Case No: 2202474/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr R. Siddhu**
Respondent: **Your.MD Ltd**

Heard at: **London Central** **On:** 9-11, 14-17 January 2019
in chambers 18 and 28 January 2019
Before: **Employment Judge Goodman**
Mrs J. Cameron
Mr. D. L. Eggmore

Representation
Claimant: **Mr. A.Hochhauser QC**
Ms. J. Russell, counsel
Respondent: **Mr. G. Mansfield QC**

RESERVED JUDGMENT

1. The claimant did not suffer detriment for making protected disclosures.
2. The claimant was not dismissed for making protected disclosures
3. The race harassment and discrimination claims fail.
4. The sexual orientation and discrimination claims fail
5. The claimant was unfairly dismissed.
6. The respondent is liable to pay the claimant for the outstanding notice period.
7. Questions of causation, contribution, and any uplift for any breach of the ACAS Code, will be decided at the remedy hearing listed for 30 April 2019

REASONS

1. The claimant's employment with the respondent company terminated on 15 December 2018 – it is disputed whether he resigned or was dismissed. There are claims for notice pay, unfair dismissal, detriment and dismissal for making protected disclosures, discrimination or harassment on grounds of race and sexual orientation, and of post-termination victimisation.

2. This hearing was concerned only with the respondent's liability for claims, and a remedy hearing was set for 30 April 2019 if required.

Evidence

3. The Tribunal heard evidence from:

   Randip Siddhu, the claimant
   Matteo Berlucchi, the respondent's CEO
   Alessandro Traverso, the respondent's COO and claimant's line manager
   Samuel Lowe, former Chief Technical Officer
   Heather Scales, HR consultant retained by the respondent
   Maureen Baker, chair of the respondent's Clinical Safety Advisory Committee.

4. There were bundles of documents of over 2000 pages. Some documents were added on different days of the hearing. The Tribunal heard and decided an application for further documents at the start of the hearing.

5. Each side had prepared a written opening, and we also had written closing submissions. Each side made oral submissions in addition. For want of time the decision was reserved.

6. Mr Hochhauser and Ms Russell appeared pro bono.

7. In writing these reasons the names of some staff who did not give evidence have been initialised to protect their privacy. The parties and the tribunal know who they are.

Findings of Fact

8. The respondent is a small start-up tech company, developing and marketing an app providing health information by means of a chatbot. The project was begun in October 2013 by Henrik Pettersen, a Norwegian, now the respondent's chairman. Mr Berlucchi was brought in as CEO in early 2015; he has had experience of running a series of start-ups. Mr Traverso arrived in June 2015 as COO, when the respondent company was incorporated. Both Mr Berlucchi and Mr Traverso are Italian, but have worked in London for many years. Mr Traverso is, like the claimant, gay.

9. V1 of the app was launched in Q2 of 2014, and V2 in Q4 of 2015, when the claimant joined the company. A version could also be found on Facebook, and on the respondent's own website. In February 2017 a more sophisticated V3 was planned, at the claimant's suggestion, and V3 eventually launched on 2 November 2017.

10. At the time of these events there were between 25-30 staff working in London and Slovenia. Like many start-ups there were times when it lived hand to mouth developing the product while seeking further funding to complete the planned task. Until an HR consultant was appointed to work part-time in November 2017, HR was covered by an administrator, VJ Batkeviciute, who travelled between London Bali and Lithuania and who also dealt with finance. Nina Savec, legal counsel was employed to provide advice on commercial and regulatory matters.

11. The respondent company is owned by a Norwegian parent company and from

time to time reports were made to the board about progress and funding.

12. The claimant grew up in London of parents who had migrated from India. He has a degree in Natural Sciences from Cambridge, then spent two years with Teach First, and then worked as an analyst in consultancies and for start-ups. From 2013 to 2015 he worked for Outfit7, a games company building apps, alongside Mr Traverso, and it was through this contact that he was approached to join the respondent. He is gay with a long-term partner.

13. He began work for the respondent as a freelancer in October 2015. His employment started 1 November 2015, as Head of Brand Experience, responsible for the personality of the chatbot. In February 2016 the Chief Product Officer left, and in practice the claimant had to assume responsibility for the product as a whole. It was explained to us that the product officer deals with the front end of the app, as experienced by the user, and the technical officer deals with the engineering of the software.

14. Towards the end of 2016 the Chief Technical Officer also left, and the claimant assumed a caretaking role until a replacement, Sam Lowe, was appointed in May 2017. During this time the claimant became aware of a number of defects and vulnerabilities in the current software. He engaged with Nina Sivec on some of these, and in May explained to Sam Lowe the steps the team wanted to take to improve systems. Sam Lowe has commented that this was useful, and that the claimant "understood that developing the technology of a start-up is an iterative process, as a start up has limited resources".

15. As a medical app, they employed two doctors, Nicola Ding and JB, to advise on the medical input.

16. This loose staff structure was in part because at the beginning of 2017 the company was running out of money and looking for more investment. In February 2017 an independent company, Optimity, was asked to test the accuracy of various scenarios ("vignettes") with a view to preparing a report for investors on the merits of the developing product. The direction now was to move from providing information to users (a sort of Wikipedia) towards personalising it to the user's reported symptoms and advising the user on what to do – whether self-care, to seek medical advice - and how urgently ("triage to an outcome"). Team members had to work long hours to get the vignettes ready in time. The report was satisfactory and by June 2017 the company did secure further funding and could move forward.

17. With this change in direction, which raised a risk to users if wrong advice was given, the company began to check the regulatory implications of this development, in particular, whether it was a medical device for the MHRA (Medicines and Healthcare Products Regulatory Agency). It was not in fact clear whether software was a healthcare product at all, but a business decision was made to work as if it was. Stuart Harrison, Head of Safety Engineering in NHS Digital, and Maureen Baker, a GP with long experience in risk management in digital medical records and former head of Patient Safety in NHS Digital, were asked in July 2017 to advise on systems to ensure product safety. A clinical safety meeting on 11 July identified risk and the need to adopt systems to reduce it. After further meetings a decision was made to work to register the app as class 1, and then 2A. Class 1 is the

lowest risk – it includes for example wound dressings – and can be self-certified. Class 2A requires some independent verification.

18. On Sam Lowe's appointment he began a review of the technical architecture and identified problems of data security and safety of the medical information and algorithms. On 12 June he emailed on "critical areas of tool support" and made two specific proposals for outside help, which the claimant endorsed; Matteo Berlucchi acknowledged the need, analysing some specific insecurities and stated: "remediating these will be one of the first priorities", and added they would be seeking an independent third party penetration test. Mr Traverso added that they were indeed aware of the lack of security and they should seek to resolve it. So the need to fix security seems to have been uncontroversial.

