EMPLOYMENT TRIBUNALS

Claimant: **Mr S McCallion**

Respondent: **Yamato Scale Dataweigh UK Limited**

Heard at: **Leeds by CVP** **On:** **28-30 September 2020**

Before: **Employment Judge Maidment**

Representation
Claimant: **Mr T Wood, Counsel**
Respondent: **Mr B Williams, Counsel**

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996 (protected disclosures) fails and is dismissed.

2. The Claimant's complaint of ordinary unfair dismissal is well founded and succeeds. Any compensatory award is to be uplifted by a factor of 20 per cent to reflects the Respondent's unreasonable failure to comply with the ACAS Code of Practice on Grievance and Disciplinary Procedures. No other adjustments to the Claimant's basic or compensatory award fall to be made.

3. The matter will be listed for a remedy hearing to take place by CVP videoconferencing with a time estimate of 1 day.

REASONS

Issues

1. The Claimant complains of unfair dismissal. He maintains that his dismissal was automatically unfair because the reason or principal reason for it was his having made a protected qualifying disclosure. The sole disclosure relied on in these proceedings is an email the Claimant sent to the Respondent on 13 August 2019. The Respondent does not accept that this

communication amounts to protected qualifying disclosure. Even if it does, it says that the Claimant's dismissal was due to a breakdown in trust and confidence (some other substantial reason such as to justify dismissal) or alternatively conduct/capability.

2. In any event, the Claimant complains that this was an ordinary unfair dismissal. The Respondent's position is that it acted fairly and reasonably in terminating the Claimant's employment.

Evidence

3. This hearing was conducted remotely by CVP videoconferencing. On behalf of the Respondent, the tribunal firstly heard from 2 of its directors, Mr Hitoshi Tamura and Mr Chun Ha and then from its Financial Controller, Ms Jennifer Race. The Claimant then gave evidence on his own behalf.

4. The Tribunal had before it an agreed bundle of documents numbering some 269 pages. Written witness statements had been exchanged between the parties. Prior to the commencement of the live hearing, the Tribunal had had the opportunity to read all of those statements and relevant documentation.

5. Mr Tamura and Mr Ha do not have English as their first language, but were able to give their evidence and to answer questions without the need for an interpreter. Mr Wood asked questions appropriately and was astute to ensure that they had been properly understood.

6. The Tribunal in its pre-reading had noted that the Claimant's witness statement appeared to include a recitation from correspondence he had sent, but which was not in the Tribunal bundle. On raising this, the Tribunal was informed that, in particular, a section of the Claimant's statement was an effective cut-and-paste from a communication he had sent to the Respondent on 1 August 2019 which was a document covered by the rule preventing the disclosure of "without prejudice" correspondence. There was nothing improper in what the Claimant included in his witness statement, where he was seeking to set out his rebuttal of various concerns raised about how he was carrying out his role as managing director. Such evidence could have been given in any event regardless of its inclusion in any "without prejudice" communication. It became clear that there had been more than one "without prejudice" communication. There came a point at the end of the second day of the hearing where Mr Williams was concerned that evidence was being given by the Claimant which conflicted with or at the very least failed to recognise the contents of some of this correspondence. The Claimant was given an opportunity, which in fact he could only take at the start of the third day of the hearing by way of an adjournment, to reread the "without prejudice" correspondence. He was asked quite properly by Mr Williams and without objection, to revisit some of his previous answers in the light of him now being reminded of that correspondence.

7. Having considered all relevant evidence, the Tribunal makes the following findings of fact.

Facts

8. The Claimant was employed by the Respondent in Leeds as its managing director from March 2013. The Respondent supplied industrial weighing equipment and is part of an international group of companies with a Japanese parent. He was responsible to the Respondent's board as well as ultimately to the board of directors of the Japanese parent company.

9. Mr Hitoshi Tamura was on the Respondent's UK board with particular responsibility for finance matters, together with Mr Ha and Mr Nakamura. The Respondent's finance controller, Jennifer Race, reported to the Claimant but was also accountable to Mr Tamura, through the Claimant. Ms Race spoke to the Claimant on a daily basis on most financial matters. He signed off all invoices and she, more formally, discussed the financial accounts with him on a monthly basis.

10. The Claimant was at pains in his witness statement to suggest an unhappy relationship with the Respondent from almost the outset of his employment, saying that he felt misled, that the Respondent had been allowed to trade insolvent, that there had been serious bullying of others and a culture of age discrimination. The majority of those assertions had no relevance to the current complaint and the Tribunal makes no findings of fact in respect of them.

11. Mr Tamura's evidence was that concerns had already been raised with the Claimant regarding his performance and conduct, particularly during a meeting he had attended with Mr Tamura and Mr Ha on 16 July 2019. He told the Tribunal that the issues raised at the 16 July meeting had been performance failures in not controlling people management, resulting in people leaving and a lack of control in project management. No note was taken of that meeting. He said the Claimant's performance and conduct had continued to deteriorate and he and the rest of the board were concerned that there had been a breakdown in trust and confidence.

12. Mr Ha, in his evidence, noted that the board had concerns about the Claimant from early 2019. He confirmed that most of them were those referred to in an email he sent to Mr Tamura and the Claimant on 18 March 2019. This set out a number of key action points specifying who was required to follow up on these and by what date. Most of the actions included the involvement of the Claimant. The Claimant was said to have only prepared overall cost figures by category, whereas a more detailed breakdown was required. These should have been presented at the board meeting on 13 March or at least quickly confirmed by the Claimant thereafter. Other action points were along similar lines – Mr Ha conceded

that he couldn't go through these one by one explaining them. Mr Ha's evidence was that by the end of April not all of the points had been actioned and were not thereafter. He accepted that there was no further chasing correspondence asking the Claimant to complete them, but said that the actions were agreed at the board meeting and the Respondent was waiting for answers.

13. Mr Ha referred to an email to the Claimant of 19 June regarding staff bonuses - referring to these as having been agreed during the March board meeting. Mr Ha said that these ought to have been reflected in the Respondent's June salary run, but had not been. A couple of employees had raised this with himself, Mr Tamura and Mr Nakamura when they were in the UK together in August. They had said that the Claimant told them that the bonus had not yet been approved by the board. Mr Ha confirmed that this wasn't a relevant issue in the board's general monitoring of the Claimant's performance. However, delivering the wrong message to staff was, he said, relevant to the Claimant's performance as managing director. No statements were taken from any of these employees as the Respondent did not want to involve them.

14. Mr Ha in his evidence also raised performance concerns regarding the turnover of employees. Whilst a schedule had since been produced of the number of leavers, he agreed that they had not made a calculation of the numbers at the time and based their view of the Claimant on an impression that quite a number had left. Ms Race's evidence was that there were people who had left who she understood had referred to a lack of leadership, but these were not conversations she had had herself with anyone. She knew some people had said that they had left because of the Claimant. She was aware that some managers had fed back to Japan, including to Mr Ha, more towards the end of the Claimant's employment, that they felt there was a lack of leadership.

