Case Number: 1403915/2021

EMPLOYMENT TRIBUNALS

Claimant: Robert Warner

Respondent: Next Steps Independence Ltd (1)
Jack Balchin (2)

Heard at: **Exeter** **On:** **30 January 2023 – 02 February 2023**

Before: Employment Judge Housego
Tribunal Member I Ley
Tribunal Member S Long

Representation

Claimant: Nicholas Smith, of Counsel, instructed by Catherine Jackson, of McCabe and Co., solicitors
Respondent: Elizabeth Evans-Jarvis, of Peninsula UK Ltd.

JUDGMENT

1. The 1st and 2nd Respondent subjected the Claimant to detriment by reason of public interest disclosures made by him, contrary to S43B of the Employment Rights Act 1996.

2. The Claimant was unfairly constructively dismissed by the 1st Respondent.

3. The dismissal was contrary to S103A of the Employment Rights Act 1996.

4. The case will be relisted for a remedy hearing.

5. A case management hearing will be listed as soon as possible to deal with the valuation of the 1st Respondent.

REASONS

Summary

1. The Claimant was finance director of the 1st Respondent, of which the 2nd Respondent is the CEO and major shareholder. The 1st Respondent provides homes for vulnerable children.

2. The Claimant raised public interest disclosures internally and externally, about matters that came to his notice when a colleague who was leaving spoke to him and then emailed him a copy of her exit interview statement.

3. Subsequently he was suspended, and he resigned immediately before the 1st Respondent was to dismiss him. The 1st Respondent relied on the Claimant allegedly not dealing properly with a report to him by a senior colleague that an IT technician had behaved inappropriately towards her. They said, among other things that he failed to treat this as a safeguarding concern because the technician also attended homes run by the 1st Respondent, and then lied about it.

4. The Tribunal found that this was not the real reason, and that the real reason was at least in part the public interest disclosures. The Claimant was unfairly constructively dismissed and suffered detriments and was dismissed by reason of having made public interest disclosures. None of the claims were out of time.

The Issues

5. These were set out in Case Management Order following a hearing on 15 July 2022. They are:

1. Time limits

1.1 With regard to the first respondent, the claim form was presented on 7 October 2021. The claimant commenced the Early Conciliation process with ACAS on 1 August 2021 (Day A). The Early Conciliation Certificate was issued on 8 September 2021 (Day B). Accordingly, any act or omission which took place before 2 May 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.2 With regard to the second respondent, the claim form was presented on 7 October 2021. The claimant commenced the Early Conciliation process with ACAS on 8 September 2021 (Day A). The Early Conciliation Certificate was issued on 20 September 2021 (Day B). Accordingly, any act or omission which took place before 9 June 2021 (which allows for any extension under the Early Conciliation provisions) is potentially out of time so that the Tribunal may not have jurisdiction to hear that complaint.

1.3 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the act complained of?
1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus the Early Conciliation extension) of the last one?
1.3.3 If not, was it reasonably practicable for the claim to have been made to the Tribunal within the time limit?

1.3.4 If it was not reasonably practicable for the claim to have been made to the Tribunal within the time limit, was it made within a reasonable period?

2. Constructive Unfair Dismissal (ss 95(1)(c) and 98(4) ERA 1996) (Claim against First Respondent only)

2.1 The claimant claims that the first respondent acted in fundamental breach of contract in respect of the implied term of the contract not to subject the claimant to unlawful detriment and/or relating to mutual trust and confidence. The alleged breaches relied upon are detriments 5.1.1, 5.1.4, 5.1.5, 5.1.6, 5.1.7, 5.1.8, 5.1.10, 5.2.12, and 5.2.13 (as set out below). (The last of those breaches 5.2.13 namely initiating formal disciplinary action against the claimant was said to have been the 'last straw' in a series of breaches, as the concept is recognised in law, and he resigned on 15 June 2021 the day after receiving notice of the disciplinary hearing (letter received 14 June 2021)).

2.2 The Tribunal will need to decide:

2.2.1 Whether the first respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.2.2 Whether the first respondent had reasonable and proper cause for doing so.

2.3 Did the claimant resign because of the breach? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.4 Did the claimant delay before resigning and therefore affirm the contract? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

2.5 In the event that there was a constructive dismissal, was it otherwise fair within the meaning of s. 98 (4) of the Act?

2.6 If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the first respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

3. Protected Public Interest Disclosures ('Whistle Blowing')

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

3.1.1 What did the claimant say or write? When? To whom? The Claimant relies on these disclosures:

3.1.1.1 Disclosure 1: on 23 April 2021 verbal disclosures made by telephone to Mr Richard White the Operations Director and Designated Safeguarding Officer of the First Respondent; and

3.1.1.2 Disclosure 2: an email to Mr Richard White at 11:28 on 23 April 2021; and
3.1.1.3 Disclosure 3: an email to Mr Richard White at 11: 59 on 23 April 2021; and
3.1.1.4 Disclosure 4: the claimant's letter to Ofsted on 5 May 2021; and
3.1.1.5 Disclosure 5: disclosures made by letter to the Devon Local Authority Designated Officer on 5 May 2021; and
3.1.1.6 Disclosure 6: disclosures made by letter to Devon's Children's Commissioner Mr Scribbins on 5 May 2021
3.1.1.7 Disclosure 7: disclosures made by letter to Swindon's Children's Commissioner Libby Butler on 5 May 2021.

3.1.2 Were the disclosures of 'information'?

3.1.3 Did the claimant believe the disclosure of information was made in the public interest?

3.1.4 Was that belief reasonable?

3.1.5 With regard to the disclosures relating to sexual harassment the claimant asserts that the information tended to show that a criminal offence (assault) had been committed and/or that there had been a failure to comply with the legal obligation under section 26 EqA.

3.1.6 With regard to the disclosures relating to second respondent's involvement in clinical intervention with a vulnerable young adult who was awaiting criminal trial, the information tended to show that there had been or was likely to be a breach of legal obligation (under the Care Act 2014 or the Children's Act 1989), and specifically that the second respondent was not qualified for clinical intervention which presented a possible safeguarding risk, and/or that a miscarriage of justice was likely to occur, specifically that the second respondent had used his status as a former police officer to try to influence the vulnerable young adult to plead guilty in criminal proceedings.

3.1.7 Did the claimant believe the disclosures relied upon tended to show that:
3.1.7.1 a criminal offence had been, was being or was likely to be committed; and/or
3.1.7.2 a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or
3.1.7.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

3.1.8 Was that belief reasonable?

3.2 If the Claimant made a qualifying disclosure, then where it was made to the claimant's employer it would be a protected disclosure pursuant to section 43C(1)(a) of the Act.

3.3 The claimant also relies where appropriate on disclosure to a prescribed person pursuant to section 43F and/or another person under section 43G.

4. Whistle Blowing Unfair Dismissal (s103A of the Act) (Claim against First Respondent only)

4.1 Was the claimant constructively dismissed?

4.2 If so, was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

4.3 The claimant did have two years' continuous service and the questions which the Tribunal will have to address are:

4.3.1 Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?
4.3.2 Has the first respondent proved its reason for the dismissal, namely misconduct?
4.3.3 If not, does the Tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

5. Whistle Blowing Detriment (s 47B of the Act) (Claim against Both Respondents)

5.1 The claimant asserts that he suffered the following detriments which were materially influenced by Disclosures 1 to 3:

5.1.1 commissioning an external investigation into the claimant's conduct (around 23 to 26 April 2021) in contradiction of the outcome of the internal report AB1 into concerns raised by Ms Bruce, circulated on 16 April 2021 (Both Respondents); and
5.1.2 attempting to discredit the claimant with a search for potential outcomes "of a financial nature that may require exploration by accountants" as per email at 04:42 on 28 April 2021 (Both Respondents); and
5.1.3 attempts to threaten civil action against the claimant in the draft suspension letter as per email at 13:32 on 28 April 2021 (Both Respondents); and
5.1.4 failure to follow the first respondent's whistleblowing policy and failure properly to investigate concerns raised internally, including comment on 26 April 2021 by Mr White that his intention was to "shred" the Exit Interview form upon receipt; and
5.1.5 suspension on 28 April 2021 for "gross breach of trust" without particularisation; and
5.1.6 the angry threat by the second respondent to call the police should the claimant leave the suspension meeting on 28 April 2021 (Both Respondents); and
5.1.7 ordered confiscation of company equipment with threat that failure to return it within two days would be seen as a "further issue of misconduct" on 28 April 2021; and
5.1.8 breach of confidentiality around the claimant's suspension and

comment that "he is unlikely to return to NSI" by the second respondent in an email to Dr Watson dated 29 April 2021 (Both Respondents); and

5.1.9 Mr White's provision of the highly damaging "Chronology of Case" document to Investigation A, which alleges the claimant suspension is for "gross breach of trust, not following company policy and procedures, allegations of falsification of documentation and collusion"; and

5.1.10 failure to contact the claimant to vote on the resolution to appoint three new directors to the first respondent company on 29 April 2021 until after his resignation on 22 June 2021 (Both Respondents).

