EMPLOYMENT TRIBUNALS

Claimant: R Massingham

Respondent Chrystal Consulting Limited

HELD AT: Manchester **ON:** 2-6, 9 August 2021 (and in chambers 13-15 December 2021, 13 January 2022)

BEFORE: Employment Judge Batten
S Anslow
A Booth

REPRESENTATION:

For the Claimant: D Bunting, Counsel
For the Respondent: A Rozycki, Counsel

RESERVED JUDGMENT

The majority judgment of the Tribunal (non-legal members Anslow and Booth being the majority, with Employment Judge Batten dissenting) is that:

1. the claimant was constructively unfairly dismissed for whistleblowing in his grievance of 31 May 2019.; and

The unanimous decision of the Tribunal is that:

2. The claimant was not subjected to detriment because of his protected disclosure.

REASONS

1. By a claim form presented on 24 December 2019, the claimant presented a claim comprising complaints of constructive unfair dismissal and of detriment/dismissal for whistleblowing. On 27 January 2019, the respondent submitted a response to the claim.

2. A case management preliminary hearing took place on 24 April 2020 before Employment Judge Leach at which the claims were clarified and a list of issues drawn up.

Evidence

3. A bundle of documents comprising 2 full lever arch files, 686 pages, was presented at the commencement of the hearing in accordance with the case management Orders. A number of further documents were added to the bundle in the course of the hearing. References to page numbers in these Reasons are references to the page numbers in the bundle.

4. The claimant gave evidence himself by reference to a lengthy witness statement. The respondent called 2 witnesses, being: Kevin Newsome, the claimant's line manager; and Andrew Baker, the respondent's finance director. All of the witnesses gave evidence from written witness statements and were subject to cross-examination.

5. In addition, the Tribunal was provided with a cast list and an agreed chronology.

6. The oral evidence was completed only late in the afternoon of the sixth day and therefore both representatives agreed to produce written closing submissions and supplied caselaw authorities in readiness for the Tribunal's deliberations.

Issues to be determined

7. A draft list of issues had been prepared at the case management preliminary hearing on 24 April 2020. At the outset of the hearing, the Tribunal discussed the draft list of issues with the parties. After amendment, it was agreed that the issues to be determined by the Tribunal were as follows:

Constructive Dismissal

1. Did the respondent fundamentally breach the implied duty of trust and confidence by reason of the following:

a. In late 2014, the respondent failed to make the claimant a 25.5% shareholder, as had been promised in 2008 (subject to the claimant still being with the business in late 2014), but instead gave him a bonus equivalent to the value of having 25.5% shares, but without the relevant shareholding / equity;

b. After the claimant was brought into Managed Services in 2017, he was required to meet high performance targets without appropriate training;

c. Repeated verbal abuse from Ian Sinclair-Ford (The respondent's Company Solicitor and Director of Legal and Compliance) in the boardroom, including during September 2017;

d. When the claimant retorted, Mr Sinclair-Ford did not include the claimant's responses in the minutes, but Mr Sinclair-Ford recorded his own unfounded criticisms of the claimant in them (September 2017);

e. Mr Sinclair-Ford failed to read out the claimant's responses at the next board meeting, despite having promised to do so in the minutes of the meeting (November 2017);

f. Despite the claimant complaining to Kevin Newsome (the respondent's owner and the claimant's line manager) and Andrew Baker (Finance Director) about these issues, no action was taken;

g. In late 2017, Mr Newsome informed the claimant, during a board meeting, that if Mr Newsome's performance had been as bad as the claimant's he would have been dismissed (September 2017);

h. The boardroom was the forum in which the claimant's performance would be discussed in an entirely unconstructive fashion, rather than in some more private setting or during part of a constructive appraisal process;

i. In January 2018, the claimant was removed from the Board of Directors (also relied upon as Det 8a);

j. Later in 2018, the respondent proposed and implemented a restructure, resulting in a change in how the claimant's remuneration was calculated, without proper consultation and without properly explaining it or putting it in writing;

k. In early March 2019, a colleague called Alex Jones found a draft suspension letter for the claimant on the Company's server, which further undermined the claimant's position (also relied upon as Det 8b);

l. Around 30 January 2019, the respondent commenced disciplinary action against the claimant in relation to his alleged failure to invite a sub-contractor called MAST into a conference call with other sub-contractors on/around 10 January 2019, notwithstanding the fact that, shortly after the event, Mr Newsome had informed the claimant that no loss had arisen due to the claimant's actions and that the matter was closed (also relied upon as Det 8c);

m. Mr Sinclair-Ford referred to the claimant's behaviour, during the supposed fact-finding investigation around 30 January 2019, as having been 'a disaster' (in writing), suggesting that he had prejudged the disciplinary process (also relied upon as Det 8d);

n. The individual who was due to determine the claimant's disciplinary process was Mr Sinclair-Ford, despite the fact that it was he who had brought the disciplinary issues to light in the first place, who was completing the investigation and who was submitting the respondent's witness statement against the claimant within the process. This was also the case despite the fact that there were 2 other directors who could have dealt with the matter (Gayle Merrygold and/or Andrew Baker) and the fact that the respondent had access to HR consultants via an organisation called Kingfisher (also relied upon as Det 8e);

o. Around November 2017, the respondent communicated, by email, that it would not be awarding the claimant with a significant bonus, as had been agreed, in respect of his contribution to a high value transaction involving an endoscopy contract, apportioning 10% rather than 50% of the applicable annual bonus calculations (with the balance going to Gayle Merrygold, another Director). Bonuses, if split, had always been split 50/50 before that (also relied upon as Det 8f);

p. During the same period, the respondent pressured him to resign when Mr Sinclair-Ford raised questions as to whether the claimant could continue working for the respondent in light of his condition (stress), despite the fact that Mr Sinclair-Ford was aware that the claimant's GP was of the view that he could continue working from home (also relied upon as Det 8g);

q. The respondent also pressured the claimant to resign when Mr Sinclair-Ford said he would be calling the respondent's insurance company about whether the claimant could continue to work for the respondent, in an effort to find a way to make it untenable for the claimant to continue to work for the respondent, despite the fact that the claimant's job role was clearly one which could be undertaken from home (and which he had been undertaking at home) (also relied upon as Det 8h);

r. From April 2019, when the claimant went off sick, he was paid SSP for three weeks of the month, rather than full sick pay, when the respondent had previously always paid him full pay (also relied upon as Det 8i);

s. Throughout the grievance process, despite repeated requests by the claimant, the respondent decided not to appoint an independent investigator to consider the claimant's grievance (also relied upon as Det 8j);

t. The grievance outcome on 12 July 2019 (also relied upon as Det 8k);

u. The grievance appeal outcome on 4 September 2019 (also relied upon as Det 8l)?

2. If the respondent's actions had the effect of breaching trust and confidence, was there nonetheless reasonable and proper cause for these actions?

3. Did the claimant resign in response to that breach or for some other reason?

4. Did the claimant affirm the contract, thus accepting any breach?

5. Did that last straw (the grievance appeal outcome dated 4 September 2019) contribute to the overall breach of trust and confidence in a manner that was more than trivial?

6. If the claimant was constructively dismissed, was the claimant's dismissal nonetheless fair under section 98 Employment Rights Act 1996?

Whistleblowing – Protected Disclosure

7. Did the claimant make a qualifying disclosure (or disclosures)? The claimant relies upon the following disclosures:

i. While a member of the Board (i.e. prior to January 2018), during 2017 and/or 2018, the claimant raised various verbal concerns in the board room regarding Mr Kevin Newsome having breached a court undertaking, currently breaching it and/or or being likely to breach it;

1. *The claimant says, at various meetings in 2017 and 2018, the claimant stated that Mr Newsome appeared to be undertaking management duties, whereas the 2011 court undertaking did not permit Mr Newsome to manage the respondent [CWS para 39?];*

ii. In January 2019, the claimant asked Mr Sinclair-Ford why Mr Newsome was directly negotiating [in a misleading manner (per para 30 of Grounds of Resistance] to get more money out of MAST, in respect of a contract, and the claimant raised concerns about Mr Newsome being involved in the negotiation (contrary to the undertaking);

1. *The claimant says he raised verbal concerns to Mr Sinclair-Ford about Mr Newsome being involved in the negotiations without scrutiny, including saying that he was concerned that Mr Newsome was "trying to find ways to obtain additional high value fees without the scrutiny of the Board [CWS 44];*

iii. The claimant's grievance dated 30 May 2019 (Bpps 335 + 338)?

8. In respect of the above, under s43B(1)(b) of the Employment Rights Act 1996:

a. Did the claimant disclose information?

b. Did he reasonably believe that the disclosure was in the public interest?

c. Did he reasonably believe that his disclosure tended to show that that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject?

Whistleblowing Detriment

9. Did the claimant suffer the following detriments:

a. In January 2018, C was removed from the Board of Directors;

b. In early March 2019, a colleague called Alex Jones found a draft suspension letter for the claimant on the Company's server, which further undermined the claimant's position;

c. Around 30 January 2019, the respondent commenced disciplinary action against the claimant in relation to his alleged failure to invite a sub-

contractor called MAST into a conference call with other sub-contractors on/around 10 January 2019, notwithstanding the fact that, shortly after the event, Mr Newsome had informed the claimant that no loss had arisen due to the claimant's actions and that the matter was closed;

d. Mr Sinclair-Ford referred to the claimant's behaviour, during the supposed fact-finding investigation around 30 January 2019, as having been 'a disaster' (in writing), suggesting that he had prejudged the disciplinary process;

e. The individual who was due to determine the claimant's disciplinary process was Mr Sinclair-Ford, despite the fact that it was he who had brought the disciplinary issues to light in the first place, who was completing the investigation and who was submitting R's witness statement against the claimant within the process. This was also the case despite the fact that there were two other directors who could have dealt with the matter (Gayle Merrygold and/or Andrew Baker) and the fact that the respondent had access to HR consultants via an organisation called Kingfisher;

f. Around November 2017, the respondent communicated, by email, that it would not be awarding the claimant with a significant bonus, as had been agreed, in respect of his contribution to a high value transaction involving an endoscopy contract, apportioning 10% rather than 50% of the applicable annual bonus calculations (with the balance going to Gayle Merrygold, another Director). Bonuses, if split, had always been split 50/50 before that;

g. During the same period, the respondent pressured him to resign when Ian Sinclair-Ford raised questions as to whether the claimant could continue working for R in light of his condition (stress), despite the fact that Mr Sinclair-Ford was aware that the claimant's GP was of the view that he could continue working from home;

h. The respondent also pressured the claimant to resign when Mr Sinclair-Ford said he would be calling the respondent's insurance company about whether the claimant could continue to work for the respondent, in an effort to find a way to make it untenable for the claimant to continue to work for the respondent, despite the fact that the claimant's job role was clearly one which could be undertaken from home (and which he had been undertaking at home);

i. From April 2019, when the claimant went off sick, he was paid SSP for three weeks of the month, rather than full sick pay, when the respondent had previously always paid him full pay;

j. Throughout the grievance process, despite repeated requests by the claimant, the respondent decided not to appoint an independent investigator to consider the claimant's grievance;

k. The grievance outcome on 12 July 2019;

l. The grievance appeal outcome on 4 September 2019?

10. If so, was the claimant subjected to these detriments on the ground that he made a protected disclosure or disclosures, contrary to s47B(1) (i.e. was the disclosure or disclosures a material factor in their causation)?

11. Was the complaint submitted within three months less one day from the date of the act or failure or, where that act or failure was part of a series of similar acts or failures, the last of them, in accordance with s48(3)?