15. Nor had there been any specific enquiry as to whether these were individuals who had day-to-day dealings with the Claimant. There was an assumption that significant costs had been incurred in their replacement, but again without any investigation or calculation. There were no records of exit interviews. Mr Ha thought that a couple or perhaps more employees had said certain things on their leaving which suggested that they did not feel supported and were frustrated with a lack of leadership. He was adamant that this was with specific reference to the Claimant, not to any management in Japan.

16. He said that departing employees had mentioned a lack of career and development plans for them. Again, nothing of what they said had been written up. The relevant employees had left, he thought, in September 2018 and another in May 2019.

17. Mr Ha also referred to concerns about the management of Client A. This was a complex project where it was necessary to engage a third-party supplier to provide a conveyor system to multiple weighing machines. The board was aware of the ongoing project in July but not in detail. It was not discussed with the Claimant on 16 July. By September details had emerged where it was considered that the Claimant had signed a contract which provided for a technical speed and accuracy which would be very difficult to achieve. The Claimant had then sought to suggest that he was not himself involved in the project specification which was a matter, he said, more for the technical experts. The board's view was that the Claimant had overall responsibility and did not ensure that the technical specifications were checked by Japan before committing the Respondent to the contract. The Claimant had used his preferred supplier to save costs, but that decision ultimately ended up costing the Respondent and damaging customer relationships.

18. Mr Ha referred to a separate incident with Client B which resulted in the Claimant entered into a settlement agreement under which the Respondent had to pay significant compensation for a weighing machine which did not meet the customer's requirements. This was mentioned at the 16 July meeting. Again, the board's view was that the issue had arisen because the manufacturer in Japan had not been involved due to a lack of management control for which the Claimant was ultimately responsible. Mr Ha considered that communication with the customer had also not been good.

19. Mr Ha referred to the Respondent receiving negative feedback in respect of the Claimant not visiting customers as regularly as he should have been and (unspecified) poor conduct and a lack of professionalism during visits. Mr Ha had received some such information from other employees when he had been in the UK and had visited customers himself. Again, he had not wanted to get statements and preferred to protect the employees who had made negative comments about the Claimant.

20. Mr Ha was also critical of the Claimant in terms of developing new business. It was put to him that turnover had actually been increased. Mr Ha's concern was that this had not translated into additional profit, referring, for example, to the cost involved in compensating Client A.

21. Mr Ha agreed that there had been no discussion in July about the Claimant being involved in any other business interests.

22. In Mr Ha's recollection, matters of concern had been raised with the Claimant on 16 July "just in general talk about trust of the board in him" although there had been reference to the project involving Client B and to people management (to the number of people leaving) as well as reference to customer issues "in general terms". They had expressed their general frustration to the Claimant without specific details.

23. At that point Mr Ha agreed that he did not feel they should go to a disciplinary stage and the Claimant was not told that his job was under threat. No letter had been sent after the meeting to confirm the nature of the discussions. Mr Ha agreed that the Claimant was not told about any specific things he had to do to improve. The Respondent simply hoped he could make some changes. He agreed that effectively on 16 July they had announced some general concerns and left the Claimant to deal with them, but said that they were "really strong concerns". Nor was any time period for improvements set. Mr Ha was taken to the Claimant's service agreement and a reference to a disciplinary procedure in an Employee Handbook. He said that the Handbook did exist. He did not know about the existence of any separate capability procedure. They had not referred themselves to the Handbook.

24. The Respondent's accounts were due to be filed by not later than December 2019. Mr Tamura accepted that, under company law, directors must not approve financial statements unless they are satisfied that they give a true and fair view. He was aware of that.

25. On 8 August 2019 Ms Race emailed Mr Tamura, to say that Mr Matthew Barton of the Respondent's accountants/auditors, Haines Watts ("HW"), had advised that a provision was required in the accounts as at 31 March 2019 in respect of outstanding legal proceedings brought against the Respondent in Italy, a piece of litigation referred to as "Italsur". That was in circumstances where the legal opinion was that it was likely that there would be a cost for the Respondent arising out of the case. Mr Tamura was surprised at this news as, at a meeting with HW on 22 May, there had been an understanding that there would be no need to make a provision. He felt that there was now a change in advice. It emerged that the suggested provision was close to £1million.

26. He therefore emailed Ms Race in response, referring to that May meeting and that the auditors had said that no provision would be made since the Italian court decision was expected on 24 June. That decision had in fact still not been published by August 2019. He told Ms Race to ask the auditors to finalise the financial statements without any provision.

27. Ms Race responded again on 8 August saying that in May, HW did not have a legal opinion on the litigation which allowed them to make provision, but they now had a further one from the Respondent's Italian lawyers.

28. Ms Race then copied into the email a communication from Mr Barton. He referred to there being an expectation that they would have certainty of the claim by the end of June and therefore the best approach was to wait for the court's judgment. This could have avoided making a provision. It would have also avoided the need for an updated legal opinion. However,

following the delay, another legal opinion had been obtained to the effect that it was likely that there would be amounts payable by the Respondent in the litigation. He went on: "If the company choose not to make the provision as at 31 March 2019, we will have to qualify our audit report accordingly!" Ms Race commented that this would be detrimental to "our UK accounts as they will not guarantee our results." She was seeking to arrange a conference call with HW so that their position could be better understood.

29. Mr Tamura's understanding was that the Respondent was being presented with an effective option to make the provision or for qualified accounts to be filed. Mr Tamura could still not understand the need for a provision and saw a difficulty in that the group accounts had already been completed on the basis that there would not be one. The conference call with the auditors took place, but they remained of the view that the provision ought to be made. The Claimant was part of that call.

30. On 12 August Mr Barton emailed Ms Race setting out the two options of a provision or the audit report being qualified. As regards qualification, he said that he would need to discuss further what form that would take, but said it would be either an "except for" opinion whereby HW stated that the accounts gave a true and fair view except for the impact of the provision, then giving details of the provision which should be included. Alternatively, there might be a "disclaimer of opinion" if it was felt that the impact of the unadjusted error was so significant that HW could not give an opinion on the accounts at all. He also then referred to finalising the accounts later in the year albeit he did not believe that this would be an option which was desired. Ms Race thought she would have forwarded this to the Claimant but there is no evidence that she did. The Claimant's position is that he had never seen it and that is accepted by the Tribunal.

31. In evidence to the Tribunal, Ms Race was of the view that a qualified opinion would have been given anyway as there was not just the Italsur litigation but also the dispute with Client B.