First Protected Disclosure

19. We set out relevant law here as it is convenient to analyse each disclosure as it was made.

20. Section 43B of the Employment Rights Act 1996 says a qualifying disclosure means "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to go one or more of the following… "This includes that person is failing to comply with any legal obligation to which he is subject, or that the health and safety of any individual is being endangered, or that information tending to show one of these has been deliberately concealed.

21. It has to be more than a mere allegation, and must disclose information – **Cavendish Munro Professional Risk Management Ltd v Geduld (2010) IRLR 38.**

22. The words "in the public interest" were inserted in 2013 to reverse **Parkinson v Sodexho**, to the effect that a worker could claim whistleblower protection even though the matter raised was purely personal, and concerned only his own contract. In **Chesterton Global Ltd v Nurmohammed (2017) EWCA Civ 979**, a case about whether a complaint about the claimant's position was in the public interest if a number others were also affected, and which concerned an allegation of deliberate misstatement of profit figures which had the effect of reducing office managers' commission payments, the Court of Appeal held that the tribunal must ask (a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest, and (b) if so, whether that belief was reasonable. Where the disclosure related to the employee's own contract, there might still be features of the case that made it reasonable to regard disclosure being in the public interest as well. The number of those involved was not of itself determinative. There may be more than one reasonable view on whether a disclosure was in the public interest. The reasons why the worker believed the disclosure was in the public interest need not have been articulated at the time, provided the subjective belief was objectively reasonable, though if the worker could not explain, it might be doubted if he in fact believed the disclosure was in the public interest.

23. The occasion of the first disclosure alleged was a meeting of the claimant with

Mr Traverso and Mr Berlucchi who were reporting back to the London management team on a board meeting in Norway on 15 June 2017. The exact date is not known; the claimant says it was "mid-June". The claimant that says that at the end of this briefing he overheard the two men say to each other "words to the effect" about "you can't so that again, you can't change the data we show", and the claimant interposed "did you show the board something that was not correct?" The answer is not recorded. Then, he says, he explained "the serious medical and safety issues", with particular reference to the V3 technical failings, and "expressly specified the broad matters raised under paragraph 66-69 and 77-82 above". These paragraphs, extending over three pages of his witness statement, list lack of data security, in particular three web based databases, visible security keys, lack of penetration testing, the risk of hacking and then malicious alteration of medical bases, lack of load testing, logs, alarms, and Facebook (there is a long explanation of some very specific insecurity) and lack of monitoring.

24. The respondent denies that any of this was said. In our finding it was not said. We make this finding because (1) the claimant cannot have said all that is in these paragraphs (for example, the section on the Cambridge Analytica scandal which broke months later), (2) there are some differences to this account and his grounds of claim, and significantly, (3) this meeting is not mentioned in the otherwise very detailed letters from his solicitors, Mishcon de Reya, in December 2017 and January 2018, in the immediate aftermath of his dismissal; (4) he is able to report the others' exact words, but none of his own, even in cross examination; (5) it would have taken some time to cover all this, even if it was material already known to all of them, (6) the claimant's context is that he thought he had heard that matters were concealed from the board, but none of this is said to have been withheld from the board, the matters had already been discussed within the company, and the need to put things right acknowledged, and he did not assert that concealment had occurred; (7) there is no account of how they reacted at the time, and given its length, their response, or lack of it, would have been equally notable.

25. The claimant has said that in general terms he was concerned about the safety of users' data being made public, or that users were getting erroneous advice on what might be fatal symptoms, or that he was concerned about information on this being concealed from the board. Had this been said, it would have qualified for protection, assuming it was in fact information, rather than a bare allegation, but we do not think it was. It is likely to have been in the public interest as it related to the health and safety of users; if it concerned falsifying or misrepresenting data related to obtaining regulatory approval (see on), clearly that would have been a matter of public interest.

Events from the end of June 2017

26. In 2016 and 2017 the claimant had organised 360 surveys of staff, with anonymised comments. The 2017 survey threw up some comment that was less than flattering about Mr Berlucchi and Mr Traverso. There was some mixed comment about the claimant. On 27 June the results were presented to the management team (Berlucchi, Traverso, Lowe and the claimant) and it was decided it would not be shared with staff. Before the 2017 survey was done, Ms Batkeviciute had said to Mr Berlucchi she didn't like doing these as "it always seems like Randeep uses these to further diminish your authority and paint a rather negative profile of both of you and better one of himself",

and there is some evidence that Berlucchi and Traverso believed that some staff had been influenced by the claimant's uninhibited vocal criticism of them from time to time, and that quoted comments reflected views he had shared with staff. As he was de facto a member of management, they took a dim view of this.

27. Next day, 28 June, Mr Berlucchi and Mr Traverso met the claimant and informed him that he was to be promoted to Vice-President, Product and Brand and was to become a permanent member of the management team; his salary was being increased by £20,000 to £110,000. He was also told his bonus was to be 83% (by way of comparison, they were getting 33%), and he was awarded stock options worth $125,000.

28. He was also told there would be a further promotion to Chief Product Officer and another £20,000 on two conditions: (1) a successful launch of V3, and (2) provided he "showed more mature behavior in his interactions with management".

29. If the holding back of pay and title is alleged as detriment for making a protected disclosure earlier that month, we think this very unlikely. There is no reason to disbelieve the stated reason, that the managers were unhappy about his role, as they perceived it, in the 360 surveys.

Race Harassment

30. In the grounds of claim the claimant said at this 28 June meeting, when it was suggested the 360 survey had been rigged, he was told that his "culture" was holding him back, and that he needed to "grow up and be more like Mr Berlucchi". In his witness statement he explains that on being told he had to alter his behaviour to get the additional money and title, he protested that he had been doing the whole job for a long time, and the 360 survey showed he was a good manager. Mr Berlucchi had then blamed him for their poor survey results, and the claimant asked how he could be a "pied piper", and affect what others thought. At this point Mr. Berlucchi said his "urban", "culture" and "background" meant he did not know how to behave, and that "where I'm from" people behave differently; the claimant should be more like them, act "more civilized" and "grow up". The claimant retorted: "you mean like an old Italian white man", and they replied "yes, there's a lot you can learn from us".

31. The claimant says this was a clear reference to his race, and that this is an act of race harassment. In particular he said that "urban" is white middle-class code for people from a black or ethnic minority background.

32. Section 26 of the Equality Act 2010 provides:

(1) A person (A) harasses another (B) if—
(a)A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i)violating B's dignity, or
(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

33. Section 26(4) provides:

In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a)the perception of B;
(b)the other circumstances of the case;
(c)whether it is reasonable for the conduct to have that effect.

