how Mr Leone had been interacting with him but tried to focus on improving things.

157. We consider that this is one of many instances where the Claimant has retrospectively sought to change the narrative of conversations, medical reports and correspondence so that it is consistent with the allegations and legal proceedings subsequently initiated. We will comment on this further in our conclusions.

158. Mr Leone made further references to Ms Thesleff to include her being a "complete mad woman" and "stupid bitch". It is, however, unnecessary for us to repeat references to such comments . This is particularly the case as this was a recording of between three and four hours made on a Sunday evening in Mr Leone's kitchen.

159. The Claimant made reference to his visit to Preventicum to include: "I am all about stress".

Conversation between the Claimant and Mr Leone on 25 August 2021

160. There is then a reference made by the Claimant to whether a person really disconnects when they are on holiday with this job. Mr Leone responds to include saying: "But what the fuck are you, the office psychologist". The Claimant went on to say we need to get the psychologist in the office.

Conversation between the Claimant and Mr Mazziotti of 5 September 2021

161. The Claimant stated: "I have always been treated in a very generous and fair way, I would simply like to have clarity on the fact that economic ownership".

Document prepared by the Claimant and left on Mr Leone's desk on 5 September 2021

162. This comprised a detailed A3 spreadsheet with multiple recommendations by the Claimant to improve performance. The recommendations largely comprised HR, employee motivation, stress and work management. Mr Leone says it was not the type of document he was looking for the Claimant to produce. He contends that it was prepared by the Claimant in the context of potential employment litigation.

163. The Claimant says that he left a hardcopy on Mr Leone's desk as he was reluctant to send it to him by email as he had previously rubbished such communications. He took a photograph of the document with a post-it on it but denies that he photographed it on Mr Leone's desk. He says the photograph was taken outside the office and in a different country. He says this was a year later.

Conversation between the Claimant and Mr Leone on 20 October 2021

164. This includes Mr Leone saying: "Anyone who comes to fuck with us will get hurt".

Conversation between the Claimant, Mr Glasper and Mr Leone on 20 October 2021

165. This includes Mr Glasper saying that Mrs Elliott will just say whatever Mr Leone says.

Conversation between the Claimant and Mrs Elliott on 27 October 2021

166. Mrs Elliott says: "I think the fundamental point is he does not trust any of us". This was a reference to Mr Leone.

167. In the context of talking about his personal romantic relationships the Claimant made reference to finding things that give him emotional stability and his volatility and depression. Mrs Elliott interpreted this as being in the context of his girlfriends rather than him stating that he was suffering from depression.

Conversation between the Claimant and Mr Wilkin on 11 November 2021

168. The Claimant brought up the question of his 2020 bonus entitlement. He says that it was £3 million and half of that had been taken out. Mr Wilkin said that the issue was the cash to pay it.

Conversation between the Claimant and Mr Glasper on 23 November 2021

169. Mr Glasper talking about feedback to Mr Leone said: "It usually results in a complete explosion of anger from Mr Leone, to, an extent where I am actually not sure how serious he is".

170. We consider that it is very apparent from this conversation that the Claimant was leading Mr Glasper to echo his own concerns regarding communication with Mr Leone.

Conversation between the Claimant and Mr Leone on 8 December 2021

171. This included the Claimant raising the alleged bonus figure of £3 million with him. Mr Leone did not expressly dispute an award of £3 million but went on to refer to the Claimant's comments being "those of someone who is packing his bags".

172. Also in this call Mr Leone was recorded as making reference to Jessica Murray, Mr Glasper's PA, as being "that bitch". Mr Leone cannot recall having referred to her as the "fat one" but acknowledges that it may have been possible that he did say this once or twice.

Conversation between the Claimant and Mr Leone on 19 December 2021

173. This included the Claimant referring to a conversation in August that made him feel bad when Mr Leone had said: "You're a jerk, you don't wear the company t-shirt, you have rings, you don't cut your hair". The Claimant says that Mr Leone referring to him by the Italian word of "cafone" was

abusive as it translates as being a “bum” or “peasant”. Mr Leone put such a remark in the context of the Claimant turning up at work in an inappropriate state of attire with an appearance inconsistent with the company’s dress and appearance expectations.

Conversation between the Claimant and Mr Leone on 28 December 2021

174. This included Mr Leone saying that the Claimant messed up with everything he did because he is in a limbo that needs to be resolved. He went on to say that the Claimant made him so pissed off that he made him lose his manners.

175. Mr Leone went on to refer to Ms Thesleff as follows: “This arsehole has gone to work somewhere else and whoever gives a fuck, is ready to make money”.

Conversation between the Claimant and Mr Leone on 3 January 2022

176. This included Mr Leone saying: “I was worried that you had a mental breakdown, so you had to see the psychologist every Friday”.

177. Mr Leone went on to say: “If you want to resign and break it [the company], you will be the first to pay me the consequences and I will make sure that you will pay all the consequences you deserve, if you break it”.

178. The conversation returned to Mrs Thesleff and Mr Leone said: “She sucked the right dicks”. The Claimant responded by saying: “But do you understand why it hurts me so much when, even as a joke, you called her “your partner” and repeated it to me numerous times”. Mr Leone is then recorded as saying: “She screwed up with client two because she went to client two to say things but he ran away with his tail between his legs. The only one who never answered the phone. One escaped from America. A Jew who ran away”.

Conversation between the Claimant, Mrs Elliott and Mr Glasper on 5 January 2022

179. Mrs Elliott asked the Claimant how he was and he responded by saying “I would say it’s business as usual in terms of me”.

180. The Claimant referred to a previous conversation with Mr Leone when he had asked whether to was seeing a shrink and the Claimant responded that he was not. In evidence the Claimant explained that he was reluctant to divulge his mental health out of concern that Mr Leone would ridicule and stigmatise him for doing so.

181. In response to a question from Mrs Elliott as to whether he was looking forward to coming back the Claimant replied: “Yeah. I am. Absolutely”.

6 January 2022 call between the Claimant and Mr Glasper

182. There was a discussion regarding Mr Leone’s anger at the Claimant following Alex Juska’s resignation and Mr Leone not having been told directly. Mr Leone accepts that he was irritated but says that this was because Mr Juska was appointed on the basis of the Claimant’s recommendation, contrary to his reservations, and he was not informed but heard it on the grapevine.

Conversation between the Claimant and Mr Leone on 24 January 2022

183. This included Mr Leone, when speaking about Mr Glasper, saying: “He’s also starting to say, Oh, but mental health care, health, etc, which, in reality, is a way of blackmailing you, right?”. He went on to refer to “this guy (referring to Mr Glasper) pulling the mental health card”.

184. The Claimant went on to refer to “six years of extreme stress, and the environment in my opinion, has become toxic”. He further said that the past six years have been extremely stressful. He said it was imperative that he took time off asap and that he needed to restructure his lifestyle, work approach and methodology.

185. The Claimant then went on to raise questions regarding his economic interest in the business and saying that in his head it is a 40/60 split.

186. The Claimant reiterated that his four key points were:

- That he take time off;
- That they hired a senior person;
- Clarity on what they had built together; and
- Clarity on compensation.

The Claimant went on say: “This is about health, about wellbeing – I don’t know how else to explain it, ok”.

187. There was a conversation regarding a high profile and ultra-high network Ukrainian individual. There is a dispute as to whether Mr Leone referred to him as being a “Ukrainian Jew”. The audio recording was unclear on this point and when listened to by one of the Respondents’ solicitors, who is fluent in Italian they could not make out the word “Jew”. Mr Leone said it was possible he may have referred to him as a Ukrainian Jew.

Conversation between the Claimant and Mr Glasper on 9 February 2022

188. The Claimant asked Mr Glasper if they could have confidentiality to which he responded yes. This is self-evidently inconsistent with the Claimant’s covert recording, and future use of, the conversation.

Conversation between the Claimant and Mrs Elliott on 10 February 2022

189. The Claimant referred to the last seven years as having been unbearable and asking why did he need to suffer.

Conversation between the Claimant and Mrs Elliott on 14 February 2022

190. This took place in a bar and Mrs Elliott did not regard it as a formal conversation regarding his health concerns. She says that they were close friends. The Claimant referred to having clarity on his 2020 compensation and his economic interest as being the important bits.

Conversation between the Claimant and Mr Leone on 21 February 2022

191. The Claimant asked how he would have recovery during a period of leave if he did not have clarity on the 2020 compensation and other matters. Mr Leone responded by saying he considered that the Claimant lacked perspective.

192. The Claimant contends that this conversation included Mr Leone saying words to the effect of: "You will see what an employer can do to you," but this is denied by Mr Leone and it does not appear in the transcript.

Conversation between the Claimant and Mr Glasper on 24 February 2022

193. The Claimant said: "I am suffering deeply and I have been suffering for a lot of time, and only now I realise how huge an impact this is having, and I need time off". The Claimant went on to talk about his "nervous eating" and that he had been doing it for years. He referred to eating and spitting stuff especially when he stressed.

Conversation between the Claimant and Mr Glasper on 14 April 2022

194. The Claimant referred to having been unwell the previous night when he could not sleep and his tachycardia had come on and he had almost fainted when looking at the sabbatical agreement. He said that he had a resting heartbeat of over 100.

Email from the Claimant to Mr Glasper on 9 May 2022

195. This included the Claimant saying: "I wanted to clarify that my physical and mental health has deteriorated, suffering very significantly over recent years as a result, as you are well aware, of the working environment in DLP. I have been repeatedly placed under unnecessary intense and unsustainable strain and interactions in addition to extremely long working hours; behaviours and treatments I have experienced are not conducive to a safe or healthy working environment. I feel completely burnt out".

196. Mr Glasper responded in an email on 12 May 2022 saying that he was not aware of the Claimant's ill health.

197. On 17 May 2022 the Claimant sent an email enclosing a sick note.

198. On 23 May 2022 Mr Glasper sent an email to the Claimant regarding requesting sick notes and referral to OH. Various sick notes from Dr Aziz signed the Claimant off for periods of up to four weeks on account of acute signs of anxiety, feeling extremely overwhelmed and stressed and remaining fairly anxious and stressed.

199. On 14 July 2022 the Claimant was informed that from 1 July 2022 he would receive statutory sick pay only.

The Claimant's grievance dated 22 August 2022

200. The Claimant said that his concerns related to three broad themes:

- As a direct result of Mr Leone's behaviour, there exists an environment and culture of fear within DLP;
- Mr Leone frequently exhibits profoundly paranoid and controlling behaviour, both in his own actions and the instructions he gives those around him; and
- Mr Leone has routinely used discriminatory, aggressive, and abusive language – not only toward me. This include misogynistic, homophobic and violent language, as well as verbal and physical threats.

201. It is significant that the grievance did not make any reference to the Claimant's race or ethnic origin. The Claimant explained this by saying that they were not excluded.

202. The Claimant set out a series of detriments he claimed to have suffered which included, but were not limited to:

- The threat of being thrown into a river;
- Unspecified consequences if he resigned;
- Increasing working toxic environment;
- Mr Leone's paranoid behaviour;
- Mr Leone's aggressive behaviour; and
- Mr Leone referring to women as "bitches" and "whores."

203. We consider it highly significant that the Claimant did not refer to his contention that he had been discriminated against on account of his Jewish ancestry. His explanation that it was not excluded is in our opinion wholly unsustainable. Further, the Claimant was not at this point, nor subsequently, reticent about making very serious allegations concerning Mr Leone's conduct.

Email from Mr Glasper to the Claimant of 7 September 2022

204. Mr Glasper said that given the duration of his absence, and as first indicated in his email of 23 May 2022, it was important that a referral was made to an OH specialist so that a report could be prepared on his condition, prognosis, and any recommended adjustments.

Feedback report for DLP from Carol Kingsnorth dated 2 October 2022

205. Ms Kingsnorth undertook a review of DLP's culture. The report was extremely positive regarding the feedback she had received. She found that employees felt comfortable about raising their concerns. She said that there was a culture of trust and psychological safety.

Investigation of the Claimant's grievance by Freshfields

206. The 1st Respondent decided that it was appropriate to appoint an independent investigator and appointed Mr David Mendel (Mr Mendel), a partner at Freshfields, to lead the investigation. As part of that investigation he, and his colleagues, interviewed Mr Leone, the Claimant, Mr Glasper, Mrs Elliott and Mr Wilkin.

207. The interview notes are lengthy and in the interests of the proportionality and relevance will only be referred to selectively.

Interview of Mr Glasper by Freshfields on 17 October 2022

208. this included Mr Glasper referring to his own concerns regarding his interactions with Mr Leone. He referred specifically to what he considered to be an "unreasonable" phone call which was late at night at the weekend. He said that as a result of this call he had to go and see a doctor.

Email from Mr Mendel to Mr Glasper of 26 October 2022

209. Mr Mendel proposed that the scope of the investigation should be confined to the period 1 January 2020 until 22 August 2022. A list of proposed search words were set out. These were confined to English rather than Italian words. The Claimant contends that the time period and key

word search were inappropriately restricted and should have been wider and included equivalent Italian words.

Email from Mr Glasper to the Claimant of 28 October 2022

210. Mr Glasper said they were happy to consider a report from a professional responsible for the Claimant's clinical care. Nevertheless, he reserved the right to request that the Claimant attend an OH appointment. The Claimant responding by asking what professional is deemed appropriate and what assessment is required. Mr Glasper did not provide an answer.

211. We consider that the Claimant's response is indicative of his failure to take a proactive approach to the process. Given that he had been told by Mr Glasper that they were willing to consider a report it was open for him to submit a report from, for example, Dr Ferrari. There was no need to go back and ask what professional is deemed appropriate when it should have been self-evident to the Claimant that it was a professional dealing with his mental health issues.

212. In an email of 14 November 2022 Mr Glasper informed the Claimant that as they did not have visibility into the background of the medical professionals currently responsible for his care they were not able to comment on who, and in respect of what subject, would be appropriate.

213. On 24 November 2022 the Claimant said he had concerns about the independence of the suggested OH.

The Claimant's response to Freshfields' questions dated 25 November 2022

214. The Claimant submitted a response of over 100 pages. He was asked to provide Freshfields with any documents relevant to his allegations and their investigation. He responded by saying that documents were almost non-existent and represent a grain in the sand vis-à-vis the whole of the communications between him and Mr Leone.

215. It is significant that the Claimant did not refer to the 72 hours of covert recordings. He sought to explain this on the basis that he was concerned whether they would be accessible. He initially sought to explain this concern by his health condition making it difficult for him to access and review such recordings. However, it became apparent that the Claimant was then saying that he had lost the phone on which the recordings were made in June/July 2022 and it was not recovered until late that year. It was apparently in a bag containing various phones left in a cupboard at his mother's flat in Milan. The Claimant did not report his phone as being lost. He apparently had another phone which he then used. He was uncertain whether the recordings were backed up to the Cloud.

216. We consider the Claimant's explanation lacks credibility. Further, it is compounded by him then saying that prior to the "loss" of the phone he had made handwritten notes of key points from the conversations. Those notes were then lost. However, the Claimant said that they formed the basis of his responses to Freshfields.

217. In a section entitled religion the Claimant introduced allegations of anti-Semitic comments by Mr Leone. He referred to Mr Leone using the words "BIG JEW" in respect of Ms Thesleff, her sucking off the right Jew, that she had been hired as a result of her being a well-connected Jew who had links to "BIG JEWS" in the industry. The Claimant said he had Jewish origins on one side of his family and found Mr Leone's selective antisemitism insulting.

218. The Claimant was specifically asked whether he had any phone records and he repeated that he did not have anything beyond his own notes.

Email from Mr Mendel to Mr Glasper of 2 December 2022

219. Mr Mendel proposed limitations on the scope of the grievance investigation given concerns of proportionality and cost. Matters to be excluded included those pertaining to Ms Thesleff, those issues which were "particularly historic" and those pertaining to Mr Leone and other employees/former employees. He suggested limiting the investigation to current senior management.

220. Mr Glasper agreed with Mr Mendel's recommendations. No communication of the proposed scope of the investigation, and limitations thereto, was made to the Claimant.

Email from Mr O'Flaherty to Mr Mazziotti of 9 December 2022

221. Mr O'Flaherty referred to Mr Leone's interview with Freshfields the following day and said: "No doubt he is nervous but also perhaps looking forward to giving his version of events and response to the Claimant's fabrications".

222. Mr O'Flaherty explained his reference to the Claimant's "fabrications" in the context, specifically, of his denial of a familial relationship with Mr Leone. He also made reference to his allegation of Mr Leone threatening to murder him and the Claimant in his opinion choosing to spin certain conversations.

223. We consider that Mr O'Flaherty's reference to the Claimant's "fabrications" was both surprising and inappropriate. Whatever view he may have formed on the credibility of the Claimant's allegations it was important that as a member of the sub-committee considering the grievance he retained objectivity. This comment calls into question whether he had already made his mind up that the Claimant lacked credibility.

Mr Leone's interview with Freshfields on 10 December 2022.

224. Mr Leone acknowledged that in 18 years of friendship with the Claimant he might have used language that was inappropriate, but homophobia was out of the question.

Freshfields' investigation report dated 20 December 2022

225. Key findings were as set out below but the summary findings need to be seen in the context of the allegations and the report in its totality.

- The Claimant and Mr Leone had a familial, brotherly relationship and friendship.
- Whilst Mr Leone's behaviour, tone and language was not always appropriate, we do not consider that there is an environment and culture fear at DLP.
- Following professional security advise it was not unreasonable for Mr Leone to take his personal security seriously.
- The Claimant was an extremely senior member of staff and we have not seen evidence to suggest he felt gagged in this way.
- We do not think that the Claimant could reasonably have treated these as genuine threats against his life.
- We do not accept that any comments were intended other than in jest amongst colleagues.
- Mr Leone's choice of language has not always been appropriate for a professional setting.

- We think it is likely that Mr Leone was, in fact, the Claimant's biggest advocate/defender around this time (referring to his poor 2021 performance).
- Our view is that the DLP senior management team were not aware of the extent of the Claimant's health concerns prior to the emails on 9 May 2022 and 17 May 2022.
- We accept that a figure around $3 million was most likely discussed in respect of the Claimant's 2020 performance bonus but that bonuses are determined by Mr Leone in his discretion and they are not paid out in full immediately following the end of the relevant financial year
- We accept that distributions are paid over time, at Mr Leone's discretion, subject to company performance.

Email from the Claimant to Mr Glasper of 6 January 2023

226. The Claimant reiterated his concerns regarding the independence of the OHs suggested and proposed that he should be provided with a list of five independent OHs. He did, however, confirm that he was willing to proceed with Dr Badenhorst.

Email from the Claimant to Mr Glasper of 20 January 2023

227. The Claimant set out various criticisms of the Freshfields investigation report. He contended that there were numerous inaccuracies, incorrect statements and conclusions. At paragraph 4 he said that there was no interaction between himself and Mr Leone that did not relate to work. He disputed that there was a familial, brotherly or friendship relationship.

Email from Mrs Elliott to Mr Mazziotti, Mr O'Flaherty and Mr Wilkin of 6 February 2023

228. She said that the Sub-Committee had received the full submission of the Claimant to Freshfields as part of the investigation. She said that was necessary to obtain the notes of Mr Leone's interview with Freshfields. The Respondents' witnesses accept that these were not provided to the Claimant.

Email from Mr Mazziotti to Mr O'Flaherty and Mr Wilkin of 23 February 2023

229. In what appears to have been an unsolicited five page email Mr Mazziotti set out his thoughts on the Freshfields' report. He questioned whether some of the Claimant's allegations had been raised in good faith. In particular he referred to his denial of the existence of a friendship/familial relationship with Mr Leone.

230. He referred to a long call he had with the Claimant in September 2021 and that he could not recall him raising any particular issue about his health, Mr Leone's paranoid behaviours or other matters described in the grievance.

231. This email was not provided to the Claimant. We consider this to be a surprising omission given that Mr Mazziotti's response to the Freshfields' report, and the Claimant's specific allegations, was clearly an appropriate matter for transparency particularly given that he formed part of the Sub-Committee considering the grievance.

Grievance outcome letter dated 6 March 2023

232. Mr O'Flaherty, Mr Wilkin and Mr Mazziotti sent a letter to the Claimant advising him that they did not uphold his grievance. It is not necessary to set out details of this letter.

233. The Claimant submitted an appeal against the grievance outcome in a letter dated 27 March 2023.

Email from the Claimant to Mrs Elliott of 2 May 2023

234. The Claimant provided his consent to the release of Dr Badenhorst's report. He disputed that he had been responsible for any delay in the process. He said that he was deeply troubled that Dr Badenhorst had made a completely different alternative diagnosis to his treating consultants and that there were numerous factual inaccuracies in his draft report.

Dr Badenhorst's recommendation that the Claimant attend six sessions of specialised psychotherapy with an occupational focus

235. The Claimant considered that this was inappropriate and inconsistent with the advice he had received from other treating specialists. In an email to Mrs Elliott of 26 May 2023 in set out his objection to this. He asked her to explain the reference to holding a meeting with him about his "employment situation". Mrs Elliott accepts that she was remiss in not responding to this question.

Letter from Mr O'Flaherty confirming a proposed Board meeting on 9 June 2023

236. The subject of the meeting was a proposal to terminate the Claimant's employment and remove him as a director of the company. It was proposed that the meeting take place on 9 June 2023.

237. The letter said that the primary reason for the proposed termination of the Claimant's employment was as a result of him not being well enough to resume work with the company in the foreseeable future or indeed in any time frame. The Board was however invited to consider whether alternatively the following matters would be grounds for termination:

- Whether the Claimant's actions had destroyed or seriously damaged the relationship of mutual trust and confidence between himself and the company, in such a manner as to amount to a fundamental or repudiatory breach of contract;
- Whether, as a result of a restructure of senior management – in particular, the appointment of a new Chair and a new advisor to the Board – the Claimant's position with the company has become redundant in any event.

238. We consider that the Respondents' witnesses were uncertain as to exactly what was being referred to in respect of the Claimant's "actions". Mrs Elliott accepted that it related to the grievance. However, the position taken by her, and others, was that it was not the fact of the grievance but rather that it contained certain allegations that were considered clearly manipulative and false and therefore went to the relationship of trust and confidence. In any event this was not the actual reason for his termination.

Mischon de Reya's the Claimant's Letter before Action dated 15 June 2023

239. This constituted a 30 page the Claimant's Letter before Action. It is, however, significant that it made no reference to the Claimant suffering detriments/discrimination on account of his religion, ethnic origins, protected disclosures, disclosures pertaining to health and safety or harassment pertaining to these matters under s.26 of the EQA. The letter was focussed on a personal injury claim. It was stated that the Claimant would now be permanently restricted to "lower stress work in the future" should he be able to return to work at all. This was in accordance with a report from Professor Elliott which was appended to the letter.

240. The letter did, however, contain references to abusive language used by Mr Leone concerning Ms Thesleff to include "whore, cock sucker, cancerous and psychopath". Further, it included reference to Mr Leone allegedly using homophobic language concerning Christian Angermayer.

241. At paragraph 41 it was stated that the Claimant considers his relationship with Mr Leone broken beyond repair and his career at DLP over. The Claimant sought to explain this as being a reaction to receipt of the invitation to the Board meeting and the expectation that he was going to be dismissed.

242. The letter referred to the Claimant suffering losses in excess of $100 million.

Board meeting on 16 June 2023

243. The meeting was attended by Mr Leone, Mr Wilkin, Mr O'Flaherty, Mr Mazziotti, Mrs Elliott and Mr Storey. Mr O'Flaherty was the chairman. Whilst Mr Leone was in attendance Mr O'Flaherty said that he said virtually nothing. The meeting lasted between 50 minutes and 1 hour.

244. The Board considered that the primary rationale for termination of the Claimant's employment was his long term absence from work and the OH advise that there was no prospect of his becoming well enough to resume work with the company in the foreseeable future or indeed in any timeframe. The Board noted that whilst consideration of the alternative rationale for termination i.e. repudiatory breach of contract and/or redundancy of the Claimant's position was not strictly required given the primary rationale, it noted that such alternative rationale would have equally provided grounds for termination.

Email from the Claimant to Mr O'Flaherty on 16 June 2023

245. The Claimant referred to that days impending Board meeting and said that if they voted to dismiss a disabled colleague because of his disability and despite that disability having been caused by events in the workplace which none of them had taken steps to challenge. He said that this would be a damming indictment on them all closing ranks to protect themselves rather than doing something about the toxic culture and behaviours of Mr Leone.

Letter from the Board to the Clamant dated 20 June 2023

246. The Claimant was informed that his employment was being terminated pursuant to clause 14.5.2 of his employment contract with immediate effect. The Claimant was advised that had it been necessary that his actions of destroying or seriously damaging the relationship of mutual trust and confidence and his position being redundant would have provided alternative grounds for termination.

Email from the Claimant to the Board of directors dated 26 June 2023 (a further version was sent on 27 June)

247. The Claimant said that the alternative grounds for dismissal came as a complete surprise to him. He asked what "actions" of his had caused a fundamental or repudiatory breach of contract. No response was provided to him.

The Respondents' grounds of resistance dated 4 March 2024

248. Questions were put to Mr Leone regarding whether he had read this document carefully. Mr Robson contended that it contained serious discrepancies. Mr Leone said that he had read it but not

in such detail as his witness statement. He was comfortable that it was true. Mr Robson specifically put it to Mr Leone that his allegations regarding Ms Thesleff and her paying unidentified "corrupt people" to assassinate him and alleged sexual favours provided by her to third parties were largely "a fantasy".

249. It is, however, significant that at the time of this response the Respondents were not aware of the Claimant's recordings. We accept Mr Leone's evidence that he sought to provide his complete and honest recollection of communications. These were not completely accurate but we do not consider this surprising given the extraordinarily high level of interaction with the Claimant in circumstances where the Claimant knew of the recordings and had reviewed them prior to his detailed response as part of the Freshfields' investigation.

Compulsory transfer notice served on the Claimant

250. On 18 June 2024 the Board of R1 issued a compulsory transfer notice on the Claimant regarding his shares. The 1st Respondent contends that this represented a standard procedure for all leavers and had nothing to do with the legal proceedings issued by the Claimant.

251. The 1st Respondent's Articles of Association provide for the service of a compulsory transfer notice on any leaver within 12 months of their Cessation Date. A compulsory transfer notice was also served on Mr Mion.

Mrs Elliott's evidence

252. She considered herself a personal friend of the Claimant. She says that she had no knowledge of his Jewish ancestry. She considers that the Claimant and Mr Leone had a close relationship. She believes that the Claimant's engagement with the business seemed to fall towards the end of his time at DLP, particularly in 2021.

253. Mrs Elliott makes various disparaging comments regarding the Claimant to include him frequently turning up to work late, and sometimes attending the office appearing hungover and smelling of alcohol. The Claimant vehemently denies this. We consider these allegations surprising as there was no contemporaneous complaint and nor are they relevant to the issues to be determined.

The 1st Respondent's costs application

254. Following the Claimant's disclosure that he had made extensive recordings discussion took place between the respective solicitors regarding their transcription. Lewis Silkin, on behalf of the Respondents engaged Acolad, a transcription and translation service provider to provide a quote for the provision of this service. The audio recordings were first typed in Italian and then translated to English. It was agreed that the parties would each bear 50% of the cost.

