EMPLOYMENT TRIBUNALS

Claimant: **Mr. Adrian Finn**

Respondent: **Community Inclusive Trust**

Heard at: **Via Cloud Video Platform**

On: **11th December 2020 (reading day)**
14th, 15th, 16th, 17th December 2020
28th January 2021
29th January 2021 (in Chambers)

Before: **Employment Judge Heap**

Representation
Claimant: **Mr. N Hamilton – Solicitor**
Respondent: **Mr. S Hoyle - Consultant**

COVID-19 Statement

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was V – fully remote via CVP. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The complaint of automatically unfair dismissal under Section 103A Employment Rights Act 1996 fails and is dismissed.

2. The claim for wrongful dismissal fails and is dismissed.

3. The claim for breach of contract in respect of outstanding expenses fails and is dismissed.

REASONS

BACKGROUND & THE ISSUES

1. This is a claim brought by Mr. Adrian Finn (hereinafter referred to as "The Claimant") against his now former employer, Community Inclusive Trust or CIT (hereinafter referred to as "The Respondent" or the "Respondent Trust") presented by way of a Claim Form received by the Employment Tribunal on 3rd April 2019 following a period of early conciliation which took place between 4th February and 4th March 2019.

2. Within that Claim Form it was sent out that the Claimant was advancing claims of unfair dismissal contrary to Section 103A Employment Rights Act 1996 and for breach of contract relating to unpaid notice pay and unpaid expenses of some £800.00.

3. The Claimant prepared and submitted his Claim Form himself as a litigant in person but at all material times since he has been represented by a solicitor, Mr. Hamilton, who has appeared on his behalf at this hearing.

THE CLAIMANT'S POSITION

4. The Claimant contends that during the course of his employment with the Respondent he made three protected disclosures. Much of the first half of the second day of hearing time (the first day being a reading day) was concerned with identifying what those disclosures actually were because they were not properly addressed in his witness statement even though he had had the benefit of legal advice and assistance in preparing it. I say more about that below.

5. However, the Claimant contends that as a result of having made those protected disclosures, he was dismissed and the reason or principle reason for that dismissal was because he had made those same protected disclosures. I should observe, however, that by the point of oral submissions Mr. Hamilton relied in essence only on the first of those alleged disclosures. Although the other two were not abandoned, little if anything was said about them in closing submissions.

6. There is also a claim for unpaid notice. In this regard it is the Claimant's case that in late November 2018 agreement was reached between himself and Mr. Bell, CEO of the Respondent, that the period of notice that they were required to give to him on termination would be increased to three months from the one week provided for under his contract of employment.

7. Finally, there is the complaint of breach of contract regarding the non-payment of expenses in the sum of £800.00 which the Claimant says was owed to him.

THE RESPONDENT'S POSITION

8. The Respondent contends entirely to the contrary.

9. It is not accepted by the Respondent that the Claimant had made protected disclosures but it is said that if he had, those were not the reason or principle reason for his dismissal which was said to relate to his capability.

10. Insofar as the notice pay claim is concerned, it is denied that any agreement was ever reached with the Claimant to provide him with an enhanced period of notice on termination of employment and that he was paid in lieu of the one week's notice to which he was contractually entitled. It is further denied that there were any expenses submitted by the Claimant to which he was entitled and which had not already been paid.

11. Further, the Respondent contends that the Claimant's contract of employment came about as a result of fraud because he had fundamentally misled them as to his skills, qualifications and experience within his curriculum vitae ("CV"). The Respondent relies on the decision in **Hewison v Meridian Shipping & Ors [2002] EWCA Civ 1821** in support of this position.

12. Mr. Hoyle also sought to advance a point that part of the discussions relied upon by the Claimant were inadmissible given the provisions of Section 111A Employment Rights Act 1996. However, after discussion as to the effect of Section 111A(3), that point was conceded.

THE HEARING

13. The claim was originally due to be heard by the Tribunal on 20th and 21st November 2019. An application for a postponement of that hearing was made by the Respondent on the basis that they had reported the Claimant to the police for alleged fraud. That application was refused by Employment Judge Blackwell at a Preliminary hearing on 12th November 2019. An Appeal to the Employment Appeal Tribunal against that decision was refused at the sift stage on 18th November 2019.

14. The Respondent subsequently renewed their application which was granted by Employment Judge Blackwell and he converted what would have been the first day of the full merits hearing to a further Preliminary hearing to consider whether the case should be stayed pending the outcome of any police investigation and whether a point that the Respondent sought to take in respect of fraud/illegality should be determined as a preliminary issue.

15. That Preliminary hearing took place before Employment Judge Ahmed on 20th November 2019. He determined that the claim should not be stayed and that the illegality point did not need to be determined as a preliminary issue. He also listed the claim for a full merits hearing for a period of five days commencing on 16th March 2020. He made Orders for the good conduct of the claim in preparation for that hearing. That included giving leave to the Respondent to amend their ET3 Response to set out the basis of the illegality argument. Mr. Hamilton on behalf of the Claimant contended that that had not been complied with and sought to apply to have the amendment struck out as a result and for the documents relating to the fraud point to not be admitted. I refused that

application with reasons given orally at the time and again as neither party has asked for them to be included within this Judgment I say no more about them.

16. The relisted March 2020 hearing was postponed on the application of Mr. Hamilton on behalf of the Claimant as he was shielding due to the effects of the Covid-19 pandemic. Instead, that hearing was converted to a Preliminary hearing for case management.

17. The claim was then re-listed for 5 days of hearing time which took place between 11th to 17th December 2020. Unfortunately, evidence and submissions were not able to be concluded within that time and a further day of hearing time had to be listed for that purpose. Thereafter, I reserved my decision as there was inadequate time to consider all matters and deliver an oral Judgment. Judgment was therefore reserved and I am obliged to the parties for their patience in awaiting the same.

18. Equally, I apologise to the parties for the delay in promulgating this Judgment which has been caused, in part at least, as a result of difficulties working remotely during the pandemic without typing facilities and the number of other cases that have also had to be dealt with.

19. The claim proceeded as a fully remote hearing which enabled it to continue in spite of the Covid-19 pandemic and I am satisfied that despite some technical issues arising during the course of the hearing, those were overcome and did not effect either the evidence or the fairness of the hearing.

20. However, it is fair to say that a number of difficulties which were encountered during and before the hearing which caused substantial delay and unnecessary difficulties. I raise these not to cause angst to the parties or their representatives but in the sincere hope that a repeat of those matters can be avoided in the future.

21. One such matter was that prior to the hearing whilst I was reading into the papers and the witness statements it became clear that the hearing bundles which had been provided by the Claimant's solicitors did not appear to contain a number of the documents listed on the bundle index nor did a number of page references in the Claimant's witness statement appear either in the index or otherwise the bundles themselves. There were no less than 20 issues identified with the bundle in this regard.

22. Whilst most of those matters were able to be dealt with when the hearing commenced the following Monday, not inconsiderable time was lost as a result. Whilst I appreciate the difficulties that most representatives have had during the pandemic the scale of the problems with the bundle and the page numbering did not appear to be wholly attributable to that and I remind myself that this case should have been trial ready in March 2020 and was only postponed then because Mr. Hamilton was shielding. It is difficult to understand, therefore, how the pandemic itself was the cause of deficiencies in the bundle and the numbering referred to in the Claimant's witness statement.

23. It also transpired that the parties appeared to be working from different bundles to those which had been provided to the Tribunal and to the Claimant himself. Mr. Hoyle appeared to have a more up to date bundle whilst a number of documents were missing from the ones that I had been supplied and which the Claimant and Mr. Hamilton were using. I expressed some concern to the parties in this regard that the claim simply did not appear to be trial ready despite the fact that it should have been some 13 months earlier.