12. Was it reasonably practicable for the complaint to be presented in time?

13. Was the complaint submitted within such further period as was reasonable?

Whistleblowing – Automatically Unfair Dismissal

14. If the claimant resigned in response to the employer's repudiatory breach of contract, was the sole or principal reason for the employer's breach of contract the claimant's protected disclosure or disclosures, and therefore unfair under s103A of the Employment Rights Act 1996?

Findings of fact

8. The Tribunal made its findings of fact on the basis of the material before it taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on the balance of probabilities. The Tribunal has taken into account its assessment of the credibility of witnesses and the consistency of their evidence with surrounding facts.

9. The findings of fact relevant to the issues which have been determined are as follows.

10. The respondent is a provider of services, initially of leasehold services and later 'managed services' to the NHS. The claimant was employed by respondent from 2000 as an account manager. On 1 July 2003, the claimant was appointed to the respondent's Board as Sales and Marketing Director. On 7 November 2003, the claimant signed a contract = B 56-70.

11. In 2007, the claimant was appointed as Account Director in the leasehold consultancy area of the respondent's business, which was doing well.

12. In October 2007, a meeting took place between the respondent's Directors about the future of the respondent and the retirement plans of the respondent's shareholders, who were Mr Newsome and Mr Baker. The claimant and his fellow Director, Ms Gayle Merrygold, were told by Mr Newsome and Mr Baker, that if they were still employed by the respondent after 7 years, i.e. in 2014, it was proposed that the claimant and Ms Merrygold would each then be eligible for a 25.5% shareholding. If put into effect, this would mean that the claimant and Ms Merrygold together would become majority shareholders because they would have a combined shareholding of 51% and Mr Newsome and Mr Baker together would have 49% of the shares in the respondent. The offer, described by the claimant

in evidence as “an offer or proposal” was never put into writing and no agreement was recorded formally or otherwise.

13. In August 2010, the respondent was investigated by the Department for BIS over allegations of fraud in public sector contracting. This resulted in the respondent having to refund approximately £1.3 million to various hospitals, police and local authorities.

14. As a result of the fraud investigation, on 11 March 2011, the respondent was subject to a winding-up petition by the Secretary of State for BIS on grounds of trading using fraudulent methods and use of false instruments and false accounts. The petition appears in the bundle at pages 88-94. The winding up petition was ultimately dealt with on 30 August 2011 by undertakings given to the Court by Mr Newsome and the respondent. The undertakings appear in the bundle at page 95 onwards, and include provision that Mr Newsome step down from the respondent’s Board and shall not be involved in the management of the respondent, but he could remain an employee. The undertakings were signed by all of the respondent’s directors at the time including the claimant.

15. A further result of this chapter in the respondent’s history was that Mr Ian Sinclair-Ford, who is a solicitor, was appointed to act as the respondent’s Professional Director, to oversee compliance with the agreement reached and the undertakings. He started working with the respondent on a part-time basis, later becoming engaged full-time on the respondent’s business.

16. In October 2014, following conversations between the claimant and Mr Baker, the claimant was not offered the 25.5% shareholding which had been discussed in 2007. Instead, the claimant accepted a payment equivalent to the dividend he would have received had the shares been transferred as intended. The payment then made to the claimant was said to be 25.5% of the respondent’s profit after expenses and the payment was made in order to compensate claimant for the fact that the 2007 proposal did not materialise. With bonus, the claimant earned over £87,000.00 in addition to his salary that year. In the years that followed, the claimant was paid a bonus of 10% of the respondent’s profits. This led to bonus payment being made to the claimant in 2015 and 2016. In 2017, the claimant received a bonus in excess of £40,000.00 and, for 2018, the claimant received a bonus payment in excess of £60,000.00 – see bundle pages 566 A and B.

17. The Tribunal noted that, despite the claimant alleging in these proceedings that the respondent was somehow “in breach of the 2007 agreement”, he had accepted the bonus payments as an alternative and took no action in response to the respondent’s alleged breach at the time, nor has he done so since then, save for raising the allegation in these proceedings. In

cross-examination, the claimant accepted that there was no written agreement in 2007 and that the matter amounted at best to a proposal.

18. It has been the claimant's case that during 2017 and/or early 2018, whilst a Director of the respondent, he raised concerns with Mr Sinclair-Ford at Board meetings about Mr Newsome's apparent involvement in setting targets for the business and undertaking management duties in breach of the undertakings. The claimant contended that the matters he raised amounted to whistle-blowing protected disclosures. The Tribunal found no evidence of any such matters raised by the claimant as he contended. They do not, for example, appear in the Board meeting minutes as might be expected, nor did the claimant suggest that he had challenged the meeting records at the time, as might be expected if such an important matter was missing. Under cross-examination, the claimant was vague about dates, times and even to whom he had raised the matters in question. In that regard, on a balance of probabilities, the Tribunal found that the claimant had not raised such matters in the way he suggested, particularly taking into account that the events of the September 2017 Board meeting made such a disclosure by the claimant to Mr Sinclair-Ford highly improbable.

19. In August and September 2017, at the respondent's Board meetings, Mr Sinclair-Ford commented critically on the claimant's contribution to the business as a Director. At the September meeting, tempers became heated and voices were raised on both sides. As a result, Mr Baker asked Mr Sinclair-Ford to apologise and Mr Baker also asked for the claimant to be given a right to reply to the criticisms. The claimant agreed in evidence that he had not been meeting his target(s) and that this was why his performance was called into question. Mr Sinclair-Ford's concerns about the claimant's performance were mirrored by comments from Ms Merrygold and Mr Baker who wanted to give the claimant time to improve his performance. In the course of discussions, the termination of the claimant's employment was mentioned as a possible outcome, if the claimant did not improve, and the removal of the claimant from the Board was mooted. Mr Sinclair-Ford included a summary of his view and criticisms of the claimant, in the Board Minutes but did not include the claimant's responses to such.

20. From 1 – 22 November 2017, the claimant decided to work from home. The claimant said that this was on advice from his GP - he had told his GP that the work environment was toxic. The claimant's GP wrote a letter on 20 November 2017, about the claimant's state of health and medical treatment, although the claimant did not give the letter to the respondent at the time. In this period, the claimant was contacted by the respondent about his working arrangements because the claimant was still attending client appointments and the respondent was concerned as to whether he was in fact well enough to do so and also whether he was covered by their insurance if he was working whilst unwell.

21. On 7 November 2017, Ms Merrygold suggested to the claimant that he should not get a 50/50 split of the rewards from an endoscopy contract which he had helped to negotiate. Ms Merrygold's view was that she would be doing the vast majority of the work to ensure the project progressed. Ms Merrygold therefore proposed a 90/10 split in her favour. The claimant was not pleased and felt this was being imposed upon him. He told Ms Merrygold that she was undermining him. Mr Baker intervened to say that the percentage split was designed to adequately reflect the work involved by the claimant as compared to Ms Merrygold. In response the claimant said he would consider a redundancy package and made proposals for such.

22. The claimant did not attend the November 2017 Board meeting but he submitted his comments in writing, responding to Mr Sinclair-Ford's criticisms. The Board meeting minutes suggest that the claimant's statement was read out but it was not. Rather, all those present at the meeting confirmed that they had read the claimant's comments. The respondent did not respond to the claimant's statement but the Board decided to defer a vote on the claimant's directorship.

23. In January 2018, the respondent's Directors voted to remove the claimant from the Board and terminate his Directorship in light of what the respondent considered to be continuing poor performance and a lack of enthusiasm. The claimant had been asked for his views and had said that he was not bothered by this development because he did not want to work with Mr Sinclair-Ford and, in any event, he understood that he would suffer no reduction in salary if he was not a Director.

24. On 14 March 2018, the claimant was formally removed from the respondent's Board and became an account director in the 'Managed Services' area of the respondent's business. As a result, the claimant was to be line-managed by Mr Newsome. The claimant was content to be managed by Mr Newsome and his performance improved thereafter.

25. In April - May 2018, the respondent proposed an 'alternative structure' for its business because the respondent found that it needed to retain capital in the business. The proposal was that all those engaged in the business, including the claimant, would take a smaller share of the profits. This meant a payment of 15% of profits, to be split between the claimant and Ms Merrygold, as to 7.5% each. On 30 May 2018, the claimant indicated his "unconditional acceptance" of the proposals and expressed a wish to " … draw a line under everything that had gone on previously and …. to move forward …". The proposal was not put into writing or signed off.

26. Around the end of 2018 and beginning of 2019, the respondent was engaged in negotiations to secure a Bowel Cancer Screening contract. Mr Newsome was working with a sub-contractor called MAST. The

respondent needed MAST to absorb certain liabilities on the Bowel Cancer Screening contract and Mr Newsome was seeking to put pressure on MAST to do so. His negotiating tactic was to suggest to MAST that the deal was dead as they were unwilling to take on liabilities, in an effort to compel them to accept such liabilities. In fact the deal was not dead at the time.

27. The claimant agreed, in evidence, that he had been told by Mr Newsome to "do nothing" in relation to MAST. On 10 January 2019, however, the claimant was contacted by another subcontractor which was seeking progress on the Bowel Cancer Screening contract. Despite Mr Newsome's express instructions, the claimant did not refer to Mr Newsome and instead he proceeded to set up a telephone conference call on the contract, with a number of sub-contractors. The call was later cancelled and did not take place. However, MAST had not been invited; they found out and were very unhappy. The claimant believed that this was because Mr Newsome had sought to mislead MAST by suggesting that the deal was dead when that was not the case. The respondent took the view that the claimant's actions had put its relations with MAST, and the potential contract, in jeopardy. The claimant offered to contact MAST to explain things and he drafted an email to that end, but Mr Newsome said he would email them instead. The claimant went away on holiday over the weekend, leaving Mr Newsome to resolve matters.

28. By 14 January 2019, Mr Newsome reported that the deal with MAST had been salvaged. The liabilities were renegotiated and divided, with the respondent taking MAST's share of the risk in return for a fee. The claimant believed that the matter was closed.

29. It has been the claimant's case that, during January 2019, he had asked Mr Sinclair-Ford why Mr Newsome was negotiating with MAST about a contract. The claimant contended that the matter he raised amounted to a whistle-blowing protected disclosure. The Tribunal found no evidence of this matter having been raised by the claimant as he contended or at all. Indeed, it is at odds with the claimant's narrative about January 2019 and the evidence that the claimant was hostile to and had no desire to work or communicate with Mr Sinclair-Ford. Contemporaneous emails also show the claimant working productively and collaboratively under Mr Newsome's management. In addition, there was no evidence that the claimant had mentioned his concerns to any other directors, as might be expected. On a balance of probabilities, the Tribunal found that the claimant had not raised this matter at the time nor in the way he suggested, and concluded from the evidence that it was inconceivable that the claimant would be complaining to Mr Sinclair-Ford about Mr Newsome during January 2019.

30. Following the MAST contract episode, the claimant had, at one point, indicated he would resign but had not done so.

31. On 21 January 2019, Mr Sinclair-Ford asked HR consultants to send him "what I need to organise a gross misconduct process" including how long the process would take to investigate and call the individual to a meeting – see bundle page 571.

32. On 30 January 2019, Mr Sinclair-Ford embarked on an investigation into the claimant, in consultation with the respondent's HR advisers. In the interim, the claimant continued to work with and for Mr Newsome, on contract sourcing. A series of emails passed between the claimant and Mr Sinclair-Ford, and between the claimant and Mr Baker, in which the claimant asks a number of questions about the investigation which the respondent had commenced. The claimant said that if the matter was to be considered as a disciplinary issue he would like everything in writing so he could seek professional advice. The claimant was told that it was a "fact find" subject to an independent external review and that no decisions had been taken.