5.2 The claimant asserts that he suffered the following detriments which were materially influenced by Disclosures 1 to 7:

5.2.1 comment by the second respondent to Mr White and Ms Beaumont that "Warner is a dead man walking" in the email dated 12 May 2021 (Both Respondents); and

5.2.2 comment by Mr White to Devon County Council Senior Commissioning Manager Mr Scribbins in meeting on 13 May 2021 that "we are dealing with a further investigation of an individual and that this subsequent whistleblowing feels vexatious in its content and intent; and

5.2.3 breach of confidentiality around the suspension and investigation into the claimant to Swindon Borough Council (date to be confirmed, see email 14 May 2021); and

5.2.4 breach of confidentiality around the claimant suspension to external third party BHS Insurance by the second respondent in an email dated 17 May 2021 (Both Respondents); and

5.2.5 the second respondent's provision of a 16 point list of "breaches in company policy and procedure RW FD" to investigation A on or around 20 May 2021 (Both Respondents); and

5.2.6 the second respondent's provision of "file note" dated 21 February 2021 to Investigation A on 24 May 2021 (Both Respondents); and

5.2.7 the second respondent's provision of the email chain between the claimant and Dr Watson to Investigation A on 25 May 2021 (Both Respondents); and

5.2.8 emails from Ms Beaumont and the second respondent to Investigation A on 25 May 2021 alleging the claimant's "serious non-compliance" with Company policies; and

5.2.9 emails from second respondent to Investigation A on 25 May 2021 strongly insinuating that the claimant was the external whistleblower (Both Respondents); and

5.2.10 the attempts to limit the remit of Investigation B to the claimant and his raising of concerns, rather than the substance of the concerns themselves, including failure to provide key documents (Both Respondents); and

5.2.11 breach of confidentiality around the suspension and investigation into the claimant in an email from the second respondent to external third party Ellis Whittam on 2 June 2021 (Both Respondents); and

5.2.12 failure appropriately to deal with the claimant's grievance dated

22 April 2021, including failure to invite the claimant to attend a grievance meeting until 16 June 2021 (the same day as the disciplinary hearing) (Both Respondents); and
5.2.13 initiating formal disciplinary action against the claimant by letter dated 11 June 2021; and
5.2.14 refusal to accept the claimant's resignation on 15 June 2021; and
5.2.15 failure to send form P 45 and pay the claimant's final expenses submitted by email on 21 June 2021; and
5.2.16 the threat to report the claimant to the police for failure to return company property on 9 July 2021 after ignoring a reasonable request to send it by courier; and
5.2.17 the attempt to dismiss the claimant for gross misconduct on 7 July 2021 thereby affecting a Compulsory Employee Transfer of Shares under the first respondent's Articles of Association; and
5.2.18 the attempt to bring legal action against the claimant to recover losses caused by "whistleblowing unsubstantiated allegations" as per email from the second respondent dated 2 August 2021(Both Respondents).

5.3 Each of the above detriments is said to have been committed by the first respondent save where the detriment is noted as "Both Respondents" in which case the claim is brought against both respondents.

5.4 Was the claimant subjected to detriment as alleged?

5.5 If so, was it done on the ground that the claimant had made the protected disclosure(s) set out above?

6. Remedy

Unfair dismissal

6.1 The claimant does not wish to be reinstated and/or re-engaged.

6.2 What basic award is payable to the claimant, if any?

6.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

6.4 If there is a compensatory award, how much should it be? The Tribunal will decide:
6.4.1 What financial losses has the dismissal caused the claimant?
6.4.2 Has the claimant taken reasonable steps to replace any lost earnings, for example by looking for another job?
6.4.3 If not, for what period of loss should the claimant be compensated?
6.4.4 Is there a chance that the claimant would have been fairly dismissed in any event if a fair procedure had been followed, or for some other reason?
6.4.5 If so, should the claimant's compensation be reduced, and if so, by how much?
6.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent or the claimant

unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?
6.4.7 If the claimant was unfairly dismissed, did the claimant cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the compensatory award? If so, by what proportion?
6.4.8 Does the statutory cap of fifty-two weeks' pay apply? (This is £86,444 until April 2020, and £88,519 thereafter).

Detriment (s. 47B ERA 1996)

6.5 What financial losses has the detrimental treatment caused the claimant?

6.6 Has the claimant taken reasonable steps to replace any lost earnings, for example by looking for another job?

6.7 If not, for what period of loss should the claimant be compensated?

6.8 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

6.9 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

6.10 Is it just and equitable to award the claimant other compensation?

6.11 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?

6.12 Did the claimant cause or contribute to the detrimental treatment and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

6.13 Was the protected disclosure made in good faith? If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

The law

6. There is a claim for pre-dismissal detriment, under S47B of the Employment Rights Act 1996 :

"47B Protected disclosures.
(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

7. The relevant section of the Employment Rights Act 1996 ("ERA") is S103A. That section provides:

> *"S103A Protected disclosure.*
> *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

8. To qualify as a public interest disclosure under the Employment Rights Act 1996, a Claimant must meet the requirements of S43A-L. The matter said to be a disclosure must fall with one or more of the criteria set out in S43B:

> *"43B Disclosures qualifying for protection.*
> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
> *(e) that the environment has been, is being or is likely to be damaged, or*
> *(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."*

9. The disclosure must be made to the Claimant's employer (S43C), to a legal adviser (S43D), to a Minister of the Crown (S43E), to a person named in a statutory instrument (a "prescribed person") (S43F), or to someone else if not made for gain, it was reasonable in all the circumstances to make the disclosure, and the conditions set out in that section are met (S43G).

10. The burden and standard of proof applicable is set out in Kuzel v Roche Products Ltd [2008] EWCA Civ 380, the substance of which is set out in points 4.3.1 – 4.3.3 of the list of issues set out in the CMO of 15 July 2022.

11. The Claimant resigned his employment. He claims that he was unfairly constructively dismissed. For the claim of unfair constructive dismissal[1] the Claimant must show that the Respondent is guilty of a fundamental breach of contract showing that it does not intend to be bound by it. He must show that he resigned because of that breach, in a reasonable time and without affirming the contract before doing so. The last matter complained of need not itself be a breach of contract.

12. The Respondents say that the resignation was the day before a disciplinary

[1] S95(1)(c) of the Employment Rights Act 1996

hearing at which they were to consider dismissing the Claimant for alleged misconduct. Had they done so, it is for the employer to put forward the reason for dismissal, here conduct. The Tribunal must first make its primary findings of fact. It must then decide what was the reason or principal reason for the dismissal, the burden being on the employer to show it was as asserted. If the employer does not do so, then it is open to the Tribunal to find that the reason was that asserted by the employee. But the Tribunal does not have to do so. It does not follow that if it was not for the reason given by the employer it must have been for the reason advanced by the employee. The true reason may have been another reason. An employer may fail to show a fair dismissal, but that does not mean that the employer must fail in disputing the case put forward by the employee. But it is not for the employee to prove that the dismissal was for a public interest disclosure reason.

13. In this case the Respondent seeks to show that if there was a constructive dismissal it was a fair dismissal and seeks to refute the Claimant's assertion that it was by reason of any public interest disclosures made by the Claimant.

14. This was summarised at paragraph 30 of Royal Mail Group Ltd v Jhuti [2019] UKSC 55:

> *"Section 103A is an example of what is often called automatic unfair dismissal. It is to be contrasted with the provision in section 98, entitled "General", under which, if pursuant to subsection (1) the employer establishes that "the reason (or, if more than one, the principal reason) for the dismissal" is of the kind there specified, the fairness of the dismissal falls to be weighed by reference to whether it was reasonable in all the circumstances pursuant to subsection (4). The application of subsection (4) to section 103A is excluded by section 98(6)(a). So there is no weighing by reference to whether the dismissal was reasonable in all the circumstances: under section 103A unfairness is automatic once the reason for the dismissal there proscribed has been found to exist. In Kuzel v Roche Products Ltd [2008] EWCA Civ 380, [2008] ICR 799, the Court of Appeal addressed the location of the burden of proof under section 103A. It held that a burden lay on an employee claiming unfair dismissal under the section to produce some evidence that the reason for the dismissal was that she had made a protected disclosure but that, once she had discharged that evidential burden, the legal burden lay on the employer to establish the contrary: see paras 57 and 61 of the judgment of Mummery LJ."*

Evidence and hearing

15. The hearing was a hybrid hearing, with the Claimant and his representatives being in the Tribunal and the Respondents' witnesses and their representative being remote.

