Case No: 1302920/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr D. Clarke**

Respondent: **Tyres on the Drive Limited**

Heard at: **Birmingham** **On: 2 to 8 January 2018**

Before: **Employment Judge Broughton**

Representation
Claimant: Mr J Crossfall, counsel
Respondent: Mr T Wood, counsel

JUDGMENT

The Claimant's claims of unlawful detriment and dismissal as a result of making protected disclosures and his claims of victimisation fail and are dismissed.

The claimant was unfairly dismissed but the unfairness made no difference to the outcome.

REASONS

The Facts

1. The Claimant set up the Respondent Company in 2011 and was founder, shareholder and Chief Executive from that point.

2. Over the years the Respondent grew quite rapidly and needed new investors from time to time which significantly diluted the Claimant's shareholding.

3. It was the Claimant's evidence that difficulties in his relationship with certain board members and shareholders started in around April 2016, by which time he was a minority shareholder, albeit still the Chief Executive.

4. Those difficulties, coupled with very challenging financial circumstances, led to a proposal later in the summer and early autumn of 2016 for the claimant to step down as the Chief Executive Officer and negotiations commenced in relation to how best to achieve this.

5. It appears that, at around this time, following certain pay reviews, the Claimant raised a possible equal pay issue in the company, albeit one that must have arisen during his tenure. However, this was not a protected act or disclosure relied upon and so the claimant's motive for raising it was not explored.

6. During the negotiations about the claimant stepping down, the Claimant obtained a recording of a meeting of certain members of the executive and board. The recording seemingly illustrated both a potentially unprofessional response to some of the pay issues and also a clear, pre-existing desire on the part of the Board to remove the Claimant. The Chairman, for example, described removing him as "a key deliverable".

7. The Claimant was suspended on account of using the recording, albeit he suggested there were other reasons. It may well be that both sides were playing games in the context of the ongoing negotiations.

8. The negotiations continued and, ultimately, they resulted in a settlement agreement that provided for the Claimant to step down as Chief Executive and from the Board and, indeed, from any executive role.

9. The only real consideration for the claimant waiving his rights at that stage was that he was offered the opportunity to remain, notionally at least, as an employee. He was to be a "strategic adviser" working one day per month in return for a salary of £120,000 per year.

10. The new arrangement was stated to be for a minimum period of one year and the settlement agreement waived all claims up to the date of the agreement and, indeed, attempted to waive future claims as well. The total value of the package, therefore, exceeded the Claimant's potential entitlements were he to have been dismissed and claimed unfair dismissal at that stage.

11. We found that the settlement agreement could not operate to waive future claims based on disclosures that had not, at that stage, even been made. That said, the agreement clearly anticipated a future termination of the claimant's employment.

12. The principal, if not the sole, reason for this settlement structure was so that the Claimant could remain employed by the Respondent. He was endeavouring to sell his shares and, if he remained employed, he would have been able to claim entrepreneur's tax relief, potentially worth almost £1million.

13. It seems likely that this structure must have been proposed by his advisors as there was no obvious benefit to the Respondent who, as already indicated, appeared keen to remove the Claimant completely. That said, the Claimant may have wanted to remain involved and indeed the Respondent may have needed him to assist in relation to securing certain future funding investments.

14. With the benefit of hindsight, and given the contents of the recording and settlement agreement, it seems likely that the Respondent had no intention of actually using the Claimant for strategic advice.

15. Following the settlement agreement, it was confirmed in a general email in January that the Claimant had stepped down from the Board and relinquished all day-to-day executive responsibilities.

16. In April 2017, the Claimant emailed the Chairman of the Board requesting a meeting regarding his settlement agreement. The claimant also highlighted certain inappropriate activity on social media by a couple of employees. The issues appeared to relate to overtly sexist posts and a potential breach of the Data Protection Act.

17. It was acknowledged that these amounted to protected disclosures and, indeed, the one in relation to sexism was also to a protected act for the purposes of the Equality Act 2010.

18. The contemporaneous evidence showed that the Respondent was grateful that the Claimant had raised these important issues and, shortly thereafter, they took disciplinary action in relation to the two individuals whose social media activity had been highlighted. Ultimately both were dismissed.

19. That said, we did hear that one of them was potentially re-employed some months later.

20. There was no evidence that Mr Fernandez, who ultimately became the Respondent's new CEO, was aware of these issues. Mr Fernandez, at the time of these disclosures, had only just been engaged to provide consulting advice to the Respondent but had not been taken on as an employee.

21. At around the same time, there was an email from a member of the board confirming the importance of addressing social media issues. The same email also referenced an earlier discussion about "disruptive investors". It was not clear what the context of that reference was, nor to whom it related.