255. It is not necessary or proportionate to refer to the extensive inter parties correspondence regarding this issue. It is sufficient to record that the Claimant has not paid his share of £39,095.70.

256. In a letter to the Tribunal dated 1 May 2025 Lewis Silkin sought a cost order pursuant to Rules 74(2)(a) and 30 of the Rules in respect of this sum. This is on the basis that in not paying the agreed sum the Claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably.

257. In a letter dated 19 May 2025 Grosvenor Law, on behalf of the Claimant, explained the Claimant's non-payment of his 50% share on the basis of "multiple issues with the translations" and his not accepting that they had been prepared competently and diligently.

Submissions

Respondents

258. A written submission comprising of 205 pages was provided together with very detailed schedules in respect of the alleged protected disclosures and detriments.

259. The Respondents dispute that any adverse inference should be drawn from Mr Glasper's non-attendance as a witness.

The Claimant

260. The Claimant provided a 140 closing submission together with detailed schedules regarding disability/knowledge of disability and alleged protected disclosures.

The Law

261. The parties have referred extensively to case law in their respective submissions. It would be disproportionate to incorporate all of these in this section. Nevertheless, we have included some of the case law referred to by the parties in this section in addition to the more standard framework of the law but for the avoidance of doubt all authorities referred to by both parties have been taken in to account even where they have not been specifically quoted.

Time limit for discrimination claims

262. S123 of the EQA provides:

(1) Proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

(3) (a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

263. Extension of time under s123 (3) is the exception rather than the rule Robertson v. Bexley Community Centre [2003] IRLR 434.

Section 33 of the Limitation Act 1980

264. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33

provided that no materially relevant consideration is left out of account: Neary v Governing Body of St Albans Girls' School [2010] ICR 473. Section 33 requires the court to take into account all the circumstances of the case, and in particular the factors set out at s.33(3). Those factors which are potentially relevant to the claim are:

(a) the length of, and reasons for, the delay by the Claimant;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action; and

(d) the steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

265. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, while the checklist in s.33 provides a useful guide for tribunals, it need not be adhered to slavishly.

Continuing course of conduct

266. For acts extending over a period, it is relevant to consider whether a discriminatory regime, rule, practice or principle, which had a clear and adverse effect on a complainant, existed. There is a distinction between a continuing state of affairs and a one-off act with ongoing consequences.

267. Guidance was provided in analysing what constitutes conduct extending over a period in Hendricks v. Metropolitan Police Commissioner [2003] IRLR 96 to include per Mummery LJ in the Court of Appeal at paragraph 48:

> *"The numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs, by the concept of an act extending over a period".*

268. The appropriate test for a 'continuing act' is highlighted by Hendricks and demonstrates where the employer is responsible for an 'an ongoing situation or a continuing state of affairs.' In Hendricks a period of 11 years of police service over which the continuous acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents.

269. A relevant factor is whether the same individuals were involved (Aziz v FDA [2010] EWCA Civ 304)

270. It is possible for conduct extending over a period to relate to different protected characteristics and different types of prohibited conduct (Worcestershire Health and Care NHS Trust v Angela Allen [2024] EAT 40) though this is not necessarily straightforward to establish on the facts. In Worcestershire (para 13) the EAT said:

> *"It may be more difficult to establish that there has been discriminatory conduct extending over a period where the acts that are said to be linked relate to different protected characteristics and different types of prohibited conduct, but there is no absolute bar that prevents there being conduct extending over a period in such circumstances".*

271. The fact that a Claimant has awaited the outcome of an internal grievance procedure before making a claim is just one matter to be taken into account by a tribunal in considering whether to extend the time limit: Apelogun-Gabriels v London Borough of Lambeth and anor [2002] ICR 713, CA.

Race and disability discrimination and the burden of proof

272. Under s13 (1) of the EQA read with s.9, direct discrimination takes place where a person treats the Claimant less favourably because of race/disability than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

273. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race/disability. However, in some cases, for example, where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was.

274. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A can show that he or she did not contravene the provision.

275. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. The tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA). The Court of Appeal in Madarassy, a case brought under the then Sex Discrimination Act 1975, held that the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g., sex) and a difference in treatment. LJ Mummery stated at paragraph 56:

> *"Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination."*

276. Further, it is important to recognise the limits of the burden of proof provisions. As Lord Hope stated in Hewage v Grampian Health Board [2012] IRLR870.

> *"They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."*

Conscious or unconscious thoughts of the alleged discriminator

277. An act may be rendered discriminatory by the mental processes, conscious or nonconscious, of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877, HL. In such cases, the tribunal must ask itself what the reason was for the alleged discriminator's actions. If it is that the complainant possessed the protected characteristic, then direct discrimination is made out. If the reason is the protected characteristic, that answers the question of whether the Claimant was treated less favourably than a hypothetical comparator; they are, in effect, two sides of the same coin. per Lord Nicholls:

"In every case…it is necessary to enquire why the Claimant received less favourable treatment. This is the crucial question. Was it on grounds of race? Or was it for some other reason, for instance because the Claimant was not so well qualified for the job. Save in obvious cases, answering the crucial question will call for some consideration of the mental processes of the alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

278. In Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL as set out by Lord Nicholls at [11]

"…employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others."

279. It is permissible for the tribunal to answer the hypothetical comparator question by having regard to how unidentical but not wholly dissimilar cases have been treated: Chief Constable of West Yorkshire v Vento (No.1) [2001] IRLR 124, EAT, per Lindsay J at paragraph 7; approved in Shamoon, per Lord Hutton at paragraph 81.

280. A benign motive is irrelevant when considering direct discrimination: Nagarajan at 884G-885D, per Lord Nicholls. It is irrelevant whether the alleged discriminator thought the reason for the treatment was the protected characteristic, as there may be subconscious motivation: Nagarajan at 885E H:

"I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must 1st make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds."

281. The less favourable treatment must be because of a protected characteristic and that requires the tribunal to consider the reason why the Claimant was treated less favourably in accordance with the guidance in Nagarajan. The tribunal needs to consider the conscious or subconscious mental processes which led the Respondent to take a particular course of action in respect of the Claimant and to consider whether his protected characteristic played a significant part in the treatment: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439.

Drawing of inferences

282. It is not sufficient for to draw an inference of discrimination based on an "intuitive hunch" without findings of primary fact to back it: Chapman and Anor v Simon [1994] IRLR 124.

283. The process of drawing inferences is a demanding task. If a tribunal is to make a finding of discrimination on the basis of inference, per Mummery J in Qureshi v Victoria University of Manchester [2001] ICR 863:

> *"It is of the greatest importance that the primary facts from which such inference is drawn are set out with clarity by the tribunal in its fact-finding role, so that the validity of the inference can be examined. Either the facts justifying such inference exist or they do not, but only the tribunal can say what those facts are. An intuitive hunch, for example, that there has been unlawful discrimination is insufficient without facts being found to support that conclusion."*

284. In determining whether a Claimant has established a prima facie case, the tribunal must reach findings as to the primary facts and any circumstantial matters that it considers relevant: Anya v University of Oxford and Anor [2001] IRLR 377 (CA). Having established those facts, the tribunal must decide whether those facts are sufficient to justify an inference that discrimination has taken place.

285. Where there are multiple allegations, the tribunal should consider whether the burden of proof has shifted in relation to each one. It should not take an "across the board approach" when deciding if the burden of proof shifted in respect of all allegations: Essex County Council v Jarrett UKEAT/19/JOJ.

286. The tribunal may cast its net widely to look for facts that are consistent with discrimination and may therefore give rise to a prima facie case. The tribunal may take account of circumstantial evidence, including matters occurring before the alleged discrimination (even those outside the limitation period) and matters occurring afterwards if they are relevant. However, there must be "some nexus between the facts relied on and the discrimination complained of": Wheeler & Anor v Durham County Council [2001] EWCA Civ 844.

287. Din v Carrington Viyella Ltd [1982] ICR 256 is authority for a tribunal being able to take account of matters that took place prior to the discrimination complained of in order to assist it in drawing adverse inferences against a Respondent.

Direct race discrimination and reference to a person by their nationality

288. A reference to a person by reference to their race or nationality, even where that "does at first sight indicate a stereotypical approach to people" will not necessarily show discrimination – the tribunal must "decide the meaning and effect of the words used", an approach that is "highly fact sensitive" (Haritaki v South East England Development Agency [2008] IRLR 945 see para 32).

Definition of disability under s.6 (2) of the EQA

289. A person has a disability if he or she has "a physical or mental impairment" which has a "substantial and long-term adverse effect on his or her ability to carry out normal day to day activities". The burden of proof is on the Claimant to show that he satisfies this definition.

290. Paragraph 2 to Schedule 1 of the EQA provides the definition of "long term" for these purposes:

The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,
(b) it is likely to last for at least 12 months, or
(c) it is likely to last for the rest of the life of the person affected.

291. The effect of an impairment is likely to last for at least 12 months under paragraph 2 (1) (b) if that "could well happen": Boyle v SCA Packaging Ltd [2009] UKHL 27. According to the House of Lords in Boyle, the relevant 12-month period should be counted from the date of the relevant impairment. The tribunal has no jurisdiction to consider events after the date of the alleged discrimination to determine whether the effect did or did not last for 12 months: McDougall v Richmond Adult Community College [2008] EWCA Civ 4.

292. In Goodwin v Patent Office 1999 ICR 302, the EAT said that the words used to define disability in S.1(1) DDA (now S.6(1) EQA) require tribunals to look at the evidence by reference to four different questions (or 'conditions', as the EAT termed them):

a) did the Claimant have a mental and/or physical impairment? (the 'impairment condition')

b) did the impairment affect the Claimant's ability to carry out normal day-to-day activities? (the 'adverse effect condition')

c) was the adverse condition substantial? (the 'substantial condition'), and

d) was the adverse condition long term? (the 'long-term condition').

293. These four questions should be posed sequentially and not together — Wigginton v Cowie and ors t/a Baxter International (A Partnership) EAT 0322/09.

294. This 'step' approach has subsequently been approved in numerous cases. In J v DLA Piper UK LLP 2010 ICR 1052, EAT, the then President of the EAT, Mr Justice Underhill, observed that it was good practice for employment tribunals to state their conclusions separately on the questions of impairment and adverse effect and, in respect of the latter, their findings on substantiality and long-term effect. However, in reaching those conclusions, tribunals should not feel compelled to proceed by rigid consecutive stages. Specifically, in cases where the existence of an impairment is disputed it would make sense for a tribunal to start by making findings about whether the Claimant's ability to carry out normal day-to-day activities is adversely affected on a long-term basis and then to consider the question of impairment in the light of those findings.

295. Schedule 1 to the 2010 Act at para 5A (2), as inserted by Equality Act 2010 (Amendment) Regulations 2023/1425 reg.6:

> *References in the relevant provisions to a person's ability to carry out normal day-to-day activities are to be taken as including references to the person's ability to participate fully and effectively in working life on an equal basis with other workers.*

296. The time at which to assess the disability (i.e. whether there is an impairment that has a substantial adverse effect on normal day-to-day activities) is the date of the alleged discriminatory act — Cruickshank v VAW Motorcast Ltd 2002 ICR 729, EAT.

Knowledge of disability

297. Paragraph 20(1) of Schedule 8 to the EQA provides that B does not owe a duty to make reasonable adjustments in respect of A where the employer "does not know, and could not reasonably be expected to know" that A "has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement". It was confirmed by the EAT in Secretary of State for Work and Pensions v Alam [2010] ICR 665 that two questions arise, and the employer will owe no duty to make reasonable adjustments where both are answered in the negative (see paras 17-18):

> *"did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is: "no" then there is a second question ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)?"*

298. Sections 6.19 and 6.20 of the EHRC Employment Code provides as follows:

> *For disabled workers already in employment, an employer only has a duty to make an adjustment if they know, or could reasonably be expected to know, that a worker has a disability and is, or is likely to be, placed at a substantial disadvantage. The employer must, however, do all they can reasonably be expected to do to find out whether this is the case. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.*

299. The Act does not prevent a disabled person keeping a disability confidential from an employer. But keeping a disability confidential is likely to mean that unless the employer could reasonably be expected to know about it anyway, the employer will not be under a duty to make a reasonable adjustment. If a disabled person expects an employer to make a reasonable adjustment, they will need to provide the employer – or someone acting on their behalf – with sufficient information to carry out that adjustment.

300. Whilst employers must make reasonable enquiries based on the information of which they are aware, they are not required to leave no stone unturned in seeking to ascertain any potential disability or the effect of a disability – the law properly recognises that this would be inappropriate. In Ridout v TC Group [1998] IRLR 628, a case under the predecessor legislation, the EAT made observations about the scope of the duty which reflect the need for the duty to be practically feasible and not infringe the privacy and dignity of employees (and which as such hold good under the EQA).

> *"It is equally undesirable that an employer should be required to ask a number of questions about a person suffering from a disability as to whether he or she feels disadvantaged. There may well be circumstances in which that question would not arise. It would be wrong if, merely to protect themselves from liability, the employers or prospective employers were to ask a number of questions which they would not have asked of somebody who was able-bodied. People must be taken very much on the basis of how they present themselves"*

301. Accordingly, it will be important to focus on how a Claimant presented themselves, and the precise nature and scope of any information provided to the employer and any/or indicators said to put them on notice.

302. The provision of some information about a health condition will not suffice: what the employer must know, or must reasonably be expected to know, is of course not simply that the employee had a health condition but that they had a disability.

303. In Gallacher v Abellio Scotrail Ltd UKEATS/0027/19/SS the EAT (Choudhury P) concluded that the tribunal's finding of no constructive knowledge was unimpeachable where although some information about health conditions had been provided, "there was none of the detail required as to substantial disadvantage, the effects on her day-to-day activities or the longevity of those effects so as to satisfy the requirements of Section 6 of the EQA" and the Claimant was herself inclined to under-report her symptoms (para 43).

304. When making findings regarding the effects of a disability for the purposes of a reasonable adjustment claim (or indeed otherwise), the tribunal must be alive to the need for all findings to be firmly rooted in the evidence. In Secretary of State for the Department of Work and Pensions v Alam [2010] IRLR 283 the EAT upheld the employer's appeal in part on the basis that the tribunal had made multiple leaps from what was borne out from the medical evidence to unsupported findings of fact regarding the impact of the Claimant's symptoms on his actions. The EAT observed:

> *"The tribunal's reasoning appears, rather, to be the result of their speculating, possibly on grounds of sympathy, about what might have lain behind the Claimant's actions, but speculation is not something in which they were entitled to engage" (para 22).*

Discrimination arising from disability under S 15 of the EQA

305. In relation to discrimination arising from disability we must consider whether under s.15 of the EQA the Claimant has shown that the Respondent treated him unfavourably, that the unfavourable treatment was because of something and that something arose in consequence of his disability.

306. S 15 of the EQA provides that a person (A) discriminates against a disabled person (B) if:

A treats B unfavourably because of something arising in consequence of B's disability; and
A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

307. In a disability discrimination claim under S.15, a tribunal must make findings on:

a) The contravention of section 39 of the EQA relied on.

b) Whether the contravention relied on by the employee amounts to unfavourable treatment.

c) It must be "something arising in consequence of disability"; for example, disability related sickness absence.

d) If unfavourable treatment is shown to arise for that reason, the tribunal must consider whether the employer can show the treatment was "a proportionate means of achieving a legitimate aim".

308. There is no need for a comparator in order to show unfavourable treatment under S.15. It is possible to demonstrate 'unfavourable' treatment without needing to resort to a 'compare and contrast' exercise. A Claimant bringing a claim of discrimination arising from disability under S.15 is entitled to point to treatment that he or she alleges is unfavourable in its own terms.

309. Unfavourably is not defined in the EQA. The Equality And Human Rights Commission Statutory Code of Practice on Employment (The Code) provides that it means a disabled person "must have been put at a disadvantage".

310. Basildon & Thurrock NHS Foundation Trust v Weerassinghe UKEAT/0397/14 provides the tribunal should identify two separate causative steps in s.15 claims (per Langstaff J, then the President of the EAT):

> *"The current statue requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The tribunal has first to focus upon the words "because of something", and therefore has to identify "something" – and second upon the fact that "something" must be something arising in consequence of a Claimant's disability, which constitutes a second causative link. These are two separate stages".*

311. In Pnaiser v NHS England and anor 2016 IRLR 170, EAT, Mrs Justice Simler summarised the proper approach to establishing causation under s.15. First, the tribunal has to identify whether the Claimant was treated unfavourably and by whom. It then has to determine what caused that treatment focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the actual motive of the alleged discriminator in acting as he or she did is irrelevant. The tribunal must then determine whether the reason was 'something arising in consequence of the Claimant's disability', which could describe a range of causal links. This stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator.

312. An employee who is treated unfavourably as a result of having to take a period of disability-related absence would have a claim under S.15 unless the employer can justify the unfavourable treatment on the basis that it is a proportionate means of achieving a legitimate aim.

313. Per the EAT's judgment in T-Systems Ltd v Lewis EAT 0042/15, unfavourable treatment is an act or omission by an alleged discriminator, in word or deed, that places the disabled person at a disadvantage.

314. The EHRC Code at paragraph 5.7 gives guidance on the meaning of disadvantage:

Often, the disadvantage will be obvious and it will be clear that the treatment has been unfavourable; for example, a person may have been refused a job, denied a work opportunity or dismissed from their employment. But sometimes unfavourable treatment may be less obvious. Even if an employer thinks that they are acting in the best interests of a disabled person, they may still treat that person unfavourably.

315. In the EAT's judgment in Trustees of Swansea University Pension & Assurance Scheme and another v Williams [2015] IRLR 885 and specifically the judgment of Mr Justice Langstaff at paragraph 29 where he stated:

"The determination of that which is unfavourable involves an assessment in which a broad view is to be taken and which is to be judged by broad experience of life. Persons may be said to have been treated unfavourably if they are not in as good a position as others generally would be".

316. In O'Brien v Bolton St Catherine's Academy [2017] ICR 737 the tribunal had upheld a s.15 claim on the basis that the school had not provide satisfactory evidence of why it would not have been possible after a 17 month absence and with no return date in sight "to wait a little longer, to establish whether the Claimant was, as she asserted at the medical incapacity hearing, able to return to work in the near future" (as quoted at para 30). Underhill LJ found that given the nature of the appellate exercise this was not a decision which could properly be overturned on appeal despite the EAT and the Court of Appeal expressing reservations about it. Stepping back from the particular grounds of appeal and considering the point as a matter of principle, Underhill LJ observed at para 37:

"More generally, the proposition that it was unfair of an employer to decide, after a senior employee had already been absent for over 12 months and where there was no certainty as to when she would be able to return, that the time had come when the employment had to be terminated, seems to me to require very careful scrutiny. The argument "give me a little more time and I am sure I will recover" is easy to advance, but a time comes when an employer is entitled to some finality. That is all the more so where the employee had not been as co- operative as the employer had been entitled to expect about providing an up to date prognosis"

317. Eady P in Parnell v Royal Mail Group Ltd [2024] EAT 130:

"As for the question of causation under section 15 EA , in Sheikholeslami v University of Edinburgh [2018] IRLR 1090 , the EAT held that this requires investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B's disability? The first involves an examination of the putative discriminator's state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found; if the " something " was a more than trivial part of the reason for the unfavourable treatment, then stage (i) is satisfied: the actual disability does not need to be the cause of the unfavourable treatment but it needs to be " a significant (or more than trivial) influence " so as to amount to " an effective cause of the unfavourable treatment " (Pnaiser paragraph 31(b)). The second issue is a question of objective fact for an ET to decide in light of the evidence: " arising in consequence " can describe a range of causal links, albeit the more links in the chain

between the disability and the reason for the impugned treatment, the harder it is likely to be to establish the requisite connection (Pnaiser paragraph 31(d) and (e))".

Proportionality

318. Any allegation of discrimination arising from disability will only succeed if the employer is unable to show that the unfavourable treatment to which the Claimant has been subjected is a proportionate means of achieving a legitimate aim.

319. The judgment given by Pill LJ In Hardy and Hansons Plc v Lax [2005] ICR1565 in which he stated:

"The principle of proportionality requires the tribunal to take into account the reasonable needs of the business. But it has to make its own judgment, upon a fair and detailed analysis of the working practices and business considerations involved, as to whether the proposal is reasonably necessary. I reject [the employer's] submission … that when reaching its conclusion, the employment tribunal needs to consider only whether or not it is satisfied that the employer's views are within the range of views reasonable in the particular circumstances".

320. To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so: Homer v Chief Constable of West Yorkshire [2012] UKSC 15.

321. The proportionality assessment involves, at its core, a balancing exercise between the discriminatory effect on the individual of the relevant step on the one hand, and the reasonable real business needs of the employer – see R. (Elias) v. Secretary of State for Defence [2006] 1 WLR 3213 at [151] and Hardy & Hansons Plc v. Lax [2005] ICR 1565 at [32].

322. The tribunal should critically evaluate the business need advanced by the employer, which in sickness absence cases may involve the employer having to adduce evidence of the difficulties caused by the absence – see Gray v. University of Portsmouth [2021] UKEAT/0242/20/OO.

323. It is for the tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee. The tribunal must undertake a fair and detailed assessment of the employer's business needs and working practices: Hardy and Hansons Plc v Lax [2005] ICR 1565 at [44].

324. The dismissal procedure can be relevant to the assessment of proportionality, so long as the tribunal remains focused on the question of whether the outcome of the decision-making process (for example, dismissal) is capable of objective justification rather than the process itself: Department for Work and Pensions v Boyers [2022] EAT 76.

325. As Summarised By Eady P In Parnell v Royal Mail Group Ltd [2024] EAT 130 at [58]:

"Where a Claimant has established the constituent elements required under section 15(1)(a) EA , the onus is on the employer to demonstrate that the treatment in question is not to be treated as amounting to discrimination because it was a proportionate means of achieving a legitimate aim (per section 15(1)(b)). This is sometimes referred to as showing " objective justification ", because, in assessing whether an employer is able to justify its unfavourable treatment of the Claimant, the ET is required to apply an objective test (see Hensman v Ministry of Defence UKEAT/0067/14, adopting the approach to justification laid down in

Hardy and Hansons plc v Lax [2005] EWCA Civ 846, [2005] ICR 1565 , and City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746), albeit that it must assess the proportionality of the impugned treatment at the time it takes place".

326. When applying the 'proportionality' limb of the justification defence to a claim of discrimination arising from disability under this, a tribunal is to consider (as part of the balancing exercise) whether lesser measures could have been adopted but in doing so need not consider whether any such lesser measures would in fact have been effective in the circumstances; this is because the test is a wholly objective one (by contrast to the differently worded s 20 on reasonable adjustments): Birtenshaw v Oldfield [2019] IRLR 946, EAT.

Reasonable adjustments on account of disability

327. We reminded ourselves of the relevant provisions regarding reasonable adjustments to include the need for the existence of a provision, criterion or practice (PCP). We took account of the duty under s.39(5) of the EQA to make reasonable adjustments and referred to sections 20, 21 and 22 and Schedule 8 of the EQA. In particular we took account of s.22 (2) which provides that where a PCP of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled that the employer is under a duty to take such steps as it is reasonable to have to avoid the disadvantage.

328. We took account of guidance in cases such as Environmental Agency v Rowan [2008] IRLR 20 that a tribunal must identify the PCP, the identity of non-disabled comparators (where appropriate) and the nature and extent of the substantial disadvantage suffered by the Claimant. There is a requirement to look at the overall picture.

329. We took account of the guidance regarding what a PCP constitutes in paragraph 6.10 of the Code and that the purpose of the comparison with people who are not disabled is to establish whether it is because of disability that a particular PCP disadvantages the disabled person in question. There is no requirement to actually identify a comparator or comparator group whose circumstances are the same or nearly the same as the disabled person. We took into account paragraph 6.2.8 of the Code as to what reasonable steps may involve in terms of trying to alleviate the effect of the substantial disadvantage.

330. As Lord Toulson observed at paragraph 83 First Group Ltd v Paulley [2017] UKSC 4; [2017] IRLR 258 , the concept of " reasonable adjustments " for these purposes is " intensely practical ", requiring an objective assessment of how the step(s) proposed would have been effective to enable the disabled person to work, albeit that it will suffice if there was a prospect of the disadvantage being alleviated even if the adjustment in question would not have been completely effective (Griffiths v Secretary of State for Work and Pensions [2017] ICR 160 CA).

331. The phrase 'PCP' is not defined in the legislation, but is to be construed broadly, having regard to the statute's purpose of eliminating discrimination against those who suffer disadvantage from a disability. It includes formal and informal practices, policies and arrangements and may in certain cases include one-off decisions: Ishola v Transport for London [2020] EWCA Civ 112.

332. The function of the PCP in a reasonable adjustment context is to identify what it is about the employer's management of the employee or its operation that causes substantial disadvantage to the disabled employee: Ishola at [36].

333. "Practice" connotes some form of continuum in the sense that it is the way in which things generally are or will be done. That does not mean it is necessary for the PCP or "practice" to have been applied to anyone else in fact. Something may be a practice or done "in practice" if it carries with it an indication that it will or would be done again in future if a hypothetical similar case arises: Ishola at [38].

334. Section 212 of the EQA defines a substantial disadvantage as a disadvantage that is “more than minor or trivial”. To succeed in his claim, the Claimant must show that a relevant PCP caused him a particular disadvantage compared to non-disabled counterparts.

335. The scope of the employer's duty, where the employee is at that disadvantage, is to take such steps as it is reasonable to have to take to avoid the disadvantage.

336. In O'Hanlon v Commissioners for HM Revenue & Customs [2007] IRLR 404 the Court of Appeal approved the approach of the EAT, in which it had been observed that "it will be a very rare case indeed where the adjustment said to be applicable here, that is merely giving higher sick pay than would be payable to a non-disabled person who in general does not suffer the same disability-related absences, would be considered necessary as a reasonable adjustment", on the basis that this would usurp the management function of the employer and would not fulfil the purpose of the legislation which is "to assist the disabled to obtain employment and to integrate them into the workforce" rather than simply to enrich them (see in particular para 28, citing para 69 of the judgment of the EAT).

337. On the facts of Parnell, the EAT upheld the decision of the tribunal that there was no failure to make reasonable adjustments in relation to an employee on sickness absence where "there was no prospect of any adjustment […] securing the Claimant's return to work" (para 97).

338. A link between failure to put in place reasonable adjustments and the unfavourable treatment in issue under EQA s 15(1)(a) may be an important factor to be taken into account when determining justification. See Code of Practice at para 5.21:

> *If an employer has failed to make a reasonable adjustment which would have prevented or minimised the unfavourable treatment, it will be very difficult for them to show that the treatment was objectively justified.*

Harassment

Claims for both direct discrimination and harassment

339. As a consequence of s212 (1) of the ERA it is necessary to consider allegations of harassment first (as if amounting to harassment they cannot amount to a detriment for direct discrimination).