16. The 2nd Respondent has suffered an injury that affects his sciatic nerve. He started his evidence in the afternoon of day 2. He had to remove first one shoe and then the other. By mid-afternoon he indicated that he was in pain to a level that made it hard to concentrate. While he had powerful painkillers which numbed the pain, they made him drowsy to the extent that he could not concentrate. Accordingly, the hearing was adjourned to day 3. At the start of

day 3 the 2nd Respondent said that he was not in pain and was well. He had taken a couple of tablets of paracetamol. I checked with him periodically, and on each occasion and at the end of his evidence he confirmed that he had not been in pain and had been able to concentrate, albeit that he said that the giving of his evidence had fatigued him. At the conclusion of his oral evidence the 2nd Respondent expressed gratitude to the Tribunal for the care taken to ensure that he was able to give evidence effectively.

17. The documents considered are described in the next section of this judgment.

18. Judgment was reserved, because submissions were taken towards the end of day 4.

19. Ms Evans-Jarvis cross examined the Claimant on his schedule of loss, and so the Tribunal had most of the evidence necessary to deal with remedy. There was no evidence as to injury to feelings, and there was no expert evidence as to the value of the 1st Respondent, of which the Claimant owns 15%. There was only the 2nd Respondent's oral evidence that he considered it was worth at least £10,000,000. Accordingly, a remedy hearing is necessary given the findings of this Tribunal. It will be necessary for an expert valuation to be obtained of its value.

Preliminary matters

Documents

20. These were:

    20.1. A bundle of documents of 492 pages.

    20.2. The Claimant produced a supplemental bundle of 106 pages, given to the Respondents in advance. The Respondents did not object to this.

    20.3. Claimant's chronology of key dates.

    20.4. The Claimant's list of key documents.

    20.5. Text messages provided by the Claimant, numbered 493-499.

    20.6. Cv of Alison Bruce and notes to financial accounts of R1 y/e 30 September 2021.

    20.7. 39 pages supplied by the Respondent on day 1 of the hearing. The Claimant did not object to these documents being before the Tribunal.

    20.8. Suspension letter for Alison Bruce of 27 April 2021 and emails of 30 April about her return to work with effect from 05 May 2021.

    20.9. Email from Respondents to the Tribunal (dated 16 November 2022) seeking strike out, Claimant's response (dated 23 November 2022) and an email from the Tribunal (dated 14 December 2022) indicating that the strength of the claim would be determined by evidence at the hearing.

Privilege

21. I pointed out that bundle 7 contained documents from the Respondents seeking advice from a solicitor, and that solicitor's advice about the Claimant's 15% shareholding in the 1st Respondent, which is the major part of the Claimant's schedule of loss. This would indicate that privilege had been waived about a central issue in this claim, and that as there had been no request that this would be a partial waiver, it would seem that all privilege as to all advice given was waived. Ms Evans-Jarvis responded that this was so, but that as the Claimant knew about the advice it was inevitable. I pointed out that the relevance of waiver of privilege was that the waiver enabled the Tribunal (and any other Court) to see and consider matters otherwise properly withheld from it. On day 3 Ms Evans-Jarvis returned to the question of privilege and said that there was a difference between litigation privilege and legal advice privilege and that litigation privilege had not been waived. I record that this was not the position accepted by Ms Evans-Jarvis on day 1 (that all privilege had been waived), and nor could it be so, as the purpose of seeking the advice was to try to ensure that the Claimant could not claim any significant value in relation to his shares on his departure. Given that the 2nd Respondent in his evidence stated that the value of the 1st Respondent was at least £10,000,000, and that an email of 16 June 2021[2] the 2nd Respondent expressly referred to the issue, the purpose of seeking that advice was in the expectation of a claim from the Claimant.

Employment status

22. At the commencement of the hearing, Ms Evans-Jarvis referred to an application to strike out the claim, made on 16 November 2022. This was on the basis that the Claimant was an "Employee Shareholder" and so the claim should be struck out for want of jurisdiction. The Claimant's solicitor opposed this in a letter of 23 November 2022, referring to S205A of the Employment Rights Act 1996 and pointing out that the Claimant could not fall within the definition in that section, because he had no written contract which was a prerequisite, and that in any event he was a worker and so could claim public interest disclosure detriment. An Employment Judge had decided[3] that this application required a hearing and should be dealt with at the start of the hearing.

23. The Respondent's witness statements set out at some length the assertion that the Claimant was not an employee at all, but self-employed, and Ms Evans-Jarvis sought to have the claim struck out on this basis also.

24. The Grounds of Resistance (prepared by Ms Evans-Jarvis) specifically state that the Claimant was an employee. The amended Grounds of Resistance (also drafted by her) repeat this. The Case Management Order made after a hearing on 15 July 2022 records that *"By way of general background … the claimant was employed by the first respondent as its finance director from 01 July 2018 until 15 July 2021"*[4] and *"…the first respondent confirmed today that it does not*

[2] 2/73 "I hope…we can hold it [the dismissal meeting] in his absence, otherwise it will muddle the articles of the company concerning the shares, not impossible but messy" [the 2nd Respondent is dyslexic and probably meant "muddy"]
[3] Documents at 9
[4] paragraph 55

dispute that the claimant's employment ended by reason of his resignation with immediate effect on 15 June 2021"[5]. The CMO also stated[6] *"The claims and issues … are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side within fourteen days from the date this Order is sent to the parties. If you do not do so, the list will be treated as final unless the Tribunal decides otherwise."*

25. The Respondent set in motion disciplinary proceedings and suspended the Claimant. The letter (there were two versions[7]) stated that he was *"suspended on full contractual pay"* and that he was not to discuss the matter with *"any other employee",* and that to do so would be regarded as misconduct. The 1st Respondent then purported to dismiss the Claimant (the day after he had resigned with immediate effect) in terms that are consistent only with the Claimant being an employee[8].

26. There has been no application to amend. Ms Evans-Jarvis did not make such an application in the hearing.

27. The Tribunal decided that it would be inappropriate to depart from the list of issues to add an issue of whether or not the Claimant was an employee.

Employee Shareholder

28. In her cross examination of the Claimant Ms Evans-Jarvis sought to argue that the Claimant was an employee shareholder within S205A of the Employment Rights Act 1996. This is not in the list of issues. The Respondent said that the Claimant did not have a written contract of employment. This was part of the case they wished to advance that he was not an employee. S205A contains detailed documentary requirements to be fulfilled before someone falls within this exclusionary section of the section. It was therefore impossible for the Respondents to succeed on such an application, even were it an issue before the Tribunal. It had not been raised before the letter of 16 November 2021. Again, no formal application was made. The Tribunal declined to allow questions on this topic, as it was not an issue to be determined. (The articles of association of the 1st Respondent contain a definition of "employee shareholder" and the Claimant's case is that he falls within that definition, relevant for the issue of rights about his shares, which he (rightly) says is a different issue altogether, relevant to remedy.)

Recusal

29. At the start of day 3 Ms Evans-Jarvis indicated that she had looked at the record in Companies House for the Claimant's service company and that there was an officer of the company named Emma Housego. She enquired as to whether there was a connection with me. I informed Ms Evans-Jarvis that I do not make enquiries outside of the evidence tendered to me, and did not know this, and that I know of no relation by that name, and until she raised the matter I did not know of her existence.

[5] paragraph 57
[6] paragraph 9
[7] 252 and 2/28
[8] page 440 – the terms "disciplinary hearing', "dismissal" "gross misconduct" and "notice pay" are used.

30. Ms Evans-Jarvis then submitted that it was possible that the Claimant was married to Ms Housego, that my surname is unusual and so I should recuse myself, citing Porter v Magill [2001] UKHL 67. I refused this application, as no right-minded person could think that I was not impartial simply because someone of whom I had never heard had the same surname as me.

31. After lunch on day 3, Counsel for the Claimant indicated that during the lunch interval Ms Evans-Jarvis had emailed his instructing solicitor (who was present throughout the hearing) to ask that she obtain instructions as to the nature of Ms Housego's relationship with the Claimant, and to ask her whether she was acquainted with me.

32. I indicated that it was unfortunate that Ms Evans-Jarvis appeared to doubt my integrity and pointed out that even if Ms Housego had heard of me, that was not to the point at all, for it was me, and not her, who was chairing the hearing, and I had not heard of Ms Housego, until Ms Evans-Jarvis told me of her existence. I indicated that it was not necessary for those representing the Claimant to contact Ms Housego, nor did I wish any enquiry made of the Claimant. At the conclusion of the case Ms Evans-Jarvis assured me that she did not doubt my integrity.

Share valuation

33. The Respondents have always argued that the resolution of the issue of what is to happen to the Claimant's 15% holding of shares in the 1st Respondent is a civil dispute which should be resolved in another forum.

34. If the Tribunal decides that it is a head of loss for which compensation is to be awarded by the Tribunal, Ms Evans-Jarvis stated that the value was the nominal value of the 30 shares, which was £1 each.

