

THE INDUSTRIAL TRIBUNALS

CASE REF: 1608/16

CLAIMANT: Dr Edward Cooke

RESPONDENT: Woodvale and Shankill Community Housing Association

DECISION

The unanimous decision of the tribunal is that the claimant's claims of constructive dismissal and detriment on grounds of having made protected disclosures are dismissed as set out in paragraph 7 of this decision.

Constitution of Tribunal:

Employment Judge: Employment Judge Crothers

Members: Mr R Hanna
Ms E Gilmartin

Appearances:

The claimant was present and represented himself.

The respondent was represented by Mr M Potter, Barrister-at-Law, instructed by BLM Solicitors.

THE CLAIM

1. (1) In his claim presented to the tribunal on 4 July 2016, the claimant claimed constructive dismissal against the respondent for allegedly making it impossible for him to continue in his contract of employment because of the respondent's breaches of health and safety (CDM 2007) Regulations),

procurement breaches, DSD audit (2014 recommendation) breaches, charity commission breaches, and various alleged contractual breaches, which he further detailed at paragraph 8 of his claim form.

- (2) The respondent denied the claimant's allegations in their entirety.
- (3) At a Pre-Hearing Review held on 3 November 2016, the claimant was given leave to amend his claim to include a protected disclosure claim in the following respects:-
 - “(i) constructive dismissal on grounds of having made a protected disclosure; and
 - (ii) detriment on grounds of having made a disclosure in the respects set out at paragraph 8 above”.
- (4) Paragraph 8 in the Pre-Hearing Review Decision helpfully summarises the scope of the claimant's protected disclosure claim as follows:-
 - (a) That he was subjected to detriment when he received a letter on 5 September 2015 from the respondent saying that his duties had been removed and he was effectively silenced following a period of his having raised concerns about health and safety and other breaches from the outset of his employment.
 - (b) That from early on in his contract (that is from July 2015) the claimant raised issues about health and safety and, as a consequence, was ignored; was not consulted in areas that he had responsibility for; and, in particular, there was a diminution of his work between January and June 2016 resulting in him being under-utilised and effectively “twiddling his thumbs” instead of working.
 - (c) That he resigned in response to a last straw event which occurred in June 2016. The claimant confirmed at the PHR what he had said at the CMD on 5 October 2016 in this regard namely:
 - (i) That he had raised his issues on a continuing basis and this culminated in his raising concerns and objections in June 2016 in relation to the work being given to the subsidiary company and its intention to bring in the ex-chairman as a foreman.
 - (ii) The claimant became aware two to three days before he resigned that the ex-chairman was proceeding to do that work and he therefore realised that his concerns and objections had effectively been ignored.
 - (iii) The claimant feared damage to his reputation and the last straw was the fact that they progressed with this contractor against his advice and that he was being ignored.
 - (iv) The claimant connects his resignation to the issues raised because it is his case that what the respondent was doing was

potentially unlawful as regards procurement processes and he had health and safety concerns particularly in relation to fire safety.

- (5) The claimant also made clear at the Pre-Hearing Review that he was relying on his 36 page resignation report (to include appendices) dated 26 June 2016 and on his resignation notice letter of 14 June 2016. The respondent made a fulsome reply to the claimant's resignation report in correspondence to him of 18 July 2016 and, at the substantive hearing, denied his protected disclosure allegations in their entirety and raised the issue that part of his claim in this regard was out-of-time. The respondent also denied that the claimant was constructively dismissed.

ISSUES

2. The following issues were agreed as follows:-

Legal Issues

- (1) Did the claimant suffer a detriment on grounds of having made protected disclosures?
- (2) Was any part of his claim out-of-time, and if so, should time be extended?
- (3) Was the claimant constructively dismissed?

FACTUAL ISSUES

- (1) Was the respondent guilty of any legal failures in respect of health and safety and other identified issues in respect of 79 Ballygomartin Road, Cambrai Street (Offices) and Rosebank Street, and any other identified property?
- (2) Was the claimant unlawfully excluded from the respondent's pension scheme?
- (3) Was there a breach of Charity Commission legislation in respect to 73 Kilcoole Gardens?
- (4) Were there legal failures in respect of the maintenance tender including the pilot and relevant health and safety issues?
- (5) Were there legal failures in respect of the Green Energy Scheme including procurement anomalies and conflicts of interest?
- (6) Why did the claimant resign?

SOURCES OF EVIDENCE

3. The tribunal heard evidence from the claimant and, on the respondent's behalf, from Michael McDowell of Toner McDowell Chartered Accountants (who provided management services to the respondent and acted, on occasions, as its

Chief Executive Officer), Sarah Swain, Operations Director, Jocelyn Dunn, Business Director, Chris Campbell, Chairman of the Respondents' Board, Edward Quigg of Quigg Golden (an expert retained by the respondent to deal mainly with procurement issues). The tribunal also received an agreed bundle of documents together with additional documents in the course of the hearing.

FINDINGS OF FACT

4. Having considered the evidence insofar as same related to the issues before it, the tribunal made the following findings of fact, on the balance of probabilities:-

(i) The claimant, who has worked for over 35 years in the Northern Ireland Housing Association Sector, and had previously been a Board Member with the respondent, was employed by the respondent on a two year fixed term contract in the position of Building Surveyor from 1 June 2015 until his resignation on 14 June 2016. He presented his claim to the tribunal on 4 July 2016.

(ii) In correspondence to the respondent dated 23 August 2015 enclosing a report entitled:-

“Senior Management Team

Clanmil Civil Action – 3 Streets Projects Workmanship/Design Defects”, the claimant describes himself as a “Building Surveyor” and adds the following qualifications at the end:-

“BA, BSc (arch), BSc (blg), LLb. (Law and Government)
PGD (Property Development), PGD (Administration and Law)
MSc (Environmental Management), MSc (Construction Management)
LLM (Corporate Governance and Public policy), LLM (Environmental law)
MA (Legislative Studies and Practice)
MRICS, MAPS.”

(iii) Although the claimant's job specification is broad, the tribunal accepts that on 4 September 2015, the respondent invited the claimant to concentrate on certain duties. At that stage the claimant had raised various health and safety concerns over houses, particularly in Rosebank Street and Cambrai Street as part of what was termed “The 3 Streets Project”. Sarah Swain's correspondence of 4 September 2015 articulates the respondent's position, in the context of ongoing civil litigation, as follows:-

“Edward

In response to your email from yesterday.

Firstly the Association is not ignoring the on-going issues within the three streets.

I can assure you the BoM and SMT have indeed took this matter very seriously. I had a conversation with you two weeks ago and informed you that three streets scheme was **subject to litigation**, you are also well aware that the Association employed Johnston Houston to carry out an independent survey at the scheme because I passed you this information.

I understand that you are frustrated and have issues with the delivery of the scheme (as are the SMT and BoM) however, the Association need to leave this in the hands of the legal team. If there are breaches in building regulations/CDM regulations I am sure that this will be uncovered through the legal process.

The Association recognised the serious issues within the three streets scheme and need for technical expertise hence the employment of a Building Surveyor.

For the avoidance of any doubt we expect you to concentrate on the following;

To progress the Disraeli/Cambrai St contract and complete any outstanding work schedules for the properties;

To progress 79 Ballygomartin Road as quickly as possible;

To prepare paperwork on the void properties at Cambrai and Rathlin Streets, with a view to having them demolished (with possibly submitting outline planning permission at the same time?)

Preparing drawings for the filing/DLO areas and estimated costs; and

Preparing works schedules for the next properties we need to include in the planned maintenance programme again with estimated costings.

I cannot stress enough how important it is for you to concentrate on the above.

If you need to speak to me about anything please feel free to do so.

Sarah”

- (iv) The tribunal was made aware that the respondent did not appear to have a designated officer for health and safety issues. Although the claimant involved himself in matters outside the framework of the foregoing correspondence from Sarah Swain, the tribunal does accept that he had genuine concerns over fire and safety issues, particularly relating to houses in Rosebank Street and Cambrai Street which he viewed as being unsafe and posing the risk of injury to tenants because of deficiencies in respect of the provision of stair rails and fire escapes. The tenants included elderly people. The tribunal accepts that the respondent did nevertheless investigate issues raised by the claimant with the Health and Safety

Executive and AECOM. The Chairman of the Respondents' Board, Sam Robinson, who the tribunal accepts resigned at the end of December 2015, had approached Belfast City Council regarding issues raised by the claimant. Correspondence to the claimant from Mr Hewitt of Belfast City Council dated 7 October 2016, (the claimant having resigned on 14 June 2016), states, in relation to the fire safety concerns in the refurbished houses in Rosebank Street and Cambrai Street area, Belfast (the "3 Streets Project") that:-

"With reference to your concerns I should firstly point out that while the specific requirements concerning fire safety which you mentioned, such as protected stairways, are indeed applicable to new build properties, the Building Regulations legislation and its associated fire safety guidance cannot be applied retrospectively to the existing properties. In enforcing the Building Regulations the Council can only operate within that legislative framework and cannot compel a property owner to bring an existing property up to the standards of the current Building Regulations".

Later in the same correspondence, in relation to the issue of the building completion certificates, (a number of which was shown to the tribunal during the hearing), Mr Hewitt states:-

"As stated the issue of a completion certificate only relates to the completion of the works to which that application relates, it should not be considered as meaning there is nothing that could be construed as a health and safety risk within the whole building".

- (v) In light of its finding that Sam Robinson resigned as Board Chairman at the end of December 2015, (and not, as incorrectly stated, 31 May 2016 in the respondent's report of the financial statements documentation for year ending 31 March 2016), the tribunal is satisfied that the claimant's subsequent concerns regarding a planned competitive tendering exercise for 51 houses being amended and his further concerns that a pilot scheme for four houses was to be undertaken by Sam Robinson, or a company owned by him, are in fact without any real foundation. The tribunal accepts that the respondent was embarking on a pilot scheme in relation to four houses as the responses to the tender for the 51 houses was not providing value for money. Sam Robinson, who had already resigned as Chairman, was not awarded the work. Instead, the respondent used a wholly owned subsidiary, WGS Property Enterprises Limited, ("the subsidiary") to carry out the work, using Sam Robinson on an ad-hoc basis to oversee the work as a Consultant/Foreman. He ceased this role in October 2016. The tribunal has no basis to doubt the factual accuracy of Mr Quigg's summary of the position in paragraph 2.31 of his Expert Report as follows:-

"(a) WSCHA awarded a contract to a wholly owned subsidiary to carry out works. It did not award a contract to an ex-chairperson or a company owned by him.

(b) As a result no procurement obligations arise.