34. That day the claimant messaged his partner,

> "Just got pay rise bonus and promotion…not just chief product officer but VP product. Means nothing but some bullshit about me needing to prove myself over the next three months. In January I will get higher chief title and additional pay rise if "I prove I'm good" and "grow up into role",

and also:

> "I just shouted at Ale and Matteo because I thought they were being insulting with how they gave me promotion. Not sure I helped myself".

35. Later that afternoon the claimant emailed Mr Berlucchi and Mr Traverso apologising for his reaction, saying: "I was feeling sensitive from yesterday and I didn't feel I had resolved the situation".

36. The apology was graciously accepted, outwardly at least.

37. We accept the claimant's account of the words uttered, which chime with the respondent's witnesses' accounts. We do not accept that this was a reference to his race. First, the understandable context is that he was thought to have openly disparaged senior managers in the presence of staff, and this was not how responsible managers should behave. This is a standard of behaviour which it is reasonable for managers to expect from their staff in leadership roles, regardless of race. The comment may have suggested that young Londoners have different ideas about solidarity and respect from older Italians, and 'culture' referred to possible differences between London and Italy in how to show proper respect. Other relevant circumstances are that the staff were racially mixed, and in his two years of employment there is no other material from the claimant at all about race comments or allusions from which we might conclude a difference in race was a factor in this comment. Lastly, while aware that racial difference can be identified in code or "dog whistle" references, we are wholly unaware that "urban" is such a term, whether in London or outside. Both the Italians present said they identified "urban" as meaning in a city, in contrast to the country, (for example, property being an "urban development"), or like "urbano", meaning pleasant, like the English "urbane". We have to consider the perception of the claimant. The claimant has almost certainly experienced both tactlessly stereotypical and outright hostile acts and remarks about his race in the course of his life, and so be sensitised, and this may well have been how he perceived it, though on this we note with caution that he did not comment on this in the contemporary message to his partner. Taking his perception against the other circumstances, we concluded that these comments were about immaturity – making disparaging remarks to staff about managers; it may also have been e reference to complaining when being given promotion and a pay rise – and that the claimant himself recognised his behaviour on this at least had been out of order. This remark was not harassment related to race.

Second Protected Disclosure

38. The next protected disclosure is said to have been made in a catch up (i.e. regular reporting meeting) with Mr Berlucchi on 2 September (though as that was a Saturday, all agree that it was probably another date around then). He says he said he had heard some time in August from one of the doctors, and had then confirmed it with MT himself, that MT, a data scientist in the medical team, had been put under considerable pressure by Mr Traverso to alter medical data so as to put it in a more favourable light for a board meeting. The claimant says he repeated this in November and again on 4 December, but he does not give any more detail of what he said. The respondent denies both that this was said, or that anything like this occurred. Mr Berlucchi denies it was said on any of the three occasions.

39. The claimant does not mention this matter in any email. MT sent the claimant an email in January 2018 (after both had left) saying he did not want to give evidence in a Tribunal because he needed a favourable reference from the respondent, adding that Mr Traverso was a "bad individual", and that he had reported everything to Sam (Lowe) and Heather (Scales), but does not say what was bad or what he had reported. Neither Mr Lowe nor Mr Scales support this. Mr Lowe agreed that MT did not like Mr Traverso, who had put him under pressure, but he knew nothing about manipulating data. MT left in December 2017; the claimant says MT had told him in January 2018 he had said in his exit interview the previous month that pressure to massage the rates of success data was a reason for departure. The written record of his exit interview however says he left for more money. That may not be the whole truth, but it does not help us know what this was about. The claimant's witness statement states that the medical team were pressured to alter the algorithm to improve successful answers for the Optimity report in February 2017, and then reverse it later, and this was "the background" to what he said in September 2017, but he does not attach MT's name to this assertion. He has *not* told us what MT is said to have done, or which data, or when, or what it was about, so we have to conclude he knew no more than the bare assertion stated. The only other evidence that may be relevant is that Professor Baker, who had regular meetings with the medical team from 27 July; she said she had never been told by the team that they could not raise issues or had been put under pressure. Sam Lowe impressed us as a straightforward person with no axe to grind (and he is no longer employed by the respondent); despite being MT's line manager he knew nothing of any concerns that might require investigation.

40. We are very doubtful that the claimant said what he said on this occasion, or the two later repetitions, otherwise he would have told us more about the conversations, and would have stated what MT is said to have done. It is also odd that in a culture of frequent emails he should not put such a matter of concern into writing, to make sure it was investigated. It is hard to know from the claimant's account what Mr Berlucchi should have investigated.

41. But even if the claimant said exactly what he says, it is doubtful that it was a disclosure of information tending to show in his reasonable belief that patient safety was in danger and that this was being concealed. The claimant even now does not say what MT may have done, though he implies it was to do with Optimity he has not attached his name to that. The app was then in

development, it had since moved on, and by September 2017 there were detailed control measures being devised by Professor Baker and the medical team which would have picked up risk even if deficiencies in the app as it was then had been disguised in February 2017. There may still be valid concern that information about safety had been concealed, but we conclude as he did not know what exactly was done, neither he nor anyone else can know whether it was or was not significant or could or did affect patient safety.

42. It seems the claimant continued to be a trusted member of management. On 14 September the claimant made a presentation to the board meeting on V3. The plan to invite him to do so was intended to give him exposure to board members. It shows that there was confidence in his ability.

Harassment because of Sexual Orientation

43. A major funder had asked for one its senior employees to be seconded to the respondent. She was Elizabeth Tapper. The respondent's senior managers were nervous that coming from a large corporate background she would be dismayed by the fluid informality of a start-up, and that her adverse impressions of some lack of professionalism or procedure might jeopardise funding. At a management meeting, with Dr JB present, on 19 September Mr Berlucchi said she was not to be trusted, and Mr Traverso said that she a was a bitch and a ballbreaker. Mr Berlucchi added "what kind of woman works when she has a family". The claimant and Sam Lowe were uncomfortable with this misogyny. Sam Lowe says a joke was made, to try to defuse the atmosphere, that JB should take Ms Tapper shopping in Oxford Street in the lunch hour, and then (according to the claimant) when the claimant objected that was not a proper use of Dr JB's time, Mr Berlucchi said: "well maybe you can take her to buy shoes instead". Mr Lowe did not hear this and Mr Traverso says it was the claimant who suggested taking her shopping, but we accept the account of the claimant and Sam Lowe.

44. The claimant says this is harassment related to sexual orientation, implying a stereotype that gay men are frivolous and like shopping.

45. All agreed the claimant had an impressive collection of shoes, particularly sneakers, of which Mr Traverso was envious.

