EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L McDonnell	**v**	**City of London Corporation**

Heard at: London Central
On: 30 January 2017 – 6 February 2017

Before: Employment Judge Hodgson

Representation
For the Claimant: In person
For the Respondents: Ms I Omambala, counsel

RESERVED JUDGMENT

1. **The claim of unfair dismissal succeeds.**
2. **The claim of automatic unfair dismissal contrary to section 103A Employment Rights Act 1996 succeeds.**

REASONS

Introduction

1.1 By a claim presented to the London Central Employment Tribunal on 20 August 2016, the claimant brought claims of unfair dismissal and automatic unfair dismissal (section 103A Employment Rights Act 1996).

The Issues

2.1 At the commencement of the hearing, I considered with the parties the issues.

2.2 The claimant alleged he had been unfairly dismissed. He also alleged the dismissal was as a result of whistleblowing.

2.3 The respondent alleged the claimant was dismissed by reason of gross misconduct. Capability was not relied on as a reason.

2.4 There was difficulty identifying the specific disclosures of information that were said to be protected and which were relied upon. I clarified there had been no formal amendment to the claim. The claim form had limited details of any disclosures. The relevant part of the claim form reads:

> **Mr Gill levelled four charges and I immediately made counter charges against Mr Gill and assistant director, Trevor Nelson for fraud to the Finance and Audit Committee and two complaints against two members who were interfering with the management of the market.**

The detail is not set out.

2.5 At a preliminary hearing on 4 November 2016, Employment Judge Auerbach. No application to amend was made. No amendment was allowed. Employment Judge Auerbach stated:

> **[The claimant] confirmed that all of the protected disclosures on which he relies are the eight occasions of whistleblowing referred to in the letter he wrote to the town clerk on 24 March 2006 (and that letter itself).**

2.6 The alleged protected disclosures were not identified further.

2.7 The letter has eight sub- sections called whistleblowing which are numbered 1 to 8.

2.8 I sought to clarify with the claimant the nature of the alleged disclosures, but he was unable to give any clear explanation. For example, the first whistleblowing allegation refers to a written complaint in April 2013. The Claimant could not identify that written complaint. It has not been produced in evidence. I will consider the various matters referred to as possible protected disclosures when I consider my conclusions.

Evidence

3.1 For the claimant, I heard from the claimant, C1; Mr Mark Boleat; Mr Andrew Hilton; and Mr Andrew Cross.

3.2 For the respondent I heard from: Mr Nicholas Gill, R2; Mr Michael Cogher, R3; Mr Peter Bennett, R4; and Mr Peter Lisley, R5.

3.3 I received a bundle, R1.

3.4 Both parties gave oral submissions.

3.5 Following the hearing, the respondent, in compliance with my request, filed a note identifying further case law. The claimant, without application or permission, filed a further document that appeared to give evidence about alleged disclosures, the intention and the status of that document is

unclear. It appears to be some form of witness statement and it gives further details of the eight alleged allegations of whistleblowing.

Concessions/Applications

4.1 On day one of the hearing, I spent some time explaining to the claimant the nature of a whistleblowing claim and the fact that the protected acts must be disclosures of information made in the public interest.

4.2 It was unclear to me what the claimant said was the reason for his dismissal. I ordered him to set out in writing what he alleged to be the reason for his dismissal. We agreed that this would be limited to 200 words.

4.3 On day 2 of the hearing, the claimant did produce a 200 word document recording what he alleged to be the reason for dismissal. Within that document, he identified no potential protected disclosure. He did not allege that any protected disclosure was the sole or principal reason for his dismissal. Instead, he referred to the three main areas of alleged misconduct relied on by the respondent, and took issue with them.

4.4 I noted that Employment Judge Auerbach had, at the request of the claimant, ordered three witnesses to attend. I could identify an application of 18 January 2017 that referred to one of those witnesses, Mr Boleat. I ordered the claimant to provide copies of all applications made and presented to Employment Judge Auerbach. The claimant did not comply with that order on day 2. On day 3 he supplied further documentation which contained no different application. Eventually, the claimant acknowledged that his application consisted of his email of 18 January 2017, and copies of various letters written to the four witnesses. There was no specific application for any witness order, other than Mr Boleat.

4.5 On day 2, the claimant stated that he had not prepared any questions for the respondent's witnesses. He asked for an adjournment. I granted a 30 minute adjournment as requested.

4.6 On day 2, Ms Omambala, suggested there may be an application to revoke the witness orders. No formal application was made. I indicated it would be helpful if I knew the basis on which the claimant had made his application.

4.7 On day 2, I agreed a timetable with the parties.

4.8 On day 3, Ms Omambala applied to revoke the witness summonses. I observed that it was unclear to me why the applications had been granted. I noted that I must assume that, when considering the application, Employment Judge Auerbach considered what evidence the witnesses could give, whether that evidence was relevant, and what steps the claimant had taken to secure their attendance. The respondent's objection was one of relevance. I took the view that it was inappropriate, and

unnecessary, for me to interfere with the order of Employment Judge Auerbach, but that I would consider relevance when the individuals were called.

4.9 It appeared that it was the claimant's intention to cross-examine the witnesses. Employment Judge Auerbach had referred to the claimant's intention to cross-examine in his letter of 16 January 2017, it appeared to me that he envisaged the possibility of cross examination, but specifically reserved consideration of the appropriateness of that to the tribunal. Therefore, identifying it was the claimant's intention to cross-examine was not enough to revoke the order. In all the circumstances, I considered it better to allow the witnesses to be called, and then consider relevance.