24. Furthermore, there had also been non-compliance with Orders by the Respondent prior to the hearing and that included in relation to the late service of witness statements. Although Mr. Hamilton had previously indicated an intention to object to those being adduced into evidence, he later confirmed that no objections were to in fact be advanced given the passage of time.

25. It was also plain that neither party had fully and diligently turned their minds to their disclosure obligations in these proceedings. Further documents continued to emerge on both sides – often as a result of requests that I had raised for documents referred to in the evidence – during the course of the hearing.

26. The final raft of documents, which was subject to an application to adduce them into evidence, was from Mr. Hamilton on the final day of hearing time. The Respondent objected to that application and I refused it with reasons given orally at the time. I had also earlier refused an application by Mr. Hoyle to strike out the claim. I gave oral reasons at the time for both of those decisions. Neither party has requested that the reasons were embodied within this Judgment and therefore I say no more about them.

27. Moreover, for reasons which I was ultimately unable to get to the bottom of on two separate occasions it transpired that Mr. Hamilton and the Claimant were working from different copies of the witness statements for the Respondent. Further time was therefore lost seeking to rectify those matters.

28. I also have to remark – as indeed I did at the time - that it was very surprising that Mr. Hamilton was not, without an adjournment to take instructions, able to set out the required details of the alleged protected disclosures that the Claimant relied upon and, indeed, he appeared to be unsure of much of the detail. That included whether the disclosures were made orally or in writing and, in the case of the former, what exactly the information was that the Claimant was said to have actually disclosed. None of that was in the Claimant's otherwise very lengthy witness statement (which ran to some 40 pages) either at all or in sufficient detail to allow cross examination to be effective and findings of fact to be made. I did express some concern at the time of that position given the nature of the case that the Claimant was advancing and whether adequate instructions had been obtained before the hearing.

29. Originally, four alleged protected disclosures were relied on. Mr. Hamilton abandoned reliance on one relating to the conduct and recruitment of teachers during the course of the hearing. He had also sought to rely on a disclosure relating to employee pension contributions which was not contained in the pleaded case and which would therefore have to be subject to an application to amend the claim. Whilst initially indicating that he intended to make such an application, that was later abandoned by Mr. Hamilton.

30. The alleged disclosures relied upon by the Claimant by the conclusion of the hearing were therefore as follows:

    a. A disclosure relating to the remuneration of a senior headteacher, JW (paragraph 70 of the Claimant's witness statement). Mr. Hamilton could not narrow down the date of that disclosure, which he believed to be an oral disclosure, to any more specific date than June or July 2018. That is said to be a disclosure of a criminal offence with that offence being a fraud on HMRC and it was in the public interest because it related to fraud on a Government body. After an adjournment to take instructions Mr. Hamilton set out what he said the Claimant had told him was the precise words used which were said to be as follows:

    "It is not normal, morally correct or indeed legal to remunerate a full time member of staff in this way purely to avoid tax. It is simply not possible as an employee. All payments should be handled through the CIT payroll. This could bring the Trust into disrepute and the HMRC would take a very dim view of this as it amounts to fraud."

    b. A disclosure about safer recruitment and safeguarding relating to the recruitment of a supply teacher (paragraph 73 of the Claimant's witness statement). This was said to have been made in October 2018 (again a precise date could not be pinpointed) and was said to relate to the failure to obtain a DBS check for that individual which was said to be a breach of a legal obligation relating to the safeguarding policy and was said to be a disclosure in the public interest because it related to the safeguarding of children; and

    c. A disclosure about the breach of the Respondent's finance policy regarding an overspend on the budget for the reconstruction of a playground at Isaac Newton Primary school and, particularly, the way which a particular invoice was processed so as to avoid it having to be approved by the Board. That was said to be a breach of a legal obligation relating to the operation of the Respondent's Finance Policy and the public interest element is said to relate to the use of public monies. That disclosure was said to be made by email on 18th September 2018 although worryingly we had some considerable difficulties locating that email within the bundle and it transpired that the email was in fact dated 19th September 2018. It appears at page 29a of the hearing bundle although unfortunately that was one of the documents that had been omitted from the hearing bundles that Mr. Hamilton had sent for the Tribunals use. In the final analysis, however, we were able to locate it and Mr. Hamilton confirmed that that email was the disclosure relied upon.

31. It must also be noted that despite an initial indication from the representatives on both sides that they had previously worked together and could work cooperatively in these proceedings, by the time that this hearing came around the position was clearly anything but. Whilst their dedication to their respective clients is commendable, unfortunately the way in which that often came across when dealing with each other, particularly in vociferous and frequent objections and on occasions inappropriate digs, was not. That type of conduct has no proper place in litigation and it did not assist me in dealing with the proceedings. Particularly,

as I observed at the time I would not expect to have to remind professional representatives once let alone more than once as happened here that they must act with civility and appropriate standards of behaviour.

32. Even after the close of evidence and submissions there was further vociferous communications by way of an email which was sent by Mr. Hoyle to Mr. Hamilton after the hearing had ended and which was copied to the Tribunal and made reference – rather pre-emptively given that Judgment had not been given – to applications for costs and other less than cordial remarks.

33. Whilst representatives should never be discouraged from pursuing their clients interests robustly, unfortunately the conduct at this hearing spilled well over robust pursuit. That too has wasted time and has not assisted me in dealing efficiently with these proceedings. I raise those matters simply in the sincere hope that they can be avoided in the future.

WITNESSES

34. During the course of hearing, I heard evidence from the Claimant on his own behalf. He had served both his own witness statement and, somewhat oddly given that there was no direction and no application to serve supplemental witness statements, a copy of Peter Bell's witness statement incorporating his responses to the same. Mr. Hamilton was not able to say why that had been done or how it was considered to be appropriate. I therefore did not take account of the Claimant's annotations to Mr. Bell's witness statement.

35. I also heard from a number of individuals on behalf of the Respondent. Those individuals were as follows:

- Peter Bell – the Chief Executive Officer ("CEO") of the Respondent;
- Michelle Allbones – the present Chief Financial Officer ("CFO") of the Respondent;
- Chris Armond – the Executive Headteacher of Woodlands & Greenfields Academy which is an academy school within the Respondent Trust;
- Paul Hill – the Primary Lead for the Respondent and the former Headteacher of Isaac Newton Primary School; and
- Lucy McClements – A Trustee of the Respondent and a member of their Finance and Financial Audit Committee.

36. Where there are references to individuals from whom I have not heard against whom allegations have been made, I have referred to them by their initials only given that they have not been given the opportunity to present their side.

CREDIBILITY

37. One issue that has invariably informed my findings of fact in respect of the complaints before me is the matter of credibility. Therefore, we say a word about that matter now.

38. I begin with my assessment of the Claimant. Ultimately, I found him to be an entirely unsatisfactory witness. In many areas of his evidence I found him to be evasive and found that he frequently failed to answer the questions asked of him,

choosing instead to answer something completely different despite having been told at the outset of his evidence that he needed to focus on the questions asked.

39. I also found him to be unnecessarily combative and defensive in his evidence during cross examination. Whilst it was fair to say that as cross examination developed I had to ask Mr. Hoyle to adopt an approach that I termed at the time as less interrogation and more cross examination, the Claimant's stance at being difficult in his answers had manifested itself long before that time with, at times, it appearing that he objected to being questioned on areas of his claim at all.

40. Whilst I prevented questions that were more apt for legal submissions, the Claimant often failed to want to address the basis of the claims that he was actually asserting and indicated that he was only prepared to do so if he was given guidance either by me or Mr. Hamilton.