22. The Claimant suggested that it must have been a reference to his disclosures but the language did not seem to bear that out. The disclosures appeared to be welcomed and the reference to disruptive investors was plural.

23. The company felt the need to "monitor" and show "zero tolerance" to some activities they viewed as disruptive but it seems to us that this must have been a reference to something else.

24. On 27 July 2017 the Claimant raised by email a number of concerns about the performance of the Respondent. The relatively lengthy email was primarily about finances and business operations and also evidenced a considerable ongoing discontent on the part of the Claimant about having to step down from his executive responsibilities.

25. The email also included a safety concern that the Claimant raised in relation to some work that had been done on his own tyres by an employee of the Respondent. Again, it was admitted on the part of the Respondent, that this part of the communication amounted to a protected disclosure.

26. Mr Fernandez was employed by the Respondent in or around August 2017 and, shortly thereafter, became the Acting Chief Executive Officer and subsequently the Chief Executive Officer.

27. The Claimant's July concerns were, therefore, passed to him. He appeared, both at the time and before us, grateful for the safety issues having been raised. He understood the importance of such matters to the future of the Respondent's business.

28. He carried out an investigation and responded to the Claimant.

29. On 13 August 2017 the Claimant emailed Bruce MacFarlane in response to this response effectively giving further detail around his safety concerns.

30. It may be that there had been some initial misunderstanding on the part of Mr Fernandez, who we understand had not worked in the tyre industry before. Nonetheless, the Claimant's concerns were again gratefully received and resulted in a full safety and training review the next month.

31. No action was taken against the individual concerned as he had flagged a safety issue and it was a unique circumstance given he was working for the founder of the business and, when asked, Mr Clarke had not followed up to suggest that he thought disciplinary action was appropriate.

32. It seemed to us, from the evidence of Mr Fernandez, that whenever genuine Health & Safety issues were raised by the Claimant they were gratefully received. He fully understood that, for a business such as this, safety was paramount.

33. The Claimant emailed Mr Fernandez on 20 August 2017 attaching a list of issues to be discussed as they had agreed to have a meeting. Those issues were primarily in relation to business performance and operations but also included certain shareholder and employee issues.

34. The meeting between the Claimant and Mr Fernandez took place on 22 August and we heard that it was a lengthy and positive meeting.

35. At that stage Mr Fernandez was unaware of the Claimant's specific circumstances. He did not know that the Claimant was still being treated as an employee. This, perhaps, further suggests that the Respondent did not require any strategic advice from the Claimant and his ongoing relationship with the company was little more than an arrangement for the purposes of tax and the settlement agreement. As a result it hadn't been

deemed necessary to inform Mr Fernandez about the Claimant's circumstances.

36. Nonetheless, at the August meeting, amongst many other issues, it was suggested that further disclosures were made. It is not entirely clear what the precise contents of the meeting were but, ultimately, the Claimant followed it up with a very lengthy dossier of his issues that ran to over forty pages with enclosures.

37. Within that dossier there were certain protected disclosures as alleged and indeed an alleged protected act. The evidence of Mr Fernandez was that he didn't actually read the dossier which, at first, sounded surprising.

38. There was a further meeting between the Claimant and Mr Fernandez in September 2017.

39. It appears that Mr Fernandez established that the Claimant was treated as an employee and the nature of the arrangement. Specifically, that the claimant was to provide one day's work per month for £120,000 per annum giving strategic advice.

40. Mr Fernandez swiftly formed the view that, with the company remaining in very difficult financial circumstances, such a role was unlikely to be sustainable. He was unaware of the Claimant having been called on to provide any strategic advice and it was clearly a very significant sum of money for which the Company did not seem to be getting much in return. That is not surprising given the origin of the arrangement.

41. Having established this Mr Fernandez emailed the Claimant to inform him that it may be necessary to put his role at risk of redundancy. At that stage, however, he was looking to find a way to keep the Claimant on. He suggested that, in conjunction with the Board, he was contemplating the potential for a role of Franchise Advisor to look at the possibility of opportunities in Europe to franchise the Respondent's business.

42. It was stated in that email that, in order to progress this possibility, the Respondent would require a legally binding agreement with the Claimant to resolve any outstanding threats of litigation. In terms of what that may have meant, the parties seemingly agreed that the principal threat of litigation was that of the Claimant, as shareholder, complaining about alleged breaches of the Companies Act and/or the Articles of Association of the Company.

43. On 6 November 2017, the Claimant emailed the Board of the Respondent to chase a response to some of his earlier safety concerns and also to raise a further issue about a failed jack that he had again discovered on social media.