46. Was this hostile and intimidating? It was a heightened atmosphere (both bitch and ballbreaker are words with which Lowe was also uncomfortable) and the: "well you can take her then", comment may have had perceptible edge. The shopping comment was introduced to lighten the atmosphere, (though may have been viewed as misogynist of itself). The claimant was invited to take her shopping because he had said JB was a professional.

47. Was it related to sexual orientation? He was upset by the remarks and spoke to Matteo Berlucchi afterwards; Mr Berlucchi said his complaint was not about homophobia, but about the treatment of Elisabeth Tapper. Looking at other relevant circumstances, we take into account that Mr Traverso is gay, so hostility to gays in general may have been unlikely, though it cannot be ruled out that this was a dig at the claimant in particular. The claimant has told us about Mr Berlucchi on an earlier occasion making remarks about whether he would be picked up when the firm had its summer party at Freedom, a gay bar, earlier that year, but given that Mr Berlucchi knew the bar and had

agreed to the party being held there, that was unlikely to be more than a slightly heavy handed joke, not hostile to the claimant's sexual orientation or to gays generally. The only other matter to which were taken was an email much earlier in the chronology headed "the two buggery doctors". Nothing is known of the context or subject matter of this email, and on the bare subject heading we take it not to be about sexual orientation, but in its common use as a general curse word indicating an awkward person or situation, just as the frequent social use of the "fuck" and "fucking" indicates anger or dismay without reference to any sexual intercourse. Taken in the context of no other hostility shown to gays in the workplace, we did not think the shopping remark was more than an off the cuff reference to the claimant's well-known shoe habit. In any event, we did not think any hostility in the comment was enough to amount to harassment. The hostility was towards Ms Tapper, and related to her sex.

Conflict with Mr Traverso

48. In September 2017, while Mr Berlucchi was away, the claimant's weekly one to one meetings were held with Mr Traverso, whether in person or by Skype. An issue arose about the claimant's attendance. A meeting intended for 4 September meeting did not take place because an administrator had not put it in the claimant's calendar. On 11 September, the claimant had to be asked by the administrator to join the call as he had not answered his Skye, and he was three minutes late for it. On 18 September, the claimant had not noticed a diary clash with a dental appointment until an hour before, when he rescheduled the meeting to later in the day. Mr Traverso says he was not aware of this change until 10 minutes before, and that he should have been told earlier. After the 18 September meeting Mr Traverso spoke to the claimant at length about showing respect and not being disruptive and aggressive. An email to Mr Berlucchi later that day shows Mr Traverso reporting it had gone "better than expected", and that he had "thought about your discussion over the weekend and he realised he had been too aggressive in his interactions". (We do not know what this refers to).

49. Then on 25 September, and against this background of Mr Traverso's rising irritation that the claimant was too casual about meetings, the claimant, who was working from home, forgot about the booked Skype call (the only matter in his diary for that day) as he was absorbed in a long call to a technical colleague in Slovenia. He missed messages asking him where he was, and did not respond until 53 minutes after the meeting should have started, saying he was on a Skype call, and apparently carried on with the call. Mr Traverso was furious, taking the claimant's casual approach to line manager meetings for deliberate disrespect. Ten minutes after the scheduled start Mr Traverso emailed the claimant that he said he was working from home that day and if he was not working he should book a day off. Behind the scenes JB messaged the claimant to say Mr Traverso was angry and sending him a long email; the claimant replied: "fuck them they are setting up HR type evidence", and said to her he was sending a reply to "screw with them a bit more". The claimant's reply to Mr Traverso objected it was a one-off, not a pattern of behaviour. An email argument ensued. Traverso said he was treating it as day's holiday: "as a lesson for the future". The claimant said: "if" (so implying the claimant thought it was not a serious issue) "you think this is a serious issue happy to have a meeting to discuss it but you appear to have made up your mind"; the forced holiday was "punitive and demotivating". Mr Traverso

said there was to be no discussion until the claimant understood the messages his actions were sending, and he expected punctuality.

50. We comment that Mr Traverso, while understandably angry, and noting that there was a background of suspicion in that the claimant had claimed to be working from home when on holiday at the beginning of the year, overstepped the mark by imposing what is in effect a disciplinary sanction (docking a day's holiday entitlement) without investigation. We do not however think it was part of a plan to remove the claimant. It was of a piece with the respondent's perception that he was disrespectful and hostile in his open criticism of them to other staff, as reflected in the 360 surveys, and showed an attitude that must be corrected. It seems to us unlikely that the respondent, which was genuinely appreciative of the claimant's considerable ability, planned to dismiss him.

51. Two days later there was a management breakfast meeting at Soho House, where the claimant complained about being docked a day's holiday, and Mr Traverso replied loudly (when challenged, while denying he shouted, he said "we are Italians") about his reasons. He said: "if he (the claimant) was incapable of understanding respect towards management and his colleagues and engaged in insubordination", he had no place at the company. The claimant was upset that this occurred in a public place.

52. On 16 October the claimant was sent information about his new stock options.

Third Protected Disclosure

53. On 17 October there was a general company meeting (a "pizza meeting") in London, with Slovenia staff linked by Skype, all eating pizza. The claimant was asked to make a presentation on the company's newly written values, which had been prepared for partnering with the BMJ. The claimant says that in the course of this he questioned whether in fact company managers followed these values, when they had recently signed off on the release of V3 in certain countries not initially thought appropriate, when it was not ready, or safe for users, and that this had not been told to the board.

54. Mr Lowe was present, and does not remember the claimant saying this; he thought that even with poor audio (he was in Slovenia at the time) he would not missed something so serious.

55. The Labs version of the app had been released in a series of less developed countries with a warning that it was a demo version, with the rationale that in countries with less developed healthcare systems, the user might need the information, and there was less risk of a user being erroneously told not to get medical advice if he could not have accessed medical advice anyway. We can see from the documents that the roll out date for V3 global release was successively put back, that specific work was under way to fix problems, and that risk was assessed by the medical team in a detailed clinical safety report, and that it was signed off just before 2 November by the managers when the medical advisory committee was satisfied.

56. We did not accept the claimant said this, not least because once again he says so little of what he actually said, rather than referring us back to general explanations of his concerns in his witness statement. It is possible he made

some passing allusion, but if he had said the board was being lied to, it might be expected that others would notice and remember. If he did say something, we did not conclude he had a reasonable belief that the board was being lied to: he knew there was much ongoing development going on, involving all the technical team and the medical team, and he has not been able to tell us what was being concealed, other than the non- specific mention of MT being under pressure to alter something at a much earlier date.

Events Leading to Termination of Employment

57. In October 2017 Heather Scales, the new HR manager, began an audit of HR process, prior to starting employment in November.