35. The Tribunal does not accede to this application. The claim is for a statutory tort. The Tribunal makes an award for loss arising from such a tort. Where an employee loses his employment loss can be of any sort. The Claimant asserts that he has been deprived of the value of his shareholding in the 1st Respondent, and that the reason for that is the statutory tort he claims to have suffered. It follows that on success he is entitled to claim for the claimed loss in value of his shares in the 1st Respondent.

36. The Tribunal's power to award compensation for unfair dismissal is limited by statute but is not limited in its power to award compensation for public interest disclosure detriment and dismissal.

Approach to findings of fact

37. The Tribunal made the findings of fact which follow. There were matters raised which were not relevant to the issues the Tribunal had to decide. The core issue is, in essence, whether the sole, or a principal, reason for the Claimant's resignation was a constructive dismissal by reason of a fundamental breach of contract based upon public interest disclosures, and whether before he resigned he had, by reason of having made public interest disclosures been

subjected to detriments.

Assessment of witness evidence

38. The Claimant gave evidence in a direct manner, consistent with the contemporaneous documentation. He was measured thoughtful and direct in his answers. His evidence was unshaken throughout a lengthy cross examination.

39. It was clear that the 2nd Respondent had not made any significant effort to familiarise himself with the detail of what had occurred, repeated saying that he was not there when some things happened, or that things were done by others so he had no knowledge of them. He had not looked at the human resources file for the Claimant, or the correspondence between the 1st Respondent and its adviser Peninsula.

40. Ms Beaumont gave evidence in a direct way. It was clear that she has great loyalty to the 2nd Respondent[9]. Her evidence was that her main role was as a notetaker and in performing that function she focussed on accuracy and did not give thought to the content of what she was recording. Insofar as she was involved with factual matters asserted by the Claimant she robustly denied the accuracy of the Claimant's account in every regard.

41. Alison Bruce was measured and calm in her evidence. She accepted that her witness statement gave impressions which were not accurate and did not hesitate to correct those misleading impressions. She was clear that she had seen no material documents prior to receiving the large bundle of documents (1) in January 2023, including notes of interviews she had with others. In this she was mistaken[10]. It was clear to the Tribunal that Alison Bruce had seen almost no documents before seeing the large bundle of documents in January 2021 and given the candour of her other evidence attributed this to failure to recall rather than untruthfulness.

Submissions

42. The oral evidence started at 09:30 am and ended at 11:45 pm on day 4 and submissions commenced at 2:30 pm. I made a full typed note of them in my record of proceedings. Mr Smith indicated that he wished to provide a full written submission, and did so. At the end of day 3 Ms Evans-Jarvis said that arthritis in her hands impeded her typing speed and that voice recognition software was only a partial solution for her. I indicated that she might deliver submissions in any way she wished, be that fully oral, oral submissions made to a speaking note, submissions in bullet point format or by full written submission. She did so, providing her speaking notes much later.

43. The submissions are not set out fully in this judgment and can be read by a higher Court if required, in my record of proceedings and in the written

[9] And had at the time – 254 email of 28 April 2021 Judith Beaumont to 2nd Respondent "Our support has been and will continue to be unwavering until we all come out the other end with NSI stronger and better."
[10] Page 250 – on 27 April 2021 Richard White emailed notes of meeting that day to Alison Bruce, and 245/246 are emails from Alison Bruce to Richard White of 28 April 2021 and refer to amending the notes of such a meeting.

submissions.

44. In summary, the Respondents say that the claimed public interest disclosures made internally were not public interest disclosures. They accept that the externally made disclosures were capable of being public interest disclosures. No reason was advanced as to why they were not public interest disclosures. It was said that the disclosures were not true (but, as I pointed out, it is not a requirement of a public interest disclosure that the matter set out in the public interest disclosure is factually accurate – that is not part of the definition of a public interest disclosure). It was not submitted that the public interest disclosures were not made in good faith. They say only that the disclosures were not a motivating factor in anything that happened. They say that the process of investigation about what they describe as the Claimant's failure to escalate the issue of the IT technician was fair, and that the Claimant was guilty of gross misconduct (described as gross breach of trust) and resigned the day before he would have been fairly dismissed for that reason.

45. The matter of the IT technician had been resolved by the friendly email from the 2nd Respondent to the Claimant[11]. However, after that the Claimant had raised other matters, and lied about what Alison Bruce had told him about the 2nd Respondent, and made spurious allegations about the 2nd Respondent. It was these that led to the suspension and were the gross breach of trust for which he would have been dismissed. Alison Bruce had also been suspended but when the matter was investigated she was exonerated. The 1st Respondent had used an external investigator (albeit a part of Peninsula) to investigate. The 2nd Respondent had been out of the business while the investigation had been carried out (because of the public interest disclosures) and had played no part in the matter.

46. While there was no reason to doubt the authenticity of the exit interview report of LW, as she did not give evidence the Respondents were hamstrung in defending the concerns raised within it. The breakdown in the relationship was not due to the Claimant's raising of the matters set out in it, but to his other behaviours.

47. Most of the claims were out of time, as set out in the Grounds of Resistance.

48. In essence, the public interest disclosures were not relevant. The issue was the lies the Claimant had told when raising his grievances against Alison Bruce and the 2nd Respondent.

49. The written submissions of the Respondents were said to be being read from a draft, with the written note to follow, the delay being by reason of Ms Evans-Jarvis' arthritis which slows her typing considerably. It is necessary to comment on some of those submissions.

    49.1. At paragraph 24 it is stated that the Claimant was found not to have reported the IT incident contrary to his training, but in the oral submissions it was clearly stated that the Respondents' position was that it was "put toi bed" by the "walk you through" email. The written and oral submissions

[11] 1/203 16 April 2021 "I will walk you through the areas where it appears you should have taken a different approach. Don't let this matter upset your weekend. … Best wishes. Jack"

differ.

49.2. Paragraph 26 refers to "spurious allegations" against both Respondents. This can only be a reference to the external public interest disclosures. At the start of the hearing the Respondents clearly accepted that these were all public interest disclosures. Even if they were inaccurate (it is not necessary to make a finding of fact on that point), the Respondent accepted that they were based on what LW had told the Claimant, and it was accepted that she was a person upon whom the Claimant could reasonably rely. This written submission differs from the position adopted by the Respondent at the start of the hearing. I asked which if any of the claimed public interest disclosures were accepted as such. The answer was that none of the internal ones were accepted as having occurred, but that all the external matters were accepted to be public interest disclosures. In oral submissions it was asserted, for the first time that it was thought by the Respondents that LW and the Claimant conspired together – paragraph 44 of the submissions - to make these disclosures. As this was not part of the pleaded case, and no witness had given evidence to that effect this judgment does not deal with that submission.

49.3. Paragraph 27 asserts that by accepting his salary and "engaging in the disciplinary process after his resignation" he was still in employment. This to confuse action before resignation, which can amount to affirmation to conduct after resignation, which cannot undue the ending of employment. The Respondent's clearly accepted that the resignation was effective. The later submission is not based on any pleading and there was no cross examination about it. Again this submission is not dealt with in this judgment for same reason.

49.4. Paragraph 32 onwards relates to the claim for constructive dismissal. It asserts that the Claimant was about to be dismissed for gross misconduct in respect of lies. This refers to C saying that AB had objected to the 2nd Respondent on her personal phone, and that AB had denied that was the case. This could not, even if so amount to a reason for a gross misconduct dismissal. But the Respondents' accepted that the 2nd Respondent had used AB's personal phone number, and AB accepted that she had told the Claimant this. The Claimant only ever said that AB seemed more concerned about that than about IT's actions, as context for her discussion with him about IT. This cannot conceivably be seen as a "lie" worthy of a gross misconduct dismissal. The previous allegation is that he failed to report that concern to the 2nd Respondent, which is then contradicted by the assertion that it was a lie. This is a very confused submission.

49.5. Paragraph 38 asserts again that the Claimant was not an employee but an employee shareholder under the articles of association. The Respondents pleaded that the Claimant was an employee (see above) but the submission is incoherent, because it is impossible to be an employee shareholder without being an employee.

49.6. Paragraph 47 is also incoherent. It says that the Claimant cannot bring a public interest disclosure claim as he was not a worker nor an employee but an employee shareholder under the articles of association of the 1st Respondent. None of this was pleaded. It is nonsense. He was working for the 1st Respondent. Of course he was a worker. He is said by the Respondents to be an employee shareholder. He was an employee.