44. Again, it appears, that this email was gratefully received by Mr Fernandez and indeed a detailed response to the earlier safety concerns was provided the same day. That appeared to further confirm that the issues had been taken seriously and various changes had been

implemented in September, albeit it appears that the Claimant had not been informed of this at the time.

45. On 19 November 2017, the Claimant raised a threat of litigation over the return of his personal property and generally complaining in relation to his access to the office and office systems. He said he had been denied this for around fourteen months.

46. On 21 November 2017, Mr Fernandez emailed the Claimant answering several points that had been raised in respect of his employment and to state that he considered the matters raised to be closed.

47. On 23 November 2017, the Claimant turned up at the Respondent's office uninvited. Mr Fernandez met with him to discuss access to the office and certain documents. The claimant covertly recorded that meeting.

48. Mr Fernandez also raised the potential redundancy situation. The Claimant acknowledged in that meeting that the potential for a franchise role was "a tall order" and suggested that perhaps the vacant marketing role might have been more suitable for him, although he had not raised this before.

49. Unaware he was being recorded, Mr Fernandez expressed an initial view on the Claimant's suitability for that role. He felt that the claimant would not be able to demonstrate the skills and experience that the Respondent had been seeking for some months. We heard that the Respondent was particularly seeking up-to-date experience in digital marketing to take the company to the next level.

50. At some point prior to 5 December 2017, it appears that the Respondent appointed Deborah Cuddy to provide independent HR advice for the process they were about to instigate in relation to the potential redundancy of the Claimant.

51. It appears that the first emails Mr Fernandez sent to her included the Claimant's dossier from August and another email of his complaints and concerns. The evidence of Mr Fernandez was that this was merely as background. We note that those documents were not initially disclosed.

52. The Claimant suggested that these emails suggested that part of the reason for his potential redundancy was that he had raised these issues and the concerns included, albeit in a relatively minor part, certain protected disclosures.

53. As stated the Respondent's evidence was that this was merely background. We would accept that it is good practice in circumstances such as this to provide an HR advisor with such background information. As a result it doesn't necessarily prove any causal link between any disclosures therein and the subsequent treatment.

54. On 5 December 2017, Mr Fernandez emailed the Claimant with a letter formally putting his role at risk of redundancy.

55. On 14 December 2017, the Claimant attended the first consultation meeting. These meetings were held at the offices of the Respondent's lawyers. They felt that this may be a more neutral and independent location although the Claimant did not agree.

56. It appears that, at this stage, the franchise role was still a possibility, but, as mentioned, the Claimant seemingly felt the marketing vacancy may have been more suitable.

57. On 19 December 2017, Deborah Cuddy emailed the Claimant with the Respondent's current vacancy list and asked for expressions of interest by 22 December. That was a very short timescale that was ultimately extended.

58. There was also a board meeting in December, albeit those minutes were, again, not initially disclosed. They appeared to show that the Respondent was, at that stage, looking for someone to be ready to hear the Claimant's appeal if he was ultimately made redundant and, indeed, did appeal. It was suggested that this may have indicated a level of prejudgment on the part of the Respondent.

59. On 2 January 2018, Deborah Cuddy emailed the Claimant with an updated vacancy list and gave a deadline of 3 January for applying for the Head of Marketing role.

60. On 3 January 2018, the Claimant expressed interest in that role and asked for help in obtaining his CV from the work systems. That was seemingly not provided and there was some evidence to suggest that Mr Fernandez felt that the Claimant not providing a CV at that stage may have provided an excuse for not taking his application further.

61. In any event, the Claimant then worked during the afternoon and early evening to prepare a new CV and sent it in that evening.

62. On 4 January 2018 the Claimant attended a second consultation meeting. By this stage it appeared clear that the franchise role could not be created due to the Respondent's finances and it was not something that the investors would support.

63. It was suggested that the Claimant would be put forward for the marketing role. Ultimately the meeting became quite heated and the Claimant left.

64. Again we reviewed emails that were disclosed late. It appears that Deborah Cuddy suggested to Mr Fernandez, following that meeting, that they had agreed that Mr Fernandez was going to redact the Claimant's CV to get a view from the recruiter as to whether he would have put the Claimant forward for interview. She went on to say that this would become the basis for refusing an interview and that she felt that this would satisfy a Tribunal that they had properly considered the Claimant for the role. Again it was suggested that this indicated a level of prejudgment.

65. Ms Cuddy went on to say that as soon as the Respondent could get this information, they could close down the recruitment process.

