EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs L McCabe	**v**	**Selazar Limited**

Heard at: Central London Employment Tribunal

On: 11 – 13, 16 – 19 May 2022, 23 & 24 May 2022 (In Chambers)

Before: Employment Judge Brown

Members: Mrs S Campbell
Mr D Clay

Appearances:

For the Claimant: Mr J Gidney, Counsel
For the Respondents: Mr K Aggrey-Orleans, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The Respondent automatically unfairly dismiss the Claimant under *s103A ERA 1996*.**

2. **The Respondent subjected the Claimant to age discrimination when it dismissed her.**

3. **The Respondent unfairly dismissed the Claimant pursuant to s98(4) ERA 1996.**

4. **It was 30% likely that the Respondent would have dismissed the Claimant fairly in any event.**

5. **No deduction for contributory fault is appropriate.**

6. **The Respondent subjected the Claimant to protected disclosure detriments by doing the following:**

6.1. **On 17th July 2020 the Respondent removed the Claimant as a Companies House Director of the Respondent without due process (s168 Companies Act) being followed;**
6.2. **On 20th July 2020 the Respondent placed the Claimant on garden leave;**
6.3. **The Respondent subjected the Claimant to a disciplinary process without being given the opportunity to respond to any allegations during an investigatory stage;**
6.4. **The Respondent refused the Claimant's request for an EGM made in September 2020 on the grounds that it was 'frivolous, defamatory and vexatious' despite it being supported by the Claimant's whistle-blowing report.**
6.5. **The Respondent issued documentation, in conjunction with PWC in August 2020, to facilitate additional investment within Selazar which did not include any reference to the Claimant as either a company founder or CFO.**

7. **These detriments formed a course of conduct, or were a series of linked acts, and were all brought in time.**

8. **The Respondent wrongfully dismissed the Claimant.**

9. **The Respondent breached the Claimant's contract or made unlawful deductions from her wages when it failed to pay her expenses of £6,589.61.**

10. **The Respondent failed to pay the Claimant for all her accrued but untaken holiday on termination of her employment.**

11. **A Remedy Hearing will take place for 1 day on 3 October 2022.**

REASONS

Preliminary

1. The Claimant brings complaints of:

1.1. Detriments on the ground that she made protected disclosures, pursuant to section 47B of the Employment Rights Act 1996;

1.2. The following claims in respect of the termination of her employment:

1.2.1. Automatic unfair dismissal, pursuant to section 103A of the Employment Rights Act 1996;

1.2.2. An age discrimination complaint;

1.2.3. Unfair dismissal, pursuant to s 98 Employment Rights Act 1996.

2. The List of Issues had been agreed as follows: .

Were there qualifying disclosures (s43B ERA)

1 Did the Claimant make the following disclosures to the Respondent:

1.1 Board presentation in August 2019 regarding Corporate Governance issues and the Respondent's compliance with the Wates Corporate Governance Principles;

1.2 Board presentation on 29th January 2020, in which the Claimant told the Respondent that it needed to monitor stress / mental health deteriorations given the pressure placed on team members (as recorded at 4.11 in the 29th January 2020 Board minutes).

1.3 The Claimant's email to Jack Williams sent on 15th April 2020 timed at 21:28 hrs in which the Claimant warns the Respondent against presenting misleading forecasts to its investment committee.

1.4 Emails to Kevan Bishonden, Jack Williams and Gareth Burns timed at 09:33 and 19:27 hrs on 7th July 2020 which disclosed health and safety concerns regarding Edwards Ross, who was on the verge of a breakdown and not able to cope with the pressure placed upon him, that the Respondent had to look closely at its executive culture towards all areas of staff.

1.5 The Claimant's document headed 'Edwards Ross - Positioning Paper' sent to the Respondent on 9th July 2020 which expressed concerns about Mr Ross' health and safety and the pressure that was being placed upon him by the Respondent;

1.6 The Claimant's email to Jack Williams, timed at 18:17 hrs on 28th July 2020;

1.7 The Claimant's grievance dated 21" September 2020 which referred to (i) corporate governance issues and failings, (ii) plagiarism pertaining to the Selazar platform, (iii) misrepresentations made to investors and other stakeholders, (iv) lack of concern from the Respondent's Board regarding health and safety, (v) a bullying culture and (vi) the non-payment of creditors.

2. In respect of the disclosures set out at 1.1 — 1.7 above:

2.1 did they disclose information or amount to a mere assertion?

2.2 were they made in the public interest? If so, in what way?

2.3 did they tend to show that a person has failed, is failing or is likely to fail to comply with a legal obligation?

2.4 did they tend to show that the health and safety of an individual has been, is being or is likely to be endangered?

3 Did the Claimant make the following disclosures to other people than the Respondent?

3.1 On 22nd September 2020 the Claimant shared with Dominic Walsh, Foresight, Invest NI and Ravindre Khangure the draft Whistleblowing report for the Respondent's Board.

3.2 The Claimant's email to Kevin Holland of InvestNI timed at 14:48 hrs on 22nd September 2020 referring to corporate governance concerns regarding the Respondent and concerns that the Respondent's investors had been misled about a significant investment made in November 2019.

4 In respect of the disclosures set out at 3.1 — 3.2 above:

4.1 did they disclose information or amount to a mere assertion?

4.2 were they made in the public interest? If so, in what way?

4.3 did the Claimant believe these disclosures to be true?

4.4 were these disclosures made for personal gain?

4.5 did they tend to show that a person has failed, is failing or is likely to fail to comply with a legal obligation?

4.6 did they tend to show that the health and safety of an individual has been, is being or is likely to be endangered?

Automatic Unfair Dismissal for Making a Protected Disclosure (s103A ERA)

5. If the disclosures set out in (above qualify for protection under section 478 of the ERA:

5.1 What was the reason why the Claimant was dismissed?

5.2 Was the reason (or if more than one reason, the principal reason) for the dismissal the fact that the Claimant had made the disclosures set out in paragraphs 1 and 3 above?

Detrimental treatment for making protected disclosures (Section 478 ERA 1996)

6. If the disclosures set out in paragraphs 1 and 3 qualify for protection under section 47B of the ERA:

7. Was the Claimant subjected to the following acts:

7.1 on 17th July 2020 removed as a Companies House Director of the Respondent by Mr Williams without due process (s168 Companies Act) being followed;

7.2 on 20th July 2020 placed on garden leave by Mr Williams;

7.3 subjected to a disciplinary process without being given the opportunity to respond to any allegations during an investigatory stage;

7.4 Refused the Claimant's request for an EGM made in September 2020 on the grounds that it was 'frivolous, defamatory and vexatious' despite it being supported by the Claimant's whistle-blowing report.

7.5 the Respondent issued documentation, in conjunction with PWC dated rh August 2020, to facilitate additional investment within Selazar which did not include any reference to the Claimant as either a company founder or CFO.

8. Did any of the matters contained at 7.1 — 7.5 above:

8.1 amount to detrimental treatment?

8.2 If 'yes', what was the reason for it? Was it because of the disclosures referred to at paragraphs 1 and 3 above?

8.3 Is the Claimant entitled to compensation for injury to feelings?

Unfair dismissal

9. what was the reason (or principal reason) for Claimant's dismissal?

10. Was the reason for the Claimant's dismissal a potentially fair reason?

11. Was the dismissal fair in all the circumstances (including reference to the Respondent's size and administrative resources) (section 98(4), ERA 1996) having regard to:

(a) Whether the Respondent followed a fair and reasonable procedure (and having regard to the Acas Code of Practice on Disciplinary and Grievance Procedures in so far as it is applicable to capability dismissals)?

(b) Did the Respondent act reasonably in treating the reason as a sufficient reason for dismissal?

12. What level of compensation is the Claimant entitled to receive if her claim is successful?

13. How and to what extent has the Claimant mitigated her loss?

Age Discrimination (Section 13 EqA 2010)

12. Did the Respondent instruct a recruitment consultancy to find 'a younger member who was more in tune with a young tech start company'?

13. Was this less favourable treatment of the Claimant?

14. Was it less favourable than the Respondent would have treated a comparable employee from a younger age group?

15. was this because of the Claimant's protected characteristic of being in the age group of 50 -65?

16. Was this a legitimate aim?

17. Was this a proportionate means of achieving any such legitimate aim?

Unlawful Deduction of Wages

18. Did the Respondent fail to reimburse the Claimant all of her reasonable expenses in the sum of £6,927.66?

Holiday Pay

18. How much holiday had the Claimant accrued at the point of dismissal?

19. Has the Claimant been paid for all accrued but untaken holiday by the Respondent?

Wrongful Dismissal/Breach of Contract

20. Was the Claimant entitled to three months' notice?

21. Is the Claimant entitled to payment of her salary in respect of her notice period?

22 Was the Claimant's misuse of Confidential Information between July and August 2020 such that the Respondent would have been entitled to summarily dismiss her for Gross Misconduct?

3. It was agreed that the Tribunal would determine all issues of Polkey and contributory fault at the liability hearing, but that all other matters of remedy would be reserved to a remedy hearing. The Respondent relied primarily on the Claimant's "misuse of Confidential Information" in 2 respects: downloading 565 emails to her personal email account and sending confidential information to Dominic Walsh, a third party.

4. The Tribunal heard evidence from the Claimant. It heard evidence from the following witnesses for the Respondents: Jack Williams, the Respondent's Chief Executive Officer and Founding Director; Neil Ashworth, the Respondent's Chairman and the dismissing officer; Gareth Burns, the Respondent's Chief Technology Officer and the grievance hearing manager; Kevan Bishonden, the Respondent's Sales Director, who dealt with part of the Claimant's grievance; Iain Lundie, Corporate Advisor to the Angel Investors in the Respondent; Brendan McIlhennon, the Respondent's current Head of Finance and Mike Matthews, HR Consultant and the dismissal Appeal Hearing Officer.

4. There was a Bundle of documents. Some additional documents were added to the Bundle during the hearing.

5. The Tribunal made various case management decisions during the hearing, for which it gave oral reasons at the time. In particular, it did not permit Mr Matthews to produce new documents at the start of his evidence, after all the other witnesses had given evidence.

6. Both parties made submissions. The Tribunal reserved its judgment. It listed a provisional remedy hearing for 1 day on 3 October 2022.

Findings of Fact

7. The Claimant was born on 10 July 1965 and was aged 55 when she was dismissed by the Respondent on 25 September 2020. She describes herself as falling into the age group of 50 to 65.

8. The Respondent company was incorporated on 10 October 2014. The Claimant and Jack Williams were 2 of the founding directors, pages 55, 58, 66-89. The Claimant ceased to be a Director for a year from April 2018. She was reappointed as a Director on 1 April 2019.

9. The Respondent engaged the Claimant's Firm, Angel Accounting Limited, as its accountants, on 21 October 2014, p90-94. Under the terms of the contract, Angel Accounting were appointed to compile the Respondent's Annual Accounts, including Full Financial Statements for HMRC, Abbreviated Financial Statements and CT600 Company Tax Returns, to provide ongoing accountancy services, personal self-assessment tax returns for the Directors and book keeping records and to prepare financial budgets and forecasts. The contract was renewed on substantially the same terms on 19 October 2017, p108.

10. On 14 October 2016 the Claimant signed an employment contract with the Respondent, appointing her from 1 January 2016 as Finance Director, pp 95-107.

11. The Respondent company is a "start up" and has needed to raise funds from investors in order to commence and continue trading. It provides an e-commerce fulfilment service platform that uses intelligent automation software to streamline retail customers' business operations. Part of its service assists with the distribution of retailers' goods.

12. At all relevant times the Claimant was a shareholder in the Respondent.

13. On 3 March 2017, a potential investor, whom the Claimant had introduced to the business, declined to invest in it, telling the Claimant in an email, "The challenge is Jack .. he is not investible 2 ears and 1 mouth is the saying. A couple of hints that I was too old to understand, probably signed the end…". P1626.

14. The Claimant introduced a different investor, Ravinder Khangure ("Rav") to the Respondent company in 2017. He invested £250,000 in the Respondent in March 2018. Further investment of about £1M was secured in November 2019. All Directors of the Respondent Company, including the Claimant, entered into new service agreements as a condition of the investment, pp283-298. The Claimant was employed part-time for 24 hours each week, with the agreement that, if she and the Company came to an agreement to increase her hours to full time, her salary would increase accordingly.

15. Pursuant to the new service agreement, the Claimant was entitled to 3 months' notice to terminate her contract, p285. The Service agreement set out the Claimant's roles and responsibilities at Schedule 1 p298: These included a. Preparation and maintain management accounts; b. Preparation of department budgets; c. Payroll services; d. Book keeping services; e. Human Resources Management; f. Health and Safety Officer; g. Creation of Staff Packs and Organisation of new employee on-boarding; h. Invoicing and billing matters; i. Leading The Customer Services Team, p298.

16. Having secured this investment in 2018 - 2019, the Respondent Company, which had previously been dormant, started to trade.

17. The 2018 – 2019 investors were MEIF ESEM EQUIT LP (acting by its general partner Foresight Group LLP), Invest Northern Ireland, Gerald McGladery, David Heenan, Nicola Heenan and Ravinder Khangur. All these investors were granted shares in the Respondent company. "MEIF" is the Midlands Engine Investment Fund. The Claimant told the Tribunal that both MEIF and Invest NI hold public funds which they invest in local companies. The Claimant said that, together, those 2 organisations invested £750,000 of public funds in the Respondent Company. The Claimant was not challenged on this.

18. In 2019, when the new investor agreements were being concluded, a concern was raised that Graham Walker, one of the original founding Directors, who had since resigned, appeared still to hold shares in the Respondent Company. It appeared that the transfer of his shareholding had not been properly executed at the time that he resigned. On 18 September 2019, Adam Huckerby from Foresight Group LLP said that there were shortcomings in filings at Company's House regarding the ownership of the Respondent Company's share capital, p1695. There was a pause in the investors' due diligence while the Respondent Company resolved the matter, pp1685, 1688 – 1693.