33. By early February 2019, the claimant was invited to an investigation meeting by Mr Baker, on either 14 or 15 February 2019, or as an alternative he was asked to answer written questions as part of the investigation. The claimant told Mr Baker that his treatment was harassment and bullying and part of a concerted effort to get him to leave, and the claimant said if that was the case he asked Mr Baker to work out a package for discussion. Around 12 February 2019, the claimant suffered a migraine and went off on sick leave.

34. On 4 March 2019, Mr Sinclair-Ford asked the claimant for a statement for the investigation. In response, the claimant told the respondent that he will not engage in the investigation process which he considered to be unfair, nor answer what he considered to be loaded and biased questions. The claimant said that he was taking legal advice.

35. At the beginning of March 2019, a junior member of the respondent's staff found a draft letter of suspension, on the respondent's server and alerted the claimant who complained to Mr Sinclair-Ford. The claimant was told that the letter was a draft and was not going to be issued.

36. On 21 March 2019, the claimant was invited to a disciplinary hearing to be held on 28 March 2019, to answer an allegation that

    "On or about the 10th January 2019, you failed to obey a reasonable management instruction, when you arranged a telephone meeting between Real Digital International Ltd, Data Innovations Ltd, NHS Digital and the Bowel Screening team, as evidenced by the attached".

    The attached was a statement from Mr Newsome and copies of a number of the claimant's emails.

37. On 21 March 2019, the claimant met with Mr Newsome about the disciplinary and a number of issues. As a result, the next day, 22 March 2019, the claimant emailed Ms Merrygold and Mr Baker to complain about events and declared that "I … feel my role here has become untenable". The claimant requested an independent third party be appointed to investigate matters. The claimant's email appears in the bundle at pages 318 – 319. The claimant summarised his complaints as follows:

    a) *That the so called "fact finding" conducted by Ian Sinclair-Ford was a deliberate and pre-conceived plan with the sole intention of finding me guilty of gross misconduct where, for the avoidance of doubt, I had done nothing but act in good faith. I would like to know which Board members supported Ian Sinclair-Ford's behaviour and approach.*

    b) *My data protection has been breached with the ill-conceived and cynical suspension letter being open to staff to come across on an open server without file protection. *Note – Fortunately for me a member of staff noted this while looking for another file and had the courage to speak out. That member of staff should not be subject to any action.*

    c) *That the actions detailed above are a continuation of consistent bullying and harassment of myself over a number of years by Ian Sinclair Ford – I shall prepare the evidence for this and present to the independent party who runs the investigation. That this bullying led to a nervous breakdown 18 months ago and left me on permanent anti-depressant medication since makes these latest actions all the more regrettable.*

38. On 26 March 2019, the claimant met with Ms Merrygold and Mr Baker about the disciplinary process and his complaints. He was hoping for their support. However, the claimant's notes of the meeting show that Ms Merrygold and Mr Baker did not share the claimant's views or version of recent events. As a result, the claimant asked again for all correspondence on the matter to be in writing from then on.

39. The respondent then decided that the disciplinary process should be suspended until the claimant's complaints had been investigated. A meeting to discuss the claimant's complaints was arranged for 11 April 2019 but the claimant did not respond to the invitation.

40. From 4 April 2019, the claimant was signed off work, sick, with stress, for 4 weeks, He did not in fact return to work prior to his resignation. The claimant kept Mr Baker and Ms Merrygold informed of his position and ill-health by text messages, which appear in the bundle at pages 333 – 334.

41. In terms of sick pay, for each of the first 2 months of the claimant's absence, that is the months of April and May 2019, the claimant was paid

one week at full-pay and 3 weeks at statutory sick pay. This arrangement was decided by the respondent so that the claimant's pension payments could be maintained. In June, July, August and September 2019, the claimant received statutory sick pay only. In paying the claimant statutory sick pay, the respondent relied upon clause 12.2 of the claimant's contract of employment (bundle page 58) which provides that sick pay is discretionary for employees. The claimant had previously been paid at full pay when sick, when he was a Director.

42. On 31 May 2019, the claimant's solicitors sent the respondent a formal and lengthy grievance letter which was addressed to Mr Baker, and appears in the bundle at pages 335-339. It is accepted by the respondent that this grievance letter contained a whistle-blowing protected disclosure in that paragraphs 20-24 of the grievance letter are about Mr Newsome's role at the respondent and the undertakings and raise a breach of legal obligations which is in the public interest, in light of the fact of and the reasons for the undertakings. The claimant was invited to a grievance hearing on 18 June 2019.

43. In June 2019, the claimant approached the respondent's main competitor, Genmed, about employment. An informal interview was arranged for some time towards the end of June 2019 and a second interview took place in early July 2019.

44. On 11 June 2019, the claimant's solicitors wrote to the respondent to say that the claimant agreed that an "independent consultant" should be appointed for the purpose of discussing his grievances.

45. The grievance meeting took place on 18 June 2019 and was conducted by Ms Redfearn of a business called Kingfisher HR Consultants which is part of a group of organisations. Another member of the group had been advising the respondent on the claimant's disciplinary process since January 2019. The minutes of the grievance meeting appear in the bundle at pages 345-376. The claimant provided a number of documents which are listed at pages 377-378 of the bundle. At the end of the grievance meeting, Ms Redfearn told the claimant that she would send him the minutes for approval and that the papers would be passed to "the legal advisor" to "discuss with the company how they take things forward". The claimant commented about the outcome: "… it just helps me in a transition. Because at 51 I'll have to change jobs …"

46. On 21 June 2019, Ms Redfearn interviewed Mr Sinclair-Ford as part of her grievance investigation, and, on 24 June 2019, she interviewed Mr Newsome.

47. On 12 July 2019, the respondent sent the claimant a letter setting out the outcome of his grievance and rejecting it. This appears in the bundle at pages 481-492. The outcome letter is signed by Ms Merrygold and

includes a number of Ms Merrygold's personal observations and opinions on events. Whilst she accepted that there had been a data breach in respect of the suspension letter, Ms Merrygold had not been a party to the grievance meeting or interviews and it was unclear how she had investigated matters herself. Rather, it appears that she had decided to reject the claimant's grievance based on the paperwork that was passed to her by Kingfisher. As a result, the Tribunal considered that the grievance outcome lacked objectivity. In particular, the Tribunal noted that, in commenting about the shares and/or the claimant's remuneration from 2014 onwards, Ms Merrygold had an interest in the outcome. The claimant was given until 4.00pm on Friday 19 July 2019 to appeal the outcome.

48. On 16 July 2019, the claimant attended a second interview at Genmed and received a verbal offer of employment as 'Business Development Manager'. The offer of employment was confirmed in writing by Genmed on 19 July 2019,. On 21 July 2019, the claimant accepted the offer of a new job with Genmed, at a salary of £60,000.00 per annum together with a commission structure. He signed a contract of employment with Genmed at the time and a detailed acceptance form and HMRC starter checklist. Genmed and the claimant agreed that he would start working for them on 1 September 2019. At a later date, the claimant asked for his start date to be deferred until 1 October 2019.

49. On 24 July 2019, the claimant appealed the grievance outcome. This was outside of the respondent's deadline for an appeal. Nevertheless the respondent agreed to address the claimant's appeal. The lengthy appeal letter appears in the bundle at pages 493-499. In his appeal, the claimant alleged he had not been given training in managed services, nor personnel reviews or assessments, that he had been removed from the Board of directors, that he had been unfairly treated over what he called 'the MAST situation' – a reference to the aborted telephone conference he had arranged, and the suspension letter, and the treatment he received for working from home when sick. In addition, the claimant raised the "offer" of shares in 2007 which he said had not been honoured.

50. The respondent, through Mr Baker, invited the claimant to a meeting to discuss his appeal on 14 August 2019. The claimant asked for "an entirely independent person to be appointed (by our mutual agreement) to hear [his] grievance appeal"; otherwise he suggested that his grievance appeal be addressed through correspondence. On 13 August 2019, Mr Baker wrote to the claimant to say that he did not see the need to engage an independent third party to hear/decide the appeal and, as an alternative, suggested that a third party could hear the appeal and make recommendations to the respondent following which he (Mr Baker) would make a decision. At 9.11am on the morning of 14 August 2019, the claimant emailed Mr Baker and Ms Merrygold to say that "there is no point wasting time on meetings where there is to be no impartiality" and he asked the respondent to "respond to [his] appeal points in

correspondence". As a result, Mr Baker proceeded to address the claimant's grievance, interviewing Mr Newsome on 12 August 2019 about the matters which the claimant raised.

51. At some point in this period, the claimant secured a deferral of his start date with Genmed, from 1 September to 1 October 2019.

52. The claimant chased an outcome to his grievance by email on 20 August and 4 September 2019 presumably because he was due to start work with Genmed on 1 September 2019. Later on 4 September 2019, Mr Baker sent the claimant a grievance appeal outcome letter, turning down the claimant's appeal. The outcome letter is in the bundle at pages 525-532. In the outcome letter, Mr Baker pointed out that the claimant's grievance mentioned all 3 directors of the respondent and, therefore, the respondent had engaged the services of a third party to consider the matters raised and that Ms Merrygold had been chosen to decide the outcome because she was the director mentioned least in the grievance.

53. On 6 September 2019, the claimant acknowledged receipt of the grievance outcome letter saying he would discuss it with his solicitor.

54. On 15 September 2019, the claimant resigned from the respondent with immediate effect – see bundle pages 543-546. The claimant's resignation letter largely expresses his disappointment with the respondent's failure to appoint an "independent third party" to hear the grievance appeal and asserts the claimant's view that his treatment by Mr Sinclair-Ford and Mr Newsome has been ignored.

55. On 1 October 2019, the claimant commenced his new job working for the respondent's main competitor, Genmed, in the role he had accepted on 21 July 2019.

The applicable law

56. A concise statement of the applicable law is as follows.

Constructive dismissal

57. Section 95(1)(c) ERA provides that an employee is dismissed if the employee terminates their contract of employment, with or without notice, in circumstances such that the employee is entitled to terminate their contract without notice by reason of the employer's conduct.

58. The case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 provides that the employer's conduct that gives rise to a constructive dismissal must involve a repudiatory breach of contract, or a significant breach going to the root of the contract of employment, showing that the employer no longer intends to be bound by one or more of the essential

terms of the contract of employment. In the face of such a breach by the employer, an employee is entitled to treat themself as discharged from any further performance under the contract, and if the employee does treat themself as discharged, for example by resigning, then they are constructively dismissed. If, however, the employee delays in resigning after the employer's breach, the employee may be taken to have affirmed the contract and, if so, may lose the right to claim that they have been constructively dismissed.

59. A course of conduct by an employer can, cumulatively, amount to a fundamental breach of contract entitling an employee to resign following a "last straw" incident even though the last straw does not by itself amount to a breach of contract, as held in the case of Lewis –v- Motorworld Garages Ltd [1985] IRLR 465. However, the last straw must contribute in some way to a breach of the implied term of trust and confidence.

Unfair dismissal

60. If a claimant establishes that they were constructively dismissed, section 98 ERA sets out a two-stage test to determine whether an employee has been unfairly dismissed. First, the employer must show the reason for dismissal or the principal reason and that reason must be a potentially fair reason for dismissal. The respondent in this case has not advanced any reason for the claimant's dismissal albeit that it denies that any protected disclosure was the reason or principal reason.

61. If the employer shows a potentially fair reason in law, the Tribunal must then consider the test under section 98 (4) ERA, namely whether, in the circumstances of the case, including the size and administrative resources of the respondent's undertaking, the respondent acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the claimant and that the question of whether the dismissal is fair or unfair shall be determined in accordance with equity and the substantial merits of the case.

62. The issue of the reasonableness of the dismissal must be looked at in terms of the set of facts known to the employer at the time of a claimant's dismissal. The Tribunal must also consider whether the decision to dismiss fell within the band of reasonable responses open to a reasonable employer in the circumstances of the case: Iceland frozen Foods Ltd -v- Jones [1982] IRLR 439. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.