S 26 definition of harassment

340. Under s26, EQA, a person harasses the Claimant if he or she engages in unwanted conduct related to a protected characteristic, and the conduct has the purpose or effect of (i) violating the Claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the Claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

Related to a relevant protected characteristic

341. The requirement that the conduct be related to a protected characteristic is different to the requirement in a claim of direct discrimination that the treatment is because of a protected characteristic. The term "related to" is designed to cover all forms of conduct that, properly viewed, has a relationship to the protected characteristic. The issue was

considered by HHJ Auerbach in Tees Esk Wear Valleys NHS Foundation Trust v Aslam & Anor [2020] IRLR 495. See paras 20-21 and 25 (emphasis added):

> *"Some basic points about the architecture of the variation of the definition of harassment found in sub-sections 26(1) and 26(4) are worth restating at the outset. The conduct must be found to be unwanted; it must be found to relate to the relevant characteristic; and it must have either the proscribed purpose or the proscribed effect, or both. Secondly, the test of whether conduct is related to a protected characteristic is a different test from that of whether conduct is "because of" a protected characteristic, which is the connector used in the definition of direction discrimination found in section 13(1) of the 2010 Act . Put shortly, it is a broader, and, therefore, more easily satisfied test. However, of course, it does have its own limits.*
>
> *Thirdly, although in many cases, the characteristic relied upon will be possessed by the complainant, this is not a necessary ingredient. The conduct must merely be found (properly) to relate to the characteristic itself . The most obvious example would be a case in which explicit language is used, which is intrinsically and overtly related to the characteristic relied upon. Fourthly, whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.*
>
> *Nevertheless, there must be still , in any given case, be some feature or features of the factual matrix identified by the tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question , and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic , as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the tribunal may consider it to be."*

342. Treatment may be "related to" a protected characteristic where it is "because of" the protected characteristic, but there may be other circumstances in which harassment occurs where the harasser was not motivated by the protected characteristic.

343. Protection is provided because the conduct is dictated by a relevant protected characteristic, whether or not the worker has that characteristic themselves. This means that protection against unwanted conduct is provided where the worker does not have the relevant protected characteristic, including where the employer knows that the worker does not have the relevant characteristic. (See Aslam at [21]).

344. Harassment can be committed even if the protected characteristic did not motivate the perpetrator at all: see Carozzi v University of Hertfordshire [2024] EAT 169, [2025] IRLR 179.

345. The first step in the analysis is to determine whether the Respondent engaged in "unwanted conduct". This means conduct that was unwelcome or uninvited from the

subjective point of view of the Claimant: Thomas Sanderson Blinds Ltd v English EAT 0316/10.

346. If the Respondent is found to have engaged in unwanted conduct from the perspective of the Claimant, the tribunal must consider whether such conduct was related to a relevant protected characteristic. This is a finding of fact for the tribunal: Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor 2020 IRLR 395, EAT.

347. Facts establishing the likelihood of each of the requisite elements of the test must be proved before the burden of proof shifts – and in the course of its assessment of whether this first hurdle is met, the tribunal must consider the context of the alleged harassment. As confirmed in Nazir and another v Asim [2010] ICR 1225 (para 70):

> *"In our judgment, when a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race.*
>
> *The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed".*

348. The tribunal must consider all comments and conduct in the relevant context, rather than considering these in isolation: Warby v Wunda Group Plc [2012] 1 WLUK 610.

349. Should the tribunal find that the defendant has engaged in unwanted conduct related to a relevant protected characteristic, it must consider whether the conduct has had the purpose or effect of violating B's dignity or creating the proscribed environment. This is a disjunctive test, requiring only one limb to be met. Either limb will be met if the conduct is designed to, or does in fact, produce the relevant effect.

350. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, where Mr Justice Underhill (as he then was) gave this guidance:

> *"An employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The Claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the Claimant has experienced those feelings or perceptions, it was reasonable for her to do so. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'*

351. General Municipal and Boilermakers Union v Henderson [2015] IRLR 451 provides that a single incident is unlikely to be sufficient to create an environment sufficient to give rise to an offence of harassment.

352. In line with Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13, mere offence is not sufficient to amount to a violation of dignity. Violation of dignity is a strong term that requires a serious and marked effect or intended effect.

353. This is a mixed subjective and objective test. Per Richmond Pharmacology a Claimant must actually feel that their dignity has been violated or a proscribed environment has been created. Where that is the case, the tribunal should then consider whether it was reasonable for the Claimant to feel that way.

354. If the Claimant is not aware of the conduct complained of until after they contend that the proscribed environment was created, the conduct cannot be found to be harassment: Greasley-Adams v Royal Mail Group Ltd EAT 2023 86.

355. In cases where a series of incidents is alleged to amount to harassment, the tribunal should take a cumulative approach, bearing in mind the totality of the incidents: Reed and anor v Stedman 1999 IRLR 299 EAT.

Victimisation

356. Under s27 EQA, it is victimisation for a Respondent to subject a Claimant to a detriment because she/he had done a protected act. A 'protected act' includes making an allegation (whether or not express) that someone has contravened the EQA.

357. An act is only protected if it relates expressly to a contravention of the EQA; complaints about general unfairness are not protected. The protected act must take place earlier in time than the detrimental treatment complained of: Beneviste v Kingston University EAT 0393/05.

358. For the test that needs to be applied useful guidance is provided in Shamoon and that an unjustified sense of grievance cannot amount to a detriment. The test to be applied in determining whether a detriment exists is if a reasonable worker would, or might, take the view that the treatment was in the circumstances to his or her detriment. This must be applied by considering the issue from the point of view of the victim. While an unjustified sense of grievance about an alleged discriminatory decision cannot constitute detriment a justified and reasonable sense of grievance about the decision may do so.

359. A detriment cannot be held to be because of a protected act if the person allegedly inflicting the detriment was unaware of the protected act: Scott London Borough of Hillingdon 2001 EWCA Civ 2005,CA.

360. A victimisation claim will be made out where the protected act(s) had a significant influence, meaning a more than trivial influence, upon the decision in question (Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931). As in relation to protected disclosure claims, it is permissible for the tribunal to draw a distinction between the protected act itself and properly separable feature of the complaint (see Page v NHS Trust Development Authority [2021] ICR 941).

A qualifying protected disclosure

361. Section 43B (1) ERA defines a protected disclosure as a qualifying disclosure, being "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more" of a number of types of wrongdoing. This includes, (b) "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject" and, (d) "that the health or safety of any individual has been, is being or is likely to be endangered".

362. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under Section 43C, to the worker's employer.

363. The five key elements are as set out in Williams v Brown UKEAT/0044/19: i) a disclosure of information, ii) the worker believing the disclosure is made in the public interest, iii) such belief being reasonably held, iv) the worker believing that the disclosure tends to show one or more of the matters listed in s.43B(1) and v) such belief being reasonably held.

364. A Claimant bears the burden of establishing that a protected disclosure has been made, i.e. that each of these elements is satisfied.

365. In order to ascertain whether a Claimant has satisfied the five key requirements of a protected disclosure, a tribunal must identify the qualifying information in each disclosure before addressing the linked questions of the information disclosed and the beliefs held, and the reasonableness of each. Where a tribunal does not actually identify the qualifying information in each disclosure the decision of the tribunal is likely to be materially flawed, as was the case in Twist DW Limited and others v Armes and another UKEAT/0300/20/JOJ (see para 108).

The disclosure of information

366. In Kilraine v Wandsworth LBC [2018] ICR 1850 the Court of Appeal clarified that "allegation" and "disclosure of information" are not mutually exclusive categories. What matters is the wording of the statute; some "information" must be "disclosed" and that requires that the communication have sufficient "specific factual contents".

367. Whether a particular disclosure of information, "tends to show" a breach of a legal obligation in the absence of any reference to a legal obligation will be a question of fact in each case.

368. What does matter is that the Claimant has a reasonable belief that the information disclosed tends to show one or more of the matters in S43B (1). In Kraus v Penna Plc [2004] IRLR 260 at para 24 the EAT held that "likely" in this context means "more probable than not".

369. In order to establish that they made a disclosure of information tending to show one of the matters within the scope of s.43B(1) at all (for shorthand, "wrongdoing"), a Claimant need not show that they at the time stated in terms the nature of their concern. It is not a necessary component of making a protected disclosure that the worker specifically identifies the precise legal obligation they contend is being breached; there is not even any requirement that they refer to the notion of breach of a legal obligation (or other wrongdoing) at all. However, where they do not this will be relevant to the tribunal's consideration of whether or not they actually held the belief in question. As per Justice Linden at paragraph 87 in Twist:

"If the nature of the worker's concern is stated - if they say that they consider that the reported information shows criminality or breach of legal obligation or a threat to health and safety - it will be harder to dispute that they held this belief and that the professed belief that the disclosure tended to show the specified matter was reasonable. The point is the same if what the worker thinks is obvious from what they say in the alleged disclosure. Conversely, if the link to the subject matters of any of section 43B(1)(a)-(f) is not stated or referred to, and is not obvious, an ET may see this as evidence pointing to the conclusion that the worker did not hold the beliefs which they claim, or that the information is not specific enough to be capable of qualifying".

370. In the light of Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] ICR 1026 what is necessary is that the tribunal first ascertain what the Claimant subjectively believed. The tribunal must then consider whether that belief was objectively reasonable, i.e. whether a reasonable person in the Claimant's position would have believed that all of the element of S43B (1) were satisfied i.e. that the disclosure was in the public interest, and that the information disclosed tended to show that someone had failed, was failing or was likely to fail with the relevant legal obligation. The Court of Appeal emphasised that it does not matter whether the Claimant is right or not, or even whether the legal obligation exists or not.

371. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the disclosure is made: Darnton v University of Surrey [2003] ICR 615.

Reasonableness of belief

372. In relation to both the information tending to show the relevant matter, and the public interest, the genuineness and reasonableness of a Claimant's alleged beliefs must be viewed in the context of that individual's subjective position, and whether the nature of the disclosures made and the individual's other contemporaneous actions are consistent with them holding the necessary reasonable beliefs.

373. As observed in Korashi v Albertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, the tribunal must consider the reasonableness of a person's belief in the context of what a reasonable person in their position (including equipped with professional or insider knowledge if they had this) would reasonably believe. The EAT in Simpson v Cantor Fitzgerald Europe [2021] ICR 695 observed that "the "insider knowledge" point mentioned in Korashi works both ways. Just as someone with experience in the field has information and insight which should be taken into account in his favour, so too he should know better than (say) a lay person who happened to overhear a conversation, whether it does tend to show that something is amiss" (para 57).

374. In that regard, as quoted by the EAT at paragraph 57, the tribunal in Cantor Fitzgerald had found it of importance that "if the Claimant genuinely and conscientiously believed that there had been regulatory breaches it was his duty as an FCA approved professional to report this to Compliance. That was never done". Instead of making such reports the Claimant had sent emails in terms that were "cryptic in the extreme". The tribunal concluded that "if it was half as serious as he originally suggested we would have expected much more detail and we would have expected concerns to have been raised to Compliance at CFE." The EAT held that the tribunal was entitled to reach this view.

Aggregation of incidents

375. It is possible to aggregate separate incidents to amount to a composite disclosure: see Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 340 EAT.

The disclosure must be in the public interest

376. It is necessary that the disclosure was in the "public interest". The Court of Appeal in Chesterton Global and another v Nurmohamed [2017] EWCA Civ 979 [2018] ICR 731 set out relevant criteria against which to assess the existence of the public interest to include:

- the numbers in the group whose interest the disclosure served;
- the nature of the interest affected and the extent to which they are affected by the wrongdoing disclosed;
- the nature of the wrongdoing disclosed; and
- the identity of the alleged wrongdoer.

Complaints regarding bullying and harassment

377. Complaining about instances of harassment or bullying may constitute a qualifying disclosure under section 43B(1)(d) of the ERA 1996. See, e.g., Fincham v HM Prison Service UKEAT/0925/01, in which the employee considered herself to be the subject of a campaign of racial harassment. She wrote a letter to her employer saying "I feel under constant pressure and stress awaiting the next incident". The EAT (Elias J (as he then was) presiding) overturned the ET's decision that this was not sufficient to amount to a qualifying disclosure, and held at paragraph 30:

> *"We found it impossible to see how a statement that says in terms "I am under pressure and stress" is anything other than a statement that [the employee's] health and safety is being or at least is likely to be endangered… [That] is not a matter which can take its gloss from the particular context in which the statement is made."*

Detriments for making protected disclosures

378. Under S47B ERA, a worker has a right not to be subjected to a detriment by any act, or deliberate failure to act, on the part of his or her employer done on the ground that the worker has made a protected disclosure.

379. A detriment is something that a reasonable worker would consider to be their disadvantage in the circumstances in which they have to work. Something may be a detriment even if there are no physical or economic consequences for the worker, but an unjustified sense of grievance is not a detriment: see Shamoon v Chief Constable of the Royal Ulster Constabulary [2003[UK HL 11, ICR 337 at paras 34-35 per Lord Hope and at paras 104-105 per Lord Scott.

380. A whistleblowing detriment claim can only be brought in respect of detriments suffered in the employment field: Tiplady v City of Bradford MDC [2020] ICR 965.

Burden of proof

381. In a claim for detriment under section 47B, the employee must prove that they made a protected disclosure and that they suffered a detriment (following the general rule that it is for a Claimant to prove their case on the balance of probabilities). The employer then has the burden of proving the reason for the treatment (section 48(2), ERA 1996). If the employer does not prove an admissible reason for the treatment, the tribunal is entitled (but not obliged) to infer that the detriment was on the ground that the worker made a protected disclosure (Ibekwe v Sussex Partnership NHS Foundation Trust UKEAT/0072/14; International Petroleum Ltd and others v Osipov and others UKEAT/0229/16 and UKEAT/0058/17 (paragraph 115). As such the section creates a shifting burden of proof that is similar to that which applies in discrimination claims under S136 of the EQA.

Causation

382. The question as regards a detriment claim is whether any detriment was on the grounds that the worker has made a protected disclosure (s.47(1) ERA 1996); this has been interpreted as meaning that "liability arises if the protected disclosure is a material factor in the employer's decision to subject the Claimant to a detrimental act" (Fecitt and others v NHS Manchester [2012] ICR 372).

383. In relation to a dismissal claim under s.103A it is for the employer to show the reason for dismissal in the usual way, and a claim will only succeed if protected disclosures were the sole or principal reason for the dismissal (s.103A ERA 1996).

384. The EAT set out the requirements for a successful claim under s.47B(1) in London Borough of Harrow v Knight 2003 IRLR 140, EAT:

a) The Claimant must have made a qualifying disclosure;
b) They must have suffered some identifiable detriment;
c) The employer must subject the Claimant to that detriment by some act, or deliberate failure to act, and
d) The act or deliberate failure to act must have been done on the ground that the Claimant made a protected disclosure.

Dismissal

385. In relation to a dismissal claim under s.103A it is for the employer to show the reason for dismissal in the usual way, and a claim will only succeed if protected disclosures were the sole or principal reason for the dismissal (s.103A ERA 1996).

386. Demonstrating that something was simply a cause involves asking whether it played a part in the decision to dismiss in a manner which was non-trivial. Recent EAT authority has warned against tribunals seeking to conclude that something played a part in a particular decision but that it was nevertheless trivial: see Bodis v. Lindfield Christian Care Home Ltd [2024] EAT 65 at [46]- [47].

387. For an employer to be liable for automatically unfair dismissal under section 103A ERA 1996 they ought to know at least something about the substance of the disclosure that has been made: they ought to have some knowledge of what the worker is complaining or expressing concerns about. Nicol v World Travel and Tourism Council [2024] EAT 42 at [82].

Approach

388. See per HHJ Taylor in University Hospital North Tees & Hartlepool NHS Foundation Trust v Fairhall UKEAT/0150/20 at [41]:

> *"If an employer really has determined to rid themselves of a whistle blower the process may be complex and involve people who are keen to appear not to have been involved in the decision making; someone who wishes to ensure an employee is dismissed because of their whistle blowing is likely to try to keep to the shadows. Wrongdoers often wish to distance themselves from their decisions. It would be troubling if in such cases* excessively *complex arguments about the difficulty in determining the precise mental processes of all those involved in the process resulted in a valid claim failing. Fortunately, we can rely on the good sense of the members of employment Tribunal's to see through such ruses and get to grips with the reason that operated, however it got there, on the mind of the dismissing officer".*

Distinction between making a disclosure and the manner of doing so

389. In some cases an individual will suffer a detriment not for the making of a protected disclosure as such, but a feature of that disclosure which can properly be treated as separable, such as the manner in which the complaint was made. This principle was considered an affirmed by the Court of Appeal in Kong v Gulf International Bank (UK) Ltd [2022] ICR 1513, and is helpfully illustrated in the judgment of Simler LJ at para 56:

> *"For example, a decision-maker might legitimately distinguish between the protected disclosure itself, and the offensive or abusive manner in which it was made, or the fact that it involved irresponsible conduct such as hacking into the employer's computer system to demonstrate its validity. In a case which depends on identifying, as a matter of fact, the real reason that operated in the mind of a relevant decision-maker in deciding to dismiss (or in relation to other detrimental treatment), common sense and fairness dictate that Tribunal's should be able to recognise such a distinction and separate out a feature (or features) of the conduct relied on by the decision-maker that is genuinely separate from the making of the protected disclosure itself. In such cases, as Underhill LJ observed in page [2021] ICR 912 , the protected disclosure is the context for the impugned treatment, but it is not the reason itself".*

390. On the facts of Kong, the tribunal had permissibly found that the reason for dismissal had not been the making of a protected disclosure but the express and unnecessary criticisms of an individual's competence and integrity made in the course of that disclosure (see para 67).

Relevance of Osipov, Wicked Vision and Treadwell

391. A detriment claim on the grounds of dismissal claim cannot be pursued directly against an employer. But such a claim can be pursued against individual co-workers or agents, with the employer subsequently being vicariously liable for that act: Osipov v. Timis [2019] ICR 655. Wicked Vision Ltd v. Rice [2024] EAT 29, sought to call into question the extent of the principle in Osipov, and in particular the vicarious liability argument. Rice was a case where there was no separate claim against an individual co-worker, and the Claimant sought to amend to add a claim on the basis of vicarious liability. The EAT concluded that the vicarious

liability route identified in Osipov did not form part of the ratio of the case, and effectively sought to row back on that position as a matter of law.

Health and safety disclosures

392. Section 44 (1) (c) of the ERA provides:

being an employee at a place where—
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

393. S100(c) of the ERA provides:

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—
being an employee at a place where—
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

Time limits for detriment claims

394. Section 48 (3) ERA provides that a tribunal shall not consider a complaint of a worker suffering a detriment unless it is presented before the end of the period of 3 months beginning with the date of the act or failure to act to which the complaint relates, or where that act or failure is part of a series of similar acts or failures, the last of them, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months.

395. Section 48(4), ERA states:

(a) where an act extends over a period, the "date of the act" means the last day of that period, and
(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer [, a temporary work agency or a hirer] shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

396. In Royal Mail Group Ltd v Jhuti EAT 0020/16, the EAT held that it was irrelevant for the purposes of extending time under S.48(3)(a) that the out-of-time proven acts may have

had continuing consequences in terms of the detriment experienced by the Claimant. S.48 (3) (a) was concerned with when the act or failure to act occurs, not with when the consequence of that act or failure to act is felt or suffered.

397. The House of Lords' decision in Barclays Bank plc v Kapur and Ors 1991 ICR 208, also distinguished between a continuing act and continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle, that amounts to a continuous act extending over a period of time. However, if there is no such regime, rule, practice or principle, then an act that affects an employee will not amount to a continuing act, even though the effect(s) of the act may be long-lasting.

Series of similar acts (s.48 (3) (a)

398. The concept of "a series of similar acts" for the purpose of S.48 (3) (a) is distinct from that of an act extending over a period of time in the context of s.48 (4) (a). In Arthur v London Eastern Railway Ltd (t/a One Stansted Express) 2007 ICR 193, CA, the Court of Appeal held that S.48(3)(a) could cover a situation where the complainant alleges a number of acts of detriment by different people where, on the facts, there is a connection between the acts or failures to act in that they form part of a 'series' and are 'similar' to one another. At paragraph 31 of the judgment LJ Mummery said (emphasis added):

> *"The provision can therefore cover a case where, as here, the complainant alleges a number of acts of detriment, some inside the 3-month period and some outside it. The acts occurring in the 3-month period may not be isolated one-off acts but connected to earlier acts or failures outside the period. It may not be possible to characterise it as a case of an act extending over a period within section 48(4) by reference, for example, to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them. Section 48(3) is designed to cover such a case. There must be some relevant connection between the acts in the 3-month period and those outside it. The necessary connections were correctly identified by HHJ Reid as (a) being part of a "series" and (b) being acts which are "similar" to one another".*

399. At paragraph 45, LJ Lloyd stated that in deciding this question "it must be sensible to consider the evidence as to each act relied on before deciding (a) whether they are part of a series at all and (b) whether they are sufficiently linked factually to be "similar" acts".

Reasonably practicable extension

400. The onus of proving that presentation in time was not reasonably practicable rests on the Claimant. "That imposes a duty upon him to show precisely why it was that he did not present his complaint" — Porter v Bandridge Ltd 1978 ICR 943, CA.

Meaning of 'reasonably practicable'

401. The relevant principles when determining whether a claim could not reasonably be presented before the end of the relevant three-month period are set out by Underhill LJ in Lowri Beck Services Ltd v Brophy 2019 EWCA Civ 2490:-

> *"The test is given a liberal interpretation in favour of the employee.*

The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was 'reasonably feasible' for the employee to present his or her claim in time.

If an employee misses the time limit because he or she is ignorant about the existence of a time limit or mistaken about when it expires in his or her case, the question is whether the ignorance or mistake is reasonable (in assessing whether ignorance/mistake are reasonable, it is necessary to take into account any enquires the employee or adviser should have made). If it is not, then it will have been reasonably practicable for the employee to bring the claim in time.

This is a question of fact, not of law. It is for the tribunal to determine objectively in light of the evidence available.

Even if a Claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented "within such further period as the tribunal considers reasonable".

Reasonable further period

402. If the Claimant does show that it was not reasonably practicable to issue the claim within the ordinary time limit, the tribunal's jurisdiction to hear his complaint is only triggered if the tribunal finds that the complaint was brought "within such further period as the tribunal considers reasonable".

403. Whether a claim that could not reasonably be brought within the ordinary time limit was brought within a reasonable further period is also a question of fact. It requires an objective consideration of the factors causing the delay and the period that should be reasonably allowed in consideration of this. The tribunal must also bear in mind the primary time limit and the strong public interest in ensuring that claims are brought promptly: Cullinane v Balfour Beatty Engineering Services Ltd and Anor EAT 0537/10.

Ordinary unfair dismissal

404. Under s.98 (1) (a) of the ERA it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under s.98 (1) (b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. At this stage, the burden in showing the reason is on the Respondent.

405. Under s.98 (4) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

406. In considering the fairness of the dismissal, the tribunal must have regard to the case of Iceland Frozen Foods v Jones [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the

ERA. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal considers the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

Dismissal on account of long-term sickness absence

407. In a case concerning long-term sickness absence, the question for the tribunal is whether the decision to dismiss is within the range of reasonable responses. The leading case is Spencer v Paragon Wallpapers Ltd [1976] IRLR 373, and the oft-cited question from Spencer (para 14) is "whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?" This question risks being misunderstood if not anchored firmly in its proper context of the range of reasonable responses test. In Spencer the EAT observed (at para 13):

> *"It is the function of the tribunal to determine whether the management has satisfied them that in the circumstances (having regard to equity and the substantial merits of the case) they acted reasonably in treating it as a sufficient reason for dismissing the employee. It is not the function of the tribunal to take the management's decision for it, but only to decide whether the decision taken by the management passes that test".*

408. The authorities emphasise two particular elements a tribunal will generally expect to see when assessing whether an employer's decision falls within the range of reasonable responses: that an employer has sought the views of the employee and obtained medical evidence (see East Lindsey DC v Daubney [1977] ICR 566). How each is done will depend upon the facts of the case. In Dabuney the position was succinctly put as follows (para 18):

> *"Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done".*

409. The correct approach in such cases was more recently considered by the EAT in Dundee City Council v Mr Benjamin Sharp UKEATS/0009/11/BI. Giving the judgment of the EAT, Lady Smith recalled Spencer and Daubney and, reflecting on those cases, noted that the standard of enquiry required is not higher than in a misconduct case and reiterated that decisions to dismiss are "management decisions not medical ones" (at para 21). Lady Smith observed that it was worth noting that in the Daubney case the EAT had considered that the

ET had expected too much of the employer "when saying that they should have demanded a detailed medical report, and should have questioned Dr Haigh about it" (para 21).

410. A number of crucial principles emerge from Dundee City Council:

a) Dismissal in a long term sickness absence case will not necessarily be unfair where there is a procedural failing.

b) This depends upon the nature of the failing and the circumstances of the case. It is not correct that fair procedure is particularly important in ill health cases: "fairness of procedure is no more important in an ill health case than it is in other cases" (para 24);

c) There is no absolute rule that dismissal will be unfair unless the employer has sought and obtained all 'relevant' facts – reasonable employers might reasonably differ on the question of what is relevant. Rather, "the overall fairness of a decision to dismiss is not determined by reference to whether or not there was something else that an employer might have done that might have produced a different result and to approach matters as if there was such a rule involves the risk of too high a hurdle being set for the employer to overcome" (para 28);

d) The employer can legitimately draw inferences from primary evidence; this is not the same as making assumptions (para 29);

e) There is no rule that an employer is not entitled to accept an employee's own account of the state of his health (para 30); and

f) The reasonableness of an employer's investigation in an ill health case is not to be judged by reference to the employee's length of service: it is not correct that more investigation is required in relation to an employee of long standing (para 31).

411. In Dundee City Council itself, the EAT held that the tribunal had fallen into error and set the bar too high for the employer (para 38):

> *"By adopting a technical and over analytical approach the Tribunal failed to stand back and ask whether the Respondent had consulted with the employee (to which the answer was 'yes, repeatedly'), had carried out a reasonable investigation and had a reached a reasonable view on the issue of whether or not it was reasonable for them to wait longer before deciding whether or not to dismiss".*

412. It is in line with the tribunal's proper focus on reasonableness that where the employer relies upon medical evidence it is not generally expected to attempt to look behind that evidence. In Liverpool Area Health Authority v Edwards [1977] IRLR 471 Arnold J observed at para 11:

> *"We do not think that an employer, faced with a medical opinion, unless it is plainly erroneous as to the facts in some way, or plainly contains an indication that no proper examination of any sort has taken place, is required to evaluate it as a layman in terms of medical expertise".*

413. The position as regards reliance upon medical evidence was more recently considered in First Manchester Ltd v Kennedy UKEAT/0818/04/DM, UKEAT/0027/05/DM. This was a case in which the employer had relied upon an occupational health report. Burton J, giving the judgment of the EAT, confirmed that the question is whether no reasonable employer would have been entitled to rely upon the occupational health report: "i.e. that any reasonable employer would have concluded, effectively, that the report was not worth the paper it was written on or was obviously flawed" (see paras 34 and 40).