19. There was a dispute of fact between the parties as to whether the Claimant or Jack Williams had been responsible for this oversight. The Claimant told the Tribunal that Mr Williams had appointed a solicitors firm, Forde Campbell, in 2015, to deal with Mr Walker's departure from the Respondent, p1700. She said that Mr Williams had never paid the previous firm of solicitors and that debt collection had been started by a Birmingham law firm, of which the Claimant knew one of the partners personally. The Claimant told the Tribunal that, through this personal connection, she was able to persuade the firm to release the relevant unsigned paperwork for Mr Walker, pp 1703 – 1705, 158 – 160, 1706 – 1711. The Claimant told the Tribunal that Mr Walker's departure had been handled by Mr Williams. She highlighted an email dated 22 April 2015 which was addressed solely to Mr Williams, p1623. This contained the Deed of Settlement for Mr Walker pp1581 – 1586, which confirmed that execution was only to be undertaken by Mr Walker and Mr Williams, p1585. She said that she had had no involvement with this.

20. Mr Williams told the Tribunal that it was the Claimant who had mismanaged the filings at Companies' House and that the Respondent had had to spend significant sums of money in 2019 to rectify this, to enable the £1M investment to proceed.

21. The Tribunal noted that Mr Williams did appear to have been dealing with the transfer of shares from Mr Walker to Mr Williams in 2015. The Claimant appeared not to have been involved in this in 2015. From the emails between the Claimant and Mr Williams in 2019 it also appeared that neither knew where the documentation relating to this transfer was. On all the evidence, the Tribunal decided that Mr Williams must have been significantly at fault in failing to complete and record the transfer of shares between Mr Walker and him. Therefore, the Tribunal did not find, as the Respondent argued, that the Claimant was primarily responsible for the costs incurred in 2019 to rectify the matter.

22. On 11 July 2019 a Report to Directors and unaudited financial statements of the Respondent showed a net loss of £559,147.00 at 30 April 2019, p114 – 123.

23. The Claimant produced a written presentation for the Respondent's Board on 13 August 2019 regarding Corporate Governance Issues and the Respondent's compliance with the Wates Corporate Guidance Principles. She relied on this as her first protected disclosure in her claim. The minutes of the 13 August 2019 Board meeting recorded that the Claimant had prepared the paper, but that there had not been time to discuss it and that the paper would be considered at the next board meeting, p136. The members of the Board at the time were Jack Williams, Gareth Burns, Kevan Bishonden and the Claimant. It did not appear that the paper was discussed at a later Board meeting. The paper, p1059, said that the Claimant believed that the Company should put in place a Corporate Governance Framework which could be tweaked as the Company grew larger. In the paper, the Claimant said that the Company would not have to "follow everything to the letter", but that having a framework in place would make it easier to change as the Company grew. She advised that the Wates Corporate Guidance Principles for Large Private Companies had come into effect on 1 January 2019. She commented that these Principles applied to large companies, which were defined as having more than 2000 employees, or having a turnover of £200M or a balance sheet of more than £2 billion.

24. The Claimant told the Tribunal that she had made another protected disclosure at a Board Meeting on 29 January 2020, concerning mental health and stress, p317- 326. The minutes of the meeting record, p323 para 4.11, " LM expressed need to ensure we monitor stress / mental health possible deteriorations given the pressure placed on team members - we operate in a fast past rapidly moving environment. She will work on possible recommendations to be reviewed internally relating to company policy in this area."

25. On 30 January 2020 the Claimant replied to a Natalie Welch, who had requested a payment from the Respondent, p330 – 331. The Claimant said, "On a different matter, I am sorry there is issues with stock placements again. I have had a long talk with Gareth and Jack about it as i think you know a Selazar contingent will be coming over on 11 Feb for a couple of days to revamp warehouse set up …I want this to be used as an opportunity to "reset the clock" so that moving forward the lads in Belfast have a fuller understanding of the issues you face. I am exceptionally grateful for all that you have done and continue to do - I know that talking to techies can get frustrating at times, especially when there is a feeling that they aren't listening. Their brains are wired differently to us more practically minded people (not that I am as practical as you and they drive me mad at times, so I can only guess at how you feel!!)".

26. The Claimant told the Tribunal - and the Tribunal accepted - that her Customer Service Team role encompassed dealing with customer service issues, not technical questions relating to the Company's software.

27. On 30 January 2020 Gareth Burns, who had not been copied into the Claimant's 30 January 2020 email, but had clearly been shown it, emailed the Claimant, objecting strenuously to what she had said, pp329 – 330. He said that the Claimant had suggested that he and Mr Williams had been "spoken to" and "brought to heel". He also said that the technical team had been working very closely with Ms Welch and that the Claimant had made them sound unreasonable; which he said had undermined the Company's relationship with a key partner. He said that the Claimant's comments about technical people's brains being "wired differently" were "insulting and disrespectful" and that her comments about being driven mad were "unprofessional

and damaging". He said that the email had been a "massive slap in the face" and he asked for a meeting about it as soon as possible, p330.

28. Mr Bishendon also complained to Mr Williams, p327, despite not having been a recipient of the email either. He said, "The recent email Louise sent is entirely unacceptable. It undermines our company, your position as CEO, Gareth and his department along with creating a strain between ourselves and our relationship with Flying Boxes/ICS."

29. The Claimant immediately replied to Mr Burns, apologising profusely, saying that she had been trying to build bridges and empathy and had worded her email in a jokey manner to ease the mood. She said that she had not intended to offend Mr Burns. She also set out the background tensions in the relationship with Ms Welch and said, "It isn't unreasonable for her to expect some form of payment." P329.

30. The Company did hold a meeting to address the Claimant's email. Mr Burns told the Tribunal that the Claimant was so apologetic that she offered to resign, but her resignation was not accepted. Mr Williams, Mr Burns and Mr Bishendon all told the Tribunal that they accepted the Claimant's apology in the meeting and that they all considered that the matter was closed at that point.

31. The warehouses from which the Respondent's clients' packages were delivered were located in the English Midlands. The Claimant worked from the Respondent's offices in Leicester and was therefore based near the warehouses. The Company's technical team, including Mr Burns and Mr Williams, were based in Belfast. Mr Bishendon, who was the sales Director, was based in South London. It appeared to the Tribunal that the Claimant, inevitably, was the Company's "person on the ground" in relation to the warehouses.

32. In March 2020 the Claimant and Mr Williams were working on Company budgets. On 19 March 2020 the Claimant set out forecasts for the number of parcels to be handled by the Company's systems over the next year. The Claimant also said that more work needed to be done on cost cutting. She said that she did not believe that the Company could sign off, in March 2020, budgets for May 2020 – April 2021, p362. The Claimant sent her email at 21.09 and said that she was working towards giving the Company 40 hours per week if Company finances would allow it. Mr Williams replied, agreeing to delay sharing the budgets with the Board until they were in final form. He proposed that the budgets be presented to the April Board meeting and that they should be updated monthly, as the Claimant had suggested, p363.

33. On 20 March 2020, Mr Williams set out a "Salazar Cash Retention Plan", p421 – 422, to ensure that the Company did not run out of money.

34. On 13 April 2020 Mr Williams emailed the Claimant, p676, congratulating her on her Q1 Department Target Report, p676, 379.

35. On 15 April 2020 the Claimant emailed Mr Williams concerning draft budgets. She said that she was "very concerned as the budget is still showing a loss of almost £500k" and that the Respondent Company needed to look at, either, greater sales volumes, or lower costs. She said that she believed that there was no guarantee that

the Company would be achieving forecasts sales revenues as early as May 2020 and that the investors would be giving them "a very hard time over this", p384.

36. The Claimant sent another email that day at 21.28, following a conversation with Mr Williams, p387. In it, she expressed her "concern about how the investment committee may view a base parcel injection figure of 10„000 per month in May when we are not yet even achieving 10% of that at the start of April 2020." She suggested that the Respondent Company present figures which anticipated either 5,000 and 3,000 parcels per month. She said, "I believe it is imperative that we convince the committee that we possess a sense of realism which has carefully considered market conditions."

37. The Tribunal considered that, on a true interpretation of her 15 April 2020 emails, the Claimant did not, in fact, say, or believe that the investors would be misled by the figures Mr Williams was proposing. Rather, she said that the investors would not accept the figures, because the investors themselves would be likely to view them as unrealistic. She proposed that different, lower figures should be presented, which the investors would accept as realistic. At the end of her email, she said that she had been working on the figures since 6.30am.

38. On 23 April 2020 the Claimant sent a 'last resort emergency contingency plan', to Mr Williams and Mr Ashworth, the Respondent Company's Chairman, p411 – 413, in case the Company did not secure a "business interruption facility". This plan proposed staff cuts and salary reduction, amongst other measures.

39. The Respondent's executive met on 28 May 2020. The Claimant took some handwritten notes of the meeting, which were not verbatim. The notes recorded that Mr Burns complained about the level of demand being placed on the Belfast office, saying that Edward Ross, who worked in the Claimant's office, needed to stop referring so much to Belfast and to "do his job". The Claimant's notes recorded that she responded that she was already working almost full time on financial matters and was spending an hour a day with Mr Ross to support him. The notes recorded Mr Burns as describing the Claimant's department as "dysfunctional" and a "shambles" and saying the Claimant would have to "step up to the mark". The Claimant recorded that she replied that she only had one pair of hands. She then recorded that Mr Williams said, "Calm down.. don't let the hormones get out of control." P1518. The Claimant recorded in this meeting that Mr Ross had not had a holiday since he started, p1519. She also recorded Mr Williams as saying that the Claimant was an integral part of the business.

40. The Claimant told the Tribunal that she took notes of executive meetings. The Respondent's witnesses agreed that she did take notes, but did not agree that these notes were necessarily contemporaneous, or accurate. In evidence, Mr Williams denied that he had said, "Calm down.. don't let the hormones get out of control."

41. The Tribunal considered that the notes appeared to record a heated exchange as it developed between the participants. There were no obvious breaks in the exchanges recorded. The Tribunal considered that the notes were broadly accurate. The Tribunal found that Mr Williams did say, "Calm down. Don't let the hormones get out of control", when the Claimant said she had only one pair of hands.

42. The Claimant told the Tribunal that she believed that Mr Williams would not have said this to a younger person.

43. There was a further executive meeting on 18 June 2020, p1523. The Claimant also took notes of this meeting. She recorded Mr Burns saying that there was no capacity in Belfast to cover Mr Ross' holiday, as it had not been provided for. Mr Williams was recorded as saying that Emily would provide assistance but that "Edward has to be told he can't have holiday yet.", p1524. The notes also record the Claimant objecting to having to deliver that message as Mr Ross was "already exhausted." P1525. In evidence, Mr Bishendon agreed that the Claimant had raised Mr Ross's need for holiday with the other Directors on 18 June 2020. He said that he could not answer whether Mr Ross had been misled when Mr Ross was later told that his holiday request was only known about on 6 July 2020, p1547.

44. On 23 June 2020 Gareth Burns sent a" letter of concern" email to Jack Williams. He said that the Claimant had been defensive and had taken department issues "very personally". He said that she had "tried to blame others for issues" and that this had undermined him "personally". Mr Burns also said that the Claimant had made a joke about Mr Burns having "no hair" to candidates at interview and had asked a candidate her age, p658 – 659.

45. The Claimant told the Tribunal that she did not recall making insulting comments about Mr Burns being bald during interviews. She said that, when an interview candidate explained her experience, the Claimant had expressed admiration that someone so young had achieved so much. The Claimant also told the Tribunal that, during the interviews, she had mentioned how much she admired people like Mr Burns and his wife, who were home schooling two children during covid while his wife was working as a front line health professional and Mr Burns was doing "amazing things" at the Respondent Company.

46. The Claimant told the Tribunal that she had produced a statistical report, p620, detailing how Mr Ross had dealt with "tickets" raised to him from customers during May 2020. She said that this showed that, of 381 "tickets", 325, or 85.3%, had been dealt with solely by "First Line" support (ie Mr Ross) and 56, or 14.7%, had been referred to second line support (in Belfast). These referrals were to Mr Burns' "tech" team.

47. The Tribunal noted that this report appeared to show that Mr Ross, who was partly managed by the Claimant, was referring comparatively few issues to Mr Burns' team in Belfast, and was, in fact, resolving the vast majority himself.

48. A Board Meeting was held on 23 June 2020, p1738 – 1746. The Claimant did not produce end of year accounts for this meeting, despite having undertaken to do so.

49. On 25 June 2020 Neil Ashworth, Company Chairman, emailed the Claimant, at 08.53, saying, "I understand that, on guidance from Barclays, we are no longer pursuing a CBILS application - good that this position is now clear. With that in mind, could we now close the year end accounts by the end of this week, please? p672.

50. The Claimant replied saying that, given her workload and other commitments, she would be unlikely to be able to do so. She set out problems with Mr Ross and resource allocation to customer service and said that she had been working very hard. She also asked for a one to one discussion with Mr Ashworth, p667. Mr Ashworth replied further, saying that he understood the pressures faced by all, but commenting that rigorous

prioritization and investor confidence were important. He said, “We made a commitment last month to deliver the year end accounts to the shareholders at yesterday's board meeting. We did not achieve that. We must, almost ruthlessly, prioritise our limited and precious time to deliver on our promises. I would ask you to do that to ensure that we continue to hold the confidence of the investors.” P666.

51. On 1 July 2020 Mr Williams texted the Claimant asking for the year end accounts, saying that he had been messaged by the investors on the matter, p681. The Claimant replied, saying that she could not do everything expected of her in 24 hours each week and said that she was close to burn-out, p 681 - 3. On 2 July 2020 Mr Ashworth again chased the Claimant for a response on the end of year accounts, p687. The Claimant said that she hoped to produce draft accounts later that day, or the following day, p686.

52. On Friday 3 July 2020 the Claimant emailed Messrs Williams, Burns and Bishonden about Mr Ross, in advance of an executive meeting on Monday 6 July, p694. She said, “He is exhausted and really does not look well at the moment, the stress is getting to him. He has said he needs time off and is able to push it back to 20th July.. I said I would confirm this with him on Monday, but I cannot see how we can refuse him any more time off..”.