- (c) The award for the 4 house pilot scheme was recommended by AECOM.
- (d) The award for the remaining 47 houses was only made after AECOM were asked to and did inspect the pilot scheme and report back.
- (e) There is no record of H&S or quality issues with WGS PE.”
- (vi) The claimant also raised concerns in relation to a contract for Green Energy RHI Boilers. At a board meeting of the respondent on 4 October 2015, a discussion paper set out options for installing three bio-mass boilers costing around £900,000.00. It was agreed that the respondent would move forward on the installation. In January 2016, an advertisement was placed for “expressions of interest for bio-mass, a three-sheltered schemes and PV systems for 300 general family need properties – supply and install companies only”, on the NIFHA website with a deadline of Friday 15 January 2016 at 12 noon. It appears that five companies responded to the advertisement. However, in early February 2016, the respondent was informed that the RHI scheme was closing in late January/early February 2016. As Jocelyn Dunn put it in her cross-examination, it was a case of “use it or lose it”. There was clearly insufficient time for a tender exercise to be conducted and completed and the respondent decided to appoint Green Energy Technology (GET). The claimant was concerned that this breached procurement legislation and involved a conflict of interest as Mr McDowell acted as the accountant for GET. However, GET had previously provided free advice to the respondent. Furthermore, as Mr Quigg explained in his expert evidence, Regulation 32c of the Public Contracts Regulations 2015 expressly provides for an exemption from the normal procurement procedures, in cases of extreme urgency such as the situation which presented itself to the respondent. In such a situation the time-limits for a tender could not be complied with. The tribunal therefore accepts that the respondent acted appropriately in appointing GET, about which it had previous knowledge. Moreover, the claimant did not cross-examine Mr McDowell on the green energy issue and focused mainly on the issues associated with the 3 Streets Project.
- (vii) The claimant also complained about his exclusion from a pension provision in his fixed term contract. The tribunal is satisfied, had the claimant remained with the respondent, that he would have been eligible to join a pension scheme in the Autumn of 2016. He was not entitled to any pension prior to that date.
- (viii) The claimant was unable to point to any specific regulation breached in relation to the Charity Commission Regulations. The DSD audit issue referred to at (xiv) below, appears to have been linked, at least in part, to the issues arising out of the subsidiary company issue, referred to previously.
- (ix) In relation to the property at 79 Ballygomartin Road, there is no doubt that the claimant was requested to work on issues relating to this property. The respondent denied that there were health and safety issues. The claimant did not provide evidence of the precise legal provisions which were allegedly

breached or how tenant safety was endangered. It also appears that health and safety files were kept in relation to all properties by the respondent.

- (x) The claimant, as part of his overall case, raised health and safety concerns about offices in Cambrai Street. He produced photographs to the tribunal in photocopy form which were insufficient to demonstrate his allegations regarding health and safety issues. These rented premises had been inspected by Belfast City Council Building Control Department and approved. However, the tribunal is mindful of the correspondence from Mr Hewitt of Belfast City Council already referred to, in response to the claimant's correspondence of 8 September 2016 to the Lord Mayor of Belfast and other members of the City Council to the effect that the issue of a completion certificate relates only to the completion of the works to which that application relates and should not be considered as meaning there is nothing that could be construed as a health and safety risk within the whole building. However, there is no satisfactory evidence to suggest to the tribunal that the existing number of fire exits was not appropriate for the number of persons using the offices in Cambrai Street.
- (xi) The claimant confirmed during the hearing that there were never any problems between the respondent's staff and himself, throughout his years of working for the respondent. He confirmed that everyone got on particularly well and indeed that there had been a long term history of getting on well with the respondent's staff. It is also common case that after tendering his resignation on 14 June 2016, the respondent requested the claimant on five or six occasions to stay in employment. It was evident that the claimant had been searching for new work in March 2016 and was contemplating resigning at that point. He did not raise a grievance in relation to the issues in the case, including the alleged removal by the respondent of certain of his contractual duties in September 2015. The respondent however merely invited the claimant to concentrate on the duties outlined in the correspondence of 4 September 2015. Moreover, the claimant was evidently not part of the strategy in relation to the pilot scheme involving Mr Robinson after he had resigned as Chairman at the end of December 2015. AECOM had found the pilot scheme successful and the respondent and its subsidiary then established a works team on a more permanent basis in contemplation of taking on more maintenance work. Workers had been employed on a temporary basis during the pilot scheme phase and there was a necessary transitional period between the ending of the pilot scheme and the development of a more permanent workforce to engage in the increased amount of maintenance work to be carried out by the subsidiary.
- (xii) The respondent contended in relation to the 3 Streets Project and the issues regarding the Cambrai Street Offices, that any claim regarding a protected disclosure and possible detriment was out-of-time as such matters had been raised in or about the Summer of 2015 up to September 2015.
- (xiii) In relation to the protected disclosures issue, the claimant maintained that he had made a "rolling series" of qualifying protected disclosures from July 2015 to the end of June 2016 whereas, in relation to the 3 Streets Project at the Cambrai Street Offices, the respondent maintained that although issues had been raised as previously referred to up to September 2015, they had not

reappeared until the claimant forwarded his extensive resignation report dated 26 June 2016.

(xiv) The claimant categorised the alleged protected disclosures as follows:-

| Date | Disclosures |
|------------------|--|
| June / July 2015 | H&S at 79 Ballygomartin Road |
| July / Aug 2015 | H&S at Cambrai Court |
| July 2015 | H&S in 3 storey re-lets |
| Aug / Oct 2015 | H&S to 12-22-24-28 Rosebank (Bray) St |
| 4 Sept 2015 | Reassigned duties – removed from Rosebank St project |
| Jan / June 2016 | H&S in the 4 house pilot project |
| 30 Jan 2016 | Charity Commission breaches at 73 Kilcoole Gdns |
| June 2016 | H&S in the 47 house project – WGS PE appointment |
| 26 June 2016 | Complete disclosure of all qualifying protected disclosures from July 2015 until June 2016 within 34 page resignation report to the WSCHA Board. |

The claimant alleged that he made protected disclosures to the DSD on 21 October 2015 and to the NIAO in a series of e-mails to Ms Dorrina Carville (and then to Mr O'Sullivan after Ms Carville's resignation). He further asserted that the disclosures to the NIAO about the alleged health and safety failings at the 3 Streets Project started on the 14 December 2016 (which should presumably read 2015) and ended on the 6 April 2016.

In his written submissions, the claimant also referenced certain pages in the agreed bundle of documents in relation to the above. All but a few of those alleged protected disclosures was made to the respondent. The exceptions were the Homes and Communities Agency, the Central Procurement Department of what is now, the Department for the Economy, the Department for Social Development, and the NI Audit Office.

(xv) It is clear to the tribunal that the respondent board lacked expertise in a number of areas covered by the claimant's broad job specification and that they relied on a number of outside sources, including consultants and legal advisers, particularly since the onset of civil litigation referred to in previous factual findings. On the other hand, the claimant was of the view that he could supply the lack of expertise in such areas. However, the reality was that the respondent invited the claimant to concentrate on the duties detailed in the email correspondence from Sarah Swain to the claimant dated 4 September 2015. This led to the claimant also contending that there was a diminution in his work between January and June 2016. However, during this period, he was not involved at a strategic level regarding the pilot scheme and the involvement of the subsidiary. It appears that it was his culminating concerns and objections in June 2016 in relation to the work being given to a subsidiary company and its intention to bring in the ex-

Chairman as a Foreman, combined with his allegation that the respondent proceeded with a subsidiary company as contractor against his advice which constituted, in his terms, the “last straw” and led to his resignation.

THE LAW

5. Protected Disclosures

- (i) The legislative provisions governing protected disclosures are contained in the Employment Rights (Northern Ireland) Order 1996 (“the 1996 Order”). Whistleblowing protection extends to “employees” and “workers” as defined in the 1996 Order.
- (ii) The following provisions are relevant:-

67A. Meaning of “protected disclosure”

In this Order a “protected disclosure” means a qualifying disclosure (as defined by Article 67B) which is made by a worker in accordance with any of Articles 67C to 67H.

Disclosures qualifying for protection

67B.—(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding sub-paragraphs has been, is being or is likely to be deliberately concealed.

Disclosure to prescribed person

67F.—(1) A qualifying disclosure is made in accordance with this Article if the worker—

- (a) makes the disclosure in good faith to a person prescribed by an order made by the Department for the purposes of this Article, and
 - (b) reasonably believes—
 - (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
 - (ii) that the information disclosed, and any allegation contained in it, are substantially true.
- (2) An order prescribing persons for the purposes of this Article may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each description, is or are prescribed.

Disclosure in other cases

67G.—(1) A qualifying disclosure is made in accordance with this Article if—

- (a) the worker makes the disclosure in good faith,
 - (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,
 - (c) he does not make the disclosure for purposes of personal gain,
 - (d) any of the conditions in paragraph (2) is met, and
 - (e) in all the circumstances of the case, it is reasonable for him to make the disclosure.
- (2) The conditions referred to in paragraph (1)(d) are—
- (a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with Article 67F,
 - (b) that, in a case where no person is prescribed for the purposes of Article 67F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or
 - (c) that the worker has previously made a disclosure of substantially the same information—

- (i) to his employer, or
- (ii) in accordance with Article 67F.

(3) In determining for the purposes of paragraph (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

- (a) the identity of the person to whom the disclosure is made,
- (b) the seriousness of the relevant failure,
- (c) whether the relevant failure is continuing or is likely to occur in the future,
- (d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,
- (e) in a case falling within paragraph (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with Article 67F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and
- (f) in a case falling within paragraph (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this Article a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in paragraph (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

Protected disclosures

70B.—(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(2) . . . this Article does not apply where—

- (a) the worker is an employee, and
- (b) the detriment in question amounts to dismissal (within the meaning of Part XI).

(3) For the purposes of this Article, and of Articles 71 and 72 so far as relating to this Article, “worker”, “worker’s contract”, “employment” and “employer” have the extended meaning given by Article 67K.

Complaints to industrial tribunals

71.(3) An industrial tribunal shall not consider a complaint under this Article unless it is presented—

- (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of paragraph (3)—

- (a) where an act extends over a period, the “date of the act” means the last day of that period, and
- (b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

Protected disclosure

134A. 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.

- (iii) Unfair dismissal includes constructive dismissal.
- (iv) Harvey on Industrial Relations and Employment Law deals with whistleblowing at Divisions C(III) and D(II).
- (v) The first matter to be considered is whether there has been a qualifying disclosure. If there has been such a disclosure the next thing to consider is whether it is a protected disclosure. A qualifying disclosure can become a protected disclosure depending who the disclosure is made to. The hurdle for protection is lowest in disclosures to the employer or a Solicitor in the course of obtaining legal advice. A second tier relating to regulatory disclosures has a higher hurdle. A third tier relating to wider disclosures has the highest hurdle of all. Furthermore, in this jurisdiction a protected disclosure may be deprived of protection if the employee lacks good faith.
- (vi) The maker of a qualifying disclosure must have a reasonable belief that the information tends to show a relevant failure in the case of a disclosure to an

employer. In the other two categories already referred to, the worker must have a reasonable belief that the information and any allegations are substantially true. According to the guide to the Public Interest Disclosure (Northern Ireland) Order 1998 (amended April 2014), the list includes the Comptroller and Auditor General for Northern Ireland (Audit Office), Department for Social Development, Health and Safety Executive for Northern Ireland, Information Commissioner, Northern Ireland District Councils, Local Government Auditors appointed by the [Department of Environment] from the Staff of the Northern Ireland Audit Office and the Charity Commission for Northern Ireland.

- (vii) The maker of a qualifying disclosure must reasonably believe that the disclosure meets the requirements. The greater the expertise of the maker of the disclosure the stricter is the criterion of reasonableness.
- (viii) Where there is a series of disclosures the requirement is that there was a reasonable belief in respect of each. It is insufficient for the claimant to show that he has believed in the general thrust of his or her complaints. Apart from the disclosure being made in good faith, the burden lies on the claimant to establish the relevant failure. In respect of health and safety matters there only needs to be a likelihood of endangerment.
- (ix) Harvey at D(II) provides useful guidance as follows:-

“[52] If it can be established that a worker has made a protected disclosure, as defined (see CIII (3) 4), it then becomes necessary to consider whether or not the worker has been subjected to an unlawful detriment as a result. When considering this question it is important that a tribunal should, in reaching and explaining its conclusions, set out separately the elements necessary to establish liability and consider them separately and in turn (see *Harrow London Borough v Knight [2003] IRLR 140, EAT*). This general approach was subject to more extensive guidance to tribunals dealing with these cases from Judge Serota in *Blackbay Ventures Ltd v Gahir [2014] IRLR 416, EAT*, which is worth setting out in full. Taking into account the amendments to this law in June 2013 (see CIII(9) he put it thus:

- a. *Each disclosure should be separately identified by reference to date and content.*
- b. *Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.*
- c. *The basis upon which each disclosure is said to be protected and qualifying should be addressed.*
- d. *Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some*

of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

- e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s43B(1) of ERA 1996, under the “old law” whether each disclosure was made in good faith; and under the “new” law introduced by s17 Enterprise and Regulatory Reform Act 2013 (ERRA), whether it was made in the public interest.*
- f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.*
- g. The Employment Tribunal under the “old law” should then determine whether or not the Claimant acted in good faith and under the “new” whether the disclosure was made in the public interest.”*

[52.01] Simplifying the above, it could be said that once a protected disclosure has been found to exist it needs to be shown that:

- the worker has been subjected to a detriment;
- the detriment arose from an act or deliberate failure to act by the employer, other worker or agent (as the case may be); and
- the act or omission was done on the ground that the worker had made a protected disclosure.”