4.10 On the afternoon of day 3, the claimant called Mr Boleat. He proceeded to start cross-examination and I confirmed an application was necessary before I would allow it. The claimant applied and I refused the application to allow claimant to cross-examine Mr Boleat, as there was no basis to consider him hostile. I gave full oral reasons. I subsequently refused applications to cross-examine Mr Hilton and Mr Cross, when they were called.

4.11 Sir Alan Yarrow failed to attend and I was informed this was intentional as he was prioritising a business matter. It was drawn to my attention that he had made an application on 26 January 2016 for a variation of the witness order. I was also informed that he did intend to appear after 12:30. The claimant chose not to apply for an adjournment. I considered Sir Alan Yarrow's application. He set out details of the evidence he could give (those details were not before Employment Judge Auerbach). I found that there was no basis for believing that Sir Alan Yarrow could give any relevant evidence. It was clear the claimant wished to cross-examine him in relation to matters which were not directly relevant to this case. I revoked the order. I gave full oral reasons.

The Facts

5.1 The claimant worked for the respondent corporation as a senior surveyor. His employment started in August 2005 and ended on 11 May 2016.

5.2 The respondent provides local government policing services for the square mile of London. It has a substantial property portfolio.

5.3 The claimant was one of a number of surveyors who assisted with property management. His duties included negotiating sales and purchasing property, resolving tenancy issues, and overseeing events.

5.4 In the later part of his employment, the claimant's remit included managing Leadenhall Market. It is clear that this was an additional duty given to the claimant. The exact nature of his portfolio is unclear. It is the claimant case that the addition of Leadenhall Market to his portfolio was not offset by any reduction of his previous responsibilities. The respondent has

produced no proper evidence to demonstrate how the claimant's portfolio changed, and I accept that the addition of Leadenhall Market caused a substantial increase in the claimant's workload.

5.5 It is common ground the claimant was subject to a code of conduct which was initially communicated and which was available on the intranet. The code provides that all employees should conduct themselves appropriately to include: giving the highest possible standard of service to the public and service users; behaving in a way not likely to fundamentally undermine the required relationship of trust and confidence; and behaving in a way which would not cause disrepute or reputational damage to the respondent.

5.6 By letter of 22 March 2016 the claimant was invited to attend a disciplinary hearing. The hearing took place on 6 April 2016. The decision to dismiss was communicated by letter of 8 April 2016. The claimant appealed. The appeal occurred on 20 May 2016, and it was unsuccessful.

5.7 The ET3 identifies that the claimant dealt with "the Tudor Market and the Barnett Waddingham Virtual Golf event, and the termination of pest control measures at the premises of a tenant CFSI." It states, "As a result of his dealing with these matters a number of issues relating to the claimant's conduct emerged."

5.8 On 5 November 2011, the claimant was suspended by Mr Gill, the respondent's investment property director. Mr Gill refers to concerns/events spanning "the short period from June – November 2015. His statement records his concerns as follows:

> **13. A summary of the concerns/events, spanning the short period from June – November 2015 which led to the suspension were as follows:-**
>
> **(i) He failed to follow the appropriate procedure and practices to put in place a licence for the Tudor Markets event which took place on 3rd August 2015, including failing to agree the heads of terms, failing to promptly regularise the position despite a reasonable management instruction to do so, failing to consult and take instructions from management before acting, failing to communicate with relevant stakeholders and line managers in a timely manner or at all and failing generally to take reasonable care to protect the Corporation's interests thereby exposing it to the risk of loss and damage, including reputational damage ("the Tudor Markets Allegation").**
>
> **(ii) That he acted in an unprofessional and obstructive manner, and failed to act in a corporate and collegiate manner, in relation to the Barnett Waddingham Virtual Golf Event which took place on 5th November 2015. Further, he involved himself in an unprofessional conflict with a Barnett Waddingham employee that he inappropriately, and without authorisation, escalated to the firm's Chief Executive thereby acting in a manner likely to damage the Corporation's interests and reputation ("the Barnett Waddingham Allegation").**
>
> **(iii) That he caused a complaint from a tenant, CSFI, to the Chairman of the Policy and Resources Committee by unilaterally terminating pest control measures provided by the Corporation in their premises on 4th November 2015 without properly informing himself as to the background**

> **and reason for the measures which had been put in place by senior management, failing to inform and consult senior managers and corresponding with the tenant in a terse and unhelpful manner thereby causing damage to the reputation of the Corporation and the Department ("the CSFI Allegation"). In relation to this allegation I became aware of this on 6th November, after the Claimant's suspension.**
>
> **(iv) As a result of the above, and his conduct and attitude towards the Corporation's core values, customer care and collegiate and co-operative working generally, there has been a breakdown of trust and confidence between him and the Corporation ("the Trust and Confidence Allegation").**

5.9 Mr Gill's statement then goes on to give considerable detail as to why he concluded that the claimant should be suspended. It is apparent that Mr Gill thought the claimant actions to be so serious that they may lead to his dismissal. Paragraph 67 of his statement states:

> **67. Because of the gravity of the above incidents, individually and cumulatively over the space of a mere 5 months, the risk of the above behaviour being repeated and therefore the potential for further financial and/or reputational risk to the Respondent I believed that the best course was to suspend the Claimant, purely on a precautionary basis, whilst an investigation tookplace to establish facts and if appropriate a disciplinary investigation follow.**

5.10 It is apparent, therefore, that Mr Gill alleges he took no further part in the proceedings, nor was he required to, other than potentially as a witness.