Whistle-blowing claims

63. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure.

64. Section 47(1A) to (1E) ERA provide that an employer can be vicariously liable for the detrimental acts of its workers unless the employer has taken all reasonable steps to prevent the detriment. It is immaterial whether the act of detriment or deliberate failure to act was done with the knowledge or approval of the employer.

65. Section 103A ERA provides that an employee who is dismissed shall be regarded 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.

66. A "protected disclosure" means a disclosure of information, but not mere allegations, to the employer or to a prescribed person which, in the reasonable belief of the worker is in the public interest and tends to show one or more matters including a failure to comply with a legal obligation, that the health or safety of any individual has been endangered, or that a criminal act has been committed.

67. The Tribunal has jurisdiction to consider complaints of public interest disclosure detriments by section 48(1A) ERA. Section 48(2) stipulates that on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

68. A 'detriment' arises in the context of employment where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see for example, Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL.

69. In Fecitt v NHS Manchester [2012] IRLR 64 the Court of Appeal held that for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the protected disclosure materially influenced the employer's action. The test is the same as that in discrimination law and separates detriment claims from complaints of unfair dismissal under section 103A ERA, where the question is whether the making of the protected disclosure is the reason, or at least the principal reason, for dismissal.

70. The Tribunal also considered a number of cases to which it was referred by the parties in submissions on liability. The cases were:

Walker v Josiah Wedgewood & Sons Ltd [1978] ICR 744
Ministry of Defence v Jeremiah [1979] ICR 13
Spafax v Harrison [1980] IRLR 442

W E Cox Toner (International) Ltd v Crook [1981] ICR 823
Berriman v Delabole Slate Ltd [1985] ICR 546
Waltons & Morse v Dorrington [1997] IRLR 488
Malik v BCCI [1997] UKHL 23
Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686
Cantor Fitzgerald International v Bird and others [2002] WL 1446181
Tolson v Governing Body of Mixenden Community 7School [2003] EAT/0124/03
Nottinghamshire County Council v Meikle [2004] EWCA Civ 859
LB Waltham Forest v Omilaju [2004] EWCA Civ 1493
El Hoshi v Pizza Express Restaurants Ltd [2004] UKEAT/0857/03
Kuzel v Roche Products Ltd [2007] ICR 945
Abbycars (West Horndon) Ltd v Ford [2008] UKEST/0472/07
Cavendish Munro Professional Risks Management Ltd v Geduld [2009] UKEAT/0195/09
Buckland v Bournemouth University HEC [2010 EWCA Civ 121
Goode V Marks & Spencer plc [2010] All ER 63
Fereday v South Staffordshire NHS Primary Care Trust [2011] WL 2747802
Lindsay v London School of Economics and Political Science [2013] EWCA Civ 500
Mari v Reuters Ltd [2015] UKEAT/0539/13
Frenkel Topping Ltd v King [2015] UKEAT/0106/15
Ishaq v Royal Mail Group Ltd [2016] UKEAT/0156/16
Eiger Securities LLP v Korshunova [2017] IRLR 115
Chesterton Global Ltd v Nurmohamed [2018] ICR 731
Kilraine v Wandsworth LB Council [2018] ICR 1850
Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1
Jesudason v Alder Hey Children's NHS Foundation Trust [2020] ICR 1226
Williams v Governing Body of Alderman Davies Church in Wales Primary School [2020] UKEAT/0108/19

71. The Tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

Submissions

72. Counsel for the claimant tendered written submission and made a number of detailed oral submissions which the Tribunal has considered with care but do not rehearse in full here. In essence it was asserted that:- the respondent breached the implied term as to mutual trust and confidence by inappropriate criticism of the claimant's performance, the instigation of a prejudicial disciplinary process and by failing to properly address the claimant's grievance; that Mr Sinclair-Ford's involvement in the disciplinary process had the effect of destroying trust and confidence; that the matters in the list of issues at issue 1 had the effect either separately or

cumulatively, of destroying trust and confidence and the respondent did not have reasonable and proper cause for its actions; that the claimant resigned because of how the respondent treated him, and that the breaches of trust and confidence were an effective cause of the resignation; that the fact that the claimant had accepted alternative employment at Genmed in July 2019 might affect affirmation but that the claimant had never accepted the respondent's breach(es); the claimant did not materially delay in resigning once he received the grievance appeal outcome in September 2019 albeit that he seemingly decided to resign by 21 July 2019 when he accepted Genmed's offer of employment and, that being the case, the treatment which caused his resignation was that before 21 July 2019; that mere delay does not constitute affirmation, particularly at a time when the claimant was off work sick and only in receipt of SSP; and that any delay was not unreasonable as the claimant was awaiting the respondent's decision on his grievance appeal; that the grievance outcome on 12 July 2019 was arguably the last straw, contributing to the overall breach in a manner which is more than trivial.

73. In respect of the whistle-blowing claims, Counsel for the claimant submitted that: - the disclosures relied upon should be considered in context and in light of the undertakings which subsisted; that the contents of the claimant's grievance dated 30 May 2019 plainly amounted to a protected disclosure; that Mr Sinclair-Ford was frustrated with the claimant raising potential breaches of the undertakings by Mr Newsome because implicitly the claimant was questioning Mr Sinclair-Ford's obligations as the professional director; that such led Mr Sinclair-Ford to question the claimant's performance and to embark on the disciplinary process; that the respondent's handling of the claimant's grievance amounted to a detriment and the outcomes of the grievance and appeal were designed to suppress his concerns about potential illegal conduct; that the claimant was subject to a series of detriments extending over a period of time up to 4 September 2019, the grievance appeal outcome with Mr Sinclair-Ford's involvement being a common thread, such that the detriment claim is in time; and that the Tribunal ought to infer that the respondent's unreasonable conduct towards the claimant was because of the protected disclosures and thereby it was the underlying cause of the claimant's constructive dismissal.

74. Counsel for the respondent also tendered written submissions and made a number of detailed oral submissions which the Tribunal has considered with care but does not rehearse in full here. In essence it was asserted that:- the claimant's case that the respondent had been seeking to oust him for a number of years is not made out; that the evidence does not show the claimant had scrutinised Mr Newsome's actions or raised concerns about such as alleged or at all; the respondent had honoured its financial obligations to the claimant and he had accepted all payments made without challenge or complaint at the relevant time; the claimant resigned because he had found alternative employment and the conduct

of the respondent, as relied upon by the claimant did not play any part in his decision to resign; by the time the claimant came to resign, in September 2019, he had already formulated his decision to leave the respondent in June 2019 when he approached the respondent's main competitor seeking employment; there was no series of detriments, and any alleged act preceding 15 July 2019 is out of time; criticisms of the claimant's performance were justified and his removal from the Board was in the context of a decline in his performance, which the claimant acknowledged in his evidence and he had been afforded a right of reply at the time; the decision to bring disciplinary proceedings was justified in light of the claimant's conduct in January 2019; the disciplinary process was in any event stopped in order to address the claimant's complaints; the claimant was not pressured to resign as alleged or at all; the claimant's contractual sick pay entitlement was discretionary; the claimant's grievance was investigated by an independent HR professional who upheld his grievance in part; the 'last straw' relied upon, being the outcome of the grievance appeal, was proper and lawful and, as such, cannot itself be a breach merely because the claimant disagreed with the outcome; and that the claimant was due, inevitably, to leave the respondent's employment because he had found and accepted alternative employment and would not have remained in employment beyond his resignation date.

75. In respect of the whistle-blowing claims, Counsel for the respondent submitted that: - there was no evidence of the first 2 protected disclosures contended for in the list of issues and that position is consistent with the terminology used in the claimant's solicitors' grievance letter dated 31 May 2019; on the basis that the grievance of 31 May 2019 is a protected disclosure, only those alleged detriments arising after 31 May 2019 can have followed such; the respondent has shown good reasons for the actions which the claimant says are detriments, (a) to (l) in the list of issues, and they each and all amount to no more than an unjustified sense of grievance; the reason(s) for the respondent acting as it did were in no sense because of any protected disclosure; there was no continuing act, given the different alleged perpetrators and no obvious connecting nature or thread to those actions; that any detriments prior to 15 July 2019 are out of time; and that, even if the Tribunal were to find that the claimant had been constructively dismissed, the reason for dismissal could not be the making of a protected disclosure.

Conclusions (including where appropriate any additional findings of fact)

76. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.

Factual allegations

77. The Tribunal started by considering the 21 factual allegations of breach of the implied duty of trust and confidence upon which the claimant relied. These are set out in the list of issues at section 1, (a) to (u). The Tribunal's findings on each of the factual allegations are as follows.

78. *Allegation (a)* was that the respondent had failed to make the claimant a 25.5% shareholder, as had been "promised" in 2008 and instead gave him a bonus equivalent to the value of 25.5% shares. The Tribunal did not find that there had been any "promise", enforceable of otherwise, in respect of the shares (notwithstanding the fact that the relevant discussions had in fact taken place in 2007 and not 2008). The claimant himself described the matter as "an offer or proposal" and nothing was put into writing. The Tribunal considered that the claimant understood the importance of contracting by reason of his role and the respondent's activities, and the requirement for such important matters to be reduced to writing. In any event, in 2014 the claimant readily accepted a payment which was at least equivalent to the dividend he would have received had the shares been transferred. The payment was made as a gesture of goodwill to compensate claimant for the fact that the 2007 proposal did not materialise and, in the following years, the claimant continued to accept similar and sizeable bonus payments. The claimant took no action at the time nor did he complain, in response to what he has since alleged to be the respondent's breach – see paragraphs 16 and 17 above. The Tribunal noted that the respondent's circumstances, and the nature of the business had significantly changed between 2007 and 2014 and considered that, if there had been any agreement as the claimant alleged, the respondent did not breach such; rather, any agreement was varied by consent of the claimant.

79. *Allegation (b)* was about the claimant being required to meet high performance targets in Managed Services, without appropriate training. The Tribunal accepted that it would take the claimant a period of time to become familiar with a new area of work, before he was likely to achieve a profit but it was unclear what training the claimant expected – he had not identified what training he could have received beyond 'support' from the other Directors. The evidence was that other Directors had no training either, but learned very much 'on the job' as was expected of the claimant. He was treated no differently albeit that he did receive informal training and guidance from Mr Newsome. The Tribunal also considered that this allegation belied the effect of the claimant's experience and client contacts, for example, by 2019 (after only 2 years) the claimant reported that he had been working on a very big contract and had a number of things "in the pipeline". Further, in cross-examination, the claimant suggested that he was meeting targets within a couple of months of the year. In any event, whether training was available and/or required or not, the Tribunal did not consider that this allegation amounted to any breach by the respondent in the circumstances.

80. *Allegation (c)* was that the claimant had been subject to repeated verbal abuse from Mr Sinclair-Ford in the boardroom. The Tribunal has found that Mr Sinclair-Ford had sought to criticise the claimant at the Board meetings in August and September 2017. After the August meeting, the claimant went to his GP because he was feeling unwell. Mr Sinclair-Ford's manner and approach was unprofessional. Mr Baker agreed that his manner was unacceptable and asked Mr Sinclair-Ford to reflect and apologise. However, the matters raised by Mr Sinclair-Ford, about the claimant's lack of contribution and poor performance, were echoed by others, including Ms Merrygold in an email to the claimant on 7 September 2017 (see bundle page 125 – 126). It was the claimant's case that such discussions continued in October and November 2017 but he brought no evidence of this including no Board minutes or notes. The Tribunal noted that for part of the relevant period, the claimant was, on his own evidence, working from home, not attending Board meetings, and avoiding his colleagues wherever possible. In those circumstances, the allegation of repeated verbal abuse, in the context of discussions arising from the claimant's poor performance and continuing beyond August and September 2017, was not substantiated.