(x) The legislation makes it clear at Article 67(B) of 1996 Order (supra) that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show, inter alia, 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 ...

(d) that the health or safety of any individual has been, is being or is likely to be endangered”.

The ordinary meaning of giving information is conveying facts (See **Cavendish Munro Professional Risks Management Team v Geduld [2010] ICR 325 (EAT)**). In the EAT decision in the case of **Kilraine v London Borough of Wandsworth [2016] IRLR 422**, Mr Justice Langstaff states at paragraph 29 of his judgement:-

“The dichotomy between “information” and “allegation” is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggests that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information”.

Therefore, a tribunal has to take care to ensure that it does not fall into the trap of thinking post **Cavendish Munroe v Geduld** (supra) that an alleged disclosure had to be either allegation or information, when reality and experience taught it may well be both.

Mere allegations, expressions of opinion, or raising of grievances or a statement of position may not qualify. There can be an admixture of fact and opinion. As noted in **Bowers** in **Whistleblowing The New Law (C.3 at paragraph 3.02)**.

“... the whistleblower may have a good hunch that something is wrong without having the means to prove it beyond doubt or even on the balance of probabilities ... The notion behind the legislation is that the employee should be encouraged to make known to a suitable person the basis of that hunch so that those with the ability and resources to investigate it can do so”.

(xi) A series of communications can collectively amount to a disclosure of information (**Shaw v Norbrook Laboratories (2014) ER 139**). A disclosure of information can also take place where the information is given to someone who already has that information.

(xii) The categories of relevant failure contained in Article 67B of the 1996 Order have to be considered insofar as relevant. Article 67B(1)(b) refers to the fact that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject. This can include a breach of any statutory

obligation, common law obligation, such as negligence, nuisance or defamation and administrative law requirements such as a duty to consult. There is no requirement that the obligation has to be of a particular level of seriousness. However the more trivial the alleged failure, the more likely an employer will argue lack of good faith. It can include breach of the contract of employment including the implied duty of trust and confidence. In **Parkins v Sodexho Ltd [2002] IRLR 109**, it was confirmed that this category was wide enough to cover obligations under the claimant's contract of employment. If the relevant failure is in connection with a breach of legal obligations, its scope is wide (see **Hibbins v Hester's Way Neighbourhood Project [2009] IRLR 198 EAT**). In that case, where the relevant failure did not need to be by the employer.

- (xiii) In relation to health and safety risks, no actual breach of health and safety legislation is required. This appears to be potentially a wide category. There is nothing to exclude trivial concerns being raised. However such trivial concerns might be relevant in ascertaining whether good faith is absent. If a trivial concern is raised, the tribunal can also look at whether the worker genuinely believed that there was a danger to health and safety and whether that belief was reasonable.

REASONABLE BELIEF

- (xiv) The principles involved in assessing the reasonable belief element can be summarised as follows:
- (1) The test involves both a subjective test of the worker's belief and an objective assessment of whether the belief could reasonably have been held (**Babula v Waltham Forest College [2007] EWCA Civ 174**) ("**Babula**").
 - (2) The worker can be wrong yet still hold a reasonable belief (**Darnton v The University of Surrey [2003] IRLR 133 EAT**) ("**Darnton**").
 - (3) The test of reasonable belief applies to all elements of the test of whether the information disclosed tends to show a relevant failure including whether the relevant criminal offence or legal obligation in fact exists (**Babula**).
 - (4) Reasonableness of the belief is to be tested having regard not only to what was set out in the disclosure but also to the basis for that information and any allegation made (**Darnton** and **Babula**).
 - (5) What is reasonable depends on all the circumstances assessed from the perspective of the worker at the time of making the disclosure and it is for the tribunal to assess this. This may include consideration of the circumstances in which the disclosure was made, to whom the disclosure was made, the context and extent to which the worker claims to have direct knowledge of the matters disclosed and a comparison with how

the worker would be expected to have behaved if he genuinely and reasonably believed in the truth of the matter disclosed and that they tended to show a relevant failure (**Darnton** and **others**).

- (6) The truth or falsity of the information disclosed and whether or not the relevant failure in fact occurred may be relevant when assessing reasonable belief. In other words it can be used as a tool to assess the reasonableness of the belief of the claimant at the relevant time (**Darnton**). It is therefore relevant to the tribunal to find out if the allegation turned out to be true as this may strengthen a claimant's claim that it was reasonable to make the allegation. If the allegation turns out to be false, it does not necessarily mean that the allegation was unreasonable based on the information and circumstances at the time the claimant made the disclosure.
- (7) The worker must exercise a judgement consistent with the evidence and resources available, including the expertise and seniority of the worker, their ability to investigate further, and whether it is appropriate in all the circumstances instead to refer the matter to someone else to investigate (**Darnton**).
- (8) The standard to be applied has to take into account that it is only necessary to have a reasonable belief that the information 'tends to show' the relevant failure, rather than that it positively establishes that failure (**Babula**). Note however that reasonable belief in this context relates to whether or not a disclosure is a qualifying disclosure. If a worker seeks protection for wider disclosure under Articles 67F to 67G, there is an additional requirement for a reasonable belief that the information disclosed and any allegation contained in it are substantially true.
- (9) In the EAT case of **Soh v Imperial College of Science, Technology and Medicine [EAT 0350/14]** a college lecturer alleged that students had told her that another lecturer had told them what would be in an exam. The EAT allowed an appeal against the tribunal decision, holding that the tribunal had erred in focusing on whether the lecturer making the assertions herself reasonably believed that the exam system was being undermined. Instead, the tribunal should have asked whether she reasonably believed that the information she was disclosing tended to show that the other lecturer had done so. As Judge Richardson stated at paragraph 47 of his judgement:-

“There is, as Mr Catherwoods submitted to us, a distinction between saying, “I believe X is true”, and, “I believe that this information tends to show X is true”. There will be circumstances in which a worker passes on to an employer information provided by a third party that the worker is not in a position to assess. So long as

the worker reasonably believes that the information tends to show a state of affairs identified in Section 43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision”.

- (10) The burden is on the worker making the disclosure to establish the requisite reasonable belief (**Babula**).
- (11) There must be more than unsubstantiated rumours in order for there to be a qualifying disclosure (**Darnton**).
- (12) The tribunal has to consider the whistleblower’s state of mind based on the facts as understood by him at the relevant time. As it is the reasonable belief of the worker making the disclosure which has to be considered, the tribunal has to look at the individual characteristics of the work input (**Korashi v Abertawe Bro Morgannwg University Local Area Health Board EAT/0424/09, 12/09/11**). Judge McMullan stated in that case (which involved a surgeon) that:-

“There may be things that might be reasonable for a lay-person to have believed, (however mistakenly) that certainly would not be reasonable for a trained professional to have believed”.

Good faith

- (13) The aspect of good faith must also be considered in this jurisdiction. It is not to be simply equated with honesty. Rather, the tribunal must consider the motive of the person making the disclosure to see if there is an ulterior motive. Should there be mixed motives, good faith can be negated if the ulterior motive was the dominant or pre-dominant one. An ulterior motive is one that is other than in the public interest. Examples of ulterior motives which have been found to negate good faith are personal antagonism, pursuing a personal campaign and seeking to obtain a personal advantage. The authorities make clear that motivation can be a complex matter to assess. Whistleblowing cases will often involve a whistleblower who may not have completely positive feelings towards the person or body that he is raising concerns about. The tribunal has to look at all the circumstances as the question of whether the disclosure was made in good faith is a question of fact. (See **Street v Derbyshire Unemployed Wales Centre [2004] IRLR 687**).

Detriment

- (xv) Detriment is determined using the test in **Shamoon v The Chief Constable of the RUC [2003] UKHL 11**, (“**Shamoon**”) ie, whether a reasonable worker would, or might, take the view in all the circumstances that the treatment was to the claimant’s detriment in the sense of being disadvantaged. There is no

requirement to show financial detriment. If an employer's treatment of the whistleblower is to his detriment, it is immaterial that the whistleblower does not know that he is being subjected to a detriment (**Garry v Ealing [2001] IRLR 681 CA**). An unjustified sense of grievance is unlikely to be regarded as a detriment.

- (xvi) The legislative provisions in relation to time-limits has been set out above. In relation to acts extending over a period, the case of **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA** is relevant. The issue for the tribunal in that case was whether there was evidence of a continuing discriminatory state of affairs, or:-

“An ongoing situation or a continuing state of affairs in which the female ethnic minority workers in the service were treated less favourably”.

- (xvii) Importantly, the detriment suffered must have been inflicted on the ground that the worker made a protected disclosure. The focus is on the reason or reasons for the employer's action. It is therefore important for the tribunal to distinguish between on the one hand detrimental acts which occur in consequence of any disclosure which does not result in liability and on the other hand detrimental acts done on grounds of having made a disclosure. In the case of **Nagaragan v London Regional Transport [1999] ICR 877**, the House of Lords set out the correct approach requiring the tribunal to consider the mental processes of the respondent and the reason why detrimental acts or omissions occurred. The tribunal must consider the motivations of the respondent, whether conscious or unconscious. The key question is whether the detrimental acts or omissions were materially influenced by the fact that the claimant made protected disclosures. The case of **London Borough of Harrow v Knight [2003] IRLR 140, (EAT)** illustrates how important it is to focus on the reason why there was a detrimental act or deliberate failure to act. The issue is whether or not the fact that the protected disclosure had been made caused or influenced the employer to act or not to act in the way complained of. The tribunal in that case should have looked at the reasons for failure to respond to the claimant's letters and for failure to protect him from being cold shouldered by colleagues.

Burden of Proof

- (xviii) The burden of proof in whistleblowing detriment cases operates in the same way as in the trade union detriment cases. This means that there is, in effect, a lower threshold for a claimant to surmount in order for the burden to shift to the respondent to provide an untainted explanation for any detrimental acts. Thus the initial burden is on the claimant to prove:

- (1) that he made protected disclosures, and
- (2) that he suffered detriment.

If he proves these two elements the burden shifts to the employer to provide an explanation which is not tainted by the fact of the claimant having made protected disclosures.

(xix) The case of **Blackbay Ventures Ltd v Gahir [2014] IRLR 416 EAT** suggested that the tribunal should take a structured approach to detriment cases by dealing with the following issues:-

- (1) identify each disclosure by reference to its date and/or content;
- (2) identify each alleged failure by the employer;
- (3) address the basis in which the disclosure is a qualifying disclosure and a protected disclosure;
- (4) identify the source of legal obligation if applicable;
- (5) determine whether the worker had the necessary reasonable belief;
- (6) identify the detriment complained of and its date; and
- (7) determine whether the claimant acted in good faith.

The tribunal must also address the issue of the causal connection between the detriment and the disclosure.