66. Mr Fernandez did send the claimant's CV to the recruiter asking for an independent view, albeit he had redacted the Claimant's experience from his time at the Respondent to, it was said, preserve his confidentiality. Of course this meant that the last seven years, which would have included significant marketing experience and indeed some digital marketing experience, were omitted.

67. Whilst we can understand why Mr Fernandez may have wanted to redact the CV to keep the Claimant's identity anonymous, it did render the exercise somewhat meaningless.

68. It appears us that the Respondent and Mr Fernandez did not fully understand the Claimant's marketing experience. It also appeared that, whilst the Respondent suggested that they had engaged in some sort of recruitment freeze while the consultation was ongoing with the Claimant, this was not necessarily the case.

69. We saw evidence of a couple of applications from December 2017 that ultimately led to an appointment decision of an external candidate in January 2018. That was a Mr Eden whose CV disclosed what appeared to be significant experience of digital marketing at a senior level.

70. The Claimant provided written submissions as part of the consultation process on 16 January 2018 and he indicated a willingness to undertake any of the Respondent's vacant roles which went right down to vacancies for tyre-fitters.

71. His submissions were considered and a fairly detailed response given about why the Respondent did not believe any of those other vacancies were suitable.

72. As a result, and having agreed to deal with the last aspect of the consultation process in writing, the Claimant was given notice of dismissal on 23 February 2018.

73. He appealed that decision and the appeal took place on 22 March 2018.

74. The dismissal was upheld on the 29 March 2018.

75. Having been placed on garden leave the Claimant's effective date of termination was 26 May 2018.

76. He issued proceedings shortly thereafter, unsuccessfully claiming interim relief.

77. We only heard oral evidence from the Claimant and Mr Fernandez. We had to base our knowledge and understanding of the decisions of the board on the evidence of Mr Fernandez, including from a time when he

was not involved with the company, and the documents that were placed before us.

78. In relation to the documentation, it was clear that a number of material documents were not disclosed until the early stages of the Hearing before us. Mr Fernandez's evidence was that he had provided all documents to his solicitor who was present and did not recuse himself.

79. It seems to us clear that at least some of the documents that ultimately came before us had been provided to the solicitors. They had made reference in some correspondence to the documents adding nothing which suggests that they must have been reviewed. Some of those documents were clearly relevant and should have been disclosed. That is potentially a serious matter and we are mindful of the possibility of drawing adverse inferences from this.

The issues and the law

80. Those are the outline facts as we have found them.

81. The issues in this case had been agreed between the parties and are annexed to this judgment, as is the relevant law.

82. The issues were significantly narrowed before us.

83. In short, the Claimant was claiming unfair dismissal under ordinary principles and also automatic unfair dismissal for having made protected disclosures i.e he was contending that the principal or sole reason for his dismissal was those disclosures.

84. A number of disclosures were identified and the Claimant was also alleging detriments as a result of these disclosures.

85. In addition he was claiming victimisation on the basis that a couple of those disclosures were also protected acts under the Equality Act 2010 and it was suggested that the same detriments flowed therefrom also.

86. The parties were largely in agreement on the legal issues and the manner in which we should approach the issues before us.

87. In short, regarding the whistleblowing detriment claims, there must be a material link between any detriment and the protected disclosures and it is for the Respondent to show the reason for the treatment in those circumstances.

88. Regarding the dismissal, the disclosures must be the sole or principal reason for the dismissal.

89. In relation to the victimisation complaints the Claimant must make out a case from which we could conclude that the detriments, including dismissal, flowed from the protected acts before the burden would shift to the Respondent to show that the protected act played no part whatsoever in the treatment.

90. The unfair dismissal complaint raises fairly well established principles about the matters which we should consider including whether there was a genuine redundancy situation, an appropriate pool and a fair selection process. In addition, whether the employee was given fair warning and a meaningful consultation process and also whether there was appropriate consideration of alternative employment. The band of reasonable responses would apply to our considerations in these matters.

Decision

91. This is an unusual case resulting in the dismissal of the founder of the Respondent's business.

92. The Respondent had initially sought to suggest that the settlement agreement had effectively compromised future claims. Whilst that contention was unsuccessful we cannot ignore the fact that the parties had clearly agreed that the Claimant would step down from any active day to day management role. Moreover, it was clearly contemplated that his role as a strategic advisor would not continue indefinitely as the Claimant rightly acknowledged.

93. The Respondent acknowledged that all of the alleged disclosures potentially amounted to protected disclosures including those made primarily in the Claimant's own interests. That said, there was some dispute about whether all of the alleged disclosures at 6.6 in the list of issues were made orally and it was suggested that nobody, including Mr Fernandez, had actually read and immediately digested the follow up dossier to those August disclosures.