Consideration of unfair dismissal and S 15 EQA claims

414. In a case such as the present, in which a s.15 EQA claim is pursued alongside an unfair dismissal claim, the tribunal is tasked with considering both whether dismissal is objectively justified for the purposes of s.15 and whether it is within the range of reasonable responses for the purposes of s.98(4) it was observed by Underhill LJ in O'Brien v Bolton St Catherine's Academy [2017] EWCA Civ 145 that it is unlikely that the two tests will lead to different results, in particular because the s.15 assessment "can, and should, accommodate a substantial degree of respect for the judgment of the decision-taker as to his reasonable needs" (para 53).

415. Tribunals have nonetheless been cautioned against truncating their analysis of an unfair dismissal claim where a s.15 claim has already been addressed earlier in the judgment (see Northumberland Tyne & Wear NHS Foundation Trust v Ward EAT 0249/18, Choudhury P at para 74):

> *"Whether or not such an approach is appropriate will depend on the facts of the case, the factors relevant to the proportionality analysis, and the extent to which those factors overlap with those relevant to the unfair dismissal analysis. The better approach, possibly in the majority of cases, would be to set out the analysis of the claim under each head more fully".*

The ACAS Code

416. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of s.207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

417. The Code does not apply to a dismissal for ill-health capability (Holmes v Qinetiq Ltd [2016] ICR 1016.

TUPE

418. TUPE Reg 2(1) provides:

"employee" means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly.

A relevant transfer

3.—(1) These Regulations apply to—
(a)a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;
(b)a service provision change, that is a situation in which—
(i)activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");
(ii)activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or
(iii)activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,
and in which the conditions set out in paragraph (3) are satisfied.

419. The Claimant avers that the expression "or otherwise" in the Reg 1 definition of "employee" includes a person who is not an employee but who is a 'worker': see the tribunal decisions of McCririck v Channel 4 Television Corpn and IMG Media Ltd (ET Case No 2200478/2013) [2014] EqLR 92 and Dewhurst v Revisecatch Ltd (ET Case No 118 2201909/2018).

420. When considering whether there has been a relevant transfer under Regulation 3(1)(a) it must be determined whether an economic entity existed and, if so, whether it retained its identity post transfer: Cheesman v R Brewer Contracts Ltd [2001] IRLR 11; Whitewater Leisure Management Ltd v Barnes [2000] ICR 1049. The Claimant says that it is clear that the LLP was a distinct economic entity. The question is whether it retained its identity post-transfer. This has been considered to mean, in the paradigm case, that the transferee continues or resumes the activity in question: Spijkers v Gebroeders Benedik Abattoir CV (24/85) [1986] E.C.R. 119.

Costs

421. Rule 74 provides:

When a costs order or a preparation time order may or shall be made
74 (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success.
The following propositions relevant to costs may be derived from the case law:

422. There is a two-stage exercise to making a costs order. The first question is whether a paying party has acted unreasonably or has in some other way invoked the jurisdiction to make a costs order. The second question is whether the discretion should be exercised to make an order (Oni v Unison ICR D17).

423. Costs orders in the Employment Tribunal are the exception rather than the rule (Gee v Shell [2003] IRLR 82, Lodwick v Southwark [2004] ICR 844).

424. While the threshold tests for making a costs order are the same whether or not a party is represented, in the application of the tests it is appropriate to take account of whether a litigant is professionally represented or not.

425. While a precise causal link between unreasonable conduct and specific costs is not required, it is not the case that causation is irrelevant.

426. The assessment may require the tribunal to take a "range of reasonable responses" approach to the conduct in question: Soloman v University of Hertfordshire [2019] UK EAT/0258.

Conclusions and discussion

Approach taken

427. For the avoidance of repetition we will not continuously set out the test applicable to the various heads of claim and they should be regarded as having generic applicability. We will therefore focus primarily on our evidential findings and interpretation of them in the context of a claim being pursued.

428. In the interest of this judgment not becoming unwieldy we do not repeat in each and every allegation the legal basis and analysis for our findings and the application of the applicable legal framework should therefore be read as having generic applicability where the allegations are the same and the reasons for rejecting the Claimant's assertions apply equally across multiple allegations.

The issues

429. The agreed list of issues has been set out below adopting the sequence, formatting and cross-referencing the parties have used. The issues are in bold and our decision in relation to each individual issue is set out below.

Protected Disclosures (s.43B ERA)

Did C make the following disclosures ("Alleged Protected Disclosures")?

430. Given the plethora of individual allegations of protected disclosures we will not repeat in our response to each individual allegation every element of the test for a qualifying protected disclosure given that this would result in a repetitive and disproportionately long judgment but rather will focus on the substantive elements of the factors we consider to be relevant. For the avoidance of doubt the Tribunal has nevertheless taken into account all relevant factors in respect of each individual allegation.

Alleged disclosures to R2 prior to the Grievance:

From 2015 onwards, complaints to R2 about the compliance implications of using auto-delete and querying the necessity of installing so many different communications apps (GoC para 108a).

431. We do not consider that this constituted a protected disclosure. We reach this decision for the following reasons:

432. The Claimant's evidence is that he raised this issue with Mr Leone on multiple occasions over a six-year period. However, we do not consider that his concerns had the required specificity, to include the disclosure of specific information regarding what breach of a legal obligation he considered was taking place, to fulfil the definition of a protected disclosure under section 43 of the ERA.

433. Further, we consider that had the Claimant had a serious concern that there was an ongoing breach of a legal obligation that he would have gone beyond raising his concerns with Mr Leone but rather have highlighted them in a written communication to Mr Glasper, Mr Wilkin or otherwise internally, and failing any action being taken, to address his concerns with the FCA. He failed to do so.

434. We also do not consider that the required public interest existed. We consider that the Claimant had concerns in respect of auto-delete, but given Mr Leone's position that there was no use of auto-delete for regulated trading activity, and we do not consider that evidence exists to contradict this assertion, the public interest element is not satisfied. Whilst there would be a public interest in regulated trading activity taking place on a transparent and recorded basis we do not consider that the Claimant has satisfied the threshold that the disclosure of information satisfied his having a reasonable belief that it tended to show that there was a breach of a legal obligation pertaining to the 1st Respondent's regulatory obligations.

In the second half of 2015, raising with R2 whether he had a duty to report Michael Phelps' behaviours to the regulator, the Financial Conduct Authority (GoC para 108(b)).

435. We do not consider that this conversation is close to being capable of constituting a protected disclosure. It represents a conversation between colleagues regarding a third party business. We accept Mr Leone's evidence that he was of the opinion that given the size, reputation and institutional integrity of Blackrock, that if they were doing it there was probably a legitimate explanation. In any event had it been the case that the Claimant genuinely believed that Mr Phelps and Blackrock were culpable of conduct breaching their legal and regulatory obligations it would have been incumbent on him as the concerned senior professional, director and an approved person from a FCA perspective, to raise the matter himself rather than flagging it as a potential concern and expecting Mr Leone to do so.

From 2016 onwards, repeatedly telling R2 that his behaviours were creating a toxic environment at work, were causing team members to fear him, were inhibiting the feedback necessary for proper functioning of the firm, and that it was necessary to hire mental health professionals at work (GoC para 108(c) and F&BPs para 77-80).

436. We do not consider that this constituted a protected disclosure. Whilst we acknowledge that the Claimant made repeated complaints, increasing in regularity in the final two years of his employment, regarding the "toxic" or "sick" working environment we do not consider that this involved the disclosure of specific information but rather the Claimant's general concern that he personally was being subject to a difficult working relationship with Mr Leone.

437. In any event we do not accept the Claimant's contention that there was a toxic working environment. We take account of the evidence of the Respondents' witnesses as to the nature of the office environment and note that it was only the Claimant who contended that it was in any way inappropriate. Further, we give cognizance to the high pressurised environment in high performing hedge funds with it being self-evident that there will be times of pressure, long working hours and responsibility for making decisions regarding client's significant financial investments. This will create times of pressure.

438. We consider it important to put these complaints in the context of the interpersonal relationship between the Claimant and Mr Leone. Mr Leone is on his own admission an extremely high performing individual who has exacting standards of himself and his colleagues. This would inevitably mean that at times of sub-optimal performance, and the Claimant acknowledges that his performance substantially deteriorated in 2021, that the working environment would become increasingly pressurised. However, having reviewed the very considerable transcripts of conversations between the Claimant and Mr Leone during this period we do not consider that they show Mr Leone exhibiting hostility towards the Claimant as a result of that poor performance but rather his exploring with him what had led to that deterioration and what steps could be taken to get his performance back to its previous levels. This is relevant in the context of the Claimant's perception of a toxic environment which would be a precursor of any potential disclosure. We do not consider the necessary precursor existed nor that he then subsequently disclosed information capable of giving rise to such a disclosure.

439. We consider that the Claimant's concerns in this respect increased significantly with the substantial deterioration in his financial performance. We consider that his repeated references to a toxic working environment are indelibly linked to the Claimant's increasing concerns regarding his own mental health and his perception that his psychological well-being was being damaged by his interactions with Mr Leone.

440. Further, we find that the public interest was not engaged.

441. It is also relevant that had the Claimant genuinely believed that a toxic working environment existed it would have been open to him to raise the matter externally with the FCA. He failed to do so.

In late 2018 or early 2019, complaining about the share allocation recorded in the incorporation documents changing the structure from an LLP to a limited company (GoC para 108(d)).

442. We do not consider that this constitutes a protected disclosure. Whilst the Claimant undoubtably had a festering sense of grievance that he was not being appropriately recognised in the equity share in the business we do not consider that he can reasonably have believed that the proposed share allocation in the Shareholders' Agreement constituted a breach of a legal obligation. This represented a purely personal matter between the Claimant and Mr Leone. We also take account of Mr Mazzotti's evidence that it was always the case that the Claimant was the junior partner within the business and that there was no legal agreement that he would receive a greater stake in the equity as the business progressed.

443. It is relevant that the Claimant signed a document which stated that he had received independent legal advice regarding the terms of the Agreement. If the Claimant had

genuinely believed that Mr Leone was reneging on a legal obligation regarding his equity share it would have been open to him, particularly given his self-evident financial well-being, to have obtained professional advice and have pursued the matter through legal channels. He failed to do so.

444. We also fail to see how the Claimant could have perceived that a public interest existed in this matter. This represented a purely personal matter regarding the Claimant's own self-interest in securing an enhanced share in the equity. He hasn't specified how the public interest was engaged.

In early 2021, asking R2 to stop openly insulting C including about his appearance, including about his hair or his appearance in general saying the Claimant looked like a "*peasant*", an "*idiot*" or telling the Claimant that he was a "*peasant*", or calling the Claimant Ms Thesleff's "*partner*" (GoC para 108(e)).

445. We do not consider that this is capable of constituting a protected disclosure. We acknowledge that on occasions Mr Leone raised concerns regarding the Claimant's dress and appearance. We accept that the Claimant may genuinely have felt insulted by such comments. Nevertheless, Mr Leone had a legitimate interest in his colleagues maintaining an appropriately professional appearance in the context of the business profile.

446. In this context we consider it relevant to refer to the 12 July 2019 memorandum from Mr Leone regarding business wear and the importance of appropriate attire and we consider that all he was doing in his communications with the Claimant was telling him that his general appearance was unsatisfactory. Whilst we consider that there were occasions when he may have been untactful, and arguably dictatorial, in his communications that is insufficient to give rise to the breach of a legal obligation.

447. Whilst Mr Leone's language was undoubtably, on occasion, insulting and demeaning in respect of the Claimant and others, the Claimant asking him to desist from such comments cannot constitute him raising a breach of a legal obligation or a concern that the health or safety of any individual has been, is being or is likely to be in danger. To have found otherwise would effectively preclude a manager from raising concerns regarding an individual's demeanour or performance on the basis that by doing so they may perceive that their mental well-being was being compromised. That would be inconsistent with the sensible and logical running of a business.

448. In any event there can be no legitimate basis for the Claimant contending that the public interest was engaged. This represented a purely personal matter and in effect is a subcategory of the Claimant's generic complaint of Mr Leone creating a "toxic" working environment.

In or around 25 August 2021, telling R2 that R1's employees were unable to disconnect even when on holiday, that the well-being of R1's employees impacts upon its performance, and that R1 needed to hire a psychologist (GoC para 108(f)).

449. We do not consider this to be capable of constituting a protected disclosure. It is necessary to consider the appropriate context. First, the concern raised by the Claimant was very general in a long conversation he recorded with Mr Leone on 25 August 2021. He did not provide specifics of "excessive" work he was required to undertake whilst on holiday but rather questioned whether anyone was able to fully switch off whilst away. In any event we consider it wholly unrealistic for someone in the Claimant's position to expect that they

would be un-contactable in the event of any significant issues arising on their investment portfolio whilst away particularly given that he was the second most senior individual in the organisation and effectively Mr Leone's "right-hand man". Not being contacted at all whilst on holiday would be inconsistent in the context of the seniority of the Claimant's role and the inherent responsibilities associated with his investment portfolio.

450. We consider that this needs to be seen in the context of the Claimant increasingly raising concerns regarding his own mental health well-being and his attribution of such health issues to his perception that Mr Leone was behaving in an unreasonable manner.

451. Further, we do not consider that there can be any basis for the public interest being engaged. This represented a generic conversation between colleagues regarding an individual's ability to disengage from the business whilst on holiday.

452. The Claimant's reference to the engagement of a psychologist is not capable of constituting a protected disclosure. This represented a personal issue from the Claimant's perspective. Mr Leone regarded it as inappropriate and disproportionate and we consider this to be understandable in the context of the size of the 1st Respondent's workforce. It was not a protected disclosure.

In or around September 2021, presenting R2 with an A3 document (not sent by email) setting out analysis and suggestions to improve performance at R1 (GoC para 108(g)).

453. We do not consider that this is remotely close to being capable of constituting a protected disclosure. It needs to be seen in context. The Claimant produced the document at his own volition. Given its size and content it does not have the required specificity of the disclosure of information about any breach of a legal obligation.

454. The Claimant has not identified the specific sections of that document which he contends constitute protected disclosures. It constitutes a series of generalised recommendations primarily to improve the working environment.

455. Further, we do not consider that the public interest is engaged. It would, in our opinion, be far too abstract to contend that the creation of a harmonious working environment in a hedge fund engages the public interest. That such an environment may improve investment performance is far too amorphous to meet the required threshold.

On 9 December 2021, raising concerns with R2 about C's state of constant overwork and its unsustainability and negative impact on health and performance (GoC para 108(h)).

456. We do not consider that this is capable of constituting a protected disclosure. Once again it needs to be seen in context. The Claimant was raising in very general terms on a repeated basis his concerns regarding the working environment to include its unsustainability and negative impact on health and performance. That in effect forms a sub-part of his allegation that there was a toxic working environment.

457. Whilst the Claimant refers to raising this concern on 9 December 2021 we note that during a very long late night conversation with Mr Leone on 24 January 2022 he repeated this contention.

458. It is necessary to consider his concern in context. A hedge fund is undoubtably a high pressure working environment. That pressure will inevitably increase at times of poor investment performance which the Claimant was experiencing by this time.

459. The concern raised does not fulfil the requirement that the Claimant had disclosed specific information regarding the endangerment of his health and safety. Further, it does not engage the necessary public interest.

In or around February 2016, telling R2 that he should go to the authorities to protect himself and his family as well as the fund and its investors (GoC para 108(i).

460. We do not consider that this is capable of constituting a protected disclosure.

461. In context we consider that Mr Leone had become increasingly preoccupied regarding his belief that Ms Thesleff, and those acting at her instigation, were responsible for a series of suspicious incidents which undoubtably caused him considerable concern.

462. The Claimant saying that given that such concerns he should go to the authorities lacks the disclosure of specific information to be capable of constituting a protected disclosure. It simply represented him telling a colleague that if he had such concerns he should take appropriate action. Mr Leone did not do so but that does not mean that the Claimant suggesting he should do so was a disclosure of information pointing to a breach of a legal obligation.

463. Further, notwithstanding the Claimant's attempts to refer to the protection of the Fund and its investors we consider that this did not satisfy the public interest requirement given that Mr Leone's concerns pertaining to Ms Thesleff were in effect a personal concern rather than something of more generic impact. In any event had the Claimant perceived that the Fund and its investors were being compromised by the matters giving rise to Mr Leone's concerns it would have been equally possible for him to have gone to the authorities. He did not do so.

At various times from 2016 onwards telling R2 that if he knew about investors working against R1 he should report these to the regulators and/or police (GoC para 108(j)).

464. As above.

At regular periods throughout his employment, disclosing to R2 that it was harmful to refer to colleagues, stakeholders and family members in offensive, violent and discriminatory ways (GoC para 108(k) and para 82 F&BPs).

465. We do not consider this to be capable of constituting a protected disclosure.

466. In context we find that Mr Leone habitually referred to individuals in disparaging, derogatory and inappropriate terms. He acknowledges as much. It is, however, appropriate to place this in a context of what he perceived to be informal conversations with a friend and colleague and with no knowledge that they were being recorded.

467. In effect this represents a repetition of the claims that the Claimant suffered harassment on account of the various protected characteristics. These will be dealt with separately.

468. We do not consider that the Claimant's expression of dissatisfaction with Mr Leone using such language and asking him to desist from referring to individuals in such terms had the required specificity of the disclosure of information to be capable of constituting a protected disclosure. It is far too generic and lacks specific communication as to what breach of legal obligation is contended was taking place. This is particularly the case given that such communications were imprecise and form part of very long, informal and rambling conversations. We do, of course acknowledge that protected disclosures can be made orally but these are not narrowly defined oral communications of specific alleged breaches of legal obligations.

469. We also do not consider the required public interest element was satisfied.

Alleged disclosures to Mr Glasper and Ms Elliot prior to the Grievance:

On or around 19 October 2021, during an in-person meeting, telling Mr Glasper about the very damaging work environment in which C was treated differently and how it hurts C a lot (GoC para 109(a)).

470. We do not consider this constituted a protected disclosure.

471. From a factual perspective we have already found that there was not a "damaging work environment" otherwise referred to by the Claimant as a toxic environment and nor was he treated differently. The Claimant has not, in any event, specified as to whom, and how, he was treated differently.

472. We consider that this conversation took place in the context of the Claimant wanting to spend an increasing amount of time working from Italy.

473. He has not specified what information he disclosed which could potentially have given rise to a breach of a legal obligation or his health and safety being endangered. We consider that it represents a general gripe regarding working arrangements and specifically what the Claimant perceived to be the approach of the Mr Leone to him. As such no public interest was engaged.

On or around 20 October 2021, during a call with Mr Glasper, raising problems about the very damaging work environment (GoC para 109(b)).

474. As above this is a vague and unparticularised contention and is not capable of constituting a protected disclosure.

On or around 23 November 2021, during a call with Mr Glasper, sharing that he struggled to tell R1 what he thinks when he thinks it given R2's behaviours (GoC para 109(c)).

475. We find it difficult to understand the specific allegation of being put forward by the Claimant. In effect what he is saying is that he considered it difficult to raise matters with the corporate Respondent given his concerns regarding Mr Leone's behaviour. However, that is inconsistent with his repeatedly raising such concerns directly with Mr Leone and Mr Glasper, the Head of Legal.

476. We consider that the conversations between the Claimant and Mr Glasper were two colleagues sharing their grievances regarding Mr Leone in a context of the Claimant leading the conversation, knowing Mr Glasper's own issues with his working arrangements and relationship with Mr Leone and being aware that the conversation was being recorded.

477. No protected disclosure was made. There was no disclosure of specific information and no public interest engagement.

On or around 19 December 2021, telling Mr Glasper and Ms Elliot that R2 would openly insult C and how bad it made him feel (GoC para 109(d)).

478. It is disputed what the Claimant told Mr Glasper and Mrs Elliott. Mrs Elliot denies that any such conversation took place.

479. In any event we do not consider that the Claimant has demonstrated what legal obligation he believed was being breached. We have found that Mr Leone had a tendency to speak in direct, and on occasions, insulting terms regarding a variety of individuals to include the Claimant. Nevertheless, given the lack of specific information disclosed, and failure to identify the legal obligation being breached, we do not consider the communications were capable of giving rise to a protected disclosure. Further, we consider that this represented a purely personal matter and not something which engaged the public interest.

On or around 5 January 2022, during a call with Mr Glasper and Ms Elliot, sharing the negative long-term impacts including on his health arising out of the conduct of R2 (GoC para 109(e)).

480. Once again the Claimant did not specify the particular conduct of the Mr Leone to which he objected. We repeat our previous findings regarding such conduct.

481. We consider that this represents the Claimant generally venting his concerns regarding the work environment rather than in a context where he was disclosing specific information regarding a breach of a legal obligation and/or the detrimental impact on him from a health and safety perspective.

482. Further, we consider that this was a purely personal matter to the Claimant and the public interest was not engaged.

On 6 January 2022, during a call with Mr Glasper, C and Mr Glasper discussing R2's anger at C following Alex Juska's resignation; and agreeing that there had been a toxic culture at R1 for years (GoC para 109(f)).

483. As above. For the avoidance of doubt we will avoid repeating ad infinitum previous findings where they cover the same ground.

On 9 February 2022, during a conversation with Mr Glasper, C referring to suggestions he had made such as recurring mental health checks for the team and performance reviews (GoCpara 109(g)).

484. Again we consider that this needs to be placed in context. The Claimant has focused on certain specific elements of a much wider conversation which included him discussing a proposed sabbatical and raising his concerns regarding what he believed to be a $3 million

bonus entitlement. We have already set out that we do not consider that there was an unhealthy work environment.

485. The Claimant requesting recurring mental health checks and performance reviews is not capable of constituting a protected disclosure. It is merely a suggestion being made by a senior employee discussing workplace issues with a colleague. It is not specific and it does not engage the public interest.

On or around 10 February 2022, at Sartoria restaurant in London, C discussing with Ms Elliot C's heart defect and the damage of repeated accusations against him (GoC para 109(h)).

486. We again consider it necessary to set the context to this meeting. The Claimant was disingenuous in enticing Mrs Elliott to an external meeting when he knew he was going to set out his concerns and covertly record their conversation. We also consider it wholly inappropriate that for an employee seeking to raise a protected disclosure that they would do so in a noisy public place where alcohol was being consumed. That is inconsistent with a genuine concern being raised regarding a breach of a legal obligation. That would be much more appropriately raised either in writing or in a meeting in the boardroom or other confidential corporate space.

487. We also consider it significant that Mrs Elliott was in a junior capacity to the Claimant. Whilst that would not preclude the possibility of a protected disclosure being made it would nevertheless be more normal to expect an employee seeking to raise a protected disclosure to do it with someone senior to them or to the board.

488. In any event we do not consider that the conversation shows the Claimant as raising specific concerns with the required provision of information regarding breaches of legal obligations and/or the endangerment of his heal Mr Leone's approach to him. The public interest was not engaged.

On or around 14 February 2022, at a meeting with Ms Elliot, saying C had been neglecting himself for too long and pretending all is fine; that there had been events that had been incredibly painful; that he felt "in prison" in terms of speaking out and how close he was repeatedly driven to burnout (GoC para 109(i)).

489. As above this is the Claimant verbalising his general dissatisfaction without the required specificity of information and engagement of the public interest.

490. It is also significant that the Claimant asked Mrs Elliott to keep the conversation confidential which is inconsistent with his contending that he raised a protected disclosure. It is also an instance of the Claimant being disingenuous when he expected confidentiality in the full knowledge that he was recording the conversation without Mrs Elliott's consent.

On or around 24 February 2022, telling Mr Glasper that R2's accusations against C, including C leaving his phone on his desk so as not to be traced, are accusations that put a lot of stress on the Claimant and people and create huge damage; that R2 takes it personally if C says the environment is sick; and asking how Mr Glasper would feel if he had co-founded a business from the beginning, going through the tough times, and then found himself in a position where one cannot say anything without triggering passive aggressive behaviours almost constantly. (GoC para 109(j)).

491. As above.

On or around 1 March 2022, telling R2, Mr Glasper and the whole team that he was taking time out due to health and family reasons (GoC para 109(k)).

492. We consider that this represents the Claimant communicating his intentions to Mr Glasper and not capable of constituting a protected disclosure.

On or around 12 April 2022, C explaining to Mr Glasper by telephone how his (C's) body had been affected by the stressful work interactions and he had either been in bed (with Covid first and "super flu" thereafter) or in the clinic for four and a half weeks (GoC para 109(l)).

493. We consider that this is a further instance of the Claimant seeking to link all adverse life/health events to his belief that Mr Leone had created a toxic working environment. In any event he does not specifically link his ill-health to the working environment in his conversation with Mr Glasper. We consider that this represents a casual conversation between colleagues during which the Claimant tells Mr Glasper about his recent health issues. It is not capable of constituting a protected disclosure.

On or around 13 April 2022, C telling Mr Glasper that his stress also was somatised in the gut (GoC para 109(m)).

494. As above.

On or around 14 April 2022, C telling Mr Glasper by telephone that he had frequent difficulty with sleeping, episodes of tachycardia, fainting, heavy headaches; and explaining to Mr Glasper how stressful the environment had been and how damaging and painful R2's accusations were; and how he frequently got memories of stressful situations and couldn't do anything to stop them (GoC para 109(n)).

495. As above. This should be placed in the context of the Claimant requesting and being granted a sabbatical given his health concerns. The 1st Respondent was supportive of this sabbatical notwithstanding the disruption it would cause to the business.

<u>The Grievance and subsequent alleged disclosures:</u>

A written grievance of 22 August 2023 (this should refer to 2022), as further particularised at paragraphs 110 and 111GoC ("the Grievance").

496. Whilst we consider that the majority of this document involves a repetition of the matters which we have previously decided did not constitute protected disclosures we nevertheless consider that the Claimant's reference to Mr Leone repeatedly referring to women as "bitches" and "whores" has the required specificity to constitute a protected disclosure. He specifically refers to Mr Leone making this comment in respect of Ms Thesleff. Mr Leone accepts that his language in this respect was wholly inappropriate and undoubtably misogynistic.

497. We take account of the conversations took place occurring largely outside the work place and normal working hours. Nevertheless, we consider that the conversations had a sufficient connection with the workplace that the Claimant was entitled to raise his concern that in making such comments Mr Leone had breached a legal obligation in breaching the non-discrimination provisions in the EQA. We consider that the public interest was engaged

as Mr Leone's use of such wholly inappropriate, misogynistic and discriminatory language was inconsistent with the standards expected of a senior executive in the financial services industry and would undoubtably have been seen as such by the FCA.

498. We consider that this is the only element of the grievance which gives rise to a protected disclosure.

499. We consider that this only satisfies the year S 43B (1) (b) this limb and does not involve a miscarriage of justice, the endangerment of the health and safety of any individual or that any matter is likely to be deliberately concealed.

A written response of 25 November 2022, to a request for further information from Freshfields ("the Further Information") (GoC para 112). C relies upon the categories of disclosure as set out at paragraph 86 of his F&BPs.

500. It is important to place this document in context. It runs for 100 pages together with multiple attachments. It covers, in considerable detail, most of the issues already referred to above which the Claimant constituted protected disclosures but also raises other matters. We consider it unsatisfactory that the Claimant refers to the totality of the document as giving rise to protected disclosures without specifying the individual breaches of legal obligation and/or endangerment of health and safety upon which he relies. Further, whilst the Tribunal was referred to this document on a few occasions during the evidence it is not one which we read in its entirety. We have nevertheless spent time reviewing that document as part of our deliberations without reading it in full. We do not consider it to be an appropriate task for a tribunal to scrutinise a detailed document to extract potential protected disclosures when they have not been expressly identified by the Claimant.