Constructive Dismissal in a Whistleblowing Case

(xx) In a whistleblowing case where the claimant alleges that he was constructively dismissed for having made a protected disclosure, the tribunal must focus on the reason for the conduct which the employee has shown amounted to the repudiatory breach of contract. If that conduct was by reason of the protected disclosure and the employee resigns because of the conduct, the employee is likely to succeed in a constructive dismissal case, provided he satisfies the other elements of the constructive dismissal case, ie that the conduct amounted to a repudiatory breach of contract; that the claimant left in response to that breach and not for another reason; and that the claimant did not delay too long before resigning. In a case involving a breach of the implied term of trust and confidence, the tribunal has to look at how important the protected disclosure was in any erosion of trust and confidence. It is still possible in such cases to find constructive dismissal on ordinary principles without finding that the reason or principle reason for the constructive dismissal was because a protected disclosure had been made. Importantly, however, if the constructive dismissal is sufficiently connected to whistleblowing, there is no cap on any compensatory award. By way of contrast if constructive dismissal is established on ordinary principles, there is a cap on the compensatory award.

Constructive Dismissal On Ordinary Principles

5. (i) Article 127 of the Employment Rights (Northern Ireland) Order 1996 (“the Order”) provides that an employee is dismissed by his employer if the

contract under which he is employed is terminated by the employer (whether with or without notice). Article 127 continues to provide as follows:-

“127. – (1) for the purposes of this Part an employee is dismissed by his employer if ... - (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct”.

(ii) Article 156(2) of the Order states as follows:-

“Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly”.

(iii) The Order further states at Article 157(6) as follows:-

“Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding”.

(iv) Harvey on Industrial Relations and Employment Law (“**Harvey**”) states at Division D1 at 403 as follows:-

“In order for the employee to be able to claim constructive dismissal, four conditions must be met:

- (1) There must be a breach of contract by the employer. This may be either an actual breach or an anticipatory breach.
- (2) That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.
- (3) He must leave in response to the breach and not for some other, unconnected reason.
- (4) He must not delay too long in terminating the contract in response to the employer’s breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract”.

(See also Western Excavating (ECC) Limited v Sharp 1978 IRLR 27).

(v) **Harvey** continues:-

“(b) **The duty of co-operation**

[461] More recently the EAT has specifically followed the *Post Office* case on this point (*Woods v WM Car Services (Peterborough) Ltd* 1981] IRLR 347, [1981] ICR 666). The Tribunal emphasised the significance of this duty for employers not to conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust. As it pointed out, it enables an employee who is 'squeezed out' of the company by the wholly unreasonable conduct of the employer to leave and claim that he has been dismissed even though he cannot point to any specific major breach of contract by the employer.

[462] This duty not to undermine the trust and confidence in the employment relationship can be subsumed under a wider contractual duty which is imposed on the employer, to co-operate with the employee.”

- (vi) Once a tribunal has established that a relevant contractual term exists and that a breach has occurred, it must then consider whether the breach is fundamental. Where an employer breaches the implied term of trust and confidence, the breach is inevitably fundamental (**Morrow v Safeway Stores plc 2002 IRLR 9, EAT**). A key factor to be taken into account in assessing whether the breach is fundamental is the effect that the breach has on the employee concerned.
- (vii) It is also possible for a tribunal to make a finding of contributory conduct in a constructive dismissal case in the event of there being a connection between the employee's conduct and the fundamental breach by the employer. As was pointed out in the Northern Ireland Court of Appeal case of **Morrison v Amalgamated Transport and General Workers Union (1989) IRLR 361 NICA**, since it was open to a tribunal to declare a constructive dismissal fair, there could be no inconsistency in its holding that the employee contributed to the dismissal in the first place. All that is required is that the action of the employee to some extent contributed to the dismissal. Once a tribunal has found on the evidence that an employee has to some extent caused or contributed to his or her dismissal it shall reduce the compensatory award.
- (viii) Unlike an anticipatory breach of contract, an actual breach of contract cannot be retrieved by the employer offering to make amends before the employee leaves. Once the breach has been committed it is for the wronged party to decide how to respond (**Buckland v Bournemouth University [2010] IRLR 445 CA**).
- (ix) In **Mahmud and Malik v Bank of Credit and Commerce International SA [1997] IRLR 606, ('Malik')** the duty of implied trust and confidence was affirmed by the House of Lords in the following terms:-

“The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of trust and confidence between the employer and the employee.”

Lord Steyn stated that:-

“The implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer’s interest in managing his business as he sees fit and the employee’s interest in not being unfairly and improperly exploited.”

- (x) The test for breach of the implied duty of trust and confidence is an objective one. The duty of trust and confidence may be undermined even if the conduct in question is not directed specifically at the employee. The duty may be broken even if an employee’s trust and confidence is not undermined. It also follows that there will be no breach simply because an employee subjectively feels that such a breach has occurred, no matter how genuinely this view is held.
- (xi) The range of reasonable responses test is not applicable to constructive dismissal per se. However it is open to the employer to show that such a dismissal was for a potentially fair reason in which case the range of reasonable responses test becomes relevant.
- (xii) The breach of contract must be “sufficiently important” to justify the employee resigning or it must be the last in a series of incidents which justify his leaving. It must go to the heart of the contractual relationship between the parties. **Harvey** comments that where the alleged breach of the implied term of trust and confidence constitutes a series of acts, the essential ingredient of the final act is that it is an act in a series, the cumulative effect of which amounts to the breach. It follows that although the final act may not be blameworthy or unreasonable, it must contribute something to the breach even if it was relatively insignificant (**Harvey** Division D, paragraph 481.01). See **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35**.
- (xiii) The employee must resign in response to the breach. In the recent EAT case of **Wright v North Ayrshire Council [2014] IRLR 4**, (“Wright”) Mr Justice Langstaff (President) states at paragraph 20 of his judgment that:-

“Where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them is the effective cause.”
- (xiv) In **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27 CA**, it was pointed out that an employee must make up his mind regarding resignation soon after the conduct of which he complains. Should he continue any length of time without leaving, he will lose his right to treat himself as discharged from the contract. However, where there is no fixed period of time within which the employee must make up his mind, a reasonable period is allowed. This period will depend on the circumstances of the case including the employee’s length of service, and whether the employee has protested against any breach of contract.

SUBMISSIONS

6. The tribunal had the benefit of written submissions from both parties. These are attached to this decision. It also considered further oral submissions on 12 May 2017.

CONCLUSIONS

7. The tribunal after having carefully considered the evidence before it and having applied the relevant principles of law to the findings of fact, concludes as follows:-
 - (i) The tribunal carefully considered the protected disclosure claims made by the claimant in connection with the dates and events referred to at paragraph 4(xiv) of its factual findings, against the legislative background and relevant authorities referred to in this decision and in the written submissions.
 - (ii) The tribunal is satisfied that the claimant acted in good faith and had genuine concerns over certain issues. It is not however satisfied that he made protected disclosures as defined by the legislation, except to the respondent in relation to what is termed the 3 Streets Project. The claimant had a reasonable belief that the information made to the respondent in relation to the 3 Streets Project tended to show a relevant failure in relation to fire safety and health and safety in relation to the provision of stair rails. The 3 Streets Project is specifically referred to in Sarah Swain's correspondence reproduced at paragraph 4(iii) of the tribunal's factual findings. The tribunal regards it as being important to observe that this correspondence was sent in the context of ongoing civil litigation and included an expectation that the claimant would concentrate on certain duties which are set out in that correspondence. The claimant, on the other hand, made the case that certain of his duties were removed as a result of this correspondence. The tribunal is not satisfied that this was the case. Furthermore, in the context of requesting the claimant to concentrate on certain duties, the tribunal was not satisfied that this constituted a detriment under the protected disclosure legislation or that his perceived diminution in workload from January to June 2016 represented a continuing detriment. The claimant was clearly not part of the strategy in relation to the pilot scheme and the involvement of the subsidiary and Sam Robinson during that period of time. Furthermore, in reality, the claimant's concerns regarding Sam Robinson and the involvement of a company allegedly owned by him is without any real foundation. Sam Robinson, resigned as Chairman of the respondent at the end of December 2015 and was clearly not personally awarded the work involved in the pilot scheme. Instead the respondent's wholly owned subsidiary WGS Property Enterprises Limited, carried out the work using Sam Robinson on an ad-hoc basis to oversee the work as a Consultant/Foreman. He ceased this role in October 2016. In this respect the tribunal reiterates the factual accuracy of Mr Quigg's summary of the position in paragraph 2.31 of his expert report, as set out at paragraph 4(v) of this decision.
 - (iii) In arriving at its conclusion regarding the alleged protected disclosures, the tribunal is also aware that the greater the expertise of the maker of the disclosure, the stricter is the criterion of reasonableness. Furthermore any qualifying disclosure to the respondent must only tend to show a relevant

failure in the case of a disclosure to an employer, whereas, in the other two categories referred to in the legislation, the worker must have a reasonable belief that the information and any allegations are substantially true. The burden is also on the claimant to establish the relevant failure. However in respect of health and safety matters, there only needs to be a likelihood of endangerment. Furthermore, the worker has to prove that he was subjected to a detriment, that the detriment arose from an act or deliberate failure to act by the employer, other worker or agent (as the case may be), and that the act or omission was done on the ground that the worker had made a protected disclosure.

- (iv) Apart from health and safety and fire safety issues in the 3 Street Project, the claimant was alleging that the respondent had failed to comply with certain legal obligations referred to in the agreed issues, which the tribunal has also addressed in its factual findings.

TIME LIMITS

- (v) (a) **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA** held that in determining whether there was “an act extending over a period”, as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The Court also held that concepts of policy, rule, practice, scheme or regime referred to in the authorities were examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of “an act extending over a period”. In the case of **Robertson v Bexley Community Centre [2003] IRLR 434 CA**, it was held that to establish a continuing act it must be shown that the employer had a practice, policy, rule or regime governing the act said to constitute it. In the case of **Richman v Knowsley Metropolitan Borough Council [2013] EqLr 1164** the EAT held that in determining whether there was evidence of “conduct extending over a period”, it is not sufficient to consider only whether there was evidence of a discriminatory policy, rule or practice in accordance with which decisions were taken from time to time. A tribunal must consider whether there was something more, such as a continuing state of affairs.
- (b) The claimant did not raise any form of grievance in relation to the correspondence from Sarah Swain dated 4 September 2015, although he alleges that it amounted to detrimental treatment under the protected disclosure legislation. The tribunal is not persuaded that there was an ongoing situation or continuing state of affairs pursuant to 4 September 2015 in which the claimant was subjected to a detriment, in the sense of being disadvantaged. Furthermore Sam Robinson had approached Belfast City Council regarding issues raised by the claimant. Detriment is determined under the test in **Shamoon**, ie, whether a reasonable worker would, or might, take the view in all the circumstances that the treatment was to the claimant’s

detriment in the sense of being disadvantageded. If an employer's treatment of the whistleblower is to his detriment, it is immaterial that the whistleblower does not know that he is being subjected to a detriment (**Garry v Ealing [2001] IRLR 681 CA**). As previously stated, any detriment suffered must have been inflicted on the ground that the worker made a protected disclosure. The focus is therefore on the reason or reasons for the employer's action. In this connection, it is in the tribunal's view significant that the claimant acknowledged that there were never any problems between the respondent's staff and himself throughout his years of working for the respondent. He also confirmed that everyone got on particularly well and that there had been a long term history of getting on well with the respondent's staff. It was also significant that the respondent requested the claimant on five or six occasions following his resignation on 14 June 2016 to remain in employment.