94. In relation to the first two disclosures from April 2017, we are satisfied on the contemporaneous documents that the Respondent welcomed the disclosures and acknowledged that action was required to protect their brand and indeed protect them against potential legal claims.

95. The respondent seemingly took appropriate action by dismissing both employees involved. Whilst there was a suggestion that one was subsequently re-employed we have no further details of that and it doesn't change our view that the Respondent was grateful for the Claimant raising this issue as it was essential for them to protect their business and to act on such matters.

96. The Claimant suggested that the reference in the contemporaneous email to "disruptive investors" referred to him and these disclosures. There was no explanation from the Respondent regarding this reference, but it seems to us that it was not necessarily a reference to the Claimant as it was in the plural and he was a founder shareholder as opposed to an investor.

97. In any event, it must have referenced a completely separate board discussion, given that the respondent was clearly grateful, and understandably so, for the Claimant having raised the protected disclosure matters.

98. As a result, it seems to us that if it did reference the Claimant it must have been in relation to something other than the disclosures. Therefore, if the reference was to the Claimant, it could only further confirm that there was a serious breakdown in relationships between him and the board which pre-dated any alleged disclosures.

99. Furthermore, in relation to those disclosures, we accept that Mr Fernandez was unaware of them as he was only a Consultant in the business at the time. The first two disclosures, therefore, can have played no material part in his subsequent considerations.

100. The third disclosure on 27 July 2017 came in fairly lengthy correspondence that raised various operational and financial issues that were not protected disclosures, as well as the safety information in relation to an employee's repair of the Claimant's car.

101. Further information in relation to this issue was provided in the follow-up disclosure of the 13 August.

102. We accept the contemporaneous email evidence and indeed the oral evidence of Mr Fernandez that he was grateful for this disclosure and that he would take appropriate action. We heard that he subsequently reviewed all safety and training procedures and made appropriate changes. That appears to have happened by the September albeit the Claimant was not informed of this until November.

103. We accept that a focus on safety in this industry is essential and it would have been very bad business not to respond as the Respondent did and indeed not to be grateful for these matters being raised.

104. We also accept that no action was taken against the individual employee in this case because of the unique circumstances of him working on the founder's car. This would inevitably have caused certain difficulties for the individual. A safety issue had been flagged and the Claimant did not suggest that he felt that the individual should be disciplined, when asked.

105. It is possible that, due to Mr Fernandez not having the same experience as the Claimant in the tyre industry, he may have misunderstood some of the issues that the Claimant was raising. However, that doesn't alter our conclusion that this disclosure was welcomed and so, again, provided no reason for the Claimant to be subjected to any subsequent detriments.

106. Similar considerations also apply to any subsequent Health & Safety disclosures.

107. The Claimant met Mr Fernandez on 22 August 2017. He described that meeting as a positive one. It appears that he wanted greater interaction with the business prior to this in his "strategy" role, so he was grateful for this opportunity.

108. The fact that the Claimant had had no previous interactions seemingly confirms, from the Respondent's perspective at least, that the strategy role was little more than a means of preserving the Claimant's employment for tax purposes.

109. The Claimant raised numerous issues in the August meeting. The vast majority of these were financial or operational and hence they were not protected disclosures.

110. He also raised some issues that had previously been resolved in the settlement agreement but, in addition, he seemingly raised certain shareholder issues that included some alleged breaches of the Companies Act and/or the Respondent's Articles of Association and so they were capable of amounting to protected disclosures.

111. There was an accompanying threat of litigation in the Claimant's personal capacity as a shareholder in relation to these issues.

112. In his dossier the Claimant also repeated allegations that had been made prior to the settlement agreement about equal pay and sex discrimination. In relation to these matters we accept the evidence of Mr Fernandez that, if they were raised, he didn't register them at the time.

113. In addition, we accept that Mr Fernandez didn't read the dossier or at least not in sufficient detail to have registered these matters as an issue.

114. There was no suggestion that anyone else, other than perhaps Ms. Cuddy months later, had read the dossier so it seems that the equal pay and/or discrimination issue can also have played no part in the Respondent's subsequent actions. Any similar disclosure, prior to the settlement agreement, that may have been made to the board or others, was not relied on before us as protected and was only mentioned in the context of background information.

115. As a result, it seems likely that the only disclosures that were potentially operative were those in relation to the shareholder issues that were made in August 2017. We acknowledge that, in relation to the detriment claims, it is for the respondent to show the reason for the Claimant's treatment, but it is helpful to have identified which alleged disclosures they were aware of and which were welcomed.