41. Moreover, in contrast to the Respondent's witnesses the Claimant was entirely unwilling to make any concessions during his evidence even where those would have been sensible to have made having regard to logic, documentary or other surrounding evidence.

42. It is also of note that the Claimant was unable to deal with some aspects of questions asked of him because of a lack of recall but that was in stark contrast to his apparent crystal clear recollection as to the content of a conversation which he relied on as a protected disclosure where, after an adjournment for Mr. Hamilton to take instructions, that was able to be set out word for word. That was despite that wording not being recorded anywhere, including in the Claimant's own witness statement, and the fact that he could not apparently even recall the date on which it had been made. I found that element of his evidence also to be lacking in credibility.

43. In short terms, I found him to be an unsatisfactory witness and I did not accept either the credibility or reliability of much of the account that he gave in his evidence.

44. In respect of the Respondent's witnesses, there were no issues which arose which led me to doubt the credibility of the account that they gave. They all made concessions where appropriate and were prepared to accept where they may have made a mistake as to dates or other matters. There were no issues of concern over such mistakes, which I find from experience not to be unusual, particularly when a witness is being asked to recall the events of some months previously as was the case here.

45. In short, unless I have specifically said otherwise I preferred the evidence of the Respondent's witnesses to that of the Claimant.

THE LAW

46. Before turning to my findings of fact, I remind myself of the law which I am required to apply to those facts as I have found them to be.

Complaints pursuant Section 103A Employment Rights Act 1996 – Protected Disclosures

47. In any claim based upon "whistleblowing" (whether for detriment or dismissal) a Claimant is required to show that firstly they have made a "protected disclosure".

48. That in turn brings me to the definition of a protected disclosure, which is contained in Section 43A Employment Rights Act 1996 and which provides as follows:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

49. Section 43B provides as follows:

> *"In this part, a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one or more of the following:*
>
> *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 and 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 one of the preceding paragraphs has been, or is likely to be deliberately concealed.*
>
> *For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is of the United Kingdom or of any other country or territory.*
>
> *A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*

> *A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice."*

50. An essential requirement of a disclosure which qualifies for protection is that there is a disclosure of information. A disclosure is more than merely a communication, and information is more than simply making an allegation or a statement of position. The worker making the disclosure must actually convey facts, even if those facts are already known to the recipient (See **Cavendish Munro Professional Risks Management Ltd v Geluld [2010] IRLR 38 (EAT)**) rather than merely an allegation or, indeed, an expression of their own opinion or state of mind (See **Goode v Marks & Spencer Plc UKEAT/0442/09**).

51. A disclosure need not be embodied in one communication and it is possible, depending upon the content and nature of those communications, for more than one communication to cumulatively amount to a qualifying disclosure, even though each individual communication is not such a disclosure on its own (**Norbrook Laboratories (GB) Ltd v Shaw UKEAT/0150/13**.)

52. It is not necessary for a worker to prove that the facts or allegations disclosed are true. Provided that the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is objectively reasonable, it matters not if that belief subsequently turns out to be incorrect (See **Babula v Waltham Forest College [2007] IRLR 346 (CA)**.

53. A worker must establish that in making their disclosure they had a reasonable belief that the disclosure showed or tended to show that one or more of the relevant failures had occurred, was occurring or was likely to occur. That reasonable belief relates to the belief of the individual making the disclosure in the accuracy of the information about which he is making it. The question is not one of the reasonable employee/worker and what they would have believed, but of the reasonableness of what the worker himself believed.

54. However, there needs to be more than mere suspicion or unsubstantiated rumours and there needs to be something tangible to which a worker/employee can point to show that their belief was reasonable.

55. The questions for a Tribunal in considering the question of whether a protected disclosure has been made are therefore firstly, whether the Claimant disclosed "information"; secondly, if so, did he or she believe that that information was in the public interest and tended to show one of the relevant failings contained in Section 43B Employment Rights Act 1996, and, if so, was that belief reasonable.

Automatically unfair dismissal – Section 103A Employment Rights Act 1996

56. Section 103A ERA 1996 provides that one category of "automatically unfair" dismissal is where the reason or principle reason for the dismissal is that the employee has made a protected disclosure.

57. Section 103A provides as follows:

"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."

58. A Tribunal therefore needs to be satisfied that a Claimant bringing a successful claim under Section 103A ERA 1996 has firstly been dismissed and, secondly, that the reason or principle reason for that dismissal is the fact that he or she has made a protected disclosure.

59. The burden of proving the 'whistleblowing' reason for dismissal under s.103A Employment Rights Act 1996 lies on the employee who has insufficient continuous service to bring a claim of ordinary unfair dismissal (see **Ross v Eddie Stobart UKEAT/0068/13/RN**).

FINDINGS OF FACT

60. I ask the parties to note that I have only made findings of fact where those are required for the proper determination of the issues in this claim. I have inevitably therefore not made findings on each and every area where the parties are in dispute with each other where that is not necessary for the proper determination of the complaints before me. The relevant findings of fact that I have therefore made against that background are set out below. References to pages in the hearing bundle are to those in the bundles before me.

61. The Respondent is a multi academy chain. It acquires schools and academy schools to bring them under one operating umbrella and which it subsequently supports in the provision of education to the pupils that attend them.

62. The Claimant commenced employment with the Respondent on 8th May 2017. Prior to that he had been a member of the Board of Trustees to which he was appointed in 2016. After he commenced his employment, he left his position on the Board.

63. Peter Bell is the CEO of the Respondent Trust and he and the Board had taken the decision to appoint a Chief Operating Officer ("COO") with the predominant purpose being to oversee the Respondent's Poplar Farm funding project (see page 39 of the hearing bundle). Poplar Farm was a new build school project operated under the Free School Programme. It was also the Head Office of the Respondent.

64. I prefer the evidence of Mr. Bell that the Claimant expressed an interest in the role of COO when he became aware of it and that he duly applied after it was advertised. I did not accept the Claimant's account that he was singled out by Mr. Bell for the position and that Mr. Bell had been reluctant to advertise the post. If that was the case then it is difficult to see why he would have had to complete a selection exercise, including a presentation to the Board.

65. I find it likely that the Respondent did have a copy of the Claimant's curriculum vitae ("CV") or at least the details on it at the time that he made his application and, indeed, many of the same details appear on his application form (see page

165 to 175 of the hearing bundle) but it appears from the evidence before me that the presentation was the more significant part of the application process.

66. I find it likely that the Claimant did exaggerate to some extent the position on his CV. Particularly, it is clear that Mr. Hoyle, using what I understand to be skills from a former career in the Police, had undertaken a great deal of investigation into the companies listed on the Claimant's CV. At least one of the companies that the Claimant said that he had worked for were dormant at the time that he had said that he had worked there and I am satisfied that by the Claimant's own admission he had somewhat embellished the content of his CV.

67. However, the evidence of Mr. Bell was not at all clear that if the position had been clearer as to the Claimant's employment history then the Respondent would not have employed him. That appears to be something rather more significantly developed by Mr. Hoyle on their behalf. As such, I make no finding that the Claimant was appointed to the post by any form of fraud or deception.

68. As I have already set out above the Claimant was offered employment with the Respondent commencing on 8th May 2017 as COO on a one year fixed term contract. That employment was at a salary of £75,000.00 per annum. The duties required of the Claimant were set out in his contract of employment and included a requirement to diligently and with reasonable care and skill exercise the duties assigned to him (see page 41 of the hearing bundle). The role was subject to a probationary period of six months and the contract signed by the Claimant and Respondent provided for one weeks notice to be given to terminate employment both during the probationary period and for any time up to two years continuous employment having been completed.