- (c) Furthermore, the claimant had been seeking alternative employment from March 2016, during a period when he alleged that certain contractual duties had been removed from him, and when he was not involved at a strategic level in the pilot scheme, having been requested to concentrate on the matters referred to in Sarah Swain's correspondence to him dated 4 September 2015.
- (d) The tribunal therefore has to consider whether it was not reasonably practicable for the claimant to present a claim to the tribunal before the end of a period of three months from when he received Sarah Swain's correspondence dated 4 September 2015. The meaning of the words "reasonably practicable" lies somewhere between reasonable on the one hand and reasonably, physically capable of being done on the other. The best approach is to read "practicable" as the equivalent of "feasible" and to ask, "was it reasonably feasibly to present the complaint to the Employment Tribunal within the relevant three months?" (**Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119 CA**). The tribunal is satisfied that it was reasonably practicable for the claimant to have brought such a claim in time, relating to the 3 Streets Project, as there was nothing in his evidence before the tribunal to suggest otherwise. The claimant in fact presented his claim to the tribunal on 4 July 2016.
- (e) Apart from the foregoing analysis of the out-of-time issue, the tribunal is satisfied, in any event, as already reflected in its findings of fact, that the claimant has not proven all of the necessary elements to establish his protected disclosure case in relation to the 3 Streets Project, being the only area in which the tribunal is satisfied that he made protected disclosures.

REMAINING ISSUES

- (vi) Part of the claimant's claim was that he resigned on 14 June 2016 in response to a last straw event, the background to which, from the claimant's perspective, can be summarised as follows:-

- (a) He had raised issues on a continuing basis which culminated in him raising concerns and objections in June 2016 in relation to work being given to the subsidiary company and its intention to bring in the ex-Chairman, Sam Robinson, as a Foreman.
 - (b) His case was that he had become aware two or three days before he resigned that Sam Robinson was proceeding to do the work and that his concerns and objections had effectively been ignored.
 - (c) The claimant feared damage to his reputation and the last straw was the fact that the respondent progressed with the contractor against his advice and that he was being ignored.
 - (d) The claimant connected his resignation to the issues he had raised, which are also dealt with extensively in his resignation report, dated 26 June 2016. It was also his case that what the respondent was doing was potentially unlawful as regards procurement processes and he had health and safety concerns particularly in relation to fire safety.
- (vii) In a protected disclosure case, where the claimant alleges constructive dismissal for having made a protected disclosure, the tribunal must focus on the reason for the conduct which the employer has shown amounted to the repudiatory breach of contract. If that conduct was by reason of the protected disclosure and the employee resigns because of the conduct, the employee is likely to succeed in the constructive dismissal case provided he satisfies the other elements of the constructive dismissal, ie, that the conduct amounted to a repudiatory breach of contract; that the claimant left in response to that breach and not for another reason; and that the claimant did not delay too long before resigning. In a case involving a breach of an implied term of trust and confidence, the tribunal has to look at how important the protected disclosure was and any erosion of trust and confidence. In such cases it is still possible to find constructive dismissal on ordinary principles without finding that the reason or principle reason for the constructive dismissal was because a protected disclosure had been made.
- (viii) The tribunal is not satisfied that any of the alleged conduct by the respondent was by reason of any protected disclosure having been made by the claimant. The respondent was clearly under the pressure of civil litigation in relation to the 3 Streets Project and had engaged legal advisers who were consulted on a range of issues, including some issues raised by the claimant. The respondent also took steps to ascertain the position from Belfast City Council. They advised the claimant to concentrate on certain duties which, in the tribunal's view, they were entitled to do. There is no satisfactory evidence before the tribunal that any conduct by the respondent amounted to repudiatory breach of contract, either actual or anticipatory. At any rate, any such breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving.

An employee must leave in response to a fundamental breach and not for some other unconnected reason. In this respect the claimant was not only engaged in pursuing alternative employment in March 2016, but was also incorrect in his understanding of when Sam Robinson had resigned as

Chairman of the respondent and his role in the pilot scheme. Furthermore, it appears that the claimant's fear of damage to his reputation was a significant factor in his resignation.

- (ix) The tribunal also concludes that the claimant was not constructively dismissed on ordinary principles. There is no satisfactory evidence before the tribunal that the respondent conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of mutual confidence and trust between itself and the claimant or that there was a breach of any contractual duty by the respondent to co-operate with the claimant.
- (x) The claimant's claims are therefore dismissed in their entirety.

Employment Judge:

Date and place of hearing: 8-12 May 2017 and 8 June 2017, Belfast.

Date decision recorded in register and issued to parties:

Edward Cooke V WSCHA – 1608/16IT - Closing Statement – 11 May 2016

Introduction

The Pre-Hearing Review Amendment Meeting Decision of the 28 November 2016 (page 45) and the accompanying attachment (Case Management Clarifications dated 13 October 2016) (page 43) form the basis of this Constructive Dismissal / Protective Disclosure case.

Page 43, sets out the Constructive Dismissal Case as follows:

- (1) – Breach of Contract (pension, Café Nero statement, workload reductions)
- (2) - The Employers Unreasonable Behaviour
- (3) – Breaches of Statutory Regulations (CDM, Planning, Building Control, H&W Act)
- (4) - Breaches of H&S Regulations (HA Guide, CDM Regs and H&S Work Act)
- (5) - Other Regulatory Breaches (Charity Commission breaches)
- (6) - Conflict of Interest Breaches (appointment of Ex-Chairman, GET and IQ I)
- (c) - Qualifying Protected Disclosures

On the morning of the hearing these seven above issues were merged to form three simplified strands of the claim in order to facilitate the progress of the hearing.

I have suggested in my witness statement and my evidence to the Tribunal that WSCHA breached the express and implied terms of my contract of employment and that I was also constructively dismissed as a result of making numerous documented qualifying protective disclosures to the Senior Management Team between July 2015 and June 2016. These qualifying protected disclosures related to conflict of interest concerns, procurement breaches (e.g. breaches of legal obligations) and H&S / Fire Safety breaches (danger to the health and safety of staff, tenants, contractors, public and myself). Projects that I considered to be within the remit of my job specification (pages 29/30) were denied to me. Moreover, having made numerous documented H&S and conflict of interest disclosures in writing to the Senior Management Team, WSCHA arguing that they were too busy, failed to provide written (and oral) replies. This I suggest is the deliberate concealment of information about my fore-mentioned qualifying protected disclosures. I believe that my documented evidence contained within the bundle and the verbal evidence that I have presented to the Tribunal indicates that I had a reasonable belief that my H&S, Fire Safety, conflict of interest and procurement concerns were justified.

Constructive Dismissal

I believe that

- (a) My contract of employment was fundamentally breached by WSCHA
and
- (b) That the breach was responsible for my resignation.

Breach of Implied Terms

There was an implied term within my contract for the employer to look after the H&S of the staff and therefore by asking me to supervise contractors who had not been H&S accredited, the employer broke the implied term of mutual trust and confidence.

There was an implied term within the contract to provide safe working conditions and the photographs taken in October 2015, November 2015 and June 2016 indicate that WSCHA breached this implied term (as well as breaching statutory obligations owed to staff under the H&S Work Regulations 1974 – e.g. the duty to provide safe working conditions)

The contract of employment has within it an implied term that the employer will provide trained people with appropriate expertise and skills (in co-workers, managers and in this case subsidiary contractors). I had no trust or confidence in WSCHA when they by allowed subsidiary contractors who had no H&S expertise, no H&S accreditation and no managerial expertise to work on a 4 house pilot scheme and then awarded a 47 house scheme to WGS PE).

Whistle-blowing / Qualifying Protected Disclosures

As an employee / building surveyor I made a series of qualified protected disclosures from the beginning of my employment in June 2015. The qualifying protected disclosures were made in documented e-mails and reports immediately I became concerned about H&S, procurement or conflict of interest matters. I was concerned that H&S matters disclosed in the reports posed a risk to the Association, the staff, the tenants or myself. The numerous qualifying protected disclosures were made to the Senior Management Team and in the main the SMT continually failed to reply in writing or verbally to my disclosures

The qualifying protected disclosures (QPD) continued until I resigned on the 15 June 2016 and thereafter I made a QPD to the Board of WSCHA in a fully documented 34 page resignation report (dated 26 June 2016). The WSCHA Board replied to my QPD on the 18 July 2016 and dismissed all my concerns. I believe that the Board of WSCHA did not take the appropriate advice to assess the validity of my disclosures and failed to hold the SMT to account. The WSCHA witness statements indicate that WSCHA's SMT failed to reply to my numerous concerns, this failure to provide information led me to make protected disclosures outside the organisation. After the 15 June 2016 I made Freedom of Information Requests to the HSE and BCC Building Control. Mr Hewitt from Building Control confirmed on the 7 October 2017 (at pages 266 and 268) that I was justified arguing that WSCHA could not rely solely upon the existence of a building control certificate to determine the fire safety of the stairwells at 12-22-24-28 Rosebank Street. WSCHA also sought to rely (mistakenly) on Mr Hewitt's analysis at the bottom of page 266. WSCHA have attempted to apply the Building Control approval certificates (pages 5, 6, 7 and 8) retrospectively and Building Control has confirmed that they have not considered the issue of the stairwells to 12-22-24-28 Rosebank Street. On the page 82 I inform WSCHA on the 25 August 2015 I intended to visit Building Control and on the 4 September 2015 I was removed from this project.

Within my QPD of the 26 June 2015 to the WSCHA Board I made disclosures about conflicts of interest in the award of non-competitive tender/s to a company called Green Energy Technology and the award of a competitive tender to a company called IQ Innovations. WSCHA argues that the IQ Innovation project never materialised, however page 182 seems to cast this assertion into some doubt. Nevertheless I believed that my job specification gave me a reasonable expectation that I should have been involved in the procurement exercises of these projects and this expectation is supported by (a) the absence of other technical skills within WSCHA and (b) the DSD Auditors May 2014 recommendations. Whether or not WSCHA entered into a contract is irrelevant, I had an expectation though page 29 (invitation and assessment of tenders) to make a contribution to the Green Energy Projects.

The QPD were made under the Employment Rights Order (NI) 1996

Employment Rights Order (NI) 1996

Section 68.(1) (c) An employee has the right not to be subjected to any detriment on the ground that he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

PART XI UNFAIR DISMISSAL

Section 126. (1) An employee has the right not to be unfairly dismissed by his employer.

Section 127. (1) For the purposes of this Part an employee is dismissed by his employer if, sub-section (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Section 132. (1) (c) 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 being an employee at a place where he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety.

My Qualifying Protected Disclosures center upon the **Employment Rights Act 1996** and are engaged because I had a reasonable belief that WSHA's categories of wrongdoing included:

- (1) **A breach of legal obligations** (e.g in breach of planning, building control, CDM Regulations, Charity Commission requirements).
- (2) That **breach of legal obligations** also includes breaches to the DSD HA Guide in relation to the conflicts of interest that existed in appointing Green Energy Technology and the EX-Chairman.
- (3) **A danger to the H&S of individuals** (e.g.in the appointment of fledgling contractors who had no H&S management expertise, no H&S policies and

procedures in place and who did not have the pre-requisite H&S accreditations required by the DSD HA Guide.

(4) That by failing to reply to my numerous H&S and procurement concerns and my failing to even inform me of the existence of some projects, that the Association were **deliberately concealing information** related to (1), (2) and (3) above.