53. Also on 3 July the Claimant sent Draft Year End Accounts for 30 April 2020 to Mr Williams and Mr Ashworth, p697.

54. Mr Ross took a day’s sick leave on 7 July 2020, p707. The Claimant emailed Messrs Williams, Burns and Bishonden at 09.33 that day, about Mr Ross and pressure on staff generally. This email was relied on by the Claimant as her 4th public interest disclosure, p1039.

55. In her email the Claimant said that Mr Ross was unwell, and gave details of his condition. She said, “As I indicated yesterday at the exec, I have been concerned that he has been pushed too hard for someone so young in their first position.” The Claimant said that she believed that Mr Ross may not return from his leave. She raised the possibility that Mr Ross might bring a claim for discrimination. She said, “… we are going to have to have a serious conversation about people culture within our business as by the very nature of what we do, we will be employing more team members who have such characteristics.” P1040.

56. At 19.27 on 7 July 2020 she emailed them again, p1036. She said that Mr Ross had looked ill the previous Friday and had been upset by the refusal to grant him holiday and by his probationary period being extended. At the end of her email she said, It's afraid in my mind, going to take more than a 4 legged wellness officer to ensure we look after mental health of employees..”.

57. Subsequently, on 9 July, the Claimant sent a document entitled headed ‘.. Ross – Positioning Paper’ to the Respondent’s Board. The Claimant relied on this communication as her 5th public interest disclosure. P1026 – 1032.

58. In this lengthy document, the Claimant set out a history of Mr Ross’ whole employment. She said, “In mid May concerns were being raised by Dev team that [Mr Ross] was just passing everything over to them …. I initiated a review of ticketing for May 2020.

This indicated that only 15% of actual tickets raised were passed over to the tech team, and out of that 15%, 80% of these tickets related to issues that could not be dealt with by [Mr Ross] as they were either things that the system did not yet cover, or were issues that required either hit fixes or were being dealt with in later releases, p1028. She said, I also brought to the attention of the exec the fact that holidays were needed by the EM team - a request [Mr Ross] made initially on 17th June 2020, was turned down by the exec, as there was no cover available for customer services…. [Mr Ross] continued to raise issues about asking for holiday in July, which I reported back to the exec on numerous occasions, and was told that arrangements were to be put in place to have cover to allow this." P1029 The Claimant continued, "I reported (in written format) to the exec on Monday 6 July that I was exceptionally worried about [Mr Ross] - I expressed concerns that he was already looking ill … along with his need for holiday, which I had said would be allowed, week commencing 20 July.." p1029.

59. In this document, the Claimant addressed some questions which she had been asked by other executive members. Mr Burns had asked where Mr Ross had felt pressure was coming from. The Claimant said, "[Mr Ross] advised me that he was losing his confidence talking to tech - the inference was he was pushing everything to tech, and that was not met well… that is why I prepared the report about the actual volume of tickets being passed over and shared it vocally with the exec in early June. My team know that the company has not been happy with the performance of Customer Services - I have never told them exactly what has been said ("everything thrown over the fence" "the department is more than dysfunctional its totally broken") but they also know that I spend endless time each day working with them to try to deal with as much within the East Midlands as we can." P1030.

60. The Claimant commenced a period of annual leave on 9 July 2020.

61. On 14 July 2020 Jack Williams asked Adam Huckerby, representative of the investor, MEIF / Foresight, for its consent to remove the Claimant as a Director, p 1747. Mr Huckerby replied on 15 July saying, "As you know, we are supportive of this decision .. accept this as consent to carry out the formal removal of [the Claimant's] directorship."

62. On 17 July 2020 the Claimant was removed as a Companies House Director of the Respondent without a process under s168 Companies Act being followed, pp 709, 711, 716 & 717. Mr Williams subsequently told the Claimant, by email on 29 July, that this removal had been a clerical error and that an email had been sent to Companies House to correct it, p 720.

63. In oral evidence, Mr Williams explained to the Tribunal that he had asked his assistant to remove the Claimant's access to the HMRC Portal and Companies House Portal after the Claimant had been placed on leave. He said that his assistant had also "clicked" on an option to remove the Claimant as a Director by mistake; he said that the Companies House website had simply given a click button option to do so. Mr Williams told the Tribunal that he had sent a number of emails to his solicitors and Companies House, including chasing emails, asking that this error be rectified. No emails, or other correspondence, with Companies House or otherwise, relating to the correction of this error, were produced by the Respondent to the Tribunal.

64. Mr Williams told the Tribunal that the consortium of investors headed by Adam Huckerby had raised concerns about the Claimant. He said that Mr Huckerby had called Mr Williams on about 13 July and asked to organise a meeting with Mr Williams and Mr Ashworth, Company Chairman. He said that a meeting was then arranged for 14 July, when Mr Huckerby raised concerns about financial governance; that the Claimant's draft end of year accounts were not the standard the investors expected, that they were not compliant with UK GAPP and had arrived late. He said that Mr Huckerby had also complained about the speed at which the Claimant had acted regarding a "bounce bank" loan and a VAT refund and about her recent argumentative behaviour in a board meeting regarding those matters.

65. Mr Williams said that no notes had been taken of the 14 July meeting. He agreed that there was no evidence that the meeting had taken place, apart from Mr Williams' oral evidence of it. He said he did not know why he had not asked Mr Huckerby to put his concerns in writing.

66. Mr Ashworth's witness statement did not contain any evidence of a meeting on 14 July. In evidence, he told the Tribunal that the investors originally wanted the Claimant to be removed as a Director and that later, between 22 – 25 September 2020, they indicated that they wanted the Claimant to be dismissed after the Claimant had sent documents to a third party.

67. The Tribunal accepted Mr Williams' evidence that the investors had raised these concerns about the Claimant's performance around this time. However, it did not find that the investors had asked that the Claimant be dismissed from employment.

68. On 20 July 2020, when the Claimant returned from annual leave, Mr Williams asked her to attend a telephone meeting with him. There was a dispute between the parties about what was said in the meeting.

69. Mr Williams' notes of his 20 July meeting with the Claimant, typed on 30 July 2020, recorded that he told the Claimant that the Board and other shareholders had lost confidence in the Claimant and believed the Claimant should step down as a Director. His notes recorded him saying that the shareholders had confirmed that they would be seeking to pass a resolution to remove her as a Director and follow the process in the Companies Act 2006, should the Claimant not resign beforehand, p709 – 710. His notes also said that the Respondent wanted to have conversations with the Claimant in relation to her performance, but that "for now her role in the finance team continues." The Tribunal noted that these notes were typed up after 28 July 2020, the date on which the Claimant had emailed Mr Williams saying that her office as a Director had been unlawfully terminated, p 717.

70. The Claimant's handwritten notes of the meeting, pp 709 – 713, recorded that Mr Williams had said that he had spoken to the investors on "Friday" and they were not happy with the Claimant. The notes recorded that Mr Williams said that the Claimant "was removed as a director" and that being a director was a privilege and that the CEO could remove that privilege. They recorded Mr Williams saying that there would be protected conversations with the Claimant and that the Claimant was being put on "gardening leave with immediate..". They recorded that Mr Williams would conduct the protected conversation as "he knows me" and that Mr Williams suggested a specific

settlement figure. They also recorded that Mr Williams said he was sorry it had "ended this way".

71. The Claimant told the Tribunal that her notes were accurate.

72. Mr Williams denied that he had used the words "gardening leave" – he said he did not know what that was. He said he had read guidance that he should have a protected conversation so that he could have an open and honest conversation. He denied that the purpose of such a conversation would be to terminate the Claimant's employment. He said that he had destroyed his own handwritten notes of the telephone meeting after typing them up.

73. On all the evidence, the Tribunal decided that the Claimant's notes were of the words that Mr Williams actually used in the telephone meeting. It noted that Mr Williams had sought investors' written consent to remove the Claimant as a director on 14 July and that she had, in fact, been removed as a Director on 17 July. It found that Mr Williams told the Claimant that she had been removed as a Director on the meeting on 20 July. The Tribunal considered that the Claimant's handwritten notes were more credible – they appeared to have been written as the conversation unfolded. It found her record of Mr Williams saying that being a Director was a "privilege", which could be removed by the CEO, was highly unlikely to have been fabricated by the Claimant. By contrast, Mr Williams' notes used inauthentically formal language. In particular, regarding the removal of the Claimant as a Director, they appeared to have been constructed to address the fact that the Claimant had already been removed, but not using the appropriate formal procedure.

74. Seeing that Mr Williams told the Claimant, on 20 July, that she had been removed as a Director, the Tribunal also decided that the Respondent had deliberately removed the Claimant as a Director on 17 July 2020. Her removal was not a clerical error. The Tribunal was reinforced in this conclusion by the absence of any contemporaneous record of this being an "error", or of any attempt to rectify the "error".

75. The Tribunal also found that Mr Williams proposed having a protected conversation because he intended that the Claimant would leave the Company entirely. This was consistent with him saying he was sorry it had "ended this way" and mentioning a specific figure for settlement.

76. The Claimant told the Tribunal that the Respondent had asked its Recruitment Agency to find a Financial Controller on 25 July 2020, p1209. It was not in dispute that Wayne Davies, a new Financial Controller, was appointed to the Respondent on 12 August 2020. The Respondent gave evidence that Mr Davies was appointed on a 6 month contract.

77. The Claimant emailed Mr Williams on 28 July 2020, p 717. She asked why she had not been invited to a shareholders' meeting on 17 July. She said that her office as a Director had been unlawfully terminated on 17 July 2020. She also said, "Over the past 12 months, I have raised with you my concerns about the Selazar business culture in general, and especially how actions of the company and the senior executive can have significant implications, both in respect of its legal obligations, on the health and safety of its staff and with regards to transparency of information presented to all stakeholders, including shareholders.. Before I went on holiday I raised my serious

concern regarding the treatment of a member of staff with a potential mental health issue and rather than investigate this, the response from the company was to remove me as a director." The Claimant relied on this email as her 6th protected interest disclosure.

78. On 29 July 2020, Mr Williams emailed the Claimant saying, "You were not given notice of a general meeting as there was no general meeting held. I spoke with all investors personally after a few contacted me with concerns, The consensus was that you should step down as a Director or we should begin the process under section 168 of the companies act to remove you as a director", p720. He also stated that the Claimant's removal as a Director had been a clerical error.

79. On 30 July 2020 Mr Williams sent the Claimant an invitation to a "Disciplinary Meeting" to be held on 14 August 2020 regarding the Claimant's "capability to perform" her duties. He said that concerns relating to her performance related, amongst other things, to the Claimant's productivity, team management, data protection, conflicts of interest, Companies House Management and engagement with third parties, p723. He attached a document headed 'Annex 1', dated 30 June, listing alleged performance concerns p725-728. Mr Williams told the Tribunal, and the Tribunal accepted, that the document was, in fact, created on 30 July.

80. Mr Williams' 30 July invitation said, "Following this meeting, you will be informed of the outcome of such meeting in writing in accordance with Selazar's Disciplinary Procedure…Please note that one potential outcome of this meeting is that your employment is terminated."

81. Mr Williams told the Tribunal that he had investigated performance concerns about the Claimant after his meeting with her on 20 July 2020. He said that the performance concerns were then discovered to be very extensive.

82. The Tribunal noted that Mr Williams' investigation did not include any investigatory interview with the Claimant.

83. The Claimant was not sent any relevant or supporting documents, or witness statements, along with Mr Williams' letter dated 30 July 2020, or at any time thereafter.

84. The Tribunal also noted that Mr Williams used the terms "disciplinary" and "capability" interchangeably in the 30 July letter. It accepted the Claimant's evidence that she was very confused by this inconsistent terminology.

85. The annex attached to Mr Williams letter included the following matters. In relation to productivity: the amount of work being delivered being below that expected in 24 hours each week; the Claimant failing to deliver Year End Accounts to the June Board meeting; the Claimant not applying for a BBLS loan and delaying applying for a CBILS loan; and the Claimant saying she did not know how "the system" worked [understood to be the Respondent's IT service to clients]. Regarding financial matters: the Claimant's budgets produced in April being late and inaccurate, including a £200,000 overpayment to HMRC; and the Claimant failing to provide documents necessary to reclaim VAT from HMRC within the required time. Regarding team management: the Claimant asking the executive in June 2020 to arrange cover for her staff's annual leave; the Claimant repeating, verbatim, concerns expressed by the management

team to Mr Ross, leading to a deterioration in Mr Ross' mental health. Regarding Companies House Management: the Claimant incorrectly managing Companies House filing leading to old directors who had left the company still owning shares and "Rav" not owning any. Regarding professionalism: in "January 2020 insulting colleagues in the business to get a partner onside".

86. In early August 2020 a number of employees raised payroll concerns regarding their incorrect tax codes and unpaid income tax, pp 731-733. The Respondent's witnesses told the Tribunal that these incorrect tax codes were the fault of the Claimant and/or her Company which had pre been engaged to manage payroll.

87. On 3 August 2020 the Claimant told Mr Williams that she was suffering from stress and anxiety and was awaiting a doctor's appointment. She asked to postpone the hearing on 14 August. She said that none of the issues alleged against her had been raised previously, p734

88. On 5 August 2020 Gareth Burns sent Mr Williams a further email regarding the Claimant, pp 735-736g. In it, he said amongst other things, "..over the last eight months, Louise has worked to undermine me… When we had the first meeting with our investors back in November, Louise stated that "Gareth's team burn money' to the investors and board. This was my first chance to meet the investors and I was incredibly embarrassed … it seemed very callous… At our first board meeting in 2020 we discussed our staff, recruitment and the make-up of the teams. As you know its very rare to have a technical team in a start-up like ours retain its core staff. This has been down to hard work and good management and it's something I am very proud of. Louise stated however in the meeting that "we've been lucky not to lose staff". This statement suggested that it wasn't good management and a solid business approach that had served us well here but just luck. This completely undermined me again in front of our investors. .. On the 30th of January … an email was brought to light from that day where Louise had contacted our warehousing partner insulting my department and the staff within." Mr Burns also repeated his previous complaints about the Claimant's conduct at recent interviews.