58. The claimant says that on 18 October JB called him with a message from Mr Traverso that he should apologise for his behavior, or he would be subject to a disciplinary process. Mr Traverso's account is that he was concerned about the claimant's ongoing attitude to management, and asked the doctors (Ding and JB), as they were friendly with the claimant, if they could get him to understand the importance of showing respect for management. In the absence of any evidence from JB, we concluded it was unlikely the respondent planned any disciplinary proceedings, and this was more an attempt at changing the claimant's attitude, with a general warning that this behavior could not go on. JB herself may have pointed out to the claimant that disciplinary action was a possibility if he did not change. He sent a message to his partner later that day: "Ale and Matteo are definitely setting me up. It may happen sooner than I thought. Random situation with (JB) means that I may be forced out sooner." This was the claimant's perception, but we are not persuaded that it was their intention to do any more than improve his attitude and get him to show more respect.

59. There was some discussion with Heather Scales of the claimant being a problem, as on 9 November she was sent a "role matrix" for the claimant. She recommended that she, Mr Berlucchi and Mr Traverso meet the claimant "to discuss where Randeep is falling short in his role, both technically and behaviourally". Her notes of a discussion with Mr Berlucchi that day list the claimant fourth on a list of HR tasks for action. His behaviour is noted as "lateness, unavailable, attitude", and performance as "Product road map behind" (a road map is a plan, or to do list). She noted she was to see him for an induction meeting. She was arranging to see all staff at this stage.

60. On 15 November Heather Scales met Mr Berlucchi and Mr Traverso again. Her notes of action points show item 3 was "exit interviews," and item 4 was induction meetings, followed by a note about the claimant and performance (to be discussed at an induction meeting), about lateness, and concern for his attitude and behavior. Then, "follow up with RS" (the claimant).

61. JB got wind of this and messaged the claimant: "be careful (the managers) have had time with Heather yesterday and your name was mentioned in a non-positive way". The claimant replied :"Ale (Traverso) threatened me with discipline in the management meeting so I saw it coming". Next day Ms Scales reported she had tried to meet the claimant but he was too busy, and they had scheduled a meeting for the following Thursday, 23 November (the claimant was using up holiday on successive Fridays). The claimant says he

approached her and asked her to look at the 360 surveys. Ms Scales mentioned this in her short report, describing him as "negative", and of the surveys, she said she would not need to look at them yet, as she was having a series of meetings with individuals in the coming weeks to get their feedback.

62. The claimant met Ms Scales on 23 November. According to her short note he "told her what he disliked about the company, how he was clearly unhappy with the leadership, the direction of the company and his role", she asked him "what he wanted to do about it", and that he said he wanted to think about his future and "believed he would be happier at a different company". Her witness statement says they discussed his unhappiness about having further promotion and money being made conditional on better behaviour, and that she had reassured him being promoted was a positive vote of confidence, but she would support whatever he wished to do. The claimant's account is much more detailed – that he voiced concern about many examples of offensive language to staff in the past, to JW leaving in tears (June 2017), to MT being under pressure, and a great many technical security concerns. He said if his holiday pay was being docked to teach him a lesson, he "did not know what the lesson was". This material cannot all have been said in 35 minutes, but the gist of it may be what she summarised as "unhappy with the leadership.." He thought she was very concerned at what he was saying, and would investigate it, but he does not state she announced she would do so. The meeting ended when someone else came in, Ms Scales said (on his account) she would "look into it".

63. In his account in his witness statement there is a telling comment by the claimant. He says: "at one point as Ms Scales was writing notes, I saw her shake her head and mutter something under her breath, something like "what would a judge do with this"." He does not say that this is what he heard, but gives that impression. To us, this reinforced an impression already formed, in the context of what he actually said on the occasions when he claimed to have made protected disclosures, that the claimant was often ready to read into others' behaviour, or read back into his account of a meeting, a dialogue within his own mind about what was going one that was never in fact communicated. Here, he has clearly imagined her comments and thoughts.

64. We know from a message conversation with JB on 28 November that the claimant had by now taken legal advice and was planning an email about suppression of information about some " lies" about vignettes, which involved her, and there appears to have been a plan urged on her to record a meeting with the managers at which she was to state her concern that management had pushed back "against them being open about this"; we can JB was concerned about her own good name; whether the claimant proposed this as evidence to protect her own part in whatever is said to have occurred, or as material to support an email he planned to write blowing the whistle on this, we do not know. There may have been another meeting with a lawyer, as on 30 November the claimant sent a message to his partner "great news with work, think I can resign without whistleblowing". (He explained that by whistleblowing he meant he did not have to give information to an outside body, such as a regulator).

65. On 4 December 2017 the claimant met Mr Berlucchi for a regular one to one meeting. On the claimant's account he was asked to work on the road map

(plan) for the next period now that V3 had launched, and the claimant replied: "we needed to talk about the company first as I was not feeling happy about how things were working". He said he was unhappy about Mr Traverso docking his holiday and shouting at him in public, that both had made homophobic and misogynist comments about him and Ms Tapper, that he was badmouthing him behind his back, saying he would be subject to disciplinary action, and that staff were being pressurised to do unethical things, referring to JW and MT, that security was poor, and although Facebook had been switched off, that the board been lied to, and the insurance cover was inadequate.

66. To explain the reference to Facebook, the claimant's witness statement explains that some of his concerns about security of data related to the version launched on Facebook Messenger in April 2016. A member of staff had pointed out to the managers then that because of the way Facebook ran bot apps, any one of the respondent's staff who had administrator rights could view the content of chatbot conversations with individual users at the same time as viewing the user profile. The problem was raised with Nina Sevic, who advised in May 2016 this did not infringe HIPAA. The issue was then left, apparently because the Facebook version was little used. It was revisited in 2017 in preparation for GDPR. Mr Berlucchi discussed it with Sam Lowe and Nina Savec, they decided simply to shut down the Facebook version. On 8 December 2017 this was done. There is no evidence from the claimant or anyone else that he participated in these discussions or had pointed out the problem.

67. On the reference to insurance, this is about product liability insurance for the respondent, in case claims were brought by users. Because of the developing nature of the product they had been exploring cover for some time, so far without success. It was not suggested that at the time insurance was compulsory, leading to breach of legal obligation. He may have raised it, but it was an ongoing discussion, and the respondent was actively looking for cover to reduce business risk.

