EMPLOYMENT TRIBUNALS

Claimants: (1) Mr R Brooks (2) Mr GW Smith

Respondent: The North England Conference of Seventh Day Adventists

Heard at: Birmingham (via CVP)

On: 3, 4, 5, 8, 9, 10, 11, 12, 15, 15, 17, 18, 19, 22, 23, 24, 25 March 2021 and 26 March 2021 (tribunal deliberations in chambers)

Before: Employment Judge Meichen, Mr S Woodall, Mr J Sharma

Appearances:
For the claimants: Ms S George, counsel
For the respondents: Mr A Sendall, counsel

JUDGMENT ON LIABILITY

(1) Mr Brooks was not disabled within the meaning of the Equality Act 2010 and so his claim for failure to make reasonable adjustments fails and is dismissed.

(2) Mr Brooks made a protected disclosure on 4 December 2017.

(3) Mr Smith made protected disclosures on 14 and 15 December 2017.

(4) The claimants made their disclosures in good faith.

(5) The principal reason why the claimants were dismissed was that they made protected disclosures and the dismissals were therefore automatically unfair. The dismissals were also unfair on ordinary grounds.

(6) Mr Brooks contributed to his dismissal by his blameworthy conduct and there shall be a 10% deduction to the basic and compensatory awards to reflect that.

(7) Mr Smith contributed to his dismissal by his blameworthy conduct and there shall be a 20% deduction to the basic and compensatory awards to reflect that.

(8) There was a percentage chance that Mr Smith could have been fairly dismissed and a further 20% deduction to his compensatory award will be made to reflect that.

(9) There was no percentage chance that Mr Brooks could have been fairly dismissed and so there shall be no further deduction to his compensatory award.

(10) The claimants were subjected to unfair disciplinary proceedings and their concerns about the involvement of Alan Hush and Richard Jackson in those proceedings were repeatedly ignored. These were detriments on the ground that they made protected disclosures.

(11) The suspension of Mr Brooks was also a detriment but it was not done on the ground that Mr Brooks made a protected disclosure.

(12) The claimants were wrongfully dismissed and are entitled to their notice pay.

REASONS

Introduction

1. This hearing took place during lockdown and so it was converted to be heard by CVP. All parties, witnesses and representatives were able to participate remotely with no major issues.
2. A particular challenge however was the large number of observers who wished to watch the hearing. At one stage we think we had around 186 observers, which may be a record for an Employment Tribunal hearing. The amount of observers logging in to one CVP room caused a problem with the CVP system. We sought advice from HMCTS staff with expertise in CVP and they were able to work out a solution involving the linking of different CVP rooms which meant everyone who wished to observe the hearing could do so.
3. The ability to accommodate a large number of observers can be seen as another advantage of conducting hearings remotely, although we should probably make clear that it may well not be possible to accommodate such large numbers at every hearing as it took some time to set up the links for different rooms.
4. Nobody suggested that the fairness of the hearing was adversely affected by it being heard remotely and we were satisfied that there was no unfairness caused.
5. We therefore record that this was a remote hearing which was not objected to by the parties. The form of remote hearing was V: fully remote over CVP.
6. The claimants both gave evidence and were cross examined. The claimants also provided witness statements from the following people: Patrick Lowe, Beverley Brown, Caroline Poyser, Lorance Johnson, Charles Bramble, John

Ferguson, Precious Kampengele. All of the witnesses with the exception of Precious Kampengele gave evidence and were cross examined.

7. The respondent provided witness statements from the following people: Richard Jackson, Alan Hush, Arunas Klimas, Andrea Robinson, Elaine Palmer Taylor, Verona Roberts, Adriana Murray. All of the witnesses with the exception of Verona Roberts gave evidence and were cross examined.

8. In respect of the two witnesses who did not give oral evidence we informed the parties that we would adopt the same approach to both sides. We would taken the statements into account but only attach such weight to them as we felt was appropriate in light of the other evidence available and the fact the witnesses had not attended to give oral evidence.

9. We started the case with an agreed bundle of 1081 pages. Unfortunately there was a significant amount of further disclosure during the hearing and this resulted in no fewer than five supplemental bundles being provided to us. This was somewhat suboptimal in terms of case preparation but we formed a clear view that all parties were doing their best to manage such a substantial case during all the challenges associated with lockdown. The further documents were provided to us in a proper format and everything was done by agreement in a spirit of professional cooperation. That being the case we focused on resolving the substantive issues before us.

The issues

10. The parties agreed a list of issues for us to determine which we attach as an appendix to this judgment.

11. It was agreed that we would consider the liability issues first and consider remedy at a later date if necessary. In the usual way we agreed that we would consider Polkey and contributory conduct as part of our liability judgment. We also suggested that it would be sensible to consider questions of alleged bad faith at this stage. Even though that is technically a remedy issue it struck us as sensible to consider it at this stage in a similar way to Polkey/contributory conduct. Both parties readily agreed with this approach and so that's what we did.

12. In their closing submissions the respondent made significant concessions. In particular the respondent conceded that both claimants had been unfairly dismissed. We explain the extent of that concession below.

13. Both counsel helpfully provided detailed written submissions. There were various delays in the hearing which meant that submissions were not delivered until the final day. We therefore reserved our judgment.

Preliminary issue – was Mr Brooks disabled?

14. There was one claim which Mr Brooks brought by himself. This was a claim of a failure to make reasonable adjustments contrary to ss. 20 and 21 Equality Act 2010.

15. It was agreed that Mr Brooks needs to show that he was disabled because of an eye condition so as to impose a duty upon the respondent to make reasonable adjustments.

16. To our mind it therefore makes sense to determine this as a preliminary issue.

17. Section 6 of the Equality Act provides that a person has a disability if—

(a) they have a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

18. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person, or if it has ceased to have a substantial adverse effect it is to be treated as continuing to have that effect if it is likely to recur.

19. In Goodwin-v-Patent Office [1999] IRLR 4, the EAT gave detailed guidance as to the approach which ought to be taken in determining the issue of disability. A purposive approach to the legislation should be taken. A tribunal ought to remember that, just because a person can undertake day-to-day activities with difficulty, that does not mean that there was not a substantial impairment. The focus ought to be on what the claimant cannot do or could only do with difficulty and the effect of medication ought to be ignored for the purposes of the assessment.

20. The approach in Goodwin was approved in J v DLA Piper UK LLP [2010] ICR 1052 (paragraph 40). It was said at paragraph 38 of that judgment:

"There are indeed sometimes cases where identifying the nature of the impairment from which a Claimant may be suffering involves difficult medical questions; and we agree that in many or most such cases it will be easier – and is entirely legitimate – for the tribunal to park that issue and to ask first whether the Claimant's ability to carry out normal day-to-day activities has been adversely affected – one might indeed say "impaired" – on a long-term basis. If it finds that it has been, it will in many or most cases follow as a matter of common-sense inference that the Claimant is suffering from a condition which has produced that adverse effect — in other words, an "impairment". If that inference can be drawn, it will be unnecessary for the tribunal to try to resolve difficult medical issues of the kind to which we have referred."

21. In Dunham v Ashford Windows [2005] ICR 1584, a case involving learning disabilities, the EAT said:

"…Tribunals are likely to look for expert evidence as to the nature and degree of the impairment from which a claimant claims to suffer (although questions of degree will principally fall to be considered in the context of whether the impairment has a substantial and long term adverse effect upon the ability of the claimant to carry out normal day-to-day activities, some evidence as to the degree of handicap will be necessary to demonstrate that there is an

impairment at all) and for evidence of a particular condition from which the claimant suffers (which may have a specific or a generalised effect on function).”

22. Day-to-day activities are things people do on a regular or daily basis, and examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

23. In Aderemi v London and South Eastern Railway Limited [2013] ICR 591, the EAT held that the Tribunal:

“has to bear in mind the definition of substantial which is contained in section 212(1) of the Act. It means more than minor or trivial. In other words, the Act itself does not create a spectrum running smoothly from those matters which are clearly of substantial effect to those matters which are clearly trivial but provides for a bifurcation: unless a matter can be classified as within the heading “trivial” or “insubstantial”, it must be treated as substantial. There is therefore little room for any form of sliding scale between one and the other.”

24. The burden of proving disability rests on the claimant. In this case we found the evidence provided by the claimant to show that he has a disability to be insubstantial and insufficient.

25. The claimant had produced an impact statement in which he described symptoms from his eye condition first appearing in early 2016, when he experienced a burning sensation and heaviness. He described how the condition makes him close his eyes for relief and he needs to take breaks, in particular if driving a long distance. Mr Brooks explained he has been diagnosed with “dry eyes” and he still has that condition.

26. Mr Brooks was seen by Occupational Health in October 2018 after he went off sick in September 2018. In the report from that time Occupational Health recorded that they understood from Mr Brooks that he went off work owing to the effect which his eye symptoms were having on his ability to drive and carry out his other duties and he had noticed that poor concentration is associated with his eye symptoms, for example in pastoral care and in meetings.

27. It has to be observed however that Mr Brooks had not had to take any time off since he first experienced the condition in early 2016 and there was no issues reported with him experiencing difficulty in doing his duties prior to September 2018. In that period Mr Brooks was regularly doing the tasks associated with his role such as driving, pastoral care and attending meetings which he relied upon as the tasks which he could only do with difficulty. It is inconsistent with Mr Brooks’ case on disability that he was able to do those tasks with no apparent difficulty prior to September 2018. Moreover Mr Brooks had

attended challenging investigation meetings in August 2018 and was able to answer questions and participate generally with no difficulties reported.

28. The Occupational Health report from October 2018 did not provide any view as to whether Mr Brooks was disabled or not. Mr Brooks obtained a specialist report from "Best Doctors". However this too did not provide a specific view on whether Mr Brooks was disabled within the meaning of the Equality Act.

29. The diagnosis expressed in the Best Doctors report was that Mr Brooks suffers from "dry eye" not "dry eyes". This was because Mr Brooks' condition was found to only affect the right eye. The symptoms were described as heaviness/irritation of the right eye mainly when driving or at meetings. It was said that the long term prognosis for this condition is generally good and although never really cured symptoms could be managed successfully. It seems to us that this falls short of a diagnosis which could be said to amount to a disability within the meaning of the Equality Act.

30. There was no other evidence which we found assisted us to determine whether or not Mr Brooks had a disability. Mr Brooks did not rely on any further evidence.

31. We concluded on the evidence put before us that:

    (i) Mr Brooks has had a physical impairment since early 2016 to date of dry eye affecting his right eye.

    (ii) The impairment has had an effect on Mr Brooks' ability to carry out normal day to day activities. The effect is that Mr Brooks right eye feels heavy and irritated when he has to focus for a long time such as when driving long distances or during long meetings.

    (iii) The effect of this has been insubstantial. Mr Brooks has been able to rest his eyes by closing them or by taking a break. There was no substantial adverse effect on his ability to carry out normal day to day activities in the period when he was employed by the respondent. There was no cogent evidence put before us of such an effect.

    (iv) The lack of a substantial adverse effect is clearly demonstrated by the fact that Mr Brooks was able to perform his duties as a pastor with no difficulty for a long time while he had his eye condition – between early 2016 and September 2018. In that period Mr Brooks successfully performed the day to day activities which he relies upon – driving, pastoral care and attending meetings – with no difficulty. It is also relevant that Mr Brooks was also able to attend and participate in the investigation meetings in August 2018. These were particularly challenging meetings but Mr Brooks was even able to participate in them with no difficulty.

    (v) We concluded that the difficulties Mr Brooks experienced from September 2018 were associated with his high level of anxiety at that time (which was understandable given the events which we will describe below). The fact that Mr Brooks was experiencing a high level of anxiety, and indeed high blood pressure, is recorded in the

Occupational Health report from October 2018. It is apparent from that report that Mr Brooks' concern (which essentially formed the basis of his reasonable adjustments claim before us) was that he would be unable to give a clear account of himself at the forthcoming disciplinary hearing. However the Occupational Heath Physician related that concern to Mr Brooks' anxiety, poor sleeping pattern and poor concentration, rather than his eye condition.

(vi) We consider therefore that Mr Brooks' concern arose because of the high level of stress and anxiety which Mr Brooks was experiencing at that time due to the disciplinary proceedings and not because of his dry eye. This explains why the problem arose at that particular time. There was nothing to indicate that his dry eye suddenly deteriorated at that stage and no cogent evidence that Mr Brooks' anxiety could have aggravated his dry eye. Rather it seems clear that the difficulty Mr Brooks was experiencing was down to his anxiety and in particular his inability to sleep which was highlighted in the Occupational Health report. That was what made it difficult for him to focus and concentrate.

32. For those reasons we find that Mr Brooks was not a disabled person within the meaning of the Equality Act and so his claim for a failure to make reasonable adjustments must fail and be dismissed.

A summary of the essential law to be applied to the extant claims

Whistleblowing

33. For the claimants' whistleblowing claims the relevant sections of the Employment Rights Act 1996 ("ERA") state:

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

43B Disclosures qualifying for protection
In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

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

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

…

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

43C Disclosure to employer or other responsible person.

A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

47B Protected disclosures

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

103A Protected disclosure

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

34. The leading authority on what is meant by the term "done on the ground that" is Fecitt and others v NHS Manchester (Public Concern at Work intervening) [2012] ICR 372. In that case the Court of Appeal stated that: "*liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detrimental act.*"

35. In detriment claims it is for the employer to show the ground on which any act, or deliberate failure to act, was done — s.48(2) ERA.

36. This means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure. However, if the tribunal can find no evidence to indicate the ground on which the respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default — Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14.

37. In applying these principles it may be appropriate to draw inferences, given that there will often be a dearth of direct evidence as to motivation when a worker has been subject to a detriment. The EAT summarised the proper approach to drawing inferences in a detriment claim in International Petroleum Ltd and ors v Osipov and ors EAT 0058/17:

(i) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure that he or she made,

(ii) by virtue of S.48(2), the employer (or worker or agent) must be prepared to show why the detrimental treatment was done. If it (or he or she) does not do so, inferences may be drawn against the employer (or worker or agent) — see London Borough of Harrow v Knight 2003 IRLR 140, EAT,

(iii) however, as with inferences drawn in a discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

38. The word 'disclosure' does not necessarily mean the revelation of information that was formerly unknown or secret. Section 43L(3) of the ERA provides that *'any reference in this Part to the disclosure of information shall have effect, in relation to any case where the person receiving the information is already aware of it, as a reference to bringing the information to his attention'.* Accordingly, protection is not denied simply because the information being communicated was already known to the recipient. This was confirmed by the EAT in Parsons v Airplus International Ltd EAT 0111/17.