49.7. These observations give a flavour of the written submissions, which are wholly unpersuasive.

50. Counsel's submissions for the Claimant are of some 20 pages, and his oral submissions of about 20 minutes. A very short summary cannot do them justice. The essence of them is that the Claimant says that all the matters set out in the Particulars of Claim were public interest disclosures. He says that before the disclosures were made the 2nd Respondent was merely going to *"walk him though"* what the 2nd Respondent said he should have done about the IT technician. The solicitor for the Respondent had, in her submissions, accepted that that matter had been *"put to bed"*. There was every reason for this, because the Claimant, as finance director, was unlikely to come into contact with any matter that might be a safeguarding or safeguarding alert matter. The issue with IT was not obviously a safeguarding alert matter, because the safeguarding was of young people, and there was nothing in what Ms Bruce reported which might lead to concern that IT might be a risk to children. In any event, it was accepted by the Respondents that the first time they alleged that the Claimant had any detail about the incident was 12th April 2021, and he was criticised for not doing anything by the next day. However, Ms Bruce who was highly experienced in safeguarding matters had not reported it at all. She had mentioned it during a long car journey with the 2nd Respondent, still saying that she was thinking about it, and it was the 2nd Respondent who had taken action. Yet no action had been taken against her.

51. However, after the disclosures were made the Claimant was suspended and was going to be dismissed for gross misconduct for exactly the same thing, even though it was now said that the matter was not a problem, being resolved on 16th April 2021. In the dismissal letter 4 of the 5 points directly referred to this. The submission went through all the matters said to be unfair, and that these resulted in the Claimant's resignation. In short, the reasons given for the asserted gross misconduct were a pretext and the real reason was the public interest disclosures. The Claimant had repeatedly asked what the *"gross breach of trust"* was and had not been given a satisfactory answer. It was making the public interest disclosures. Once the 2nd Respondent decided that the Claimant had to go, a gross misconduct reason had to be found in order to deprive the Claimant of the value of his shares. That was exactly what had happened as his shares had subsequently been forfeit as he had been deemed a *"bad leaver"* under the articles of association of the 1st Respondent. It was all about the money, and while the 2nd Respondent presented himself as amiable and perhaps bumbling, his evidence about the articles of association had been razor sharp, another pointer to the real reason for the treatment of the Claimant.

Findings of fact

52. The Tribunal heard and read a lot of evidence about many details and minutiae of events. Only the salient facts are set out below. The Tribunal has carefully considered all the evidence. There is no point in setting out the minute detail of the events described in over 500 pages of emails and reports.

53. In this account of the facts the witnesses are named. All other people are referred to by their initials, or by description. The parties know who they are, and that is sufficient transparency. Those individuals have a right to a private life and to name them would be a disproportionate interference with that right, particularly given the possible effect on them of their names being set out in full, and so likely to be turned up in an internet search against their names.

54. The 1st Respondent is a business running homes (ordinary houses and flats) staffed by carers who look after vulnerable young people. The staffing is one to one, 24 hours a day (so three members of staff, plus managers) per child. It is an organisation that has a statutory regulator[12]. Plainly safeguarding procedures are very important to the running of the business. The children in their care are placed, and funded by, local authorities.

55. The 2nd Respondent is the managing director. He and his wife owned all the shares in the 1st Respondent before the Claimant joined the 1st Respondent.

56. The Claimant is a chartered accountant. He is highly skilled and has specialised in corporate turnarounds and business expansion. He had helped the 2nd Respondent in a previous business and had salvaged it from potential collapse (the evidence of the Claimant to this effect was unchallenged).

57. The Claimant joined the 1st Respondent in 2016 initially in an unpaid capacity. He became finance director on 01 July 2018. He was never issued with a written contract of employment. He was always paid through the PAYE system. He became a statutory director of the 1st Respondent at the same time as he became an employee. He worked two days a week for the 1st Respondent, Mondays and Wednesdays. He worked for another company on the other three days a week.

58. After a while he was given 10% of the shares in the 1st Respondent, and later another 5% of the shares. This was in part as recognition of his unpaid contribution from 2016 to the end of June 2018.

59. The relationship between the 2nd Respondent and the Claimant was warm. The 2nd Respondent is older than the Claimant. Both expected that in time the Claimant would succeed the 2nd Respondent as managing director. The 2nd Respondent came to feel that the Claimant was being too pushy in seeking that outcome and rebuffed a suggestion of a management buyout[13]. It is no part of the Respondents' case that this was *"some other substantial reason"* relevant to the ending of the Claimant's employment.

60. Alison Bruce joined the 1st Respondent on 17 February 2021. She was estates manager. She was appointed a non-executive director on 01 August 2012 and an executive director on 11 February 2022. At the material time she reported to the Claimant.

61. On 09 April 2021 an IT technician (who will be referred to as "IT") from the company retained by the 1st Respondent to look after its computer and software needs was asked to attend the home of Alison Bruce to install an A3 printer and attend to some software issues that could not be addressed remotely.

62. Ms Bruce had drawn the curtains of the room with the computer in it, as the sun made it hard to see the screen. Her evidence (which there is no reason to doubt) is that IT quickly became flirtatious. He made remarks to the effect that he expected that Ms Bruce liked to walk about naked when the curtains were

[12] Ofsted according to 1/179
[13] 1/179

drawn.

63. At the time Ms Bruce had family circumstances that were both personally distressing and time consuming. The exact nature of these is not germane. Nevertheless, she continued to work. She was grateful to the Claimant for his support and for the care he showed her at the time. She described him as *"a gentleman"*.

64. Ms Bruce had been undertaking a significant project for the Claimant, Subsequent to the visit to her home by IT on 09 April 2021, at 16:18 on that day she emailed the Claimant a detailed report[14]. The Claimant was keen to discuss this, but appreciative of Ms Bruce's present circumstances.

65. There was a telephone conversation later on Friday 09 April 2021 between them. Ms Bruce mentioned that there had been an issue with IT, but (this was her evidence) had provided no detail about it. It is accepted by the Respondents that at the time there was nothing for the Claimant to report to anyone.

66. On Monday 12 April 2021 the Claimant and Ms Bruce met in an office at the head office. The Claimant closed the door and is said to have locked it. Ms Bruce said (in her oral evidence) there was nothing untoward about that, as the door did did not shut properly, and both wanted their discussions not to be overheard.

67. In her witness statement Ms Bruce said that the Claimant towered over her – in her oral evidence she was clear that the Claimant was suffering from a bad back, and that was the reason he stood up, and that he had expressly asked her if she was happy that he did, and she had said she was. She agreed that any impression given by her witness statement that she felt threatened in any way in that meeting was not intended.

68. In that meeting Ms Bruce raised the matter of IT's visit to her home. Her oral evidence was that at the time the Claimant did not know anything about the incident with IT. He started the meeting about the intended subject matter, her report. She then raised it. The Claimant had some experience with IT and was incredulous that IT would do such a thing. Ms Bruce did not give any great detail, just that he was *"a creep"*. She then backed off, thinking that this was a new male boss not listening to her. He then carried on with meeting as originally intended. Ms Bruce did not raise it again in that meeting. After the meeting she did not visit the safeguarding lead RW who was in his office next door, which she now much regretted.

69. While Ms Bruce's evidence was that she felt shut down on 12 April 2021 when they met, this is how she now feels. At the time she did not, for there is no other explanation of an email to the Claimant from her dated 12 April 2021 at 19:40[15]:

> *"Hi Robert. Jack just called. Thank you so much, I really appreciate your support and I am so looking forward to the next phase. … All the best."*

The context is an imminent promotion to director level, and the call from the 2nd

[14] 2/9-14
[15] 1/184

Respondent to Ms Bruce was to that effect.

70. At this time the line management of Alison Bruce was intended to move from the Claimant to the 2nd Respondent[16].

71. On Monday 13 April 2021 the 2nd Respondent and Ms Bruce went on a business trip to Swindon. On the return journey Ms Bruce told the 2nd Respondent about IT's visit to her home on 09 April 2021. She was still in two minds as to whether to do anything about it, and said she wanted time to think about it.

72. The 2nd Respondent took action immediately. He asked RW, another director and Designated Safeguarding Lead, to investigate and he made sure that IT was removed from any work with the 1st Respondent. He was a technician who sometimes visited the 1st Respondent's homes to sort out or check up on computer matters.

73. On 15 April 2021 the 2nd Respondent sent RW an email[17]. He set out what Alison Bruce had told him in the car. He said he had telephoned the Claimant afterwards to ask him about it and said that the Claimant had referred to three other (unspecified) allegations. He said that as a result he had asked RW to investigate safeguarding concerns arising.

74. On 15 April 2021 RW interviewed Alison Bruce with Judith Beaumont as note taker[18]. The telephone conversation with the Claimant was not mentioned. As to the 12th, the notes say that Ms Bruce said she *"did not push Robert [the Claimant] to do anything on her behalf"* and that *"Robert said that he would be led by AB as to how to take it forward*". She was asked if the Claimant had offered any direction and had said not. The note says that Ms Bruce said that she *"wanted to decide herself how to handle it"*.