116. Mr Fernandez only discovered that the Claimant was an employee after the August meeting. It is not surprising, given the nature of the arrangement with the Claimant, that Mr Fernandez swiftly formed the view that the strategy role was likely to be unsustainable. The Respondent was almost constantly in difficult financial circumstances and looking for new funding to be able to stay in business. Moreover, the strategic advice hadn't actually been utilised even though the Claimant was willing to play a more active role.

117. At that stage Mr Fernandez was looking for a way to retain the Claimant, albeit in a sustainable and justifiable role. He comes up with the possibility of creating a role of Franchise Advisor to support international

expansion. The fact that he was even contemplating creating a role for the Claimant suggests the opposite of a detriment and certainly does not indicate any negative disposition towards the Claimant as a result of his disclosures or otherwise.

118. The possible role was raised with the Claimant and the board. It was not a role which would have returned the Claimant to the board or to any executive day-to-day operational management. That was unsurprising given that the claimant stepping down from such responsibilities had already been required and settled.

119. Consideration of the role came with a condition of the Claimant waiving his legal claims. It was unclear which claims were being referenced. We saw that there were at least some threats of litigation in relation to matters unrelated to the disclosures, such as the return of the Claimant's property. It seems likely, however, that at least one of the main issues was the potential shareholder claim.

120. It was conceded that placing such a condition on a possible role was capable of amounting to a detriment even though, ultimately, the role was not created. Given the financial state of the company that decision was not in dispute before us.

121. It seems to us that the condition cannot be viewed in isolation. The respondent was considering creating a role for the Claimant which was beyond their obligations. In effect they were contemplating treating him better than was required. Placing a condition on that preferential treatment still left the Claimant in an improved position than one where the creation of a role was not contemplated. Viewed in that way a detriment may not have arisen.

122. In any event, an honest and reasonable attempt to settle threatened litigation cannot, in our view, amount to a detriment. To conclude otherwise would mean that any settlement offers that involved waiving rights could give rise to detriment claims. We accept the Respondent's case that the offer to contemplate the creation of a role was an honest and reasonable attempt to resolve the Claimant's threats of litigation. This was effectively confirmed by the fact that when considering pre-existing alternative roles no such condition was placed on them.

123. We also accept that it was the threat of litigation in a personal capacity (and, indeed, the manner of disclosures and the numerous other issues that were which were not protected) that caused the condition on the offer. As a result it was not the public interest disclosure itself. We have already explained why we accept that the other disclosures played no part in the Respondent's actions.

124. That said, we would acknowledge that it is difficult to sever the Claimant's threatened litigation from the public interest element of the disclosure, particularly when it was conceded that the disclosures were, at least in part, made in the public interest.

125. Even if we were wrong on detriment and causation in relation to this issue, on its own it was conceded on the part of the Claimant that this particular detriment claim was presented considerably out of time and it would have been reasonably practicable for him to issue sooner. As a result, this issue only comes into play if it was part of a continuing series of acts on the part of the Respondent continuing through the redundancy consultation process up to and including the Claimant's dismissal.

126. The second alleged detriment was the threat of redundancy. We are satisfied that the Respondent has demonstrated that this decision was entirely due to the unsustainability of the advisor role. A £120,000 per annum salary for a business of the size of this Respondent that was in significant financial difficulties in exchange for advice one day per month, advice that had never actually been called on, was clearly unsustainable.

127. It was clear to us that the potential for the redundancy of the Claimant's role was inevitably considered by Mr Fernandez almost as soon as he was aware of it. Indeed, it seems likely to us that it was always the intention of the board when the settlement agreement was entered into, given that the role was little more than a sham.

128. We do not accept that any disclosures played any part in that decision, let alone any material part and they made no difference to the outcome whatsoever.

129. The Claimant's third alleged detriment was that he was being ostracized, removed from the workplace and denied access to the resources and documents that were there.

130. However, from the Claimant's own email and complaint in November 2017, that had been the case since the time of the settlement agreement. If anything the situation had improved as Mr Fernandez had met the Claimant and was communicating with him. He also agreed to put in place certain access arrangements, albeit these were ultimately unsuccessful.

131. In those circumstances, there was no detriment arising after the disclosures, nor could any alleged detriment have been caused by such disclosures. It merely was a continued state of affairs put in place because of the pre-existing breakdown of the Claimant's relationship with the board.

132. We would accept that it is not uncommon for employers consulting about redundancy at senior executive level to require employees to remain away from work and only have certain supervised access to other employees and company systems and documents for obvious reasons. We further accept that it was for these reasons that Mr Fernandez maintained restrictions on the Claimant's access and the Claimant's disclosures played no part in this decision.