39. The worker's reasonable belief must be that the information disclosed tends to show that a relevant failure has occurred, is occurring, or is likely to occur, rather than that the relevant failure has occurred, is occurring, or is likely to occur. In other words, the worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that that belief was reasonable — rather, the worker must establish only reasonable belief that the information tended to show the relevant failure.

40. This point was considered by the EAT in Soh v Imperial College of Science, Technology and Medicine EAT 0350/14. It was explained that there is a distinction between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'. This is a particularly important distinction for us to bear in mind in the circumstances of this case, which involves the claimants passing on information from a third party (Precious Kampengele).

41. The EAT in Soh made a further observation which is of particular relevance here which is that where a worker passes on to an employer information provided by a third party the worker may not be in a position to assess the information. As long as the claimants reasonably believed that the information provided tends to show a state of affairs identified in section 43B(1) ERA, the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

42. The EAT has stated that the test of 'belief' in section 43B establishes a low threshold - Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT. However, the reasonableness test clearly requires the

belief to be based on some evidence — rumours, unfounded suspicions, uncorroborated allegations and the like will not be enough to establish a reasonable belief.

43. If the claimants reasonably believed that the information tends to show a relevant failure there can be a qualifying disclosure of information even if they were later proved wrong. This was stressed by the EAT in Darnton v University of Surrey 2003 ICR 615, EAT. The EAT held that the question of whether a worker had a reasonable belief must be decided on the facts as (reasonably) understood by the worker at the time the disclosure was made, not on the facts as subsequently found by the tribunal. This case was cited with approval by the Court of Appeal in Babula v Waltham Forest College 2007 ICR 1026, CA , when it made clear that a worker will still be able to avail him or herself of the statutory protection even if he or she was in fact mistaken as to the existence of any criminal offence or legal obligation on which the disclosure was based. Where the legal position is something of a grey area, a worker might reasonably take the view that there has been a breach.

44. In Kilraine v London Borough of Wandsworth 2018 ICR 1850, the Court of Appeal held that 'information' in the context of S.43B is capable of covering statements which might also be characterised as allegations - 'information' and 'allegation' are not mutually exclusive categories of communication. The key principle is that, in order to amount to a disclosure of information for the purposes of S.43B the disclosure must convey facts.

45. In this case we shall have to consider what constitutes a disclosure made to the claimants' employer. We will be guided by the principle that a disclosure made to any person senior to the worker with express or implied authority over the worker should be regarded as having been made to the employer. A disclosure made to a junior colleague, or even one of equal status, on the other hand, would be unlikely to be covered.

46. There is no requirement that to attract the protection of the statutory scheme, disclosures must be made in good faith. However, S.49(6A) of the ERA, gives the tribunal the power to reduce compensation in successful claims under S.47B by up to 25 per cent where 'it appears to the tribunal that the protected disclosure was not made in good faith'. There is a similar provision to reduce compensation in successful claims under s.103A.

47. The leading case on good faith (in a slightly different context under previous whistleblowing legislation) is Street v Derbyshire Unemployed Workers' Centre 2005 ICR 97 where the Court of Appeal equated 'good faith' with acting with honest motives. It was held that where the predominant reason that a worker made a disclosure was to advance a grudge, or to advance some other ulterior motive, then he or she would not make the disclosure in good faith.

48. In Kuzel v Roche Products Ltd [2008] ICR 799, the Court of Appeal considered the operation of the burden of proof as regards the reason for the dismissal in an unfair dismissal case brought by reference to both section 98 and section 103A. Mummery LJ envisaged that the tribunal will decide first whether it accepts the reason for the dismissal advanced by the employer before turning, if it does not find that reason to be proved, to consider whether the reason was the making of the protected disclosure.

49. In his judgment Lord Justice Mummery also rejected the contention that the burden of proof was on the claimant to prove that the making of protected disclosures was the reason for dismissal. However, Mummery LJ was in agreement with the EAT that, once a tribunal has rejected the reason for dismissal advanced by the employer, it is not bound to accept the reason put forward by the claimant. He proposed a three-stage approach to S.103A claims:

    (i) First, the employee must produce some evidence to suggest that his or her dismissal was for the principal reason that he or she had made a protected disclosure, rather than the potentially fair reason advanced by the employer. This is not a question of placing the burden of proof on the employee, merely requiring the employee to challenge the evidence produced by the employer and to produce some evidence of a different reason.

    (ii) Second, having heard the evidence of both sides, it will then be for the employment tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or reasonable inferences.

    (iii) Thirdly and finally, the tribunal must decide what was the reason or principal reason for the dismissal on the basis that it was for the employer to show what the reason was. If the employer does not show to the tribunal's satisfaction that it was its asserted reason, then it is open to the tribunal to find that the reason was as asserted by the employee. However, this is not to say that the tribunal must accept the employee's reason. That may often be the outcome in practice, but it is not necessarily so.

50. We bear in mind that an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case of automatically unfair dismissal advanced by the employee.

51. It may be possible to separate out the manner of disclosure from the disclosure itself: Panayiotou v Chief Constable of Hampshire Police and anor 2014 ICR D23. In that case the fact of the protected disclosures was separable from the way in which the claimant had pursued his complaints, which had made him completely unmanageable. The employment tribunal permissibly concluded that he had been dismissed because of that conduct and not for having made the disclosures per se.

52. It is necessary however to be careful when an employer alleges that an employee was dismissed because of acts related to the disclosure and not because of the disclosure itself (Bolton School v Evans 2007 ICR 641). As the EAT observed in Parsons v Airplus International Ltd EAT 0111/17 *'it can be all too easy to think it is the manner of blowing the whistle that is the issue, when really it is simply the whistleblowing itself'*.

53. Section 43J ERA will render any contractual term void in so far as it purports to prevent an employee making a protected disclosure. This is likely to cover rules prohibiting unauthorised disclosures or breaches of confidence. In many cases, a breach of confidence will be an intrinsic part of a protected disclosure, so a dismissal for the breach will amount to a dismissal by reason of the disclosure itself (see for example Kaltz Ltd v Hamer EAT 1853/10).

54. However it is possible that some breaches of confidence will amount to a separable act of misconduct, dismissal for which would not contravene S.103A. As per the observations in Parsons and Evans it will be necessary to proceed with caution to determine if the breach really is separable from the disclosure.

Unfair dismissal

55. Regarding the claimants' claims for 'ordinary' unfair dismissal the relevant parts of the ERA state:

> *94 The right*
> *(1) An employee has the right not to be unfairly dismissed by his employer.*
> *. . .*
> *98 General*
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it—*
> *. . .*
> *(b) relates to the conduct of the employee*
> *. . .*
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) 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*

(b) shall be determined in accordance with equity and the substantial merits of the case.

56. It is for the respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include conduct which is the reason relied on in this case.

57. Guidance as to what constitutes reasonableness in the context of a dismissal for conduct was given in the case of BHS Ltd v Burchell [1980] ICR 393. The guidance suggests that the tribunal should consider whether the employer had a genuine belief in the misconduct alleged and whether that belief was held on reasonable grounds formed after a reasonable investigation.

58. We shall also consider whether the sanction of dismissal fell within the range of reasonable responses open to a reasonable employer. We must bear in mind the cardinal rule that it is not for us to substitute our own view for that of the respondent.

59. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

60. As part of our decision making the tribunal will consider whether there were any procedural flaws which caused unfairness. Guidance on that part of the exercise was given by the Court of Appeal in the case of OCS v Taylor [2006] ICR 1602, which clarified that the proper approach is for the tribunal consider the fairness of the whole of the disciplinary process. The court stated that our purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage.

61. The Court went on to say that the tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss.

Notice pay

62. The claimants' claim for notice turns on whether the respondent was entitled to treat their actions as a breach of the contract of employment entitling them to dismiss without notice. In practical terms we must be satisfied on the balance of probabilities that the claimants actually committed an act of gross misconduct entitling the respondent to summarily dismiss them.

Our findings

63. We made the following findings of fact which we found were necessary for us to properly determine the issues which were before us. Our findings were made on the civil standard of proof which is the balance of probabilities.

64. In this case we heard a great deal of evidence about matters which might be said to be peripheral to the issues which we have to determine. Much of that peripheral evidence contained a number of allegations and counter allegations made by people who we have not heard oral evidence from on issues where we do not have all the available evidence before us. We found that it was not necessary or appropriate for us to make decisions on all of those matters. We have restricted ourselves therefore to making findings about issues which we think are directly relevant to the claims before us.

Background

65. The respondent is a charity and part of the 7th day Adventist church organisation. Mr. Brooks and Mr. Smith were both long serving pastors with the respondent. They both worked for the respondent for in excess of 30 years. Mr. Brooks started his employment on 1 September 1987 and Mr. Smith on 1 September 1985. Prior to the events with which we are concerned we were not informed of any disciplinary matters involving the claimants. We have no doubt of the importance to the claimants of their vocation and their former employment with the church.

66. Dismissal of pastors in the 7th day Adventist church is an exceptionally rare occurrence. In fact, none of the witnesses we heard from on the issue (some of whom have been involved with the church for a very long time) could remember a pastor being dismissed before.

67. The essential structure of the 7th day Adventist church in the UK is as follows. The church members belong to their local church and the churches make up the membership of the respondent ("the NEC"). The respondent, the South England conference ("SEC") and a number of missions make up the membership of the British union conference ("BUC"). Although there is a requirement for the respondent to operate in harmony with the purpose and policy of the BUC the respondent is otherwise autonomous and is responsible for its own decisions according to its constitution.

68. Although the BUC does not have any legal responsibility for the NEC it was clear on the basis of the evidence that was before us that in practical terms the BUC does exercise a degree of oversight or influence on the respondent. This could be seen for example in a letter written on 1 February 2019 by the president, executive secretary and treasurer of the BUC to the president of the NEC in which they expressed their sadness and surprise over the dismissal of these two claimants. The respondent's president, who was at that time Richard Jackson, was requested to explain the respondent's actions

further and to respond to some specific concerns. Although the BUC made it clear that they were not intending to interfere they equally emphasised that both institutions are part of a wider church family and all should be held to account by colleagues elsewhere within the church structure. The principle of accountability within the church as a whole strikes us as significant. It is a principle which we think influenced the claimant's actions, described below, which led to their dismissal.

69. We observe that many of the concerns expressed by the BUC in the 1 February 2019 letter have transpired to be well founded.

70. The leadership of the respondent's organisation is essentially vested in two committees. Firstly and most importantly there is the executive committee which includes the president, the executive secretary and the trustees. Secondly there is an officers committee which comprises the president, the executive secretary and the treasurer. We understand that the president, executive secretary and treasurer positions are elected positions and elections to fill those positions take place every four years at a "session". These are the most important leadership roles in the respondent.

Resignation of Rejoice Kampengele and its aftermath

71. Prior to 1 February 2016 the treasurer of the respondent was Rejoice Kampengele, the president was Lorance Johnson and the executive secretary was John Ferguson.

72. On 1 February 2016 Rejoice Kampengele resigned. We heard evidence that Rejoice Kampengele's resignation was prompted by John Ferguson raising concerns about suspected misuse of the respondent's funds by Rejoice Kampengele in order to pay for travel to Zambia where he had personal business interests. Some of the information which led to this inquiry had come from Rejoice Kampengele's then wife Precious Kampengele. Some further information which was said to support the suspected misuse of the respondent's funds by Mr Kampengele was also reported by the then assistant treasurer.

73. The evidence which we heard was to the effect that when he was confronted with the allegations of potential misuse of funds Rejoice Kampengele decided to resign. It was initially his decision to resign on notice but he later decided to resign with immediate effect. Mr Johnson had decided that if he resigned on notice there would need to be an investigation. Rejoice Kampengele's resignation therefore took immediate effect on 1 February 2016.

74. Rejoice Kampengele's resignation letter indicated that he was resigning for family reasons, and it seems to have been agreed by Mr Johnson that this would be the purported reason for resignation. We would agree with Mr Sendall that there seems to have been some kind of agreement that Mr Kampengele would be allowed to "go quietly".

75. On 7 February 2016 the executive committee met and agreed that the reason for the resignation that would be published to the wider church family would be family reasons rather than revealing the background of potential financial impropriety by Mr Kampengele.

76. However on 11 February 2016 Paul Lockham who at that stage was the executive secretary of the BUC sent an email to BUC trustees that referred to the fact that the real reason for Rejoice Kampengele's departure related to potential financial impropriety. This email was then leaked. This meant that the potential financial impropriety on the part of Rejoice Kampengele became well known.

77. The leaked email evidently angered Rejoice Kampengele and resulted in him writing a letter dated 2 March 2016. This letter was circulated by Rejoice Kampengele to a wide distribution list of people in the respondent and the wider church organisation. In that letter Rejoice Kampengele stated (which the respondent now says is incorrect) that he had resigned for "pressing family matters". In addition Rejoice Kampengele made serious allegations against Mr Johnson and Mr Ferguson.

78. A letter was then sent on 14 March 2016 to the respondent's trustees by a number of directors and sponsors expressing a loss of confidence in Mr Johnson and Mr Ferguson. The signatories to that letter included the then Pathfinder Director Alan Hush and the then Secretary of the Ministerial Association Richard Jackson.

79. It is striking to note that in that letter the signatories called for an independent investigation into the issues raised by Rejoice Kampengele (including an alleged abuse of trust towards Precious Kampengele) and also clarification of the process leading up to Rejoice Kampengele's resignation. As far as we are aware those who signed this letter faced no adverse consequences for doing so. In fact, as will be seen, Mr Hush and Mr Jackson went on to higher positions in the respondent. This can be contrasted with the actions taken against the claimants later on when they made similar calls for investigation and transparency.

80. Moreover, the 14 March 2016 letter made serious allegations against Mr Johnson and Mr Ferguson including that they had been involved in a *"gross breach of pastoral care".* This too did not lead to any adverse consequences for the signatories. Again this can be contrasted with the approach later taken against the claimants, even though they stopped short of actually alleging any wrongdoing themselves.