32. The claimant emailed Mr Tamura on 13 August disagreeing with his assessment of the conference call and stating that the auditors clearly explained that they would need to provide for a liability of £1 million since that was the last figure put forward by the lawyers. They had all agreed to wait until 24 June and for the Italian court to publish its decision. Since the Italian courts were said to be 12 months behind with their decisions, the Claimant had, however, requested an update from the lawyers who confirmed that there had been no change to their opinion and giving the aforementioned figure as "the most likely outcome". He went on that, as such, HW had clearly recommended that the accounts are filed with the provision for this sum. He went on that Mr Tamura's request to file accounts in their current form would result in a qualified audit report within the main accounts which would be publicly available. He explained: "This will further

result in the company having a very poor credit rating and potentially stop suppliers from providing goods and services. Our bank guarantee would also stop. Additionally, customers will stop providing orders to the business with many customers now requiring a healthy credit rating before they will provide any orders above £50k. As such the business will most certainly suffer. Going forward, against the advice of the auditors, this demand by you to submit the accounts in their current format, knowing full well that the accounts will be public and will have a qualified report and include my name as the Managing Director of the business, in (sic) completely unacceptable. In effect you would discredit me from future employment and restrict my position with any future business opportunities. As such I have taken advice on this matter and I refuse to sign the accounts in the format you are suggesting."

33. The Claimant relies on this email of 13 August as a qualified protected disclosure. He accepted in cross examination that he was aware that there was no statutory cap on compensation available in claims of unfair dismissal where the reason for dismissal was whistleblowing. He accepted that his case was that the whole reason for his dismissal was this act of whistleblowing - if he had not sent this email, he wouldn't have been dismissed.

34. The Claimant's evidence was that he felt that the Respondent's parent company was prepared to gamble the livelihood of staff and act against creditors without there being any financial commitment to the Respondent. He had therefore thought it to be in the public interest to raise the matter with the Insolvency Service. He agreed, however, that he had not raised it with them. He said he wanted to wait to see what happened. He agreed that a statement that Mr Tamura and Mr Ha threatened him with his job if he did not get the accounts filed exactly as they had been produced, had not been a matter put to them when they gave their evidence. He agreed that he had made no reference to any such threat in his email of 13 August. The Tribunal cannot conclude that there was one.

35. The Claimant said that he believed the auditors were clear that the Respondent should make a provision in the accounts, which is why he wrote the 13 August email. His view was that, in itself, a qualified report would be against the Companies Act because the auditors had said what the right procedure was. He disagreed that the qualified report did not mean the Respondent had done anything wrong. He disagreed that the auditors would not have raised the option of a qualified report if that was an unlawful option. He disagreed with the proposition that Mr Tamura was simply challenging the advice of HW. His position was that Mr Tamura was giving an instruction to do something unlawful. He conceded, however, that at no stage in correspondence had he suggested that the Respondent's course was illegal or unlawful. It was not in his 13 August email. Worries about his reputation were not, he said, the main reason for his disclosure. That, however, was referenced whereas what he now said was the main reason

– the Respondent's breach of a legal obligation – was not. He said he had thought that he had in fact made that clear, before agreeing in cross examination that he had not. The Respondent, however he said "knew what they were doing."

36. The Claimant at one point conceded that at and around the Claimant's meeting with Mr Ha and Mr Tamura on 16 July he thought that the Respondent might be considering taking disciplinary action against him. At another point he said that he did not think that he was going to be sacked and had no thought of disciplinary action. The Tribunal considers the first answer to be more likely to be accurate. No one in his position could have had that conversation and have not been fearful regarding their continued employment. He agreed that general concerns about his performance were raised at that meeting. The Claimant refused in cross examination to accept that he was aware in the period after that meeting that his employment was under threat suggesting he did not have a clue what was going on and that, whilst there had then been settlement discussions involving his employment ending, these had occurred after the 13 August email.

37. The Claimant had sent a "without prejudice" email to the Respondent on 1 August. Much of this had been pasted into his witness statement where concerns raised about his performance were refuted by him. He addressed the concern of too many people leaving the business, suggesting reasons for leaving were varied, but the common denominator had been a wages freeze. He explained how cash flow issues had arisen. He explained the situation regarding Client B - the contract been entered into after due technical analysis and the Claimant had managed to save the Respondent from a much more significant claim for compensation, he said. The Claimant maintained that, despite Brexit uncertainties, he had increased sales to record levels. The Claimant also, however, addressed possible terms of his departure from the Respondent's employment. Having been shown the "without prejudice" correspondence which was not in the agreed bundle before the Tribunal, the Claimant accepted that after the 16 July meeting and up to 12 August there had indeed been correspondence discussing his continued employment and a possible settlement on his leaving.

38. In his witness evidence he asserted that he had expressed concerns that the allegations of poor performance were "just a cover" for the fact that he would not press the auditors to submit the accounts without any provision. The Tribunal does not accept that. He did not make any such suggestion in his correspondence of 1 August or in the aforementioned 13 August email about the issue of the provision. Nor, when he was invited to the subsequent disciplinary meeting, did he refer to it arising out of his 13 August email.

39. Mr Tamura's view before the Tribunal was that the Claimant's main concern was that he might be personally discredited. The Tribunal on balance agrees, noting the context was of background discussions which might

result in him needing to look for alternative employment. The Claimant referred to his future employability. Mr Tamura said that he couldn't agree to an adverse £1 million accrual and thought it would actually be better to submit a qualified report than that. He did not understand/anticipate any potential issue of insolvency saying that most of the liability ultimately rested with Japan. The Japanese parent was the main supplier and would support the UK business.

40. Mr Ha accepted that there was no meeting with the Claimant to discuss ongoing performance from 16 July until a 1 October disciplinary invite. Mr Ha had met with the Claimant in August, but accepted they did not really speak about performance. There was no query for instance raised as to whether the Claimant needed any particular support.

41. As referred to, issues with Client A did arise in September. Email correspondence from Mr Nakamura to Peter Hartley, sales manager, referred to it being very doubtful whether the required accuracy could be achieved. The Claimant was copied into this and asked how this order had been authorised, Mr Nakamura having been told that the Claimant had signed up to this contract. Again, Mr Ha's evidence was that they expected the Claimant to understand the basic requirements involved in the customer specification and if they could be achieved. It was very obvious in this case that the client's expectations were not achievable. The Claimant hadn't appreciated the risk in this project. The technical issues ought to have been referred back to Japan to avoid that risk.

42. The Claimant's response was that he had had no involvement in the trials and specification of the project. There was no response from the Respondent to this email, but the Claimant's reply was regarded as a failure to show leadership.

43. It is noted that after the 16 July meeting and before the Claimant's own dismissal, 2 employees left on 25 August and 23 September 2019. Mr Ha said that he did not get the opportunity to talk with either of them and could not say why they had left.

44. The disclosure documents in these proceedings included an apparent meeting request sent on 2 September setup regarding a "R&D Fact find ZLX Mansell Finishes". Mr Ha was aware of this only after the Claimant had left the business. ZXL was a company formed by the claimant as explained below.