69. At some later point, the Claimant was also appointed to the position of Chief Financial Officer ("CFO").

<u>The Poplar Farm Project</u>

70. One central issue to the Claimant's role as COO was the overseeing of the Poplar Farm project for the Respondent. This was a new school which was to be opened in or around September 2018 in Grantham.

71. The Executive Principal of Poplar Farm at the material time was JW and, after an initial period where she was engaged on a consultancy basis via her own service company, she became an employee of the Respondent Trust. The Claimant alleges that he became aware that JW was invoicing overtime payments via the service company even after she became an employee and that this amounted to a fraud on HM Revenue & Customs. He alleges that, in some unspecified point in either June or July 2018, he disclosed to Mr. Bell, Paul Hill who was the then Primary Lead at Poplar Farm and Ann White of Human Resources ("HR") of that position and said as follows:

> *"It is not normal, morally correct or indeed legal to remunerate a full time member of staff in this way purely to avoid tax. It is simply not possible as an employee. All payments should be handled through the CIT payroll. This could bring the Trust into disrepute and the HMRC would take a very dim view of this as it amounts to fraud."*

72. I do not accept that the Claimant made that statement at all. I found it extraordinary that he was not able to recall even the precise month that he says that he made this disclosure but, despite it not being in his witness statement, was able to recall with crystal clear clarity precisely what he says that he said. I find it more likely that that account has been developed after the event to fit the case that is now advanced.

73. Instead, I prefer the evidence of Mr. Hill that after she had tended her resignation JW asked him whether or not the outstanding overtime would be paid via her Service Company or PAYE. Mr. Hill was not sure of that position and so he asked the Claimant in his capacity as CFO if it would be acceptable when JW left the Respondent Trust to pay her overtime that had been accrued but not taken in lieu via her Service Company. I accept that all that was said by the Claimant was that the Respondent could not do that and referred him to Michelle Allbones. Mr. Hill then took that back to Ms. Allbones as directed and she also said, in his words, "no chance". I accept the evidence of Mr. Hill and Ms. Allbones that no payments of overtime were ever made via the Service Company after JW became an employee and that her outstanding overtime was paid on termination via PAYE and therefore subject to deductions for tax in the usual way.

74. I would also note here that the Claimant made plain at a later meeting to discuss a grievance that he had made that the alleged conversation that he had had with Mr. Bell about this was "well documented" (see page 99 of the hearing bundle) but no documentation in that regard has been disclosed by the Claimant as part of this process.

75. I accept Mr. Bell's evidence that it was never discussed with him by the Claimant and, indeed, his evidence was that no such discussion would have taken place in June/July 2018 as JW did not resign until September/October of that year and so there would have been no question in those earlier months of how accrued overtime payments that had not been taken in lieu would be paid on termination.

76. Similarly, I accept Mr. Hill's evidence that it would not have been possible for the Claimant to have a meeting at Autumn Park with himself, Mr. Bell and possibly Ann White[1] of HR at the time that he alleged, because the Respondent had already left those premises by that juncture.

77. As I say, I prefer the evidence of Mr. Hill that the Claimant's sole comment was that the Respondent could not make payment in that way and directed him to Ms. Allbones. Nothing was said to Mr. Bell about the matter.

Permanent contract

78. I accept the evidence of Mr. Bell that whilst there were some aspects of the Claimant's work where he was performing satisfactorily there were also areas of concern in respect of his performance and, particularly, his ability to get along with others within the Respondent Trust. I accept that that was fed back to Mr. Bell by other members of staff and that there had also been concerns raised about the Claimant's preparedness for meetings and progress that he made with projects which he was required to oversee. That is borne out in a meeting that Mr. Bell had with the Claimant on 5th March 2018 where he was told that there

[1] The position on the presence of Ann White changed during Mr. Hamilton's cross examination.

should be “less of” emails of a certain tone, and more preparation for meetings and the like.

79. On 14th March 2018 Mr. Bell met again with the Claimant who had by that stage been in employment for 10 months and was approaching the expiry of his fixed term contract. I accept that the notes of the meeting which are appended to Mr. Bell’s statement at “PB1” are an accurate summary of the meeting. Mr. Bell commented that overall he was very pleased with how the COO role was developing but he also referred to the fact that “noise” had been reaching both him and the Trustees about the Claimant. In this regard I accept that members of staff had continued to express concerns about the Claimant and the way that he performed his role. Mr. Bell gave examples of that in that the Heads of schools did not think that the Claimant respected them; that he had not turned up for meetings, that his team was at rock bottom and that the team did not know what was happening.

80. The Claimant did not and does not accept those criticisms and much has been made during this hearing of there having been a division between educational practitioners and non-academic staff and the Claimant facing difficulties as a result. However, if there was any such hostility (and given my concerns over the Claimant’s credibility I cannot find that there was) that was nothing to do with any alleged protected disclosures upon which the Claimant relies. It is a matter of potential fairness, but that is not what I need to consider in these proceedings given the Claimant’s lack of service.

81. To seek to address the issues, Mr. Bell proposed regular meetings to address what he referred to as “serious concerns”. I accept that he genuinely held those concerns given the “noise” that was coming back to him from other staff members.

82. Whilst the Claimant is critical that Mr. Bell would often cancel one to one meetings at short notice which were designed to support him, I remind myself that the Claimant was a senior figure commanding a significant salary and, in all events, he has been at pains to suggest that there were no issues with his performance which would have warranted input. Moreover, this is not of course an “ordinary” unfair dismissal claim.

83. Despite the concerns that Mr. Bell had about the Claimant, he nevertheless recommended to the Board that the Claimant’s position should be made permanent. The Claimant’s employment therefore continued beyond the expiry of his fixed term contract and he was issued with an amendment to his terms and conditions of employment to reflect that. I do not consider that that was indicative of the fact that nothing was wrong in terms of the Claimant’s performance, but was more that Mr. Bell had seen that there were also positives and thought that with time the Claimant would be able to develop.

84. On 6th July 2018 there was a further meeting between the Claimant and Mr. Bell. The Claimant agreed on day three of his evidence that the notes of the meeting which are appended to Mr. Bell’s witness statement at “PB7-10” were accurate as to what was said at the meeting, albeit that he did not accept the criticisms that were made of him thereat.

85. At the meeting with the Claimant Mr. Bell again referred to the "noise" from the Headteachers reaching a "crescendo" and that he believed that the Claimant's team had lost confidence in him. He also commented that the Claimant could be bombastic on occasions and could come access as it being his way or no way. It has to be said that those are comments which resonated with certain behaviours that the Claimant exhibited during this hearing before me.

86. I also accept the evidence of both Mr. Hill and Mr. Armond that they had reported their concerns about the Claimant's performance and inaction to Mr. Bell and that Mr. Hill was aware of other head teachers who had shared similar concerns with him. Mr. Hill gave examples of failures of the Claimant to deliver what he had said he would (which is supported by emails from Mr. Hill chasing the Claimant for progress on matters to do with the Isaac Newton playground which I come to below) such as getting the school kitchen up and running which then had to be taken on by others and there being problems with purchase orders, missing invoices and payments with contractors chasing up the schools for outstanding monies. Those were matters that the Claimant and the team that he oversaw was responsible for. In short, I accept that there was dissatisfaction about the Claimant from various Head teachers and that that was fed back to Mr. Bell.

87. Mr. Bell also commented at the meeting that there were a number of people coming to him and not speaking with the Claimant and that the feedback that he was getting reports that the Claimant had not done things that he was supposed to; did not understand the timescales in education and that he had had to deal with the Poplar Farm budget and that the Claimant had not told him that he did not have the time to undertake it.