81. *Allegation (d)* was that Mr Sinclair-Ford did not include the claimant's responses to criticisms in the minutes whilst he recorded his own criticisms of the claimant. This related to the September 2017 Board minutes. At paragraph 19 above, the Tribunal found this factual allegation to be made out in respect of the contents of the September 2017 Board minutes. This is connected to *Allegation (e)*, concerning how the claimant's responses were handled at the next Board meeting. The claimant's comments were read by the Directors but not 'read out' at the meeting as the claimant thought they should be. There was no evidence of any "promise" to do so as alleged. The claimant did not attend the November Board meeting and his fellow Directors decided simply to record that he had circulated a note to all Directors and that they had read the claimant's comments – bundle page 447 – the minutes in fact suggest that Mr Baker had read out the claimant's comments although Mr Baker said in evidence that this was not the case. Whilst allegation (d) was made out on the facts, the Tribunal considered that it should be taken together with allegation (e) as they were linked: What happened was that the claimant was given a right of reply to Mr Sinclair-Ford's criticisms and he exercised that right - the fact that his comments were not formally read out at a Board meeting was a minor detail which did not constitute a breach of trust and confidence and he did not complain about how the matter was handled or by whom, at the time.

82. *Allegation (f)* is also linked to allegations (c), (d) and (e). In the bundle at page 132 is an email dated 7 August 2017, from the claimant to Mr Newsome and Mr Baker, complaining about Mr Sinclair-Ford's "tirade of verbal abuse" at the August Board meeting. Importantly, this email includes a statement by the claimant that "*I have decided against*

requesting you to investigate the matter as we all have a lot on". On 27 October 2017 the claimant emailed Mr Newsome and Mr Baker to the effect that he wished to avoid confrontation and, at the respondent's November 2017 Board, the claimant's fellow Directors agreed to hold over a number of issues due to the claimant's absence, working from home and subject to a fit note. In all those circumstances, the Tribunal considered that it was factually correct to say that the respondent took no action on the claimant's complaint about Mr Sinclair-Ford, but this was because he had asked them not to and because the respondent wished to respect the claimant's health position whilst he was under a fit note. Nevertheless the claimant was offered a right to reply to the statements made by Mr Sinclair-Ford, in the September 2017 Board minutes, and the claimant did so.

83. *Allegation (g)* is about a comment of Mr Newsome in 2017 about the claimant's performance. The Tribunal considered this to be an expression of the personal opinion of Mr Newsome and did not amount to a breach of trust and confidence by the respondent. In any event, the Tribunal noted that the claimant had agreed, under cross-examination, that he had not been meeting his target(s) and that this was why his performance had been called into question, as it had been on other occasions, by each of his fellow Directors.

84. *Allegation (h)* is an allegation about how to manage poor performance, arising from and largely revisiting the matters complained of in allegations (c) to (g). The Tribunal considered that Board meetings were not the appropriate forum to initiate such discussions and that they were not constructive. The respondent had no appraisal process and no capability procedure. It would have been fairer to the claimant to have a private or separate meeting, with notice given of the issues to be discussed, so the claimant could be afforded a reasonable opportunity to answer criticisms about his performance and to defend himself. However, the claimant was a Director of the respondent and one of the 4 most senior personnel in a small business. It was unclear how the claimant envisaged an appraisal process would work in those circumstances and/or which individual might be responsible for such. In any event, the Tribunal did not consider that a breach of trust and confidence was made out on this allegation, noting also that the evidence showed that, in 2018, the claimant's performance in fact improved.

85. *Allegation (i)* concerns the removal of the claimant from the respondent's Board of Directors in January 2018. The respondent was entitled to remove the claimant if it so wished. Exercising a legal right cannot ordinarily be a breach of contract. In any event, the claimant had been asked for his views and he had said at the time that he was not bothered by his removal from the respondent's Board because he did not want to work with Mr Sinclair-Ford. The claimant was looking to reduce his

stressors and he in fact agreed to his removal once he learned that it would mean no loss of remuneration – see paragraph 23 above.

86. *Allegation (j)* is about the respondent's proposed alternative structure in April - May 2018 – see paragraph 25 above. The claimant alleges that he was not consulted and that matters were not explained to him. This allegation bears no relation to what in fact happened. The evidence before the Tribunal was that the proposal was explained to the claimant by Mr Baker, including the need to retain funds in the business. Indeed, the claimant formulated his own counterproposals but these were rejected. The Tribunal has found that, in the end, on 30 May 2018, the claimant indicated his "unconditional acceptance" of the proposals and expressed a wish to " … draw a line under everything that had gone on previously and …. to move forward …". This factual allegation is not therefore made out on the evidence.

87. *Allegation (k)* concerns the draft suspension letter – see paragraph 35 above. The Tribunal considered this to be an unfortunate error; it was not deliberate and did not amount to a breach of trust and confidence. Suspension of itself is a neutral act, and is provided for in the respondent's disciplinary policy. It was a draft letter which had not been and was not used; the claimant was never suspended. Nevertheless, correspondence and documents relating to Directors should not have been saved in an accessible area of the respondent's IT system. The Tribunal was told that the employee who found the letter was disciplined for revealing it in breach of confidence.

88. *Allegation (l)* concerns the respondent's decision to embark on disciplinary action against the claimant in January 2019 over him having arranged a telephone conference on/around 10 January 2019, which upset an important contractor of the respondent (MAST) and affected the respondent's relations with MAST for a period. The claimant asserted that, shortly after the MAST contract episode (see paragraphs 26 - 28 above), Mr Newsome had informed him that no loss had arisen due to his actions in arranging the call, and that the matter was closed although his assertion was contradicted by the evidence of communications at the time.

89. The Tribunal disagreed on whether the respondent's decision to embark on disciplinary action constituted a breach of trust and confidence.

89.1 The majority of the Tribunal considered that the respondent's decision to embark upon disciplinary action against the claimant was in fundamental breach of trust and confidence and was not justified. It was not clear where the initial complaint about the claimant's conduct had come from and the majority considered that no loss arose from the claimant's actions which they viewed as innocuous and not gross misconduct: what the claimant had done in arranging the telephone conference had merely conflicted with Mr

Newsome's attempts to manipulate MAST. The majority considered there was no clear evidence of what the claimant had been told not to do and also considered that the conference call itself was innocuous in that it was an IT meeting which was later cancelled. The fact was that MAST was cross to learn of the meeting and the respondent wanted to be seen to take action. However, disciplinary action was not taken immediately – there was a delay despite the allegation being one of gross misconduct. In addition, the majority considered that the investigation was a sham, and was only started when the claimant did not resign as expected.

89.2 The minority considered that the respondent's decision to commence disciplinary action was justified and was not in breach of contract. The claimant's assertion that he had been told there was no loss and that the matter was closed was unsubstantiated. In fact, in the bundle at page 254, an email from Mr Newsome dated 14 January 2019 to the claimant, Mr Baker and Mr Sinclair-Ford, states that "… the revised MAST offer negotiated is now re-instated" and that the reinstatement of the MAST offer "marks the close of the first contract delivery stage". Mr Newsome did not say the matter of the claimant's conduct was closed nor did he suggest there was no loss arising from the claimant's actions. The claimant agreed in his evidence that he had been told to do nothing. He misunderstood the situation which he had created – the negotiations with MAST were clearly sensitive and the claimant failed to appreciate the potentially damaging effects of his actions. The claimant's assertion that Mr Newsome had declared the matter closed is also contradicted by the fact that Mr Newsome tendered a statement to the disciplinary investigation, about the claimant having acted in direct contravention of his instructions. Mr Newsome clearly did not consider the matter to be closed and he assisted the disciplinary process. The minority considered that the pursuit of disciplinary action about an allegation of a failure to follow a reasonable management instruction cannot ordinarily constitute a fundamental breach of trust and confidence. In the circumstances of this case, there was reasonable and proper cause for the disciplinary action. In addition, the minority also took account of the fact that the disciplinary process was put on hold and never progressed.

90. *Allegation (m)* was that Mr Sinclair-Ford had referred to the claimant's behaviour as having been 'a disaster' during the fact-finding investigation around 30 January 2019. The claimant contended that Mr Sinclair-Ford had prejudged the disciplinary process despite that he had been appointed to conduct an investigation and he also proposed to chair the disciplinary hearing. The Tribunal considered that Mr Sinclair-Ford's comment and opinion of the claimant's behaviour, set out in a written question to be answered by the claimant as part of the investigation, displayed pre-judgment. Emails at the time also suggested that Mr Sinclair-Ford was

looking to dismiss the claimant. From the content of Mr Sinclair-Ford's first email to the HR consultant about a disciplinary process (bundle page 571), it is apparent that he was not merely seeking advice; rather, on a balance of probabilities, the Tribunal found that he had decided that the claimant was guilty of gross misconduct and that there needed to be a disciplinary procedure. Mr Sinclair-Ford's initial email to the HR consultant was followed by an email which included a comment about the reason the respondent had not taken action before, namely because the claimant had indicated he might resign and that it had only recently been determined that the claimant would not in fact resign. The implication of this correspondence was that, if the claimant was not going to leave voluntarily, the respondent might seek to remove him via a disciplinary process. However, the disciplinary process was put on hold and did not resume after the grievance appeal because the claimant then resigned. In those circumstances, any prejudgment by Mr Sinclair-Ford was immaterial. In light of the Tribunal's findings on Mr Sinclair-Ford's role under allegation (n) below, and the fact that the claimant had been unaware of Mr Sinclair-Ford's correspondence with the HR consultants at the time (he only learned of it in the course of these proceedings) the Tribunal considered that this allegation was about the opinion of one Director and did not find a breach of contract by the respondent per se.

91. *Allegation (n)* was that in effect Mr Sinclair-Ford was going to conduct the disciplinary process against the claimant. The claimant contended that it was Mr Sinclair-Ford who had brought the disciplinary issue to light in the first place, who was pursuing the investigation and who obtained Mr Newsome's witness statement against the claimant within the process, despite the fact that there were 2 other directors either of whom could have dealt with the matter (Ms Merrygold or Mr Baker). Hence, the claimant considered Mr Sinclair-Ford's involvement to be controlling and inappropriate. The Tribunal considered the numerous points raised in this allegation. The evidence was in fact unclear as to who had initiated the disciplinary complaint. It was Mr Newsome who first complained that the claimant had jeopardised the MAST deal, following the reaction of MAST, albeit that Mr Newsome was quite possibly overstating the position in order to detract from his apparent duplicity in negotiations with MAST. The claimant asked Mr Sinclair-Ford directly "Who is originating this and why?" and he was told it was the Board and shareholders, a statement which was not contradicted by Mr Baker in his emails to the claimant at the time. The witness statement upon which the respondent relied was that of Mr Newsome. The claimant believed that the investigation meeting was to have been conducted by Mr Sinclair-Ford because he sent the claimant questions for written answers, as an alternative to a meeting. However, emails sent by Mr Baker in early February 2019 show that the claimant would be meeting with him rather than Mr Sinclair-Ford. In addition, the letter dated 21 March 2019, inviting the claimant to a disciplinary hearing on 28 March 2019, in the bundle at page 309, is signed by Mr Sinclair-Ford but it does not expressly state who will be conducting the hearing,

whether himself or another Director. In any event, the disciplinary action did not proceed. It was held in abeyance while the respondent addressed the claimant's grievances and so Mr Sinclair-Ford's role, whatever that might have been, never materialised. In those circumstances, the Tribunal considered that this allegation was not made out and could not amount to a breach of contract just because of the claimant's unsubstantiated belief about what might happen in the future.