75. The Tribunal observes that Ms Bruce has great experience with safeguarding matters. The Claimant does not. He was finance director. The Respondents make great play of the Claimant having been on a safeguarding level 3 course and that he should have realised that this was a safeguarding alert matter and should have taken action by raising it with RW, Designated Safeguarding Lead. It is wholly misconceived to criticise the Claimant in any way over this. It can only be 12 April 2021 that he could have been expected to know anything, for Ms Bruce's clear evidence was that she did not tell the Claimant any detail on 09 April 2021. No criticism was made of Ms Bruce, who did not report it at any time, and even on 13 April 2021 she told the 2nd Respondent that she was uncertain what she should do. She did not report it to the Designated Safeguarding Lead on 12 April 2021, even though he was in the next room to the one she was in. This is not to criticise Ms Bruce, but to set out why it was unfair to criticise the Claimant regarding IT.

76. On 14 April 2021 the 2nd Respondent asked RW to investigate. He gave terms of reference, which he said RW accurately recorded in the document[19] called

[16] Note of voice message 13 April 2021 2nd Respondent to Claimant, 2/18
[17] 1/188
[18] 1/189-193
[19] 1/186-187

"Investigation Plan". This was inaccurate for it said it was to investigate why the Claimant had not escalated the matter "when it had been disclosed to Robert Warner on Monday 12th April, and to investigate the further allegation that three other people within NSI had made Alison Bruce feel uneasy". The report was to be prepared by 23 April 2021. The remit was to interview Alison Bruce, the Claimant and IT or someone from his company. The 2nd Respondent was not to be interviewed but would supply a statement about what Ms Bruce and the Claimant had told him.

77. The 2nd Respondent provided such a statement[20]. In it he records that Ms Bruce told him that the Claimant had told her to *"forget about it, it will go away"*. Ms Bruce has not said that in her interview with RW, in her witness statement or oral evidence. Ms Bruce was a truthful witness (not always accurate – see below) and the Tribunal finds that she said no such thing to the 2nd Respondent.

78. Ms Bruce had no opportunity to correct this, as she said that she had seen no documents, including notes of interviews she gave, before seeing the bundle of documents for this hearing, which was January 2023. She is mistaken in this for on 28 April 2021[21] she did amend a note of a discussion she had with RW on 27 April 2021. However, the Tribunal finds that at no time did she see anything that the Claimant had written or said, nor anything that the 2nd Respondent had written.

79. On 16 April 2021 RW concluded his report[22]. This was only two days later. It stated that it had considered the report from the 2nd Respondent, and the interview with Ms Bruce. It stated *"We have not yet spoken to [the IT company]"* but did not say why not, or whether it was intended to do so. It stated *"We have not interviewed Robert Warner"* but did not say why not. It says the IT incident probably occurred. It says that the Claimant *"would appear Robert Warner wasn't aware of his responsibility despite undertaking L3 safeguarding training…".* It says that Ms Bruce's similar complaints related to invasion of personal space that was Covid-19 related and required no action.

80. On 18 April 2021 the 2nd Respondent emailed the Claimant[23]. He said he had discussed this with the IT company (and this was to bar IT from the Respondent's premises). He stated that the Claimant was *"implicated by not appearing to follow procedure regarding safeguarding"* that he would *"walk you through the areas where it appears you should have followed a different approach"*. It ended *"Don't let this matter upset your weekend" and signed off "Best wishes. Jack".*

81. From this it is clear (and it was the Respondents' case in closing submissions) that this was not regarded by the 2nd Respondent as a serious matter, at the date this email was written (and in submissions that did not change).

82. Ms Bruce felt supported during what was a difficult time. Her current position, that she was shut down by the Claimant on 12 April 2021 was not how she expressed herself at the time. A lengthy email of 18 April 2021[24] to the 2nd

[20] 1/188
[21] 1/246
[22] 1/194-201
[23] 1/203
[24] 1/206-208

Respondent (redacted but plainly from Ms Bruce) states:

> *"Finally, I would like to add, I very much appreciate yours, Robert's and Richard's support … you have all made me feel valued and heard."*

83. The report was sent to the Claimant on 19 April 2021. The Claimant was not happy that the report criticised him without him having any opportunity to have any input. On 19 April 2021 he emailed the 2nd Respondent[25]. He enclosed a written statement[26]. In answer to questions I asked of the 2nd Respondent he accepted that given the terms of reference, and the absence of any opportunity to comment it was hardly surprising that notwithstanding the email from the 2nd Respondent the Claimant felt this very unfair and would want to set out what he had to say.

84. This statement set out (at point 2 d) three matters that he said Ms Bruce had raised – IT, a *"brush past"* at one of the homes by a member of staff, and the use of Ms Bruce's personal email and telephone number by the 2nd Respondent.

85. There followed grievances from both the Claimant and the 2nd Respondent against Ms Bruce, about what she was alleged to have said about each of them.

86. On 21 April 2021 RW interviewed the Claimant. Judith Beaumont took the notes[27]. In that interview it was put that Ms Bruce had told RW that she had told the Claimant how uncomfortable the statements made by IT about her being naked had made her feel. No such statement was shown to the Claimant. No such statement is in the bundle of documents before the Tribunal. The Claimant called it a lie. It may well have been a lie, but it was not a lie told by Ms Bruce.

87. At the conclusion of the submissions, I enquired whether there was any evidence to show that the Claimant and Ms Bruce had ever had sight of what the other had written or said in interview. There is not. Both Ms Bruce and the Claimant were truthful witnesses (if not always fully accurate, as set out elsewhere). They each responded to what they were told the other had said or written. The Tribunal finds that these were not accurate reports. This accounts for two fundamentally decent individuals being set one against the other.

88. Towards the end of the interview on 21 April 2021 RW left the room. Judith Beaumont told the Claimant of the approach of the 2nd Respondent towards women and indicated that this was part of the reason LW was leaving, and that he might like to telephone her. Ms Beaumont vehemently denied this in her oral evidence, but there was no other reason for the Claimant to telephone LW. It was said that it was to wish her well, but they had not had a working relationship

89. After his return and after the interview RW said that he was bullied by the 2nd Respondent. The Tribunal accepted the oral evidence of the Claimant that he had witnessed such bullying at a board meeting. The Tribunal judged the Claimant's expression of shame and regret that he had not intervened to stop it to be sincere. The Tribunal accepted the Claimant's evidence on this point

[25] 210
[26] 211-214
[27] 1/217-225

(as it did on every other point where the evidence was contrasting).

90. On 22 April 2021 the Claimant raised a grievance against Ms Bruce by email to RW[28]. He said that Ms Bruce had told his line manager lies about him and about what he had said to her. This was on the basis of what he had been told Ms Bruce had said, and not on any record of such a statement. This was about what she had told him about IT and when, and what he had done about it. He thought this amounted to malicious lies and slurs upon him. As the Tribunal has found, she had not said what he alleged, but that was what he was told she had said.

91. The Claimant wanted to talk to Ms Beaumont about this some more, and on Friday 23 April 2021 called her to ask to meet up. On Monday 26 April 2021 Ms Beaumont declined by email[29]. She stated *"I would respectfully decline this meeting. I do not feel that a meeting would be either helpful or appropriate to the current situation."* The Tribunal finds this formal phrasing between colleagues indicative of the fact (for the Tribunal so finds) that this request was relayed back to the 2nd Respondent who had exerted control over both RW and Judith Beaumont. RW was bullied by the 2nd Respondent, and it is unsurprising that he was malleable.

92. Plainly the 2nd Respondent is a man used to being in charge, and exerts his authority fully, as the facts relating to the Claimant show.

93. On 23 April 2021 the Claimant telephoned LW as suggested. His note[30] records him raising concerns with RW that LW had been subjected to sexual harassment from the 2nd Respondent. It was a public interest disclosure.

94. Subsequent to that conversation the Claimant emailed Richard White twice[31]. He stated that LW had made inappropriate sexualised comments, in which he had persisted though told to stop. He had said that he found her *"sexy"*. LW had said that she had heard from Judith Beaumont and another that they had also suffered this. The second email was that LW had also said that the 2nd Respondent had been holding himself out as clinically qualified when he was not, had asked LW to supervise him, which would not have been appropriate, and that as he was not qualified to provide psychological services to young people this was a real issue for her.

95. The Tribunal finds as a fact that these two emails also meet all the requirements for public interest disclosures.

96. On 23 April 2021 the 2nd Respondent emailed the Claimant[32], asking him to come to a meeting on 28 April 2021. It was to discuss *"how the SMT moves forward following various issues regarding the last two weeks"*, management realignment and finance.

97. On 26 April 2021 the Claimant emailed the 2nd Respondent. He asked what preparation was required. A reply same day said that none was required. The

[28] 1/228
[29] 1/231
[30] 1/262
[31] 1/229-230
[32] 2/26

Tribunal finds that this was because the 2nd Respondent had decided to suspend the Claimant, and to dismiss him as soon as possible.

98. The Tribunal finds there is no coincidence here. The Tribunal finds as a fact that RW relayed the contents of these two emails to the 2nd Respondent immediately they were received by him, and that the 2nd Respondent immediately decided that the Claimant would leave the organisation. He made this decision because of those public interest disclosures.