501. We do, however repeat our finding above that the references to Mr Leone using discriminatory language to include, but not necessarily limited to, homophobic and misogynistic language constitute a protected disclosure. That has been raised with sufficient particularity to give rise to the disclosure of information constituting a protected disclosure and as above we consider that the public interest was engaged. This included Mr Leone using discriminatory and abusive terms such as "bitch", whore" and "faggot". We do not consider it necessary to extract all such discriminatory references from a 100 page document but rather to acknowledge that in raising these matters the Claimant has made a protected disclosure of alleged discriminatory conduct in breach of the EQA. Given Mr Leone's wide ranging and repeated use of such language regarding multiple individuals we consider that the public interest requirement is satisfied.

502. However, in all other respects we do not consider that the document gave rise to other protected disclosures. It ultimately represents an extremely detailed repetition of the Claimant's multiple personal concerns regarding his working environment and more specifically his relationship with Mr Leone. That is a personal issue and not one which engages the public interest.

Written representations of 20 January 2023 in response to the Investigation Report ("the January Representations") (GoC para 113). The specific disclosures relied upon by C are as pleaded in paragraph 88 of his F&BPs

503. We do not consider that this constitutes a protected disclosure. It needs to be seen in context. This effectively represents the Claimant seeking to adduce additional protected disclosures to those previously relied upon as a result of Freshfields not accepting his

principal allegations. It is not clear what legal obligation he seeks to rely on. Freshfields were appointed as independent investigators and undertook a review in accordance with their professional obligations. The Claimant's perception that their review was one-sided and took an unreasonably subjective stance of his evidence is not sufficient to give rise to a reasonable belief that a breach of a legal obligation had taken place.

504. Further this represents an entirely personal matter as far as the Claimant was concerned. The public interest was therefore not engaged.

505. The Claimant also seeks to rely on a miscarriage of justice, that his health and safety has been endangered or that any of the matters within section 43B are likely to be deliberately concealed. We do not consider that any realistic basis exists for any of these sections being satisfied.

Grounds of appeal of 27 March 2023, in relation to C's grievance ("the Grievance Appeal") (GoC para 114). The specific disclosures relied upon by C are as pleaded in paragraph 90 of his F&BPs.

506. We do not consider that the public interest was engaged. This represented a personal dispute between the Claimant and the 1st Respondent. More generally it would be inconsistent with the purposes of the whistleblowing protection that any grievance process/appeal pursuant to which the investigation outcome was challenged thereby gives rise to a qualifying protected disclosure. We consider that this would extend the scope of a qualifying protected disclosure beyond that envisaged by the legislation particularly given the public interest requirement.

507. As a more general point the Claimant has failed to identify the legal obligation relied on.

508. We also consider it disingenuous for the Claimant to complain about deficiencies/inadequacies in the grievance investigation/outcome when he knowingly concealed the fact of his substantial recordings, and detailed notes derived from them, which would have been material relevant to Freshfields' investigation.

A pre-action letter of 15 June 2023 sent by solicitors for C ("the Pre-Action Letter") (GoC para 115). The specific disclosures relied upon by C are as pleaded in paragraph 92 of his F&BPs.

509. We have carefully considered the contents of the the Claimant's Letter before Action dated 15 June 2023. We consider that it does include some protected disclosures namely:

a) Mr Leone's misogynistic comments regarding Ms Thesleff to include in paragraph 23 (j) that she was a "bitch", "whore" and "cocksucker";

b) Mr Leone's use of homophobic language at paragraph 28 (b); and

c) The allegation that Mr Leone's conduct towards the Claimant involve multiple incidents of bullying and harassment as set out in the detailed list appended to the the Claimant's Letter before Action.

510. Whilst we have previously rejected the contention that allegations regarding a toxic working environment and bullying constituted protected disclosures we consider that this

document provides a level of specificity in the information provided that it satisfies the threshold for a qualifying disclosure.

511. We consider that the allegations of misogyny and homophobia fall within a breach of a legal obligation and that the allegations of bullying and harassment fall within the health and safety of an individual likely to be endangered i.e. that of the Claimant.

512. We have considered whether these are matters which engage the public interest. We find that they do. We repeat our findings in relation to the allegations of misogyny and homophobia above. In respect of the allegation of bullying we consider that whilst the complaints are specific to the Claimant, in the context of prospective High Court litigation for substantial personal injury compensation, they nevertheless have a significance, if true, that there would be a wider interest than that specific to the Claimant.

Written representations of 16 June sent by email to the Board at 13:25 on 16 June 2023 ("the 16 June Representations"). The specific disclosures relied upon by C are as pleaded in paragraph 94 of his F&BPs.

513. We do not consider that this constitutes a protected disclosure. This represented an internal procedural matter. A contention that if the 1st Respondent were to dismiss the Claimant it would be an act of discrimination on account of his disability is a matter involving an allegation without factual content. No information has been disclosed and it is a mere assertion. Further, this relates to the Claimant's own personal interests as an employee and potential litigant. The public interest is therefore not engaged.

The Claimant presenting claim number 2216895/2023 ("the First Claim") to the tribunal.

If so, were these disclosures of information?

If so, did C believe that the disclosure tended to show one or more of the categories of failure within s.43B(1) ERA?:

In relation to 0 above, C relies upon s.43B(1)(b) and (f) (GoC para 108(a));
In relation to 0 above, C relies upon s.43B(1)(a), (b) and (f) (GoC para 108(b));
In relation to 0 above, C relies upon s.43B(1)(b), (d) and (f) (GoC para 108(c));
In relation to 0 above, C relies upon s.43B(1)(b) (GoC para 108(d));
In relation to 0 above, C relies upon s.43B(1)(b) and (d) (GoC para 108(e));
In relation to 0 above, C relies upon s.43B(1)(b), (d) and (f) (GoC para 108(f));
In relation to 0 above, C relies upon s.43B(1)(b) and (d);
In relation to 0 above, C relies upon s.43B(1)(d) and (d) (GoC para 108(h));
In relation to 0 above, C relies upon s.43B(1)(b) and (d);
In relation to 0 above, C relies upon s.43B(1)(a), (b) and (f) (GoC para 108(j));
In relation to 0 above, C relies upon s.43B(1)(b) and (d);
In relation to 0 above, C relies upon s.43B(1)(b), (d) and (f) (GoC para 109(a));
In relation to 0 above, C relies upon s.43B(1)(b), (d) and (f) (Goc para 109(b));
In relation to 0 above, C relies upon s.43B(1)(a), (b) and (f) (GoC para 109(c));
In relation to 0 above, C relies upon s.43B(1)(b) and (d) (GoC para 109(d));
In relation to 0 above, C relies upon s.43B(1)(b) and (d) (GoC para 109(e));
In relation to 0 above, C relies upon s.43B(1)(b) and (d) (GoC para 109(f))
In relation to 0 above, C relies upon s.43B(1)(b), (d) and (f) (GoC para 109(g));
In relation to 0 above, C relies upon s. s.43B(1)(b), (d) and (f) (GoC para 109(h));
In relation to 0 above, C relies upon s.43B(1)(b), (d) and (f) (GoC para 109(i));

In relation to 0 above, C relies upon s.43B(1)(b), (d) and (f) (GoC para 109(j));
In relation to 0 above, C relies upon s.43B(1)(b), (d) and (f) (GoC para 109(k));
In relation to 0 above, C relies upon s.43B(1)(b) and (d) (GoC para 109(l));
In relation to 0 above, C relies upon s.43B(1)(b) and (d) (GoC para 109(m));
In relation to 0 above, C relies upon s.43B(1)(b) and (d) (GoC para 109(n));
In relation to 0 above (the Grievance), C relies upon s.43B(1)(b), (c), (d) and/or (f) (GoC para 110, F&BPs para 84);
In relation to 0 above (the Further Information), C relies upon s.43B(1)(b), (c), (d) and/or (f) (GoC para 112, F&BPs para 86);
In relation to 0 above (the January Representations), C relies upon s.43B(1)(b), (c), (d) and/or (f) (GoC para 113, F&BPs para 88);
In relation to 0 above (the Grievance Appeal), C relies upon s.43B(1)(b), (c), (d) and/or (f) (GoC para 114, F&BPs para 90);
In relation to 0 above (the Pre-Action Letter), C relies upon s.43B(1)(b), (c), (d) and/or (f) (GoC para 115, F&BPs para 92);
In relation to 0 above (the 16 June Representations), C relies upon s.43B(1)(b), (c), (d) and/or (f) (GoC para 116, F&BPs para 94); and
In relation to 4.7 above, C relies upon s.43B(1)(b), (d) and (f) (Second Claim).

If so, was any such belief reasonable?

If so, did C believe that the disclosure was made in the public interest?

If so, was any such belief reasonable?

Was the First Claim a disclosure made to C's employer or to a person other than his employer in accordance with a procedure authorised by his employer within the meaning of s.43C ERA?

514. We do not consider that the First Claim is capable of constituting a protected disclosure. First, it was not made to the 1st Respondent, or any other prescribed persons, and therefore we accept the Respondents' position that it cannot amount to a protected disclosure.

515. Further, the First Claim involves a reiteration of the multiple individual allegations which the Claimant has already contended constitute protected disclosures. Given that we have rejected that the majority of these are capable of constituting protected disclosures it would be inconsistent for us to now find that they are so capable. The Claimant already has the benefit of the limited findings we have made of protected disclosures without it being necessary for us to then conclude that the First Claim in effect involves further such protected disclosures being made in relation to the same subject matter to the extent to which the allegations of misogyny, homophobia and bullying are repeated.

516. Further, we consider that the First Claim was presented purely in the Claimant's own private interests and therefore the public interest element is not engaged.

The Tribunal's general observations on the protected disclosure claims

517. We consider that there is very significant repetition and duplication in the Claimant's alleged protected disclosures. It would have been beneficial if a more focused approach had been taken.

518. In relation to the majority of the purported protected disclosures we do not consider that the Claimant has disclosed information which in accordance with the guidance provided by the Court of Appeal in Kilraine requires the communication relied upon to have sufficient specific factual contents.

519. We also consider that the Claimant would appear to have retrospectively scrutinised his covert recordings to extract every element of such conversations which could potentially amount to protected disclosures. That is a very different situation from a concise and specific conversation having been recorded. In the circumstances it is often extremely difficult to extract the basis of each individual purported qualifying protected disclosure from many hours of largely unfocused and repetitious conversations.

520. We have also considered whether the Claimant's other contemporaneous actions are consistent with him holding the necessary reasonable beliefs. In large respects we do not consider this to be the case. For example, had the Claimant had the purported level of concern and upset regarding Mr Leone's use of the discriminatory language we do not consider that he would have repeatedly sought to engage in conversations regarding, for example, his perception of Ms Thesleff, when he would inevitably have anticipated that this would induce Mr Leone to use abusive and discriminatory language given his obvious antipathy towards her. This in effect represents the Claimant inducing Mr Leone to use such language and then complaining about his doing so. There was no contemporaneous requirement for him to repeatedly revisit these issues and as such we can only conclude that he was doing so knowingly with a view to inducing such a response from Mr Leone. This in our view is disingenuous and inconsistent with the Claimant having a genuine concern.

521. Further, we have considered whether the Claimant's other actions are consistent with him having serious concerns, potentially engaging the public interest, regarding matters pertaining to the Fund and the interests of its investors. For example, we take account of the guidance of the EAT in Cantor Fitzgerald where it was held that if a Claimant genuinely and conscientiously believed that there had been regulatory breaches it was his duty as an FCA approved professional to report this to Compliance.

522. Whilst we have found that the Claimant made 3 protected disclosures we nevertheless question whether all of his disclosures were made in good faith. We consider that this was not the case given his failure to formalise matters giving rise to his failure to contemporaneously raise the subject matter of his purported protected disclosures either with the Board or the FCA and his covert recording, and then failure to disclose the existence of such recordings, until after his grievance had been investigated and determined.

523. We also consider that there was a significant element of artificiality about the process pursuant to which the substantial list of purported protected disclosures was compiled. We are under the distinct impression that the Claimant, and potentially his legal advisers, undertook a retrospective trawl of the very substantial transcripts from the covert recordings, with a view to extracting all the material which could potentially constitute a protected disclosure or alternatively an act of harassment. Further, we consider that the majority of the concerns raised by the Claimant did not engage the public interest but rather represented matters of purely personal concern to his employment relationship and his personal/professional relationship with Mr Leone.

Health and Safety Disclosures (s.100(c) ERA)

Did C bring to R1's attention circumstances connected with his work which he believed were harmful or potentially harmful to health and safety? C relies upon each of the Alleged Protected Disclosures save for that set out at paragraph 108(b) of the Grounds of Complaint (para 2.2 above) ("the Alleged Health and Safety Disclosures") (GoC para 126 and F&BPs para 98).

If so, was C's belief reasonable?

If so, did C bring the above to R1's attention by reasonable means?

524. We do not consider that the Claimant brought to the 1st Respondent's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful, or potentially harmful, to health or safety. We reach this finding for the following reasons.

525. We have rejected the Claimant's assertion that there was a "toxic" working environment.

526. We have rejected the Claimant's multiple allegations, save for the list of bullying and harassment appended to the the Claimant's Letter before Action, of matters capable of endangering his health or safety. Whilst we have acknowledged that this constituted a protected disclosure we do not consider that a the Claimant's Letter before Action represented "reasonable means" to bring to his employer's attention matters which he considered to be harmful or potentially harmful to health or safety.

527. We consider it necessary to place the multiple communications in context. The Claimant made wide ranging and non-specific allegations primarily to Mr Leone, but to a lesser extent Mr Glasper and Mrs Elliott, regarding the working environment. However, his primary focus was on matters specific to him and his concerns were frequently linked to non-health and safety matters to include his bonus entitlement and working arrangements. There were also substantial occasions during which he sought to embroil Mr Leone in protracted retrospective analysis of matters which were historical and specifically those pertaining to Ms Thesleff. This is relevant as we consider it negates the requirement that the Claimant brought such matters to the 1st Respondent's attention by reasonable means.

528. We also consider that the purpose of the protection under section 100 pertains to matters which give rise to a direct and overt health and safety concerns. We consider that the assertions made by the Claimant were to a large extent peripheral or tangential to health and safety concerns. For example, his complaining about to Mr Leone's acknowledged use of inappropriate, discriminatory or abusive language, whilst unacceptable, does not give rise to health and safety issue.

529. It is also relevant that the Claimant has sought to utilise health and safety for multiple matters which self-evidently do not properly fall within this category. For example, he refers to the use of auto-delete as a health and safety issue when palpably on any reasonable interpretation it cannot be.

530. We also consider it relevant, as to the existence "reasonable means" that the Claimant was frequently pursuing his own personal financial interest in the matters he was raising. This is not consistent with his having a genuine concern regarding health and safety but rather him seeking to adopt a scattergun approach of including all issues under multiple statutory provisions rather than a narrowly focused contention that he was genuinely

concerned as to the existence of circumstances connected with his work which were harmful or potentially harmful to health and safety.

Dismissal Claims

What was the reason or principal reason for C's dismissal on 20 June 2023?

Insofar as relevant to his claims in respect of 'automatically unfair dismissal' and subject to his claims for discrimination set out below, C alleges that the reason or principal reason for C's dismissal was C having made one or more of the Alleged Protected Disclosures and/or C having made one or more of the Alleged Health and Safety Disclosures.

Rs allege that the reason or principal reason for C's dismissal was capability.

If the reason or principal reason for C's dismissal was C having made one or more of the Alleged Protected Disclosures (s.103A ERA) or Alleged Health and Safety Disclosures (s.100 ERA), his dismissal is automatically unfair.

531. We find that the Claimant was dismissed on the grounds of capability. We do not consider that any grounds exist to infer that his dismissal was for the reason or principal reason that he had made protected disclosures. We accept the 1st Respondent's explanation that his dismissal was solely on account of his protracted period of ill health. That constitutes a potentially fair reason for dismissal pursuant to S 98 of the ERA. The Claimant had been absent for over a year on account of ill health. There was no indication that he was likely to be in a position to return to work in the foreseeable future. Indeed the medical report from Prof Elliott, together with the Claimant's Letter before Action pursuant to which a substantial personal injury claim in the High Court was envisaged, made it clear that he was unlikely to be in a position to return to work at all in a hedge fund or at a comparable level of employment. We find that the decision to dismiss in these circumstances was within the range of reasonable responses open to the 1st Respondent.

532. We reject the assertion that those protected disclosures we have found substantiated, namely that Mr Leone used misogynistic and homophobic language and that the Claimant reasonably believed that he been subject to workplace endangering his health and safety, were the reasons, or indeed contributory factors, to the Board's decision to terminate his employment. We accept the evidence of the Respondents' witnesses who participated in that Board meeting that his termination was solely on the grounds of capability. Whilst there was some uncertainty regarding potentially alternative grounds of dismissal namely his actions i.e. conduct and redundancy we find that it was solely on the grounds of capability.

If the reason or principal reason for C's dismissal was capability, was his dismissal fair within the meaning of s.98(4) ERA? The Claimant relies on all relevant facts and circumstances including (i) that his dismissal was an act of detriment under s.47B ERA (see paragraph 17 onwards below); and (ii) that his dismissal was an act of unlawful discrimination (see para 30 onwards below); and (iii) further, without limitation:

533. We reject the Claimant's assertion that the 1st Respondent dismissed him as an act of detriment under S 47B of the ERA and/or that his dismissal was an act of discrimination.

The decision to dismiss being taken by, in part, Mr Leone despite C's grievance and his obvious lack of impartiality (GoC para 145(a)).

534. We accept the Respondents' witnesses evidence that Mr Leone was not involved in the decision. He would, of course have been aware of that process and attended the board meeting to ensure that it was quorate but in a non-participatory capacity in respect of the decision to terminate the Claimant's employment. Further, we consider it inevitable that had he been asked to opine he would have supported the decision to dismiss on the grounds of capability. In the circumstances there was no realistic alternative.

The failure properly to consider C's various representations (GoC para 145(b)).

535. We reject this assertion. It is not clear as to what representations the Claimant considers were material to the decision to terminate his employment. We have found that the Claimant did not put forward any representations regarding steps which could be taken, to include any reasonable adjustments, to facilitate his return to active employment. His medical evidence and solicitors' the Claimant's Letter before Action indicated that any such return to active employment was almost certainly not possible.

The reliance on reasons for dismissal that had not been foreshadowed and on which C had not been able to comment (GoC para 145(c)).

536. We consider that it was unfair that potentially alternative grounds for dismissal i.e. "the Claimant's "actions" and redundancy were included without particulars been provided. This is particularly the case in respect of his alleged "actions" contributing to a breakdown of the relationship of trust and confidence. The Respondents' witnesses were uncertain as to exactly what was being referred to and the extent to which this was a relevant issue.

537. We accept the Respondents' evidence that the Claimant's dismissal was on the sole ground of capability. Nevertheless as a matter of fairness, and to reflect the provisions of the ACAS Code, we find that his dismissal was unfair. The letter inviting him to a disciplinary hearing dated 5 June 2023 referred to such alternative grounds without providing specifics of his alleged "actions", and that he together with redundancy were then referred to as potential alternative grounds for dismissal in paragraph 3.13 of the minutes of the Board meeting dated 16 June 2013 and in the letter dated 20 June 2023 pursuant to which the Claimant's employment was terminated. Whilst we acknowledged that the ACAS Code is not applicable to capability dismissals we nevertheless consider that its principles should have been applied given the alternative ground for dismissal pertaining to the Claimant's alleged "actions". This would have involved the possibility of a conduct related dismissal.

538. Nevertheless, we do not consider that this would have made any difference to the outcome. We have accepted the Respondents' evidence that his dismissal was solely on the grounds of capability. In the circumstances we consider it appropriate to apply a 100% deduction under Polkey to the compensatory award on the basis that notwithstanding this unfairness the same outcome would inevitably have been reached at the same time.

539. The Claimant would, however, have an entitlement to a basic award subject to any deductions which we may consider to be appropriate pursuant to S 122 (2) of the ERA on the basis of it being just and equitable to do so as result of any conduct of the Claimant before his dismissal.

Rs pre-judging the outcome of the hearing (GoC para 145(d)).

540. We do not consider that the outcome of the dismissal hearing was pre-judged. Whilst the outcome may have been inevitable given the duration of the Claimant's ill-health

absence, and no indication being provided as to his potential return to work, it was not pre-judged.

541. However, we do consider that the email from Mr O'Flaherty to Mr Mazzotti and Mrs Elliott of 9 December 2022 was wholly inappropriate as he referred to the Claimant's "fabrications". That, however, would have carried greater relevance in the context of the Claimant's grievance rather than his dismissal. Further, the grievance was subject to a thorough and independent investigation by Freshfields.

The failure to offer any meaningful appeal (GoC para 145(e)).

542. We reject the Claimant's assertion in this respect. First, it is significant that the Claimant did not submit an appeal. Whilst we acknowledge that the Respondents' position would have been that any appeal would have involved a review by the Board which had reached the decision to dismiss we consider that there would have been no reasonable alternative option. Whilst in some circumstances it may have been possible for, for example, that some of the executives/non-executives had not participated in the dismissal hearing it was in this instance necessary for there to be a quorate Board given that the Claimant was not just been dismissed as an employee but removed as a statutory director.

543. We considered whether a potential option would have been the appointment of an independent HR/legal professional to carry out any such appeal. First, this would have been an entirely notional scenario given the absence of any appeal but we also consider that it would have involved substantial repetition given that the Claimant's substantive allegations pursuant to his grievance had already been investigated and determined by Freshfields.

Detriment Claims

Detriment on grounds of protected disclosures (s.47B ERA)

In relation to those claims which are *prima facie* out of time, are they part of a series of similar acts or failures the last of which occurred within the primary time limit?

544. We consider that the alleged detriments, had we found them to have been made subsequent to the first of the protected disclosures on 22 August 2022 would have formed part of a series of similar acts or failures and therefore would have been in time. Whilst not strictly necessary for us to opine we would have found that any acts or failures to act relied on prior to the first of the protected disclosures on 22 August 2022 would have been out of time on the basis that it would have been reasonably practicable for a complaint to have been presented within the applicable time period of the individual detriments, or series of interrelated detriments, relied upon.

If not:

Was it reasonably practicable for the complaint to be presented before the end of the three month period; and

If not, was the complaint presented within such further period as the tribunal considers reasonable?

Was C subjected to the following treatment ("the Alleged Detriments"):

545. In considering whether the Claimant suffered a detriment on account of the protected disclosures we have found he made we have applied the burden of proof. In accordance with S 48 (2) of the ERA we have considered whether the 1st Respondent has provided an admissible reason for the treatment which the Claimant contends constituted a detriment. Given the numerous individual allegations we do not set this out repeatedly but have applied this shifting burden of proof consistently to our discussions and determinations.

The treatment set at paras 30 to 32 and 34 to 77 GOC (pursued against R1 and R2).

546. Given the dates upon which we have found protected disclosures were made, with the earliest being on 22 August 2022, any alleged detriment which predates this cannot constitute a detriment in respect of which the protected disclosure was a material factor. It is therefore unnecessary for us to consider whether those incidents relied on as detriments prior to 22 August 2022 would have been capable of constituting detriments had we found that earlier protected disclosures were made.

Use of auto-delete

547. There is an element of circularity insofar as the Claimant is seeking to rely on the alleged inappropriate use of auto-delete as a protected disclosure but also a detriment. We have found that it did not constitute a protected disclosure. In any event Mr Leone's use of such applications had nothing to do with the protected disclosures we found to have been made.

Installation of safes in the office

548. We do not consider that this would have been capable of constituting a detriment given that it would have been for normal and reasonable business purposes. Mr Leone's decision to install a safe in the office had nothing to do with the Claimant's protected disclosures.

Mr Leone's alleged use of "plausible deniability"

549. We do not make a finding of fact as to whether on the balance of probabilities Mr Leone used such a phrase. It is not necessary for us to do so. Even if we had found that he had used such a phrase we consider no grounds to infer that it had anything to do with the Claimant's protected disclosures.

Repeatedly asking the Claimant as to whether he had discussed matters with third parties and harassing him about confidentiality relating to any such matters

550. We accept Mr Leone's evidence that legitimate business reasons existed for him to be cautious regarding third-party communications and confidentiality. That included the potential ramifications of his location being known by third parties where it could give rise to potential materiality for business and investment purposes. In any event we reject the Claimant's contention that his concerns were capable of constituting a detriment and in any event they had nothing to do with his protected disclosures.

Mr Leone hounding the Claimant when he was on holiday, creating an unnecessary sense of extreme urgency, and ensuring that he never had a fully relaxing break

551. Again there is circularity. We have already rejected the Claimant's contention that he was subject to excessive contact and pressure whilst on holiday given his seniority and the

nature of his role. In any event his perception of Mr Leone's conduct in this respect was not in any way attributable to any protected disclosures. There is no suggestion that Mr Leone's approach regarding holidays in any way changed subsequent to such protected disclosures being made.

Allegation that Mr Leone guilt-tripped the Claimant and others in DLP for taking breaks or leaving their desks

552. We consider that this represents a purely subjective perception of the Claimant. Further, we note that evidence was given that the Claimant would on occasions attend work late or arrive and then go to the gym during trading hours. We do not consider that any criticism by Mr Leone of such absences from the office would have constituted a detriment and in any event not one attributable to any protected disclosure.

The "severed horse's head" allegation

553. We accept Mr Leone's evidence that this represented a reference to the Godfather. We consider that this is an example of the Claimant adopting a wholly unrealistic interpretation of conversations with Mr Leone pursuant to which he attributed references to individuals, movies, previous events, colloquial phrases such as "throw him in the river" as being literal when there was no sensible basis for doing so. Further, any such communication is not dated and even if it were shown to have taken place after the first of the protected disclosures we do not consider it would have been capable of constituting a detriment to the Claimant and nor was it attributable to his protected disclosures.

Mr Leone repeatedly claiming that other investors and their employees were in cahoots with Ms Thesleff

554. There is no basis for the Claimant considering that any such comments constituted a detriment to him.

Mr Leone making allegations that Mr Mazzioti's political aspirations meant that he was not there to help Mr Leone manage the situation with Ms Thesleff

555. There is no basis for the Claimant considering that any such comments constituted a detriment to him.

In the 2 years prior to the termination of the Claimant's employment Mr Leone claiming to have told external investors and other stakeholders in the financial community that the Claimant has "checked out", "does not believe in the mandate of the funds", "is burned out", and "wanted to go on sabbatical".

556. It is possible, but we consider it to be understandable, that Mr Leone may have discussed issues pertaining to the Claimant's financial performance with third parties given the very substantial losses attributable to him in 2021. This would have been perfectly normal. Further, such communications would largely have taken place prior to the first of the Claimant's protected disclosures and would not have constituted a detriment attributable to them.