81. Rejoice Kampengele made further allegations against Mr Johnson and Mr Ferguson in a second letter of 14 April 2016. This letter was again widely circulated by Rejoice Kampengele. In his second letter Rejoice Kampengele complained that Mr Ferguson and Mr Johnson had misrepresented the respondent's accounts in order to defame him. Rejoice Kampengele also

complained that they were standing in the way of a negotiated settlement of a claim which he had brought against the respondent.

82. On 17 April 2016 Mr Johnson and Mr Ferguson were suspended by the respondent's executive committee, and on that same day the executive committee voted to start negotiations with Rejoice Kampengele.

83. On 21 April 2016 Precious Kampengele wrote to the NEC's executive committee expressing concerns about how Mr Johnson and Mr Ferguson had handled matters. The substance of that complaint is that Mr Johnson and Mr Ferguson had exceeded their authority and that Mr Ferguson had manipulated Precious Kampengele as a vulnerable individual and presented her as disclosing financial information about her husband which was passed onto the president when that was not true. Precious Kampengele said that she went to see Mr Ferguson for family counselling to help her in her marital relationship but the information she shared in confidence had been misused and manipulated to the detriment of Rejoice Kampengele and her marriage.

84. Precious Kampengele's email of 21 April 2016 was later used as part of the evidence against Mr Johnson and Mr Ferguson in the investigation into them.

85. The claimants' evidence, which we accept, was that they did not see the 21 April 2016 email prior to them forwarding Precious Kampengele's later statement of the 2 December 2017.

86. It is notable that in the 21 April 2016 letter Precious Kampengele asserts that she was completely unaware of her husband's financial dealings and she did not discuss those at any time. This is inconsistent with the account which is given by Mr Ferguson including in his evidence before us and it's also inconsistent with the later statement of Precious Kampengele dated 2 December 2017.

87. Nevertheless Precious Kampengele accused Mr Ferguson of taking advantage of her vulnerable situation to launch an attack on Rejoice Kampengele. She alleged that Mr Johnson had allowed or even encouraged the situation to escalate to the point of Rejoice Kampengele's resignation.

88. At the conference session in July 2016 Richard Jackson was appointed president and Alan Hush was appointed executive secretary, replacing John Ferguson and Lorance Johnson.

Settlement with Rejoice Kampengele

89. It appears that following his resignation Rejoice Kampengele had started employment tribunal proceedings. He contacted ACAS by 15 May 2016 and the tribunal claim was later presented. By 18 September 2016 the executive committee had approved a confidential out of court settlement involving the payment of a sum of money to Rejoice Kampengele. The employment tribunal proceedings were therefore settled at an early stage in the litigation.

90. We were not provided with the details of the tribunal claim or of the settlement. However according to a High Court claim which was later brought by Rejoice Kampengele the settlement payment was in the sum of £45,000. There is also reference within that claim to constructive dismissal and discrimination claims having been made.

91. It appears that within the church the information got out that Rejoice Kampengele had been paid a substantial sum as part of a settlement agreement despite the fact that he was alleged to have been involved in financial impropriety involving the misuse of the respondent's funds. There was substantial speculation and concern in the church over whether in those circumstances the settlement was an appropriate use of church money. The claimants were among those concerned.

92. The situation was not made any easier by the fact that the investigation into the allegations made by the Kampengeles about Mr Ferguson and Mr Johnson had not been concluded. The failure to do so contributed to the atmosphere of speculation and rumour.

The outcome of the investigation into to Mr Johnson and Mr Ferguson

93. On 2 December 2017 there was a plot twist. Precious Kampengele wrote a further statement in which she alleged that her 21 April 2016 letter had been produced and sent in collaboration with Alan Hush and at the instigation of his wife, Deniza Hush. She asserted that Mr Hush had said that as a result of Precious Kampengele's April 2016 statement Rejoice Kampengele would be able to bring a claim against the NEC for a lot of money .

94. Following Precious Kampengele's 2 December letter the majority of the allegations raised by Rejoice Kampengele against Mr Ferguson and Mr Johnson were dismissed. However, it was not until February 2018 that Mr Ferguson and Mr Johnson were formally cleared of wrongdoing. The length of time taken to conclude this process unfortunately led to further speculation and concerns among the church membership. Moreover, the effective exoneration of Mr Ferguson and Mr Johnson strengthened the feeling among sections of the church membership that the substantial settlement payment to Rejoice Kampengele may not have been a good use of church funds.

95. Such concerns were not mitigated by the letter sent on 19 February 2018 by Alan Hush. This letter was written to workers of the respondent and informed them there had been an investigation into allegations made by the Kampengeles against Mr Johnson and Mr Ferguson and the outcome was that the allegations were overwhelmingly not upheld and therefore the matter had been brought to a close. The letter says that the executive commutive had accepted the findings of the investigation on 17 December 2017 but there was no explanation for the further delay in formally informing the workforce. Mr Hush also communicated that the executive committee had decided not to publish the investigation report, its findings or its recommendations. There

was a recognition of the lengthy time that it had taken to bring the matter to a conclusion but the workforce was emphatically asked to keep the matter confidential.

96. It is fair to say that this letter demonstrates the respondent's approach focused on the need for confidentiality at the expense of transparency and we think overall this emphasis contributed to the atmosphere of rumour and speculation which appears to us to have been rife within the church over the period we have described.

97. The claimants were plainly among those concerned by the approach taken. In particular Mr. Smith wrote in response to Mr Hush's letter expressing concerns with the approach and especially the emphasis on confidentiality and not releasing the findings of the investigation. He suggested that there should be an independent investigation and effectively called for greater transparency.

98. The claimants' belief in the need for a transparent investigation informed their actions in relation to Precious Kampengele's statement of 2 December 2017. In order to understand that we need to say a little bit more about the contents of the statement and what the claimants did about it.

The contents of Precious Kampengele's statement of 2 December 2017

99. Precious Kampengele's 2 December 2017 statement is headed "true statement regarding Rejoice Kampengele's issues at home and work". In the first paragraph Precious Kampengele says that she is writing the statement to correct wrongs that have become public about herself and Rejoice Kampengele from the beginning of 2016. She says that wrongs that have been done publicly have to be made right in the same way. We accept the claimants' interpretation of that paragraph which is that it suggests that Precious Kampengele was intending for what she was saying to be made public in some way.

100. As its title indicates the statement concerns matters relating to Rejoice Kampengele's home life and his work life. We understand that by December 2017 the Kampengeles had separated and divorced. The personal matters relating to Rejoice Kampengele's home life are obviously written from his former partner's perspective. She alleges that Rejoice Kampengele had had affairs with other women, including with at least two women in Zambia. It was also said Rejoice Kampengele had purchased land in Zambia, built a house there and married another woman. The suggestion made by Precious is that Rejoice Kampengele may have been a polygamist.

101. Precious Kampengele described a friend of hers confronting another member of the church about having an affair with Rejoice Kampengele but she denied having had an affair with Rejoice Kampengele.

102. Precious Kampengele also explains how following their divorce, which appears to have been finalised in September 2017, Rejoice Kampengele quickly remarried in Jamaica on 5 November 2017.

103. Precious Kampengele made it clear that she considered herself to have been wronged by Rejoice Kampengele but that the church too had let her down in the way it has handled matters. Precious Kampengele described herself as particularly shocked and distressed as some well-known people from within the respondent had supported Rejoice Kampengele at his wedding in November 2017.

104. In terms of work related issues Precious Kampengele's statement contains the following information:

104.1 In 2012 Rejoice Kampengele got involved in a transport business with Alan Hush in Zambia.

104.2 Alan Hush put an amount of capital into the business in Zambia but it had failed.

104.3 Rejoice Kampengele then reached an agreement with Mr Hush to repay him manageable monthly repayments.

104.4 Precious Kampengele discussed her concerns with Pastor Ferguson in early 2016, focusing on Rejoice Kampengele's time out of the country and the business that he was involved with.

104.5 Rejoice Kampengele then confronted Precious Kampengele and accused her for the loss of his job which he told her was due to "conflicts of interest".

104.6 Deniza Hush insisted that Precious Kampengele wrote her statement in April 2016 and had helped her with writing it, including doing the first draft of the statement.

104.7 Alan Hush agreed to tidy the statement to make it flow well and he sent the final draft from his email account.

104.8 Precious Kampengele scanned through the final draft and Alan Hush then forwarded the email from her account to all of the individuals that he wanted to receive the email.

104.9 Following the statement being sent Alan Hush seemed to be elated and said *"this is good [Rejoice Kampengele] can now sue the conference and you will have a lot of money which will help the whole family; you will be able to bring your Saint Albans mortgage down with the money; the conference is in a lot of trouble".*

104.10 Precious Kampengele got a call from Deniza Hush a few days later saying that the email had worked as Mr Johnson and Mr Ferguson had been suspended.

104.11 Richard Jackson said that he had been hoping to reinstate Rejoice Kampengele but this had not been possible due to Mr Jackson finding out that Rejoice Kampengele had been having an affair.

105. In her 2 December 2017 statement Precious Kampengele's account of her conversation with John Ferguson about her husband can be contrasted with the account she gave in her 21 April 2016 email complaint against Mr Ferguson and Mr Johnson.

106. In the 21 April 2016 email, Precious Kampengele criticised John Ferguson for meeting with her. She said "*to my shock and disbelieve [sic] I found out that information I shared in confidence has been misused and manipulated to the detriment of Rejoice and my marriage*." She also says that she was "*shocked to discover that I was labelled a whistle-blower and a witness against my husbands' work related financial dealing of which I was completely unaware and did not discuss at any time*."

107. In the 2 December 2017 statement however, she says that she discussed concerns about Mr Kampengele's absence from the country with John Ferguson and the kind of business he was engaged in. She describes Mr Ferguson as very helpful and she expressly says that she had consented to Mr Ferguson telling Mr Kampengele that she had been the source of the information leading to Mr Ferguson concerns. In these particulars the later statement is apparently inconsistent with the first. The inference in the 2 December 2017 statement is therefore that the 21 April 2016 email contains untruths.

108. Given that the 21 April 2016 email had been part of the case which had led to Mr Ferguson and Mr Johnson being suspended and then investigated over a period in excess of 18 months this could have been seen as a reason why the 2 December 2017 was worth investigating in an open and transparent way. The respondent evidently did not do that however.

109. Evidence was produced at this hearing which showed that Rejoice Kampengele had repaid money to Alan Hush as alleged by Precious Kampengele in her statement. Mr Hush admitted this was the case but said this arose from a personal (rather than a business) loan which he made to Rejoice Kampengele, that the sum involved was not substantial (£600) and it dated back to 2015.

110. There was some debate over whether Mr Hush had breached his employment contract by loaning the money to Rejoice. The claimants have a term in their contract which prohibits loaning money to colleagues. At the relevant time Mr Hush was employed as Pathfinder Director. We were not provided with Mr Hush's contract of employment for this role. However his

current contract also contains the term prohibiting lending money to colleagues. We consider it is more likely than not that Mr Hush was bound by a similar contractual provision at the time he loaned money to Rejoice Kampengele. Moreover the loan appears to us to have been a breach of the code of conduct contained in the respondent's employee handbook because it was a clear conflict of interest and there is also a prohibition in the code on loaning money to any person who is in a fiduciary relationship with the respondent.

111. Had the respondent decided to fully investigate the contents of Precious Kampengele's December 2017 statement they could have reached their own view on whether Mr Hush's loan to Rejoice Kampengele was a breach of contract or the code of conduct or otherwise inappropriate and whether that lent support to the other allegations made by Precious, but it does not appear that was not done.

112. The previous financial relationship between Mr Hush and Rejoice Kampengele (even if it was limited and historic in the way described by Mr Hush) was a clear reason why Mr Hush should have completely disassociated himself from the disciplinary/investigation process concerning the claimants' alleged wrongdoing in distributing the statement. However that too was not done.

113. Although the loan was a matter which suggested that there was some truth to the allegations made by Precious Kampengele there was a particular allegation within Precious' statement which cannot be true in light of other evidence. In her statement Precious Kampengele described how Deniza Hush had phoned her after she sent her letter of 21 April 2016 to say it had worked as Mr Johnson and Mr Ferguson had been suspended. The clear implication is that it had been Precious Kampengele's letter which had brought about the suspensions. However that cannot be correct as Mr Ferguson and Mr Johnson had been suspended on 17 April – prior to Precious Kampengele's letter of 21 April.

The claimant's actions in relation to Precious Kampengele's statement

114. Precious Kampengele's statement of 2 December 2017 was emailed to Ian Sweeney, who was then the president of the BUC and other members of the executive committee of the BUC. In addition Precious Kampengele blind copied in Mr. Brooks.

115. Mr. Brooks sought permission from Precious Kampengele to share her statement with colleagues and interested parties. He inquired if it was for public consumption. In response to Mr Brooks Precious Kampengele asked who Mr. Brooks had in mind to share it with. Mr. Brooks replied to say that he was referring to the other Pastors in his area which was area 5. Precious Kampengele responded to say that she had no problem with that and Mr Brooks then said that he would share as deemed appropriate.

116. On 4 December 2017 Mr Brooks did as he had agreed with Precious Kampengele and shared her statement with the other pastors in area 5. These included Pastor Nicholson who was the area coordinator for that area.

117. Mr. Brooks sent a short covering email with the statement in which he said that he had permission to share it with the other Pastors and that troublesome times were here. Mr. Brooks' evidence, which we accept, was that he shared the statement as he felt the issues within it needed investigating. He said that he wanted to share it with the other area 5 Pastors including the coordinator so that they could consider putting a joint response to the statement forward in order to prompt an investigation. Mr. Brooks explained that something similar had been done by the area 5 Pastors in response to Rejoice Kampengele's statement in March/April 2016. We accept that explanation.

118. On 7 December 2017 John Ferguson sent a copy of Precious Kampengele's statement to Mr. Smith.

119. On 14 December 2017 Mr. Smith emailed Precious Kampengele's statement along with Rejoice Kampengele's statement from March 2016 to a number of people within the church. These included senior figures from the BUC such as the president and the executive secretary (who would have already had the statement anyway) but also people from the wider church organisation such as the president and the educational director of the trans-European division.