88. It is plain from the notes of the meeting that the Claimant was not receptive to the feedback from Mr. Bell and was somewhat dismissive of the concerns that were being raised. Largely, his responses sought to deflect blame onto others and, particularly, members of his team.

89. Mr. Bell sent an email to the Claimant on 9th July 2018 attaching a copy of the notes. The relevant parts of the email said this:

"Strengths:-

- *The initial face to face meetings with Heads and BM's*
- *Culture of central team*
- *Company secretary and Governance compliance*
- *SAAF negotiation and reversal out of contract*
- *(Not mentioned in the meeting, HR renegotiation, pensions)*

Development

- *A lost* (sic) *of confidence from many of the main stake holders, the Head Teachers and significant proportion of your team. They need to have communicated to them, the central function plan, in a way they buy in, with realistic deadlines and KPI's they can measure roll out by. This will help and rebuild confidence.*
- *You and the team need to be clear of their areas of responsibility. This will stop detail and actions being missed or late. Ultimately you are responsible for your teams!*

- *You need to build a culture within your team, that they feel comfortable to raise their concerns with you, listened too* (sic) *and where necessary see change. This will be measured in the first instant* (sic) *by them not constantly turning to the Head Teachers, Director or education or me re decisions that you have made, for clarification of a solution.*
- *As raised by yourself we need a regular 1-1 that isn't moved unless absolutely necessary. If Ok with yourself, earlier doors once a fortnight on a fixed day is best for me, as it is less likely to be "bumped".*

As discussed I appreciate you have had a wide range of tasks to manage, however the above "Development areas" raise significant concerns.
Finally, Adrian, I am genuinely invested in your success. I will work to support you where appropriate to address these concerns, your mid year PM's and schools being closed during the summer should also give you space to focus on theees (sic) *areas.*

At our meeting tomorrow we will focus on the next steps and any help you need from me."

90. I accept that those were genuine concerns that had been reported to Mr. Bell and that he was acting so as to seek to support and develop the Claimant.

91. Mr. Hamilton relies on the June/July 2018 alleged disclosure as being the most significant. As a result of not being able to pin down a precise date it is not clear if the Claimant says that he had already made that disclosure by the time of the 6th July meeting. Whilst I am satisfied that he did not make a disclosure as claimed, the fact of this meeting is also a further problem for the Claimant's case.

92. Either the alleged disclosure had already been made by this time - in which case there is no reason why Mr. Bell would not have taken more significant action and dismissed the Claimant there and then if that was apparently the motivation for his later dismissal– or it had not and as such there would have been no basis for Mr. Bell to have manufactured concerns about the Claimant as appears to have been alleged so as to lead to a later dismissal and there were already in his mind clear performance issues.

93. Mr. Bell also arranged for some coaching training for the Claimant in London. I accept Mr. Bell's evidence that the Claimant did not properly engage with that and that was an additional concern.

94. There was a further meeting between the Claimant and Mr. Bell on 5th November 2018 at which Mr. Bell referred to the fact that he felt that they were "winning". I do not accept that that is indicative of the fact that all was well and there were no concerns about the Claimant and his performance.

95. Indeed, by late November 2018 Mr. Bell was seeking advice from Croner about how to deal with the Claimant's performance issues and that led to a proposal to the Respondent Board on 10th December 2018 that he exit the Trust. I say more on that below.

Isaac Newton school playground

96. Before that time, the Claimant had been having dealings with the installation of a new playground at Isaac Newton school. The headteacher at the material time was Mr. Hill. In order to deal with the playground works, it was necessary to expend funds for contractors to come in and undertake the necessary tasks.

97. The Respondent Trust has a Financial Management Policy. That is a detailed document and it makes plain at the outset that its purpose is to ensure that the Respondent was *"able to develop and maintain effective systems of financial control that conform with the requirements of statutory and regulatory authorities, as well as complying with established principles of good financial management and common sense"* (see page 62 of the hearing bundle).

98. It is also made plain that it was essential that the systems operated by the Respondent met the requirements of the Funding Agreement between CIT, the Education & Skills Funding Agency ("ESFA") and the Department for Education and also met the requirements laid down in the Academies Financial Handbook published by the ESFA and were also in accordance with the Respondent's Articles of Association (see again page 62 of the hearing bundle).

99. The Policy also makes plain that the CFO/COO is the lead on finance matters and that the holder of that post is responsible for the monitoring of budgets and ensuring sound and appropriate financial governance and risk management processes are in place (see page 63 of the hearing bundle).

100. The Policy also requires that the Respondent should attempt to achieve the best value for money for all purchases, including at the best price possible, given that a large proportion of purchases would be paid for with public funds and there was a need to maintain the integrity of those funds (see page 65 of the hearing bundle).

101. The Policy provides for spend limits for purchasing. Any contract for a spend between £1,000.00 and £3,500.00 could be done verbally; written quotes were required for those between £3,500.00 and £50,000.00 and for anything over £50,000.00 a tendering exercise was required (see pages 66, 68 and 69 of the hearing bundle). The Policy also set out details of the tendering process which was to be adopted and that a report for contracts over the £50,000.00 level had to be reported to the Respondent Board.

102. As touched upon above, one of the schools which the Respondent operated was Isaac Newton Primary school. In readiness for the new school year in September 2018, work needed to be done at Isaac Newton to reconstruct the playground at that setting. I need not deal with all of the ins and outs in respect of that work, but I am satisfied that the Claimant was aware of it and that ultimately as COO/CFO he had overall responsibility.

103. The total sum for the reconstruction of the playground came to £64,653.60 inclusive of VAT or £53,878.00 net of VAT. It should therefore have been tendered under the Respondent's Financial Management Policy but it common ground that it was not. Three quotations were received but that was not sufficient under the terms of the Policy. It is not necessary to make any finding about who

was responsible for that, although the Claimant did of course have overall responsibility as COO/CFO.

104. Moreover, the Claimant was aware before any work took place that the works to be done by the preferred provider would exceed £50,000.00 (see pages 19 and 20 of bundle 2). The Claimant set out in an email to Michelle Allbones and Paul Hill of 16th July 2018 that they should "hold fire" on placing the order for a day as he knew the owner of the provider in question and he would speak to him about a final price. He indicated that he "*might be able to squeeze a few quid on the final quotation*."

105. The Claimant made it plain in emails of 19th July 2018 to Julie Haddock and Paul Hill that they were "good to go" and dates for the works could be booked and that he just needed to "try and get a discount on the job". Accordingly, the work was booked with the preferred supplier.

106. The Claimant did make email contact with the provider, but it would appear that he did not have a conversation about obtaining any discount. However, even if that did take place, the works at no time came in below £50,000.00 and no Board approval for the spend was obtained. The Claimant was well aware of the amount of spend required.

107. An invoice was submitted on completion and that was, of course, for a sum in excess of £50,000.00. Julie Haddock sent the invoice to the Claimant on 19th September 2018. The Claimant sent the invoice onto Mr. Bell and Mr. Hill the same day by email and the email, which he relies on as a protected disclosure, said this:

"Ok,

So how do we sign this off without a tender document to support it?

£53k + £10k VAT = £63k

Whichever way you look at this it's over £50k."

108. That email was, on any reading, seeking views as to how the invoice could be signed off. It was not a disclosure of information that showed or tended to show that there had been a breach of any legal obligation (in all events no actual legal obligation having actually been identified by Mr. Hamilton other than a vague reference to the Financial Management Policy).