45. Mr Ha's evidence was that by late September 2019, the Claimant's performance having remained under review, the Respondent had reached a stage where it was considered necessary to conduct a disciplinary hearing. This was particularly given the issues involved with Client A. Against that background, the Claimant was invited to a disciplinary meeting.

In cross examination he said that there are a lot of other things of concern as well. He described the Claimant's email of 13 August about the provision in the accounts as "a totally different subject" and "totally irrelevant". He denied that the invitation to the disciplinary hearing was linked to this. Mr Tamura in cross examination rejected the proposition that the Claimant's dismissal was related to his 13 August email about the provision in the accounts.

46. His view was that confusion regarding the treatment of the accounts had been caused by the auditors. The issue was still under discussion with them and there were differing opinions as to how to deal with the accounts. In May the auditors' advice said there could be no provision. At that point the liability from Italsur could have been anything from nothing to £1 million. There was too much uncertainty and the plan had been to wait until June. By August there was still no more certainty, yet the Respondent was being told to put in a provision of £1 million. Effectively, the auditors had advised treating the accounts in 2 very different ways when the same legal case was involved and its status had not changed.

47. There was no instruction for the Claimant to sign auditor's report. No one was being forced to do anything. For Mr Ha the issue was one to be discussed and resolved between the Respondent and the corporate office in Japan regarding the management of their respective audits.

48. Mr Ha wrote to the Claimant on 1 October inviting him to a meeting on 4 October. The purpose was said to be to address concerns the board had regarding the Claimant's performance and leadership and also a fundamental breakdown of trust and confidence. He went on: "The Company is therefore considering if your employment should be terminated." Mr Ha agree that he made no reference to what had been discussed on 16 July. On questioning, he said that he did have in mind a list of specific concerns and agreed that these could have been put in the letter. He agreed that any documentary evidence supporting the Respondent's concerns could have been included, but said that the point of the letter was to invite him to a meeting. They believed he already knew all of the Respondent's concerns. This was the case even though the concerns had been described only in general terms back in July. Also, the substantive issue of Client A had emerged later. The issue with Client B had, Mr Ha said, been raised as an example at the July meeting – the Claimant ought to have appreciated that this was still a concern. It was up to him as managing director to understand that. The meeting was to be conducted by Mr Ha, Mr Nakamura and Mr Tamura, who would also attend as notetaker. The Claimant was entitled to bring a colleague or union representative with him.

49. The Claimant responded by email of 2 October referring back to the meeting with Mr Ha and Mr Tamura on 16 July. He noted: "After all this time you now say you want a disciplinary hearing." He then complained of the treatment

of him and said he was suffering from stress-related illnesses including nausea, anxiety and chest pains. He had already been to see the doctor who wished to see him again. He described the nausea and pain as that day becoming unbearable and as result he was leaving for Glasgow, where he lived, as soon as possible to see his doctor. He said that he had not received sufficient time in any event to prepare for such a meeting and that he could not attend a meeting on Friday.

50. Mr Ha wrote further to the Claimant on 3 October rearranging the meeting for 8 October, albeit the Respondent was willing to hold a meeting in Glasgow if that assisted the Claimant with his travel arrangements. The Claimant was told that if he did not attend the meeting, the Respondent would consider whether it was appropriate to make a decision in his absence. In a covering email Mr Ha said that he did not accept a reference in the Claimant's previous email to "abusive behaviour". Mr Ha said he had no idea what the Claimant was referring to. He did not recognise the Claimant to be raising a separate grievance. The Claimant was being invited to a meeting so that he could refute the allegations if he wished. No decision had been made and it was therefore important for him to participate so that the company had the full picture before making a decision.

51. The Claimant responded by email of 4 October reiterating that the Respondent had failed to give him enough information to know what he was being accused of. Nor had there been any reasonable notice of the meeting. He went on that the Respondent had failed to recognise that he had raised concerns which he said amounted to a grievance. The Respondent was failing to investigate his concerns. He said that the Respondent was also failing to take note of the fact that he was unwell due to their actions and could not attend the hearing as a result of ill health. He attached a statement of fitness for work which signed him off as unfit for work due to stress related problems and that he would be unfit to attend any meetings at present.

52. The Claimant did not attend the rearranged hearing on 8 October, but that day the Claimant was sent written notification of the termination of his employment by Mr Ha. Mr Tamura had no real recollection of being involved in any discussion prior to that decision being communicated. Whilst he was to have been the notetaker at the meeting no notes it appeared had been taken. Mr Tamura was definitely there and thought there had been a discussion between himself, Mr Ha and Mr Nakamura. Mr Ha said that they felt that the Claimant had no intention of attending. The Claimant had managed to send an email to Ms Race on 8 October about the tax reclaim issue so the issue for the Claimant was simply one of travelling to a hearing. They had been willing to hold it locally or it could have been done by conference call. It did not occur to them to seek medical advice. They had, Mr Ha said, no option left, other than to continue in the Claimant's absence. The first half year results were poor and they felt a sense of urgency to make a decision.

53. Mr Tamura told the Tribunal that they had to decide the issue of the Claimant's employment on the information before them. He could not, however, recall what information they had. He was not sure if they had any documentary evidence to hand. Mr Ha said that they had none. Clearly they did not.

54. Mr Ha had drafted the letter of dismissal but Mr Tamura said that he had agreed with its contents. In his evidence he went through the reasons for the Claimant's dismissal. He and Mr Ha said that the Claimant had not been managing staff, leading to a number of employees leaving the business and increasing costs. He said that this matter was covered at point 1 in the letter of dismissal by a reference to the Claimant failing to exercise appropriate management of employees, leading to poor staff retention rates and therefore additional costs to the Respondent. Mr Ha just wanted to include this summary in the letter. Everyone, including the Claimant, he said was aware of their concerns.

55. Point 2 in the letter of dismissal referred to a failure to demonstrate appropriate leadership in significant projects leading to losses and to recent discussions of a number of examples with the Claimant. Mr Tamura in his witness statement referred to poor performance or misconduct with customers, both in not managing customer relationships and not working appropriately on significant projects which led to financial losses. He could give no details in terms of specific customer relationships, but confirmed that the projects being referred to related to Clients A and B. Mr Ha accepted that the only client project recently discussed with the Claimant had been that involving client B, but he said they the business had failed to win some other projects. The Claimant would have been aware that there was an issue regarding his leadership of the project with client A. The Tribunal accepts that he was, given the email correspondence referred to above.

56. Point 3 of the termination letter referred to negative feedback from customers regarding the infrequency and conduct of visits, the subject matter referred to already above. Mr Tamura also referred in evidence to the Claimant not participating directly enough in business development activities although he agreed there was no mention of this in the termination letter, he said it related to the failure to exercise appropriate management of employees.