120. There was a lengthier covering email to Mr Smith's communication which highlighted some of the concerning events surrounding Mr Kampengele's resignation and its aftermath which we have summarised above. Mr. Smith pointed out that many of the issues raised by Precious Kampengele suggested a different story to the one given by Rejoice Kampengele. He emphasised the key concern over the propriety of the use of church funds to make a settlement payment to Rejoice Kampengele in the circumstances.

121. Mr Smith made it clear that he was in no position to verify Precious Kampengele's statement and he expressed the view that the individuals accused within it should be given the opportunity to transparently show to an independent panel that they are innocent or otherwise.

122. Mr. Smith emphasised that there should be an immediate investigation in order to determine the truth. He expressed his belief that matters needed to be dealt with publicly and that the allegations raised by Rejoice Kampengele had in effect been made public and taken seriously. The clear inference is that Precious Kampengele's December 2017 allegations should be given as much weight as the allegations made by Rejoice Kampengele in March/April 2016. As we have explained Rejoice Kampengele's allegations had led to the suspension of Mr Ferguson and Mr Johnson and the lengthy investigation into them.

123. Mr Smith sent this email to a number of recipients which were blind copied in. The blind copied list of recipients included an email address for NEC office staff, the NEC executive committee and NEC directors and sponsors. In addition there were a number of individual email addresses, including members of the NEC executive committee and the wider church organisation. It appears however that a number of the addresses used by Mr Smith were incorrect.

124. Mr. Smith used the recipient list which had been used by Rejoice Kampengele when he sent his statement in March 2016. As we have said Rejoice Kampengele had sought to distribute that statement widely. Mr Smith took the view that in the interests of balance those who were recipients of Rejoice Kampengele's statement should also receive Precious Kampengele's statement.

125. Mr Smith's approach resulted in him inadvertently using a large number of incorrect email addresses and he received emails to the effect that delivery had failed to a large number of the intended recipients. In addition one email address on the Rejoice Kampengele recipient list was incorrectly entered so that somebody in New Zealand who had nothing to do with the 7th day Adventist church inadvertently received a copy of the email. This was a mistake which resulted from a typographical error on Rejoice Kampengele's recipient list. It did not demonstrate that Mr Smith was seeking to share the statement outside of the church.

126. Mr Sendall drew our attention to the fact that one of the recipients of Mr Smith's email was a "member of the press". However it transpired that the press organisation he worked for was in effect an internal operation of the 7th Day Adventist church – producing publications for and about the church. The person who worked for that organisation sat on the executive committee of the BUC and he was a recipient of Mr Smith's email for that reason. In that context we found that the inclusion of a "member of the press" as one of the recipients of Mr Smith's email did not betray any intention on his part to publicise the Precious Kampengele statement outside of the church.

127. As a result of the large number of failed deliveries and the fact that Mr. Smith had found out that the BUC president was on leave Mr. Smith sent a further copy of his email on the 15 December 2017. This email was sent from one of Mr Smith's email accounts to another email account of his but he blind copied in a number of individual email addresses for people who sat on the respondent's executive committee.

The impact of Precious Kampengele's statement within the church

128. Precious Kampengele's statement of 2 December 2017 became the subject of widespread gossip and concern amongst church members. However, we do not think it is accurate or fair to identify the claimants as

being responsible for that in the way in which the respondent did in the disciplinary case against the claimants.

129. It appears clear to us that the statement was being shared and discussed through various different routes which had nothing to do with the claimants. For example, Rejoice Kampengele shared a copy of the letter via WhatsApp and this copy was shared with at least one member of the church and at least two other Pastors.

130. By 2018 the church boards and many church members were aware of and concerned about matters arising from Precious' statement. The level of concern was such that letters were written and meetings organised. There is simply no proper evidential basis for the suggestion made as part of the disciplinary case that the claimants were responsible for this state of affairs generally or that they had specifically informed their church boards and encouraged or organised the letters and meetings of concern.

131. The respondent was clearly concerned about the effect which it perceived the Precious Kampengele statement had in terms of causing more distress within the church. Again we do think it is fair or accurate to hold the claimants responsible for that. We would observe that it is entirely unsurprising that the statement caused such widespread speculation and gossip in the church. It was the latest stage in a saga which was already well known and of obvious interest to church members. The saga had effectively gone public from the start when the real reason for Mr Kampengele's resignation was leaked and he distributed his letters in March and April 2016. The suspension of Mr Johnson and Mr Ferguson was also public knowledge and the fact that a payment had been made to Mr Kampengele had become well known too.

132. The church was plainly concerned about the effect of all the speculation and the potential it hard to bring the church into disrepute. Moreover individuals named within Precious Kampengele's statement were upset including at least one of the women with whom Rejoice Kampengele was alleged to have had an affair. We were told that Rejoice Kampengele went as far as to attempt to sue his former wife over the contents of the statement. It was plainly a very controversial document.

133. One way of attempting to settle the controversy and speculation over the statement, at least insofar as it related to church matters, would have been for the respondent to do as the claimants suggested and commission an independent transparent investigation. The respondent elected not to do that however, and it instead turned its focus on the claimants for their perceived wrongdoing in distributing the statement.

The claimants' motives in distributing the Precious Kampengele statement

134. On 8 January 2018 Mr. Brooks and Mr. Smith received a letter from Richard Jackson seeking to arrange a meeting to explain their motives for

distributing Precious Kampengele's statement. Mr. Smith responded to that to say that he felt his motives for distributing Precious Kampengele statement were clear from his email. This was a fair comment.

135. Mr Smith also expressed concern about the conflict of interest caused by Mr Jackson being involved. Similarly Mr. Brooks telephoned Mr Sweeney expressing concern about the conflicts of interest caused by Mr Jackson being involved in investigating their motives when he was named in the statement. Mr. Brooks and Mr. Smith both drew attention to the fact that Mr Jackson had recused himself from discussions on Precious Kampengele's statement at the executive committee meeting. There was an inconsistency between Mr Jackson doing that but then involving himself in investigating the claimant's motives. Despite these concerns the executive committee apparently did not consider there was any issue with Mr Jackson being involved.

136. On 1 March 2018 Mr. Brooks raised his first grievance, which concerned Mr Jackson's involvement in the disciplinary process. This was the first in a number of grievance and concerns raised by the claimants in which they effectively complained about the involvement of Mr Jackson and Mr Hush in matters relating to the investigation of the Precious Kampengele statement and the sharing of it. None of these complaints caused the respondent to change their approach.

137. On 21 April 2018 Mr. Smith produced a lengthy statement explaining why he had distributed Precious Kampengele's statement. Mr. Smith pointed out that his motives were in fact clearly given in his covering email. We agree with that: it was clear from the start that Mr Smith's motive was calling for an open and transparent investigation.

138. We find that Mr Brooks had the same motive for distributing the statement. In his "statement explaining my motive for sharing letter" document Mr Brooks explained how it was his intention to raise the statement at the Area Pastoral Team Meeting with a view to making collective representations to the NEC asking them to investigate the allegations, as Pastor Nicholls had done after receiving Rejoice Kampengele's letter in 2016. Like Mr Smith, Mr Brooks has been consistent from the outset that this was his motive and we accept that explanation.

139. We emphasise that in respect of both claimants there were never any real evidence that they were acting for any other purpose. The allegation that they were engaged in some kind of conspiracy was a clear example of an allegation which never had any reasonable grounds and should never have been made, let alone upheld. The description of the claimant's actions as "malicious" was also unsubstantiated. The accusation of malice is not consistent with the fact that the claimants have never alleged that the contents of Precious' statement must be true; rather that an investigation was required to establish the truth.

140. It was notable that the respondent effectively abandoned the conspiracy suggestion in its closing submissions. Instead it was suggested that the claimants disclosed the statement because they wished to bring pressure on the respondent to disclose the terms on which the claims bought by Rejoice Kampengele had been compromised. This was a very late change of tack. We find it was not properly put to the claimants and there was no real evidence of it. The respondent's inconsistent approach to what it alleges the real reason was for the claimants' actions and its tendency to assert alternative reasons without proper evidence does not reflect well on it. The simple reality is that the claimants were plainly motivated by their stated purpose of calling for an investigation. This was an entirely understandable response to the information provided by Precious Kampengele, against the background we have summarised above.

The start of the disciplinary case against the claimants

141. On 17 July 2018 Mr. Brooks and Mr. Smith were informed that they were to be the subject of a disciplinary investigation relating to distributing Precious Kampengele' s statement. This decision was confirmed in a letter of the same date. It was said that the purpose of the investigation was to establish the facts surrounding their involvement in the email distribution of Precious Kampengele's statement and it was alleged that their conduct in distributing the statement contravened various policies of the respondent including their contracts of employment.

142. At this stage the allegations against the claimant were straightforward. However as will be seen the case against them expanded and grew very significantly.

143. The letter confirming the decision to start a disciplinary investigation was written by Alan Hush. We consider Mr Hush's involvement in the disciplinary proceedings was a clear conflict of interest given the content of Precious Kampengele's statement. However, the respondent never seems to have appreciated this rather obvious point.

144. Mr Hush also communicated that once the investigation was concluded the matter would be considered by Arunas Klimas, who was the respondent's IT manager, and an independent HR consultant, Elaine Palmer Taylor, to determine if there should be a disciplinary.

145. The claimants were subsequently invited to an investigation meeting to be heard by Andrea Robinson and they were given the right to be represented at that meeting by a recognised trade union representative or a colleague.

146. On 2 August 2018 Mr Brooks raised a grievance about Mr Hush initiating the disciplinary investigation. Mr. Smith also raised a similar grievance at around the same time. Mr Hush responded to those by informing the claimants that their grievances would be dealt with at the same time as the disciplinary investigation. Mr. Hush also wrote it to the claimants around

the same time to tell them the BUC had no jurisdiction and their complaints would be handled by the NEC.

147. In August 2018 the disciplinary investigation meetings took place. The claimants attended with a trade union representative who was Caroline Poyser. The claimants were not actually members of a trade union but Ms Poyser was an accredited trade union representative. Nevertheless the respondent took the decision to exclude Ms Poyser from the meetings on the basis that she could not provide confirmation that she was attending in her capacity as a trade union representative. This meant that the claimants could only consult their representative by leaving the meeting.

148. The respondent subsequently wrote to the claimants to inform them that Ms Poyser would not be permitted to be involved further in the disciplinary process.

149. On 7 August 2018 Mr Hush wrote to Mr Brooks to inform him that the disciplinary investigation would now consider wider allegations. In particular the case again Mr. Brooks was being expanded to consider allegations that he had shared information with members of one of his church boards. The information contained in the statements of Precious Kampengele which Mr. Brooks was alleged to have shared inappropriately was said by Mr Hush to be confidential, sensitive and “unfounded”. There were further allegations relating to Mr. Brooks being involved in a letter written by one of his church boards which was said to be a fundamental breach of the general data protection regulations 2018.

150. We found the use of the word “unfounded” in Mr Hush’s letter to describe Precious Kampengele’s statement significant. There was no evidence put before us of any investigation into the matters contained in the statement and the claimants have never been provided with any evidence of an investigation either. We note that the respondent had written to Precious Kampengele on 22 April 2018 to inform her that a full investigation into her statement would not take place. It is wholly unclear what level of investigation has taken place, if any. In that context we do not see any basis for describing the statement as unfounded. The proper way to determine whether it was well founded or not would be to do a full investigation – which is exactly what the claimants were calling for.

151. Similarly if the respondent wished to rely on a finding to the effect that the statement was unfounded in the disciplinary case against the claimants then the investigation would need to be transparent. Again that was exactly what the claimants were calling for and again that was not done. If there has been some level of investigation then it has not been transparent at all.

152. Describing the statement as unfounded appears strongly to us as prejudging the matter in a way which was prejudicial to the claimants. However this description of the statement as unfounded evidently gained

traction. It was repeatedly used to describe the statement throughout the disciplinary process including in the dismissal letters where there appears to have been an assumption that the statement was in fact unfounded. For the reasons we have explained the respondent did not have reasonable grounds to describe the statement as unfounded.

153. On 10 August 2018 the claimants' representative Ms Poyser wrote to the respondent asserting that Mr. Brooks and Mr. Smith were whistleblowers and asking for the disciplinary proceedings to be suspended. The respondent did not do so and it does not appear to us to have cogently engaged with the assertion that the claimants were whistleblowers.

The first disciplinary hearings

154. On 6 September 2018 the claimants were written to by Mr Klimas inviting them to a disciplinary hearing to take place on 17 September. The claimants were informed that Mr Klimas would chair the hearing and the panel would consist of Elaine Palmer Taylor (HR consultant) and Michael Likupe (solicitor). The claimants were informed that the purpose of the hearing was to consider their conduct in the email distribution of Precious Kampengele's statement. It was again said that the content of that statement was unfounded.

155. The case against the claimants had by this stage expanded significantly. We find that the expansion was without foundation and the case against the claimants had in fact become wildly exaggerated. For example it was said that their conduct had caused upset, embarrassment, alienation, interrogation and malicious conjecture. They were accused of exerting undue influence upon Precious Kampengele and that they had acted with a view to destabilise the current administration for their own professional gain. These were extreme allegations which were put without any proper evidential basis. The case against the claimants became divorced from reality and difficult to understand.

156. On 7 September 2018 Mr Jackson wrote to Mr. Brooks to inform him that separate complaints had been made about him by Anthony Taylor and that these too would be investigated.

157. On 9 and 11 September 2018 the claimants wrote to Mr Klimas to question the inclusion of Mr Likupe on the disciplinary panel and query the extent of the expansion of the disciplinary allegations against them. They, understandably, sought clarification of the allegations.

158. Mr Klimas responded to those letters to say that Mr Likupe would not be recusing himself from the disciplinary panel and reminding them that their representative Ms Poyser would be excluded.

159. On 14 September 2018 Mr. Brooks was signed off work sick, initially for four weeks by his GP.

160. On 17 September 2018 Mr. Smith was also signed off work sick, also initially for four weeks.

161. The claimants were quickly referred to occupational health and we see nothing untoward about the respondent's prompt action in that particular respect.

162. The disciplinary hearings which were scheduled for September did not take place.

Mr Brooks' suspension

163. On 27 September 2018 Mr Jackson telephoned Mr Brooks to inform him that he was being suspended following a statement received from one of his church board members. Mr Jackson's decision was confirmed in a letter to Mr. Brooks the following day. The letter refers to a witness statement having been received from a member of the public who is also a member of the church board and that based on that Mr Jackson had decided to suspend. The nature of the allegation which justified suspension is not set out to any extent.