133. The main issue before us, acknowledged by both parties, was in relation to alternative employment.

134. We note that the Respondent did not start from a position of removing the Claimant. Rather, they were trying to find a role for him and that included going further than they were legally obliged to do by considering creating the role of franchise advisor. Ultimately, given the financial state of the company, the investment required to look into expansion into Europe was understandably considered not to be viable. That was not in material dispute before us.

135. Regarding the marketing role, Mr Fernandez's initial view was that the Claimant did not have sufficient recent qualifications and experience to be able to take the company to the next level in digital marketing, although it is equally clear that he was not fully informed about the Claimant's skills and abilities in this area. Nonetheless, that was his initial reaction and we accept that it was genuine.

136. It seems to us that the process thereafter in relation to the marketing role suggested prejudgment on the part of the Respondent. We also suspect that the Respondent was seeking to hide this from us and the Claimant. That said, this was unnecessary in our view as, had the Respondent been entirely upfront with the Claimant, it would have resulted in the same outcome.

137. Ultimately, we are not convinced that there is any adverse inference to be drawn from the Respondent's failures, including the disclosure omissions, in and around this issue.

138. It seems clear to us from the settlement agreement and subsequent documents, that the board would not entertain an executive role for the Claimant. It was confirmed by the settlement agreement that he had been required to not only stand down as chief executive but also as director and to cease all day-to-day executive activities. That must have been down to some prior breakdown of relationship with the board and the Claimant, at least partially, accepted this. The respondent's evidence was that the relationship continued to deteriorate for reasons unconnected to any alleged disclosures.

139. That was also the initial and genuine view of Mr Fernandez when the Claimant was discussing the marketing role with him. He said that he thought it unlikely that the board would approve him returning to executive duties but he would be prepared to put the Claimant's name forward.

140. That suggests, as did numerous other examples, such as the short timescale for the application, the apparent desire not to interview the Claimant and some of the emails between Ms. Cuddy and Mr Fernandez, that the process in relation to the marketing role was a sham.

141. Nonetheless, we accept the evidence of Mr Fernandez that he genuinely did not believe the Claimant was suitable for the role and, in any event, that the breakdown in his relationship with the board meant that it was impossible. In fact, we consider that it was abundantly obvious that the Claimant would never have been appointed back to an executive day-to-day role and he must have known this.

142. As a result, we accept that the disclosures, and specifically the disclosures in relation to the shareholder issues, played no part in the Respondent's decision. Moreover, given that the Respondent had been seeking to place a condition of waiving those claims in relation to the franchise role, if they were to have considered the Claimant potentially suitable for the marketing role, the same condition could have been applied, but it was not. The reason, it seems to us, was because there was no prospect of the Claimant being successful and his disclosures were irrelevant to that conclusion.

143. Nothing since the settlement agreement showed any improvement in the relationship between the Claimant and the board, quite the contrary. The Claimant remained unhappy about stepping down and continued to want involvement in operational, financial and executive matters.

144. It was the Respondent's genuine belief that the Claimant was not suitable for the marketing role. It was a prior breakdown in relationships that led to him being removed from executive roles and nothing that happened after the settlement agreement had any material influence on the decision not to reverse that state of affairs.

145. In any event, even if the Respondent had conducted a fairer process, and fully understood the Claimant's abilities, it was clear that the Respondent was looking for something more than the Claimant had to offer in terms of up-to-date digital marketing experience and taking the business to the next level.

146. They ultimately appointed someone who seemed to meet those requirements in a way that the Claimant could not.

147. As a result, the unrealistic application and the sham process that followed ultimately made no difference to the outcome and it would not, it seems to us, have been unreasonable for the Respondent to have simply been upfront about the real reasons for rejecting the Claimant. The fact that they sought to conceal the sham could have caused us to draw adverse inferences but, for the reasons given, we do not.

148. Regarding the other roles, the Respondent appears to have based some of their reasons for rejection on questionable grounds. Again, the email from Ms. Cuddy appeared to suggest some prejudgment on this issue.

149. The fact that a role may not have met the legal definition of suitable alternative employment for redundancy purposes, does not mean that it is necessarily fair and reasonable for a Respondent not to offer lower level roles. For example, if there are grounds for believing the employee may be capable of carrying them out and indeed willing to step down.

150. It may well be that the Claimant, wanting to remain involved with the company that he had founded and also to retain a potentially valuable entitlement to entrepreneur's relief, may have accepted a much lower role than ordinarily we might have found credible.