92. *Allegation (o)* concerns events in November 2017, when Ms Merrygold told the claimant of her proposal for the bonus arising from an endoscopy contract. The claimant had expected to receive 50% of the rewards from the contract which he had helped to negotiate. The Tribunal has made findings relevant to this allegation, at paragraph 21 above. Ms Merrygold emailed the claimant to suggest that the rewards be apportioned to reflect the work involved in the endoscopy contract over its lifetime and, as a result, she suggested that the claimant should receive 10% of the rewards. The claimant contended that he was entitled to an "agreed" 50% although there was no evidence to support this and, like many other aspects of the respondent's business, nothing had been committed to writing in that regard. The claimant was upset and felt undermined; after all he believed that he was losing 40% of the rewards. He sought support for his position but Mr Baker intervened to say that it was a reasonable split, designed to reflect the work involved from the claimant as compared to Ms Merrygold's contribution. As an alternative, the claimant was at one point offered the opportunity to run the contract himself and to undertake the work which Ms Merrygold would otherwise be doing in the future so that he could reap all the rewards - see bundle page 219. At this, the claimant backed down and agreed to Ms Merrygold's proposal. In any event, the Tribunal accepted the respondent's evidence that the endoscopy contract was not, at that stage, concluded and that there was much more work to be done. Ms Merrygold was a specialist in running such contracts, whereas the claimant had little experience of such and it was unreasonable of the claimant to expect to receive 50% of the rewards for his relatively minor input. The respondent therefore did not act unreasonably in the circumstances and was not in breach of the claimant's contract.

93. *Allegation (p)* is that the respondent pressured the claimant to resign in November 2017, when Mr Sinclair-Ford raised questions as to whether the claimant could continue working for the respondent in light of his being absent from the office with stress. The Tribunal has made relevant findings on this matter, at paragraph 20 above. The claimant said in evidence that he had decided to work at home and not come into the office, following a consultation with his GP. The respondent learned that the claimant was nevertheless attending client appointments and driving on company business. Mr Sinclair-Ford and the respondent's Board were concerned as to whether the claimant was in fact well enough to do so, given his diagnosis of stress, and also whether the claimant was covered by the respondent's insurance if he was working and driving on business whilst

unwell. The Tribunal considered that these were reasonable enquiries for the respondent to make. The claimant had told Mr Sinclair Ford that his GP was of the view that he could continue working from home although the GP's letter dated 20 November 2017, in the bundle at page 87, does not mention working at or from home. The claimant gave evidence that he did not in fact give his GP's letter to the respondent at the time, because he "felt Mr Sinclair-Ford would use my mental health condition … against me" and that the respondent would find a way to make it untenable for him to continue to work for it – see the claimant's witness statement, paragraph 82. This was the claimant's perception; he did not direct the Tribunal to any evidence of the alleged pressure and/or how such was applied to him beyond the September 2017 Board minutes and comments about possible termination of the claimant's employment. However, in the bundle at page 223, Mr Baker refers to a sick note tendered by the claimant which had advised the respondent that the claimant "would benefit from working from home" and Mr Baker is supportive of the claimant. In those circumstances the Tribunal did not consider this allegation to be made out. It was the claimant's perception of a situation which was not substantiated.

94. *Allegation (q)* is an extension or duplication of allegation (p), to the effect that the respondent pressured the claimant to resign when Mr Sinclair-Ford said he would be calling the respondent's insurance company about whether the claimant could continue to work for the respondent whilst absent from the office and under a sick note. The Tribunal has concluded above, under allegation (p) that the respondent undertook reasonable and legitimate enquiries of its insurers in the circumstances. Allegations (p) and (q) amounted to the claimant's erroneous perception of the situation despite that Mr Baker's email of 8 November 2017 (bundle page 223) is in gentle terms and not pressurising the claimant, but the claimant drew unreasonable conclusions from it.

95. *Allegation (r)* concerns the claimant's pay from April 2019, when the claimant went off sick and was paid SSP for part of the first 2 months of his absence, rather than full sick pay, and thereafter SSP only. The respondent had previously always paid the claimant full pay when off sick. The respondent's position was that under the claimant's contract of employment, sick pay was discretionary (clause 12.2, bundle page 58). It said that in the past when the claimant was a Director they had paid full sick pay but the claimant was an employee in April 2019 and no longer so entitled. There were convoluted explanations given by the respondent's witnesses as to how and why the respondent paid the claimant at the SSP rate for part of the first 2 months of his sickness absence – In April and May 2019, the claimant was paid 1 week's full-pay and 3 weeks at the SSP rate. This arrangement was decided by the respondent which said that the claimant was paid that way so that his pension payments could be maintained. In June, July, August and September 2019, however, the claimant received SSP only. The respondent also sought to explain its

initial decision not to pay full pay by suggesting that it was due to the length of the claimant's absence. However, the claimant was signed off sick for a month at a time and so the respondent could not and did not know, in April 2019, that the claimant's sickness absence would be for more than a month's duration when it decided to pay the claimant as it did. The later decision, in June 2019, to pay only SSP and not even cover the claimant's pension payments was not explained. The claimant was a long-serving employee in any event and the Tribunal considered the decision to pay him SSP was a detriment and a form of punishment. In all the circumstances, the Tribunal considered that the respondent's decision to pay only SSP, when the claimant had always received full pay whilst off sick, was in breach of trust and confidence.

96. *Allegation (s)* concerns the grievance process. The claimant complained that, despite his repeated requests, the respondent decided not to appoint an independent investigator to consider the claimant's grievance. The Tribunal considered the evidence and concluded that the respondent had shown good reasons for its actions and had, in fact, appointed an independent HR professional to investigate the claimant's grievance, which was in an effort to meet the claimant's demands to a degree, whilst thereafter referring the matter to the Director who had been mentioned the least in the grievance (Ms Merrygold) to make the final decision, based on the evidence gathered by the HR professional. Given the limited number of senior personnel at the respondent, and the fact that all the Directors feature in the claimant's grievance to some extent, the Tribunal considered this to be a reasonable approach in the circumstances. Having regard to the strict wording of allegation (s), the Tribunal found that the respondent had, in fact, appointed an independent investigator to consider the claimant's grievance, namely Ms Redfearn of Kingfisher and she had investigated the matters raised, such that no detriment has been established in light of Ms Redfearn's appointment and role as independent investigator. The claimant largely disagreed with the respondent's approach and decisions but that does not find a breach of trust and confidence by the respondent.

97. *Allegation (t)* concerns the grievance outcome of 12 July 2019, at bundle pages 481 – 492. The Tribunal disagreed on whether this amounted to a breach of trust and confidence.

97.1 The majority of the Tribunal considered that the grievance outcome was in fundamental breach of trust and confidence because it considered that the outcome was not an objective assessment by Ms Merrygold - the majority noted that, in commenting about the shares and/or the claimant's remuneration from 2014 onwards, Ms Merrygold disagreed with the claimant's view of events and she had an interest in rejecting his grievance. Ms Merrygold had not been party to the grievance meeting or discussions and it was unclear how or whether she had investigated matters herself.

97.2 The minority considered that the evidence showed that the claimant did not agree with the outcome save for the acknowledgement of a data breach in respect of the suspension letter. The Tribunal has found that the letter lacked objectivity because it included a number of personal observations and opinions on events, by Ms Merrygold – see paragraph 47 above. However, the minority considered that Ms Merrygold had decided to reject the claimant's grievance based on the investigation paperwork that was passed to her by Kingfisher HR, albeit that neither party put the actual paperwork in evidence before the Tribunal and Ms Merrygold did not give oral evidence. Part of the grievance was a protected disclosure, being that a section of the letter was about Mr Newsome's role at the respondent and what the claimant says were breaches of the undertakings. However, the minority considered that Ms Merrygold had rejected the grievance principally because she disagreed with the claimant's view of the matters raised and she did not consider that the respondent had breached the undertakings. Ms Merrygold was entitled to come to the conclusions that she reached. The mere fact of the claimant's disagreement with the outcome does not put the respondent in breach of contract nor was there any evidence to suggest that Ms Merrygold's motivation for the conclusions she had reached was the protected disclosure within the letter.

98. *Allegation (u)* concerns the grievance appeal outcome of 4 September 2019, in the bundle at pages 525 - 532. This allegation does not specify what the claimant complains of, whether the process or the outcome or both. However, the Tribunal noted that, on 14 August 2019, the claimant had emailed the respondent to say that he chose to have the grievance appeal "processed in correspondence". This stance was adopted by the claimant because the respondent would not agree to his demand for an independent third party to determine the appeal and for such to be binding on the respondent. The claimant had no right to an independent appeal but he was intransigent. Mr Baker had proposed to the claimant that the respondent engage "*the services of a third party to hear the grievance appeal and provide the Company with recommendations on the outcome*" and thereafter that Mr Baker would make a decision. The Tribunal considered that this was, again, done in an effort to meet the claimant's demands to a degree and that it was not unreasonable for the respondent to wish to retain the final decision. In any event, the Tribunal considered that Mr Baker's decision on the grievance appeal was arrived at only after careful consideration, including interviewing Mr Newsome and gathering evidence. The outcome letter is lengthy and detailed, answering each of the claimant's points of appeal and did not amount to a breach of trust and confidence. The Tribunal also noted that, by the time of the grievance appeal, the claimant had already accepted the offer of alternative employment with Genmed and he was due to start on 1 September 2019. The Tribunal considered it to be no coincidence that the claimant put back

his start date with Genmed to 1 October 2019 – the claimant was waiting for the grievance outcome which was given on 4 September 2019. The claimant disagreed with the outcome but that, of itself, does not amount to a breach of contract by the respondent.

Constructive dismissal – analyses

99. The claimant resigned from his employment with the respondent on 15 September 2019, with immediate effect, that is to say without notice. In his resignation letter, in the bundle at pages 544 - 546, the claimant expressed his disappointment that the respondent did not agree to his request for an independent third party to deal with his grievance, and contended that he had been bullied and harassed by Mr Sinclair-Ford and Mr Newsome whilst alleging that the respondent turned a blind eye to Mr Newsome's activities. The claimant also said that the gross misconduct charge brought against him was contrived and the disciplinary process flawed. In his claim form (ET1) at paragraph 18, the claimant pleads that the last straw, upon which he resigned, was the respondent's failure to get a third party to deal with his grievance appeal and its failure to investigate Mr Newsome.

100. In respect of the largely historic allegations upon which the constructive dismissal complaint is pursued, the Tribunal has found that allegations (a) to (k), (m) to (q), and (s) and (u) do not amount to breach(es) of trust and confidence. The Tribunal considered that the respondent had reasonable and proper cause for many of these historic allegations when viewed in context, for example, of the need to address the claimant's poor performance and at Board level.

101. The Tribunal has unanimously found that allegation (r) amounted to a breach of the implied term of trust and confidence, but see below, paragraph 102. In addition, the majority of the Tribunal considered that allegations (l) and (t) amounted to a breach of trust and confidence whilst the minority did not agree with that conclusion.

102. Allegation (r), relating to the payment of SSP only whilst off sick, might have supported a claim of constructive dismissal but the claimant did not rely on it at the relevant time – it is not mentioned in the claimant's resignation letter nor in the claimant's grievance letter or in his grievance appeal, all of which are lengthy documents. The Tribunal therefore unanimously decided that there was no evidence to support a finding that the claimant's resignation was related to the issue of the payment of SSP.

103. In light of the above, the respective parts of the Tribunal have determined the issues for the constructive dismissal claim in the following ways.