57. Mr Tamura's evidence was that there were concerns that the Claimant had other business interests, contrary to his contract of employment. This, he said, related in fact to point 4 of the reasons given for dismissal. The letter of dismissal simply referred to the Claimant potentially having outside business interests in breach of his service agreement. That was, Mr Tamura said, the management of a research and development tax rebate claim leading to significant financial losses. He said that he had, however, been unaware of the outcome of the tax rebate claim until after the decision to dismiss had been made. He had heard about research and development

issues "but not so deeply". In his view this was an issue, but not a major point in the dismissal decision. Mr Ha said that they had some information about Legal Rooms, who had been engaged on the tax rebate claim. They did not know about the meeting arrangement referring to ZLX or the sending of a test email from the Claimant to a ZLX address for a Linda Gray until after the letter was sent. For Mr Ha any activity of the Claimant relating to ZLX had no relevance to the decision to dismiss.

58. By way of explanation, on 4 September the Claimant had emailed Linda Gray at a ZLX address a blank message with the subject matter: "test". The Claimant then a few minutes later emailed the Respondent's outsourced IT support provider asking if his emails were being monitored. Shortly thereafter he sent to them the email address linda.gray@zlx.co.uk, without any further text or explanation. The Linda Gray relevant to this exchange was said by the Claimant to be a friend of his sister and not the Linda Gray who was married to a Mr William Gray of Legal Rooms. The Claimant floundered in an inability on his part to explain what he was doing. Linda Gray was not working for ZXL (the claimant's company) but was helping the Claimant to set up emails. The Claimant was unclear whether there was an intention that she be employed in the future. He said that he was paranoid about emails. He agreed that his email to IT support was "bizarre". He probably should have tested that the address was working from his private account. The Tribunal can only conclude that this was a deliberate decision of the Claimant not to be open with the Tribunal.

59. Mr Ha said he now had knowledge of "the big picture" of the Legal Rooms matter from information provided by Ms Race. He agreed that it was in the Respondent's interests to try to obtain a tax rebate. However, the Claimant hadn't informed the board and had selected a company without a written agreement to represent them in the claim. The results showed that the incorrect information had been provided resulting in the need to pay money back to HMRC. This is in circumstances where Legal Rooms had already received their fee. If everything had been done properly the Claimant's actions would have been okay, but he had not protected the reputation of the Respondent and had not given the board the necessary information. Mr Ha was clear that there were very detailed guidelines in place for subsidiary managers that any new contractual arrangement had to be reported. These were not disclosed to the Tribunal.

60. Mr Ha answered in the affirmative to a question as to whether he was saying that the Claimant's involvement with Legal Rooms amounted to potentially him having business interests outside of the Respondent. When they found out about Legal Rooms on 4 October they found some clue that possibly the Claimant was using them to collect the tax rebate claim for his own personal financial interests. Mr Ha couldn't recall however every detail. He agreed they did not have evidence, more that there might be a potential relationship between the Claimant and this company. He agreed there was no evidence of the Claimant receiving any financial benefit. When put to him

that Mr Tamura had said that the Legal Pro issue had not been a major point in the Claimant's dismissal, Mr Ha said that was because there was not concrete evidence. At the time they didn't think they would get any clear evidence because Legal Rooms was so "non-responsive".

61. The Claimant did not involve Ms Race in the R&D tax rebate claim. At some point in September she was aware of the claim as the Claimant asked her if funds had been received. At that point she did not know who had submitted it and that incorrect information had been given. She said it would have been normal for her to have been involved in reviewing tax computations even if they had not been prepared by her. She would have expected to have been involved. The Claimant did not usually in his ordinary work get involved in the detail of such financial matters. The Respondent, she said, had a £69,000 liability to HMRC yet had not received any monies by way of the rebate. Legal Rooms had however received their fee. She was concerned that the bank details for the receipt of the rebate had been changed with HMRC from the Respondent's to those of Legal Rooms. HW had seen records of the claim on the HMRC website when they were reviewing the Respondent's tax return. In her view, the money should have come directly to the Respondent but didn't.

62. On 2 October the Claimant emailed Ms Race asking her to ascertain the group turnover and number of employees in the group as he said HW needed the information.

63. Ms Race believed that the Claimant had had a long-term business relationship with Mr William Gray. He had been to a meeting she was aware of in 2018 and had also stayed in hotels which the Respondent had booked for trade shows. ZLX had the same registered office address as Legal Rooms. A Linda Gray also had a business at the same address. She felt it to be a coincidence if she was not related to Mr Gray. Potentially, the Claimant had chosen Legal Rooms to submit the tax reclaim because he knew them.

64. The Claimant said that he had met Mr William Gray in mid-2018 having been introduced by a colleague. Mr Gray had some IT knowledge and there had been discussions as to whether or not his business could help the Respondent. However, it was not felt that he was suitable. The Claimant received a call around January 2019 from him about a business he thought would interest him called Utility Zone. It had a licence to sell electricity. The Claimant bought this company off him and became a director. He never, however, traded it and did not get round to doing anything with it. It had recently been wound up.

65. Around March 2019 Mr Gray had indicated that he did tax rebate claim work and that the Respondent could benefit from an R & D tax credit. He contacted HW to asked if they did this sort of work. They said that they

would discuss it with him, came to a meeting and offered to do it. The Claimant then had to evaluate who was best placed to act for the Respondent. He understood that the accountancy regulator recommended that auditors did not carry out this type of work for companies they audited. He spoke to Legal Rooms (who traded under the name of Tax Pro) and was convinced by them that they could get more money for the Respondent than HW. He said he had no business relationship with Mr Gray and had never benefited financially from the tax reclaim.

66. The Claimant's position was that he had faithfully and diligently served the Respondent as required under his service agreement. He couldn't recall doing anything wrong or which might justify disciplinary action. He thought that his conduct of the tax reclaim issue had been beyond reproach, when that was put to him in cross-examination.

67. The Claimant was taken through the tax reclaim issue in detail in cross examination. He accepted that the possibility of tax rebate claim been discussed with HW in early 2019 and before 28 February. At that point HW had been considered for the job. The Claimant told HW on 5 March that he was waiting for another quote - that was a reference to Legal Rooms. No quote or written terms of service have been located, although the Claimant says they were provided.

68. On 4 March the Claimant incorporated his own new limited company, ZLX. The Claimant agreed that this is a company which now provides the same R&D tax rebate service as HW and Legal Rooms, but said that it was never started up with the intention to be that sort of company. It was to be used for engineering consultancy services if and when the Claimant wanted to use it.

69. On 20 March HW chased the Claimant for a decision and on 27 March the Claimant told them he was instead going for a company who specialised in this area. He agreed that that was his decision and he did not escalate the matter to anyone else.