5.11 It is clear that the claimant raised concerns on 10 November 2015 which were viewed by the respondent as potential protected disclosures. Mr Gill says the following:

> **<u>Whistleblowing Allegation</u>**
>
> **73. On 10th November 2015, immediately after his suspension, the Claimant raised concerns which I am aware the Respondent's Monitoring Officer/City Solicitor subsequently investigated in accordance with the Whistleblowing Policy found at page 87 -93 of the bundle.**

5.12 The matter was investigated by Mr Michael Cogher, who is the corporation's chief solicitor. He was tasked to investigate the claimant's whistleblowing allegations, which subdivided into allegations against paid officers and elected members. At paragraph 6 of his statement he states:

> **6. Three different processes were therefore engaged – the disciplinary allegations against Mr McDonnell, and his counter allegations which had to be split between the officer allegations and the member allegation. Given the complexity and the seriousness of the allegations and the shared issues it was decided, in discussion with the City Surveyor, the Chamberlain (i.e. Finance Director and senior officer responsible for Internal Audit) and the Director of Human Resources that I should conduct all three investigations, in the case of the disciplinary matters with the assistance of a senior officer in the City Surveyor's Department and their HR adviser.**

5.13 Part of the claimant's allegations concerned a member, Mr Chapman. It is the officers' responsibility to deal with day-to-day administration of Leadenhall Market. This would include dealing with requests to hold events at the market and ensuring appropriate arrangements were made to include all practical matters, the provision of insurance, and any licenses. Elected members should not interfere with that process. Part of the claimant's alleged disclosures was that Mr Chapman was interfering in the process. He describes this as political interference.

5.14 It is clear that the claimant raised this for two reasons. First, it was, at least in relation to Mr Chapman, true. Second, he raised it at that time as he was subject to disciplinary proceedings. The claimant was unhappy with Mr Chapman and he considered Mr Chapman's interference to be entirely wrong and contrary to his public duties.

5.15 The timing of the complaint is explained by the disciplinary action. The reason for the complaint is explained by his true belief that Mr Chapman was breaching his duty as an elected member. As a result of his information, the relevant subcommittee investigated and upheld the claimant's complaints.

5.16 Mr Michael Cogher states at paragraph 10:

> **10. On 29th January 2016 the Standards Committee's Hearings Sub-committee considered the outcome of my investigation into the Standards complaint, Bundle Pages 1200 -1206. Minutes of this meeting can be found at Bundle Page 1195, and referred the matter to a full hearing which took place on 23rd February. The Hearing sub-committee's decision was published on 29th February… The Sub-committee found that Mr Chapman had been overly involved in operational matters to the extent that he had breached the Member's Code of Conduct. However, it made no criticism of senior officers, noting that Mr Chapman had put them in a difficult position (see Decision Notice at paragraph C5). It also found that Mr Chapman was "probably acting out of what he perceived to be the best of motives, his love for the City in general and Leadenhall Market in particular". They went on to consider what sanction to impose on Mr Chapman at a subsequent hearing but that is not directly relevant to these proceedings.**

5.17 There is no doubt this was a very serious allegation and a significant finding.

5.18 As part of his disclosure of 9 November 2015, the claimant also made allegations against Mr Gill, the director of investment property (who suspended the claimant) and Mr Nelson, the assistant director.

5.19 Mr Michael Cogher gives limited details as to the allegations against Mr Gill and Mr Nelson. The letters to the claimant of 20 November 2015 from Ms Chrissie Morgan, director of HR, goes into a little more detail. Mr Michael Cogher refers to this letter in his witness statement. It is unclear to me from his statement to what extent he identified the specific complaints made by the claimant. At paragraph 4 of his statement he says the following:

> **4. I first became aware of this matter in November 2015 when Mr McDonnell began to make a number of complaints in response to his suspension pending the investigation of a number of disciplinary allegations. On 5th November 2015 Mr McDonnell was suspended (I was not involved in this decision) and on 9th November 2015 he made a complaint to the Head of Audit and Risk Management citing the Public Interest Disclosure Act 1998 (Bundle page 230-231). This complaint contained allegations against Nicholas Gill, the Director of the Investment Property Group (who had suspended him) and Mr Nelson, the Assistant Director, together with John Chapman, a Common Councilman for the Ward of Langborne in which Leadenhall Market is situated. On 18th November he made a further complaint in relation to the same matters to the Standards Committee (which I will refer to as the Standards complaint).**

5.20 It is apparent that it was understood that allegations against Mr Gill and Mr Nelson concerned inappropriate conduct. Mr Cogher's statement fails to set out, at any point, what he believed to be the whistleblowing allegations made by the claimant against Mr Gill and Mr Nelson, what he did to investigate them, what facts he found, and why he reached the conclusion that they were unfounded as regards Mr Gill and Mr Nelson. The closest his evidence comes to any analysis is at paragraph 10, where it is stated the subcommittee made no criticism of the senior officers.

5.21 I should note that this respondent has produced 5 lever arch folders of documents running to some 2,500 pages.

5.22 I have considered the various documents referred to in paragraph 10 of Mr Cogher's statement. It is difficult to ascertain a clear statement of the complaints made by the claimant, the factual findings in relation to those allegations are not set out adequately. It is for the respondent to set out its evidence. It may be that the respondent has taken the view that it can point generally to documents on the assumption that they are self-explanatory. If that is the assumption, it is erroneous.