89. At some point in July or August 2020 a document was produced entitled E Ross Selazar Wellness Report, p1547. Mr Ross' name was typewritten at its foot. The document said, amongst other things, "I was told that other departments felt we (customer service) were not doing well and not working hard enough… these as well as general stress at the time started to overwhelm me and I was forced to take the next day off for the sake of my own mental health. After this I was contacted by serval members of the company to check on me and offered to listen if I needed to talk. My holiday request was then approved. However I learnt from talking to these people that my holiday request had only been made known on that Monday, despite my submitting it weeks ago. I also discovered that my probation being extended was the sole decision of my supervisor, Louise, and not a group decision as she had told me. Further from speaking to other departments they did not share the line of customer service not working hard enough that she had told me. To this end the company has now removed Louise and approves holiday request within a reasonable timeframe."

90. The Tribunal was not satisfied that Mr Ross had created or agreed that document. He had not signed it in manuscript and there was no email trail, or other contemporaneous record, showing that it had emanated from him. Mr Ross did not give evidence to the

Tribunal. In any event, the Tribunal concluded that, if this document was created by Mr Ross, then he had been seriously misled regarding the matters stated in it. For example, it was not true that his holiday requests were only known about on Monday 6 July. His requests and need for holiday had been raised by the Claimant for several weeks, in several different forums, before 6 July. Mr Burns had said, in an executive meeting on 18 June 2020, that there was no capacity in Belfast to cover Mr Ross' holiday.

91. The Tribunal accepted the Claimant's evidence that Mr Burns had said that there was no cover in Belfast for Mr Ross' holidays and that that was the reason that Mr Ross had not been allowed to take holiday. Mr Ross had been recruited as a technical customer service resource. The Tribunal found that technical cover – from Belfast – would be required if Mr Ross was away on holiday, but that Mr Burns had not made any provision for this.

92. On 7 August 2020 the Respondent issued documentation, in conjunction with PWC plc, to facilitate additional investment. The documents did not include any reference to the Claimant, either as a company founder, or as CFO, p 747.

93. On 12 August Mr Williams told the Claimant that the disciplinary/capability meeting would be rescheduled as she had requested, p781.

94. On 19 August 2020 Mr Ashworth, Chairman, emailed David Heenan, one of the investors, referring to Mr Heenans's "discussion with the company on 15th July" and saying that Mr Ashworh was "keen to finalise the matter that was discussed in relation to Louise McCabe". Mr Ashworth asked Mr Heenan to confirm his latest position. Mr Heenan responded saying, " I am concerned as to the ability of Louise to continue in her current role in Selazar. If the situation is not addressed, it may affect our position regarding further investment in the company, p1763.

95. On 20 August 2020, Mr Ashworth emailed Adam Huckerby in almost identical terms, but referring to discussions on 14 July. Mr Huckerby responded saying, "I have been disappointed with the errors and inaccuracies in the financial information provided to the board. It is a requirement of the Investment Agreement that the company provides management information which is consistent and free of error. Continued errors and problems in the information could result in a breach of the Investment Agreement, which clearly the company and directors should avoid. This is also disappointing given the issues which arose during the initial investment, whereby significant additional legal costs were incurred to remedy incorrect Companies House filings, which I understand also arose due to Louise's errors." p1764.

96. On 27 August 2020 Mr Williams sent the Claimant an invitation to a rescheduled meeting on 4 September 2020, p 783. He attached an expanded Annex of "Performance Concerns" dated 26 August 2020, p788-81. He said, "The purposes of this disciplinary meeting will be to consider your failure to reach the required standard in the performance of your duties as CFO, the alleged gross negligence and consider the impact this may have on future funding for Salezar." He repeated that an outcome of the meeting could be dismissal.

97. Again, Mr Williams had not conducted any investigatory meeting with the Claimant while compiling the expanded list of allegations.

98. The expanded list of allegations included more details of allegations previously made, including extracts from documents, but not the complete documents themselves. It included an allegation of "Neglecting duty of care as manager" which stated that the Claimant had failed to approve leave for Mr Ross when he had applied for annual leave, p805. It also included allegations regarding conflicts of interest and professionalism in relation to the Claimant's email of 30 January 2020. The list included an allegation that the Claimant was responsible for incorrect filings at Companies House in 2019 and that legal costs were incurred rectifying these. It referred to "a statement provided by Management to the CEO of 5th August 2020" and set out some concerns in it.

99. Mr Williams agreed that he did not disclose that Gareth Burns had sent this "statement provided by Management to the CEO of 5th August 2020". He agreed that the Claimant was not given the full text of Mr Burns' 5 August email, nor was the Claimant told that it was Mr Burns who had made these allegations.

100. On 3 September 2020 the Claimant wrote to Mr Williams saying that she was ill and could not attend a meeting 7 days after she had received Mr Williams' invitation, p815. She asked for clarity regarding whether the allegations against her were conduct, or performance, matters. Mr Williams replied the same day, saying that the allegations primarily related to her performance, but might be considered as gross negligence, as a form of gross misconduct, p816. He said that he had had a number of informal conversations with the Claimant "on various dates", including at management and board meetings, but that there had been no improvement thereafter.

101. On 4 September 2020 the Claimant informed Mr Williams that she would raise a grievance, p819-820. Mr Williams replied, requesting a fit note, p821.

102. On 11 September the Claimant provided a fit note, signing her off work until 8 October 2020.

103. Mr Williams wrote further to the Claimant on 14 September 2020, p833. He said that the Claimant would not be required to work for the duration of her fit note but that, "I am under a significant amount of pressure from our investors who have confirmed that if this matter is not addressed, it may affect their position regarding further investment in the company." He said that it was now "business critical" that a meeting be held. He said he had "rescheduled the capability hearing" for 18 September, p833. He sent further formal invitation letters to the Claimant that day, pp 834 – 836.

104. On 15 September 2020 the Claimant asked for an Occupational Health referral and repeated that she was signed off work until 8 October. She said that she was unfit to attend a meeting in 4 days' time, p837.

105. On 17 September 2020 Mr Williams invited the Claimant to a virtual meeting to be held on 21 September 2020, pages 838-842. He said, "In relation to an occupational health appointment I do not consider that it is feasible to arrange this given the significant pressures facing the business at present, nor indeed is it considered necessary."

106. Mr Williams told the Tribunal that he had made enquiries of one Occupational Health provider, who had indicated that there would be a 2 -3 wait for an appointment.

He did not contact any other provider and did not have notes of his conversation with, or written evidence of timescales from, the single OH provider he did contact

107. On 20 September 2020 the Claimant submitted a formal grievance, saying that a more detailed submission would follow, pp847-851. She relied on this as her 7th protected disclosure. She said that she had been removed as a Director, that she had not resigned, and that a lawful process had not been followed for her removal. She said that she had raised "whistleblowing concerns" over the previous 2 years. These were mainly expressed in general terms.

108. She said that she had raised concerns about, "An apparent lack of tangible concern from the CEO and other members of the executive with regards to various Health and Safety matters, in particular, but not exclusively, the mental health and wellbeing of staff at all levels within the company."

109. The Claimant said she had raised the following concerns, under the heading, "failure by fellow members of the executive to accept full control and monitoring processes to control how investor money is spent", " This is with regards to, but not limited to, staff castings, cost control and monitoring with regards to system build, cost control and monitoring with regards to cost of acquisition and maintenance of clients and a disregard for both adhering to initial budgets submitted to investors pre November 2019 investment and advice received back from investors with regards to financial matters. This is added to by the actions of the CEO to which appeared to be directed at trying to undermine me with regards to the budget setting process, where he was insistent on moving forward with what appeared to be over optimistic, unsupported and potentially grossly inflated projections which were not shared with the executive prior to the board pack being circulated."

110. In the grievance she also said, "Given my role within the Company and the potential seriousness of the issues that have raised, I trust that the Company will comply with all governance requirements and ensure that my full complaint dossier will be presented to ALL shareholders" … "My illegal removal as a director on 17th July 2020 occurred whilst I was on annual leave, without my knowledge and most pertinently , immediately after I had brought to the attention of the full executive serious deficiencies with regards to both the legality of company practise and the behaviour of other company directors (during the week commencing 6th July 2020,) prior to my departure on annual leave."

111. The Claimant did not attend the meeting on 21 September. Mr Williams emailed her that day saying, "I would like to give you the opportunity to put your case forward and answer the allegations made against you in writing. This must be received by close of business tomorrow and including any evidence." p 858. He said that he would then make a decision, having reviewed the evidence.

112. On 21 September 2020 the Claimant sent a request for an EGM and Special Notice by email to all directors of the Company, stating her intention to propose a resolution to remove Mr Williams as a director of the Company with immediate effect, p859.

113. The Claimant relied on correspondence she sent on 21 September 2020 to a Dominic Walsh, p855, as her 8th protected disclosure. In this email she said, "If you

are able to share this with James, I would be grateful if you aren't comfortable, don't worry, I fully understand and I will find another way." The Claimant attached her grievance and her request for EGM and special notice. She also said, "I understand that the company is begging investors for more money — they need commitment by 30th sept to then be able to put in a futures fund round. Foresight are critical to this."

114. Dominic Walsh was not an employee of Foresight, or any of the other investors. The Claimant told the Tribunal that Foresight was an investment partner in Mr Walsh's company and that James Livingstone was Foresight's appointed director in Mr Walsh's company's board. She gave evidence that she had asked Mr Walsh him to pass her report to James Livingstone at Foresight, who was a Senior Director and confidante of Mr Fairman, co-founder of Foresight. Mr Walsh confirmed that he had passed the documents on as requested, p857.

115. The Claimant told the Tribunal that she had simply intended Mr Walsh to act as a "post box".

116. The Claimant also sent Ravindre Khangure, an investor, the grievance.

117. The Respondent agreed that investors had responsibility for health and safety matters at the Respondent Company.

118. At 14:48 hrs on 22nd September 2020 the Claimant sent her grievance, EGM request and special notice to Kevin Holland, chief executive of Invest NI, p897. She relied on this as her 9th protected disclosure.

119. The Respondent's Board was notified that the Claimant had sent copies of her EGM request, Special Notice and grievance to Mr Walsh, the director of a third party Company, as well as to the following shareholder investors: Foresight Group, Invest NI, David and Nicola Heenan, Gerry McGladery and Ravindre Khangure.

120. Mr Williams told the Tribunal that, after Mr Walsh sent the correspondence to Foresight, Mr Huckerby notified the Company that the Claimant sending the correspondence to Mr Walsh was a breach of the Investment Agreement.

121. Mr Williams told the Tribunal that he considered there was no legitimate reason for the Claimant to share confidential information with Mr Walsh. Mr Ashworth said that the Claimant had the contact details for Mr Huckerby and other investors. The Claimant told the Tribunal that she believed that Mr Huckerby had already been influenced by Mr Williams and others, against her.

122. On 16 September 2020 Mr Ashworth sent an email to Mr Huckerby, p1774, saying that the Respondent could create a new position for the Claimant in the Finance Department and asking for his view. On 24 September 2020 Mr Huckerby replied saying, "The concern would be, given the company's current stage of growth and financial position, whether there is the need any more financial resource, in particular at the level of cost that role may carry, and whether the company can afford it given the current cash burn rate."

123. On 22 September Mr Williams wrote to the Claimant saying that the Company was under significant pressure from investors to resolve matters. He said that her

request for an EGM would be dealt with by the Board and that her grievance would be dealt with separately to the disciplinary process in order to preserve fairness and impartiality. He also said, ".. today I have been made aware that you sent your correspondence of 21st September 'enclosing 'our special notice and EGM request along with your grievance to an independent third party who then forwarded this correspondence to one of our investors. This is a serious breach of confidentiality and could be considered as gross misconduct in and of itself. Further, our investors have confirmed to me that this confidentiality breach by you is a breach of the investment agreement. You will appreciate that this is extremely concerning and has detrimental consequences for Selazar and its relationships with key investors. This additional allegation will be considered as part of my overall decision in relation to the issues previously identified and confirmed in writing to you including the significant pressure the company is being placed under by its investors. In a further and final attempt to allow you to address this additional allegation as I have outlined above, please send me any written representation for my consideration on or before COB tomorrow." p899.

124. Gareth Burns was appointed to investigate the Claimant's grievance.

125. On 23 September the Claimant replied to Mr Williams, saying that Dominic Walsh, the manging director of Hospital Supplies Limited, had forwarded the paperwork to James Livingston at Foresight Group on her behalf. She said, "Dominic is an exceptionally experienced company director with integrity who is very highly thought of within Foresight Group and works very closely with the CEO of Foresight and I understand that Dominic works with Foresight on a variety of projects they are involved with. This action was taken to purely ensure that my whistleblowing concerns were seen by Foresight, as I was exceptionally concerned that you may had already suggested to the shareholders that I was simply "a disgruntled and upset employee" and had not shared any of my whistleblowing concerns with them. Your failure to immediately provide me with a written report as to why I had been removed as a director (you indicated almost a week after the event that you had asked for written reports from fellow directors about their concerns) also indicated to me that you had simply told Adam Huckerby, the Foresight representative who looks after Selazar, that I had been removed because you and your fellow directors "were unhappy," and no written evidence to substantiate this had been provided for him to consider or comment on. If I am incorrect in this assertion, please provide copies of the details you sent over to Adam and any other investors, or any form of correspondence received from them, as these are exceptionally pertinent to my whistle blowing concerns."