104. The majority of the Tribunal considered that the respondent was in fundamental breach of the claimant's contract and the implied term of trust

and confidence, when it decided to institute disciplinary proceedings against the claimant, which were pursued because the claimant declined to resign, and in an effort to force him out. The majority considered that this was why Mr Sinclair-Ford sought advice from the HR consultant on "what I need to organise a gross misconduct process" including how long the process would take. The majority considered that his approach was not objective and that the claimant's actions did not support a charge of gross misconduct but that charge was selected by Mr Sinclair-Ford because of a wish to remove the claimant without supporting evidence, taking account of the fact that the meeting arranged by the claimant, which formed the basis of the allegation, had never taken place. In addition, the majority took account of the fact that the respondent did not act immediately after the MAST complaint – it was almost 3 weeks before Mr Sinclair-Ford sought HR advice once it became clear that the claimant would not leave voluntarily – see also paragraph 89.1 above. The majority also considered that the fact that the disciplinary action was suspended, whilst the claimant's grievances were considered, meant that it hung over the claimant for months and perpetuated the breach of trust and confidence, such that when the claimant resigned he was doing so in the expectation that the disciplinary action would be resumed after the grievance process had concluded.

105. The majority also considered that the claimant had resigned in response to the grievance appeal outcome which was the end of the grievance process. The majority considered that the grievance and appeal outcomes were detrimental to the claimant – his grievance was rejected and rejected again on appeal because of the claimant's protected disclosure, raising issues with Mr Newsome's conduct as regards the requirements of the undertakings which were still in place and for which the claimant remained liable as a signatory. It was reasonable for the claimant to pursue such and the respondent's refusal to address the conduct of Mr Newsome meant that it became intolerable for the claimant to continue in employment with the respondent in those circumstances.

106. The majority also took account of the fact that the claimant said in evidence that he wanted his grievance to be heard, even though he had made up his mind to leave, and the majority considered that it was reasonable for the claimant to pursue a grievance at the time. He only accepted the Genmed offer when he had received the grievance outcome from Ms Merrygold.

107. The majority considered that the claimant had not affirmed his contract nor accepted any of the respondent's breaches when he submitted his grievance on 31 May 2019,and/or when he appealed the grievance outcome. The claimant was continuing to pursue his complaints via the respondent's internal processes and the majority considered that it was reasonable for the claimant to do so. His resignation letter specifically expressed his dissatisfaction with the grievance appeal which was the

"last straw" and the operative cause of his resignation, combined with the respondent's failure to appoint an independent third party to hear and decide the grievance appeal.

108. The minority of the Tribunal has determined the issues in the following way.

109. The minority considered the reasons given by the claimant for his resignation and constructive dismissal including his pleaded case as to the "last straw". Save for allegation (r) about SSP, which the Tribunal has concluded was not a factor in the claimant's resignation – see paragraph 102 above, the minority did not consider that allegations (l) and (t) constituted fundamental breaches of the implied term of trust and confidence either individually or cumulatively, and so did not entitle the claimant to resign and treat himself as discharged from his contract of employment.

110. In contrast to the majority, the minority did not consider the institution of disciplinary action by the respondent to be in breach of contract as alleged by the claimant or at all – see paragraph 89.2 above and allegation (t). The minority considered that the respondent had reasonable and proper cause to discipline the claimant who had, by his own admission under cross-examination, acted contrary to an instruction from his manager to "do nothing" in respect of the contract which involved MAST. Such conduct is defined as gross misconduct in the respondent's disciplinary procedure – see bundle page 68, point 1.6.1 – and the respondent was therefore entitled to investigate the matter. In any event, the disciplinary process was put on hold at the end of March 2019 when the claimant first complained to Mr Baker and Ms Merrygold, and never progressed. It is not enough that an employee expects his employer to repudiate the contract, and in this case there was no evidence to conclude that there would be a future repudiation beyond the claimant's fear of dismissal.

111. The ET1 pleads that the "last straw" was the respondent's failure to get a third party to deal with his grievance appeal and its failure to investigate Mr Newsome – the latter is however not an allegation which appears in the list of issues. In relation to an investigation into Mr Newsome's conduct in 2019, the claimant gave evidence that he had, in 2019, reported his concerns to the external individual/police officer who had led the investigation into the fraud allegations against Mr Newsome and he had passed his evidence on, because he did not want to report to Mr Sinclair-Ford. An external investigation did not materialise and it remained entirely unclear how or why the claimant thought that, despite having gone to the police with his evidence, the claimant believed that the respondent should have investigated Mr Newsome and/or how it failed to do so when such an accusation was more properly levelled against the police and when the claimant was not prepared to report matters to the respondent's statutory Director.

112. Whilst the claimant was unhappy that the respondent did not accede to his demands for an independent third party to carry out the grievance procedure, the Tribunal considered that the respondent had reasonable and proper cause for not agreeing to such albeit that the respondent did appoint Kingfisher HR to fact-find – see allegation (s) at paragraph 96 above. Likewise, in respect of allegations (t) and (u), the claimant did not agree with the outcomes of the grievance process or his appeal but the minority considered that his disagreement does not put the respondent in breach and his disagreement did not entitle him to resign without more; in any event the claimant's pleaded case does not rely on those outcomes as the last straw.

113. The question then is whether the claimant resigned in response to a fundamental breach of contract or for some other reason. The minority considered that, in any event, the claimant did not in fact resign in response to any of the breaches of contract he contended for nor in response to any cumulative actions of the respondent. Instead, and importantly, by the date of the claimant's resignation on 15 September 2019, he had already accepted alternative employment with Genmed, the respondent's main competitor, some 2 months previously and he was due to start working for them on 1 October 2019. Under the claimant's contract of employment with the respondent he was required to give and serve 3 months' notice – clause 3.7 of the schedule to the contract, bundle page 65. By September 2019, it did not suit the claimant to give or serve due notice. If he had done so, he would not have been able to start working for Genmed on 1 October 2019 as he had agreed. In the circumstances, the minority considered that the reasons given in the claimant's resignation letter were not the genuine reasons for his resignation; they were put in order to support an immediate departure.

114. In determining that the claimant did not resign because of any breach of contract by the respondent, the minority took account of the conduct of the claimant in the months preceding his resignation. As early as February 2019, the claimant had told Mr Baker that he considered his treatment was harassment and bullying and part of a concerted effort to get him to leave. It was apparent from the evidence before the Tribunal that the claimant had, by that stage, formulated a plan to leave as evidenced by the fact that he asked Mr Baker to "work out a package" for discussion. The claimant did not however resign, even though he was at the time facing the disciplinary action about which he later complained.

115. On 22 March 2019, the claimant had emailed Ms Merrygold and Mr Baker to complain about events and declared that "I … feel my role here has become untenable" but he did not resign. The claimant complained about the "fact finding" being conducted by Ian Sinclair-Ford as a deliberate plan to find him guilty of gross misconduct (despite that the fact-find was conducted independently by Kingfisher HR) and he complained about

what he described as “consistent bullying and harassment over a number of years by Mr Sinclair Ford”. On 26 March 2019, the claimant met again with Ms Merrygold and Mr Baker hoping for their support but he discovered that they did not share his view of matters. It was at that stage that the respondent decided that the disciplinary process should be suspended until the claimant’s complaints, as relayed to Ms Merrygold and Mr Baker, had been investigated. A meeting to discuss his complaints was then arranged for 11 April 2019 but the claimant failed to respond to the invitation. Eventually, on 31 May 2019, the claimant instructed solicitors to write a formal grievance letter to the respondent on his behalf. Under cross-examination, the claimant described this as “an olive branch to the respondent”. Up to then, the claimant had experienced a number of acts by the respondent which, in these proceedings, he has contended were fundamental breaches of trust and confidence. The claimant was in receipt of legal advice on his position, yet at no time did he resign in the face of any of the alleged breaches, whether individually or cumulatively.

116. The minority considered that the claimant had made his decision to leave the respondent by early June 2019. The claimant was cross-examined about his intention to leave and when this was formed. He gave evidence that it was either before his first interview with Genmed, in June or at the latest by 1 July 2019 and he confirmed that he was already contemplating leaving when he instructed his solicitors to write a grievance letter for him at the end of May 2019. Having then resolved to leave, he approached the respondent’s main competitor, Genmed, about employment. This evidence accords with the claimant’s comments at the end of his grievance hearing, on 18 June 2019, when he mentions “a transition” and comments about having to change jobs – see bundle page 376. The minority evaluated the claimant’s reasons at the time, June 2019, and found, on a balance of probabilities for the purposes of causation, that the claimant had resolved to leave before the grievance outcome was delivered. The claimant attended an informal interview with Genmed in June 2019 and had a second interview in early July 2019. By 16 July 2019, the claimant had received a verbal offer of employment which he always intended to accept but waited for it to be confirmed in writing, on 19 July 2019, formally accepted by the claimant on 21 July 2019, when he signed a contract of employment with Genmed, with an agreed start date of 1 September 2019.

117. At this point, the claimant was in receipt of the grievance outcome from Ms Merrygold, since 12 July 2019, and he had been given until 19 July 2019 to appeal. It has been the claimant’s case that the grievance process and its outcome were in fundamental breach of his contract of employment and detriments – as allegations in the list of issues section 1, (s) and (t) and also section 9, (j) and (k). Nevertheless, the minority found that he had already decided to leave. The claimant took no prompt action in response to the grievance outcome. Instead, he waited to receive the Genmed offer in writing, accepted it straight away, signed a contract of employment and

agreed a start date. Having accepted a new job with Genmed, it might have been expected that the claimant would then resign his employment with the respondent but he did not do so. The minority considered that the claimant was “hedging his bets” in the hope of a return to the respondent, whilst keeping Genmed in reserve, and deferring his start date to that end. Such conduct is at odds with an employee who considers his employer to be in fundamental or repudiatory breach of contract.

118. On 24 July 2019, the claimant sought to appeal the grievance outcome outside of the respondent’s deadline for an appeal. The respondent agreed to address the appeal – the respondent had no idea of the claimant’s employment with Genmed at the time. Despite the numerous pleaded breaches of contract, the claimant chose to continue to engage with the respondent, through the appeal process which could have led to a resolution of their differences or some form of compromise so the claimant could continue working for the respondent. He retained a hope of continuing to work for the respondent. In cross-examination, the claimant was challenged on this aspect and admitted that one factor in his approach was the higher pay he would enjoy if he remained with the respondent as opposed to leaving for Genmed. The clear implication of the claimant’s evidence was that, if the grievance/appeal outcome had been different, the claimant would have continued to work for the respondent. Only when the claimant’s repeated request for the grievance appeal to be dealt with by an independent third party was turned down by Mr Baker, a director with whom the claimant had retained a positive relationship, did he tell the respondent to deal with it on the papers. He did not at any point withdraw his appeal and he accepted in evidence that Mr Baker’s grievance appeal outcome letter was detailed and thorough – the essence of the claimant’s complaint was that he did not agree with the outcome and that Mr Baker was not, in his view independent, The minority considered that the claimant’s view of Mr Baker’s independence would no doubt have been different if Mr Baker had upheld the appeal. Likewise, the appointment of an independent third party would not guarantee a different appeal outcome.

119. To succeed in a constructive dismissal, a claimant must demonstrate that circumstances were such that it was intolerable to work for the respondent any longer and that he did not delay in resigning in response to such. Having regard to the circumstances as pleaded, the claimant had, on his own case and his evidence, reached such a situation in or around June 2019. He did not then resign nor did the minority consider that he resigned in response to any of the further breaches contended for (allegations (t) and (u)). The minority considered that the grievance appeal outcome was not an effective cause of the claimant’s decision to resign when he did beyond the fact that, upon its receipt, the claimant realised that his differences with the respondent would not be resolved in the way he wanted. The only genuine reason for resigning was that the claimant had decided to take up his reserve option of employment with Genmed.