5.23 At paragraph 11 of his statement, Mr Cogher says the following:

> **11. With the Standards hearing concluded I was then able to conclude the disciplinary and whistleblowing aspects of the case and issued my report (Bundle page 2003 -2019) which I did on 29th February. I will not repeat my detailed conclusions here but my recommendations were that a disciplinary hearing be convened to consider the allegations in respect of the Tudor Markets, Barnett Waddingham and CSFI allegations but not the UI Centric allegation. I also considered that a further breach of trust and confidence allegation should be added given the apparent gulf between the Corporation's values and expectations in relation to general conduct and client care and Mr McDonnell's conduct and attitude.**

5.24 I have considered that document. It identifies allegations against Mr Gill and Mr Nelson. They include the following: they behaved in an unprofessional manner by bowing to pressure to give an obvious favour to Mr Chapman and his car club members and failed to run the market on a commercial basis in relation to an event known as Monte Carlo or bust car rally; they deliberately ignored the request for fees in the Barnett Waddingham event; they caused discrimination by not advertising an internal post adequately; Mr Gill caused discrimination by not having a

consistent policy on job titles. The report goes on to say that the allegations against Mr Gill and Mr Nelson were investigated, statements were taken from Mr Gill, Mr Nelson, Mr Chapman and the claimant. There appears to be no attempt whatsoever to set out the relevant factual basis. As regards the allegations of improper conduct, Mr Michael Cogher simply states (R1/2009):

> **Full statements were taken… In the monitoring officer's opinion the lettings to the Monte Carlo or Bust Car Rally and the Barnett Waddingham Virtual Golf event where within the Leadenhall Market Strategy and the authority of the Director of the Investment Property Group… Mr McDonnell is entitled to his opinion in relation to them, the events are clearly within the market policy and Mr Gill's discretion.**

5.25 He does acknowledge that Mr Chapman breached the code. He appears to imply that either Mr Gill or Mr Nelson, or both, were involved, but the subcommittee "made no criticism of officers." It is difficult to ascertain the nature of the investigation undertaken by Mr Cogher. There is no attempt to set it out in his written evidence. It is difficult to discern from the documentation. To the extent that the documentation provided any evidence, it appears that Mr Cogher simply formed a view, but the basis for that view remains entirely obscure. There is no attempt to analyse why Mr Chapman was criticised, the extent of his interference, or the extent of the complicity of any officer. There is a serious question left unanswered as to the extent of involvement of Mr Gill and Mr Nelson and their potential complicity in wrongdoing which, if obvious to the claimant, may have also been obvious to them. As to why the claimant's general suggestion that they did favours to Mr Chapman was rejected, I have no sufficient evidence.

5.26 Mr Cogher concluded his report of 29 February 2016 with the following comment:

> **6. Conclusions and recommendations**
>
> **For the reasons set out above it is recommended that a disciplinary hearing be convened to consider the specified disciplinary actions against Mr McDonnell and his counter allegations in relation to market events against Mr Gill and Mr Nelson.**

5.27 I note at paragraph 11 of his statement, Mr Cogher states that one of the allegations against the claimant, which has been referred to as the UI Centric allegation, was dropped, but he added "a further breach of trust and confidence allegation" which appears to have concerned an alleged gulf between the corporation's values and expectations and the claimant's general conduct. What conduct he had in mind is unclear.

5.28 During the course of oral evidence, it became apparent that Mr Cogher was referred to the claimant's appraisals going back to 2008, which he believed evidenced some form of wrongdoing, or some form of poor attitude. Mr Gill referred to them. However, any behaviour illustrated in those appraisals was never put to the claimant either by Mr Gill, or in the

investigation by Mr Michael Cogher, or ultimately by Mr Bennett who dismissed the claimant.

5.29 I also note that in his conclusions he appears to say that the counter allegations, i.e., the potential protected disclosures, made by the claimant concerning Mr Gill and Mr Nelson should form part of a disciplinary hearing. There is no further direct evidence on this. However, if the claimant's allegations against Mr Gill and Mr Nelson were seen as blameworthy conduct, that was never made explicit. Mr Cogher's reference to these matters in his conclusions, and the nature of his recommendation, appear to state that the claimant should be disciplined for raising the allegations.

5.30 Mr Peter Bennett, who prior to his retirement in October 2016 was the city surveyor, chaired the disciplinary hearing. There were two other members of the panel. I have not heard from them. At paragraph 19 of his statement he confirms the documents he received:

> **19. As part of the process I was provided with the substantial disciplinary bundle, page 244 to 943, which included the following:**
>
> **a. Respondent's Disciplinary Policy, (page 77 - 86)**
> **b. Respondent's Code of Conduct, (page 64 - 76)**
> **c. Disciplinary Investigation Report dated produced by Mr Cogher dated 29th February 2016 (page 2003 - 2019)**
> **d. Appendices, including statements taken as part of the investigation,**
> **e. Claimant's statements/comments received during the investigation process, (page 296 -345)**
> **f. Claimant's formal complaint against Mr. Nicholas Gill and Mr. Trevor Nelson, (page 356 - 421),**
> **g. Claimant's formal complaint against Mr. John Chapman and Mr. Mark Boleat, (page 356 - 421),**
> **h. Whistleblowing Outcome Report dated 29th January 2016, page 2003 - 2019.**

5.31 It follows he was fully aware of the whistleblowing complaints, and he had Mr Cogher's report referred to above. Starting at paragraph 20 he sets out what he understands to be the allegations:

> **The Allegations & Claimant's Response**
>
> **20. Having considered the documents provided I understood the following:**
>
> **a. During the course of his employment with the Respondent the Claimant dealt with the following events: the Tudor Market, the Barnett Waddingham Virtual Golf event and the termination of pest control measures at the premises of a tenant CFSI. As a result of his dealing with these matters a number of issues relating to his conduct emerged, these have been addressed in detail within Mr. Gill's statement to both the Tribunal and as part of the disciplinary investigation, page 254 – 271.**
>
> **b. As a consequence of the above, on 5 November 2015 the Claimant was suspended from his employment by Mr. Gill and a**

disciplinary investigation commenced in accordance with the Respondent's disciplinary policy;

c. Mr Cogher, the Respondent's City Solicitor/Monitoring Officer, was tasked with investigating the disciplinary allegations against the Claimant, having done so he concluded, within his report at page 2003 – 2019 of the bundle, that there was a disciplinary case for the Claimant to answer in respect of allegations of gross misconduct, namely that the Claimant:-