126. The Claimant repeated this evidence at the Tribunal.

127. Mr Williams told the Tribunal that, upon investigation, the Company became further aware that, between July and August 2020, the Claimant had exported 565 emails and confidential documents from the Company's computer system and sent them to her email address at Angel Accounting. He said that the documents contained sensitive personal data that the Claimant had no legitimate reason to export. He said that this was another breach of confidentiality, the Claimant's duties as a Director of the Company and her obligations under the terms of her Service Agreement. He said that the Company's solicitors were instructed to deal with the matter, pp 909-911, 915-916 and 920-921.

128. The Claimant told the Tribunal that she had serious concerns about whether the Respondent would preserve documentation regarding her whistleblowing concerns. She said that many of the documents in the Tribunal bundle were the ones she had exported. She said that the Respondent had provided very few documents indeed by way of disclosure in the Tribunal process. She said that she had agreed to return and/or destroy any documents which were not directly relevant to her.

129. The Tribunal noted that many of the documents in the Tribunal Bundle did appear to be documents the Claimant had sent from herself to herself. The Tribunal noted that the Respondent appeared to have produced very few documents for the Tribunal, including documents which its own witnesses said existed. The Tribunal accepted the Claimant's evidence that she had taken copies of these documents to preserve them in relation to her whistleblowing allegations.

130. Mr Ashworth later wrote to the Claimant on 26 October 2020, refusing her request for an EGM made in September 2020 on the grounds that it was 'frivolous, defamatory and vexatious' p935. He said that the Board had consulted majority shareholders and they had unanimously indicated that they were not prepared to vote in favour of her proposed resolution, p 934-935.

131. The Claimant told the Tribunal that this conclusion was unwarranted because her request had been supported by the Claimant's whistle-blowing report. The Claimant relied on this refusal to allow the Claimant to engage in her rights as a shareholder as an act of detriment because of her protected disclosures.

132. Mr Ashworth was cross examined about his letter refusing an EGM, p935. The letter had said that the request had been the subject of "careful consideration by the board". Mr Ashworth told the Tribunal that he had consulted the investor directors, Mr Heenan, Invest NI and Adam Huckerby and the Directors, apart from the Claimant, about whether they supported the Claimant's motion, but they did not. He said that he decided that it would not be a good use of time to pursue an EGM when the Claimant's motion at the EGM would not be supported by the attendees. Mr Ashworth agreed that there was no documentary evidence of these discussions and that the Claimant's request had therefore not considered at Board meeting. He said that he did not know whether corporate governance would require that a decision to deny a shareholder's request for an EGM to be minuted.

133. Mr Williams told the Tribunal that, because the Claimant had raised complaints about his conduct as part of her grievance, the Company's Chair, Mr Ashworth, took over the disciplinary/performance procedure in late September 2020.

134. On 25 September 2020 Mr Ashworth wrote to the Claimant dismissing her with immediate effect, p905-908. He said that the Claimant had shared information with a 3rd party, Mr Walsh.

135. He said, "Our investors, Foresight, have confirmed to us that this act has caused them great concern. I believe that this has exacerbated their already significant concerns in relation to your performance and actions and has impacted on their confidence to invest, if you remain engaged by Selazar." P907.

136. He continued, “In light of the above, we consider that our investors have made their position clear and unequivocal. You will appreciate that this pressure has left the Company with no alternative option and therefore I must confirm the termination of your employment as of today's date. Redeployment has been suggested to our investors as an alternative means of removal from your current role however, our investors do not consider that there would be merit in this alternative option; particularly as the only option remains a demoted position within the financial function of the business. As such, the reason for your dismissal is due to the significant pressure we are facing from more than one of our investors to address your continued employment with the Company (notwithstanding the substantial and outstanding issues which exist In relation to your gross misconduct as outlined above).” P908

137. Mr Ashworth made his decision in the Claimant’s absence. He did not himself investigate obtaining any Occupational Health advice about the Claimant’s fitness to attend a meeting.

138. Mr Ashworth told the Tribunal that he had discussed the matter with Mr Williams. Mr Ashworth said that he had reached a decision that the Claimant should be dismissed after reading her email to Mr Walsh. He agreed that he had not tried to rearrange a meeting with the Claimant. In oral evidence he said, “The circumstances were such that only one decision could be reached. We needed to reach a decision. I decided that enough was enough and that there were serious breaches and I took the necessary decision.”

139. Mr Ashworth agreed in cross examination that the Company’s shareholders were responsible for ensuring health and safety and corporate governance and that the Company’s handbook allowed disclosures to be made to those who are responsible for legal matters. He said that he had no issue with the Claimant raising the matters with investors and that, indeed, she was obliged to do so under the service agreement. He said that he believed that the Claimant could and should have raised her concerns to Adam Huckerby, so that there was no reason for information to be shared with Mr Walsh.

140. Mr Ashworth was also cross examined about the lack of documentary evidence about the shareholder’s views on the Claimant’s correspondence with Mr Walsh. He agreed that no conversations with shareholders between 22 and 25 September had been documented and that he had not addressed the matter in his witness statement. He said that the matter had arisen during a regular telephone conversation with Mr Huckerby and he could not remember the exact date of the conversation. He did not agree that corporate governance would require an instruction to dismiss the CFO of a Company to be documented.

141. The Tribunal concluded, from Mr Ashworth’s own evidence, that it was he who had made the ultimate decision to dismiss the Claimant, having read her email to Mr Walsh.

142. However, Mr Ashworth also told the Tribunal, and the Tribunal accepted, that he had been discussing the Claimant’s disciplinary/capability proceedings with Mr Williams throughout.

143. The Respondent reinstated the Claimant as a Director on 19 October 2020, p954. It then lawfully removed her as a Director, on 19 November 2020, having followed the appropriate Companies Act procedure, pp 1179-1181.

144. The Claimant told the Tribunal that she was telephoned on 5 August by Lee Gibbons at Brewster Partners, a recruitment consultancy used by the Respondent, who told her that a new financial controller was starting the following Monday, p780. She told the Tribunal that, when she informed Mr Gibbons that she had been put on leave, he then told her, in embarrassment, that his firm had been instructed by Mr Williams to find '*a younger team member who was more in tune with a young tech start company*', to look after finances.

145. The Claimant drew the Tribunal's attention to a text exchange between Lee Gibbons and her on 2 July 2020. In it, Mr Gibbons asked, "..off the record, are you looking for a candidate from a certain age group for this role?" The Claimant replied saying, "Age means nothing to me… ability to do the job is all I ever care about…" p693.

146. The Respondent relied on an email from Mr Gibbons to Mr Williams on 11 March 2020, which said, "I can confirm Louise tried to contact me on numerous occasions once she placed on gardening leave with Selazar. Louise asked to talk to me regarding her current position/situation with Selazar. On a couple of occasions Louise tried to contact me during out of hours and not through the correct channels. I didn't not respond to these requests from Louise. I have since been informed my name was used by Louise, stating I was asked by Selazar to recruit her replacement and this replacement needed to be a younger male. This absolutely was not the case, or was I ever asked to recruit for Louise's replacement", p1799.

147. The Claimant gave evidence that she had never tried to contact Mr Gibbons outside work, save on one occasion in relation to the ET proceedings. She said that Mr Gibbons had telephoned her in August 2020 but that the Claimant had informed him that she was on gardening leave. She said, " In his embarrassment at the fact that I had told him that I was on garden leave he said he had been approached by Salazer to look for someone who was younger and more in tune with a tech start up business."

148. Mr Gibbons did not give evidence.

149. The Claimant appealed against her dismissal on 16 November 2020, pp951 – 955. She attended an appeal hearing, p1189 – 1213. Mike Matthews, HR Consultant, conducted the appeal. The appeal was not by way of rehearing.

150. At the dismissal appeal hearing, the Claimant agreed that she had acted outside the Respondent's whistleblowing policy in sending documents to Mr Walsh. She said that she had panicked.

151. In evidence at the Tribunal, Mr Matthews agreed that there was no evidence of investor pressure to dismiss the Claimant. He agreed that, insofar as he obtained information from Mr Williams to support the decision to dismiss the Claimant, he did not invite then the Claimant to a meeting to discuss that evidence.

152. It was put to Mr Matthews that the dismissal was unfair and bullying because the Claimant had been sent 5 contradictory invitation letters, she had not been referred to Occupational Health and that she had been sent new allegations 3 days before the dismissal hearing. Mr Matthews told the Tribunal that he did not believe the dismissal process constituted bullying, but said that he did not wish to make any other comment about the fairness of the process.

153. The appeal decision was sent to the Claimant on 11 January 2021, p1246 – 1250.

154. The decision did not identify any procedural failures in the dismissal process.

155. The Claimant sent a more full whistleblowing report/grievance to the Respondent Company on 13 November 2020, pp 963 – 1174. Mr Burns also produced a whistleblowing / grievance outcome report, pp 1226 – 1243.

Notice Pay, Expenses, Holiday

156. The Claimant was entitled to 3 months' notice of the termination of her contract, p285.

157. The Claimant's contract provided, at clause 9.2, that she was entitled to 28 days' paid holiday each year, p288. It provided that she was entitled to be paid for accrued, but untaken, holiday on termination of her employment, at 1/260th of her salary for each day of accrued but untaken holiday, clauses 9.4 & 9.5.

158. The Claimant told the Tribunal that she had booked holiday on 11 – 15 May 2020 and 27 – 31 July 2020, but had cancelled it because of the covid pandemic. She said that she did take holiday on 10 – 17 July 2020, returning on 20 July. The Claimant told the Tribunal that she had worked on all the bank holidays in 2020.

159. The Respondent Company's annual leave record for 2020 showed the Claimant having taken holiday on 25 February, 20 March, 23 March, 10 April, 13 April, 8 May, 11 May, 25 May and 31 August. The Claimant told the Tribunal that she had worked on each of those days, save 31 August, when she was on authorised leave.

160. The Tribunal accepted her evidence. It considered that it was likely that she did not take the holiday she had booked during 2020, given the covid pandemic.

161. The Claimant's contract provided that the Respondent Company would reimburse her for, "all reasonable expenses wholly, properly and necessarily incurred by the Employee in the course of the Appointment, subject to production of VAT receipts or other appropriate evidence of payment." Clause 8.1, p288.

162. The Claimant told the Tribunal that she had accrued expenses at the date of her dismissal which the Respondent Company has refused to pay. She said that she had provided expense details and receipts to Alison Keefe, book keeper, but no longer has copies of these. She said that she is unable to access her Flybe account because that company went into administration in March 2020. The Claimant asserts that the Respondent has not paid her the following expenses: Accommodation £1,109; Flights £5,371.68; Taxi £108.93.

163. The Tribunal accepted the Claimant's evidence regarding her unpaid expenses. She was able to give precise details of them. It accepted that she had given details of them in accordance with her contract.

164. The Respondent had a Capability Procedure, pp471-477 and a Disciplinary Policy pp492-499.

165. The Respondent's whistleblowing policy provided, p573:

"3.1 We hope that in many cases you will be able to raise any concerns with us. You may speak to us in person or put the matter in writing if you prefer. We may be able to agree a way of resolving your concern quickly and effectively.

3.2 However, where the matter is more serious, or you feel that we have not addressed your concern, you should contact the Managing Director.

7. External Disclosures

7.1 The aim of this policy is to provide an internal mechanism for reporting, investigation and remedying any wrongdoing in the workplace. In most cases you should not find it necessary to alert anyone externally.

7.2 The law recognises that in some circumstances it may be appropriate for you to report your concerns to an external body such as a regulator. It will very rarely if ever be appropriate to alert the media. We strongly encourage you to seek advice before reporting a concern to anyone external. The independent Whistle Blowing charity, Public Concern at Work, operates a confidential helpline. They also have a list of prescribed regulators for reporting certain types of concern."

Relevant Law

Age Discrimination

166. By *s13 Eq A 2010*,

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

167. By *s5 EqA 2010*, age is a protected characteristic. A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group. A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages.

168. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Causation

169. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?" Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

170. If the Tribunal is satisfied that the protected act is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

171. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Burden of Proof

172. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

173. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

Protected Disclosure

174. An employee who makes a "protected disclosure" is given protection against his employer subjecting him to a detriment, or dismissing him, by reason of having made such a protected disclosure.

175. Protected disclosure is defined in *s 43A ERA 1996*: "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."

176. "Qualifying disclosures" are defined by s *43B ERA,* which provides,

"43B Disclosures qualifying for protection
(1) In this Part 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 show one or more of the following—

(a) that a criminal offence had been, was being or was likely to be committed; or
(b) that a person had failed, was failing or was likely to fail to comply with a legal obligation;
…
(d) that the health or safety of any individual has been, is being or is likely to be endangered
…
(f) that information tending to show any matter falling within any one of the preceding paragraphs had been, was being or was likely to be deliberately concealed."

177. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR [24] – [25]; *Kilraine v LB Wandsworth* [2016] IRLR 422.

178. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non-compliance, *Fincham v HM Prison Service* EAT 19 December 2002, unrep; *Western Union Payment Services UK Limited v Anastasiou* EAT 21 February 2014, unrep.

179. The test for whether a relevant failure is *"likely"* to occur is: it need only be *"probable"* or *"more probable than not"*, *Kraus v Penna plc and anor* [2004] IRLR 260 at [24]. Reasonableness has both a subjective and objective element.

180. In *Chesterton Global Limited v. Nurmohamed* [2015] ICR 920 the EAT (Supperstone J) found that the words *"in the public interest"* were introduced to do no more than prevent a worker from relying on a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

181. By s43C ERA "**Disclosure to employer or other responsible person**

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—
(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

182. Disclosure to an apparent outsider is therefore deemed disclosure to the employer where the worker follows a procedure as authorised by his employer.

183. Protection from being subjected to a detriment is afforded by *s47B ERA 1996*, which provides:

" 47B.— Protected disclosures.
(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

184. A "whistleblower" who has been subjected to a detriment by reason of having made protected disclosures may apply for compensation to an Employment Tribunal under *s48*.

185. Under *s.48(2) ERA 1996* where a claim under *s.47B* is made, "it is for the employer to show the ground on which the act or deliberate failure to act was done".