99. On 27 April 2021 RW suspended Ms Bruce[33] at a meeting. He said there were *"fundamental differences between the statements taken from herself and those from [the 2nd Respondent] and [the Claimant]"* Ms Bruce asked for details. In reply RW *"restated that this is not a disciplinary situation"*.

100. The Tribunal finds that this was no more than a diversionary tactic by the 2nd Respondent and by RW, to attempt to give an appearance of even handedness.

101. The Tribunal finds as a fact that the 2nd Respondent knew or directed everything which occurred. This continued throughout what he called his own suspension from the 1st Respondent and during his holiday in the first two weeks of May 2021.

102. On 27 April 2021 LW sent to the Claimant by email[34] a copy of the exit interview statement[35] she intended to provide to RW on 30 April 2021 (and which she did provide to him on that date). On 28 April 2021 LW agreed that the Claimant could use the document. His email about this[36] makes it clear that he takes what she says very seriously and feels obliged to act on it.

103. The Tribunal finds that his assessment was correct. As a director he had an obligation to act even greater than that of every employee. LW is a highly respected professional. There was every reason for the Claimant to take at face value everything she said and wrote, as the Respondents' representative conceded.

104. Ms Bruce emailed RW on 28 April 2021[37]. She said that the notes of her interview with him said *"RW explains to AB that two grievances have been raised against AB as a result of the statements taken".* She then asked *"But the questions all appear to relate to Robert's allegations, and do not mention what Jack [2nd Respondent] has found as a fundamental difference between my statement and his? Can you please elaborate?"*. RW responded that the 2nd Respondent's grievance was that the 2nd Respondent claimed that the Claimant had said that Ms Bruce had complained to him about the 2nd Respondent contacting her on her personal mobile phone, made inappropriate jokes during the car journey back from Swindon on 13 April 2021 and that it was inappropriate for the 2nd Respondent to make Ms Bruce phone the police (about IT) and had prevented Ms Bruce from leaving work on 16 April 2021. Ms Bruce did not comment on these. RW did not send a copy of the Claimant's grievance.

[33] 1/232
[34] 1/244
[35] 1/257-261
[36] 1/243
[37] 1/249-250

Instead, he emailed on 28 April 2021 at 09:30[38]

> *"Robert's grievance is saying that the difference between your statement and his have fundamental differences: he wasn't aware of the severity of the [IT] incident, because he's alleging that you didn't tell him using the language that you did."*

105. There is scant evidence that the Claimant had attributed statements to Ms Bruce about the phone and email. All he had said was that the 2nd Respondent had contacted Ms Bruce using her personal email and phone details prior to 02 March 2021 when she had been issued with a work phone and email address and that she had seemed more concerned about those things than she had seemed to be about IT. In short this was no more than putting in context his (incorrect as it was) perception of the low level of Ms Bruce's concern arising from the IT incident.

106. Three days later Ms Bruce was told by telephone that her suspension was lifted, and she returned to work on 06 May 2021.

107. By 28 April 2021 Ms Beaumont and RW[39] had decided to support the 2nd Respondent against the Claimant without reservation. An email from Judith Beaumont to the 2nd Respondent of that date[40] stated:

> *"Great stuff Jack. Our support has been and will continue to be unwavering until we all come out the other end…"*

108. On 28 April 2021 the 2nd Respondent engaged Peninsula to approve a suspension letter. They amended the draft prepared by RW (at the instruction of the 2nd Respondent) to omit a threat of civil action.

109. On the same day RW suspended the Claimant. The reason given was *"the allegations of gross breach of trust"*. No indication was given as to what these allegations were.

110. The Peninsula investigation report sets out that the Claimant was told by RW that if LW put in her exit interview statement he would shred it[41]. It was sent in by LW. The report states *"The employee [the Claimant] provided a copy of the draft exit interview form completed by LW. LW confirmed permission for the [Claimant] to share a copy of the submitted exit interview with [Peninsula]. However the version submitted to the [1st Respondent] had not been retained…"*. It had indeed been shredded. The Respondents say that LW wished all her file to be destroyed and expressed the wish to have no more to do with the Respondents. No evidence was provided to substantiate this, but even if so it does not undermine the force of the exit interview statement. The Respondent accepted that it was a genuine document (although the Respondents' representative later attempted to submit that as LW was not available for cross examination there was doubt about what was said).

---

[38] 1/250

[39] See also 2/72, 2nd Respondent to RW "Thank you, you're doing a brilliant job, we are so pleased with your commitment and work ethic. Let's get the whole job done and dusted, once I know the full outcome to Wednesday I will contact [name] Corporate lawyer on Thursday and start the legal ball rolling."

[40] 1/254

[41] 1/345

111. On 29 April 2021 the 2nd Respondent emailed[42] LW to wish her well. He said:

> *"On a different note, you will have been informed that [the Claimant] is on extended leave, to be precise (he has been suspended from duty, he is being investigated by an external organisation, concerning a number of serious issues both within and outside of the work place), he is unlikely to return to NSI, as you remain a Director within the Company I ask you not to share this information as it is highly confidential."*

There were no issues, serious or otherwise, outside the 1st Respondent. The 2nd Respondent had decided that the Claimant would be leaving the 1st Respondent.

112. On 30 April 2021 the Claimant emailed the 2nd Respondent[43] asking what was meant by *"allegations of gross breach of trust"* and *"a further issue of misconduct"* without any explanation of what the allegations were. The response on 02 May 2021 did not answer that question. It remained without satisfactory answer through to the end of the hearing.

113. On 05 May 2021 the Claimant sent a series of emails to those using the services of the 1st Respondent[44] about the issues raised in the exit interview of LW. The Respondents concede that these were public interest disclosures so no more needs to be said. A statement[45] attached to the emails set them out fully.

114. The Claimant remained suspended.

115. On 19 May 2021 LS of Peninsula interviewed RW and the 2nd Respondent [46]. The 2nd Respondent made clear that there was *"systemic and continued badgering"* from the Claimant to take over the 1st Respondent and he found offensive reference to his age (74) in that connection[47]. He valued his company at between £16m and £24m and he said that the Claimant wanted to buy it for £10m[48]. But he did intend to sell the company in the next 2-3 years, which the Claimant knew. LS also interviewed the Claimant on the same day[49]. This paints a rather different picture of what the Claimant has on his mind so far as the 1st Respondent is concerned.

116. LS of Peninsula prepared a 38 page report[50].This is described as an investigation report. The Claimant set out clearly what he had to say[51], including that RW had told him that if LW sent in her report he would shred it.

---

[42] 2/255
[43] 1/256
[44] 1/268-272
[45] 278-279
[46] 1/290
[47] 2/302
[48] 1/303
[49] 1/305-310
[50] 1/314-348
[51] 1/345, page 34 of the report

117. AN of Peninsula conducted what was described as an independent report into the Claimant's public interest disclosures. It appears that Devon County Council required an independent investigation into the Claimant's public interest disclosures. It appears that they accepted that the 1st Respondent would ask Peninsula to prepare it. It is perhaps unsurprising that the investigator paid and instructed by the company being investigated provided a report stating that there was no substance to the disclosures[52]. Along the way there is[53] a totally unjustified slur on the Claimant stating that he was considered *"a bully"*.

118. The Tribunal noted the role of the 2nd Respondent was clear in AN's mind, for in interviewing RW on 26 May 2021 AN stated:

> *"I'm interested in how much I am going to be permitted to share with these individuals. I mean from a commercial perspective, this investigation is being commissioned by Jack, as the client, and I will need to go back to Jack to say, yes the meeting happened."*

119. On 25 May 2021 RW required the Claimant to attend a video hearing on 26 May 2021[54]. LS took the meeting[55]. She stated (at paragraph 11) that:

> *"it is not within the remit of the Peninsula Face 2 Face Consultant to investigate whether the evidence provided is genuine but to accept it in good faith, and where no evidence exists, to determine an outcome based on the Balance of Probabilities supported by reasonable justification."*

The starting point appears to rule out anything other than accepting that allegations are true.

120. The report concluded that there were five matters which, if proved, could amount to gross misconduct. They were;

120.1. It is alleged that during a call Alice (sic) Bruce on 9 April 2021 you failed to inform her to contact the Designated Safeguarding Officer, RW when she told you of alleged incident at her home with the creep from [IT company].
120.2. It is alleged that you failed to report Alison Bruce's concerns about the home visit from the [IT company] representative following her one to one on 12 April 2021 to the Designated Safeguarding Officer, RW.
120.3. It is alleged that if the above allegations are upheld that you have failed in your responsibilities as a Level 3 safeguarding representative.
120.4. It is alleged that you failed to report Alison Bruce's concerns about calls to her personal phone from Jack Balchin, at the time of the alleged complaint, to the Designated Safeguarding Officer, RW.
120.5. It is alleged that you lied when you stated that Alison Bruce had complained about a number of calls to her, on her personal number, from Jack Balchin in which she has denied.