120. The minority also considered that the claimant had delayed in resigning to such an extent that he had effectively affirmed the contract or waived any breaches. In Western Excavating Ltd v Sharp Lord Denning commented that an employee must "*make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged*." The claimant was off sick from 4 April 2019, with stress, and did not return to work prior to his resignation, almost 6 months later. It took him almost 2 months to raise his formal grievance, having failed to engage with the respondent's efforts to meet him to discuss matters informally in April 2019. Counsel for the claimant accepted in submissions that the claimant had decided to resign by 21 July 2019 at the latest when he accepted the offer of employment with Genmed and the claimant's submissions state, "Therefore, the treatment … which caused [the claimant] to resign, must have occurred prior to on/around 21 July 2019" with the claimant making his final decision when he accepted Genmed's offer. This submission means that the last straw would have been the grievance outcome or something earlier, despite that such had not been the claimant's case until it was revealed, only in the course of this hearing, that the claimant had sought and secured his new employment some months prior to mid-September 2019, being the time period which the claimant had originally suggested in evidence, before his approach to Genmed in June 2019 was revealed. In any event, the minority considered that the claimant did not resign in response to the grievance outcome, despite that he accepted Genmed's offer very shortly after the grievance outcome in July. He had decided to leave long before then.

121. Counsel for the claimant argued that mere delay by itself does not constitute affirmation and that the period of delay, which Counsel submitted was around 8 weeks, was not unreasonable while the claimant awaited the outcome of his appeal. The minority took account of the fact that, although the claimant received the grievance appeal outcome on 4 September 2019, he had then delayed in resigning for almost another 2 weeks. The claimant was paid SSP throughout and accepted it - he did not complain in April 2019 or at any time thereafter about that aspect; sick pay does not feature in his grievance or appeal, nor in his resignation letter, notwithstanding that he sought to rely on the matter as a further allegation of a fundamental breach in these proceedings. The claimant said that he needed to support his family and that SSP alone was insufficient but he did not then resign. In contradiction of that position, the claimant delayed, having put off his Genmed start date for a month (and foregoing a month's salary from Genmed in favour of SSP), actions which conflict with the claimant's suggestion of financial hardship. If he had needed to, he could have started with Genmed on 1 September 2019. The minority considered the case law in this area to which it was referred by the representatives and concluded that the claimant's continuing to accept sick pay, whilst deferring his start date with Genmed, was not in the

circumstances of this case a neutral act but was one factor tending to show affirmation/waiver of the breaches relied upon up to April 2019; by remining under contract with the respondent, combined with a considerable delay in resigning, in the context of having another job to go to and the claimant's evidence that he did not want to leave. Although the mere pursuit of internal procedures does not normally constitute affirmation, in the particular circumstances of this case, the minority took into account that the grievance appeal had been pursued late and once the claimant had set up an 'insurance policy', of employment with Genmed, and the claimant was not, therefore, merely seeking to remedy his differences; the internal procedures became but one option for him. The totality of the claimant's circumstances and his actions amounted to affirmation and/or waiver of the alleged breaches relied upon. In light of all the above, the minority decision is that the claimant had not demonstrated circumstances amounting to a constructive dismissal and his claim of unfair dismissal is not well-founded.

Whistle-blowing - detriment

122. The Tribunal was unanimous in its conclusions on the complaint of whistle-blowing detriment as follows.

123. First the Tribunal considered the 3 disclosures contended for as qualifying disclosures. The Tribunal has found that the first and second disclosures were not made out on the evidence or on a balance of probabilities – see paragraphs 18 and 29 above. The respondent has accepted that the claimant's grievance dated 31 May 2019 amounts to a protected disclosure, given the matters raised within it in respect of Mr Newsome's behaviour and the Tribunal agreed – see paragraph 42 above. That being the case, any detriment arising in consequence of this protected disclosure must arise after 31 May 2019. Detriments (a) to (i) pre-date the claimant's protected disclosure and so were not considered further.

124. The remaining 3 detriments contended for, numbered (j), (k) and (l) in the list of issues above, relate: (j) to the grievance process, specifically the allegation that the respondent decided not to appoint an independent investigator to consider the claimant's grievance despite repeated requests by the claimant; together with (k) the grievance outcome of 12 July 2019; and (l) the grievance appeal outcome of 4 September 2019.

125. The claimant's case for these 3 detriments was in effect that he disagreed with the respondent's approach and decisions. The Tribunal considered the evidence and concluded that the respondent had shown good reasons for its actions in appointing an independent HR professional to investigate the claimant's grievance, which was in an effort to meet the claimant's demands to a degree, whilst referring to the Director who had been mentioned the least, to make the final decision, based on the evidence. Given the limited number of senior personnel at the respondent, and the

fact that all the Directors feature in the grievance to some degree, the Tribunal considered this to be a reasonable approach in the circumstances. Having regard to the strict wording of the allegation in the list of issues at point 9 (j), the Tribunal found that the respondent had, in fact, appointed an independent investigator to consider the claimant's grievance, namely Ms Redfearn of Kingfisher and she had investigated the matters raised, such that no detriment has been established in light of Ms Redfearn's appointment and role.

126. In respect of the grievance appeal process, the Tribunal noted that Mr Baker had proposed to the claimant that the respondent engage "*the services of a third party to hear the grievance and provide the Company with recommendations on the outcome*" and thereafter that Mr Baker would make a decision. The Tribunal considered that this was, again, done in an effort to meet the claimant's demands to a degree and that it was a reasonable approach, in the circumstances, for the respondent to wish to retain the final decision on the outcome. The claimant was being offered the same process as was adopted for his grievance hearing. However, the claimant wanted a third party to run the appeal process ***and*** to make the final decision which presumably would be binding on the respondent. Having not got exactly what he wanted, the claimant then decided that the respondent should respond to his appeal points in correspondence, which it did. The Tribunal considered that the respondent's decision not to appoint an independent investigator to consider the claimant's grievance appeal was, in part, a product of the claimant's intransigence which itself demonstrates the claimant's unjustified sense of grievance about the process, per Shamoon, and that no detriment in relation to the appeal process has been established.

127. The claimant's case is that the grievance outcome and the appeal outcome themselves are detriments, at (k) and (l) in the list of issues. The claimant did not agree with those outcomes. For a whistle-blowing detriment claim to succeed, the claimant must show that his protected disclosure was a material factor in the causation of the detriment. The Tribunal considered that the simple fact of the rejection of a grievance/appeal cannot establish a detriment; otherwise every rejected grievance would find a successful claim of detriment. The Tribunal found no evidence that the claimant's protected disclosure about Mr Newsome's conduct was a material factor in either the rejection of his grievance or the dismissal of his appeal. Ms Merrygold decided to reject the claimant's grievance based on the paperwork that was passed to her by Kingfisher. She commented on the offer of shares and/or the claimant's remuneration from 2014 onwards, but there was nothing to suggest that the claimant's protected disclosure (that part of the grievance about Mr Newsome's conduct) was a material factor in the outcome she arrived at. Likewise, Mr Baker's decision on the appeal was arrived at only after careful consideration, including interviewing Mr Newsome and gathering evidence. The outcome letter is lengthy and detailed, answering each of

the claimant's points of appeal. The Tribunal therefore concluded that the claimant had not established any link to his protected disclosure and had demonstrated, at best, an unjustified sense of grievance at the outcomes, per Shamoon.

128. Further, given the provisions of section 48(3) ERA, and the fact that the claimant commenced early conciliation via ACAS on 14 October 2019, only those detriments relied upon which arose on or after 15 July 2019 are in time. This means that only the grievance appeal outcome and the decision by Mr Baker not to appoint a third party to investigate the grievance appeal are in time. The grievance outcome and process are out of time. Whilst the Tribunal has found that no detriment has been established in respect of grievance outcome and process, the Tribunal nevertheless considered that it would have been reasonably practicable for these 2 complaints of detriment which were out of time to have been presented in time, in light of the fact that the claimant had been in receipt of legal advice from Solicitors, who wrote his grievance letter on or before 31 May 2019.

129. In light of the above conclusions, the Tribunal found that the claim of detriment for whistleblowing is not well-founded and is dismissed.

Whistleblowing – automatically unfair dismissal

130. The majority have concluded that the claimant resigned in response to the respondent's repudiatory breach(es) of contract in circumstances constituting a constructive dismissal. For a claim of automatic unfair dismissal for whistleblowing to succeed, the issue arises as to whether the sole or principal reason for the employer's breach(es) of contract, which led to the claimant's resignation, was the claimant's protected disclosure, and therefore whether the dismissal was unfair under s103A of the Employment Rights Act 1996.

131. The Tribunal has found that one protected disclosure was established, namely the claimant's grievance of 31 May 2019 insofar as paragraphs 20-24 of the letter concern Mr Newsome's role at the respondent and raise a breach of legal obligations arising from the undertakings given by the respondent and its Directors in August 2011 – see paragraphs 42 and 123 above.

132. That being the case, any detriments/breaches by the respondent arising in consequence of the protected disclosure must have occurred after 31 May 2019. The disciplinary action (factual allegation (l)) was commenced in January 2019 and put on hold due to the receipt of the claimant's grievance. The payment of sick pay to the claimant at the SSP rate was decided in April 2019 (factual allegation (r)) and has been found not to be a cause of the claimant's resignation. In addition, these matters pre-date

the protected disclosure, and so cannot have occurred because of the protected disclosure.

133. That leaves the grievance outcome of 12 July 2019 – allegation (t) at paragraph 97 above. The majority of the Tribunal has found this to be a breach of the implied term of trust and confidence because of certain content of the outcome letter written by Ms Merrygold, namely that the letter lacked objectivity because it included a number of personal observations and opinions on events, by Ms Merrygold – see paragraph 47 above. The majority considered that the grievance process turned into a vehicle to deliver an outcome against the claimant: The claimant raised issues about the conduct of Mr Newsome, who was one of the 2 shareholders and the driving force of the respondent, for example in his handling of the important negotiations with MAST; The outcomes were intended to ensure that the claimant's concerns about potentially unlawful conduct by Mr Newsome, and by extension the respondent, were not brought to light. In that vein, the majority considered that the underlying sole or principal reason for the treatment afforded to the claimant, by rejecting his grievance and appeal, was because of his protected disclosures.

134. Insofar as the grievance outcome letter replies to the issue raised by the claimant about Mr Newsome's conduct (which constitutes the substance of the protected disclosure) the minority considered that Ms Merrygold's approach to that part of the grievance was to explain Mr Newsome's role and to point out to the claimant that Mr Newsome was acting in a capacity approved by the respondent's Board at a time when the claimant was a Director and Board member. The minority of the Tribunal found no evidence to suggest that Ms Merrygold's response to that part of the grievance which constituted the protected disclosure was other than objective – she was bound to respond to the points raised in paragraphs 20-24 of the grievance and her rejection of the matters raised was considered such that the minority concluded that Ms Merrygold had not been influenced by the fact that what the claimant said was whistleblowing. In those circumstances, the minority concluded that the protected disclosure did not form part of the breach of contract found by the majority under allegation (t). In those circumstances, the minority of the Tribunal considered that the respondent's sole relevant breach of contract, allegation (t) about the grievance outcome, did not arise because of the claimant's protected disclosure.

135. The majority decision is that the grievance outcome was because of the protected disclosure. The claim of automatic unfair dismissal for whistleblowing is therefore well-founded by virtue of the majority decision.

Remedy

136. In light of the Tribunal's majority decision that the claimant was constructively automatically unfairly dismissed by the respondent, the claim shall be listed for a remedy hearing in respect of the constructive unfair dismissal complaint, on a date to be fixed.

_____
Employment Judge Batten
Date: 18 May 2022

JUDGMENT SENT TO THE PARTIES ON:

18 May 2022

FOR THE TRIBUNAL OFFICE