186. In the absence of a satisfactory explanation from the employer which discharges that burden, Tribunals may, but are not required to, draw an adverse inference: *Kuzel v. Roche Products Ltd* [2008] IRLR 530 at paragraph 59 dealing with a claim under s.103A ERA 1996 relating to dismissal for making a protected disclosure, *International Petroleum Ltd v Osipov*, EAT 19 July 2017.

187. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that, where a whistleblower is subject to a detriment without being at fault in any way, Tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The detrimental treatment of an innocent whistleblower necessarily provides a strong prima facie case that the action has been taken because of the protected disclosure and it cries out for an explanation from the employer.

188. “Detriment” has the meaning explained by Lord Hope in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.

Protected Disclosure Detriment – Causation

189. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, “the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower." Per Elias J at para [45].

Automatically Unfair Dismissal

190. A whistleblower who has been dismissed by reason of making a protected disclosure is regarded as having been automatically unfairly dismissed, *s103A ERA 1996*:

"**103A Protected disclosure**
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."

191. In order for an employee to have been automatically unfairly dismissed under *s103A ERA*, the reason or principal reason for dismissal must be that the Claimant had made one or more protected disclosures.

192. In *Royal Mail Group v Jhuti* [2019] UKSC 55, Ms Jhuti made protected disclosures, in response to which her line manager sought to pretend that her performance was inadequate. The company appointed another officer to decide whether Ms Jhuti should be dismissed. That officer, *"albeit by reference to evidence which was hugely tainted, genuinely believed that the performance of Ms Jhuti had been inadequate and…dismissed her for that reason"*. The Supreme Court held at [60]-[62]: "In the present case, however, the reason for the dismissal given in good faith by Ms Vickers turns out to have been bogus. If a person in the hierarchy of responsibility above the employee (here Mr Widmer as Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker….if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."

193. In *Kong v Gulf International Bank Ltd* EA-2020-000357 (10 September 2021, unreported) the EAT said that the rule remains that the reason for dismissal is the reason in the mind of the decision maker, except as set out in *Jhuti*. The EAT said that, for a case to come within the *Jhuti* exception, there must be 'two common features: (a) the person whose motivation is attributed to the employer sought to procure the employee's dismissal for the proscribed reason; and (b) the decision-maker was peculiarly dependent upon that person as the source for the underlying facts and information concerning the case. A third essential feature is that their role or position be of the particular kind described in either scenario, so as to make it appropriate for their motivation to be attributed to the employer.'

Unfair Dismissal

194. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer.

195. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA,* " ... or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

196. 'Pressure from external third parties' can be 'some other substantial reason' in certain circumstances, *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466, EAT. In that case, the EAT held that, where an employee is dismissed at the behest

of a third party, such as a client, the fact that the client who procures, directly or indirectly, the dismissal of an employee may have acted unfairly, and the employee has thus suffered an injustice, does not mean that the dismissal is unfair within the meaning of the unfair dismissal legislation. That is because the focus of s.98 of the 1996 Act is squarely on the question of whether it was reasonable for the employer to dismiss

197. The EAT also held that, if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair.

198. The EAT said that, according to *Dobie v Burns International Security Services (UK) Ltd* [1984] IRLR 329 CA, the employer must to take account, on the facts known to him at that time, whether there will be injustice to the employee and the extent of that injustice. Nonetheless, there will be cases where, however much the employer "takes into account" the injustice to the employee caused by the third party's stance, he may still reasonably decide to dismiss. In a case where the client's stance appears liable to cause injustice, the tribunal must consider with special care whether the employer has indeed done all that he could to avoid or mitigate that injustice.

199. During submissions in the present case, it was not in dispute between the parties that third party pressure dismissals will only be fair in the following circumstances:

a. "The employer adduces clear evidence of the 3rd party instruction.

b. The employer must take reasonable steps to change the 3rd party's mind.

c. The employer must then do all that it reasonably can to redeploy the employee."

Polkey and Contributory Fault

200. If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

201. In *Gover v Propertycare Limited [2006] ICR 1073*, the Court of Appeal held that the *Polkey* principle does not only apply to cases where the employer has a valid reason for dismissal but has acted unfairly in its mode of reliance on that reason, so that any fair dismissal would have to be for exactly the same reason. Tribunals should consider making a *Polkey* reduction whenever there is evidence to suggest that the employee might have been fairly dismissed, either when the unfair dismissal actually occurred or at some later date. In making an assessment Tribunals should apply the following principles set out in *Software 2000 Limited v Andrews* [2007] ICR 825.

202. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it reduces any compensatory award

by such proportion as it considers just and equitable having regard to that finding, *s123(6) ERA 1996. Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662

203. In *Nelson v BBC (No 2)* [1980] ICR 110, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct:

(a) The relevant action must be culpable and blameworthy

(b) It must actually have caused or contributed to the dismissal

(c) It must be just and equitable to reduce the award by the proportion specified.

204. It is open to a Tribunal to make deductions both for *Polkey* and contributory fault.

Discussion and Decision

205. The Tribunal has taken into account all the relevant facts and the law before coming to its decision. For clarity, however, it has addressed each issue separately.

206. **Were there qualifying disclosures (s43B ERA): Did the Claimant make the following disclosures to the Respondent:**

207. **1.1 Board presentation in August 2019 regarding Corporate Governance issues and the Respondent's compliance with the Wates Corporate Governance Principles**

208. The Tribunal found that the Claimant submitted a written presentation to the Respondent's Board on 13 August 2019 regarding Corporate Governance Issues and the Respondent's compliance with the Wates Corporate Guidance Principles. She relied on this as her first protected disclosure. It did not appear that the paper was discussed at a Board meeting. Nevertheless, the Tribunal inferred that the Claimant had provided the paper to the other Board members and therefore had disclosed the information in it, to them.

209. The paper, p1059, said that the Claimant believed that the Company should put in place a Corporate Governance Framework which could be tweaked as the Company grew larger. In the paper, the Claimant said that the Company would not have to "follow everything to the letter", but that having a framework in place would make it easier to change as the Company grew. She advised that the Wates Corporate Guidance Principles for Large Private Companies had come into effect on 1 January 2019. She commented that these Principles applied to large companies, which were defined as having more than 2000 employees, or having a turnover of £200M or a balance sheet of more than £2 billion. On 11 July 2019 a Report to Directors and unaudited financial statements of the Respondent showed a net loss of £559,147.00 at 30 April 2019, p114 – 123.

210. The Tribunal found that the Claimant did not disclose information which in her reasonable belief tended to show that the company was likely to fail to comply with a legal obligation. To her knowledge, the Company was a very small company at the

time, which had fewer than 10 employees and no turnover. She advised that it would not be necessary to implement the Wates Corporate Guidance in full at the time and she did not identify where, or when, the Company might fail in the future, even if it did grow. The Tribunal could not conclude, on that basis, that the Claimant had a reasonable belief that the information tended to show that the company was, or was likely to be, in breach of any particular legal obligation.

211. The Tribunal therefore found that the first alleged protected disclosure was not a protected disclosure.

212. **1.2 Board presentation on 29th January 2020, in which the Claimant told the Respondent that it needed to monitor stress / mental health deteriorations given the pressure placed on team members (as recorded at 4.11 in the 29th January 2020 Board minutes).**

213. The Claimant relied on another alleged protected disclosure at a Board Meeting on 29 January 2020, concerning mental health and stress, p317- 326. The minutes of the meeting recorded, p323 para 4.11, " LM expressed need to ensure we monitor stress / mental health possible deteriorations given the pressure placed on team members - we operate in a fast past rapidly moving environment. She will work on possible recommendations to be reviewed internally relating to company policy in this area."

214. The Tribunal considered that this statement by the Claimant amounted to no more than an allegation. It did not contain information. It was expressed in extremely general terms and did not disclose any specific facts about individuals or the working environment.

215. The Tribunal decided that this was not a protected disclosure

216. **1.3 The Claimant's email to Jack Williams sent on 15th April 2020 timed at 21:28 hrs in which the Claimant warns the Respondent against presenting misleading forecasts to its investment committee.**

217. The Tribunal considered that, on a true interpretation of her 15 April 2020 emails, the Claimant did not, in fact, say, or believe, that the investors would be misled by the figures Mr Williams was proposing. Rather, she said that the investors would not accept the figures, because the investors themselves would be likely to view them as unrealistic. She proposed that different, lower figures should be presented, which the investors would accept as realistic. The Claimant was trying to present persuasive figures to the investors.

218. The Tribunal decided that the Claimant did not disclose information which, in her reasonable belief, tended to show that anyone was likely to breach any legal obligation to the investors. That was not was in her mind.

219. **1.4 Emails to Kevan Bishonden, Jack Williams and Gareth Burns timed at 09:33 and 19:27 hrs on 7th July 2020 which disclosed health and safety concerns regarding Edwards Ross, who was on the verge of a breakdown and not able to cope with the pressure placed upon him, that the Respondent had to look closely at its executive culture towards all areas of staff.**

220. In her email of 7 July 2020, p707 at 09.33 to Messrs Williams, Burns and Bishonden, the Claimant said that Mr Ross was unwell and gave details of his condition. She said, "As I indicated yesterday at the exec, I have been concerned that he has been pushed too hard for someone so young in their first position." The Claimant said that she believed that Mr Ross may not return from his leave. She raised the possibility that Mr Ross might bring a claim for discrimination. She said, "… we are going to have to have a serious conversation about people culture within our business as by the very nature of what we do, we will be employing more team members who have such characteristics." P1040.

221. The Tribunal decided that the Claimant disclosed information about Mr Ross' medical condition. She also said that she was concerned that he had been "pushed too hard" by the Company. The Tribunal concluded that she disclosed information which, in her reasonable belief, tended to show that the Company had breached its legal obligation to provide a safe working environment for Mr Ross. In her second email that day, at 19.27, the Claimant gave information that Mr Ross had been looking unwell and had been upset by the Company's refusal to allow him holiday and by the extension of his probation period. She said that the Company would have to do more to safeguard the mental health of its employees. Again, the Tribunal considered that the Claimant did disclose information - about Mr Ross looking unwell and about his distress having arisen from the Respondent Company's actions. The Tribunal found that this was information which in her reasonable belief, tended to show that the Company had breached its legal obligation to provide a safe working environment for Mr Ross.

222. The Tribunal was also satisfied that, in the Claimant's reasonable belief, the information was disclosed in the public interest. Maintenance of a safe working environment for employees is a matter of public interest, not of personal interest for the Claimant.

223. It was not in dispute that the contents of the emails were disclosed to the Claimant's employer. The Claimant made protected disclosures in her emails on 7 July 2020.

224. **1.5 The Claimant's document headed 'Edwards Ross - Positioning Paper' sent to the Respondent on 9th July 2020 which expressed concerns about Mr Ross' health and safety and the pressure that was being placed upon him by the Respondent;**

225. The Claimant sent her 9 July '.. Ross – Positioning Paper' to the Respondent's Board, pp1026 – 1032. It was not in dispute that this paper was disclosed to her employer.

226. In the document, the Claimant gave information about her review of ticketing for May 2020, p1028. She also said, "I also brought to the attention of the exec the fact that holidays were needed by the EM team - a request [Mr Ross] made initially on 17th June 2020, was turned down by the exec, as there was no cover available for customer services…. [Mr Ross] continued to raise issues about asking for holiday in July, which I reported back to the exec on numerous occasions, and was told that arrangements were to be put in place to have cover to allow this." P1029 The Claimant continued, "I reported (in written format) to the exec on Monday 6 July that I was

exceptionally worried about [Mr Ross] - I expressed concerns that he was already looking ill … along with his need for holiday, which I had said would be allowed, week commencing 20 July..” p1029.

227. The Claimant disclosed all this information in her document. In addition, the Claimant told Mr Burns that Mr Ross had felt pressure from Mr Burns’ suggestion that Mr Ross was sending all issues to the technical team, rather than resolving them himself.

228. Taking into account the whole of the document, the Tribunal found that the Claimant disclosed information which, in her reasonable belief, tended to show that the Respondent Company had breached its legal obligation to provide a safe working environment for Mr Ross. She disclosed information about Mr Ross’ ill health and its cause, by working conditions at the Company. She reasonably believed that the information about Mr Ross’s ill health was in the public interest – Corporate breaches of health and safety duties are matters of public interest.

229. The Claimant’s 9 July position paper was a protected disclosure.

230. **1.6 The Claimant's email to Jack Williams, timed at 18:17 hrs on 28th July 2020;**

231. The Claimant emailed Mr Williams on 28 July 2020, p 717, saying that her office as a Director had been unlawfully terminated on 17 July 2020. She also said that she had raised concerns with him about the health and safety of staff and transparency of information presented to shareholders. She said, “Before I went on holiday I raised my serious concern regarding the treatment of a member of staff with a potential mental health issue and rather than investigate this, the response from the company was to remove me as a director.”

232. The Tribunal decided that the Claimant disclosed information to her employer that her office as Director had been terminated, in breach of legal obligations. She also disclosed information that this had been done after she had raised a concern about how the Company had treated a staff member with a potential mental health issue. The Tribunal decided that she disclosed information which, in her reasonable belief, tended to show that the Respondent had breached its legal obligation under the Companies Act to follow a statutory process for removal of Company directors. In addition, she disclosed information which, in her reasonable belief, tended to show that her previous health and safety disclosures were being covered up, by her removal. She reasonably believed that these were made in the public interest as they concerned corporate governance in a company which had received significant public funds.

233. **1.7 The Claimant's grievance dated 21" September 2020 which referred to (i) corporate governance issues and failings, (ii) plagiarism pertaining to the Selazar platform, (iii) misrepresentations made to investors and other stakeholders, (iv) lack of concern from the Respondent's Board regarding health and safety, (v) a bullying culture and (vi) the non-payment of creditors.**

234. The Claimant’s grievance was made to her employer and repeated, at least, her previous protected disclosure that the Respondent Company had removed her as

a shareholder unlawfully and that this had happened after she had told the executive about legal flaws in Company practices. It was a protected disclosure.