109. Moreover, quite apart from the fact that the email itself made no suggestion of impropriety and was merely a statement of fact, the Claimant cannot reasonably have been making any disclosure to bring matters of financial mismanagement to the attention of Mr. Bell or Mr. Hill with a view to those matters being appropriately addressed as instead he arranged for the provider to split the invoices for the works so that one was in the sum of £49,000.00 and the other for £4,878.00. That avoided having to take the matter to the Board.

110. It is clear that the Claimant took the lead for that position given his email at page 29c of bundle 2. In that email and emails on the following two pages it is plain that the Claimant arranged for the original invoices to be credited and re-

submitted in the above sums. That was done by the provider on the same date as the Claimant's email – i.e. on 20th September 2018 (see pages 93 and 94 of bundle 1). The matter was never drawn to the attention of the Respondent Board.

111. I accept the evidence of Mr. Bell that the Claimant told him that the single invoice had been submitted as a result of a misunderstanding with the provider in that they had invoiced for fencing work on the same invoice and that Mr. Bell considered that to be a reasonable explanation at the time.

112. I did not accept the Claimant's evidence that he was in some way pressured or placed under duress by Mr. Bell to "rectify" or conceal the situation and that that had led to the splitting of invoices. That was a matter raised for the first time in a grievance that the Claimant raised after he had been told that his employment was being terminated (see page 97 of bundle 1). I prefer the evidence of Mr. Bell on that point and it is plain that none of the Claimant's emails made any suggestion of impropriety in that regard.

Safeguarding issue

113. At some point in October 2018 the Claimant contends that he made a disclosure to Mr. Bell which amounted to the raising of safeguarding concerns. Mr. Hamilton was not able to set out exactly what it was that the Claimant says that he told Mr. Bell and his witness statement was not particularly helpful on that matter. However, as far as can be ascertained from that statement his position is that he told Mr. Bell that the Headteacher of the school in question had bypassed normal recruitment processes and had appointed a member of teaching staff via a service company which had been dissolved so that payments had been going to a defunct company and that the disclosure and barring service ("DBS") status of that person was "questionable".

114. Again, and for the reasons that I have already given in respect of credibility, I prefer the evidence of Mr. Bell that the Claimant told him no such thing. I accept instead his evidence was that Ann White had become aware of those matters in her HR capacity and had conducted an investigation into them. She had then informed the Claimant about that matter during a supervision with him. The matter had already been dealt with by Ms. White and I accept that there was no further discussion about the matter with Mr. Bell as the Claimant alleges and that it was only raised for the first time when the Claimant raised a grievance after he had given notice of dismissal by the Respondent.

115. I also accept Mr. Bell's evidence that there had been no breach of the Safeguarding Policy because all checks, including DBS checks, were done via the agency supplying temporary staff and not by the Respondent.

Notice period

116. The Claimant contends that in the last week of November 2018 he had a meeting with Mr. Bell at which he was offered an extension to his one week notice period to three months.

117. I prefer the evidence of Mr. Bell that the Claimant asked about an increased notice period and salary increase but Mr. Bell did not agree to that and that at no time did he agree to increase the notice period required to be given to the Claimant by the Respondent to three months or, indeed, anything over that the one week which was provided for under his contract of employment.

118. However, even on the Claimant's case this issue raises some question marks over his automatically unfair dismissal claim. In this regard, the Claimant has not been able to give any explanation at all as to why, if he had already made all disclosures relied upon as protected disclosures, Mr. Bell would have offered him an increased notice period if his intent was to get rid of him. Indeed, if Mr. Bell had been excised over any alleged disclosure then it would not have made sense at all to offer the Claimant an increased period of notice. The Claimant was not able to offer any reasonable explanation on that point and it again simply highlights a glaring inconsistency in the case that he seeks to advance.

The lead up to dismissal and settlement agreement proposals

119. On 28th November 2018 another member of staff, LP, emailed the Claimant complaining about the way in which he had spoken to her in an operations meeting that she had attended remotely because her daughter had been ill. LP described herself as being "devastated" by the Claimant's actions and that she did not feel that she had his support. Mr. Bell later became aware of the content of that email.

120. By late November/early December 2018 I accept that Mr. Bell had formed the belief that things were not improving and that the Claimant's position was no longer tenable. He accordingly sought advice from Croner about how to proceed.

121. Following receipt of that advice he put a proposal to the Trust Board. The proposal that Mr. Bell put to the Board was contained in a two page document which appears in the bundle at pages 107 and 108. It contained a two stage process, the first of which was to offer the Claimant a Settlement Agreement with payment of his salary until 31st January 2019 along with accrued holidays – that being a sum of circa £13,000.00.

122. It was made plain that if the Settlement Agreement was not acceptable to the Claimant then there would be what Mr. Bell described as a "short service dismissal". He made reference to the advice from Croner being that as the Claimant did not have two years service then he could be dismissed without following the Respondent's disciplinary procedure. Mr. Bell referred to that being in accordance with the relevant clause of the Claimant's contract of employment and to him in those circumstances receiving one week's notice. There was no mention of the three months notice that the Claimant contends that Mr. Bell had offered to him in late November 2018 and again I am satisfied that that did not occur as the Claimant contends.

123. The proposal document set out Mr. Bell's rationale and the relevant parts of that document said this:

"The decision to put this proposal to yourselves, is not something I have entered into lightly, as detailed into my minuted discussion with AF prior to the summer, I raised serious concerns, but I recognised that he had brought in significant

structural changes, to ensure we function but I recognised that he had brought in significant structural changes, to ensure we function correctly as a Trust, in terms of Non Educational requirements and that these require time to bed in. I therefore made the conscious decision to give this time to happen. From September through to the end of October I felt that we had turned a corner, as the "noise" from the Heads had reduced. However, in recent weeks, a number of the new direct staff, who report directly to AF are starting to state they are unsure of their roles and are frustrated by the quality of information given to them by AF. This is in conjunction with new concerns being identified by myself and other senior staff.
There are also numerous anecdotal examples where work or deadlines haven't been completed and the trail leads back to AF. However, these are not always easy to pin down as staff across CIT have picked them up and sorted.

To summarise my reasons to end AF's employment at CIT are:

- *Loss of confidence from the senior Education Leaders across CIT*
- *A significant level of discontent from his direct reports, including newly appointed*
- *A growing cultural divide between some of the central team and the rest of the Trust, which isn't being effectively addressed through AF's Leadership*
- *AF's lack of Leadership/communication skills or apparent desire to address a significant number of smaller issues that are undermining the effective operation of CIT*

I appreciate the timing of this might not be the most sensitive[2], however the discontent within a number of his team is high and I am concerned we may lose more staff if we do not act now. Due to the timing and also in resect to fairness, I am proposing the settlement agreement route and for this to happen as soon as possible."

124. I am satisfied that the proposal document was a true reflection of Mr. Bell's concerns and the reasons that he proposed to the Board taking the course that he suggested. Particularly, the matters that Mr. Bell recorded in his proposal all accorded with discussions at the meetings that he had had with the Claimant and his note of 9th July 2018 and I remind myself again that the Claimant did not dispute the notes of the meeting that preceded it.

125. It is clear from the documentation which has been adduced by the Respondent that, contrary to the Claimant's maintained position, the Board of the Respondent were fully aware of the situation with the Claimant and the majority agreed with the course which Mr. Bell proposed (see for example page 106 of the hearing bundle). Ms. McClements evidence, which was supported by an email trail disclosed during the hearing, was that she had also given her input and that the Trustees were aware of the situation and supported the course that Mr. Bell had proposed.

126. It was not therefore the case that Mr. Bell acted without the knowledge or authority of the Board and there was no breach of any procedure in that regard.

[2] That was a reference to the fact that the proposal was to come in the weeks immediately preceding Christmas.