164. Not surprisingly, on 1 October 2018 Mr. Brooks requested details of the statement which had led to his suspension. Mr. Brooks received a response to the effect that the allegations would be discussed when he was fit to return to work.

165. On 3 October 2018 Mr. Brooks was examined by occupational health and the report produced by them is referred to above when we considered the question of whether Mr Brooks was disabled. There was a recommendation that when the disciplinary hearing reconvened it would be helpful for Mr Brooks to be sent a list of questions to be posed in advance so that he could prepare. This was not done but we have already found that the respondent was not under any duty to make reasonable adjustments.

166. On 10 October 2018 Mr. Brooks wrote to Mr Jackson, Mr Hush and others at the respondent regarding his suspension. He pointed out that it was now 10 days since he had been suspended and he remained unaware of the identity of the alleged witness or the nature of the allegation which had led to his suspension. He asked what allegations could possibly be so serious as to warrant such immediate and drastic action. He questioned who had made the decision to suspend and raised concerns about the process being followed. He pointed out that the suspension was painful, embarrassing and humiliating and he asked for his concerns to be taken seriously.

167. Mr. Brooks received a response to his letter from Mr Jackson but there was little further detail given about the nature of the complaints which were

said to have justified his suspension. It was asserted that there had been 3 written complaints which related to the claimant's leadership and conduct but again the identity of the complainants and the nature of the allegations was not specified. The claimant was instead told that this would be discussed when appropriate or when he returned to work.

168. Mr. Brooks raised a further grievance on 16 November which primarily concerned the decision to suspend him without any explanation as to what he was alleged to have done or how long his suspension was to last.

169. There was no good reason for the lack of transparency over the reason for Mr Brooks' suspension.

The further disciplinary hearings

170. Despite the fact that the claimants were still signed off sick the respondent wrote to them on 21 November 2018 inviting them to further disciplinary investigation meetings to take place on 2 December 2018. These letters again set out an expanded and highly exaggerated case against the claimants. Precious Kampengele's statement was again described as unfounded. The letters were written by Mr Jackson.

171. On the following day, 22 November 2018, Mr. Brooks and Mr Smith wrote to the respondent questioning why a disciplinary investigation meeting had been scheduled when they were signed off sick from work.

172. The respondent did not postpone the meetings scheduled for 2 December 2018.

173. On 27 November 2018 Mr Brooks submitted a further grievance in which he alleged bullying and harassment.

174. On 29 and 30 November 2018 Mr Jackson wrote to the claimants informing them that the meeting scheduled for 2 December would consider another disciplinary allegation; this time relating to their possible involvement in a letter purporting to be from the Charities Commission.

175. On 2 December 2018 the reconvened disciplinary investigation meetings took place in the claimants' absence. The notes of the meetings record that at the start of the meetings the panel waited for the claimants to attend but they did not attend having not given any notification of their non-attendance. This was an entirely unfair and inaccurate misrepresentation. The reality was that both claimants had been signed off sick and they had objected to the meeting taking place at a time when they were unfit to attend. It appears that information was not passed on to the investigation panel.

176. On 19 December 2018 Andrea Morgan wrote to the claimants providing the notes from the hearings which had taken place in their absence.

The claimants were asked to return within five days any comments on the notes including any documentation or information that they may consider important.

177. On 28 December 2018 the claimants both wrote to Mr Hush in similar terms. They pointed out, correctly, that the allegations they were now facing bore little resemblance to the allegations that they had first been notified of. They observed, again rightly in our view, that the allegations had grown exponentially. They again raised concerns about conflicts of interest with the panel members given their association with Mr Hush and Mr Jackson and emphasised that they did not consider that the respondent was acting fairly. The letters did not have any discernible effect on the respondent's approach.

The final disciplinary hearings

178. On 2 January 2019 Mr Klimas wrote to the claimants to inform them that they were required to attend a disciplinary hearing to take place on 8 January. An expanded and exaggerated case against the claimants was again set out in these letters and the letters again referred to Precious Kampengele's statement as unfounded.

179. Mr Klimas wrote to the claimants on 3 January 2019 informing them that if they wished to rely on witnesses the claimants should confirm in advance who they are and provide contact details. Mr Klimas said that the panel would then seek to contact the witnesses by telephone *"should that be appropriate and necessary".*

180. Mr. Brooks provided telephone contact details for 10 proposed witnesses and Mr. Smith for 3 proposed witnesses. Each claimant fairly queried how their witnesses could be appropriately questioned if they were unable to call them to give evidence.

181. The respondent has made a concession regarding the unfairness of the process adopted by the respondent regarding the claimant's witnesses. The essential reality is that the claimants were not given a proper opportunity to call relevant witnesses and they were not able to rely on their full witness evidence as they had wished to.

182. The claimants were written to on 17 January informing them that the respondent had decided to speak to only two of their witnesses; they did not have the opportunity to ask questions or otherwise present the evidence which they wished those witnesses to give.

183. On 14 January 2019 the disciplinary hearings for the claimants took place. The claimants were now permitted to be accompanied by Ms Poyser.

184. In Mr Brooks' hearing he made it clear that he had not taken part in any investigation regarding the further allegations which were supposed to have been discussed with him on 2 December. He made it clear that he did not

agree with the findings which had apparently been reached on those matters, however the panel did not ask him any questions about them. They nevertheless went on to uphold the further allegations. This was an obvious example of the respondent's unfair approach.

185. On 24 January 2019 the claimants attended disciplinary outcome meetings at which they were both informed that they were being summarily dismissed for gross misconduct and that written reasons would follow.

The claimants' dismissals

186. On 30 January 2019 the claimants were both written to and informed of the reasons for their dismissal. The dismissal letters in this case were unusually lengthy: around 30 pages.

187. The dismissal letters unequivocally demonstrated the unfairness to which these claimants were subject, which is now in part admitted. The letters were so prolix as to create confusion. The allegations described as upheld were repetitive and on occasion nebulous. The case against the claimants was on occasion exaggerated and put far too high. A number of allegations were unsubstantiated and demonstrated that the respondent failed to take a balanced approach to the evidence.

188. We consider that the above points became obvious at the hearing before us and resulted in the respondent's concession that the case against the claimants could and should have been limited effectively to a single allegation that the claimants acted in breach of confidence in distributing the Precious Kampengele statement.

189. The cross examination of the decision makers who we heard from regarding the contents of the letters was telling, particularly in relation to Mr Klimas who told us he was the ultimate decision maker on whether the claimants should be dismissed. The decision makers who we heard from were unclear in their evidence as to how the decision had been reached and what evidence was supposed to have substantiated the findings. Mr Klimas became so vague and hesitant in his evidence as to how the decision was reached and on what grounds that we doubted whether he was even familiar with the case which was described in the decision letters. We do not think he had had much, if any, input into the writing of the letters even though they bore his name.

The appeals

190. On 4 February 2019 Mr Brook and Mr. Smith each gave notice that they wanted to appeal their dismissals.

191. The claimants were invited to an appeal hearing which was heard by a panel including Adriana Murray who was a HR consultant. The claimants objected to the participation of Ms Murray essentially on the basis of her

previous involvement in the issues. It was also suggested that she had strong links with Mr Jackson. Nevertheless on 10 February 2019 the appeal hearings for Mr. Brooks and Mr. Smith took place and on 11 February they were sent appeal outcome letters dismissing their appeals.

Our conclusions

Unfairness

192. It is convenient to firstly set out the extent of the respondent's concession of unfairness, and then move on to our further findings on unfairness.

193. We find that the respondent was plainly right to concede procedural unfairness; these dismissals were manifestly unfair.

194. The respondent admitted that the dismissals were procedurally unfair in the following respects:

194.1 It is accepted that the allegations used at the disciplinary hearing were too complex and unclear. They could and should have been significantly simplified and clarified. In particular, they could and should have been limited to allegations of gross misconduct for deliberate and serious breaches of confidence relating to the distribution of the Precious Kampengele statement:

A. By distributing otherwise than to the claimants' line manager or to the Executive Committee or in accordance with the whistleblowing policy;
B. By failing to seek permission from the individuals named in the statement before distributing the statement in the manner described in (a).

194.2 The process adopted in respect of the calling of witnesses at the disciplinary hearing was not sufficiently explained and this seems to have resulted in a lack of opportunity for some witnesses which the claimants wished to be called to be included in the hearing either at the time or by being contacted subsequently. The respondent suggested the process was better in respect of Mr Smith's witnesses than Mr Brooks' but it admitted both processes were unfair. However, it was submitted that if the allegations had been limited to the core allegations of gross misconduct as set out above many of the witnesses would not have been necessary as the key facts relating to those allegations would not have been in dispute.

194.3 It does not appear that all of the allegations were individually addressed at the disciplinary hearing and although the claimants were given an opportunity in the meeting to add anything further that he wished to add, this was not the same as addressing each of the allegations in turn and expressly asking him to respond to it.

194.4 The use of anonymised witness statements including evidence from one anonymous witness where not even the gist of the evidence was provided was

unfair. The disciplinary panel did not satisfy themselves that there were sufficient grounds for anonymising the statements.

194.5 The conclusions on each allegation and the identification of the supporting evidence (if any) for each allegation were inadequately expressed.

195. We find the above concessions were all rightly made.

196. The respondent did not accept that the dismissals were procedurally unfair for the following reasons which were relied upon by the claimants:

196.1 It is not accepted that Mr Hush was conflicted from undertaking his administrative role in corresponding with the claimants in respect of the disciplinary and grievance processes. It is said the panels were selected by committee and not by Mr Hush alone. In retrospect, it is accepted that it might have been preferable to have removed Mr Hush from any role in the process at all, but it is submitted that his limited role did not render the processes unfair.

196.2 It is not accepted that Arunas Klimas or Michael Likupe were conflicted from being members of the disciplinary panel. It is submitted that their connections to Mr Kampengele and/or Mr Hush did not place them in a position of conflict in deciding the issues in respect of the claimants' conduct in distributing Precious Kampengele's statement.

196.3 It is not accepted that the refusal to permit Caroline Poyser to accompany the claimants at the investigation stage of the process was procedurally unfair. It is submitted that she was accompanying in a purely personal capacity and was neither a colleague nor Mr Brooks' trade union representative. She was permitted to accompany him at the disciplinary hearing.

196.4 It is not accepted that the failure to adjourn the second disciplinary investigation on 2 December 2018 rendered the dismissals procedurally unfair. It is submitted that the claimants had a fair and proper opportunity to have input into that investigation in writing, but chose not to take it up. It is further submitted that it is not a requirement of fairness that an employee should be interviewed as part of an investigation process prior to disciplinary allegations being formulated.

196.5 It is not accepted that the involvement of Adriana Murray as HR adviser to the disciplinary appeal panel when she had chaired a previous grievance was procedurally unfair. It is submitted that she was attending in her HR role and not as a decision-maker and that the grievance in question had been resolved predominantly in Mr Brooks' favour.

196.6 It is similarly not accepted that the involvement of Sally-Ann Flemmings-Danquah in the disciplinary investigation when she had been a member of a grievance panel gave rise to any form of conflict of interest or other procedural irregularity.

197. Our further findings on unfairness are as follows:

197.1 The flipside to the respondent's concession that the case against the claimants could and should have been limited to their distribution of the Precious Kampengele statement is that they each faced allegations which should never have been made, let alone upheld. It is important that we emphasise our finding that the claimants faced allegations which were unsubstantiated but nevertheless upheld. For example:

a. One of the allegations upheld against Mr Brooks was: *"You excreted [sic] undue influence as a minister of the gospel upon a member of the public who is also a church member of the NEC namely sister Precious Kampengele so that she would assist you in your desire to destabilise the current administration of the NEC for your own professional gain."* Mr Smith was similarly alleged to have acted to destabilise the current administration of the NEC for professional gain and he was said to have acted in conspiracy with Mr Brooks in that regard.

b. There was no evidence that the claimants had abused their position to exert undue influence on Precious Kampengele. That part of the allegation was directly contradicted by a statement which Precious Kampengele made on 8 January 2019 in which she made it clear she had written her statement herself for her own reasons.

c. Furthermore, Precious Kampengele was interviewed by phone on 21 January 2019 and in that conversation she asserted that no one had asked her to write the statement, that she had written it for her own reasons and that the permission to circulate had come from her.

d. Precious Kampengele's own evidence was therefore inconsistent with the allegation that the claimants had exerted undue influence on her. Nothing was said by Precious Kampengele which supported the allegation of undue influence. The respondent did not put any sort of positive case to her that she had or may have been subject to undue influence.

e. Regarding the second part of the allegation there was not a shred of evidence to show that the claimants were acting as part of a desire to destabilise the respondent's administration for their own personal gain. During the disciplinary process the respondent was not even able to articulate at the time what the professional gain was supposed to be.

f. It appears reliance was placed on a statement which was inappropriately anonymised at the time but which we now know to be from Pastor Isaac Liburd in which he speculated that the claimants seemed to be involved in an attempt to destabilise the administration for an ulterior motive. This was merely an opinion and there was no attempt made to identify any evidence in support of it or even to properly identify the ulterior motive that Pastor Liburd was referring to.

g. During the hearing before us there was a suggestion made, for the first time, that the claimants wished to obtain senior positions at the next session. This suggestion was not put to the claimants during the process, there was no evidence for it and it did not make any sense taking into account that the next session was not due to take place until 2020. Sensibly, Mr Sendall did not pursue this suggestion in his closing submissions and the allegation that the claimants were acting for personal gain was effectively abandoned. This demonstrated the complete lack of evidence to support the allegation.

h. As we have already made clear there was never any evidence of conspiracy.

i. It can therefore be seen that each element of this upheld allegation was unsubstantiated.

197.2 The consequence of the respondent unfairly restricting the claimants' ability to call witnesses and the unfair use of anonymous statements was that they were deprived of the opportunity to effectively defend themselves against the allegations they faced.

197.3 The respondent did not adequately investigate the chain of distribution which led to Precious Kampengele's statement being widely known. This chain included the fact that Precious Kampengele had sent the statement to individuals herself and that Rejoice Kampengele had also circulated it. Instead the respondent unfairly assumed that it was the claimants who were responsible for it becoming widely known and speculated upon. There were no reasonable grounds for this assumption.