235. **3.1 On 22nd September 2020 the Claimant shared with Dominic Walsh, Foresight, Invest NI and Ravindre Khangure her draft Whistleblowing report for the Respondent's Board.**

236. The Claimant sent her grievance to investors in the Respondent Company.

237. It was not in dispute that investors had legal responsibility for matters including health and safety, so that disclosures made to them came within s43C(1)(b)(ii) ERA 1996. Mr Ashworth agreed in cross examination that the Company's shareholders were responsible for ensuring health and safety and corporate governance and that the Company's handbook allowed disclosures to be made to those who are responsible for legal matters. He said that he had no issue with the Claimant raising the matters with investors and that, indeed, she was obliged to do so under the service agreement.

238. Sending the Claimant's grievance to investors was therefore a protected disclosure.

239. The dispute between the parties was whether the Claimant sending her grievance and other documents to Dominic Walsh came within s43C(2) ERA 1996, "(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

240. The Tribunal noted that the Respondent's whistleblowing procedure apparently allowed external reporting.

"7.1 The aim of this policy is to provide an internal mechanism for reporting, investigation and remedying any wrongdoing in the workplace. In most cases you should not find it necessary to alert anyone externally.

7.2 The law recognises that in some circumstances it may be appropriate for you to report your concerns to an external body such as a regulator. It will very rarely if ever be appropriate to alert the media. We strongly encourage you to seek advice before reporting a concern to anyone external. The independent Whistle Blowing charity, Public Concern at Work, operates a confidential helpline. They also have a list of prescribed regulators for reporting certain types of concern."

241. While the policy encouraged employees not to alert anyone externally to alleged wrongdoing in the workplace, it envisaged that employees might to do. The policy did not lay down any particular requirements for this. The Tribunal found that the Respondent's procedure permitted reporting of qualifying disclosures externally.

242. The Respondent contended that the Claimant knew that it was wrong for her to send her grievance to Mr Walsh, because she told him that she understood if he could not pass her documents to Foresight, while making disparaging comments about the Respondent begging investors for money. It pointed out that, at her dismissal appeal

hearing, she agreed that she had acted outside the Respondent's whistleblowing policy. It contended that the Tribunal should conclude that the Claimant sent her documents to the heads of Foresight and Invest NI in an attempt to damage the Respondent. Mr Ashworth told the Tribunal that the Claimant could and should have raised her concerns to Adam Huckerby, so that there was no reason for information to be shared with Mr Walsh.

243. The Claimant contended that the Respondent had already influenced Mr Huckerby and other investors against her, so she was compelled to contact other representatives of the investors, so that her protected disclosures were properly considered.

244. The Tribunal concluded that the Claimant had good reason to suspect that Mr Huckerby would not treat with her disclosures fairly or impartially. Mr Williams had already told the Claimant that the investors had lost faith in her and that he was subject to pressure from them to conclude proceedings against the Claimant. The Claimant knew that it was Mr Huckerby who acted on behalf of Foresight and other investors. The Tribunal found that the Claimant reasonably believed that it was necessary to send her grievance to Mr Walsh so that her protected disclosures could properly be considered by the investors.

245. The Claimant had her own interests in mind when sending her grievance externally; she wanted the investors to see it before the Respondent was able to make a decision to dismiss her. However, she specifically linked her removal as a Director to her disclosures about Mr Ross. The Tribunal accepted that the Claimant believed that the Respondent had removed her as a Director at least partly because she had told the Respondent that it had damaged Mr Ross' mental health.

246. The Tribunal concluded that the Claimant was genuinely seeking a fair consideration of her grievance by the investors. Her grievance included qualifying disclosures. She wanted those disclosures to be properly considered by the investors, who she reasonably believed were responsible for the governance of the Company. As stated, health and safety of employees is a matter of public interest, as is the appropriate investment of public money. The Tribunal found that the Claimant reasonably believed that she was disclosing information, through Mr Walsh, to the investors, in the public interest.

247. Her qualifying disclosures, made to Mr Walsh, were protected disclosures.

248. **Automatic Unfair Dismissal for Making a Protected Disclosure (s103A ERA) 5. If the disclosures set out in (above qualify for protection under section 478 of the ERA: 5.1 What was the reason why the Claimant was dismissed? What was the reason in R's mind. Has R shown reason for dismissal?**

249. The Tribunal considered, first, who made the decision to dismiss the Claimant and when the decision was made.

250. It found that Mr Williams had made a decision that the Claimant would be dismissed before his meeting with her on 20 July 2020. The Tribunal found that Mr Williams had no expectation that the Claimant would continue to be employed. He proposed protected conversations which he intended would lead to her leaving the

company. His intention was revealed by his words that he was “sorry” “it ended this way”.

251. The Tribunal’s finding in this regard is reinforced by its conclusion that the Respondent made little attempt to conduct a fair dismissal procedure. It did not invite the Claimant to an investigatory meeting, at any point, before inviting her to a meeting at which it warned her could be dismissed. The Respondent only gathered evidence against the Claimant. It did not try to establish any exculpatory evidence at an investigatory hearing.

252. The Respondent had confirmation from the Claimant’s GP that she was not well enough to work. The Claimant also told the Respondent that she was not well enough to attend a hearing. As the Tribunal has found below, it was outside the band of reasonable responses for the Respondent to proceed with a hearing without making a reasonable attempt to obtain Occupational Health advice on how the Claimant might be able to participate in it. Mr Williams had little interest in ensuring that the Claimant would be able to answer the allegations against her, even at the disciplinary hearing.

253. The Tribunal noted that Mr Williams sent his “annex” to the investors. The Tribunal inferred that he must have known that, having read the annex, there was very little prospect that the investors would support the Claimant’s continued employment.

254. The Tribunal concluded that, when Mr Ashworth took over the process, he had no interest in hearing the Claimant’s side of the matter. He did not try to rearrange a meeting with the Claimant. He told the Tribunal that he decided that the Claimant should be dismissed after reading her email to Mr Walsh. “The circumstances were such that only one decision could be reached. We needed to reach a decision. I decided that enough was enough and that there were serious breaches and I took the necessary decision.”

255. However, while the Tribunal accepted Mr Ashworth’s evidence that he made the decision to dismiss, the Tribunal found that he was implementing Mr Williams’ intention from the start of the process. On Mr Williams’ evidence, Mr Ashworth and Mr Williams discussed throughout the Claimant’s disciplinary / capability process throughout. The Tribunal concluded that they had a common mind about the Claimant’s dismissal. Mr Ashworth had no interest in coming to a different conclusion, as evidenced by his lack of concern to hear the Claimant’s side.

256. The Tribunal considered whether the Respondent had shown the reason for the dismissal and that it was a potentially fair reason.

257. The Respondent relied on investor pressure.

258. Mr Ashworth was cross examined about the lack of documentary evidence about the shareholders’ views on the Claimant’s correspondence with Mr Walsh. He agreed that no conversations with shareholders between 22 and 25 September had been documented and that he had not addressed the matter in his witness statement. He said that the matter had arisen during a regular telephone conversation with Mr Huckerby and he could not remember the exact date of the conversation.

259. The Tribunal did not accept that investor pressure was the principal reason for dismissal. There was little supporting evidence of this and, on Mr Ashworth's oral evidence, he himself decided that the Claimant should be dismissed for "serious breaches" after he had read her letter to Mr Walsh.

260. Further, the Tribunal did not find that "investor pressure" was the principal reason in Mr Williams' mind for deciding the Claimant's employment would end.

261. There was no evidence that investors had instructed the Claimant's dismissal from employment in July 2020. On 14 July 2020 Jack Williams asked Adam Huckerby, representative of the investor, MEIF / Foresight, for its consent to remove the Claimant as a Director, p 1747. Mr Huckerby replied on 15 July saying, "As you know, we are supportive of this decision .. accept this as consent to carry out the formal removal of [the Claimant's] directorship."

262. The only evidence of the investors' intention was that the Claimant should be removed as a Director. Even if the investors had concerns about the Claimant's competence in July 2020, including because she had not produced accounts by a promised date, there was no evidence that the investors had decided that she must be dismissed as an employee.

263. Investor pressure was not the reason for dismissal.

264. The Tribunal observed that the immediate background to Mr Williams' determination to dismiss the Claimant was considerable animosity from Mr Burns towards the Claimant. In executive meetings on Mr Burns had made accusations in trenchant terms about the Claimant's department and about Mr Ross' competence. The Claimant's position paper, which was a protected disclosure, had disproven Mr Burns' criticism of Mr Ross. The position paper had said that Mr Ross had gone off work, sick, due to his treatment by the Company. The Tribunal considered that the Claimant's position paper had made clear that Mr Burns had been responsible for denying Mr Ross' holiday and for the pressure Mr Ross felt that he was under.

265. Immediately after the Claimant submitted her position paper she went on leave. During that leave, Mr Williams decided that the Claimant would be dismissed.

266. It appeared that the Directors also acted against the Claimant at this time, misleading Mr Ross about their knowledge of his request for leave, and encouraging him to blame the Claimant for his lack of holiday.

267. The Tribunal inferred that the primary reason in Mr Williams' mind for deciding that the Claimant would be dismissed was the Claimant's protected disclosures about Mr Ross, contained in her position paper.

268. The Tribunal noted that, during the dismissal process which was then instituted, Mr Williams relied very heavily on Mr Burns' allegations against the Claimant. Mr Williams did not disclose to the Claimant that Mr Burns was the source of the allegations. This reinforced the Tribunal's conclusion that the Claimant's position paper was the primary motivating factor in Mr Williams' decision that the Claimant must be dismissed.

269. The Tribunal decided that Mr Ashworth implemented Mr Williams' decision.

270. However, even if the Tribunal was wrong in its conclusion that Mr Ashworth simply implemented Mr Williams' decision, Mr Ashworth's stated reason for dismissal, in oral evidence, was the Claimant's email to Mr Walsh, p899. The Tribunal has already found that that email was a protected disclosure.

271. The principal reason for the Claimant's dismissal was her protected disclosures.

272. That was an automatically unfair reason for dismissal.

S 98(4) Fairness of Dismissal

273. If the Tribunal was wrong as to the reason for dismissal– and the Respondent did dismiss the Claimant for the potentially fair reason of investor pressure – the Tribunal decided that the Respondent dismissed the Claimant unfairly under *s98(4) ERA 1996.* It did so for the following reasons.

274. The Respondent had already decided the Claimant would be dismissed before any meeting with her. Mr Williams had already decided in July 2020 that the Claimant would be dismissed. He made this clear to her in their meeting on July 2020. On 30 July 2020 Mr Williams invited the Claimant to a disciplinary hearing without having conducted a fair investigation. He did not meet with the Claimant and he did not seek an exculpatory, rather than incriminating, evidence. Mr Ashworth had also decided the Claimant would be dismissed before the scheduled meeting with him. On his oral evidence, he did not see any value in obtaining the Claimant's version of events.

275. The Respondent did not invite the Claimant to an investigatory meeting, at any point, before inviting her to a meeting at which it warned her could be dismissed. The Respondent only gathered evidence against the Claimant.

276. The Claimant was off work, sick, at the time of her dismissal. The Tribunal decided that the Respondent made no real attempt to establish the availability of Occupational Health advice on how the Claimant could fairly participate in a hearing. Mr Williams contacted one OH provider only and did not keep any note of his discussion on what advice might be available and when. Even allowing for the Respondent's stated time constraints, OH might well have advised that the Claimant was fit to provide a written response to allegations within a reasonable time. The Respondent made no real attempt to obtain such advice.

277. 'Pressure from investors' was not a potential reason for dismissal given in the disciplinary invitation letter and the Claimant had no warning of it, or opportunity to meet that case and she was never provided with any details of it. The Respondent conflated the disciplinary and capability processes and then dismissed the Claimant for a different reason that had not been identified in advance. No capability process had been commenced by the Respondent to improve the Claimant's performance.

278. The parties agreed that pressure from investors could only be a fair reason for dismissing an employee in certain circumstances as set out in the Relevant Law section of this Judgment. Addressing each of these:

279. *The employer adduces clear evidence of the 3rd party instruction.* There was no corroborating evidence of such an instruction. The only written evidence related to the Claimant's removal as a Director, not as an employee. The Tribunal did not accept the Respondent's evidence that there was substantial pressure from investors to dismiss the Claimant;

280. *The employer must take reasonable steps to change the 3rd party's mind*. The Respondent took no such steps. Instead, it prompted its investors to support removal of the Claimant as a Director;

281. *The employer must then do all that it reasonably can to redeploy the employee / otherwise mitigate the consequences.* The Respondent engaged another individual in a finance role in August 2020 and did not consider the Claimant for that role at any point. It sought evidence of investor resistance to redeployment p1774, but the investor only expressed concern about costs. The Respondent did not consider how to save costs in other ways, for example retaining the Claimant in a role and dismissing others.

282. The appeal on 11 January 2021, p1246 – 1250, did not identify any procedural failures in the dismissal process. Mr Matthews' evidence to the Tribunal was poor – ultimately he declined to answer questions on the fairness of the dismissal process. The Tribunal was not persuaded that he rectified any of the defects in the original decision.

Detrimental treatment for making protected disclosures (Section 478 ERA 1996). If the disclosures set out in paragraphs 1 and 3 qualify for protection under section 47B of the ERA: Was the Claimant subjected to the following acts:

7.1 on 17th July 2020 removed as a Companies House Director of the Respondent by Mr Williams without due process (s168 Companies Act) being followed;

283. The Tribunal concluded that removing the Claimant as a Director from the Company, of which she was a founding member, was a detriment. A reasonable person would consider themselves to be disadvantaged in the circumstances in which they had to work where they had been removed, without consultation, from a position of influence in the Company.

284. The Claimant was removed shortly after she made protected disclosures. The Tribunal considered whether the Respondent had shown that the Claimant's removal was not because she had made these protected disclosures.

285. The Tribunal rejected the Respondent's alleged reason for the Claimant's removal as Director. Seeing that Mr Williams told the Claimant, on 20 July, that she had been removed as a Director, the Tribunal decided that the Respondent had deliberately removed the Claimant as a Director on 17 July 2020. Her removal was not a clerical error.