[52] 1/375 paragraph 199
[53] At paragraph 121
[54] 1/312
[55] 1/314-322

121. This report is grossly unfair. The Respondents accepted that the Claimant was not told anything of significance on 09 April 2021, and Alison Bruce has never said otherwise. On the 12 April 2021, Alison Bruce subsequently thanked the Claimant (and others) for his support. Ms Bruce was not accused of gross misconduct for not reporting it to the Designated Safeguarding Office that day, although he was in the next room at the time. He had been trained to Level 3 but the statement that he was a Level 3 representative was not correct. He did raise Alison Bruce's concerns about use of the personal number and email but only to give context: she appeared to him more concerned about that than the IT incident. It is impossible, in any event, to see this as potential gross misconduct. The fifth point appears to be a total contradiction of the fourth.

122. In all, it is clear that the Respondents were paying for, and got, the result they asked for.

123. On 11 June 2021 the Claimant was told that *"an impartial consultant from Peninsula Face 2 Face"* would hear his grievance at 09:30 on 16 June 2021, and then deal with the disciplinary at 2:00pm the same day. The person to take the hearings cannot be described as impartial, as that organisation had been advising the Respondents throughout, against the Claimant.

124. The Claimant received this on 14 June 2021, and the same day sent in a detailed and coherent refutation of the five points[56]

125. He thought about it overnight and on 15 June 2021 the Claimant resigned[57], with immediate effect. At the same time he raised a grievance against the 1st Respondent. It was clear to him that the process was a charade and he was going to be dismissed. He was correct in that assessment. He arranged for the 1st Respondent's accountants to remove him as a director at Companies House.

126. Later that day the 2nd Respondent replied by email[58] stating that he had no legal duty to accept the resignation so that the Claimant, it was asserted, remained in post.

127. A disciplinary hearing was arranged and taken by CR of Peninsula. It was held on 16 June 2021[59]. CR recommended dismissal and said that action was a matter for the directors. CR upheld all the allegations, as no doubt was inevitable. There was no independence visible in this process. It stated that the resignation had not been accepted, that the Claimant was guilty of gross misconduct and dismissal was recommended. This was puppetry.

128. On 06 July 2021 the Respondents received legal advice[60] about the shares. The 2nd Respondent sent a letter of dismissal on 07 July 2021[61]. This relied on the same five points, analysed above. The grievance was dismissed the same day in a short letter that said no more than that there were no grounds to uphold

[56] 1/400-402
[57] 1/403
[58] 1/405
[59] 1/407-435
[60] 2/10-16
[61] 1/440

it[62].

129. On 21 July 2021 RW sent the 2nd Respondent and his wife an Offer Notice under Article 46.1.1 and 46.1.4 of the 1st Respondent's articles of association to acquire the Claimant's 30 shares in the 1st Respondent at the price of £1 each, this being their nominal value, on the basis that they had been gifted to him and so had no other value[63]. These articles provide for compulsory transfer of shares where:

> *"such member is guilty of conduct which has or is likely to have a serious adverse effect on the Company or bring the Company into disrepute (in the reasonable opinion of the board)."*

130. No board resolution setting out what conduct of the Claimant was relied upon to justify this action. It can only be the matters for which the Claimant was to be dismissed.

131. The Tribunal noted a series of matters which shed light on the 1st and 2nd Respondent's actions and the motivation and character of the 2nd Respondent.

131.1. Email 29 April 2021 2nd Respondent to LW – *"…[the Claimant] has been suspended from duty … (he is being investigated by an external organisation, concerning a number of serious issues both within and outside[64] of the workplace) he is unlikely to return to [the 1st Respondent."*

131.2. Email 08 May 2021 to LW – *"I am in receipt of the correspondence of all the emails sent between both you and Mr Warner dates 27/28 April 2021. These emails have been sent to our instructed legal team we are advised they contain matters of laible (sic). The litigation solicitor will write to both you and Mr Warner in due course."*

131.3. Email 12 May 2021 to Judith Beaumont and RW *"Warner is a dead man walking."*[65]

131.4. 13 May 2021 – RW in Teams call to Devon CC senior commissioning manager – *"RW stated that … we are dealing with the further investigation of an individual and that this subsequent whistleblowing feels Vexatious in its content and intent."*

131.5. Email 09 July 2021[66] - *"I shall be reporting … to the Police as a matter of theft if you fail to return the various items…"*

131.6. Email 14 July 2021[67] - *"RW has again been dealing with a letter loaded with Warner Babble…"*

131.7. Email 15 July 2021 to Judith Beaumont and RW[68] - *"So Warner is about to have an entertaining super, super, Blackpool roller coaster ride."* (An email setting out, in terms that seem hard to describe in a term other than gloating, how the Claimant's shares are to be forfeit.)

132. The Tribunal has not found it necessary to make findings of fact about

---

[62] 1/441
[63] 1/178
[64] This was simply untrue – there has never been any external issue, and the outside organisation, Peninsula, did not investigate anything outside the 1st Respondent.
[65] 1/284
[66] 1/446
[67] 2/100
[68] 2/99

whether the 2nd Respondent was or was not guilty of improper behaviour towards females. There was evidence of an unfortunate sense of humour shared with other men (who may well not have appreciated it), but the issue is not central to this claim.

133. It is clear, however, that the 1st Respondent is somewhat autocratic in the running of his business.

Conclusions

134. At all times when making the public interest disclosures the Claimant acted in good faith, and in the public interest.

135. The Claimant meets the test for succeeding in a public interest disclosure claim set out in Kuzel v Roche Products Ltd [2008] EWCA Civ 380.

136. There were suggestions in the oral and documentary evidence that the Respondents felt that the Claimant was seeking to become managing director and replace the 2nd Respondent. The Respondents did not seek to argue that this amounted to some other substantial reason for the breakdown of relationship. They were firm in the assertion that the Claimant was guilty of gross misconduct. This is probably because some other substantial reason would not deprive the Claimant of the value of his shares. Whatever the reason, the Respondents committed their defence to the assertion that the Claimant was guilty of gross misconduct. He was not.

137. The *"gross breach of trust"* of which the Claimant was accused was a euphemism for the public interest disclosures.

138. Because the process of the Respondents was so unfair, it necessarily follows that this was a constructive unfair dismissal. The Claimant did not delay of affirm the contract. He resigned because of the fundamental breach of the duty of mutual trust and confidence by the 1st Respondent, and he did so in good time. The last straw was the listing of the grievance and the disciplinary hearing on the same day which the Claimant rightly regarded as predetermined.

139. The 2nd Respondent was irritated at what he perceived as the Claimant wanting to elbow him out of the way. Then came the telephone public interest disclosures, reported to him the day they were made. The 2nd Respondent then wanted the Claimant gone, and because of those disclosures. That determination became implacable after the external public interest disclosures on 05 May 2021.

140. The issue then was how to achieve that without paying out on the shares. That was why the 2nd Respondent set about trying to construct the exit of the Claimant on gross misconduct terms, so as to get the shares for nothing (instead of a great deal of money). Judith Beaumont and RW decided, whether through loyalty or because they were overawed by the 2nd Respondent, to go along with the 2nd Respondent.

141. That the issue was always about the money is shown in two email exchanges. First on 12 June 2021 the 2nd Respondent emailed RW:

> *"Let's get the whole job done and dusted, once I know the full outcome to Wednesday I will contact [name] Corporate lawyer on Thursday and start the legal ball rolling."*

And on 15 and 16 June 2021[69] RW emailed the 2nd Respondent:

> *"…I've had email contact with the person conducting the grievance and hearing tomorrow. They fully agree that Warner should not be allowed to resign … everything is in order and we're ready for what ever he throws at us…"*

In reply the 2nd Respondent emailed RW and stated:

> *"Thank you for contacting the independent Consultant. I hope S [at Peninsula] agrees we can hold it in his [C's] absence, otherwise it will muddle the articles of the company concerning the shares, not impossible but messy."*

142. Alison Bruce was caught up in this, but not part of it. She was played, as was the Claimant, by neither being told exactly what the other had said but being led to think that it was something that was untrue. The Respondents then engaged paid advisers masquerading as independent investigators to try to give the process a veneer of respectability.

143. None of the matters said to be out of time are out of time. The conduct of the Respondents was an uninterrupted sequence.

144. The Tribunal has been through the list of issues carefully. It is not necessary to set them out individually at this point in the judgment. They are all found proved.

145. The board of the 1st Respondent did not have the reasonable opinion that the Claimant was guilty of conduct which had or was likely to have had a serious effect on the 1st Respondent, or to bring the 1st Respondent into disrepute[70].

Employment Judge Housego
Date 07 February 2023

Judgment & Reasons sent to the Parties: 21 February 2023

.

FOR THE TRIBUNAL OFFICE

[69] 2/73

[70] The terms of article 46.1.4 of the 1st Respondent at page 1/95