Allegations relating to Mr Leone's alleged comments pertaining to Mr Glasper, Mrs Elliott, Ms Murray, Ms Edwards, and Ms Tidy

557. We do not consider that any basis exists for the Claimant contending that Mr Leone's comments regarding other employees constituted detriments to him. Further, we do not consider that Mr Leone's comments or communications, to the extent to which they took place, were in any way attributable to the Claimant's protected disclosures.

Mr Leone's alleged detrimental comments regarding team members

558. We do not consider, even if found to have been made, that such comments are capable of constituting a detriment to the Claimant and in any event these comments, to the extent to which they were made after the first of the protected disclosures, were not attributable to them.

Mr Leone referring to employees by their nationality

559. Mr Leone accepts that on occasions he would do so as he is poor with names and the 1st Respondent has a cosmopolitan workforce. We do not see how this could have been a detriment to the Claimant and in any event not something attributable to his protected disclosures. We take account of the guidance provided in Haritaki that a reference to a person by their race or nationality will not necessarily show discrimination given that we have to decide the meaning and effect of the words used.

Our general assessment of those matters alleged to be detriments which occurred prior to the first of the protected disclosures

560. Whilst it is not strictly necessary for us to opine on these matters given that a detriment cannot of been materially influenced by a protected disclosure where the alleged detriment preceded it we nevertheless considered the extent to which the multiple individual allegations would hypothetically have been capable of constituting detriments. To a large extent we consider that most of the matters relied on involved the Claimant having an unjustified sense of grievance and in accordance with the guidance in Shammon cannot therefore constitute a detriment.

561. Whilst there are some instances which would have been sufficient to constitute a detriment, for example, the Claimant's belief that he was not paid a full bonus to which he believes he was entitled, these would in our view have been normal business decisions and not materially influenced by any alleged protected disclosures had such been made at the material time, which on the basis of our findings above, they were not. We consider that Mr Leone had legitimate business reasons for the various financial decisions pertaining to the Claimant given the acknowledged significant deterioration in his performance during 2021.

Failing to provide a fair, rigorous and transparent investigation of and response to C's grievance; and/or not upholding or substantially upholding C's grievance and/or grievance appeal (pursued against all Rs) (GoC para 122(b) and 124(b)).

562. We reject the Claimant's assertion. It is self-evident that Freshfields spent very substantial time in their investigation, to include detailed interviews with relevant individuals. It was in our opinion reasonable and proportionate that some restrictions were placed on the subject matter and time period over which that investigation took place.

563. The fact that the Claimant's grievance was not upheld does not in our opinion constitute a detriment attributable to him having made protected disclosures. The

independent and documented findings of Freshfields which were in effect adopted without modification by the sub-committee of the Board appointed to consider the Claimant's grievance. That in itself runs counter to the Claimant's argument that the rejection of his grievance constituted a detriment as it would require him to demonstrate that Freshfields, as independent solicitors, were materially influenced by his having made protected disclosures.

564. We also consider its disingenuous of the Claimant to contend that there was a detriment in not upholding his grievance, as result of the inclusion of matters constituting protected disclosures, in circumstances where he had knowingly withheld relevant material i.e. the covert recordings and notes emanating therefrom, notwithstanding a specific request having been made by Freshfields to disclose all documents and other materials relevant to their investigation.

Failing to take seriously and/or reasonably act upon the concerns expressed by C as to the impact of R1's behaviour upon C and his ill-health (pursued against all Rs) (GoC para 122(c) and 124(b)).

565. We do not consider that evidence exists that the Claimant's ill-health was solely attributable to workplace issues. That is inconsistent with the contemporaneous medical reports and the Claimant's own report of his health issues to the medical professionals.

566. Further, we reject the Claimant's assertion that the 1st Respondent did not take his concerns seriously. On his raising a grievance they commissioned a leading law firm to carry out a detailed investigation. That represented the serious consideration of his grievance and the concerns he had expressed regarding the impact of Mr Leone's behaviour on him and his health. As such we do not consider it to be capable of constituting a detriment.

Stopping C's pay when he was on sick leave (pursued against all Rs) (GoC para 122(d) and124(b)).

567. As a matter of fact the Claimant was treated more favourably than his contractual entitlement in that he remained on his full basic salary until July 2022. As such there can have been no detriment.

Failing properly to consider the 16 June Representations (pursued against all Rs) (GoC para 122(e) and 124(b)).

568. The Respondents did consider the representations notwithstanding that they were served outside the stipulated time period. As such this cannot constitute a detriment.

Refusing and/or failing to pay C his 2020 performance bonus, and stigmatising C with regards to redeeming both his own personal investments from the fund and the amounts matured under the DLP's Incentive Scheme and not allowing him to redeem his own private investments from the fund. In particular (i) failing to recognise and/or denying C's entitlement to the remainder of his $3,000,000 2020 bonus of which only c.£1,300,000 has so far been redeemed; and (b) preventing C's DLP Incentive Scheme entitlement of $1,000,000 to be redeemed (pursued against all Rs) (GoC para 122(f)(a)-(b), 155(g) and 124(b)).

569. This predated the first of what we have found to be protected disclosures and therefore could not be a detriment materially influenced by them. In any event we consider that this

represented the 1st Respondent's normal and reasonable management of its remuneration to reflect the terms of its incentive arrangements.

570. In preventing the Claimant exercising an entitlement of $1 million pursuant to the DLP incentive scheme we do not consider that this constituted a detriment materially influenced by a protected disclosure. We accept Mr Leone's evidence that when the Claimant's employment was terminated his option lapsed in full with immediate effect. This was in accordance with the scheme rules.

Dismissing C (pursued against Rs 2 to 6 and, by reason of its vicarious liability, R1) (GoC para 121(g) and 124(c)).

571. We acknowledge that a lower evidential threshold exists for dismissal as a detriment against individual Respondents i.e. that they were materially influenced by a protected disclosure in the decision to dismiss as opposed to a corporate respondent where the protected disclosure needs to be the reason or principal reason for the dismissal. Notwithstanding this lower evidential threshold we reject the Claimant's assertion that his dismissal was influenced by his having made protected disclosures. As previously set out we accept that the Respondents had legitimate grounds to terminate the Claimant's employment given he had been absent on account of ill health for over a year and there was no realistic prospect of his return to active employment.

Exercising a purported discretion to send, and then sending, the Compulsory Transfer Notice (Second Claim, GoC, para 15).

572. We do not consider that this was a detriment. It represented the 1st Respondent acting in accordance with its Articles of Association and we accept the Respondents' evidence that it was a standard request in the circumstances and part of the tidying up process which also took place in relation to Mr Mion's shares

If so, did such treatment amount to a detriment within the meaning of s.47B ERA?

573. As above

If so, was the detrimental treatment on the ground that C had made a protected disclosure? In respect of each detriment, the Claimant relies on each and every disclosure that pre-dated that detriment (F&BPs para 96).

574. As above.

In relation to the period from 3 January 2019, are R1-R6 liable on the basis that (GoC para 125):

R2-R6 were workers of R1 acting in the course of their employment for the purposes of s.47B(1A)(a); and/or

575. Yes, but given our findings above no liability exists.

R2-R6 were agents of R1, in capacity as director, acting with R1's authority for the purposes of s.47B(1A)(b); and

576. Yes, but given our findings above no liability exists.

R1 is vicariously liable for the acts of R2-R6 pursuant to s.47B(1B)?

577. Yes, but given our findings above no liability exists.

In relation to the period prior to 3 January 2019, was R2 liable?

578. This is not applicable given findings above.

Was R2 a worker of the LLP acting in the course of his employment and/or an agent of the LLP acting with its authority, rendering R2 liable pursuant to s.47B(1A)(a) and/or s.47B(1A)(b)?

579. Yes, but given our findings above no liability exists.

Was the LLP vicariously liable for the acts of R2 pursuant to s.47B(1B)?

580. Yes, but given our findings above no liability exists.

If the LLP was vicariously liable for the acts of R2 in relation to the period prior to 3 January 2019, is R1 vicariously liable for those acts following the Asset Transfer Agreement of 3 January 2019 of by operation of regulation 4 of TUPE Regulations (GoC para 2D and GoR para 13A))?

581. Given that the earliest of the protected disclosures was 22 August 2022 there is no need for us to decide whether there was a relevant transfer of an undertaking or service provision change pursuant to TUPE.

Was there a business transfer pursuant to regulation 3(1)(a)?

Was there a service provision change pursuant to regulation 3(1)(b)(ii) and/or (iii)?

In the event that there was a TUPE transfer, did any liabilities relating to C transfer under regulation 4? As well as being a member of the LLP, was C an employee of the LLP pursuant to regulation 2(1)?

If R1 was not vicariously liable in relation to acts prior to 3 January 2019 by operation of TUPE, was C a worker of R1 at all material times prior to 3 January 2019 (GoC para 2G)?

582. Given that the earliest of the protected disclosures was 22 August 2022 there is no need for us to decide whether the Claimant would have fulfilled the definition of a “worker” of R1 prior to 3 January 2019.

<u>Detriment on grounds of health and safety disclosures (s.44(1)(c) ERA)</u>

Was C subjected to the Alleged Detriments?

583. Given that we have rejected the Claimant’s assertion that he made disclosures pursuant to S 100 (1) (c) of the ERA this claim fails.

If so, did such treatment amount to a detriment within the meaning of s.44 ERA?

If so, was any such detrimental treatment on the ground that C had made the Health and Safety Disclosures set out above? C contends that each of the Alleged Health and Safety Disclosures led to each detriment which followed it (F&BPs para 100).

These claims are pursued in relation to R1 only.

Discrimination Claims

Jurisdiction

Are the allegations of discrimination which are *prima facie* out of time brought within time on the basis that:

They constituted conduct extending over a period which continued (within the meaning of s.123(3)(a) EqA) until a date within the primary time limit; or

In the alternative, they were brought within a further period which the tribunal considers just and equitable within the meaning of s.123(1)(b) EqA?

584. Given that multiple claims are brought regarding different protected characteristics, different incidents and individuals we address the question of jurisdiction on account of time in respect of the specific allegations rather than on a generic basis. However, as a generic observation we do not consider that it would be just and equitable to extend time in circumstances where we have not found there to have been a continuing course of conduct. It is relevant that the incidents relied upon by the Claimant are diffuse and extend over a period of up to 10 years. The memories of the 1st Respondent's witnesses, and most specifically Mr Leone, would inevitably have deteriorated over this time and they would suffer considerable prejudice if the Tribunal were to extend time. Further, it is relevant that the Claimant is a high net worth individual and had access to, or was capable of obtaining access, to employment lawyers at any time during his employment.

585. We accept that time would not have run until the Claimant submitted his appeal against the grievance outcome on 27 March 2023. However, given that the overwhelming proportion of the individual allegations relate to 2022 or earlier this does not have any material bearing on the issue of jurisdiction.

Harassment related to race, religious belief, sex, conduct of a sexual nature, sexual orientation and/or disability (s.26 EqA)

The burden of proof

586. In our discussions we have applied the burden of proof and carefully considered whether there are grounds upon which an inference could be made of discriminatory treatment and if so whether the Respondents have satisfied the burden of rebutting such inferences. However, we are conscious to avoid this judgment becoming ridiculously unwieldy and repetitive and do not set out the application of the burden of proof in relation to each individual allegation, but for the avoidance of doubt, it has been considered and applied consistently throughout our deliberations and determinations.

587. In respect of the most of the allegations of harassment the primary matter we need to consider is not necessarily whether the alleged incidents took place, although we do consider that where it is disputed and material, but rather if they did whether they were capable of constituting harassment of the Claimant pursuant to S 26 of the EQA. That

involves considering both his subjective perception but also whether such was objectively reasonable in all of the circumstances.

Was C subjected to the following conduct related to race and/or religious belief?

At various times during C's employment, in particular between around 2018 and 2020 (GoC para 128(a)) with timings as further specified in C's F&BPs (at para 102):

Throughout Ms Edwards' employment from around 2016 until 2019, increasingly towards the end of her employment in or around September 2019 and thereafter, Mr Leone referred to Ms Edwards as "negretta" (little n*er lady); and**

In or around September 2019 Mr Leone accused Ms Edwards and her husband of running a "scheme" to leverage their ethnicity by making claims race discrimination against their respective employers (R1 for Ms Edwards) to obtain financial settlements.

588. We find that this did not constitute harassment of the Claimant on the grounds of race. Whilst we acknowledge that it is possible for an employee to suffer harassment on account of a protected characteristic they personally do not have this is not a case where that would be appropriate.

589. On the balance of probabilities we find it unlikely that Mr Leone would have used the derogatory and racist "negretta" regarding Ms Edwards. In effect this is the Claimant's assertion against Mr Leone's strong denial. We take account of the fact that Mr Leone has in other instances admitted using inappropriate and discriminatory language.

590. In any event even if we had found it likely that he had used such language we do not consider that it would have constituted the harassment of the Claimant. This would have been something he overheard as a bystander. He was not being asked to participate in discriminately conduct towards Ms Edwards and as such the situation is distinguishable, for example, from a manager asking a junior employee to commit an act of discrimination in the recruitment or dismissal of an employee of a different race. The same situation applies in relation to the allegation that Ms Edwards was involved in a scheme to pursue employment tribunal litigation with her husband.

591. In any event we do not consider that the Tribunal has jurisdiction to consider this claim. We find that it did not represent a continuing course of conduct but, if it took place, was a one-off act and therefore substantially out of time.

<u>Mr Leone's knowledge of the Claimant's Jewish ancestry</u>

592. We consider it necessary to first address the question as to whether Mr Leone had knowledge of the Claimant's Jewish ancestry prior to the initiation of the Tribunal proceedings. He denies having done so. We have carefully considered the respective evidence on this issue. We find on the balance of probabilities that he did not have such knowledge. We reach this finding for the following reasons.

593. We consider that had Mr Leone been aware of the Claimant's Jewish ancestry he would have sought to utilise it for the business advantage of the 1st Respondent. This would be consistent with the Claimant's evidence that a significant positive attraction giving rise to the recruitment of Ms Thesleff was her Jewish ancestry and book of contacts with high net

worth Jewish investors. If Mr Leone had perceived that the Claimant had similar contacts given a Jewish heritage he would have sought to utilise them for business advantage.

594. We also consider it significant that the Claimant's the Claimant's Letter before Action did not make reference to his suffering discrimination on account of his Jewish heritage. Given the level claims to have of detail contained in this letter that is a significant indication that he did not regard the alleged adverse treatment he suffered as being primarily attributable to his religion or race.

595. We have considered the various conversations the Claimant relies on pursuant to which he argues that Mr Leone would have been aware of his Jewish ancestry. Mr Leone and the Claimant had multiple wide-ranging conversations over many years on matters not related to the workplace. These included matters such as Greek philosophy and the inheritance principles pertaining to Jewish ethnicity. The fact that the Claimant highlights a limited number of such conversations, amongst innumerable conversations on a range of issues, is not in our view sufficient to give rise to Mr Leone having such knowledge. Further, none of these conversations directly go to the Claimant's Jewish heritage. It is also relevant that Mr Leone and the Claimant were brought up as a Roman Catholics in Italy. Given that they had a relationship for approximately 20 years we have no doubt that if the Claimant had identified as Jewish Mr Leone would have been aware. Their lives were substantially entwined both in the workplace and outside and it is difficult to envisage that such a situation would not have been apparent had the Claimant's Jewish identification been transparent. We find that it was not.

596. We therefore accept Mr Leone's evidence that he was not aware that the Claimant identified as Jewish until the initiation of the Tribunal proceedings.

597. We reject the Respondents' assertion that an arithmetical attribution of ancestry would be appropriate and on the basis of a single Jewish grandparent that the Claimant would be only 1/8th Jewish. We find that identification on the grounds of race and religion is a matter of self-identification rather than pursuant to a genetic percentage attribution.

598. Notwithstanding our finding above regarding Mr Leone not having knowledge of the Claimant's Jewish heritage we still need to reach findings on the individual allegations. It is, of course, possible that the Claimant may have suffered harassment on the grounds of religion or race notwithstanding Mr Leone not having knowledge of his Jewish identification.

At various times during C's employment, including on at least one occasion in or around January 2016 and on one occasion in or around April 2018, R2 said to C that he (C) was "a Rabbi" or said to C "Don't be Rabbi", apparently referring to the fact he thought C did not want to spend money (GoC para 128(b)).

599. We consider it probable that there were a few occasions when an interchangeable use of the term "Rabbi" between the Claimant and Mr Leone occurred. It is significant that the most recent occasion relied upon by the Claimant was in around April 2018. This would suggest that such usage was infrequent and is unlikely to have occurred subsequent to April 2018.

600. We accept that the use of Rabbi in a context of implying an unwillingness to spend money or tightness would be inherently anti-Semitic. However we do not consider that the language was directed at the Claimant in a way which would be capable of constituting

harassment of him given that it was occasionally used on an interchangeable basis between him and Mr Leone.

601. In any event we do not consider that this represented a continuing course of conduct. It was rather a series of isolated incidents. Had the Claimant taken genuine and serious exception to Mr Leone's use of Rabbi as a term of anti-Semitic abuse it would have been incumbent on him to raise a formal complaint and ultimately a grievance. He failed to do so.

At various times during C's employment, R2 regularly referred to certain individuals as "Jews, but those that matter", "Big Jews" or their connections with "Big Jews", or complained about "that corrupt big Jew like her", said that Ms Thesleff had "sucked off" the "right Jew" and joked that his name and nose made him sound/look Jewish, like the name of the Claimant (and in circumstances where R1 knew that C was of Jewish ancestry) (GoC para 128(c)). Such comments are said to have been made at the time of Ms Thesleff's hiring in around 2012-3, following the deterioration of R2's relationship with her, and after Ms Thesleff had left the business including specific instances on or around January or February 2022 (F&BPs para 102(c)(iv)).

602. We consider it necessary to place these allegations in context. The Fund had significant reliance on ultra-high net worth Jewish investors and its two original and most significant clients are Jewish.

603. In this context we consider that it was inevitable that Mr Leone would occasionally refer to Jews. We do not consider a reference to "Big Jews" to be inherently anti-Semitic. We accept that this would have been a reference to those Jews of ultra-high net worth who would be potentially attractive investors for the Fund.

604. As for context we refer to a conversation on 8 February 2022 when the Claimant said "he's a Ukrainian, Russian oligarch". The Claimant was thereby identifying someone by their nationality in the context of their being a potentially attractive ultra-high net worth investor.

605. We consider that there were occasions when Mr Leone used highly inappropriate language regarding Ms Thesleff. He accepts this. Nevertheless we consider that the Claimant has exaggerated the extent to which such language was used.

606. We have reviewed the transcripts and it is significant that the only reference to Jew or Jews within them is in a conversation between the Claimant and Mr Leone on 15 July 2021. This related to Mr Leone's remark that "like all Jews he has a tendency to save". This is not specifically referred to in the list of issues. However, during the hearing counsel for the Claimant argued that it involved a stereotypical anti-Semitic trope of Jews being miserly or tight. We reject this assertion. We consider that this was a reference by Mr Leone to Jews given the hardships they had endured during the 20th century having a tendency to be cautious with their money like his own father. We reject the assertion that this is inherently anti-Semitic given the context in which it was used and the reference to Mr Leone's own father. We accept Mr Leone's evidence that a tendency to save and be prudent with your finances is not derogatory but rather him asserting a positive attribute held by his own father based on his life experience.

607. We also consider that the majority of incidents relied on by the Claimant relate to the period of Ms Thesleff's recruitment in 2012/13 and her departure in 2016. The fact that he

repeatedly returned to the year circumstances of Ms Thesleff's employment and the breakdown in the relationship between her and Mr Leone in his recorded conversations with Mr Leone does not in our view bring these earlier matters in time when time would otherwise have expired. We do not consider that there was a continuing course of conduct and as such the Tribunal does not have jurisdiction to consider these complaints.

At various times during C's employment, R2 referred to C's girlfriend at the time and finance executive Andreea Constantinescu as C's "Romanian teddy bear" instead of using her real name, and continued to do so after the relationship came to an end (GoC para 128(d)). Such comments are said to have been made from 2013 and for example in or around August 2016, mid-2017, early 2020, and mid-2021 (F&BPs para 102(c)(v)).

608. We reject the contention that this constituted an act of harassment. Mr Leone acknowledges that he used such a description of the Claimant's then girlfriend on the grounds that when in his presence they were very affectionate and frequently cuddling. There is no evidence that the Claimant took contemporaneous offence to such comments.

609. The only arguable element of harassment would have been the reference to her nationality i.e. Romanian but we consider this to be consistent with Mr Leone's acknowledged habit of referring to people by their nationality. We do not consider that this in itself will be sufficient to constitute harassment and especially in a situation where the Claimant is not Romanian but rather taking what in effect is vicarious offence on behalf of his then girlfriend.

610. Given that the last instance alleged is mid-2021 we find that this allegation would in any event have been out of time.

R1 frequently referred to staff by their nationality, often deliberately incorrectly and in derogatory terms (such as "that Irish little piece of shit" or "that corrupt Brit") (GoC para 128(e)). Such comments are said to have been pervasive and repetitive, with particular examples in or around June 2018, July 2021, and January 2022 (F&BPs para 102(c)(vi)).

When C told R1 that Darko Matovski was not Bulgarian but came from Macedonia, R2 said that it was all the same (GoC para 128(f)). C says reference to "the Bulgarian" were made repeatedly after C having told R2 that Mr Matovski was not Bulgarian in 2015 and 2016 (F&BPs para 102(c)(vii)).

R2 claimed that no-one could accuse him of being racist towards Eastern European people because he supported causes in Eastern Europe (GoC para 128(g)). Such comments are said to have been made in or around June 2016, around the time of Mr Matovski's departure, in or around September 2019, and repeatedly before and after those times (F&BPs para 102(c)(viii).

611. We consider it appropriate to address the 3 individual issues above collectively as they in effect involve the same propensity of Mr Leone to refer to individuals by their nationality and on occasions in an abusive way. It is undoubtedly the case that Mr Leone would use abusive language regarding a range of individuals and would sometimes accompany such abuse by reference to their nationality. It is apparent that this was wide ranging and involved multiple individual nationalities so it was not specific to those of a particular religion, ethnicity, race or nationality.

612. Whilst inappropriate we do not consider that it would be capable of constituting harassment of the Claimant given that it was part of Mr Leone's mode of communication throughout their employment. There is no indication that his stance changed in recent years and it was only on the breakdown of their working relationship that the Claimant took issue with it.

613. We have to consider both the Claimant's subjective perception but also whether his sense of offence would be objectively reasonable. We find that it would not have been particularly in a context where he did not share the nationality of the individual to whom Mr Leone was referring.

614. Further we consider that the allegations are out of time and given that they involve different individuals, different nationalities and in different contexts do not represent a continuing course of conduct.

Was C subjected to the following conduct of a sexual nature?

At various times during C's employment including on 25 August 2021 R2 describing Ms Thesleff as a *"bitch"* or a *"whore"* or a *"prostitute"* or "*who sold herself"* for $4m (GoC para 129(a)). C relies upon comments repeatedly having been made from 2015-2016, until March 2022, with specific examples in or around July 2021, December 2021, January 2022 and February 2022 (F&BPs para 102(c)(ix)).

615. Mr Leone accepts that he used highly inappropriate misogynistic language regarding Ms Thesleff. What we need to consider is whether the Claimant suffered harassment pursuant to section 26 in overhearing such comments. We find that he did not.

616. It is significant that the majority of the issues pertaining to Ms Thesleff were in year or 2 following her departure in 2016. Whilst there are multiple instances of Mr Leone referring to Ms Thesleff, and what we have described as his preoccupation regarding her involvement in actions against him, in more recent times these were almost invariably led by the Claimant enticing him to rehash historical issues in the knowledge that he was recording their conversations. This is wholly inconsistent with the Claimant being genuinely harassed as he was inducing the very conversations to which he then claims to take offence. We consider this to be a disingenuous and self-serving.

617. Further we consider context important as it was not solely Mr Leone referring to Ms Thesleff in abusive terms. For example, in a conversation on 24 January 2022 (page 2336 in the bundle) the Claimant referred to her as "that bitch".

At various times during C's employment R2 referring to Ms Thesleff as cancer-inducing or cancer-causing, for example on 26 March 2016 describing her as *"the carcinogen"* and the *"cancer-causing partner"* (GoC para 129(b)). C relies upon comments having been made repeatedly until March 2022, with specific examples on or around March 2016 and March 2022 (F&BPs para 102(c)(x)).

618. We consider this to be wholly misconceived. It is not apparent as to the basis upon which any protected characteristic would apply on account of which the Claimant could have experienced harassment.

619. In any event the Claimant had on various occasions referred to Ms Thesleff as being "cancer-like spreading divide and conquer way within the firm" and otherwise. It is wholly

unrealistic in that context for him to then claim that he suffered subjective harassment on account of overhearing Mr Leone's acknowledged references to her as being a cancer or carcinogenic.

620. In any event we do not consider that a continuing course of conduct existed and the claim would be out of time.

At various times during C's employment R2 saying that Ms Thesleff had *"sucked the right cocks"* to have *"credits"* vis a vis other individuals (GoC para 129(c)). C relies upon comments having been made repeatedly until March 2022 with specific examples in or around July 2016, July 2019, July 2021 and January 2022 (F&BPs para 102(c)(xi)).

At various times during C's employment R2 saying that Ms Thesleff had *"sucked off"* the *"right Jew"* (GoC para 129(d)). C relies upon comments having been made repeatedly from approximately 2017 onwards with two examples on or around July 2021 and January 2022 (F&BPs para 102(c)(xii)).

621. We reject the Claimant's contention that he has suffered harassment in relation to the above comments. We address them together as they largely cover the same ground. We do not consider it apparent as to the protected characteristic on account of which he experienced harassment.

622. We perceive that the Claimant, who himself had used inappropriate language regarding Ms Thesleff, trawled through all of Mr Leone's communications with a view to extracting material which is potentially detrimental to him and then contends that he suffered harassment on account of overhearing such communications. The chronology is inconsistent with this. As we have already observed the Claimant on occasions induced Mr Leone to make such comments and then claims to take exception to them.

623. We do not consider that any subjective offence that the Claimant may have suffered was objectively capable of constituting harassment given the context in which the communications took place, his own involvement in those conversations and his failure to take any contemporaneous action. It would have been open to him to ask Mr Leone to desist and had he refused to put his concerns in writing and if necessary inform the Board.

At various times during C's employment in particular between around 2018 and 2020 R2 frequently asking inappropriate questions of C about who was sleeping with whom in the office (GoC para 129(e)(i))). C relies upon comments having been made from around June 2016 and in particular in or around May 2017, November 2018 and September 2019 (F&BPs para 102(c)(xiii)).

At various times during C's employment in particular between around 2018 and 2020 R2 falsely accusing C of sleeping with Aisha Edwards (Assistant) repeatedly despite C's clarification that this was not the case (GoC para 129(e)(ii)). C relies upon comments having been made from around June 2016 and in particular in or around May 2017, November 2018 and September 2019 (F&BPs para 102(c)(xiii)).