(i) failed to follow the Respondent's adopted procedure and practices in relation to an event; including failing to agree Heads of Terms, obtain the appropriate delegated authority for the event, failed to promptly regularise the position despite a management instruction to do so, failed to consult and take instruction from line managers in a timely manner, failed to take reasonable care to protect the Corporation's interest thereby exposing it to the risk of loss, and both financial and reputational damage (the "Tudor Market Allegation");

(ii) acted in an unprofessional and obstructive manner, failed to act in a corporate and collegiate manner, further that he involved himself in an unprofessional employee conflict concerning an external stakeholder and without consultation or authorisation caused it to be escalated to the stakeholder's Chief Executive; thereby acting in a manner likely to damage the Respondent's interests and reputation ("The Barnett Waddingham Virtual Golf" Allegation);

(iii) caused a complaint from one of the Respondent's tenants by unilaterally terminating pest control measures provided by the Respondent, failed to make himself familiar with the background and reason for the measures, failed to inform and consult senior managers of the action taken, and corresponded with the tenant in a terse and unhelpful manner thereby causing damage to the Respondent's reputation (the "CSFI Allegation"); and

(iv) as a result of a-c above, and the Claimant's conduct and attitude towards the Respondent's core values, customer care cooperative working generally there had been a breakdown in trust and confidence between him and the Respondent,

(v) that an aggravating factor was that the Claimant had failed to take personal responsibility for any of his actions.

21. The Claimant had raised whistleblowing concerns immediately upon his suspension, dated 9th , 16th and 19th November, summarised as:

a. That Mr Gill and Mr Nelson had failed to adhere to the Respondent's policy to manage Leadenhall Market on a sound commercial basis and failed to comply with the Respondent's recruitment practices in relation to a vacancy,

b. That Mr Chapman and Mr Boleat, elected members, had exercised political interference in relation to the Management of Leadenhall Market.

> **22. These allegations were subsequently investigated by the Respondent's Monitoring Officer/City Solicitor, Michael Cogher and the following determinations were reached in February 2016, a copy of his report can be found at page 2003 – 2019 of the bundle, :**
>
> > **a. That the allegations against Mr Gill and Mr Nelson were dismissed,**
> >
> > **b. That the allegations against Mr Boleat were dismissed,**
> >
> > **c. That those allegations against Mr Chapman be refered to the Respondent's Standards Committee for determination.**
>
> **23. Those allegations were upheld following a full hearing on 23rd February 2016 and sanctions and remedies determined. Having concluded the investigation into the Claimant's whistleblowing allegations the disciplinary outcome could proceed**.

5.32 The allegations he cited reflect those which were in the letter of 22 March 2016 inviting the claimant to a disciplinary hearing (R1/2020).

5.33 Mr Bennett did receive a specific defence and the claimant in advance of the 6 April 2016. Paragraph 26 consders it:

> **Disciplinary Hearing - 6th April 2016**
>
> **26. In advance of the Hearing I received the Claimant's document entitled "Defense Against Allegations of Gross Misconduct and accompanying documents (page 296 -443). From this I understood that that the Claimant denied the allegations made, specifically:**
> > **a. that at the relevant time he felt he was undertaking 2 roles and was therefore stressed and under pressure;**
> > **b. that in relation to:**
> >
> > > **(i) the Tudor Market, Monte Carlo or Bust Rally, allegations (i) Mr. Chapman, an elected Ward Member, had abused his position and inappropriately exercised political influence by insisting that the event went ahead, (ii) that the event resulted in several hundreds of pounds lost revenue, the event was contrary to the Policy that events should be run on a commercial basis, (iii) that Mr. Gill and Mr. Nelson (Assistant Director), had behaved unprofessionally by bowing to pressure and giving obvious favors to Mr.Chapman in relation to the event, that on the day of the event Mr. Chapman had sworn excessively in public, made threats and had acted in a manner not expected from a Ward Member;**
> > >
> > > **(ii) the Barnett Waddingham Virtual Golf" Allegation that (i) political interference at the market was shocking and perpetuated by Mr. Chapman (ii) that Mr. Gill and Mr. Nelson had deliberately ignored the Claimant's request that a fee be paid and this went against the policy of running the market for commercial reasons;**
> > >
> > > **(iii) the "CSFI Allegation" that (i) it was obvious that the works undertaken were as a favor (ii) Mr. Gill had sanctioned several thousands of pounds on skirting board despite the building manager saying it was not required (iii)**

> **that Mr. Gill had bowed to political pressure with the asset manager being made the scapegoat.**
>
> **(iv) And that Mr Gill "is a Director out of control" in relation to the Claimant's suspension, his agreeing of compensation on transactions when not required and his waiving of fees and RAMS (Risk & Method Statement) and insurance without good cause and without informing the Respondent's Property Investment Board which removes a good income stream and puts Leadenhall Market at financial and reputational risk if an accident were to happen.**

5.34 Starting at paragraph 28 he records further assertions made by the claimant during the disciplinary:

> **28. The Panel also heard from the Claimant during the Hearing, in addition to his statement (page 288 - 295 of the bundle). The Claimant informed that Panel that:**
>
> **(i) for the relevant period he had been performing 2.5 roles;**
> **(ii) he had an unreasonable workload;**
> **(iii) he was under pressure and did not have time to devote attention to particular tasks;**
> **(iv) he was under stress.**