70. Subsequent email correspondence of 2 July indicated that, by this point, management accounts had been supplied to Legal Rooms. The Claimant confirmed that he had provided these. There was no need for him to speak to Ms Race as he was able to easily lift them from a relevant folder on his computer.

71. By 22 July Mr Barton of HW had raised a concern that the relief claimed might be under the incorrect category. The Claimant said that he would carry out some checks. The Claimant said that he subsequently asked questions of HW and Legal Rooms about the criteria relevant to claims from a larger company and one classed as an SME. The Respondent being

classed as an SME depended upon considerations of, in particular, the number of employees within the wider group.

72. On 25 July the Claimant emailed Mr Barton asking him to destroy the submission saying that the information was incorrect and the document cannot be submitted to HMRC. By this point the issue was whether the group employed more than 500 people and the Claimant said he wanted to cancel the process until they were sure. The Claimant said that this information was not readily accessible and suggested an element of secrecy on the part of the Japanese parent in disclosing this sort of information. He had believed that the number of employees was just short of 500 on the basis of an organisational chart he had been able to access. He said that he made contact with 2 other subsidiary directors as they were the best people to ask regarding overall numbers of employees.

73. Another business, Horizon Chartered Accountants, had been engaged, apparently by Legal Rooms as the chartered accountants who were needed to make the submission to HMRC. They wrote to HW on 29 July, notifying HW of their involvement. Mr Barton of HW emailed the Claimant on 13 August asking what was happening and expressing concerns if an incorrect claim was submitted. The Claimant responded that he had asked a number of questions of Legal Rooms.

74. The Tribunal notes again that the issue of correspondence with the ZXL email address for Linda Gray arose in early September.

75. By 26 September the Claimant was in discussions regarding terminating Horizon's involvement and bringing HW back into the fold. HW thereafter saw a copy of the claim which had been submitted to HMRC. The Claimant agreed that he was still seeking information about employee numbers which was crucial to the categorisation of the claim, but in circumstances where the claim had already been submitted by then. He agreed that, under his charge, the claim been made under the wrong category.

76. An email from Mr Barton of HW to the Claimant of 1 October referred to them having discussed with the Claimant that the group would be "over on all fronts, being turnover, balance sheet and employees." Mr Barton highlighted that there could be penalties from a fraudulent claim, but that there should not be any problems if relevant due diligence had been done on the size of the group. The Claimant said he had not seen that email and that that conversation had not taken place. The Claimant sent the aforementioned email to Ms Race on 2 October asking for information on group turnover and the number of employees.

77. The Claimant disputed that the Respondent had suffered a loss as a result of his actions. He did not know how the relationship with Legal Rooms had been terminated or if any cancellation charges then arose.

78. The Claimant was asked some questions regarding the ZLX business. It was noted that it had an active website and that a number of individuals had been recruited. The Claimant said that the website had been live from June 2020 and that the people mentioned on it were self-employed contractors. One had started in March and another around March/April.

79. After the Claimant's termination of employment had been asked to return his mobile phone and laptop. He had referred to the phone as having been stolen but in his witness evidence referred to as having been lost. He explained that it had gone missing around August 2019 and he did not know if it had been lost or stolen.

80. The Respondent's accounts were finalised after the Claimant's dismissal and duly filed. They included a qualification as no provision had been made in respect of legal claims (there were in fact 2 separate claims) against the Respondent. The qualification was that a provision was required for the claims in the sum of £301,091. The Respondent had been advised of the result of the Italsur case in October and the total liability for that piece of litigation had in fact been around €226,000. The Claimant said that he was surprised to discover after his dismissal that the accounts had been submitted with the qualification as the auditors had made "a massive recommendation" to include a provision.

Applicable law

81. Section 43A of the Employment Right Act 1996 provides that a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of the Sections 43C to 43H. Section 43B of the Employment Rights Act 1996 provides as follows:-

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more of the following:-*
>
> *(b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject; ………*

82. The case of **Cavendish Munro Professional Risk Management Ltd v Geduld 2010 ICR 325 EAT** referred to a need to convey facts. **Kilraine v London Borough of Wandsworth 2018 ICR 1850 CA** warned however of the dangers of applying a rigid dichotomy between facts and allegations and held that a disclosure of information covering statements which might be categorised as allegations was still capable of amounting to a relevant disclosure. Clearly, also, the context in which information is provided can be hugely relevant. The focus must be on the reasonable belief of the worker – a subjective test with perhaps a low hurdle to surmount, albeit the belief must be based upon some evidence. An objective standard is then applied with reference to the personal circumstances of the discloser where, for

instance a person's qualification and knowledge may be taken into account in assessing the reasonableness of belief. Similarly, it is not for the Tribunal to determine whether a disclosure was made in the public interest, but whether person making the disclosure had a reasonable belief of that.

83. As regards the public interest requirement, the Tribunal refers to the case of **Chesterton Global Limited v Nurmohamed [2017] IRLR 837** where Underhill LJ cited following factors as a useful tool in determining whether it might be reasonable to regard a disclosure as being in the public interest as well as in the personal interest of the worker:
    - *(a) "the numbers in the group whose interests the disclosure served…..;*
    - *(b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
    - *(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
    - *(d) the identity of the alleged wrongdoing –… "The larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest…"*

84. Section 103A of the Employment Rights Act provides that:

    "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."

85. This requires a test of causation to be satisfied. This section only renders the employer's action unlawful where that action was done because the employee had made a protected disclosure. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. If the employer does not show to the Tribunal's satisfaction that it was its asserted reason, then it is open to the Tribunal to find that the reason was as asserted by the employee. However, this is not to say that the Tribunal must accept the employee's reason. Establishing the reason for dismissal, requires the Tribunal to determine the decision

making process in the mind of the dismissing officers which in turn requires the Tribunal to consider the employer's conscious and unconscious reason for acting as it did.

86. In a claim of ordinary unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. Two such potentially fair reason for dismissal are reasons related to capability or conduct - Section 98(2)(a) and (b) of the Employment Rights Act 1996.

87. An employer may alternatively rely on "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". This may in suitable cases include a breakdown of trust and confidence as a substantial reason justifying dismissal. That said, the authority of **Perkins v St Georges Healthcare NHS Trust [2005] IRLR 934** recognises that employers must guard against *"using the rubric of 'some other substantial reason' as a pretext to conceal the real reason for the employee's dismissal".*

88. In cases of misconduct a Tribunal is normally looking to determine whether the employer genuinely believed in the employee's guilt of misconduct and that it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard. In cases of poor performance, such factors can be relevant, as well as issues such as the provision of support, warnings and an opportunity to improve as well as an exploration sometimes of any alternative available positions.

89. This, however, is simply part of the Tribunal's fundamental application of Section 98(4) of the Employment Rights Act which provides:

> *"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> > *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> > *shall be determined in accordance with equity and the substantial merits of the case."*

90. The Tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. A Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in the circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached including the investigation.

91. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. In cases of dismissal for conduct or poor performance, the Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

92. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

93. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the Claimant and its contribution to his dismissal – Section 123(6) of the Act.

94. Under Section 122(2) of the Act any basic award may also be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee’s part that occurred prior to the dismissal.

95. In **Steyn v ASP Packaging Limited [2004] ICR 56** Tribunals were advised to address four questions, namely [1] What was the conduct in question? [2] Was it blameworthy? [3] (In relation to the compensatory award) Did it cause or contribute to the dismissal? [4] To what extent should the award be reduced? Whether the misconduct occurred is a question for the Tribunal to determine as a matter of fact.

96. It was suggested at the outset that relevant to compensation may be matters of the Claimant conduct discovered only after the termination of his employment. Pursuant to the authority of **W Devis and Sons Ltd v Atkins 1977 ICR 747 HL** a compensatory award may be reduced if it is just and equitable to do so on the basis of pre-termination conduct not known about at the point of dismissal.

97. Applying those principles to the facts as found, the Tribunal reached the following conclusions.

Conclusions

98. The Tribunal looks firstly a question of whether the Claimant's email of 13 August 2019 amounted to a protected qualifying disclosure. The Tribunal concludes that it did not.

99. This is not a brief email communication and it arises in a particular context. That context is of the auditors' advice to make a provision in the accounts for the outcome of current litigation. Indeed, the context from the point of view of the Respondent was a change in advice where previously they had understood that there would be no need to make a provision. The Respondent's directors could not understand why the advice had changed and why indeed now they were being told to include a provision in the accounts of not much less than £1million. Mr Tamura, in the circumstances, was challenging that advice and seeking to understand what had changed.

100. At no point did the auditors suggest that if no provision was made there would be a breach of legal obligation. As the Claimant himself put it, their view that a provision ought to be included in the accounts was "a massive recommendation". That was again put forward in the context of there being another option open to the Respondent of omitting any provision, in circumstances where the auditors would have to qualify the accounts. Again, there was no suggestion from the auditors that such qualification would be unlawful – it was something they were prepared to do, if the Respondent rejected their advice to make a provision. Clearly, the company's accounts would not be in a form which could mislead anyone – if no provision was to be made then within the publicly available accounts, there would be an express qualification with the amount the auditors considered ought to have been provided disclosed.

101. There was an internal debate and questioning of the external auditors, but certainly no demand of the Claimant or anyone else to submit the accounts in a particular form. There was no particular urgency or any deadline set in circumstances where annual accounts had to be filed by the end of December.

102. Looking at the wording in the 13 August email, nowhere within it does the Claimant mention a breach of any legal obligation. Nor it is it to be reasonably inferred that the Respondent or anyone else would understand that was what he was saying. He was simply advocating following the auditors' advice after the culmination of discussions which had been taking place as to the options available to the Respondent in the filing of the annual accounts. In terms of context, the Claimant cannot point to any other communication where it was clear or ought reasonably to have been clear from his 13 August email that that was the concern he was disclosing. The

Tribunal does not conclude that this was, on the evidence, something in the Claimant's mind at all. His email discloses the reason why he is advocating the inclusion of a provision. He feels that it would be more detrimental to him as managing director to put his name to a set of qualified accounts and qualified accounts might have a detrimental effect on the Respondent's future business.

103. The Tribunal appreciates, as Mr Woods points out, that many of the decided cases have been concerned with whether the employee has conveyed facts rather than simply made an allegation. Here there are plenty of facts conveyed and the Tribunal is urged to conclude that they are at the very least capable of tending to show a breach of legal obligation. The Claimant's difficulty however is that the Tribunal does not consider that he held, on the evidence, any such belief of his own. Issues of insolvency or misleading those dealing with the Respondent were not at the time matters he considered. Again, this is not a case where the Claimant is incorrect in his belief - he simply did not have the belief when he made his purported disclosure. The Tribunal is clear that the Claimant did not have in his mind at the time the matters he sets out in his witness statement in terms of, for instance, the company trading illegally if it refused to make the recommended provision.

104. Whilst not relevant given its findings, had he made the disclosure contended for, the Tribunal would have accepted there to be reasonable belief that it was made in the public interest, given how widely it is clear that that criterion is to be construed and where a company's accounts could have obvious ramifications in terms of its employees, shareholders and creditors, well beyond the Claimant as a single individual.

105. In any event, the Tribunal can and does make a positive conclusion that the 13 August 2019 email was not the reason for the Claimant's dismissal and certainly not the principal reason. Nor does the Tribunal consider that the Claimant believed that to be so. The Claimant was disingenuous in his evidence (even allowing for understandable sensitivity and uncertainty regarding reference to "without prejudice" communications). The Claimant was happy to include in his statement his refutation of the accusations of poor performance and misconduct (which he regards now still as completely baseless), without accepting the context of the Respondent having raised these prior to the 13 August email. At the meeting on 16 July concerns about his performance as managing director were raised, which had led, prior to his sending of that email, to discussions in which the Claimant took full part around the Claimant leaving the Respondent's employment and the terms of his possible departure. The Claimant does not in subsequent correspondence assert that the allegations are a creation to disguise the real reason for the Respondent taking against him i.e. his protected disclosure. He is likely to have done so had he believed that to be the case.

106. The Claimant's employment was certainly under threat prior to his alleged protected disclosure in circumstances where, when such issues are raised in the context of such a senior position in a company, the situation is rarely retrievable. The Claimant was well aware of that at the time.

107. The Tribunal entirely accepts the evidence of Mr Tamura and Mr Ha that by 16 July the Respondent's board was seriously concerned about the Claimant continuing in his leadership role within the Respondent. Those concerns continued up to and beyond the Claimant's 13 August email as did "without prejudice" discussions aimed at the Claimant leaving employment under a settlement agreement. Mr Ha may not have specifically had in mind disciplinary proceedings immediately after the 16 July meeting, but the Claimant's continuance in his employment was at risk and under continued consideration. Matters did progress to discussions about severance arrangements which, if concluded, would have removed the need for any form of disciplinary process.

108. Whilst the Respondent's disciplinary case is characterised by a lack of detail and corroborative evidence provided by the Respondent of its concerns with the Claimant, the Tribunal finds that there were genuine issues for the Respondent in terms of staff retention and the Claimant's management of projects which the Respondent considered put it at risk. The board's trust and confidence had been lost. The Claimant in his response to the raising of concerns on 1 August did address a number of perceived issues which the Respondent had with his performance, albeit where the Claimant felt he had an adequate explanation.