68. Returning to the 4 December meeting, according to the claimant ,Mr Berlucchi brushed aside his concerns saying this is how start-ups work, "let's focus on the future… there is a great opportunity for you" and "the board are excited to see what you come up with". When he reiterated concern about Mr MT, he was told to stop being sensitive, at which the claimant says he got "frustrated", and said: "Objectively this is ridiculous. Any judge would see how ridiculous this situation is", and "if you can't see this, how can you expect me to continue working here", at which point Mr Berlucchi said: "well you have a 3 month notice period so you could easily do the 2 year plan in that time". The claimant says he understood Mr Berlucchi had just decided he should leave, and said it was ridiculous, at which Mr Berlucchi asked what he would do in his shoes, and the claimant said he would not ask him to write a road map when he was leaving, as it might be a business risk, there was then a comment about a non-compete clause, and the claimant said that to minimise disruption he should be allowed to leave before Christmas. The claimant adds that he thought he was discussing a hypothetical termination, and the termination decision came from Mr Berlucchi.

69. Mr Berlucchi's account is much briefer - that the claimant said he was resigning. The amended grounds of claim relate that the claimant said he

wanted to take some time out to think about the next step in his career.

70. We have to decide whether the claimant made disclosures at this meeting. He probably referred to the mangers' approach to holiday and their unfair attitude to punctuality. He may have spoken on the Facebook switch-off, which had just been decided or was under discussion, and made a general comment on security generally. We are still unclear what he was saying colleagues had been pressurised to do, and it is not clear to us that he did say this, and there is too little information to understand whether he held a reasonable belief in wrongdoing on a matter of public interest. Nor do we believe he said the board had been lied to; it was telling that when it was put to him he had already said this on 16 October, and it was not clear what he had said then, he said he was now "more vocal", without giving any more detail of what the concealment was. Of those things he did say, the comment about security was a matter of public interest (health data security) in the reasonable belief of the claimant, but in our finding the comment would not have surprised or upset the respondent, which had been addressing and trying to solve these difficulties at least since Sam Lowe's arrival. It was not a cause of detriment or dismissal. Finally, information about his own treatment is not a matter of public interest. What he said at this meeting was either not a disclosure qualifying for protection, or did not cause detriment.

71. Reviewing the claimant's account, our reading is he made it clear he was resigning – he intended to resign or was going to resign - but he did not believe it to be formally effective until he had put it in writing. As to whether Mr Berlucchi seized the opportunity to ask him to leave, which is the implication of the claimant's account of the discussion, the claimant's sequence of events suggests something has been omitted. Had the respondent asked him to leave because exasperated by his criticism, the claimant would have protested, then or later, that he was not resigning, but his behavior over the next few days is inconsistent with that of a man who thought he had been told to leave.

72. It was agreed he would see Ms Scales next day, and that he would sleep on it. He told Sam Lowe soon after the meeting that he had decided to leave. Just before midday Mr Berlucchi emailed him saying he was sorry to hear he had reached the decision to leave, but could he not tell anyone until he had informed Ms Scales. The claimant replied he had already informed Sam Lowe, and "as discussed I will send a formal email/letter about my decision", after he had his catch up (meeting) with Ms Scales next day. He did not say he was not resigning, or that he was only thinking about resigning. Ms Scales, getting the news from Mr Berlucchi, informed payroll that the claimant had "handed in his notice" and that she was meeting him next day to "agree the terms of his release". She would cover "his notice as a 'good leaver' non-competes, benefits etc, drafting a script (for reasons for leaving) timescales for briefing, and drafting … a settlement agreement".

73. At this stage, we record, it was understood the claimant was leaving, because he wanted to leave, not because the respondent wanted him to leave, but it was not yet settled whether he would work his notice, or be paid in lieu, and if so, when his last working day was. Both knew he had three months' notice in his contract

74. Despite the claimant describing this meeting with Ms Scales on 5 December

as a continuation of his expression of the detail of Mr Berlucchi and Mr Traverso's shortcomings, and him then being surprised that she only wanted to talk of practicalities, in our finding the claimant had not changed his mind. Ms Scales says that 8 December (that Friday) was agreed as his last day, and proposed an exit interview on 7 December. She told him the company wanted to pay him in lieu of notice, and would like to sign a settlement agreement.

75. The claimant's contract of employment provides for notice in writing of three months either side, and the right to pay notice in lieu in the company's absolute discretion. The claimant had brought his contract to the meeting, and when she read it at this point, she noted that although in standard form it was provided that there would be non-compete period for the term of notice at least, the contract had been edited to state the non-compete period was to last 0 days. When Mr Berlucchi learned of this he was concerned the claimant might go to work for a competitor and so Ms Scales was told to offer the claimant extra money if he agreed not to work for specified competitors. While later that day the claimant sent her the 360 surveys, so she could see the back up for his complaints about the managers, Ms Scales meanwhile emailed colleagues in payroll to establish the claimant's outstanding holiday entitlement.

76. Early next morning, 6 December, the claimant was sent a settlement agreement which provided three months' salary paid in lieu of notice, plus an extra 2 months' pay for not working for a competitor, the latter to be paid in two instalments, 60% in December 2017 and 40% on 6 April 2018, plus reasonable legal fees. He was asked to sign by midday. The claimant protested about the deadline, not least because it would be hard to secure legal advice in time, and said he was unhappy with how things were going.

77. There are three versions of the agreement sent that day and the next, the last including his stock options, which were the subject of what reads as an amicable exchange part way through 7 December, though the claimant says there was a discussion shortly after that was not amicable, which is not otherwise referenced by either side in any contemporary document. What can be said however is that the claimant never signed any of the drafts, nor did he ever write formally resigning.

78. On 7 December he told Ms Scales he had told Mr Berlucchi his leaving date would be when "I sign and actually leave", so he had told others he would be working from home or on vacation until he actually left. He did say to others he would be taking holiday until the paperwork was signed, and would come in for JB's leaving drinks the following week. Meanwhile on 7 December, Mr Berlucchi told the staff the claimant had decided to move on, and a short leaving ceremony took place when he was presented with a cake and a card and thanked for his service. The claimant did not show surprise, or protest he was not leaving.

79. In the event he did not attend leaving drinks for Jo JB, saying he was unwell, or a renewed date for an exit interview on 14 December. He did agree to bring in his laptop by 22 December, commenting that if he didn't he might not get paid. He did not attend work after 7 December.

80. On 15 December Mishcon de Reya wrote to the respondent on behalf of the

claimant saying their treatment of the claimant had been "shocking", rights in respect of their conduct were reserved, and he remained employed, and had not resigned. He would be taking holiday until 29 December. The respondent replied that it had been agreed his employment would terminate on 15 December, and his employment had ceased on that date.