197.4 The respondent failed to properly engage with the allegations relating to data breach and it was unclear exactly what the respondent believed the claimants' misconduct was in connection with the proper handling of data.

197.5 In addition to failing to properly identify evidence to support the allegations it upheld the respondent also failed to properly take into account evidence which was helpful to the claimants. For example:

a. The respondent took into account a statement from Faith Mayo without even informing the claimants of the gist of its contents. It is accepted that this was procedurally unfair. However we consider that the unfairness is deeper than that. In Mr Brooks' dismissal letter it is said that in her evidence Faith Mayo had articulated the far reaching, practical and emotional life changing impact that the claimant's actions had had on her. This is not an accurate representation of the contents of Faith Mayo's evidence. In fact her evidence makes it clear there were pre-existing issues between herself and the Kampangeles which had upset her and she expressly says that the statement *"added insult to injury as opposed to causing the injury*". Moreover there is nothing in her evidence to suggest that she blames Mr Brooks for the impact of the statement. In fact Faith Mayo described how it was Rejoice Kampengele who alleged to her that Mr Brooks had circulated the letter but she *"did not place much weight upon this information*". It is not surprising that

Faith Mayo appears to hold Precious Kampengele responsible as it was Precious Kampengele who authored the statement and not the claimants. The respondent had therefore mischaracterised her evidence in a way which was prejudicial to the claimants.

b. The disciplinary panel was in receipt of evidence from the wife of Anthony Taylor who was one of the complainants against Mr Brooks. This evidence effectively demonstrated that the complaints made by Mr Taylor were highly likely to be malicious. Before us it was accepted that the evidence showed that and therefore the respondent's decision was that Mr Taylor's allegations had not been upheld. However that finding is not recorded in the outcome letter which appeared to uphold the allegations. Moreover Mr Hush wrote to Mr Taylor on 25 January 2019 to inform him that his complaint against Mr Brooks had effectively been upheld and apologising on behalf of the respondent. This was plainly inappropriate, especially in light of the fact that the respondent now says Mr Taylor's allegations were not in fact upheld. However the apology has not been retracted and the respondent was equivocal when asked at the hearing if it would be. This series of events reflects particularly badly on the respondent.

197.6 We consider that Mr Hush was plainly conflicted in dealing with matters relating to Precious Kampengele's statement. The statement heavily implied that he was involved in wrongdoing. By way of example Mr Hush plainly had a vested interest in declaring the statement to be "unfounded". We are satisfied that Mr Hush's role in the disciplinary process was more than merely administrative. For example Faith Mayo's evidence shows that he was involved in contacting witnesses and telling them about the Precious Kampengele statement. In addition Mr Hush accepted that he was involved in appointing the disciplinary, investigation and appeal panels. It is also apparent that he was involved in framing the allegations against the claimants and drafting key letters.

197.7 On the evidence put before us, in particular regarding Mr Hush's involvement in his wedding, we concluded that Mr Likupe is a close personal friend of Mr Hush. He ought not to have been a decision maker in the disciplinary for that reason. Again it is relevant that the unsubstantiated disciplinary finding that the Precious Kampengele statement was "unfounded" directly benefitted Alan Hush.

197.8 Mr Klimas accepted that his wife had shared a credit card with Mr Kampengele. The reasons for this were rather opaque but it was clear that there was a friendship between the families. Given that the background to the issues concerned financial and other impropriety by Mr Kampengele it should have been obvious to any reasonable employer that the decision maker should not be someone whose family was close to the Kampengele family and in particular it should not be someone whose wife had a financial relationship with Mr Kampengele.

197.9 We do not think the involvement of Adriana Murray as HR adviser to the disciplinary appeal panel when she had chaired a previous grievance was procedurally unfair. However it is apparent from our other findings (and indeed the respondent's concessions) that Adriana Murray was not able to ensure fairness in the dismissal process.

197.10 In context of our findings the failure to adjourn the second disciplinary investigation on 2 December 2018 was unfair. The claimants were both signed off as unwell and no other meetings had had to be adjourned. Although the claimants were given some limited opportunity to make representations in writing they wished to provide their evidence orally and the reality was that by the time of the dismissal meetings the respondent did not have their response to many of the matters raised on 2 December. However this was not rectified at the dismissal meetings and adverse findings were consequently made against the claimants on matters where they had not provided the respondent with their evidence. We were satisfied this was as a result of the respondent's unreasonable approach rather than any evasiveness on the part of the claimants and we therefore found it was unfair.

197.11 We do not think that the involvement of Sally-Ann Flemmings-Danquah in the disciplinary investigation when she had been a member of a grievance panel was procedurally unfair. However there remained unfairness in the process as our findings and the respondent's concession demonstrate.

197.12 We found the respondent's approach to the claimants' representation to be inconsistent however we do not think it caused any unfairness on top of that which we have identified elsewhere.

197.13 Despite the length of the dismissal letters there was no mention of the claimant's length of service in the dismissal letters. We are not satisfied that the respondent took this into account. This was unfair. We find that no reasonable employer could have failed to consider the claimants' length of service as they had each provided in excess of 30 years good service prior to dismissal.

197.14 In light of our findings overall we found that the decision makers failed to take an open minded and balanced approach to the decision which they had to take. The allegations faced by the claimants became so complicated that they were difficult to understand and it became practically impossible to identify the evidence which would be necessary to meet them. The decision makers took no steps to rectify this completely unnecessary and obviously unfair situation.

Did the claimants make qualifying disclosures?

198. We find that in distributing the statement of Precious Kampengele both claimants clearly disclosed information. We have identified the 11 relevant pieces of work related information in our findings under the subheading "the contents of Precious Kampengele's statement".

199. We are satisfied that both claimants genuinely and reasonably believed the disclosures were made in the public interest. There is no evidence which might suggest that they were acting to serve a personal or private interest and we find that they did not do so.

200. The information disclosed related to whether the respondent's funds had been properly used by its leadership when settling the claim brought by Rejoice Kampengele. As the respondent is a church and a charity the proper use of its funds is a clear example of a subject which is in the public interest and the claimants genuinely and reasonably believed that.

201. The claimants also genuinely and reasonably believed it was in the public interest to disclose the information that tended to suggest that the allegations which led to Mr Ferguson and Mr Johnson being suspended and investigated were false. Mr Ferguson and Mr Johnson were senior leaders within the church and their treatment was a matter of legitimate public concern.

202. In our judgement the fact that the claimants were calling for an investigation supports the finding that they genuinely and reasonably believed they were acting in the public interest. The claimants had nothing to gain personally from an investigation; rather they genuinely and reasonably believed that it was in the public interest that the information disclosed was investigated.

203. We find that Mr Brooks genuinely and reasonably believed it to be in the public interest that the other Area 5 pastors and the area coordinator knew of the information contained in Precious Kampengele's statement given they had jointly made representations and called for an investigation in response to Rejoice Kampengele's statement.

204. Similarly Mr Smith genuinely and reasonably believed that it was in the public interest for there to be balance by providing the Precious Kampengele statement to those who had received Rejoice Kampengele's statement.

205. We find that the claimants genuinely and reasonably believed that the information disclosed tended to show the following wrongdoing:

(1) Mr Hush had aided and abetted Rejoice Kampengele to obtain monies from the NEC by deception (i.e. his settlement payment) to which he ought not to have been entitled;

(2) Mr Hush had failed to comply with his legal obligation to ensure that his duty to the respondent did not conflict with his personal interests;

(3) The respondent's executive committee or officers had failed to comply with their fiduciary obligations to act in the best interests of the respondent by approving and making the settlement payment to Rejoice Kampengele; and

(4) Those matters were being concealed.

206. The claimants' belief was, we find, based on credible evidence and not rumours or speculation. The evidence was that provided by Precious Kampengele in her statement. This was credible because Precious Kampengele was speaking from her own experience and was married to Rejoice Kampengele at the relevant time so was likely to have been aware of what he was doing. Her statement is written in terms which suggest she wishes to reveal the truth and there is no reason to dismiss it as merely gossip or speculation. It may not in the end have stood up to scrutiny but this is not to the point. What matters is that it provided a proper basis for the claimants to have formed a reasonable belief that the information tended to show the above wrongdoing.

207. We described above how in her statement Precious Kampengele had described how Deniza Hush had phoned her after she sent her letter of 21 April 2016 to say it had worked as Mr Johnson and Mr Ferguson had been suspended. It cannot be correct however that Precious' letter brought about the suspensions as Mr Ferguson and Mr Johnson had been suspended on 17 April – prior to Precious Kampengele's letter of 21 April.

208. However, we also accepted that the claimants had not seen Precious Kampengele's 21 April letter and the 2 December statement does not give its date. They were not therefore aware of this inconsistency at the time they received and distributed the 2 December 2017 statement and there is no basis for any suggestion that they could or should reasonably have been aware of it. For that reason it does not affect the reasonableness of their belief about what the statement tended to show.

209. Moreover even if Mr Johnson and Mr Ferguson were not suspended because of Precious' 21 April 2016 email it was evidence against them in the investigation which lasted for more than 18 months. Therefore Precious Kampengele was not wrong to feel responsible that she had been instrumental in what happened to Mr Johnson and Mr Ferguson in that broader sense.

210. It was plain to us that the claimants reasonably believed that the information disclosed tended to show that Mr Hush's personal affairs and professional affairs were conflicted. The information was that Mr Hush, as Pathfinder Director, had invested capital in a business venture with the Treasurer and was being repaid by him because the business had failed. That would tend to show that he had not complied with his obligation to ensure that his duty to the respondent did not conflict with his personal interests. Mr Hush accepted that, as Pathfinder Director, he would have had an obligation not to allow personal affairs to conflict with professional affairs. Mr Brooks and Mr Smith genuinely and reasonably believed that the information about the capital investment tended to show that conflict and that the conflict was a breach of a legal obligation.

211. The information that the Hushs had worked with Precious Kampengele to produce and send a formal letter of complaint against the then Executive Secretary and President, and that Mr Hush had stated that, because of that statement, Rejoice Kampengele would be able to sue the NEC for a "lot of money" tends to show that Mr Hush had been involved in sending, creating and/or encouraging a complaint which was designed to enable Rejoice Kampengele to claim a lot of money from the respondent. This was in the context of the concerning information that Rejoice Kampengele had been indebted to Mr Hush, most likely in contravention of Mr Hush's contract of employment.

212. The suggestion that Precious Kampengele's complaint has been made for the ulterior motive of claiming a lot of money clearly indicates that the complaint was not genuine and this is backed by the fact that Precious Kampengele appears in her statement to believe that she was taken advantage of and/or manipulated. For example this is strongly suggested when Precious Kampengele describes how the Hushs had made her feel as though they were helping after they approached her but *"something was not right with their involvement… I take full responsibility for allowing myself to be instrumental in how [Mr Ferguson and Mr Johnson] were treated and for that I am truly sorry".*

213. We also took into account the context which the claimants were aware of and which is relevant to the reasonableness of their belief:

(i) Mr Brooks and Mr Smith were both aware from the leaked email that the real reason Rejoice Kampengele had resigned was because of suspected final impropriety.

(ii) They were also both aware through Rejoice Kampengele's widely distributed statements of his allegations against Mr Ferguson and Mr Johnson and they were plainly aware those two had been suspended and were being investigated following Rejoice's allegations. They were aware there had been no outcome to the investigations.

(iii) More specifically the claimants were aware from the contents of Rejoice Kampengele's March letter that he had alleged that his wife had been used and manipulated by Mr Ferguson. As we explained above that allegation (which was effectively repeated in Precious Kampengele's email of 21 April 2016) is undermined by the information in the 2 December 2017 statement which tends to suggest it was falsely made. The relevant information to this effect includes Precious Kampengele's description of Mr Ferguson as "very helpful" and her assertion that she consented to him telling Rejoice Kampengele that she was the source of the information which led to Mr Ferguson raising his concerns.

(iv) They were also aware and/or reasonably believed that Mr Hush and Mr Jackson had been part of a written complaint to the NEC Executive Committee expressing no confidence in the previous administration

and they had then been elected to the senior positions previously occupied by Mr Ferguson and Mr Johnson in July 2016.

(v) They were aware of the settlement payment to Rejoice Kampengele and it was a legitimate and widely held concern that a settlement payment had been made to a Treasurer said to have been responsible for financial impropriety.

214. At the conclusion of her statement Precious Kampengele said: "*I feel that one individual that has been used and been instrumental in aiding and abetting [Rejoice Kampengele] above everyone else has been [Alan Hush] who used his influence and friendship to his own ends".* In context this was not a baseless allegation; rather it was supported by all of the other information to which we have referred.

215. In light of all the above we were satisfied that the claimants reasonably believed that the information disclosed tended to show that Mr Hush had aided and abetted Rejoice Kampengele to obtain monies from the NEC by deception (i.e. his settlement payment) to which he ought not to have been entitled.

216. It follows that the claimants also reasonably believed the information disclosed tended to show that the settlement payment was contrary to a legal obligation on the part of the Trustees to use charity funds appropriately and in the best interests of the charity.

217. The claimants reasonably believed that the information disclosed tended to show matters being concealed. The clear implication in her account of the drafting and sending of the 21 April 2016 email is that the involvement of the Hushs was concealed so that the email was read to be her own work.

218. We therefore conclude that Mr Brooks' email of 4 December 2017 and Mr Smith's emails of 14 and 15 December 2017 were qualifying disclosures.

Were the qualifying disclosures protected?

219. The respondent has a whistleblowing policy. That states that whistleblowing disclosures should be made to the executive secretary and if the employee is dissatisfied with the response then to the president. There is also reference to the fact that advice can be sought from Public Concern at Work. It does not suggest that a disclosure can or should be made to Public Concern at Work.

220. Neither claimant acted in accordance with the whistleblowing policy. We do not consider that this is necessarily fatal to their whistleblowing claims. We bear in mind that the claimants are longstanding men of the church who have had little or no exposure to HR/employment law matters. We also consider that the claimants had good reason not to follow the policy because both the executive secretary and the president were named in the disclosure in the way we have described.

221. The respondent conceded that if Mr Smith made qualifying disclosures they were protected because they were sent to the executive committee of the respondent and were therefore made to the employer. This was undoubtedly a proper concession.