286. The Tribunal inferred that the reason the Claimant was removed as a director was her protected disclosures. This was consistent with Mr Williams' decision to dismiss the Claimant made at the same time.

7.2 on 20th July 2020 placed on garden leave by Mr Williams;

287. The Tribunal rejected the Respondent's evidence that the Respondent did not put the Claimant on garden leave. Being placed on garden leave was also a detriment. It removed the Claimant from her important role in the Company and from involvement in decision making. The Tribunal decided that the Claimant was placed on garden leave as a prelude to her dismissal because of her protected disclosures; being placed on garden leave was because of her disclosures.

7.3 subjected to a disciplinary process without being given the opportunity to respond to any allegations during an investigatory stage;

288. The Respondent acted unfairly in not inviting the Claimant to an investigatory meeting and not allowing her to respond to allegations, before inviting her to a hearing at which she was warned she could be dismissed. The Respondent made no effort to ensure that its investigation was fair and balanced. The Claimant would reasonably have considered she was placed at a disadvantage in attending a potential dismissal hearing in those circumstances. She would be required to disprove all the allegations against her, without the Respondent ensuring that relevant evidence which might assist her would be available to the hearing.

289. Again, the Tribunal concluded that this was a prelude to Mr Williams' intended dismissal of the Clamant because of her protected disclosures. The Tribunal considered that Mr Williams was not interested in finding evidence which might disprove any allegations against the Claimant because he had already decided that she should be dismissed. This detriment was done because of the Claimant's protected disclosures.

7.4 Refused the Claimant's request for an EGM made in September 2020 on the grounds that it was 'frivolous, defamatory and vexatious' despite it being supported by the Claimant's whistle-blowing report.

290. Mr Ashworth had no interest in hearing the Claimant's version of events. It was clear from his evidence that, having seen the Claimant's email to Mr Walsh, which was a protected disclosure, he was determined to dismiss her. He had no interest in her request for an EGM or her whistle-blowing report. He supported Mr Williams' intention to dismiss, which was also because of the Claimant's protected disclosures. His refusal of her request for an EGM was because she had made protected disclosures.

7.5 the Respondent issued documentation, in conjunction with PWC dated 7th August 2020, to facilitate additional investment within Selazar which did not include any reference to the Claimant as either a company founder or CFO.

291. The Respondent had already decided to remove the Claimant from the Company because of her protected disclosures. It followed from that decision that the Claimant would not be mentioned in documents directed to obtaining future investment; the Claimant would not be relevant to the Company's future. The failure to mention the Claimant was because of her protected disclosures.

292. All these detriments formed a course of conduct, or were a series of linked acts. All arose from the Respondent's decision to dismiss the Claimant for the principal

reason that she had made protected disclosures. All the Claimant's complaints of protected disclosure detriment were brought in time.

Age Discrimination (Section 13 EqA 2010)

Did the Respondent instruct a recruitment consultancy to find 'a younger member who was more in tune with a young tech start company'?

293. The Claimant was 55 when she was dismissed. It was not in dispute that Mr Williams and Mr Burns were in younger age groups. The Tribunal accepted the Respondent's evidence that it employs people of all ages, including in the 60+ age bracket.

294. The Respondents' witnesses gave convincing evidence that they did not, in fact, use Mr Gibbons to recruit Wayne Davies, the new Financial Controller, who was appointed to the Respondent on 12 August 2020, or any other replacement for the Claimant.

295. However, the Tribunal concluded that Mr Gibbons' denial, that he was never asked by the Respondent "to recruit her replacement and this replacement needed to be a younger male", as set out in his email of 11 March 2022, was of little probative value. There was text evidence from 2 July 2020 that he had, himself, previously asked the Claimant whether she wanted to recruit a candidate of a particular age. This demonstrated that age was a characteristic which Mr Gibbons routinely used to sort candidates. Mr Gibbons did not give evidence to the Tribunal.

296. The Tribunal found the Claimant's evidence that Mr Gibbons had spoken to her and, in embarrassment, revealed that he had been asked to look for a younger person for the finance department, more in tune with a tech start up business, was convincing.

297. On balance of probabilities, the Tribunal concluded that Mr Gibbons did speak to the Claimant and did say that he had been asked to look for a younger person for the finance department. That did not mean that he had actually recruited such a person to replace the Claimant.

298. The Tribunal noted that, in March 2017, a potential investor said, in an email, "The challenge is Jack .. A couple of hints that I was too old to understand, probably signed the end…". P1626. This showed that another person, entirely independent of these proceedings, considered that Mr Williams viewed older people as not familiar with information technology business.

299. The Tribunal also found that Mr Williams did say to the Claimant, in a meeting on 28 May 2022, "Calm down.. don't let the hormones get out of control." The Tribunal considered that this was evidence that Mr Williams viewed the Claimant as a menopausal woman – that is, an older woman.

300. On all the evidence, the Tribunal decided that it could conclude that at least part of the reason for the Claimant's dismissal was her age: the Respondent had asked Mr Gibbons to look for a younger person for the finance department (even if Mr Gibbons did not, in fact, recruit one); Mr Williams viewed the Claimant as an older woman; Mr Williams considered that older people were not familiar with IT businesses. The burden

of proof shifted to the Respondent to show that age was not part of the reason the Claimant was dismissed.

301. The Tribunal decided that the Respondent had not discharged the burden to show that age was not part of the reason for the Claimant's dismissal. The Tribunal has rejected the reason put forward by the Respondent for the Claimant's dismissal. It has also found that the Respondent acted unreasonably in its dismissal processes. The Respondent did not take care to ensure that its decision making was fair and untainted by discriminatory motives. While the principal reason for dismissal was the Claimant's protected disclosures, the Tribunal concluded that, on all the evidence, the Claimant's older age was part of the reason she was dismissed.

Polkey/Contributory Fault

302. It was agreed between the parties that the Tribunal would decide matters or Polkey and Contributory Fault arising out of the evidence heard at the Final Hearing.

303. The Claimant contended that so horrendous was the Respondent's treatment of the Claimant it is impossible to know what would have happened had she been treated by a fair employer.

304. The Respondent contended, primarily, that the Claimant could have been fairly dismissed for gross misconduct in sharing sensitive and confidential information with Dominic Walsh and / or exporting 565 emails to her personal e-mail account.

305. The question for the Tribunal was what was the likelihood that this employer, acting fairly, would have dismissed the Claimant after a fair procedure.

306. The Tribunal has already found that her correspondence with Mr Walsh was a protected disclosure. The Respondent could not rely on it to dismiss the Claimant fairly.

307. Further, the Tribunal decided that the Claimant had good reason to download documents, to preserve evidence in relation to her case, which centrally included whistleblowing allegations. It is difficult to see how the Respondent could dismiss the Claimant fairly for preserving evidence to support protected disclosures.

308. The Tribunal decided that the Claimant was not culpable in this regard, either. No reduction for contributory fault was appropriate.

309. However, on the evidence before the Tribunal, the Respondent had also raised numerous competence issues against the Claimant in its disciplinary/capability procedure. These were the matters which the Respondent had originally relied on in putting the Claimant on garden leave and inviting her to a disciplinary/capability hearing.

310. The Respondent's allegations of "Neglecting duty of care as manager" included that the Claimant had failed to approve leave for Mr Ross when he had applied for annual leave, p805. It also included allegations regarding conflicts of interest and professionalism in relation to the Claimant's email of 30 January 2020. The list included an allegation that the Claimant was responsible for incorrect filings at

Companies House in 2019 and that legal costs were incurred rectifying these. It referred to “a statement provided by Management to the CEO of 5th August 2020”.

311. The Tribunal concluded that a number of these allegations were historic – like the alleged incorrect filings in 2019 and the “lack of professionalism” on 30 January 2020. It has also decided that, on the facts, these allegations were not accurate or fair. The incorrect filings were not primarily the Claimant’s responsibility. The Claimant’s email of 30 January 2020 was, objectively, intended to mollify one of the Respondent’s commercial partners, rather than to insult her colleagues. The Tribunal concluded that the Respondent, acting fairly, could not have dismissed the Claimant for these reasons. It would have been outside the band of reasonable responses to do so.

312. Further, other more recent allegations against the Claimant, in relation to her failure to allow Mr Ross holiday, were not accurate. The Claimant had asked, on Mr Ross’ behalf, that he be allowed to take holiday and Mr Burns had said there was no cover for it.

313. Nevertheless, on the facts, the Tribunal accepted that the investors did have some substantial concerns about the Claimant’s performance, which they expressed to Mr Williams. This included that the Claimant’s draft end of year accounts were not the standard the investors expected, that they were not compliant with UK GAPP and had arrived late; the Claimant had acted slowly regarding a “bounce bank” loan and a VAT refund and she had been argumentative in a board meeting regarding those matters. The investors did want the Claimant to be removed as a Director.

314. The Claimant had failed to produce draft end of year accounts at the time she had originally promised. Mr Ashworth was very direct in his communication with her about this – indicating significant frustration with her.

315. At the end of June 2020 Mr Ashworth told the Claimant that rigorous prioritization and investor confidence were important. He said, “We made a commitment last month to deliver the year end accounts to the shareholders at yesterday's board meeting. We did not achieve that. We must, almost ruthlessly, prioritise our limited and precious time to deliver on our promises. I would ask you to do that to ensure that we continue to hold the confidence of the investors.” P666.

316. The Tribunal considered that this email reflected Mr Ashworth’s considerable unhappiness with the Claimant’s performance at that time.

317. On 1 July 2020 Mr Williams also texted the Claimant asking for the year end accounts, saying that he had been messaged by the investors on the matter, p681.

318. The Tribunal also noted, however, that some of the investors’ concerns about the Claimant, for example Adam Huckerby’s concerns of 20 August 2020, p1764, were inaccurate. He said, “.. This is also disappointing given the issues which arose during the initial investment, whereby significant additional legal costs were incurred to remedy incorrect Companies House filings, which I understand also arose due to Louise's errors.” The Tribunal has found, as a fact, that Mr Williams was at fault in relation to those Companies House failings. The Tribunal concluded that a fair investigation would have established the truth of the matter. It noted that Mr Huckerby

appeared to have been influenced against the Claimant as he said he "understood" that the filings had arisen from mistakes by the Claimant.

319. Further, it was clear, from the Tribunal's findings of fact, that the Claimant had been working very hard and at unsociable hours. Her emails were sent late at night and early in the morning. A reasonable and fair investigation would inevitably have taken this into account in assessing the seriousness of any failings by the Claimant. The Tribunal noted that Mr Burns had been scathing in his assessment of Mr Ross' work output; but on a fair analysis, Mr Ross had been undertaking the vast majority of his work without assistance. The true facts of the Claimant's output would have been likely to have been established on a fair investigation.

320. On all the facts, the Tribunal decided that, on a fair investigation of the allegations against the Claimant, many would not have been upheld. Some significant concerns about the Claimant's prioritisation of work would, however, have been upheld.

321. The Tribunal took into account, in assessing the likelihood that this Respondent would have dismissed the Claimant fairly for these failings, that the Respondent had not given any warning to the Claimant about her capability, or given her a chance to improve.

322. The Tribunal took into account that a fair procedure would have considered whether the Claimant could be redeployed into another role at the Respondent, even if she did not continue in her existing role.

323. It took into account the fact that the Respondent's principal reason for dismissing the Claimant was, in fact, her protected disclosures and not her capability.

324. On all the evidence, including that she was not dismissed for capability and she had not been formally warned in relation to capability, the Tribunal considered that it was unlikely that the Respondent would have fairly dismissed the Claimant for capability. Acknowledging, nevertheless, that the Respondent did have significant concerns about the Claimant's performance, the Tribunal decided that it was 30% likely that the Respondent would have dismissed the Claimant for capability fairly, in any event.

325. The Tribunal decided that the Claimant was not "culpable" or "blameworthy" in relation to her capability failings. She may have failed to carry out particular tasks in time, but the Tribunal accepted that the Claimant was working extremely hard at the relevant times. The failings were genuinely matters of capability rather than conduct. No deduction for contributory fault was appropriate.

Breach of Contract: Wrongful Dismissal

326. The Claimant was dismissed without notice. The Respondent dismissed her automatically unfairly.

327. The Tribunal concluded that the Claimant was not guilty of gross misconduct in sending her correspondence to Mr Walsh. Her correspondence was a protected

disclosure and she had good reason to download documents and preserve evidence in relation to that.

328. The Respondent was not entitled to dismiss the Claimant without notice. The Claimant was entitled to 3 months' notice to terminate her contract, p285. The Respondent breached her contract when it failed to pay her three months' notice.

Wages: Did the Respondent fail to reimburse the Claimant all of her reasonable expenses in the sum of £6,927.66?

329. The Claimant's contract provided that the Respondent Company would reimburse her for, "all reasonable expenses wholly, properly and necessarily incurred by the Employee in the course of the Appointment, subject to production of VAT receipts or other appropriate evidence of payment." Clause 8.1, p288.

330. The Tribunal accepted the Claimant's evidence that she had provided expense details and receipts to Alison Keefe, book keeper, the Respondent has not paid her the following expenses: Accommodation £1,109; Flights £5,371.68; Taxi £108.93. Total: £6,589.61.

331. The Respondent breached her contract or made unlawful deductions from wages when it failed to pay her for those expenses, which she had properly evidenced.

Holiday Pay

332. The Tribunal accepted the Claimant's evidence that she worked through bank holidays and cancelled pre-booked holidays in 2020.

333. The Claimant took holiday on 10 – 17 July 2020 and on 31 August 2020, only. The Respondent's holiday record for the Claimant was inaccurate. The Tribunal concluded that the Respondent did not pay the Claimant for her accrued but untaken holiday at the termination of her employment.

_____

Employment Judge **Brown**

Date: 28 July 2022

SENT to the PARTIES ON

28/07/2022

FOR THE TRIBUNAL OFFICE