Time Issues

It is my contention that I made a rolling series of qualifying protected disclosures. These disclosures commenced in July 2015 and ended in June 2016. From the evidence given from the WSCHA witnesses, the main reason that the Senior Management Team (SMT) failed to reply to my numerous H&S / procurement and technical reports was not that they were too busy, rather, it was the complete lack of technical competence within the SMT, including the Operations Manager. There was an inability to formulate a proper response. Qualifying protected disclosures (QPD) were made to the Employer in the following sequence of e-mails / reports. The common thread across the QPDs is the employee's concern for the H&S of individuals (tenants, staff, builders and the public). QPDs were also made to other external agencies when the Employer failed to respond to my disclosures.

| Date | Disclosures |
|------------------|--|
| June / July 2015 | H&S at 79 Ballygomartin Road (p.40-41) |
| July / Aug 2015 | H&S at Cambrai Court (p.40, p.42, p.43, p.55) |
| July 2015 | H&S in 3 storey re-lets (p.40) |
| Aug / Oct 2015 | H&S to 12-22-24-28 Rosebank (Bray) St (p.43, p.61-66, p.72-73A-79, p.80-86, p.87-105 and p.112) |
| 4 Sept 2015 | Reassigned duties – removed from Rosebank St project |
| Jan / June 2016 | H&S in the 4 house pilot project (p.136-138, p.142-150, p.160/161, p.177/178, 190/191, p.196) |
| 30 Jan 2016 | Charity Commission breaches at 73 Kilcoole Gdns (p.139/140) |
| June 2016 | H&S in the 47 house project – WGS PE appointment (p.196, p.197-203, p.204-213) |
| 26 June 2016 | Complete disclosure of all qualifying protected disclosures from July 2015 until June 2016 within 34 page resignation report to WSCHA Board. |

After being removed from my duties at 12-22-24-28 Rosebank Street, I made protected disclosures to the DSD (21 October 2015, page 122) and then the NIAO in a series of e-mails to Ms Dorrina Carville (and then to Mr O'Sullivan after Ms Carville's resignation). The disclosures to the NIAO about the H&S failings at the 3 Streets Project started on the 14 December 2016 and ended on the 6 April 2016.

Qualifying Protected Disclosures and Employee Detriment

I believe that as a result of the qualifying protected disclosures that I made to WSCHA between July and October 2015 (about the WSCHA Offices and 12-22-24-28 Rosebank Street) and the written disclosures made from the start of February 2016 (about the employment of the Ex-Chairperson and the H&S failings of a (A&O Ltd / WGS PE subsidiary) company that WSCHA deliberately excluded me from working on two large green energy schemes (the RHI scheme and the pv solar panel scheme) for fear of me exposing procurement irregularities.

Constructive Dismissal

It was my belief that I was being ignored in key areas of procurement and health and safety and as a result of my various QPD, I was increasingly side-lined from procurement projects within which the employer knew conflicts of interest, or H&S failings existed. I believe that these conflicts of interest fall under breaches of statutory obligations.

I believe that the employer's failure to properly consider my various H&S disclosures is what Lord Denning in *Western Excavating Ltd v Sharp (1978)* would consider the employer of being guilty of conduct that goes to the root of the contract. I suggest to the Tribunal that progressively that series of H&S breaches about property safety that commenced as early as July 2015 and thereafter between February and June 2016 about contractor H&S standards led directly to my resignation in June 2016.

I believe that the Associations repeated failure to reply to my documented H&S, procurement and conflict of interest concerns were not occasioned by time-management constraints, rather they were deliberate concealment of information related to breaches of legal obligations and danger to the health and safety of individuals.

By June 2016 my workload was virtually non-existent and when WSCHA finally decided to abandon a 51 house competitive tender process and to award the remaining 47 house maintenance project to a fledgling company that had no H&S expertise and no management structures, I resigned. In the weeks prior to my resignation a series of events occurred which suggested that I should resign. On the 20 April 2016, WSCHA attempted to re-let a 'fire-risk' house at 66 Bray Street; information came to light in April / May 2016 about potential procurement irregularities in the appointment of Green Energy technology and IQ Innovations.

As it stands the Green Energy Technology RHI scheme at Cambrai Court, a scheme that started in February 2016 has still not been awarded planning approval and the Planning Office in a letter dated 24 March 2017 indicated that they would be rejecting the December 2016 planning application on Environmental Health grounds? I consider that failure of WSCHA to obtain Planning Approvals (at Cambria Court and 64 Ohio Street), Building Control Approvals (for the three RHI Boiler and heating schemes) and to make N10 submissions to the HSE is evidence of the Association's disregard for the H&S of its tenants.

Relevant Employment Law cases

I believe that the *Onyango v Berkeley* case heard by the Employment Appeal Tribunal in 2013 allows for protected disclosures made after a contract has come to an end and my 35 page disclosure (resignation) report to the Board of WSCHA on the 26 June 2015 fully documented my various H&S and procurement concerns. I consider that the Board needed to take expert advice before readily dismissing all my disclosures. I believe that the *Woods v WM Car services (Peterborough) Ltd case 1982* allows for constructive dismissal action to be taken for a breach of an implied contract term as well as a breach of an express term. I believe that my actual job description, and the commitment given to me by the SMT at Café Nero May 2015 can be construed as either implied or express terms and that I had a reasonable expectation (though my job description) of being involved in NEC 3 contract projects, green energy projects, dilapidation schemes and pre-purchase house surveys. I believe that in withdrawing my services in Rosebank Street on the 4 September 2015, WSCHA committed a breach of contract that I objected to.

I believe that there was a fundamental breach of trust and confidence when the employer declined to pay a statutory workplace pension; a pension that I believe should have been paid from the start of my employment. When I was informed in June 2015 that the job was advertised without a pension, I trusted the employer that I would be paid any statutory entitlements, it was only in December 2015 that I learnt from NILGOSC that the employer had erred in interpreting work place pension entitlements. The *IBM UK Holding Ltd v Anor Dalglish & Others (2014)* case dealt with the issue of non-pensionable increases in salary and considered the importance of the employee's reasonable expectations. I believe that many employees aged 58-59 would have a reasonable expectation to receive a statutory work place pension.

Hilton v Shiner Ltd (2001) suggests that if an employer changes the contractual duties – whether by removing some duties (as in removing me from working in Rosebank Street, from failing to use my skills in undertaking pre-purchase surveys, from failing to involve me in the several green energy projects) or by requiring employees to perform new duties (as in asking me to provide a Clerk of Works service to the fledgling WGS PE company in June 2016), that any such changes may constitute a repudiatory breach. *Coleman v S & W Baldwin (1977)* deals with issues of deskilling employees and I suggest that WSCHA's actions transferring work to profit-making subsidiary companies and abandoning a NEC suite of contracted de-skilled myself. *Nottingham County Council v Meikle (2004)* and the EAT decision in *Logan v Celyn House Ltd UKEAT/0069/12* confirms that a repudiatory breach need not be the only cause of the employee's resignation and that it is possible for the employee to have objected to more than one actions of the employer.

I would argue that the following cases *Waltons & Morse v Dorrington (1997)*, *Bliss v South Thames Regional Health Authority (1987)* and *Abbey National v Robinson EAT/743/99* (re: a last straw incident rescuing a delay of one year) would have allowed for any delays in resigning between the 1 June 2016 and the 15 June 2016. Furthermore, *Bliss V South East Thames Regional Health Authority (1987)* allows for any short delays in resigning.

Edward Cooke's Detriment

I believe that time runs from the date of the last detriment and not the date of the last disclosure. My last detriments was in being omitted from the Green Energy Projects that started in February 2016 and the solar panel tender and the post inspections that took place between April and June 2016.

WSCHA had no green energy expertise, had no technical expertise and had no H&S expertise within the staff and management and yet the association choose to undertake two large green energy projects (the RHI boilers to the 3 sheltered schemes and the solar panel tender / contract to the 350 houses) without using my technical, procurement and H&S expertise. WSCHA confirmed in the hearing that a non-technical manager (Sarah Swain) prepared a complex tender document for the provision of the April 2016 solar panel tender. It was not until after this tender exercise had got underway that I found out about it. As I argue elsewhere I have reasonable grounds to believe there are conflicts of interest in the procurement of Green Energy technology and IQ Innovations and I was ignored because of my documentary style of project administration. The RHI boilers commenced on site in January / February and were still ongoing when I resigned and the solar panel surveys started around the 3 / 4 June 2016. I disclosed my H&S and procurement concerns about these projects to the Board on the 26 June 2016

After a prolonged period of expressing procurement concerns (from February 2016 to June 2016) and after patiently awaiting the resumption of an abandoned competitive (47 house) tendering exercise I decided I needed to leave the organisation to protect my reputation. This was not an easy decision to make, I could have stayed employed in the organisation, doing very little work until June 2017 (or to the end of the 4 year Framework period) whilst earning £30,000 per annum, or, I could resign and run the risk that any potential employers would be weary of employing a 59 year old whistle-blower.

I believe that many whistle-blowers are not motivated by economic reasons, I suggest that many whistle-blowers, including myself, feel so strongly about their qualified interest disclosures that they disadvantage themselves to bring into the public domain concerns which in turn allow employers to try to attack the good-standing and character of the whistle-blowers. In effect the Public Accounts Committee at Westminster (Mid-Staffordshire NHS Foundation Trust, August 2014) has concluded that many whistle blowers are not just disadvantaged by their employers whilst in employment, but they also suffer unfair and ongoing detriments, in terms of time and cost in bringing actions against errant employers and in reduced employment opportunities thereafter.

It has been suggested by all of the WSCHA witnesses that my character is suspect, that I am foul mouthed, negative / pessimistic, un-obliging, workshy, pedantic with documentation and that I was motivated by a desire to retire early. I would ask the Tribunal to recognise that I have not labelled any accusations against individual members of WSCHA but have argued that there has been collective, organisational failings. I would point out to the Tribunal, that there is a growing body of evidence that whistle-blowers are perceived to be organisational traitors and their characters

are fair game for those who wish to maintain the status quo. I ask the Tribunal to be mindful, that WSHA's derogatory comments of myself are not accompanied by any documented evidence such as: verbal or written warnings, there were no complaints about the quality of my work or about delays in the delivery of my work. I believe some of the statements made by WSCHA's SMT in the witness statements were unjust and portray me unfairly, furthermore, I believe that evidence in the bundle refutes comments made at a February meeting between myself and the Acting CEO. Having worked for this organisation and indeed having dedicated myself to providing voluntary services to the Save the Shankill Campaign, the Shankill Community Council Housing Forum, the Lower Oldpark Housing Forum, Flax Housing Association, Harmony Homes and WSCHA since the early 1980s, the witness statements have been unwarranted.

The employer on the 18 July 2016 (page 254, paras 3 and 4) having ignored the May 2015 conversations at Café Nero, finally reported that in the opinion of WSCHA there was no H&S issue with these properties. The witnesses from WSCHA reaffirmed this position on the 9 and 10 May 2017 without providing any substantive evidence to support this view. Therefore, I believe that in this constructive dismissal / whistle-blowing case I have acted reasonably and that I have acted in the best interests of WSCHA's tenants. I ask the Tribunal to accept that the factual and documented evidence that I have provided is (on the balance of probabilities) more reliable than the testimonies given by the WSCHA witnesses and therefore I ask the Tribunal to find in my favour.

Constructive dismissal case

(1) – Breach of Contract

By removing key duties stipulated within the February 2015 pro-forma job specification (page 29/30) and by asking me to perform new duties (e.g. asking me to work as a clerk of works (p.201) supervising WGS PE in the June 2014 47 house project) WSCHA are in breach of contract. In the absence of other documents, I suggest that the job description (pages 29/30) represents the full duties of the Building Surveyor. In addition, I suggest that when WSCHA have either removed me from duties (as at 12-22-24-28 Rosebank Street and the Cambrai Street Offices) or, were WSCHA have failed to engage my services (as the RHI boilers and PV solar panels) there have been H&S / procurement / conflict of interest concerns / failings that WSCHA wanted to keep concealed.

WSCHA sought Framework tenders in the Spring 2015 from AECOM and in July 2016 WSCHA appointed AECOM to provide both Project Management services (at £70/dwelling) and Building Surveying Services (at £200/dwelling) throughout all phases of the 4 year Framework package. It was AECOM who undertook all the building surveys within the 51 Framework Phase 1 houses, not I. I could not provide the same building surveying service to the same project as AECOM. The removal of me from key projects in the absence of other in-house technical expertise makes no sense and exposed the Association to risk in light of the DSD's May 2014 Audit report (pages 10/11)

I suggest that I was provided in May 2015 (at Café Nero) with a pre-contract commitment by WSCHA that WSCHA would address my H&S / Fire safety concerns at 12-22-24-28 Rosebank Street. WSCHA failed to honour that commitment even after I wrote reminding WSCHA of the Café Nero May 2015 commitment (see pages 73 and 94/95).