222. We therefore concluded that Mr Smith made protected disclosures on 14 and 15 December 2017.

223. The situation in relation to Mr Brooks was less straightforward. In our judgement the issue turns upon whether disclosing to the Area 5 coordinator constituted a disclosure to Mr Brooks' employer.

224. We concluded that it did. We accepted the oral evidence which was given explaining the role of the area coordinator in this way: "*in practice he is a link between the pastors and the administration and specifically the president. He meets with us [the area team] and reports back to the president and the president communicates to the local pastors though the area-coordinators*."

225. We considered that the role therefore had a supervisory and leadership element and was in practice senior to the other area 5 pastors with an implied authority associated with the role. The identification of the coordinator as being the link between the pastors and the administration was significant. It was relevant that the purpose of the disclosure was to discuss the letter for a collective response to be put forward to the administration and the area coordinator would have been the person responsible for orchestrating that (as had been done with Rejoice Kampengele's letter).

226. We took into account that the church is not the same as a company or, say, a civil service department in that it does not operate on a strict hierarchical basis with clear chains of command. We were not provided with anything like a company structure or organisational chart for example. In the context of the nature of this employer and the area coordinator role we were satisfied that that Mr Brooks was in effect going up a level when he made his disclosure and that should constitute a disclosure to his employer.

227. We therefore concluded that Mr Brooks made a protected disclosure on 4 December 2017.

Were the dismissals automatically unfair?

228. The respondent has not denied that the reason for dismissal was that Mr Brooks sent the email of 4 December 2017 and that Mr Smith sent the emails of 14 and 15 December 2017.

229. In his closing submissions Mr Sendall said that the claimants were dismissed for gross misconduct arising from the distribution of Precious Kampengele's statement. The only occasions when the claimants distributed

Precious Kampengele's statement was in their emails of 4, 14 and 15 December 2017 - i.e. their protected disclosures.

230. We nevertheless followed the approach set out in Kuzel. We did not close our minds to the possibility that there may have been some separable misconduct associated with the manner of the claimants making their protected disclosures.

231. The respondent did not come close to proving that the reason for dismissal was misconduct of that nature.

232. We were unable to identify at any stage in the disciplinary process any cogent attempt by the respondent to identify the misconduct associated with the manner of the disclosures which was separable from the fact of the disclosures. Rather, it seemed to us that from the start to the end of the process the respondent was overwhelmingly concerned with the fact that the claimants had made the disclosures. For example that explains the focus on seeking to get to the claimants to explain their motives in distributing the statement, the persistent description of the statement they distributed as unfounded and the lurid descriptions of the perceived effect of the claimants' disclosures.

233. The claimants had therefore produced evidence to suggest that their dismissals were for the principal reason that they made protected disclosures.

234. We noted that the that the breach of confidence described in the respondent's closing submissions was said to have come about because the claimants had distributed other than to their line managers, executive committee or otherwise in accordance with the whistleblowing policy and had failed to seek permission from the individuals named in Precious Kampengele's statement. However, we could not see any cogent evidence that the decision makers had identified those matters as the reason for the claimant's dismissal.

235. Moreover, it seems to us that what the respondent is now alleging to be a breach of confidence is in fact an intrinsic part of the disclosures in the context which we have described. We think there are many situations where it will not be appropriate or even practical for a whistleblower to obtain permission to disclose or disclose to specific individuals and/or strictly in accordance with a whistleblowing policy. We think this was one such situation. The claimants were, in our view quite legitimately and reasonably, concerned that what that they were raising should not be concealed. This is in line with the objectives behind the whistleblowing legislation.

236. The respondent's evidence and the nature of their concession showed that the purported reasons for dismissal were confused and confusing. We were not provided with any satisfactory explanation as to why this had happened. This was a matter from which we felt it was appropriate to draw an adverse inference.

237. The first and foremost allegation which was upheld in the dismissal letters is that each claimant was involved in the distribution of the statement of Precious Kampengele. That is an allegation which is directed simply to the fact of the disclosure. We were satisfied that allegation was the principal reason for dismissal. What followed in the dismissal letters showed that the respondent was primarily concerned about the perceived effect of the claimants' disclosures, rather than any separable or distinct misconduct.

238. Accordingly we concluded that the principal reason for the dismissals was that the claimants had made the protected disclosures and the claimants succeeded on their clam that they were automatically unfairly dismissed.

Were the dismissals ordinarily unfair?

239. In light of the concession made by the respondent and our further findings on unfairness set out above we would have concluded that the claimants' dismissals were ordinarily unfair in any event. The respondent did not carry out a reasonable investigation, did not have reasonable grounds to uphold all of the allegations, the procedure adopted was unfair and the sanction of dismissal ultimately fell outside of the reasonable range of responses.

Were the claimants wrongfully dismissed?

240. The respondent did not prove on the balance of probabilities that either claimant committed gross misconduct.

241. In their closing submissions the respondent said that the claimants were guilty of gross misconduct by circulating the Precious Kampengele statement. The reality here was that the respondent had not identified any gross misconduct which was truly separable from the making of the disclosures, and it abandoned all allegations of misconduct which did not arise from the disclosures.

242. The claimants had not pursued their disclosures aggressively or repeatedly. The disclosures were not accompanied with abusive language, threats or blackmails. All that the claimants had done was pass on information in the form of a protected disclosure which genuinely concerned them and which they, quite understandably in the context of everything else which we have summarised, felt merited open and transparent consideration and investigation. They did not seek to publicise that information outside of the church organisation which had a legitimate interest in the information in view of the history outlined above. The claimants did not say that the information must be true; just that it should be investigated. The claimants had shared their disclosure more widely than was strictly necessary (Mr Smith more obviously so than Mr Brooks) but to the extent the respondent may now be seeking to rely on that as a breach of confidence we found that it was in

context an inherent part of the making of the protected disclosures and did not constitute gross misconduct.

243. We therefore concluded that the claimants were wrongfully dismissed and they are contractually entitled to their notice pay.

Should there be reductions for Polkey or contributory conduct?

244. The respondent did not seek to rely on any conduct other than that associated with the making of the disclosures. It was not said that any other matter could fairly have led to the claimants' dismissals.

245. We see no basis on which Mr. Brooks could have been fairly dismissed for his conduct. He made his disclosure to his area coordinator and small group of fellow area 5 pastors. This was what Precious Kampengele had expressly given him permission to do. Insofar as it is now suggested that this amounted to a breach of confidence that was an intrinsic part of the disclosure. In light of all the background which we have set out above we do not see how Mr. Brooks' conduct could reasonably justify dismissal.

246. Our analysis in respect of Mr Smith was different. We decided there was a percentage chance the claimant could have been fairly dismissed for his conduct. Mr Smith had shared the Precious Kampengele statement more widely than Mr Brooks and, importantly in our view, it had been difficult to identify all the people he had sent it to due to his use of "bcc". Related to this was a level of evasiveness in Mr Smith's approach to the disciplinary proceedings when he was asked about the recipients. Although we considered that might have been caused by the unfair conduct of the proceedings it was a matter which could fairly have been taken seriously and was distinct from the fact of the disclosures. We therefore formed the view that he could have been fairly dismissed for misconduct which was properly separable from the fact of the disclosures.

247. A fair dismissal could only result from a fair investigation and disciplinary process which did not happen here. We concluded that dismissal was by no means inevitable; a reasonable and open minded decision maker would have to take a balanced approach to the evidence including the evidence as to Mr Smith's real motives and the potential inconsistency with the treatment of those who wrote the letter of no confidence in March 2016. We decided that it was appropriate to make a reduction of 20% to the claimant's compensatory award to reflect the percentage chance that he could have been fairly dismissed.

248. Regarding contributory conduct, we have to consider whether the conduct of the claimants was culpable or blameworthy in the sense that it was foolish or perverse or unreasonable in the circumstances, and if so whether it caused or contributed to the dismissal and whether it is therefore just and equitable to reduce the assessment of the claimants' loss. We bear in mind that contributory conduct in this context includes conduct which may fall short of

gross misconduct and it need not necessarily amount to a breach of contract (Jagex ltd v McCambridge UKEAT/0041/19/LA).

249. We found that the conduct of Mr. Brooks just crossed the threshold for contributory conduct. We concluded that he had acted unreasonably in immediately making his disclosure to all of the Area 5 pastors without any clear explanation in his covering email as to why he was doing so. Mr. Brooks' covering email referring to "troublesome times… may god help us" made it difficult to understand his motives. In light of the controversial nature of the statement it would have been sensible to set these out in his covering email. We think it was blameworthy not to do so. This contributed to the dismissal as the tone of the covering email was seen by some area 5 Pastors as unwelcome and led to the questioning of Mr. Brooks' motives which was part of the reason for dismissal (see Pastor Isaac Liburd's evidence).

250. We found that the conduct of Mr. Smith was more blameworthy than that of Mr. Brooks. We refer to our findings as to his use of bcc and evasiveness as to the recipient list. This was unreasonable in the circumstances and contributed to the dismissal.

251. We therefore find that it is appropriate to make deductions of:

(i) 10% to Mr Brooks' compensatory and basic awards.
(ii) 20% to Mr Smith's basic award.
(iii) A further 20% to Mr Smith's compensatory award making a total 40% deduction to that award.

252. Our judgement is that these deductions reflect the different levels of contributory conduct. We consider the percentages to be just and equitable taking into account the seriousness of the conduct, the mitigation relating to the claimants' real motives in distributing the statement and the fact they were whistleblowers in the context which we have described above.

Were the claimants subject to detriments on the ground that they had made protected disclosures?

253. The respondent subjected both claimants to these detriments:

(i) Unfair disciplinary proceedings.

We do not agree with the claimant's allegation that the proceedings were "wholly unwarranted". It seems to us that as the claimants had not followed the whistleblowing procedure it cannot be said that it was unwarranted to at least consider whether there had been misconduct.

Plainly in light of the respondent's concession and our findings the proceedings were unfair.

We found a reasonable worker would take the view they had been disadvantaged by the unfair conduct of the disciplinary proceedings.

(ii) Repeatedly ignoring their concerns in relation to the involvement of Alan Hush and Richard Jackson in the disciplinary proceedings.

We found a reasonable worker would take the view they had been disadvantaged by the respondent's failure to act in response to the claimants' concerns over Mr Hush and Mr Jackson being involved in the disciplinary proceedings. This is because their involvement was a clear example of a conflict of interest.

254. The respondent subjected Mr Brooks to the additional detriment of suspending him from work from 27 September 2018 until his dismissal. We found a reasonable worker would take the view they had been disadvantaged by the suspension. Suspension cannot be seen as a neutral act. The suspension in this case was particularly impactful because the reasons for it were opaque and effectively unexplained. It is apparent from Mr Brooks' letter of 10 October 2018 that the suspension had a detrimental effect on him and we think it was reasonable for it to have had that effect.

255. The claimants therefore made protected disclosures and the respondent subjected the claimants to detriments.

256. The respondent made the broad submission in closing that the detriments took place because of the way in which the claimants went about making their protected disclosures. As we have already made clear we do not think the respondent actually made a proper distinction between the making of the disclosures and the way in which the claimants went about making them. We did not find that any of the detriments were done because of misconduct which was related to the way in which the claimants made their disclosures but was separable from the disclosures. Insofar as the respondent's submission was referring to breach of confidence we have found that was an intrinsic part of the disclosures that the claimants made.

257. Our analysis in respect of the unfair conduct of the disciplinary proceedings and ignoring of the claimants' concerns over the involvement of Mr Hush and Mr Jackson was similar, because we saw the ignoring of the claimants' concerns as part of the unfair conduct of the proceedings. We consider that the guiding hands behind these detriments were Mr Hush and Mr Jackson themselves, who we have found were inappropriately involved in the proceedings despite their clear conflicts of interest.

258. The disciplinary proceedings took place because the claimants had made protected disclosures. The procedures were initiated because the claimants had made their disclosures and the disclosures were the driving force in the conduct of the proceedings against them. The claimants showed that the disclosures were a more than trivial reason for the detrimental unfairness which they were subject to, including the ignoring of their concerns

over the involvement of Mr Hush and Mr Jackson. We made findings and drew adverse inferences from the following salient matters.

259. In their written submissions the respondent submitted that the proceedings were not unfair which is inconsistent with the tribunal's finding and the respondent's own concession. Although the respondent had conceded that it had acted unfairly it did not put forward any explanation for why there had been such clear unfairness. We drew an adverse inference from that.

260. We also took into account and drew an adverse inference from the respondent's steadfast refusal to permit a transparent investigation into the matters which are the subject of the disclosures. The difference between that refusal and the call for an open and transparent investigation of Rejoice Kampengele's allegations in March 2016 is conspicuous.

261. It will be recalled that those who called for a transparent investigation in March 2016 were the very people who were leading the respondent at the time of the claimant's disclosures and the subsequent decision to ignore their calls for a transparent investigation into them (Mr Hush and Mr Jackson). We found that the most likely reason for this was that the leadership in December 2017 were concerned as to the damaging effect that the disclosures may have, particularly with regard to the appropriateness of the payment made to Rejoice Kampengele and the other wrongdoing which we found the information disclosed tended to show. The leadership in December 2017 was the same leadership who had authorised the payment to Rejoice Kampengele which was now being called into question. It was plainly more convenient to the leadership to dismiss the information in the disclosures as "unfounded", than to fully and transparently investigate.

262. We were told that investigations within the church and the respondent have concluded that the allegations made by Precious Kampengele are without merit and no action should be taken. However no evidence of these investigations was put before us, the claimants were unaware of any investigations and it is unclear how they were conducted. The respondent did not take the opportunity to question Precious Kampengele in any meaningful way when she was interviewed in the disciplinary process, which appears to be inconsistent with a desire to investigate her statement.

263. The suggestion that there had been an investigation was also undermined by the contemporaneous evidence in that the respondent wrote to Precious Kampengele on 22 April 2018 to inform her that a full investigation would not take place. If there were investigations they have certainly not been independent, open or transparent.

264. We found that the unfairness in this case was so extensive that it could not be easily explained by incompetence, oversight or some similar innocent reason. The respondent had not shown such a reason.

265. We agreed with the submission made on behalf of the claimants that the unfairness here was so extensive as to betray the fact that the dismissals were predetermined. Again we felt this was a matter from which we could draw an adverse inference.