624. We address the above issues together as they effectively cover the same or similar ground. We consider that these claims are out of time and there was no continuing course of conduct. In any event we do not consider that they would in themselves be capable of constituting harassment of the Claimant on account of sex. We accept Mr Leone's evidence that from a business perspective there would on occasions be legitimate grounds to question

an employee, to include the Claimant, as to whether they were in a relationship with another employee.

At various times during C's employment R2 making comments about the penis sizes of individuals within and outside the firm; recounted things which Ms Thesleff had allegedly said about an ex-team member's penis size; and made comments with regards to individuals he believed were sexually proficient (GoC para 129(f)). C relies upon comments having been made following 2018 or 2019 and again in around 2021, and in relation to R5 comments in approximately 2015, 2020 and 2021 (F&BPs para 102(c)(xiv)).

625. We accept Mr Leone's evidence that he may have referred to individuals in this way but in a context of using a phrase such as "big swinging dick" to denote an individual's business success and prowess. We do not consider that this involved reference to actual penis sizes but a colloquialism used to connote business acumen. Further, we consider that this would have been out of time and not a continuing course of conduct.

On or around 8 December 2021 R2 referring to a female colleague of Mr Glasper as *"that *sshole companion"* of Mr Glasper who does nothing and *"the fat one"* (GoC para 129(g)).

On or around 15 July 2021 R2 calling Ms Jessica Murray in compliance *"that little insignificant bitch"* (GoC para 129(h)).

In or around 2016, R2 referring to ex-employee Liz Tidy as a *"piece of shit"* for allegedly hiding she was pregnant when interviewing with DLP (GoC para 129(i)). C relies upon comments in or around January, February and March 2016 (F&BPs para 102(c)(xvii)).

626. We address the above 3 allegations together as they effectively involve the same contention that the Claimant suffered harassment on account of sex, or that of the subjects of the alleged comments. We reject this assertion. It is not necessary for us to make findings of fact as to precisely what language was used by Mr Leone. It is sufficient to record his own acknowledgement that he frequently used abusive and discriminatory language regarding multiple individuals. For example, whilst he denies describing Ms Murray as "that little insignificant bitch" he accepts that he described her as a "bitch". That is wholly inappropriate and Mr Leone acknowledges such.

627. That is not however the issue we need to consider. The Claimant himself repeatedly used inappropriate language. For example, we have identified 6 occasions during his conversations with Mr Leone on which he used "arse hole". It is therefore wholly inconsistent of him to claim subjective offence on overhearing Mr Leone using such language regarding other employees. Further, had he genuinely experienced the level of subjective offence which he now claims to have experienced it would have been incumbent on him, as a director and senior employee of the 1st Respondent, to raise his concerns formally with Mr Leone and if necessary the Board. He failed to do so.

628. Further, we do not consider that these matters are in time. Whilst there may have been some level of repetition of such comments more recently they were individual incidents of inappropriate language and time ran from the allegation in question. It is not extended by a continuing course of conduct given that they involve different individuals, different occasions and different terminology.

At various times during C's employment R2 describing his wife as *"piece of shit"*, *"*sshole"*, *"idiot"*, *"dumb*ss", "bitch"* or *"whore"* (GoC para 129(j)). C relies upon such comments throughout his employment with examples of this conduct in or around July 2021 and January 2022 (F&BPs para 102(c)(xviii)).

629. We consider context is very important. These conversations took place outside the workplace with the expectation of privacy. They were never intended for public consumption. Mr Leone acknowledges that his language, particularly concerning his wife, was wholly inappropriate and something he deeply regrets. The Claimant himself, on occasion, used inappropriate language and referred to individuals as a "piece of shit". He did not contemporaneously take issue with Mr Leone's language.

630. The Claimant would have been aware as to the impact on Mr Leone of including this allegation in the tribunal proceedings. For him then to claim that he suffered harassment on account of the protected characteristic of sex as result of overhearing such remarks is in our view wholly disingenuous as there is no evidence of him experiencing subjective offence and nor that it would be objectively reasonable given the context in which the conversation took place.

631. Further, we consider that the claim is out of time as it did not represent a continuing course of conduct but rather an isolated conversation.

R2 referring to Mr Glasper's wife as *"crazy"* and *"mental"* (GoC para 129(k)). C relies upon such comments in 2021, in particular in or around January 2021 (F&BPs para 102(c)(xix)).

632. We consider that this is out of time. Once again we consider that it is consistent with the Claimant extracting multiple instances of what are clearly inappropriate comments. Whether the exact verbiage is accepted or not is to a certain extent beside the point given that we do not accept that the Claimant could objectively have suffered the level of offence which would be required for him to succeed on a S 26 harassment claim.

<u>Was C subjected to the following conduct related to sexual orientation?</u>

At various times during C's employment, including but not limited to 25 August 2021, R2 described Prof. Alessio Lanna as the *"f*ggot scientist"* who *"comes from Frosinone",* a town in Italy which Mr Leone picked for no reason other than it rhymes with *"Frocione" ("big f*ggot")* (GoC para 130(a)). C relies upon such comments having been made repeatedly including in or around July 2020, January 2021, February 2021, March 2021 and August 2021 (F&BPspara 102(c)(xx)).

R2 called an acquaintance of C, Mr Christian Angermayer "that big f*ggot friend of yours" (GoC para 130(b)). C relies upon comments being made repeatedly including in June and July 2021 (F&BPs para 102(c)(xxi)).

From 2016 onwards, R2 called the DLP ex-investment professional Stefan Stupar "gay" (GoC para 130(c)) (F&BPs para 102(c)(xxii)).

In meeting in approximately January 2021, March 2021, mid-2021 and September 2021, R2 said Mr Angermayer was connected to other "big f*ggots" including Peter Thiel, part of the "big f*ggot mafia" (GoC para 130(d)) (F&BPs para 102(c)(xxiii)).

Repeatedly from around 2018 and in 2020, R2 said that he worried about his son being gay, because of his voice and some of his gestures (GoC para 130(e)) (F&BPs para 102(c)(xxiv)).

In approximately January 2021, March 2021, mid-2021 and September 2021, R2 repeatedly asked C if he "liked to take it up his *ss" or had homosexual relationships (GoC para 130(f)) (F&BPs para 102(c)(xxv)).

In approximately January 2021, March 2021, mid-2021 and September 2021, R2 said that no-one could accuse him of homophobia no matter what he said because he claimed he had "f*ggot connections too" (GoC para 130(g)) (F&BPs para 102(c)(xxvi)).

633. We reject the Claimant's contention that he suffered harassment on account of the protected characteristic of sexual orientation. The Claimant does not himself contend that he is gay. We acknowledge that that does not preclude him experiencing harassment on account of the characteristic. Nevertheless it is a relevant factor in assessing his likely subjective level of offence regarding the purported comments made by Mr Leone.

634. There is a dispute in the evidence as to exactly what was said by Mr Leone about specified individuals. It is, however, acknowledged that Mr Leone used the wholly unacceptable and abusive term of "faggot" when talking generically about factors which may make someone vulnerable to manipulation or bribery. That indicates a propensity to use such homophobic language.

635. We consider that the Claimant has been disingenuous in seeking to extract every possible communication by Mr Leone which could be construed as homophobic. The Claimant himself makes inappropriate references to sexuality and we refer to him using the term "queer scientist" in the transcript from the call with Mr Leone on 25 August 2021.

636. We also consider it inappropriate for the Claimant to adduce evidence of Mr Leone's alleged concerns regarding his son's sexuality. That was clearly not a work-related conversation. We consider that its use, and the comment is in any event denied by Mr Leone, was for the sole purpose of creating maximum embarrassment to Mr Leone and his family.

637. Whilst it is not necessary for us to scrutinise the specific evidence given our overarching findings set out there are certain matters upon which we did not hear any evidence for example the Claimant's contention that Mr Leone repeatedly asked him if he "liked to take it up his ass" or had homosexual relationships. Given the seriousness of the allegation that is a surprising omission.

638. Further we consider all of the allegations regarding alleged homophobia are out of time given that the last alleged incident relied on was September 2021.

<u>Was C subjected to the following conduct related to disability?</u>

In or around mid-2021, July 2021, August 2021 and December 2021 and in other conversations, R2 repeatedly calling C a "peasant" or "bum" or similar and repeatedly suggesting that C was broken (GoC para 131(a)) (F&BPs para 102(c)(xxvii)).

639. We have found that the Claimant fulfilled the definition of disability from 9 May 2022 and that the 1st Respondent had knowledge of it from this time. It would therefore not be possible for any conduct prior to this date to constitute harassment related to disability. The Claimant has not provided any explanation as to why he contends Mr Leone's pejorative comments regarding his appearance were linked to his disability, as opposed to Mr Leone's evidence, which we have accepted, that he was simply seeking to maintain appropriate appearance and attire in a professional setting. In doing so we do not consider that this was on account of disability or any other protected characteristic. Mr Leone's actions, whilst he used on occasions abusive, pejorative or appropriate language, are not such that they could objectively be considered as sufficient to constitute harassment on account of a specified protected characteristic. We do, however, acknowledge that the Claimant did experience subjective upset regarding such comments as they are a prominent and repeated feature of his claim.

640. We also consider that to these alleged comments, and we accept that the broad nature of them is reflected in the evidence, are significantly out of time given that the last incident relied on was a December 2021.

In or around January 2020, December 2021 and January 2022, R2 saying that C was "burnt out" and would have to "runaway" (GoC para 131(b)) (F&BPs para 102(c)(xxviii)).

In or around July and August 2021, and repeatedly on other occasions, R2 saying that C was "burnt out", that he had made serious mistakes and that he was not the same day-to-day (GoC para 131(c)) (F&BPs para 102(c)(i)).

641. It is acknowledged that Mr Leone did make comments to the effect that the Claimant's physical and mental well-being had deteriorated and thereby were impacting on his performance. However, this should be seen in context of the Claimant repeatedly referring to his own physical and mental health and its deterioration. For example, in May 2022 the Claimant informed Mr Glasper in an email that he felt completely "burnt out". It is therefore difficult to understand how the Claimant contends that he suffered harassment on account of disability when Mr Leone was echoing the Claimant's own perception of his deteriorating physical and mental health well-being.

642. We do not consider that this would have been out of time had we found in the Claimant's favour given it represented a continuing course of conduct up until the termination of his employment.

R2 rubbishing any concerns that C repeatedly presented to him about the working environment, which C often defined as "toxic" and "sick" and their impact on performance as "excuses"; R2 getting upset when C shared health concerns (GoC para 131(d)). C relies upon such comments having been made from June 2016 onwards and regularly thereafter in particular in or around February 2021, June 2021, January 2022 and February 2022 (F&BPs para 102(c)(ii)).

643. We consider that this allegation is repetitious in that it is already been referred to as a protected disclosure. We have found that the working environment was not "toxic" as the Claimant alleges. In effect what he is contending is that working with Mr Leone was a source of stress to him.

644. The Claimant seeks to rely on his concerns having been raised from June 2016 onwards. However, even on his own case he did not fulfil the definition of having a disability

until May 2021, so it would not be possible for him to have suffered harassment on account of the protected characteristic of disability earlier than this, even had we considered that it would have been capable of so doing. Given the need to consider both the subjective perception of the Claimant but also whether it would be objectively reasonable we reject such a contention.

645. We would, however, have considered this to have been in time insofar as this particular contention involved a continuing course of conduct and not a separate and discrete one-off incident.

If so, was this conduct unwanted?

If so, was this conduct:

In relation to paragraph 31 above, related to race and/or religious belief?

In relation to paragraph 32 above, related to sex (s.26(1)(a)) and/or of a sexual nature (s.26(2)(a)?

In relation to paragraph 33 above, related to sexual orientation?

In relation to paragraph 34 above, related to disability?

If so, did this conduct have the purpose or effect of violating C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him (s.26(3) EqA)?

646. We have addressed these points in respect of the individual allegations above. It is not, therefore, necessary for us to repeat our findings. However, as a generic observation we refer to the observation in the Betsi Cadwaladr University case that mere offence is not sufficient to amount to a violation of dignity and that it requires a serious and marked effect or intended effect. We do not consider that the Claimant has met this threshold.

647. Further, we consider that the majority of the matters upon which the Claimant relies are ones in respect of which the effects on him would have been trivial or transitory, particularly in circumstances where it should have been clear that no offence to him was intended by Mr Leone. We take account of the guidance of Mr Justice Underhill in Richmond Pharmacology that it is important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.

Is R1 liable under s.109 EqA on the basis that R1 acted:

In the course of his employment with R1; and/or

As an agent of R1 with the authority of R1?

Is R2 liable under s.110 EqA?

648. As we have rejected all of the Claimant's allegations of S 26 harassment on account of the various protected characteristics relied on it is not straightly necessary for us to answer this question. However, as a general comment we consider that the majority of the allegations, had we upheld them, and had they been in time, would have been in the course of employment and ones for which the 1st Respondent would therefore have been

vicariously liable. There are, however, some exceptions to this and we specifically refer to the allegations pertaining to Mr Leone's alleged discriminatory comments regarding his wife and son which we consider were outside the course of employment.

Direct Race Discrimination (s.13 EqA)

Was C subjected to the Alleged Detriments and dismissed?

If so, did this amount to less favourable treatment?

If so, was any such less favourable treatment because of C's actual or perceived race? C relies upon being of, or having been perceived to be of, Jewish ethnic origin, and relies upon a hypothetical comparator.

649. Given our findings above, and the more onerous test to establish direct discrimination as opposed to S 26 harassment, the claim of direct race discrimination fails and is dismissed. We do not consider that any grounds exist to infer that the Claimant was treated less favourably on account of his race or religion. In fact we consider that the evidence is that he was consistently treated more favourably by Mr Leone than other employees or a hypothetical employee, in otherwise identical circumstances. We accept Mr Leone's evidence that he was being advised by colleagues and investors that he should dispense with the Claimant's services earlier than he did, given the very significant and serious deterioration in his financial performance in 2021, but he gave him the benefit of the doubt when many would not have. That is inconsistent with the allegation that the Claimant was treated less favourably on account of his race, religion or any other protected characteristic.

Is R1 liable under s.109 EqA on the basis that R1 acted:

In the course of his employment with R1; and/or As an agent of R1 with the authority of R1?

Is R2 liable under s.110 EqA?

Disability (s.6 EqA)

It is admitted by Rs that from 22 February 2023 onwards and at least until the time of his dismissal in June 2023 C was a disabled person for the purposes of the EA 2010. It is admitted that from at least 2 May 2023 R1 had knowledge that C had a disability (though not of the specifics of the disability).

Prior to 22 February 2023, did C suffer from a mental impairment at the relevant time(s)? C relies upon having suffered from the following since 2021 (paras 105-106 GoC and para 4 F&BPs):

Depression;

Anxiety;

Adjustment disorder; and/or
Post-traumatic stress.

If so, did any such impairment have a substantial and long-term adverse effect on C's ability to carry out normal day-to-day activities?

650. We consider that the Claimant fulfilled the S6 EQA definition of disability from 9 May 2022. We reach this decision for the following reasons.

651. We consider that the medical evidence and chronology are consistent with a progressive deterioration in the Claimant's mental health. The Claimant had 30 sessions with Mr Dravers, a psychoanalyst from April 2021 until the end of that year. However, we do not consider that this in itself was sufficient for him to have fulfilled the definition of disability. We need to take account of whether his condition was having a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities. We do not consider that this would have been fulfilled during 2021. We nevertheless take account of the Memorandum of Agreement/Disagreement between Prof Greenberg and Dr Shields dated 2 April 2025 when they say that the Claimant's psychiatric symptoms were highly unlikely to have suddenly emerged and that there had been a period of gradually increasing symptoms prior to April 2021.

652. We take account of the Preventicum report dated 28 February 2022 which records the Claimant being under tremendous pressure and at risk of significant burnout.

653. We consider that as at the date of Dr Aziz's letter dated 9 May 2022 the Claimant fulfilled the definition of disability. She referred to a video consultation that day when the reported feeling extremely overwhelmed and stressed. She referred to him displaying signs of acute anxiety which is affecting his sleep which is disturbed and also his eating pattern. He is unable to function on a day-to-day basis because of the anxiety which is related to work issues. We consider that this involved a substantial adverse effect on normal day-to-day activities. Given that the Claimant's symptoms had not appeared suddenly and were likely to have already existed for at least 12 months we consider that he fulfilled the definition of disability as at this date.

The Respondents' knowledge of the Claimant's disability

654. We consider that the Respondents had knowledge as at the date of the Claimant fulfilling the definition of disability on 9 May 2022. We take account of the fact that the Claimant attended a meeting on 1 March 2022 in which he referred to taking some time out due to health and family reasons. We consider that it would have been, or at least it should have been, apparent to the Respondents by this stage that the Claimant had significant health issues and that they were likely to be pertaining to stress and other mental health conditions. Further, we take account of the fact that the Claimant had a conversation with Mr Glasper on 12 April 2022 during which he discussed his health to include stress in the context of taking a 12 month sabbatical. The fact that the Claimant was raising and discussing the possibility of a long-term sabbatical would have given the Respondents knowledge that he had serious health issues and that these pertained to his mental health.

Direct Disability Discrimination (s.13 EqA)

Was C's dismissal because of, or significantly influenced by, C being disabled or being perceived to be disabled by Rs?

655. The claim of direct disability discrimination fails. The Claimant was not dismissed because he had disability but rather because of his long term absence from work. He was not treated less favourably than a non-disabled employee with a comparable period of ill-health absence, and non-foreseeability of a return to active employment, would have been.

Is R1 liable under s.109 EqA on the basis that R2-6 acted:

In the course of their employment with R1; and/or

As agents of R1 with the authority of R1?

Are R2-6 liable under s.110 EqA?

Discrimination arising from disability (s.15 EqA)

Rs admit that from 22 February 2023 onwards and at least until the time of his dismissal in June 2023 C was a disabled person for the purposes of the EA 2010. It is admitted that from at least 2 May 2023 R1 had knowledge that C had a disability (though not of the specifics of the disability).

If C was a disabled person before 22 February 2023 as above:

Did Rs know that C had this disability?

If not, could Rs reasonably have been expected to know?

If so, did the following arise in consequence of C's disability (GoC para 138(b)):

His long-term absence (admitted at least in part by Rs at GoR para 183(a));

656. The Claimant's absence from work from 9 May 2022 was on account of his disability.

The effect (and/or the effect as perceived by R1) of his disability on his ability to function and/or perform at; and/or

657. Given our finding that the Claimant fulfilled the definition of the disability on 9 May 2022, and that he was not in active employment subsequent to this date, this in effect represents the something arising as being his absence from work. At no point during his absence did the Claimant propose any adjustments to working arrangements which would have facilitated his return to active employment. We do not consider that the Claimant was subject to any unfavourable treatment on account of his disability given that whilst his absence was on account of disability any perception of the 1st Respondent as to his ability to perform at work was not unfavourable treatment arising from that disability

The fact (or the perception of R1) that he would need to take further time off work as a result of his disability?

658. We do not understand what unfavourable treatment the Claimant relies on given that his employment continued from 9 May 2022 until the termination of his employment on 20 June 2023 notwithstanding that he was unable to perform any of his duties during this period and no indication was provided that he would be in a position to do so.

If so, to what extent was the decision to dismiss C because of, or significantly influenced by, one of these matters arising (noting the admissions made by Rs at GoR/183(a) and (b))?

659. The 1st Respondent's decision to terminate the Claimant's employment was because of his long-term absence on account of his disability and there being no foreseeable prospect of his return to active employment.

If so, can Rs show that the decision to dismiss C was a proportionate means of achieving a legitimate aim? Rs rely upon (GoR para 183(c):

660. We consider that the 1st Respondent's decision to terminate the Claimant's employment was a proportionate means of achieving a legitimate aim. The Claimant had been absent from work for approximately 13 months and as a director and senior employee it was a necessary and reasonable step from a business perspective for the continuing uncertainty regarding his position to be resolved. As indicated by the the Claimant's Letter before Action there was no indication of any prospect of the Claimant being in a position to return to active employment and indeed the position taken was that he would almost certainly not be able to at any stage.

The legitimate aim of ensuring senior employees who were also members of the Board of Directors were capable of discharging their employment and fiduciary duties for the benefit of R2, either at all or within a reasonable and realistic timeframe; and

Dismissal being proportionate as it was treated very much as a *"last resort"* after a lengthy period of absence (much longer than the minimum period after which summary dismissal was permitted under C's employment contract) and R1 obtained and gave careful consideration to medical evidence and consulted fully with C (as further particularised at GoR para 183 subparagraphs (i)-(iv)).

661. As above we consider these to be legitimate and proportionate aims.

Is R1 liable under s.109 EqA on the basis that R2-6 acted:

In the course of their employment with R1; and/or

As agents of R1 with the authority of R1?

Are R2-6 liable under s.110 EqA?

662. Given our findings above this is not applicable.

<u>Failure to make reasonable adjustments (ss.20-21 EqA 2010)</u>

If C was a disabled person at the relevant time as above:

When did Rs first know that C had this disability?

When could Rs reasonably have been expected to know?

Did R1 apply the following provisions, criteria or practices ("PCPs"):

663. As a general observation we consider that the list of PCPs is repetitious and poorly formulated. Whilst we will address the individual PCPs we will do so relatively briefly given their repetition and duplication.

664. Whilst we have made observations regarding the purported PCPs in many respects it is unnecessary for us to do so given that they would only be potentially applicable subsequent to 9 May 2022 when we have found the Claimant fulfilled the definition of disability. Given that he was not in active employment subsequent to this date most of the PCPs would therefore not, even if they should be regarded as such, have resulted in a situation where any adjustment would have been effective to enable him to work.

665. Further, we do not consider that the majority of the purported PCPs would have been such that because of his disability he was placed at a disadvantage compared with a non-disabled employee.

Not formally investigating or otherwise taking seriously complaints and concerns raised by employees and/or senior employees (GoC para 141(a)) (further detail of alleged complaints set out at F&BPs paras 104-108).

666. We do not consider that any such PCP existed. The only occasion upon which we consider that the Claimant raised a formal complaint was his grievance dated 22 August 2022. We consider that this was taken seriously given that Freshfields were appointed and a thorough investigation was undertaken. We do not consider that the Claimant's innumerable expressions of concern, if they should be so regarded, during his covertly recorded conversations with Mr Leone are capable of being characterised as complaints and nor were they concerns raised through an appropriate forum.

Allowing R1 to have management or supervision responsibilities including over C

at all; and/or

without his having undergone training in respect of management; employers' duties of care to employees; equal opportunities; and/or managing sickness (GoC para 141(b)).

667. We do not consider that Mr Leone being in effect the Claimant's direct line manager is capable of constituting a PCP. In any event given the nature of the business and the close relationship between Mr Leone and the Claimant, and given their respective leading roles and responsibilities, we do not consider that any adjustment could have been made even had we found that such a PCP existed.

Not requiring managers against whom complaints are made to be subject to a fair and impartial investigation and, insofar as appropriate following that investigation, disciplinary consequences and/or further training (GoC para 141(c)).

668. As above we consider that a fair and impartial investigation was undertaken of the Claimant's grievance.

Not imposing a requirement or recommendation that, when complaints were made against R2, he be subject to a fair and impartial investigation and, insofar as appropriate following that investigation, disciplinary consequences and/or further training (GoC para 141(d)).

669. As above.

Requiring that C should at all times be physically and mentally fit to do his job (GoC para 141(e)).

670. We do not consider that this is capable of constituting a PCP. Further, even if it had the Claimant has not explained what adjustment should have been made to enable him to perform his duties, given the very significant responsibilities inherent in his role both internally, but more significantly from the perspective of the Fund's investors.

Requiring that C must maintain a certain level of attendance at work in order not to be subject to the risk of sanctions (including, but not limited to, dismissal and/or the loss of bonus (GoC para 141(f))? C does not know what the alleged level of attendance would have been (if any) in order for him not to be subject to the risk of sanctions (F&BPs para 110).

671. We do not consider that any such PCP existed. The Claimant did not propose attending work on a part-time basis subsequent to being signed off as unfit for work on 9 May 2022.

If so, did the PCPs put C at a particular disadvantage compared to persons who were not disabled as follows (with C relying on each disadvantage, individually and collectively, in respect of each PCP):

C's poor psychiatric health meant he was less able to cope with continued management by R2 which led to further deterioration in his health (GoC para 142(a)).

672. Not applicable given that the Claimant was not in active employment, and therefore not in regular contact with Mr Leone, subsequent to 9 May 2022.

C's poor psychiatric health left him unable to participate properly or cope with a number of processes and led to further deterioration in his health (GoC para 142(b)). The processes relied upon are (i) the occupational health process (ii) the grievance process (iii) the grievance appeal process and (iv) the process to terminate his employment (F&BPs para 112).

673. We do not consider it clear how the Claimant contends that the PCPs relied on created the purported disadvantage above. Further, we consider that the evidence demonstrates that the Claimant was able to participate properly in the OH, grievance, grievance appeal and dismissal processes albeit we acknowledge that it took him longer to do so than would otherwise have been the case. He corresponded extensively in relation to all of these to include producing a 100 page document together with attachments as part of the grievance process. He also corresponded extensively over a protracted period with Mr Glasper regarding an appropriate OH professional.

C's poor psychiatric health meant that he was unable to maintain a certain level of work attendance (GoC para 142(c))?

674. It is acknowledged that the Claimant's absence from work from 9 May 2022 was on account of his disability. We do not understand how it is contended that this was as a result of the PCPs relied upon and what steps the Claimant contends the 1st Respondent should have made to enable him to return to active employment.

If so (Schedule 1 EqA, para 2):

Did Rs know that C was likely to be placed at this disadvantage?

If not, could Rs reasonably have been expected to know?

If so, did Rs take such steps as it was reasonable to have to take to avoid the disadvantage? C contends that the following adjustments would have been reasonable:

Taking steps against R2 to prevent him from harassing, bullying and/or otherwise acting unlawfully towards C (GoC para 143(a)).

675. We have rejected the Claimant's contention that he was subject to harassment, bullying and/or otherwise unlawful conduct from Mr Leone. Therefore we do not consider that any adjustment would have been applicable. Further, the 1st Respondent's other witnesses rejected the contention that Mr Leone's behaviour was characterised as harassment, bullying or otherwise unlawful and the Claimant failed to disclose the fact and content of his recordings during his employment.

676. In respect of this proposed adjustment, and a number of the others, we take account of the evidence of the 1st Respondent's witnesses as to their experience of Mr Leone's conduct and demeanour, and also the positive feedback provided to Ms Kingsnorth in her autumn 2022 review and report. This evidence is inconsistent with significant adjustments being required to ameliorate the adverse effect of Mr Leone's conduct on other employees. The 1st Respondent did, of course, only have the benefit of the evidence before it and not the transcripts. Whilst the Claimant's grievance dated 22 August 2022 included limited references to misogynistic comments by Mr Leone these represent a very small part of the totality of the claim now being pursued and we consider it wholly unrealistic and disingenuous of the Claimant to effectively require the 1st Respondent to have made adjustments in respect of behaviours of which it was unaware.

Taking steps to ensure that C be managed by someone other than R2 given R2's inappropriately abrupt, oppressive and brusque management style (GoC para 143(b)). Providing training to R2 to improve his inappropriate and oppressive management style (GoC para 143(c)).