5.35 Mr Bennett was concerned that the claimant made further allegations including allegations against Mr Gill and what is described as an attack on Mr Lohmann. Mr Bennett's evidence is as follows:

> **29. Throughout the proceedings the Claimant repeated serious allegations against Mr.Gill, namely that he had granted a £750,000 compensation agreement without the correct authority and that this should be investigated. Further, he also initially refused to either accept any wrongdoing or any responsibility for his actions, opting to attribute blame to managers instead. The Claimant did at some point accept that he could have done things differently. The Claimant did not feel that, other than with Mr.Nelson, there had been a breakdown in trust with management. Additionally, in response to a question I put to him regarding allegations he had made about management commented "what am I supposed to do, I have four disciplinary accusations against me, and of course I will retaliate."**
>
> **30. At the beginning of his summing up the Claimant launched into a personal attack on Mr. Lowman. To be clear Mr Lowman's sole role in proceedings was to present the management case. He had not been part of the any decision-making body or investigative process. I would describe the Claimant's attitude and demeanour toward Mr Lowman as aggressive. The Claimant made irrelevant and derogatory comments about Mr Lowman's aptitude and professionalism.**

5.36 Mr Bennett describes that the panel then adjourned and considered all of the relevant evidence. In his statement he makes no attempt to set out what questions he asked the claimant, what investigation was made into the allegations against Mr Gill, what factual conclusions were reached concerning the specific allegations of the claimant, or the basis for reaching such factual conclusions. The findings are set out at paragraph 31:

> **31. Having heard all the evidence and received all relevant papers Ms Al-Beyerty and I adjourned to reflect on the evidence we had read and heard and to deliberate our decision. Having done so we concluded that:**
>
> > **a. the allegations against the Claimant, as set out at paragraphs 21 above, had been substantiated;**
> > **b. the conduct demonstrated by the Claimant was sufficiently serious to warrant dismissal for gross misconduct;**
> > **c. the dismissal should be with notice;**
> > **d. the Claimant had failed to acknowledge or accept that his own approach in relations to allegations 1-3 was itself:**
> >
> > > **(i) unprofessional,**
> > > **(ii) lacked understanding of the importance of the customer relationship that the Respondent needed/needs with its tenants and clients;**
> > > **(iii) lacked understanding of the need to engage with his Line Managers and colleagues, especially when issues and complaints had been raised;**
> > > **(iv) was confrontational and inappropriate in the way he communicated with tenants which was more likely to lead to complaints;**
> >
> > **e. the Claimant had demonstrated throughout the investigation and during the Hearing that he had no respect for or, trust and confidence in his Line Managers or Senior Managers, particularly Mr. Gill. That this was shown by the repeating of unsubstantiated allegations and by blaming them for his own shortcomings;**
> > **f. there was a complete breakdown in trust and confidence between the Respondent and Claimant.**

5.37 Mr Bennett was also concerned about what he describes as the "attack" on Mr Lowman. He says at paragraph 32 of his statement:

> **32. We were also deeply concerned by both the attack on Mr. Lowman and the retaliation comment made by the Claimant in the course of the proceedings We were mindful of the fact that trust and confidence needed to be mutual and that these comments/actions demonstrated a lack of this from the Claimant, but also made it difficult for managers to have the trust and confidence in him. This informed our view that dismissal was the appropriate sanction in this case. The Panel had no confidence that the type of behaviour exhibited by Mr McDonnell would not reccur and it considered that this was a risk that could not be taken.**

5.38 It is apparent that whatever the alleged retaliation was, it was at the very least an important factor in the deliberation. The evidence falls short of saying how significant it was.

5.39 Similarly, Mr Bennett was concerned about the allegations against Mr Gill. In his statement he says the following:

> **33. As mentioned earlier one specific allegation repeatedly advanced by the Claimant during the Hearing was that Mr Gill had granted a £750,000 compensation agreement in the absence of authority. Given the gravity of the assertion made, Ms Al-Beyerty investigated the allegation made and found that this was wholly untrue. Mr. Gill's decision to award compensation was indeed correctly made; the Respondent's Finance department had been consulted in advance of the intended action and the**

action agreed to by the Corporation's Property Investment Board and Finance Committee.

5.40 The nature of that investigation, how thorough it was, and the factual basis of the finding remains obscure. It is clear a decision was taken to dismiss the claimant within a very short period, as it was communicated by 8 April 2016. It appears the decision was made before then. It follows there was little time for an investigation.

5.41 It appears that Mr Bennett's primary position is that the conduct as outlined in paragraph 21 was made out and that perhaps this is said to be gross misconduct. It is not clear. This appears to be the position at paragraph 31. However, there is reference to a complete breakdown in trust and confidence, but this appears to be an allegation made against the claimant. There is no suggestion that the managers have lost complete trust in the claimant. Albeit, the reference to breakdown in trust in the original allegation is less clear.

5.42 There is no attempt in Mr Bennett's evidence to set out the basis for the alleged breakdown of mutual trust and confidence. There are allegations concerning the claimant's general conduct concerning a number of procedural matters. These are been referred to as the Tudor market, the Barnett Waddingham, virtual golf event and the CSFI allegation. The factual basis surrounding those matters is not set out in Mr Bennett's evidence, his evidence does not describe what conclusions he came to in relation to those factual matters. I will consider them in a little more detail in due course.