266. The evidence of predetermination was most clear in the respondent's extreme exaggeration of the case against the claimants, the unsubstantiated adverse findings against them and the obstacles which were placed in the way of the claims defending themselves (for example by failing to allow their witnesses and failing to obtain their evidence on some allegations). Predetermination was also supported by contemporaneous evidence, in particular the notes of the respondent's executive committee on 13 May 2018 which showed adverse conclusions were reached about the claimants' conduct even before the start of the investigation.

267. It is striking to compare the wide ranging case which was upheld against the claimants in the dismissal letters with the narrow way in which the respondent now accepts the case against them should have been put. The contrast demonstrates the extent to which the case against the claimants was exaggerated and artificially inflated.

268. In light of the above we found that the unfairness was as a result of the determination on the part of the respondent to bring about the dismissal of the claimants because of their protected disclosures (on the basis that the disclosures were unfounded) rather than properly investigate.

269. There was a denial in the respondent's submissions that the claimants' concerns about Mr Hush and Mr Jackson had been ignored but we cannot accept that in the light of our findings as to Mr Hush and Mr Jackson's continued involvement. Again there was no explanation as to why the claimant's concerns had been ignored and we drew an adverse inference from that. It is difficult to understand how it could possibly have been seen as appropriate that Mr Hush and Mr Jackson continued to be involved in the disciplinary proceedings. In our judgement this was not a case of a finely balanced potential conflict of interest; it was a clear and obvious one.

270. We have already made our findings as to the clear conflict of interest which Mr Hush had and his inappropriate continued involvement. We consider the conflict in relation to Mr Jackson was also very clear. In his statement Mr Jackson expressly told us that he and Mr Hush were friends with Mr Kampengele. That alone created a clear conflict of interest in the claimants' disciplinary hearing outcomes, especially the unsubstantiated finding that Precious Kampengele's statement was unfounded.

271. We also noted that Mr Jackson said in his statement that he formed the view that the claimants had made their disclosures with a view to forcing him to resign and replace him as president with themselves or their preferred candidates. There was no evidence of that and Mr Jackson was not even able to cogently explain how he reached that view. It is another example of the

respondent making unsubstantiated allegations against the claimants. This view also indicates a very clear conflict of interest with Mr Jackson having a personal interest in the claimants' disclosures being discredited (i.e. held to be "unfounded"), and indeed in their dismissals.

272. Despite that Mr Jackson was involved in the disciplinary process, for example in obtaining the claimant's evidence as to their motives and he was responsible for forwarding relevant evidence to the investigator. There was a particular failure on the part of Mr Jackson in that he failed to forward the occupational health report concerning Mr Brooks to either Mrs Morgan or, likely, Mrs Palmer Taylor.

273. We concluded that the reason why the claimants were subject to such manifestly unfair disciplinary proceedings including the failure to act on their concerns about Mr Hush and Mr Jackson was because they made protected disclosures. It was the disclosures and their obvious potential to embarrass and inconvenience the leadership of the respondent which caused the determination to bring about the claimants' dismissals and the related decisions to conduct the disciplinary proceedings in such an unfair manner including to fail to act on their concerns about Mr Hush and Mr Jackson. We could not see the continued involvement of Mr Hush and Mr Jackson despite their clear conflict of interest as being anything other than a product of their vested interest in discrediting the disclosures made by the claimants.

274. The disclosures were therefore a material factor in the unfair conduct of the disciplinary proceedings and the failure to act on the claimants' concerns about Mr Hush and Mr Jackson. The claimants' detriments claims succeed to that extent.

275. Our analysis in respect of the suspension of Mr Brooks was different. The evidence is that Mr Brooks was suspended as a result of 3 separate complaints. There are reasons to seriously doubt the veracity of those complaints and it appears they were not properly investigated (see our findings in relation to the complaints of Antony Taylor for example). No doubt this is why the respondent now accepts that the reasons for dismissal should not have included these allegations.

276. Nevertheless when we focused on the reasons for Mr Jackson's decision to suspend Mr Brooks at the time we found that the claimant had not shown to any extent that the reason for that decision was his protected disclosure and we did not draw any inferences relevant to that specific decision. The respondent had provided an explanation and we found that they had in fact shown that the reason for suspension was the 3 separate complaints.

277. We therefore concluded that the protected disclosure was not a material factor in the decision to suspend the claimant. Mr Brooks therefore failed in his claim that his suspension was a detriment on the ground that he made a protected disclosure.

Were the protected disclosures made in good faith?

278. Appropriately, we end on a question of faith. We find the disclosures were made in good faith.

279. The claimants acted with honest motives. The predominant reason why they made their disclosures was to call for an investigation. There was no evidence that they made their disclosures to advance a grudge, or to advance some other ulterior motive. The claimants were consistent and transparent from the outset about the fact that their motive was to call for an investigation. We do not consider that was a motive which is unrelated to the objectives behind the whistleblowing legislation.

280. We do not think calling for an investigation was in this context a personal or political move; there is no evidence that the claimants could have gained anything from an investigation or that in calling for one they were pushing a particular agenda. Rather the claimants' view, which we think was genuinely and reasonably held, was that it was in the church's best interests and the public interest generally for there to be an open and transparent investigation.

281. We shall therefore not make any deduction to the claimants' compensation for not acting in good faith.

Next steps

282. The claims have largely succeeded. This means there may need to be a remedy hearing. We express a hope that that may not be necessary given the delay in concluding the liability hearing and consequently producing this judgment. We hope there may now be a mutual desire to draw a line under this sad case. The parties should at least be talking to one another to see if matters can be agreed. If that proves to be impossible then we have made a separate case management order to prepare the case for a remedy hearing.

283. Despite the fact that it has been necessary to express ourselves in occasionally trenchant terms during this judgment we would like to think that our decision may at least be a platform for the church organisation and its membership to move on from what has evidently been a very difficult few years, as was apparent at the hearing before us.

_____

Employment Judge Meichen 28.5.21

Sent to the parties on:

…….

For the Tribunal:

……..

APPENDIX – THE AGREED LIABILITY ISSUES

Public Interest Disclosure

Mr Brooks

1. The alleged disclosure Mr Brooks relies upon is as follows: Sending an email to the pastoral team within Area 5 on 4 December 2017 which included as an enclosure the statement of Precious Kampengele. The issues which arise in relation to Part IVA of the ERA as between Mr Brooks and the Respondent are:

   (1) In sending that email and statement, did Mr Brooks make one or more protected disclosures (ERA sections 43B & 43C)? This will involve consideration of the following issues:
   - (a) whether there was a disclosure of information which, in the reasonable belief of Mr Brooks was both
   - (b) made in the public interest; and
   - (c) which tended to show that:
     - (i) a criminal offence had been committed, specifically that Alan Hush had aided and abetted Rejoice Kampengele to obtain monies from the respondent by deception to which he ought not to have been entitled (s.43B(1)(a) ERA 1996);
     - (ii) that Mr Hush had failed to comply with a legal obligation to which he was subject, namely that Mr Hush had failed to comply with his legal obligation to ensure that his duty to the respondent did not conflict with his personal interests S.43B(1)(b);
     - (iii) that the respondent had failed to comply with a legal obligation to which it was subject, namely, by approving and making a payment to Rejoice Kampengele, those responsible (whether the Executive Committee of the respondent or its Executive Officers) had failed to comply with their fiduciary obligations to act in the best interests of the respondent s.43B(1)(b) ERA 1996; and/or
     - (iv) that information tending to show (a)-(c) above had been deliberately concealed (s.43B(1)(f) ERA 1996).

   (2) Was the disclosure made to the Respondent or other responsible person for the purposes of s.43C ERA 1996? In particular:
   - (a) Was the disclosure by Mr Brooks to the pastoral team within Area 5 on 4 December 2017 a disclosure made to the Respondent or other responsible person?

   (3) Was the reason or the principal reason for which Mr Brooks was dismissed that he had made a protected disclosure?

   (4) Did the Respondent subject Mr Brooks to any detriments, as set out below:
   - (a) Being subjected to unfair and wholly unwarranted disciplinary proceedings;

(b) Repeatedly ignoring his concerns in relation to the involvement of Alan Hush and Richard Jackson in those proceedings;
(c) Being suspended from work from 27 September 2018 until his dismissal;
Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the first claimant as a matter of law.

(5) If so, was this done on the ground that he made one or more protected disclosures?

Mr Smith

2. The alleged disclosures Mr Smith relies upon are as follows:

(1) Sending an email to members of the British Union Conference and others (as set out in paragraph 14 of his Particulars of Claim) dated 14 December 2017 which included as an enclosure the statement of Precious Kampengele;

(2) Forwarding the same email to the Executive Committee of the Respondent on 15 December 2017.

3. The issues which arise in relation to Part IVA of the ERA as between Mr Smith and the Respondent are:

(1) In sending that email and statement, did Mr Smith make one or more protected disclosures (ERA sections 43B & 43C)? This will involve consideration of the following issues:

(a) whether there was a disclosure of information which, in the reasonable belief of Mr Smith was both
(b) made in the public interest; and
(c) which tended to show that:
(i) a criminal offence had been committed, specifically that Alan Hush had aided and abetted Rejoice Kampengele to obtain monies from the respondent by deception to which he ought not to have been entitled (s.43B(1)(a) ERA 1996);
(ii) that Mr Hush had failed to comply with a legal obligation to which he was subject, namely that Mr Hush had failed to comply with his legal obligation to ensure that his duty to the respondent did not conflict with his personal interests S.43B(1)(b);
(iii) that the Respondent had failed to comply with a legal obligation to which it was subject, namely, by approving and making a payment to Rejoice Kampengele, those responsible (whether the Executive Committee of the respondent or its Executive Officers) had failed to comply with their fiduciary obligations to act in the best interests of the respondent s.43B(1)(b) ERA 1996; and
(iv) that information tending to show (a)-(c) above had been deliberately concealed (s.43B(1)(f) ERA 1996).

(2) Was the disclosure made to the Respondent or other responsible person for the purposes of s.43C ERA 1996? In particular:
   (a) Was the disclosure by Mr Smith to the Executive Committee of the respondent on 14 and/or 15 December 2017 a disclosure to the Respondent or other responsible person?
   (b) Was any alleged disclosure made to the BUC a disclosure made to the respondent or other responsible person?
   (c) insofar as the disclosure was made to any person other than the Respondent, did Mr Smith reasonably believe that the relevant failure related solely or mainly to a matter for which that person had legal responsibility?

(3) Was the reason or principal reason that Mr Smith was dismissed that he had made a protected disclosure?

(4) Did the Respondent subject Mr Smith to any detriments, as set out below:

   (a) Being subjected to unfair and wholly unwarranted disciplinary proceedings;
   (b) Repeatedly ignoring his concerns in relation to the involvement of Alan Hush and Richard Jackson in those proceedings;

   Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to Mr Brooks as a matter of law.

(5) If so, was this done on the ground that he made one or more protected disclosures?

Unfair dismissal contrary to s.98(4) ERA

4. What was reason or the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was a reason relating to the Claimants' conduct. The Claimants assert that the reason or principal reason for their dismissal that they had brought to light alleged misconduct on the part of the Respondent's executive secretary and had exposed the making of an unwarranted payment to the Respondent's former treasurer.

5. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'? This will involve consideration of the following questions:

(1) Did the Respondent have a genuine belief in the Claimants' guilt?

(2) Did they have reasonable grounds for that belief?

(3) At the time that they formed it, had as much investigation been carried out as was reasonable in all the circumstances? The Claimants argue that, in

particular, the investigation was not within the range of reasonable responses because it focused exclusively on obtaining evidence from witnesses who were supportive of the Executive Secretary and whose evidence was unfavourable to them.

(4) Mr Brooks relies, in particular, upon the matters set out in paragraph 73 of his Particulars of Claim and paragraphs 108 & 109 of his witness statement.

(5) Mr Smith relies, in particular, upon the matters set out in paragraph 68 of his Particulars of Claim and paragraph 157 of his witness statement.

6. If the Claimants were unfairly dismissed and the remedy is compensation:

(1) if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimants (or either of them) would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway?

(2) would it be just and equitable to reduce the amount of the claimants' basic awards (or that of either of them) because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?

(3) did the claimants, by blameworthy or culpable actions, cause or contribute to their dismissals to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory awards, pursuant to ERA section 123(6)?

Breach of contract/Wrongful Dismissal

7. It is not in dispute that the Claimants were each contractually entitled to 12 weeks' notice.

8. Did Mr Brooks fundamentally breach the contract of employment by an act of so-called gross misconduct entitling the Respondent to dismiss him summarily? This requires the Respondent to prove, on the balance of probabilities, that Mr Brooks actually committed the gross misconduct.

9. Did Mr Smith fundamentally breach the contract of employment by an act of so-called gross misconduct entitling the Respondent to dismiss him summarily? This requires the Respondent to prove, on the balance of probabilities, that Mr Smith actually committed the gross misconduct.

Disability Discrimination: Failure to make reasonable adjustments – contrary to ss.20&21 EQA

10. Is/was Mr Brooks disabled because of an eye condition so as to impose a duty upon the Respondent to make reasonable adjustments?

11. Did the Respondent know or could the Respondent have been reasonably expected to have known that Mr Brooks was disabled? The Respondent denies constructive knowledge.

12. Did the Respondent apply a provision, criterion or practice (PCP) to the Claimant? In particular did the Respondent apply the following alleged PCPs:

    (1) a requirement to attend disciplinary investigation meetings without being provided in advance with a list of the questions to be asked at such meetings;

    (2) a requirement to attend disciplinary hearings without being provided in advance with a list of questions to be asked at the hearing.

13. Did the PCP put Mr Brooks at substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled? In particular, did Mr Brooks have concentration difficulties which made it substantially less likely that he would be able to give a proper account of himself in a formal disciplinary setting than a non-disabled employee. In the event that Mr Brooks proves that he was disabled and that the Respondent knew or ought to have known of this, it is not disputed that the Respondent had actual or constructive knowledge of the substantial disadvantage.

14. What adjustments ought the Respondent to have made in order to avoid the disadvantage and to comply with the duty to make reasonable adjustments? In particular would it have been a reasonable adjustment for the Respondent to be required to provide a list of questions in advance of the disciplinary investigation meeting and/or the disciplinary hearing? The Respondent contends it would not have been reasonable or practicable to provide the questions in advance because they would not have known what those questions would be.

15. Did the Respondent fail to comply with its duty to make reasonable adjustments?