677. We reject the Claimant's characterisation of the Mr Leone's conduct as being abrupt, oppressive and brusque. We consider that given the content, repetitious nature and duration of many of the recorded conversations that he was anything but abrupt and brusque when the Claimant was leading the conversation.

Taking adequate disciplinary action against R2 in respect of his harassing, bullying and/or otherwise acting unlawfully in relation to C and others (GoC para 143(d)).

678. Given our findings above not applicable.

Conducting training of R2 in aspects of discrimination, whistleblowing, bullying and harassment awareness (GoC para 143(e)).

679. We do not consider that a requirement for Mr Leone to undertake training on diversity would have become fully apparent until the Claimant disclosed the recordings and the resulting transcripts were reviewed. In any event as previously stated we consider that the Claimant would on occasions induce Mr Leone to embark on emotionally charged commentaries on historical matters and specifically those pertaining to Ms Thesleff.

Supervising and/or monitoring the working practices of R2 (GoC para 143(f)).

680. Given the extensive nature of the communications between the Claimant and Mr Leone, to include those in the evenings, weekends, in restaurants and at Mr Leone's London and Ibiza homes it is not apparent as to what adjustments the Claimant contends should have been made to supervise and monitor Mr Leone's working practices and nor how any such adjustments would have been effective to ameliorate any disadvantage suffered by the Claimant had we found any of the PCPs to exist.

Making reasonable enquiries of C's health and offering reasonable support to him (GoC para 143(g)).

681. We consider that there was a regular and extensive dialogue between the Claimant and Mr Leone, Mr Glasper and Mrs Elliott regarding his health. The Claimant was provided with access to top of the range private medical services to include annual appointments at a cost of £10,000 with Preventicum. Further, arrangements were being progressed for the Claimant to go on a long term sabbatical.

Seeking or obtaining or taking heed of advice or information as to how to avoid exposing C to unacceptable stress (GoC para 143(h).

682. We consider this to be far too generalised to constitute a reasonable adjustment. Further, as we understand his case the Claimant's position is that the "unacceptable stress" was solely attributable to the conduct of Mr Leone and we repeat our findings above.

Not condoning and/or turning a blind eye to the harassing, bullying and/or otherwise unlawful conduct of R2 (GoC para 143(i)).

683. As above.

Once C was demonstrating visible signs of stress and illness, preventing C from being subjected to further harassing, bullying and/or otherwise unlawful conduct of R2 (GoC para143(j)).

684. As above.

Warning R2 that his treatment of C was adversely affecting C's mental health (GoC para 143(k)).

685. As above. Further, we do not consider that the medical evidence is consistent with the Claimant's now contention that all of his mental health issues were solely attributable to his working environment, and more specifically the conduct of Mr Leone, as opposed to the pressures and stresses inherent in the role of a hedge fund analyst, particularly in circumstances where significant losses were being incurred.

Referring C for an occupational health assessment in a timely manner (GoC para 143(l)).

686. We consider that the referral of the Claimant to an occupational health assessment was undertaken in a timely manner. Mr Glasper commenced the process of referring the Claimant to OH on 23 May 2022 which was only 2 weeks after his long-term ill-health absence commenced. The subsequent delay in the referral was as a result of the Claimant's innumerable expressions of concern regarding the process and nominated OH providers.

Properly taking heed and acting upon previous instances in which members of the team may have been harassed, bullied and/or otherwise subject to unlawful treatment by R2 (GoC para 143(m)).

687. We do not consider that there have been any evidence to previous occasions on which team members had been harassed, bullied and/or otherwise subject to unlawful treatment by Mr Leone and therefore no such adjustment would have been appropriate to alleviate any disadvantage on account of the Claimant's disability.

Conducting a risk assessment in respect of the conditions under which C was expected to work (GoC para 143(n)).

Making a suitable and sufficient assessment of the risks to which employees were exposed in the course of their duties and/or implementing the same (GoC para 143(o)).

688. We consider that the reference to the 1st Respondent undertaking a risk assessment is wholly inapplicable. The only risk which we understand the Claimant was in effect raising was that inherent in his relationship with the Mr Leone and as we have already stated the Claimant did not take steps to reduce his contact with Mr Leone but rather engaged in long, repeated and unnecessary conversations and meetings with him outside working hours. It would have been open to him to have declined some of these meetings given that the contents of the transcripts show that very little involved active business issues but rather protracted revisiting of historical issues largely at the Claimant's instigation. It is not our understanding that the Claimant contends that a risk assessment should have been undertaken as to the role, responsibilities and inherent stresses of a hedge fund analyst and nor do we consider that it would have been a reasonable adjustment which would have been likely to have alleviated the disadvantage of any PCP had we found that such existed.

Conducting a fair and impartial (rather than selective and partial) investigation of C's grievance and/or grievance appeal and fair and accurate outcomes to C (GoC para 143(p)).

689. As above we consider that investigation of the Claimant's grievance and grievance appeal were fair.

Compiling or preparing or adopting and putting into practice any or any adequate policy and guidelines on whistleblowing, discrimination, bullying/harassment and how to prevent or deal with such incidents or events (GoC para 143(q)).

690. Given our findings above no such adjustment after the date of the Claimant fulfilling the definition of disability on 9 May 2022 would have had the effect of alleviating the disadvantage he suffered on account of any PCP.

Paying any or any adequate heed to published Health and Safety Executive guidelines on tackling or reducing stress at work or preventing workplace harassment and/or to guidance or information provided by the National Bullying Helpline (GoC para 143(r)).

691. As above.

Not dismissing C and/or not dismissing him at the time they did without having made reasonable adjustments (GoC para 143(s)).

692. We repeat our findings above regarding the timing and circumstances of the Claimant's dismissal.

Appointing or providing a human resources or personnel department or any suitable and adequately trained person who was primarily dedicated to employee relations and/or to whom C could complain or from whom C could seek advice and/or assistance/support in dealing with the treatment received by him from R2 and/or who could advise R1 on the need for and/or devise and put into practice appropriate policies and procedures to tackle and/or prevent and/or deal with such treatment in good time before the mental and physical health of C was adversely affected and/or seriously damaged (GoC para 143(t)).

693. We consider that the Respondent had appropriate personnel in place, to include Mrs Elliott and Mr Glasper, and that their roles and accessibility were appropriate in the context of the relatively small number of employees within the business. We do not consider that it would have been a reasonable adjustment to have appointed a dedicated HR professional with the specific responsibilities the Claimant has set out above.

Ensuring that C could be paid his bonus notwithstanding his absence from work (GoC para 143(u)).

694. We do not consider that paying the Claimant a bonus when he was not performing any active duties would have been a reasonable adjustment. We refer to Court of Appeal's guidance in O'Hanlon and the more general point that the purpose of an adjustment is not this in effect to treat a disabled employee as a recipient of charitable munificence.

General observations on the reasonable adjustment claims

695. We consider that a significant number of the proposed adjustments are wholly unrealistic. In many instances a viable PCP has not been established. Many of the proposed adjustments are in our opinion wholly unrealistic and inappropriate in the context of the business and the contemporaneous knowledge of the 1st Respondent. Many of them would not have had a realistic prospect of ameliorating the disadvantage experienced by the Claimant as a result of his disability. Given our finding that the Claimant did not satisfy the definition of disability until 9 May 2022 it does, of course, follow that many of the adjustments would in effect constitute retrospective arguments as to steps which could have been taken to have avoided, or at least minimised, the escalating deterioration of his mental health. However, as he was not in active employment from this date most of the proposed adjustments, even had we found PCPs existed, would not have had any prospect of alleviating the disadvantage and improving the prospects of his returning this to active employment.

Victimisation (s.27 EqA)

Did C make the following disclosures ("the Alleged Protected Acts") (F&BPs para 116):

The alleged disclosures set out at paras 2.7, 2.8 and 2.11 above (GoC paras 108(g), (h) and(k) of the GoC).

696. We do not consider that the above paragraphs can reasonably be interpreted as including Protected Acts. In relation to (g) and (h) the Claimant's concerns regarding matters such as "constant overwork" and its "negative impact on health and performance" are too vague to constitute Protected Acts. Whilst it is acknowledged that as per (k) the

Claimant regularly made disclosures to Mr Leone regarding matters of concern these were not sufficiently specific and defined pursuant to the various categories of potential discrimination pursuant to the EQA to constitute Protected Acts. We are conscious that these communications took place in very long and often rambling conversations and it would not be appropriate, in our opinion, for the Tribunal to extract what could arguably constitute Protected Acts from voluminous transcripts from covertly recorded conversations.

The alleged disclosures set out at paras 3.1, 3.2, 3.4, 3.5 and 3.7-3.14 above (GoC paras 109(a), (b), (d), (e), (g-n)).

697. We do not consider that any of the paragraphs referred to contain Protected Acts. We read them as the Claimant complaining to primarily Mr Glasper and Mrs Elliott regarding his working relationship with Mr Leone and the deterioration in his health. The Claimant does not expressly refer to any specific protected characteristic in respect of which he contends to have been discriminated. The multiple paragraphs read as the Claimant continuously divulging his concerns regarding his own position and his health rather than which can properly be characterised as him disclosing matters constituting a Protected Act. The various concerns raised by the Claimant are too generic e.g. “the very damaging working environment” to be capable of constituting Protected Acts.

The Grievance, see para 4.1 above.

698. We consider that the grievance contains matters sufficient to constitute Protected Acts. We refer specifically to the Claimant referring to Mr Leone’s alleged use of “discriminatory” language on page 1 and his reference to Mr Leone repeatedly referring to women as “bitches” and “whores” on page 5.

The Further Information, see para 4.2 above, including the exhibits.

699. We consider that this 100 page document contains material sufficient to constitute a Protected Act. We refer specifically to the Claimant’s allegation that Mr Leone used language including misogyny, homophobia, ageism, religious discrimination and racism as at his response to question 10 on page 3642 of the bundle and his reference to Mr Leone using “whore” and bitch” in respect of Ms Thesleff as at page 3644.

The January Representations and email chain by which they were sent.

700. We consider that there are various references within this document which constitute Protected Acts to include, but not necessarily limited to, those at paragraphs 13, 14 and 15.

The Grievance Appeal, see para 4.4 above.

701. We consider that that this contains Protected Acts and specifically the allegations of discriminatory conduct by Mr Leone which appear in paragraph C or on page 4.

The Pre-Action letter, see para 4.5 above. Her

702. We consider that there are sufficient allegations within this document to give rise to Protected Acts to include, but not exclusively, at paragraphs 23 (j) pertaining to Ms Thesleff, 28 (b) which involves an allegation of homophobia and the allegations regarding Mr Leone’s discriminatory language regarding various employees in paragraph 33.

The 16 June Representations, see para 4.6 above.

703. We consider that this included a Protected Act and refer specifically to the Claimant's contention that that in "voting to dismiss a disabled colleague because of his disability".

If so, in each instance did the disclosure constitute a protected act within the meaning of s.27(2) EqA? The Respondents accept that the First Claim constituted a protected act (Second Claim, GoR, para 13).

Was C subjected to the conduct relied on as detriments as set out at paragraph 19.1 above ("the Alleged Victimisation Detriments") (GoC para 147(a) to (g)).

704. These matters are specifically set out below and will be addressed individually.

The treatment set at paragraphs 30 to 32 and 34 to 77 GOC (pursued against R1 and R2) (GoC para 147(a)).

Paragraphs 30 to 32

705. The matters relied upon largely, or entirely, predate the first of the Protected Acts we have found i.e. the grievance dated 22 August 2022, or to the extent to which they did not, we do not consider that the matters referred to constituted acts of victimisation. We consider that the various matters relied on form part of the normal business interaction between the Claimant and Mr Leone and that the Protected Acts did not have any influence upon the various decisions made by Mr Leone.

Paragraphs 34 to 77

706. We consider that there is a very considerable amount of repetition and circularity within these paragraphs. Many of the matters relied upon by the Claimant as Protected Acts are then relied on by him as acts of victimisation. It would be disproportionate to go through such a long list in detail but as an example we refer to paragraph 76 (f) where the Claimant alleges that Mr Leone in referring to Mrs Elliott as "dumb" and "mentally slow" is an act of victimisation against him. We consider that this is illogical. In any event it is difficult to see how the Claimant could reasonably perceive that any such comment, even if he could demonstrate that Mr Leone was materially influenced in making it by his Protected Acts constituted an act of victimisation of him.

707. All of the matters relied upon at paragraphs 32 to 74 are incapable of constituting acts of victimisation given that they pre-dated the first of the Protected Acts i.e. the grievance dated 22 August 2022.

708. We reject the contention that the various matters referred to in paragraphs 75 to 77 were acts of victimisation.

Failing to provide a fair, rigorous and transparent investigation of and response to C's grievance; and/or not upholding or substantially upholding C's grievance and/or the grievance appeal (pursued against all Rs) (GoC para 147(b) and 149(b)).

709. We have already set out our finding that the process adopted and investigation undertaken in respect of the Claimant's grievance was thorough and appropriate. A Sub-Committee of the Board was appointed. We reject the Claimant's contention that the process or its outcomes constituted acts of victimisation.

Failing to take seriously and/or reasonably act upon the concerns expressed by C as to the impact of R2's behaviour upon C and his ill-health (pursued against all Rs) (GoC para 147(c) and 149(b)).

710. Again we consider there is a considerable element of circularity. The Claimant relies in some instances on raising his concerns regarding his health and welfare with Mr Leone as Protected Acts but then claims that Mr Leone's failure to take appropriate action was an act of victimisation. We reject his assertion that Mr Leone failed to take any action. There are multiple instances in the transcripts of Mr Leone expressing concern regarding the Claimant's well-being. Further, Mr Leone supported the Claimant's proposed long-term sabbatical as result of his health concerns.

711. In any event the Claimant's contention would effectively involve his contending that had he not undertaken Protected Acts that Mr Leone would otherwise have been more sympathetic to his health concerns. We do not consider that any evidence exists that Mr Leone's attitude and approach to the Claimant's various health concerns altered subsequent to the first of his protected acts i.e. his grievance dated 22 August 2022. Therefore there was no material influence capable of giving rise to a detriment. In any event Mr Leone stepped back from matters pertaining to the Claimant following his raising the grievance.

Stopping the pay of C when he was on sick leave (pursued against all Rs) (GoC para 147(d) and 149(b)).

712. As we have previously set out the decision to stop the Claimant's pay was actually more generous than his contractual entitlement and did not constitute an act of victimisation on account of Protected Acts.

Failing properly to consider the 16 June representations (pursued against all Rs) (GoC para 147(e) and 149(b)).

713. As previously set out we accept the Respondents' evidence that the Claimant's dismissal was solely on account of his having been absent from active employment for over a year and there being no foreseeable prospect of his return to active employment. As such we reject his assertion that his Protected Acts had any bearing on this decision. The 1st Respondent exercised its discretion to allow his "late" 16 June Representations to be considered.

Failing to recognise and/or denying C's entitlement to the remainder of his $3,000,000 2020 bonus of which only £1,300,000 has so far been redeemed (pursued against all Rs) (GoC para 147(f)(a) and 149(b)).

714. As set out previously we reject the Claimant's characterisation of events regarding his entitlement to this bonus. More specifically in the context of a victimisation complaint this matter pre-dated the first of the Protected Acts.

715. Preventing C's R1 incentive scheme entitlement of $1,000,000 being redeemed (pursued against all Rs) (GoC para 147(f)(b) and (149(b)).

716. Once again we repeat our previous findings and specifically that the Claimant did not request its redemption within the applicable timescale. This is therefore not capable of constituting an act of victimisation and in any event we find that the Respondents were not

in any way influenced by the Claimant's Protected Acts to the extent to which this took place after the first of the Protected Acts.

C's dismissal (pursued against all Rs) (Goc para 147(g) and 149(b)).

717. As above we have found that the 1st Respondent had legitimate grounds to terminate the Claimant's employment on the grounds of capability and we repeat our previous findings.

Exercising a purported discretion to send, and then sending, the Compulsory Transfer Notice (Second Claim, GoC, para 15).

718. As above we find that this was in accordance with the 1st Respondent's Articles of Association and was the approach which would have been adopted in respect of any other departing employee/participant.

If so, was C subjected to one or more the Alleged Victimisation Detriments because he had done one or more of the Alleged Protected Acts? In respect of each detriment, the Claimant relies on each and every protected act that pre-dated that detriment (para 148 GoC). In the

719. As above no.

Liability in relation to EqA 2010 claims

In respect of EqA 2010 claims relating to the period from 3 January 2019 onwards, is R1 liable under s.109 EqA on the basis that R2-6 acted:

In the course of their employment with R1; and/or

As agents of R1 with the authority of R1?

In respect of EqA 2010 claims relating to the period from 3 January 2019 onwards, are R2-6 liable under s.110 EqA?

Is R1 liable for any EqA 2010 claims relating to the period prior to 3 January 2019 by operation of TUPE?:

Was R2 acting in the course of his employment by the LLP and/or as agent with the authority of the LLP pursuant to s.109(1) and/or (2) EqA?

Was the LLP vicariously liable for R2's actions during this period?

Was the LLP itself liable pursuant to s.45 EqA 2010?

If so, is R1 liable by operation of TUPE? The issues to be determined regarding whether a TUPE transfer occurred are as set out at paragraph 24 above.

720. Given our findings above the above paragraphs are by definition not applicable.

Remedy

Unfair Dismissal claims

What loss has the Claimant suffered in consequences of the dismissal?

Has C mitigated his loss?

Was the conduct of C before the dismissal such that it would be just and equitable to reduce or further reduce the amount of the basic award (s.122(2) ERA)? Rs rely on (i) C making covert recordings; and/or (ii) C allegedly spending a significant amount of time during working hours engaged in activities relating to his personal investments as opposed to the business of R1, contrary to his duties of employment and reasonable instructions issued to him (GoR para 202 and 202A).

In the event that C was unfairly dismissed for the reasons set out at paragraph 0 above, should any compensation be reduced on the basis that C would have been fairly dismissed in any event? If so, within what period would C have fairly been dismissed?

Did C fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures by failing to appeal his dismissal? If so:

Was any such failure unreasonable; and

If so, does the tribunal consider it just and equitable to reduce any award by no more than 25% (s.207A TULR(C)A 1992)?

Did Rs fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures? If so:

Was any such failure unreasonable; and

If so, does the tribunal consider it just and equitable to reduce any award by no more than 25% (s.207A TULR(C)A 1992)?

721. Given our finding that there should be a 100% deduction of the compensatory award pursuant to Polkey this would apply equally to the 1st Respondent's failure to comply with the terms of the ACAS Code.

In the event that C was unfairly dismissed, was the dismissal to any extent caused or contributed to by (i) C making covert recordings; and/or (ii) C allegedly spending a significant amount of time during working hours engaged in activities relating to his personal investments as opposed to the business of R1, contrary to his duties of employment and reasonable instructions issued to him (GoR para 202 and 202A)? If so, what proportion (if any) does the tribunal consider just and equitable to reduce the amount of any compensatory award by having regard to that finding (s.123(6) ERA).

In the event that C was unfairly dismissed for having made a protected disclosure:

Was that disclosure not made in good faith; and If so, it is just and equitable in all the circumstances to reduce any award by no more than 25% (s.123(6A) ERA)?

722. We consider that the Claimant was culpable of conduct before his dismissal which makes it appropriate just and equitable to reduce the basic award. We consider that his conduct of covert recording, and especially that of Mrs Elliott and Mr Glasper, justifies a 50%

reduction in the basic award. The Claimant's entitlement to a basic award of £2572 is therefore reduced to £1286.

Detriment claims

Does the tribunal make a declaration that C was subjected to detriments for having made protected disclosures?

Does the tribunal make an award of compensation and if so what sum would be just and equitable in all the circumstances of the case having regard to (a) the infringement to which the complaint relates and (b) any loss which is attributable to the act or failure to act which infringed C's right not to be subjected to a detriment (s.49(2))?

Discrimination claims

Does the tribunal make a declaration that C has been subjected to:

Race discrimination;

Disability discrimination;

Harassment; and
Victimisation?

Is C entitled to compensation and if so in what sum? C seeks:

Damages for financial loss;

Damages in respect of personal injury;

Damages for injury to feelings; and

Stigma damages.

Does the tribunal award aggravated damages on the basis of Rs' conduct*?*

723. Given our findings the above paragraphs are not applicable.

The 1st Respondent's application for costs

724. We consider it appropriate to make an award to the 1st Respondent in respect of the claimant's share of the transcription/translation work undertaken by Acolad (the Work Undertaken) in the sum of £39,181.14 in accordance with the Rules.

725. We consider that the Claimant's refusal to pay his agreed 50% share of the Work Undertaken constituted his acting unreasonably in the conduct of the litigation. We consider that the reasons put forward on behalf of the Claimant for refusing to pay his 50% share were inherently unreasonable. We reject his assertion that there were multiple errors/inconsistencies in the Work Undertaken. Given that we have read hundreds of pages of the transcribed material we consider that a very high standard of transcription and translation took place. This is particularly the case given the covert nature of the recordings and that some of them took place in public places to include restaurants and taxis, when there would inevitably have been ambient noise. It is inevitable that there would on

occasions be disputes as to the correct translation of individual words given the subtleties and nuances of language but also in a context where both the Claimant and Mr Leone had a vested interest in an interpretation of particular words being to their advantage in the context of the litigation.

726. We consider that the grounds put forward by the Claimant for his refusal to make any payment of his 50% were un-meritorious and in our view disingenuous.

727. Given that this is a defined sum we do not consider that it is subject to the normal limitation on a tribunal awarding more than £20,000 without a taxation and therefore the Claimant is ordered to pay Lewis Silkin LLP the sum of £39,181.14 within 14 days of the date of this judgment being sent to the parties so that Lewis Silkin LLP can reimburse the costs incurred by the 1st Respondent for the Work Undertaken.

728. Further the Tribunal orders that the Claimant pay the 1st Respondent's costs of £9897.84 incurred since 27 March 2025 in connection with pursuing the Claimant's agreed share of the costs in respect of the Work Undertaken.

This

Overarching conclusions and discussion

729. Whilst not necessarily directly relevant to the claim and our conclusions on the list of issues we consider it appropriate, given the length of the hearing, our deliberations and this judgment to make some overarching observations.

The list of issues

730. We consider that the list of issues was in many instances repetitive, in many respects involved circular contentions and included many matters which on any realistic assessment would have had little or no reasonable prospect of success. This unnecessarily extended the time of the hearing to include the voluminous bundles, very long skeleton arguments and this judgment.

The Claimant's selective interpretation of history

731. We consider that there were a number of instances where the Claimant sought to selectively reinterpret history in the context of the breakdown of his professional and personal relationship with Mr Leone. We refer specifically to:

a) His denial that he had a close personal friendship with Mr Leone;

b) His partial attempts pursuant to his third witness statement, and during his evidence, to dispute the incontrovertible evidence that there had been a significant deterioration in his financial performance in 2021;

c) His retrospective attempts subsequent to the Letter before Action dated 16 June 2023 to revisit previous medical reports which suggested that personal as opposed to workplace factors may have been contributory factors to the decline in his mental health;

d) His failure to disclose the existence of the recordings, and notes he had taken from such recordings, to Freshfields despite being specifically asked to disclose all potentially relevant material;

e) What we consider to be his wholly inconsistent, and lacking in credibility, explanation regarding the circumstances of the loss of the iPhone on which the recordings were made; and

f) His inclusion of significant allegations of anti-Semitism/his Jewish ancestry notwithstanding these issues not being included in the Letter before Action.

The Claimant's covert recording of conversations

732. That in covertly recording multiple conversations with t primarily Mr Leone, but to an even greater extent Mr Glasper and Mrs Elliott, the Claimant acted egregiously. Mrs Elliott's sense of betrayal was manifest from the emotion she displayed on giving witness evidence as she clearly perceived, with legitimate reason, that she had been betrayed by someone she regarded as a friend. Further, we consider that the Claimant sought to exploit Mr Glasper's own issues to his own advantage knowing that there were elements of his employment, to include his wish to work from home, where he shared similar views to the Claimant and was therefore a fertile target for conversations which we consider were almost invariably led by the Claimant.

The Claimant's motivations

733. We consider that the Claimant's understandable concerns that the very significant deterioration of his performance in 2021 would have a detrimental impact on his remuneration, bonus entitlement and potential future position with the 1st Respondent, were a significant factor in the deterioration of his mental health/general well-being and a catalyst for his increasing propensity to revisit historical issues in long conversations with Mr Leone and to record such conversations.

734. We consider that the Claimant was at least in part motivated by desire to cause maximum embarrassment and potential reputational damage to Mr Leone in the inclusion of some of his claims and material extracted from the transcripts. For example, we particularly consider that his belated inclusion of anti-Semitism, given that it was not referred to in the Letter before Action dated 16 June 2023, and highly embarrassing and potentially relationship damaging comments made by Mr Leone regarding his wife and son were motivated primarily by seeking to cause as much damage and hurt as possible.

735. That in a number of instances the Claimant acted in a manner which we consider to have been obstructive with a view to delaying processes. For example, we refer to his multiple and protracted objections to the appointment of an OH professional and then subsequent complaint in the list of issues that the referral to an OH professional was delayed.

Mr Leone's conduct

736. Mr Leone acknowledges that in a number of instances, and particularly his misogynistic comments regarding Ms Thesleff and his wife, that he acted inappropriately. He accepts and apologises for such comments. Even in the context of what he considered

to be private conversations with a long-term colleague, friend and confidante his language was wholly unacceptable. That is not, however, the same as the Claimant's contention that in being party to such conversations that he personally suffered harassment or other discrimination pursuant to the EQA.

Final conclusions

737. The claim for ordinary unfair dismissal succeeds and the Claimant is awarded a basic award which would have been £2572 but is reduced to £1286 in accordance with S 122 (2) of the ERA. The claimant is not entitled to receive a compensatory award given the hundred percent deduction we have applied pursuant to Polkey.

738. The following claims fail and are dismissed:

Automatic unfair dismissal on the grounds of the protected disclosure pursuant to S103A of the ERA;

Dismissal for making health and safety disclosures pursuant to S 100 of the ERA;

Detriment on the grounds of protected disclosures pursuant to S 47B of the ERA;

Detriment for making health and safety disclosures pursuant to S 44 (1) (c) of the ERA;

Harassment related to race, religious belief, sex, of a sexual nature, sexual orientation and disability pursuant to S 26 of the EQA;

Direct race discrimination pursuant to S 13 of the EQA;

Direct disability discrimination pursuant to S 13 of the EQA;

Discrimination arising from disability pursuant to S 15 of the EQA;

Failure to make reasonable adjustments pursuant to sections 20 and 21 of the EQA; and

Victimisation pursuant to S 27 of the EQA.

739. The 1st Respondent is awarded costs in the sum of £39,181.14 in accordance with the Rules.

Employment Judge Nicolle

1 September 2025 (with the original paragraphs 96 and 97 being deleted following a reconsideration on 16 September 2025 pursuant to Rule 68) and with the amount of the Respondents' solicitors legal costs relating to the recovery of the Claimant's

share of the costs pertaining to the transcription/translation work undertaken by Acolad being interpolated into the judgment on 29 September 2025.)

Sent to the parties on:

7 October 2025

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For the Tribunal:

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