WSCHA have argued that there was no solar panel contract entered into for 350 houses, however WSCHA have offered up no evidence to support if / when the NIE information caused the project to be aborted prior to the contract being signed. The evidence at page 182 indicates that tenants were informed in May 2015 that WSCHA's contractor – IQ Innovations - would be calling to undertake surveys. Any such undertaking indicates the existence of a contract. Moreover, the Operations Manager having confirmed that she had no technical expertise, then confirmed that she prepared the tender documents and assessed IQ innovations competencies before allowing IQ innovations to submit a tender. WSCHA offered no reasonable explanation why I was overlooked on this project at a time when I was seriously under-employed and was asking AECOM to find me employment with the next phase of the WSCHA Framework project (page 184, bottom para)

WSCHA declined to provide me with a statutory workplace pension and failed to take advice from NILGOSC the pension administrator for the sector (see page 260 – SECTION 1).

(2) - The Employers Unreasonable Behaviour

I believe that WSCHA acted unreasonably from early on within the contract by failing to reply to important H&S, procurement and technical reports that I had sent. The DSD regulator stresses the importance of housing associations keeping auditable paper trails and conducting their business in an open and transparent manner. The Board of WSCHA, who have little technical expertise sitting on the Board, failed to take any independent advice prior to rejecting all the different disclosures made in my Resignation Report of the 26 June 2016. The Board of WSCHA failed to hold the Senior Management Team to account.

(3) – Breaches of Statutory Regulations (CDM, Planning, Building Control, H&W Act)

H&S Work Act 1974 – Section (2) (a), (b) and (e) - the employer must provide safe systems of work, undertake H&S risk assessments and ensure the workplace is safe. (note Ms Swain confirmed there was no one in the organisation appointed with the responsibility for H&S and the DSD in the June 2016 Audit report could find no fire safety policy – page 194)

H&S Work Act 1974 – Section 2 (6) – the Employer must consult with the employees on matters of H&S.

CDM Regulations 2007 Part 2) (11) designers are to avoid foreseeable risks to the H&S of any person and Part 2 (11) designers are to eliminate hazards that give rise to risks, Part 2 (11) designers are to reduce risks; - the stairwells at 12-22-24-28 Rosebank Street are in breach of the CDM regulations

Part (3) (14) the client had a duty to appoint a CDM coordinator as soon as practically possible after work has commenced, Part (3) (18) (1) no designer shall commence proper designs until after a CDM co-ordinator has been appointed and Part (3) (20) the CDM co-ordinator is to notify the HSE of the project. In the award of the green energy projects there was no consideration given to the CDM regulations, there was no evidence provided to indicate any H&S considerations had been taken before or after the award of the green energy tenders. This failure places builders, tenants and the public at risk. Page 257 evidences that the HSE had no knowledge of these projects, there were no N10 submissions.

WSCHA have submitted no building control application forms or approval certificates for the green energy boilers / heating alterations as required under Building regulations (NI) 2012 Part 6 (making applications under the building regulations) Part 6 (A and F) which says that building control applications are required for projects which involve conservation of fuel and power. Building regulations Part 6 (L) – building control approval is required from combustion appliances and fuel storage systems. By commissioning GET directly and by not appointing consultants, WSCHA did not have the technical expertise to make the building control submissions.

Planning Act (NI) 2011 (art 3 (24) states that development requires planning permission. WSCHA obtained planning permission for the Boiler houses at Mount Eden Court and McCallum Court but not Cambrai Court – this was also a condition of the RHI Grant.

DSD Housing Association Guide and the Achieving Excellence through Health and safety Booklet 10.

(4) Health and Safety Breaches.

I believe that I have presented evidence that shows that on the balance of probability that (a) 12-22-24-28 Rosebank Street (and four similar houses in Bray Street) have a higher degree of risk than is acceptable; (b) that Sam Robinson's 4 house pilot scheme firm and the follow-on WGS PE company (to be appointed to the 47 house project) were not fit for purpose; and (c) The Cambrai Street offices (between June 2015 and June 2016) posed a greater degree of risk to the staff arising from inaccurate building control plans, the absence of a 1hr fire resisting roller shutter and bedding being stored by USEL in an area shown as Association Workshop Area Page 306)

Since 2013 when 12-22-24 and 28 Rosebank Street were tenanted, WSCHA have failed to obtain from Building Control any documented explanation about the nature of the building control certification process for rehabilitated properties. Whilst the mistakes made in these houses were made by others, from September 2013 WSCHA were made aware of potentially high H&S / Fire safety risks to these houses and it was WSCHA who decided to tenant the houses and who become responsible for the H&S of the occupants. I confirmed to WSCHA on the 25 August 2015 (p.82) that I would visit Building Control to obtain the necessary Building Control explanations. On the 4 September 2015, WSCHA removed me from having any

more contact with these four houses. Eventually I obtained a written explanation from Mr Hewitt of BCC Building Control (7 Oct 2016) (p.268) which suggests that Building Control did not give approval of the stairwells at 12-22-24-28 Rosebank Street. WSCHA have disagreed with this assessment, but WSCHA have confirmed that they could find no risk assessments undertaken by Knox Clayton when the H&S project files were handed over. In addition the houses have been handed over without having fire doors as required in the Association's Rehab Design Guide. Mr McDowell was incorrect when he stated in his witness statement that he did not know the stairwells had no handrails – he and WSCHA was informed on the 20 August 2015 (p.71) and the 15 September 2015 (pages 101/102) that these stairwells were high risk because of the absence of handrails.

(5) - Other Regulatory Breaches (DSD HA Guide Charity Commission breaches)

I believe that WSCHA in asking me at the end of January 2016 to undertake survey at 73 Kilcoole Gardens without informing who I was undertaking the survey for, breached my contract (pages 139-141). WSCHA sub-contracted my services out to a profit-making subsidiary company and did so without first (or subsequently) obtaining Charity Commission advice.

Procurement Breaches

I have argued that the DSD's Achieving Excellence Framework places H&S at the heart of all competitive and non-competitive tenders and that unless contractors (including subsidiary companies A&O Ltd / WGS PE acting as contractors) have undertaken the pre-requisite H&S risk assessments, have H&S expertise and are accredited by an appropriate H&S accreditation body, the Association is in breach of the DSD's Housing Association Guide. WSCHA awarded Sam Robinson and A&O Ltd / WGS PE a pilot project to four vacant houses in and around March 2016. The success of the company's performance was to determine if the subsidiary company was competent to undertake a much larger project to 47 occupied houses. WSCHA however confirmed in evidence that the Sam Robinson pilot team workers left WSCHA's employment in the summer of 2016 which means that the 47 house scheme was awarded to defacto a complete new group of workers which reinforces that the original bona fide competitive tender was aborted and replaced by a sham procurement exercise. There was no justification for aborting the remaining 47 house competitive tender and awarding the 47 house project to a new group of workers 'managed' by a Board of part-time professionals who had no previous background in construction. I believe I was fully justified in resigning rather than work with a subsidiary company who had on the 14 June 2016 no managerial staff and no H&S expertise.

(6) - Conflict of Interest Breaches (appointment of Ex-Chairman, GET and IQ Innovations)

The WSCHA Chairperson confirmed that Mr Robinson was appointed as a consultant without a competition on the 4 house pilot project sometime between February and the end of March 2016, however the documentary evidence suggests

that Mr Robinson confirmed in March 2016 (page 162) only an intention to resign and that he actually resigned on the 31 May 2016 (page 175). Moreover the Association presented false information to the Department of the Economy on its IPS 2016 Annual return form (p.170-171) by stating they had no subsidiary companies when four had been incorporated in Sept 2015.

Edward Cooke

11 May 2017

IN THE OFFICE OF THE INDUSTRIAL TRIBUNALS
AND THE FAIR EMPLOYMENT TRIBUNAL

Edward Cooke v Woodvale and Shankill Community Housing Association

Submission on behalf of the Respondent

1. This is a claim of constructive dismissal under the Employment Rights (NI) Order 1996 and of detrimental treatment contrary to Article 70B of the said Order, as inserted by the Public Interest Disclosure (NI) Order 1998.
2. The Claimant alleges that he was detrimentally treated and unlawfully constructively dismissed following his making a range of 'disclosures' during the period of his employment, June 2015 – June 2016.
3. The Respondent accepts that the Claimant made multifarious disclosures about many issues. The Respondent disputes that the disclosures were protected disclosures for the purposes of Articles 67A-67L (particularly 67B & 67C). The Respondent further disputes that the Claimant was subjected to a detriment or that the Respondent conducted itself in a manner which fundamentally breached the Claimant's contract of employment including the duty of trust and confidence. A final issue is whether the claim or any part of it is out of time.
4. The background is that the Claimant is a highly qualified and experienced building surveyor. He has vast experience in the housing sector. Before taking the position of Building surveyor he was on the Board of the Respondent organisation. Prior to the Claimant becoming employed (and whilst he was on the Board) an issue arose over the quality of the work on the 'Three streets project' - and the Respondent sought assistance with that matter through solicitors and consultants appointed to advise thereon. The Claimant was appointed to take responsibility for the planned maintenance programmes and instructed not to involve himself in the three streets project. He was not appointed to provide advice generally on all organisations matters.
5. The Claimant's case can be divided into two main parts: (a) his concerns over houses in the three streets, particularly Rosebank Street and Bray Street, which focus upon health and safety concerns; and, (b) his concerns about irregularities in respect of tenders in relation to building work and green energy, including a number of alleged conflicts of interest. A number of other matters include concerns about pension

entitlement, 79 Ballygomartin Road, a DSD audit and alleged breaches of Charity Commission Regulations.

The Health and Safety Issues

6. A major part of his case involves an allegation that a number of premises, primarily houses in Rosebank Street and Bray Street, are unsafe and tenants at risk of injury because of deficiencies in respect of stair-rails and fire escapes.

7. It is clear from his demeanour when giving evidence and conducting his case that the Claimant is exercised on this particular issue. He wrote many emails about such issues to his employer mainly, in the first few months of his employment. The Respondent reminded him that he should concern himself with the issues he was employed to address and these were outside his remit.(See page 96-7)

8. Notwithstanding the Respondent investigated issues he had raised with the Health and Safety Executive and AECOM. Also the Respondent had previously raised and engaged on such issues with the Building Control Department in Belfast City Council. Further reference is made to a letter from Building Control at pages 266-269 where it is explained that the sorts of issues the Claimant was raising were applicable to new builds and could not be retrospectively applied to existing properties. However it is correct at page 268 that the Council clarified that the Completion Certificates did not necessarily indicate that a house had no health and safety risks.

Cambrai Street Office

9. The Claimant further raised health and safety concerns about the Cambrai Street Offices. He produced photographs in an attempt to substantiate his claim. The Cambrai Street Offices were rented from Ulster Supported Employment Ltd. The premises were Building Control inspected and approved subject to minor adjustments e.g. a mirror in the bathroom. The number of fire exits were deemed appropriate for the number of persons in the building. It is denied that the photographs established anything of substance.

The maintenance tender

10. AECOM had been retained to assist in a building maintenance tender. Their report is at page 152 with a corrected document at page 157A. The first maintenance programme involved 51 properties. Pursuant to its corporate strategy, the Respondent isolated four properties with a view to running a pilot scheme through its subsidiary, Woodvale and Greater Shankill Property Enterprises Limited. The hope was that the subsidiary might be able to undertake future maintenance programmes.