81. Form P45 (HMRC notification of leaving) was issued by the respondent, and states 15 December 2017 as the last day.

82. On 22 December Mishcon de Reya wrote again, saying the claimant had told Mr Berlucchi on 4 December that he was planning to hand in his notice and wanted to leave on 7 December, but he had not in fact resigned, nor agreed to leave on 15 December, or any other date. If he had resigned, however, it was because of the treatment he had "suffered at the hands of Mr Traverso and yourself over the prior weeks and months" which amounted to a repudiatory breach of contract, which claimant had accepted on 4 December "after it became clear to him following a meeting with Ms Scales on 22 November 2017 that nothing would be done to address the behaviour or protect" him. This had completely undermined his trust and confidence in the respondent as his employer. The writer went on to list "unreasonable and detrimental treatment", including the "racially charged language" about his culture holding him back and him having to grow up, the buying shoes remark on 19 September, the docking of holiday on 25 September, the breakfast meeting on 20 September, refusal to listen on 29 September, the relayed message from Dr JB in October, and a higher standard of punctuality being applied to the claimant than to other staff. It was further asserted that the claimant had raised issues which amounted to whistleblowing. The dates of disclosures were not set out, but the subject matter was, and included a culture of lying to investors and the board; that the claimant had wanted to add "medical risk to the board's agenda in August as the board did not get an honest picture of this", and that a discussion at the all hands meeting on 17 October had been shut down by saying the company had to bend the rules, and "to the board we always lie". Claims of discrimination and harassment because of age, race and sexual orientation were also notified.

83. A very detailed denial was sent by Allen and Overy on behalf of the respondent on 16 January 2018.

84. Early conciliation began on 26 February. The claimant presented ET1 on 20 April 2018.

85. The claimant was not paid for the contractual notice period, nor for any holiday outstanding on termination.

Dismissal - Relevant Law

86. The claimant disputes he resigned, but if he did, asserts it was a constructive dismissal. The respondent's case is that he resigned, voluntarily.

87. By section 95 of the Employment Rights Act, when considering a claim for unfair dismissal, an employee is dismissed when his contract is terminated by the employer, with or without notice, and also when the employee terminates it, with or without notice, "in circumstances in which he is entitled to terminate

it without notice by reason of the employer's conduct". This is called "constructive" dismissal.

88. It has been made plain from **Western Excavating (ECC) Ltd v Sharp (1978) IRLR 27 o**nward, that such conduct must be more than unreasonable: it must be a repudiatory breach of a fundamental term of the contract. Often this is the implied term of mutual confidence and trust, that an employer "will not without reasonable and proper cause conduct himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" - **Woods v WM Car Services (Peterborough) Ltd (1981) IRLR 347**. Not every breach is grave enough to breach the term – **Croft v Consignia plc (2002) IRLR 851**. If there is such a breach, a tribunal must consider whether that breach caused the resignation.

89. We considered case law on whether the claimant did resign. Provided the intention was clear, it does not matter that he did not resign in writing, whatever the contract said, but we must ascertain how clear it was. Announcing an intention to resign does not terminate the contract if it is uncertain whether the contract will end, and generally, if there is no statement of when it will end, it must be doubted whether this a resignation at all, rather than an announcement of intention. We considered that facts of **Ely v YKK Fasteners (UK) Ltd (1993) IRLR 500** which are similar but not the same: the employee announced he would be emigrating to Australia when he had made arrangements but did not name a date. Some weeks later he was asked to commit to a date, because a replacement had been recruited, and he said he had changed his mind. It was held he had been dismissed (for some other substantial reason), rather than resigning.

90. In our finding, when the claimant said on 4 December he was leaving, it was his initiative, and did not come from the respondent, whether by plan or in exasperation. We know that in the background the claimant had taken advice and was contemplating leaving. It is possible he planned to announce he was going at this meeting, more likely he decided to do so when voicing his complaints about his treatment and criticising the way the mangers ran the company. No precise date was discussed, save that both knew he had to give three months notice by contract, so will have assumed his leaving date was three months from then (5 March 2018); that is what the respondent understood when he spoke of getting the road map planned in that time. It was the claimant who proposed he be released at an earlier date, and it is – and was - understood by both that he was in effect asking the respondent to exercise discretion to allow him to be paid in lieu of notice not worked. The claimant did not propose a particular date, but suggested it was before Christmas, leading to the proposal that he finish on 8 and then 15 December. Tacitly the respondent, by its discussion with Ms Scales and the sending of a settlement agreement, accepted the proposal to resign, though the actual termination date was not clear. Neither proposed date was agreed because of the intervention of the respondent's negotiation to obtain a non-compete clause in a settlement agreement, and the pressure on the claimant (unreasonable in our view) to get legal advice and then sign it in a matter of hours, which the claimant resented, and led him to rethink whether he wished to leave on the respondent's terms. The solicitor's letter, read in the light of events to that date, should be read not as meaning that he wished to affirm the contract and carry on working for the respondent,(otherwise the claimant might have said when he was returning to work), but that he wished to

continue negotiating the terms on which he was leaving. The respondent could have replied that they expected him to attend for work on the next working day after annual leave ended on 29 December, but instead stated that the contract had ended on 15 December and backed it up with a P45 and no further payment of salary. In the event the contract was terminated by the employer and was a dismissal.

Constructive Dismissal

91. The claimant's resignation announcement was not, in our finding, because of any repudiatory breach by the respondent. The respondent perceived his conduct – whether open criticism of his managers, or a lackadaisical attitude to meetings – to be unsatisfactory. On the latter it can be understood why an employer would consider his attitude unsatisfactory, and would expect a more genuine apology than the one they received. On the former, we read some of the survey material as showing that others considered the claimant was critical of the managers. An employer is permitted to discuss conduct with an employee. In legal language, they had proper cause to act as they did in seeking to tell the claimant his behaviour was not acceptable and should change. As noted, the docking of a day's holiday was done without an opportunity to state his case, but it was the claimant who raised the issue in a public place, to which the respondent replied (though it is not shown that anyone did in fact overhear), when he had the option of raising a grievance more discreetly by email or in an office. The relationship was in trouble, but we do not consider that the employer's behavior was such as to seriously damage the duty of trust and confidence.

92. We do not accept that the respondent planned to dismiss the claimant as the claimant may have thought (the references to being set up for HR), as all the evidence is that they valued his services highly and relied on him to move the company to its next step in promoting and marketing the app, even after he had said he did not wish to continue. They did intend to take steps, by discussion or even formal warning, to reform his conduct, but that it is not a repudiatory breach.

93. In our finding, the respondent's objection to his negative conduct, (as they perceived it), was not related to what he maintains were protected disclosures. He was critical of them, in not very specific ways, and the enigmatic messages with JB and his Slovenian colleague tend to show this, but not because of regulatory shortcomings or concealment but because he resented the way he had been treated on 25 September. We have discussed the 4 December. Such disclosures as were made and protected, or the respondent's response, did not cause him to decide to leave, and the respondent wanted him to stay.