5.43 It is possible that the breakdown of mutual trust and confidence received by Mr Bennett arises out of the claimant's conduct in relation to those procedural matters. However, it is also possible that the alleged breakdown of mutual trust and confidence is more specifically concerned with the matters raised by the claimant. It is clear that at least some of those matters are said to have been disclosures of information which are protected.

5.44 Paragraph 32 of Mr Bennett's evidence specifically confirms that his concern about the breakdown of trust and confidence stemmed from the alleged retaliation made by the claimant during the course of proceedings. That retaliation was the raising of alleged protected disclosures. Mr Bennett goes on to say that that retaliation, leading to the alleged breakdown of mutual trust and confidence, "informed our view that dismissal was the appropriate sanction in this case."

5.45 I should consider the Tudor Market allegation. Leadenhall Market is a market which has a number of shops and retail outlets. It has a central area which is sometimes hired out for specific events. The Tudor market event took place on 3 August 2015. Market stalls selling various items were allowed to set up in the marketplace and operate for a limited period. It appears the claimant was contacted by Ms Susan Pohan of Tudor Markets on 2 July 2015. There then followed email correspondence.

There is no allegation that the claimant expressly gave permission for the market to proceed. Mr Gill puts it as follows:

> **20. On second July 2015, Susan Pohan, representing Tudor Markets, emailed Mr McDonnell with proposals for Christmas and monthly markets at Leadenhall. On 10th July she again emailed him confirming his meeting with Danny from Tudor Markets earlier in the week and to confirm details as discussed, including the date of the August market from Monday 3rd August to Friday 7th August 2015, page 476 of the bundle. On 10th July, further email correspondence regarding the number of market stalls between Mr McDonnell and Susan Pohan took place, page 478 -479 of the bundle.**
>
> **21. The Claimant does not state that in order for the event to go ahead appropriate formal arrangements would need to be put in place, including obtaining the appropriate delegated authority and the completion of a licence, in any of this correspondence. Nor is any of it marked "subject to contract" or "subject to licence" or headed in any other way to indicate that a contractual arrangement could not be created by the simple exchange of correspondence. I would have expected such precautions as a minimum given the Claimant's many years as a Surveyor with the Corporation; it was a basic and essential professional task to have marked his emails "subject to contract" or to have inserted an alternative appropriate protection.**
>
> **22. Additionally it was solely the Claimant's responsibility to have warned Ms Pohan of the formal procedural requirements at an early stage so as to avoid the sort of confusion and misunderstanding which, in fact, occurred. I consider this to be a very serious professional lapse, again not one that a Surveyor of the Claimant's many years standing ought to have made.**
>
> **23. As a result of the Claimant's failure to mark his email "subject to contract" or to inform her of the necessary formalities required before agreement could be reached Ms Pohan clearly considered that a binding agreement had been reached and on 30th July she emailed him stating that Tudor Markets would be coming to set up on Sunday from around 4pm, page 482 of the bundle. This email arrived out of office hours and Mr McDonnell was on leave the following day. He did not therefore learn that the event was taking place until the day it occurred on 3rd August. On that day he sent an email to Susan Pohan at 09.22 stating *"I hope it goes smoothly. This will need to be formalised in the form of a licence. I will come to you shortly. What is the date of the next set up in September?"* She replied on the same day: - "*Just to clarify, we had agreed to pay you £800 (plus VAT) per event during the pilots"*, page 490 of the bundle.**
>
> **24. The first time the Claimant's managers, Andrew Cross and Trevor Nelson, were made aware of the existence of the Tudor Markets event was on Monday 3rd August itself when enquiries were received from tenants and Ward Member John Chapman asking what was going on and why tenants had not been notified in advance, page 494.**
>
> **25. As the Claimant had failed to discuss this with his line manager and make proper arrangements, no Heads of Terms were in place and no communications were sent out in advance notifying all tenants and Ward Members. An Authorised Delegated Authority ("ADA") (an internal management control system) was not completed, and therefore no formal licence was put in place and no licence fee was charged in advance. Again, I would have expected this as a minimum given the Claimant's many years as a Surveyor and with the Corporation**

26. Having created the situation in which Tudor Markets assumed they had permission to proceed the Claimant's email on Monday 3rd August at 9.22am, page 490, legitimised this expectation and gave confirmed approval to Tudor Markets which meant the market event could not be terminated and removed that morning. As a result the on-site facilities management team had to deal with notification to all tenants at short notice, many of whom were unhappy, page 484 of the bundle. The Claimant thus deprived management of an opportunity to decide whether to permit the event or not once they had had become aware of it. In my view this is an example of his failure to act in a collegiate manner and to consult others before taking action. It also shows a lack of consideration of and understanding about the impact of his actions on others.

27. An emergency discussion took place mid-morning on Monday 3rd August between myself, Trevor Nelson, Andrew Cross and the Claimant regarding this event including a discussion about why line managers had not been informed, the lack of communications, the lack of any agreed Heads of Terms and the absence of an Authorised Delegated Authority. The Claimant was then instructed by me to complete an Authorised Delegated Authority form for signature as soon as possible to regularise the position. However, he failed to comply with this instruction promptly. The Tudor Markets event ran from Monday 3rd August to Friday 7th August, but the Authorised Delegated Authority was not signed off until Monday 17th August, some 2 weeks after the start date, page 515 -518 of the bundle. The completion of an Authorised Delegated Authority is not an onerous task and should have been completed no later than 24 hours after my instruction. This was clearly a failure by the Claimant to comply with a reasonable management instruction.