151. It seems to us, contrary to some of the explanations given by the Respondent, that the Claimant could probably have done most of the roles that were vacant at the relevant time. However we accept the evidence of Mr Fernandez that it would have been unworkable for the founder, shareholder and former chief executive to be managed at a lower level in the business and that was the real reason for the refusal.

152. Whilst we are aware that this can sometimes happen and be successful, in our experience this would be highly unlikely and so it was not unreasonable to refuse on those grounds. That is even before returning to the pre-existing breakdown in the Claimant's relationship with the board who only seemed willing to contemplate a role away from all day-to-day operations even at a lower level.

153. That breakdown was only confirmed by the Claimant's ongoing resentment at having stepped down and, indeed, his attempts to remain involved in management. None of that related to any of the disclosures and it was equally understandable that the Respondent wanted to move on without such distractions.

154. Regarding the victimisation, we have already determined that there was no evidence that the protected acts played any part in the Respondent's actions. The first from April was both welcomed and unknown to Mr Fernandez. The second was not registered by Mr Fernandez or anyone else. They cannot have led to any of the alleged detriments and the Claimant has failed to establish facts from which we could conclude otherwise.

155. In relation to the unfair dismissal, we have already identified that we are satisfied that the strategic advisor role was unsustainable. Indeed, it was rightly accepted on behalf of the Claimant that it would not have been sustainable for much longer and that £120,000 pa for one day a month's work was largely just a mechanism in relation to the previous settlement. The company's finances could not sustain such a role and there was no strategic advice sought.

156. It is clear, therefore, that role was potentially redundant and that was the genuine and real reason for the commencement of the redundancy process.

157. The Claimant's role was unique and in a pool of one. It was fanciful to suggest that the Claimant should, for example, have been pooled with the new chief executive who had been appointed to replace him after an agreement for him to step down from all executive management. The fact that the Claimant even suggested this at one stage supports our view that his approach was, at times, unhelpful.

158. The fact that there was an initial attempt to manufacture a role for the Claimant, albeit away from day to day operations, is to the Respondent's credit, notwithstanding that it subsequently turned out to be unsustainable.

159. The Claimant was given fair warning of possible redundancy and there was a consultation process and an appeal followed in which he was

allowed to be accompanied and given an opportunity to make representations.

160. That said, we have already found that the Respondent's response in relation to the alternative vacancies was a sham and that was enough to render the process unfair.

161. The Respondent seemed initially unwilling to directly address the real reasons for refusing the alternative vacancies especially the breakdown in the relationship with the board that pre-existed and continued unabated. That breakdown had resulted in an agreement for the Claimant to step down from all day-to-day executive activities and it seems to us that it would have been bizarre if he was subsequently reinstated to such a role as a result of the redundancy process when nothing had improved.

162. The Respondent also failed to fully and directly address the difficulties in managing the Claimant in a lower level role, albeit we accept that this was the real reason for their refusal to appoint him to such a role. That was within the band of reasonable responses.

163. In a fair process, the Claimant should have been given an opportunity to respond to those issues and so, as stated, those failings render the dismissal unfair.

164. Nonetheless, it is clear from our findings that we accept there was a serious breakdown in the relationship with the board and that there were genuine and reasonable reasons for the refusal to reappoint him to executive activities or indeed to a lower level role. As such, the unfairness would have made no difference to the outcome.

165. Finally, we accept that the principal reason for dismissal was redundancy. To the extent that there was a secondary reason it was a breakdown in relationships that existed prior to the settlement agreement and continued thereafter. The protected disclosures played no material part in any of that, let alone being the principal reason for dismissal.

166. Ultimately, the breakdown in the relationships between the board and the Claimant resulted in the settlement agreement that he step away from the board and executive and day to day duties.

167. His employment under an arrangement that was largely for tax purposes was always going to end due to the finances of the company and the lack of need for sustained strategic advice. In fact, it was clear that the role was unsustainable beyond the agreed initial term.

168. We cannot conceive of any circumstance in which the Claimant was likely to have been allowed to return to a board or executive role or even a lower level day to day role.

169. The outcomes would be have been exactly the same even if there had been no disclosures or protected acts. As a result, all of the Claimant's other claims must fail.

170. We have considerable sympathy with the Claimant who worked incredibly hard to build a business. Letting go of that was very difficult. Whilst it is understandable that he wanted to remain involved, he had agreed to step down following a breakdown in relationships and that is what ultimately started the chain of events that resulted in his dismissal from the company.

171. The settlement agreement attempted to provide for such a subsequent dismissal. Whilst that attempt was unsuccessful a future dismissal was clearly in the contemplation of the parties at that stage before any disclosures or protected acts. No other outcome was a realistic possibility.

Employment Judge Broughton

25 February 2019