94. Having found that the respondent dismissed the claimant by declaring the contract as at an end on 15 December without concluding an agreement, or paying him in lieu, we must consider the reason.

95. A reason is a set of facts or beliefs known to the employer which caused him to act as he did. The reason must be inferred, because the respondent's case is that the claimant had resigned, that it was mutually agreed he would leave on 15 December, and they had no reason to dismiss. It is possible that the solicitors' reiteration of the material said to be protected operated on the

respondent, but we think that most unlikely to be the cause. The respondent had heard these criticisms before, and still wanted to keep him at work. It is hard to understand why in ending his employment by declaring he had left by agreement on 15 December they did not pay the balance of the notice period. Had they done so, they could say the claimant had wanted to leave by Christmas, and he was, or if they maintained the termination was by agreement, that was the date, and they were paying the contractual entitlement. It has not been explained by the respondent, save by reference to matters discovered later, why they did not pay. We concluded the respondent saw this as a negotiating tactic to secure a non-compete clause in a settlement agreement, as they were worried he was moving to a competitor.

96. Ending the employment because the claimant had said he was leaving, and then done nothing to indicate he had changed his mind, save for instructing solicitors who did not state he was returning to work, (and for the avoidance of doubt, we do not conclude this was oversight; the claimant did not intend to return) is capable of being a substantial reason justifying dismissal. Did the respondent act fairly in treating that as a reason for dismissal, having regard to equity and the substantial merits of the case? We concluded they did not. Had they written to say the claimant had given notice, and had indicated a desire to leave before Christmas, and they were exercising a discretion to pay in lieu, and then paid him, that would have been fair, and the act of a reasonable employer in these unusual circumstances. As it was, they failed to pay, probably because they wanted to secure an agreement not to compete, or possibly from anger, rather than any good reason.

97. In terms of compensation for dismissal, the claimant is entitled to a basic award. On our finding the employment would have ended on the expiry of three months from 4 December. It is highly improbable the claimant would have changed his mind and wanted to return.

Wrongful Dismissal

98. The respondent pleaded that misconduct on the part of the claimant discovered after termination would have justified termination for gross misconduct such that the contract was repudiated by the claimant, releasing the respondent from the obligation to pay wages in lieu. This is (a) making remarks behind the backs of Mr Berlucchi and Mr Traverso to the effect that they were useless and should not be running the company (b) that he deliberately manipulated the data of the 360 degree survey so as to skew the results in his favour and against the senior managers, (c) disclosing the 360 survey result to Ms. Tapper (using a personal email address) without permission and allegedly telling Ms Ding he did so to have the managers removed at the behest of the investor and (d) failing to contribute to the road map for the next stage, as revealed by staff at a 13 December meeting he did not attend.

99. There was not much evidence on these points. On (a) if we credit the remarks being made, they serve to show the respondent's suspicions about his open criticism of them was correct, but as they had not viewed it as gross misconduct before the resignation when they wanted to keep him at work it is hard to understand why it should be any more serious after resignation.

100. On (b) we heard evidence from the claimant and the senior managers

about the survey and its production and what the claimant as alleged to have done, but not from the staff member who produced the survey and collated the material, admittedly with some guidance from the claimant. We conclude it was unlikely he manipulated the data itself; we are prepared to believe he had significantly influenced staff views of the managers by his open discussion of their shortcomings, but such disloyalty had not been viewed as repudiatory, only a reason for holding back on the rewards granted and promised in June 2017.

101. As for (c) the claimant admits he disclosed the survey result and should not have done, as a decision had been made not to share it outside the management team. He says it was because Ms Tapper was concerned she was excluded from management meetings and he thought this would help her understand the company better. He says she assured him she had authority. He says he sent it on 17 November (so before resignation). This was misconduct, breach of confidence which he well knew could damage the company's source of investment, as he believed the survey findings to be damaging. Investors hold it important that the people driving the start-up are worth investing in as much as the product. In his mood at the time, believing he could be being set up to leave, he may well have held that the managers deserved to be shown up. He could legitimately have shown it to Ms Scales, but not to Ms Tapper. We know however that Ms Tapper has remained in the company and the relationship is said to have been successful. It suggests no harm was done. Taken on its own we concluded it was not gross misconduct, repudiatory of itself, though we can see how if discovered at the time it may have accelerated the respondent's drive to reform his undermining behavior.

102. Finally on (d), this was a performance issue which would have been discussed, but not of itself misconduct. We note that lack of progress on this since the product was launched on 3 November, is additional evidence that the claimant did not plan to stay with the respondent, but we do not have the detail of what work he or did not do in this period, and if working it cannot, without knowing more, have been repudiatory that he had held back on the road map.

103. We did not conclude that this conduct released the respondent from its obligation to pay notice under the contract.

Victimisation

104. Victimisation is defined in section 27 of the Equality Act as when a person is treated unfavourably because he has done a protected act; in this case the protected act relied on is the solicitor's letter alleging discrimination and harassment.

105. On 26 January 2018 the claimant made a data subject access request. The respondent replied in detail, with data, on time, on 5 March. The claimant asked for more material on 20 March, concerning recruitment, and communication with others. A detailed reply to this was sent on 6 April.

106. Our finding on the victimisation claim is this: there was timely and substantial compliance, both with the initial request and the follow up seeking more detail on particular areas, where appropriate explaining why there was

no data. Some documents (handwritten notes notably) were not disclosed. We observe this is not uncommon, and sometimes both sides overlook that this material too is relevant. In our experience, the claimant has not been treated unfavourably, but even if he was, we cannot attribute this to having alleged discrimination or harassment under the Equality Act. Small, occasionally very significant, gaps in disclosure occur in many employment cases, regardless of equality allegations. Large amounts of material were disclosed here, and on time. It is not shown that any missing or delayed data had anything to do with the equality allegations. We cannot link the two.

Discrimination because of race or sexual orientation.

107. The claim is pleaded in the alternative as discrimination (less favourable treatment) rather than harassment. As provided in the Equality Act, the same conduct cannot be both. We did not understand how the remark about growing up was less favourable than what would have been said to someone who is white who had engaged in undermining his managers with staff, or had shouted at them when told some of his promotion was being held back. That person would also have been told to grow up. As for the shoe shopping, we did not think it less favourable treatment than a remark addressed to a heterosexual employee with a partiality to shoes who had protested at a female member of staff being asked to take a visitor or new staff member shopping. In other words, in neither case was the treatment because of the protected characteristic.

_____

Employment Judge Goodman

Date 4 February 2019

JUDGMENT SENT TO THE PARTIES ON

5 February 2019

.....

FOR THE TRIBUNAL OFFICE