127. Whilst the Claimant disputes that there were any issues with his performance and both he and Mr. Hamilton have stressed that the problem came from academic staff and their hostility towards him, that misses the point. The complaints were genuinely made to Mr. Bell and he had significant concerns about the Claimant's performance as a result. Whether the issues that the academic staff had were well founded is not to the point because this is not a claim of "ordinary" unfair dismissal. It was those matters and the "noise" that Mr. Bell had received that operated on his mind when he chose to make the proposal to the Board and which the Board then ratified.

128. On 12th December 2018 Mr. Bell met with the Claimant along with a representative from Croner. The Claimant was told that the Trustees of the Respondent had determined that he was to be dismissed or that alternatively the Respondent wanted to look at a mutual agreement on termination and he was to be offered a Settlement Agreement. The proposal for settlement was sent by email to the Claimant the same day (see PB19). That letter set out that the Claimant was receiving that proposal as a result of issues relating to his performance arising from "concerns raised by members of [his] team not knowing what was expected of them".

129. Thereafter, there followed a number of emails from the Claimant to Mr. Bell and others within the Respondent. Those emails referred, amongst other things, to the Claimant having received advice from various sources including City law firms and having been advised that he had a potential claim under the "discrimination rules". The emails also made requests for various documents; made references to a Freedom of Information request and that his legal team had been very clear that he should register concerns under "whistleblowing guidance". The relevant issue in that regard was set out as follows:

"Also as I have been advised to consider the possibility that actions by CIT may be deemed to be discrematory (sic)*, again I have been advised to raise a complaint.*

Also I have been advised to raise an (sic) *formal notice to the Trust about the workings and functionality of processes. The consequence of that because of its potentially far reaching effect should be registered and protected in line with the Whistleblowing protection set out in law".*

130. The Claimant made no reference in that email, nor in any later ones where whistleblowing was referred to, to having already made any alleged protected disclosure and I am satisfied that his reference to raising new matters at that stage was designed to advance his position in negotiations.

131. Much has been made by Mr. Hoyle as to whether the Claimant had what he suggested in his correspondence was something of an eminent legal team who were giving him advice. That is largely irrelevant to the issues in the claim and whilst it was plain from the Claimant's evidence that he was, at best, seeking to use that suggestion and other things such as the involvement of a press agent as leverage for negotiation, that of itself is not a matter of considerable issue in the proceedings and a great deal of what was said appeared to be somewhat fanciful.

132. However, what was a more important issue is that this was an area where the Claimant's evidence was very evasive and unsatisfactory and again, gave me significant issues over the credibility of the account that he was prepared to give to the Tribunal.

133. The Claimant sent no less than nine emails to various people within the Respondent on 12th December 2018 within a short period of time and a further email the following day. None of those engaged with the proposal that the Respondent had made under the terms of a settlement agreement or sought to make any counter proposals.

The Claimant's dismissal

134. In view of those matters and advice sought from Croner, I accept that the Respondent determined that a settlement agreement was not going to resolve matters and moved therefore to the alternative position, which was to terminate the Claimant's employment on one weeks notice.

135. Ann White of the Respondent therefore wrote to the Claimant in her HR capacity on 14th December 2018 and said this:

"As we have received no response or positive engagement with yourself in trying to agree a Settlement Agreement it is with regret that CIT now formally dismiss you in line with Point 16 of your contract under Policies and Procedures:

"The Trust reserves the right to discipline or dismiss an employee with less than 2 years' continuous service without following Trust procedures and to modify procedures (subject to current minimum requirements) for any employee if, in the opinion of the Trust, the individual circumstances of the case reasonably require it"."

136. Ms. White also sought in the same letter to arrange a meeting for the return of company property.

137. On 2nd January 2019, one of the Trustees of the Respondent, PB, resigned from the Board. The Claimant appears to rely on that resignation as being indicative that there was some form of impropriety as to his dismissal and/or that the Board had not been in agreement with that course (a matter which I have already dealt with above) but I do not accept that position. Whilst PB was clear that he was "unsettled" about the situation with the Claimant and felt some sympathy with him "irrespective of the circumstances that resulted in his dismissal" there was no suggestion in that email that he believed that the Respondent had acted inappropriately. Indeed, much of his unease appeared to stem from him having introduced the Claimant to the Respondent in the first place and the fact that they lived near each other.

138. I should perhaps observe that it did not help that the Respondent was not prepared to give the Claimant a full explanation of the reasons for the termination of his employment – although it is questionable whether he would have accepted them - but I accept the evidence of Mr. Bell that that was as a result of advice that he had received from Croner that because the Claimant had under two years service, they were not required to give a reason. Whilst technically accurate, it

did not assist in the mistrust that the Claimant clearly had as to why his employment had been terminated.

139. On 16th December 2018 the Claimant wrote again to Mr. Bell although he did not read that until three days later because it had gone into his junk mailbox. The main thrust of that email was to seek an off record discussion with Mr. Bell although it is, in my view, notable that the Claimant indicated that he would be prepared to accept a warning or suspension. There was no reasonable explanation as to why he would have made that comment if there were, as now claimed, no deficiencies in his performance and that his dismissal had been because he was a whistleblower (see page 54 and 55 of bundle 2).

140. Ms. White replied on 19th December 2018 to say that a further meeting would not be necessary and that his employment would end on 21st December 2018.

The Claimant's grievance

141. On 21st December 2018 the Claimant raised a grievance in which he complained about the following matters:

a. That the Finance Policy had been breached in relation to the Isaac Newton playground project;
b. That the Head had authorised a partial repair payment which was outside the Finance Policy;
c. That there was an agreement to pay JW overtime via a service company;
d. That people had been hired outside the recruitment policy and that was a safeguarding issue; and
e. That the termination of his employment was incorrect and unfair.

142. The Respondent commissioned an investigation into those matters by Croner and this was dealt with by JT of that organisation who met with the Claimant on 25th January 2019 for a grievance meeting. It is not necessary to deal with all of the matters discussed at that meeting because they are not relevant to determine the reason for the Claimant's dismissal, but I am satisfied that he was not candid with JT in a number of respects and, most notably, that he had not been aware until receipt of the invoice for Isaac Newton Primary school that the spend would be over £50,000.00. The emails that I have already referred to above make plain that that was not the case.

143. JT produced her report on 12th February 2019 and on the same day Ms. White wrote to the Claimant indicating that in relation to all but one point there was no evidence to substantiate the grievance. The issue as to safeguarding was partially upheld on the basis that it had been a matter which had been identified at the time as a concern, but it had been rectified. A copy of JT's report was enclosed for the Claimant.

144. The key findings in that report were as follows:

a. That there was clear evidence that the Claimant was aware in July 2018 that the costs of the playground works would be in excess of £50,000.00 and that there was no evidence that Mr. Bell had instructed

him to "make it compliant". For the reasons that I have already given, there was more than sufficient evidence to support that conclusion;

b. That payroll had confirmed that no payments were made to JW via her service company after she had become an employee of the Respondent as the Claimant had alleged;

c. That Ms. White had carried out an investigation with regard to a member of staff who had submitted invoices via a dissolved company but that the Respondent had believed that the individual was registered with a teaching agency and he did have a DBS check via that agency and the matter was rectified at the time; and

d. That the termination of the Claimant's employment had been due to performance issues.

145. The Claimant appealed against the grievance outcome and that appeal was again dealt with by Croner and a different consultant, BR, dealt with that. BR met with the Claimant on 27th February 2019 and a report was sent to him on 15th March 2019 by Ann White dismissing his appeal. It is not necessary for me to deal with that in any detail because it is not relevant to the Claimant's dismissal or the reasons for it.