109. Performance issues were not raised when the Claimant saw Mr Ha in August, but again background settlement discussions were continuing. It is said on behalf of the Claimant that nothing happened in the period from 16 July, such that an inference ought to be drawn that the termination process initiated in October was because of the 13 August email. The Tribunal, however, is mindful of there being background settlement discussions, the claimant had not accepted as legitimate the concerns raised in July and the respondent genuinely believed that the Claimant continued to fail to show leadership, including, for instance, in respect of the project for Client A. The Tribunal accepts Mr Tamura and Mr Ha's evidence as to the irrelevance of the 13 August email to their decision to dismiss the Claimant. Had they been significantly concerned at the stance the Claimant took, it is likely that it would have featured in the letter of termination – they never considered that the Claimant was a whistleblower or that they might therefore want to avoid any admission of an adverse view taken of his 13 August email.

110. The Claimant's dismissal was not automatically unfair. The principal

reason for his dismissal was, the Tribunal finds, the Respondent's concerns regarding his performance as managing director and not the 13 August email. Indeed, the concerns were principally about performance - a lack of leadership, management control and a failure to carry out tasks required of him – rather than willful refusal/misconduct. Trust had been lost from the Respondent's perspective, but this arose out of its assessment of the Claimant's performance.

111. That is a potentially fair reason for dismissal – a reason related to capability. Did then the Respondent act reasonably in treating it as sufficient to justify dismissal?

112. The Respondent carried out no independent investigation in respect of the alleged performance failings. No documentary evidence was gathered up or reviewed. No statements were obtained from employees who had apparently complained about the Claimant's leadership and/or his behaviour with customers. There was no analysis of the number of employees leaving, the timing and their reasons. Whilst Client B had been discussed on 16 July with the Claimant, the Respondent had not ever given the Claimant an opportunity to explain his conduct in respect of the project involving Client A. The Respondent did not know in any detail the individual responsibilities of the Respondent's managers who had been involved in this project, in particular on the technical side. Indeed, whilst the decision to dismiss was a joint one and there had been a discussion between the 3 directors involved, they each knew different things from their individual observations, what they had heard on the ground on visits to the UK and from hearsay. Some knew more than others. It was evident when Mr Tamura was cross-examined that he genuinely had serious concerns and frustrations about the Claimant as managing director, but a limited grasp of the detail behind them or any specific incidents.

113. Whilst the Claimant was invited to a disciplinary hearing, he had no advance notice of the allegations in a way which would have enabled him to prepare for it. He was given little notice and no disclosure of corroborative documentation or anything else which the Respondent might be considering. Nor can it be said that from the 16 July meeting the Claimant knew about all the specific performance concerns and what he needed to do to improve. He knew that there were concerns and a lack of confidence in him. That conversation, on the Respondent directors' own evidence, was again predominantly in quite general terms.

114. Whilst in some cases it might be reasonable to proceed to a disciplinary hearing in an employee's absence, the Claimant had submitted a doctor's note to the effect that he was unfit to attend a meeting. The Respondent unreasonably simply formed the view that he had no intention to attend and that the only issue was travelling arrangements in circumstances where they had been willing to meet with the Claimant nearer

to his home. There was no attempt to seek written representations, but instead a desire to press ahead regardless and reach a decision to terminate employment which the Tribunal considers had been predetermined. The Claimant was in reality unlikely to be able to say anything which would have persuaded the Respondent that it should continue with him as managing director.

115. Such conclusion is supported by a lack of any evidence or any serious discussion between the directors. They might say that a hearing was held in the Claimant's absence, but there is no evidence or notes of any such hearing or what the directors were considering at the time. There is no evidence of the decision-making process.

116. In such circumstances, the Claimant was unfairly dismissed.

117. Furthermore, in terms of compliance with the ACAS Code, there was little more than an invitation to a disciplinary hearing and the provision of a written decision with a right of appeal after it. There was no investigation to establish the facts, the Claimant was not told of the matters under consideration in sufficient detail and had no reasonable time to prepare to attend a hearing. No hearing of any substance took place, even in the Claimant's absence. An uplift in the compensatory award of 20% is therefore appropriate to reflect the Respondent's unreasonable failure to comply with the Code.

118. This is not a case where the Tribunal can conclude that had any defects, of a procedural nature or otherwise, been remedied the Claimant would have been fairly dismissed in any event or with any degree of probability. The Tribunal has before it now very little evidence from which the Respondent might reasonably have concluded the Claimant to have been guilty of aspects of poor performance such as to justify his dismissal. Whilst appreciating often that a less forensic investigation occurs, the more senior the employee and that the issue of confidence in a managing director is more prone to subjective opinion, the allegations raised against the Claimant and determined to be well-founded are still often of a most general nature. For instance, the Tribunal has no corroborative evidence of the reasons for staff turnover and whether the Claimant was justifiably to blame, whether he had failed to take appropriate steps to develop the business, whether he had failed to visit customers and been unprofessional on visits, the extent of his and others' blame in problematical projects. The Tribunal has seen some evidence of projects which have gone awry and where the Claimant as managing director may be expected to often carry the can, but it has no basis for understanding the level of the Claimant's direct blame for any failings or losses sustained in circumstances where the Claimant asserts that he reasonably relied upon others, in particular, employees with more of a technical background.

119. Perhaps the strongest evidence of performance failings related to the tax credit reclaim, which can objectively be viewed as something of a fiasco in circumstances where there was a lack of caution as to the supplier chosen to conduct a task of some complexity and where the Claimant inexplicably and indeed suspiciously chose not to involve anyone else, particularly Ms Race. The Respondent's difficulty is that this matter, albeit not all of the detail and the full paper trail, was within its knowledge at the time it dismissed the Claimant and yet the Respondent's evidence was that it was not a significant part of the reason for the termination of the Claimant's employment. The Tribunal cannot conclude, for instance, that had a fair procedure been followed the Claimant would have been dismissed for his actions in the R& D tax rebate claim.

120. Nor is the Tribunal in all the circumstances able for itself to make a finding that the Claimant acted in a blameworthy manner which caused and/or contributed to his dismissal such that his basic and compensatory award ought to suffer a deduction. The best evidence, from the Respondent's viewpoint, related to the tax rebate but that was not, again, why the Claimant was dismissed.

121. The evidence further does not allow the Tribunal to reduce compensation on a just and equitable principle on the basis of conduct of the Claimant discovered after his dismissal. Whilst Mr Williams has pushed and probed as much has he could on the basis of the evidence he had, there can be no conclusion that the Claimant had outside business interests and in particular was active in them during his employment. An air of mystery surrounds the various Mrs Grays and the Claimant's dealings with them. Significant suspicion is raised by the Claimant's test email and his concerns about his work emails being monitored. His general demeanour in giving evidence did not suggest a straightforward individual. However, by the conclusion of this hearing they still remained mere suspicions and certainly not proven acts of wrongdoing such as to engage this principle.

N. Maidment

Employment Judge Maidment

Date 8 October 2020
RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
Date 6th November 2020

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