11. At the core of the Claimant's concern is the apparent involvement of Mr Sam Robinson and A and O Enterprises. He alleged a conflict of interest on the basis that Mr Robinson was Chair of the Board at the time when he obtained work from the Respondent. The Respondent denied any impropriety. Mr Robinson resigned from the Board at the end of December 2015, A and O Enterprises were not awarded the work, the Subsidiary was awarded the work, and Mr Robinson was appointed on an *ad hoc* basis in 2016 in an overseeing role. It is accepted that there are various errors in documentation. However when giving evidence Mr McDowell plainly explained what the organisation had done and why it had done it. Mr Quigg provided useful expert evidence on this issue.

Green Energy

12. Development of green energy was part of the corporate strategy. The Claimant raised a concern about the Respondent abandoning the tender process for Green Energy and appointing Green Energy Technology (GET). He alleged this breached procurement legislation and involved a conflict of interest because Mr McDowell (the acting Chief Executive Officer via a consultancy agreement) was the accountant for GET.
13. The reality is benign. GET provided free advice as a favour given the connection with Mr McDowell whose firm does their accounts. The tender had to be abandoned because a closing date was given for the Renewable Heating Incentive scheme in or about February 2016. This is permissive under Regulation 27 (c) of the Procurement Regulations on the basis of urgency. GET were appointed because the Respondent was familiar with them having previously obtained advice, and had some knowledge and confidence in them. Notably the Claimant did not put his case on this issue to Mr McDowell – spending most of the cross examination of Mr McDowell on the Three Streets health and safety issues.

The pension scheme

14. The Claimant alleges he was excluded from the pension scheme. However the Respondent did not operate the pension scheme in such a way to enable a person on an initial fixed term contract to enter the scheme. The Claimant would have been eligible to join the scheme in the autumn of 2016 had he remained in employment.

The Charity Commission regulations & the DSD audit

15. The Claimant made broad allegations about these issues. He was not able to identify what charity commission regulation was broken or specifically why there was an irregularity. The DSD audit appears not to have been a stand alone issue but evidence relevant to issues relating to the subsidiary company.

79 Ballygomartin Road

16. In relation to this matter, the Respondent accepted the Claimant was asked to work on issues relating to this property. However again it is denied that there were health and safety issues.

Protected disclosures

17. A protected disclosure for the purposes of the legislation must fall within certain statutory criteria. (See generally *Harvey on Industrial Relations and Employment Law* CIII paras 40-97; and, *The Law of Whistleblowing in Northern Ireland* by Amy Barr (Google).)
18. There are a number of relevant components to a qualifying disclosure:
- a. The maker must have a reasonable belief that the disclosure is in the public interest and tends to show one of the statutory categories at Article 67B;
 - b. The maker must reasonably believe the disclosure meets the requirements. Importantly the greater the expertise of the maker the stricter is the criterion of reasonableness. A lay person may mistakenly reasonably believe that something is unlawful or dangerous for the purposes of Article 67B, but the bar is higher for an expert; (*Harvey on Industrial Relations and Employment Law* CIII para 41);
 - c. Where there are a plethora of disclosures, the requirement is that there was a reasonable belief in relation to each. It is not enough that the claimant can be shown to have believed in the general gist of his or her complaints
 - d. The disclosure must be made in good faith. (Article 67C);
 - e. In respect of a health and safety matter, there only needs to be the fact of or the likelihood of endangerment; (Harvey 51)
 - f. The burden lies on the Claimant of establishing the relevant failure;
19. If a qualifying disclosure is established, useful guidance is provided in *Harvey* at paras 93-94 how to approach the a finding on detriment:

[93]

If it can be established that a worker has made a protected disclosure, as defined, it then becomes necessary to consider whether or not the worker has been subjected to an unlawful detriment as a result. When considering this question it is important that a tribunal should, in reaching and explaining its conclusions, set out separately the elements necessary to establish liability and consider them separately and in turn (see *Harrow London Borough v Knight* [2003] IRLR 140, EAT). This general approach was subject to more extensive guidance to tribunals dealing with these cases from Judge Serota in *Blackbay Ventures Ltd v Gahir* [2014] IRLR 416, EAT, which is worth setting out in full. Taking into account the amendments to this law in June 2013 (see para [42]) he put it thus:

“a. Each disclosure should be separately identified by reference to date and content.

- b. *Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.*
- c. *The basis upon which each disclosure is said to be protected and qualifying should be addressed.*
- d. *Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.*
- e. *The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, under the "old law" whether each disclosure was made in good faith; and under the "new" law introduced by s 17 Enterprise and Regulatory Reform Act 2013 (ERRA), whether it was made in the public interest.*
- f. *Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.*
- g. *The Employment Tribunal under the "old law" should then determine whether or not the Claimant acted in good faith and under the "new" whether the disclosure was made in the public interest."*

[94]

Simplifying the above, it could be said that once a protected disclosure has been found to exist it needs to be shown that:

- the worker has been subjected to a detriment;
- the detriment arose from an act or deliberate failure to act by the employer, other worker or agent (as the case may be); and
- the act or omission was done on the ground that the worker had made a protected disclosure.

Constructive Dismissal

20. A broad and useful outline of the law on constructive dismissal is found in a recent tribunal decision called *Knox v Henderson*.

Submissions on the merits.

21. In this case the Claimant has from the beginning of his employment sought to raise multifarious concerns about a plethora of issues. He did not lodge a grievance. The matters were largely outwith his job duties and remit.
22. The Claimant says he has suffered detriment and constructive dismissal by reason of the response or lack of response on the part of the Respondent to his various issues.
23. It is submitted that he has failed to establish:
- a. Any qualifying disclosures;
 - b. Detriment;
 - c. Fundamental breach of contract justifying his resignation and premising a constructive dismissal claim;

24. Addressing the main heads of issue:

- a. **The three streets project.** The main issue here relates to health and safety as regards fire doors and staircases / handrails. A great focus was on the houses in Rosebank Street. The following points can be made:
 - i. On this point it is accepted that the Claimant has a genuine belief that tenants would be safer in houses that benefit from regulations applicable to new-builds.
 - ii. However the case being made by the Claimant was at times unclear and confused. There was a lack of clarity as to the precise legal provisions that were allegedly breached.
 - iii. It is not accepted that he has a reasonable belief as to a likelihood of endangerment. The Claimant did not provide evidence to establish a likelihood of endangerment. It is not enough for the Tribunal to assumptively conclude that new build houses compliant with applicable fire safety requirements will be safe and old build houses unsafe. The Claimant must establish a likelihood of danger in respect of houses such as those in Rosebank Street. He has not done this. His claim is very ambitious and represents a blatant attack on prevailing building law and practice rather than on the Respondent.
 - iv. The Respondent sought to clarify the matter with external organisations.

- v. It is submitted the Respondent caused him no detriment in relation to this matter.
 - vi. The Respondent believes the claim is out of time on this issue having been raised repeatedly over the summer months in 2015 is seemed to die a death until resurrected in his resignation report issued after his resignation.
- b. **The Cambrai Street Offices.** The points raised above in respect of the three streets project are broadly applicable here also, except for the issue of (i) good faith – the comment recorded by Ms Swain [para 6 of her witness statement] raises a doubt over the veracity of his conduct in relation to Cambrai Street. As stated previously, the premises were Building Control inspected and approved subject to minor adjustments e.g. a mirror in the bathroom; the number of fire exits were deemed appropriate for the number of persons in the building; and, the photographs did not establish anything of substance relevant for the purposes of proving the claim.
- c. **The planned maintenance tender.** This focuses upon the AECOM tender and the pilot scheme involving the subsidiary.
- i. The Respondent relies upon the evidence of Mr Quigg.
 - ii. There was no breach of law for the purposes of Article 67B(1) (b).
 - iii. The Claimant was unable to identify the legal provision that had been breached.
 - iv. It is not accepted the Claimant had a reasonable belief as to unlawfulness.
 - v. The Respondent queries the Claimant's *bona fides* on this issue – it is submitted his concerns are focused upon Mr Robinson and his involvement in the pilot scheme. The Respondent's explanation via Mr Quigg and Mr McDowell properly address the organisational realities.
 - vi. The Claimant has taken a few errors and adopted a conspiratorial approach in questioning what is happening in the organisation.
 - vii. It is submitted the Respondent has acted properly in this matter.
 - viii. It is submitted he suffered no detriment in relation to this matter.
- d. **Green energy.** This allegation appears to involve the abandonment of the tendering process following the pre-emptive closure of the Renewable Heating Incentive scheme in early 2016.
- i. The Respondent relies primarily upon the evidence of Mr Quigg and Mr McDowell and Ms Dunn.
 - ii. It is not clear what legal provision the Claimant alleges was breached.

- iii. Once more the Claimant has adopted a conspiratorial approach in questioning what is happening in the organisation – focusing his concern upon the acting Chief Executive Officer and his links with Green Energy Technology.
 - iv. It was remarkable that the Claimant did not question Mr McDowell on this issue.
 - v. It is not accepted the Claimant has a reasonable or genuine belief on this issue for the purposes of Articles 67B and C.
 - vi. It is submitted he suffered no detriment in relation to this matter.
- e. **79 Ballygomartin Road.** The Claimant has failed to adequately explain the precise legal provisions that were allegedly breached; and how tenants safety was endangered. Ms Swain explained health and safety files were kept in relation to all properties.
- f. **The pension issue.** The Claimant relied upon correspondence from NILGOS. Ms Dunn was the main witness for the respondent on this issue. The Respondent's position was that he would have been eligible for the pension scheme in November 2016 had he stayed on. The Claimant did not cross examine Ms Dunn on this issue. Her evidence is therefore unrefuted.
- g. **The Charity Commission regulations.** The Claimant was unable to identify the legal provision allegedly breached. This case fails on this point also.

Resignation

25. The Claimant's case on constructive dismissal is found in *inter alia* paragraphs 31-33 of his statement. The alleged trigger appears to be his hearing a conversation about the subsidiary working on a kitchen. His concern was that the subsidiary was not fit for purpose. The Claimant was looking for new work from March 2016 and admits he was looking to leave from that point. It is not accepted that there was a fundamental breach of contract at any time during his employment entitling him to leave. The Claimant accepted in his evidence he was asked "5 or 6" times to stay. He also accepted he had a good relationship with the Respondent and a "long history of getting on well."
26. It seems the Claimant was out of the loop in relation to the organisational strategy regarding the pilot scheme and developing the subsidiary. The Respondent relies upon Mr McDowell's evidence on this in his statement and as given in cross examination. It also relies upon Ms Swains evidence. The Respondent was seeking to develop the work of the subsidiary. It lawfully undertook a pilot scheme. Workers

were employed on a temporary basis for the purposes of the pilot. AECOM found the pilot scheme to be successful. The respondent and its subsidiary then moved toward employing a works team on a more permanent basis for the purpose of taking on more maintenance work. It was inevitable that there would be a transition between the works team for the pilot scheme and a works team for future bigger projects.

27. Moreover it is notable from documentation in the bundle (eg p144) and his oral evidence and comments made when questioning witnesses that the Claimant had great confidence in Mr McDowell and his contribution to the Respondent organisation. Mr McDowell was central to the development of the subsidiary. The Claimant's position is hard to understand – he has confidence in Mr McDowell yet he believes the operation is so fundamentally flawed his position is untenable. In any event the Respondent does not seek to provide a perfect explanation as to the reason for the Claimant resigning.

28. The Respondent valued the Claimant as an employee although found his constant querying of many issues outside his remit frustrating. It was not reasonable to expect the Respondent to provide proportionate responses to the Claimant's many emails and documentation. When the Claimant resigned he continued to pursue various matters with various bodies. His leaving report is reasonably comprehensive as to his various queries. A reasoned response was provided by the Respondent which is relied upon. This is neither a valid whistleblowing case nor a valid constructive dismissal case.

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11 May 2017