CONCLUSIONS

146. Insofar as I have not already done so within my findings of fact above, I deal here with my conclusions in respect of each of the complaints made by the Claimant.

Did the Claimant make a protected disclosure or disclosures?

147. I begin firstly with consideration as to whether the Claimant made a protected disclosure or disclosures.

148. The Claimant relies on three disclosures which he contends are protected disclosures and I deal with each of those separately.

149. The first of those is the alleged disclosure about the remuneration of JW. I can deal with that in very short terms because I have found as a fact that the Claimant never made the disclosure that he alleges that he made to Mr. Bell (and potentially Mr. Hill and Ms. White). I am satisfied that all that occurred was that Mr. Hill raised a query with the Claimant about whether payment for accrued overtime which had not been taken in lieu could be paid via JW's service company on termination and the Claimant said no and referred Mr. Hill to Ms. Allbones.

150. The Claimant was doing no more than answering a simple query which was part of his job. There was no disclosure of information nor could what the Claimant told Mr. Hill possibly show or tend to show that there had been any fraud nor could the Claimant reasonably believe that there had been. No such inappropriate payments were made nor could the Claimant reasonably believe that they had been based on his interaction with Mr. Hill.

151. It follows that the Claimant did not make any protected disclosure about the remuneration of JW.

152. The second alleged disclosure is said to be a disclosure about safeguarding made agaib to Mr. Bell. Again, I can deal with that in short terms because I am not satisfied that any such disclosure was ever made. I prefer Mr. Bell's evidence on that point for the reasons that I have given above.

153. I am satisfied that this was a matter brought to the attention of the Claimant by Ms. White; that she had investigated and resolved the matter and that nothing more was said about it and – specifically – there was no disclosure by the Claimant to Mr. Bell. I am satisfied that the first time that this was raised was in a grievance raised by the Claimant after notice of his dismissal had been communicated to him.

154. It follows that the Claimant did not make a protected disclosure in relation to the alleged safeguarding issue.

155. The final disclosure that the Claimant relies on is the content of his email of 19th September 2018 to Mr. Bell and Mr. Hill.

156. As I have already set out in my findings of fact above, that email was, on any reading, seeking views as to how the invoice could be signed off. It was not a disclosure of information that showed or tended to show that there had been a breach of any legal obligation (in all events no actual legal obligation having actually been identified by Mr. Hamilton other than a vague reference to the Financial Management Policy).

157. The email made no suggestion of impropriety and was merely a statement of fact. Furthermore, as I have already observed, the Claimant cannot reasonably have been making any disclosure to bring matters of financial mismanagement to the attention of Mr. Bell or Mr. Hill with a view to those matters being appropriately addressed, as instead he arranged for the provider to split the invoices for the works so that one was in the sum of £49,000.00 and the other for £4,878.00 so as to avoid the need to draw the matter to the attention of the Board.

158. The suggestion of impropriety was again only raised for the first time in a grievance that the Claimant raised after he had been told that his employment was being terminated.

159. I am therefore not satisfied that what was said in the email comes anywhere chose to being information which, in the reasonable belief of the Claimant, showed or tended to show a relevant failure within Section 43B Employment Rights Act 1996. It was a mere statement of fact and query as to how to resolve the invoice situation – of which the Claimant had been aware all along. The Claimant's email therefore did not amount to a protected disclosure.

160. It follows that the Claimant's claim fails on that basis because he did not make a protected disclosure and as such he could not have been dismissed for doing so.

161. However, I have gone on to consider whether, if I had found the Claimant to have made a protected disclosure, whether that was the reason or principle reason for his dismissal.

162. I remind myself that as a result of the Claimant having insufficient service to claim "ordinary" unfair dismissal the onus is on him to show that the reason or principle reason was that he had made a protected disclosure. There is absolutely no evidence to show that that was the case in respect of any of the matters relied upon by the Claimant even if they had been factually made out and I was unfortunately left with the impression that little thought had actually been given to that. The best that I had was a repeated contention that the "disclosures" were the real reason for dismissal but there was no substance to that and it was not rooted in any form of fact.

163. Whilst Mr. Hamilton asserted in his skeleton argument that the failure to give a reason for dismissal was telling and thus it could somehow be inferred that the disclosures were the real reason, I have accepted that the Respondent was simply acting on advice from Croner and the absence of a full explanation was not to disguise an unlawful dismissal.

164. Moreover, Mr. Hamilton's submissions also focused on what he said must be something that had happened between 5th and 25th November 2018 as all had been well at the start of that period and then at the later stage Mr. Bell was seeking advice about exiting the Claimant. That ignores the fact, however, that all alleged disclosures (had I found any of them to be made out) had already been made well in advance of that time period. Indeed, the main disclosure about JW that Mr. Hamilton relied on had been made on the Claimant's case at least four months previously.

165. Mr. Hamilton relied very heavily on the alleged JW disclosure (with little by way of submissions being advanced about the other alleged disclosures) and appeared to assert in his oral submissions that JW had somehow exerted influence in respect of the Claimant's dismissal because of a grievance that she had raised about him. However, there was nothing other than assertion to that effect nor was it a matter that was put to Mr. Bell in cross examination.

166. Although the Respondent is not required to prove the reason for dismissal, I am nevertheless entirely satisfied that this was as a result of the concerns that they had about his capability and performance.

167. It follows from all that the Claimant has not established that the reason or principle reason for his dismissal was that he had made a protected disclosure and so the claim for automatically unfair dismissal fails and is dismissed.

168. The next complaint that I am required to consider relates to unpaid notice pay. In this regard, the Claimant contends that he reached an agreement with Mr. Bell as to an extended notice period of three months. As I have already set out in my findings of fact above, I do not accept the Claimant's evidence and prefer that of Mr. Bell that no such extended period of notice was ever agreed. I am satisfied that the Claimant has therefore been paid all that he was entitled to and there was no enhanced notice period. This part of the claim therefore also fails and is dismissed.

169. Finally, I turn to the complaint about outstanding expenses which the Claimant pursues as a complaint of breach of contract. This is a claim which I am able to deal with in short terms. I had observed to Mr. Hamilton at the commencement of the hearing that there did not appear to be anything in the Claimant's witness statement or the hearing bundle which supported that he was owed some

£800.00 in outstanding expenses. Whilst the Claimant gave supplemental evidence on this point it was far from certain that he had actually submitted any expenses claim to the Respondent as was the required course nor what the expenses actually related to. He alluded in his evidence to having some documentation to that effect but that was not produced at the time.

170. In fact, extraordinarily and without any application having made to adduce it nor to copy it to the Respondent, the Claimant sent a document purporting it seems to be his final expenses claim to me directly after the hearing had already concluded. I say that was extraordinary firstly because of the way that it was transmitted without any application being made by Mr. Hamilton and without sending a copy to Mr. Hoyle; secondly because there was no reference made to why this document had not been provided earlier and thirdly because only that morning I had refused an application by Mr. Hamilton to adduce yet further documents at which no mention was made of the expenses claim document. It follows that, for those reasons and the fact that no evidence was ever heard about this expenses claim document nor were the Respondent's witnesses given the opportunity to comment upon it, I have not paid reference to the email or to the attached document in respect of this part of the claim.

171. I therefore have no evidence – and do not accept the Claimant's suggestion to that effect – that there were any outstanding expenses submitted to the Respondent. I prefer the evidence of Mr. Bell that there were no outstanding expenses submitted by the Claimant. It follows that this part of the claim also fails and is dismissed.

172. It follows that the claim as a whole fails and is dismissed.

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Employment Judge Heap

Date: 27th April 2021
JUDGMENT SENT TO THE PARTIES ON

Note:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.