28. This ill-planned event clearly brought the City into disrepute and caused reputational damage with our stakeholders being both our tenants and a Member. This is demonstrated by correspondence and complaints which the Respondent received from tenants. Stephen Ivers emailed tenants at 9.01 on 3rd August advising them that Tudor Markets would be operating that week. It elicited a number of complaints, page 488 of the bundle. For example, Mr Bascherini of Chamberlains wrote in reply at 9.32 on 3rd August:

"I must express my total disappointment with the situation this morning in Leadenhall Market. Not only none of the tenants have been told a pop up market was being put up for a whole week but as always this has been put on our terrace. We do pay top dollars to have tables and chairs outside and it is absolutely not acceptable not to be notified our licence would be suspended….I expect a full explanation from whoever has approved this, happy to meet them today here in the restaurant to go through it!"

5.46 There is a failure to identify what procedure or practices are referred to. Mr Bennett assumed general good practice, but did not question the matter further or ask the claimant about it. It was the claimant's position that he gave no authority. Mr Gill's accusation goes as far as to say that Ms Pohan assumed she had a right.

5.47 As well as not authorising the event in writing, whether by license or otherwise, the claimant did not allow the market stalls onto the premises. Who did and why, does not appear to have been explored. Mr Bennett did not ask those questions.

5.48 There is an assertion that the claimant failed to respond to management instruction. The oral evidence was to the effect that the instruction was to, retrospectively, put in place a licence. There was no failure. He did put a licence in place, the real complaint appears to be that it took two weeks to do this. However, there is no evidence Mr Bennett considered this or formed a view as to why the two-week period, which the claimant considered to be reasonable having regard to all the matters to be dealt with, was inappropriate, or why the fact that he did comply with management instructions within a two-week time period, should be seen as a failure. None of this is addressed in the respondent's evidence.

5.49 I should consider the Monte Carlo or bust event. Mr Gill describes it as follows:

> **Monte Carlo or Bust Rally**
>
> **37. This was an event organised by Lloyds Motor Club (Club Sonar), to drive and park 15 No. 2 CV cars in the Market as part of a 2 CV vintage car promotion. The event was to take place from 11am on 8th September to 8.30am on 9th September with cars parked overnight before setting off for Monte Carlo. An Authorised Delegated Authority form was drafted by the Claimant and completed on 4th September 2015, page 691 - 692.**
>
> **38. As explained above our objective is to ensure that the Market and its environs are maintained and managed efficiently to produce an improved tenant mix, which will result in a more attractive offer, higher footfall and higher income and value for the Corporation. Further considerable efforts are made to raise awareness of the market with events including St George's week, musical festivals, art fairs and fashion shows. The Monte Carlo event was a significant event run by a substantial City concern, Lloyd's, and assisted to maintain and raise the profile of the Market. It attracted visitors and customers into the market to view the cars. It increased shoppers dwell time and it did not disrupt tenants business. The event was cost neutral to the City as although no licence fee was charged, Club Sonar (Lloyd's Motor Club) were responsible for the management, safety and security of each car and were responsible for cleaning up and making good any damage. The licence fee was waived by me as Investment Property Director, having considered the proposal on its merits. I determined it would be positive for the marketing of the Market and was in line with the letting events policy.**
>
> **39. The ADA was signed off by the Claimant, Andrew Cross, Trevor Nelson and me. The ADA states that risk and method statements have been requested. I reviewed and signed it off as it is in line with our lettings policy.**
>
> **40. The Claimant was unacceptably obstructive and resistant to the event taking place. It was clear that he did not agree with it going ahead. The Claimant persisted in questioning the legitimacy of the event, its charitable nature, the basis upon which authority had been given, and what fees if any were due to the Respondent, this continued despite him having received explanations/reassurances.**

5.50 This was not formally pursued as an allegation of gross misconduct. It appears to be cited as general evidence of the claimant's obstructive behaviour as set out in paragraph 40 above. It is unclear how far Mr Bennett took it into account. It is also unclear why the respondent should

consider it inappropriate for the claimant to question its charitable status and the fee paid. (Mr Gill makes it clear it was his own decision, but fails to set out why the failure to charge a fee was appropriate.) It appears that raising questions was part of the claimant's job.

5.51 I should consider the Barnett Waddingham allegations. Mr Gill deals with as follows:

> **41. Barnett Waddingham is a firm of actuaries and consultants who wished to hold a corporate event on Thursday 5th November. Broadly it involved Barnett Waddingham holding a virtual Golf event at the Leadenhall Market whilst raising money for charity. Adam Brook of Barnett Waddingham had been in contact with John Chapman, Ward and Property Investment Board Member, on Tuesday 13th October, and the matter had been passed to the Claimant to progress.**
>
> **42. The Claimant had previously refused the event in July/August 2015, page 720, and he was now being asked to consider an amended application. Over the course of events it became clear that the Claimant was being unnecessarily obstructive and confrontational and did not want it to go ahead. An example of this can be found within the Claimant's email of 28 October 2015, where he queried a related request for a power source and what Adam Brook's relationship was with John Chapman, page 865 and 869.**
>
> **43. The above was subsequently raised by Mr.Chapman with Mr.Nelson, and in turn discussed with the Claimant on 28th October. Instead of waiting for further clarification from Management, or requesting further information from the organisers, he responded by sending Mr.Chapman a blunt email asking him to tell Adam that, "you do not have my permission or any agreement in place and will be denied access" page 710 of the bundle. I am aware that this was forwarded to Mr Nelson by John Chapman saying, "Can you deal with this – I may just lose my rag if I do it!". Page 871 of the bundle. This was further compounded by the Claimant then emailing Adam Brook directly with another blunt email stating, "Please do not go ahead with the below event. You do not have my permission or any agreement in place and will be denied access.", page 874. This was again forwarded to by John Chapman to Mr. Nelson, asking him to deal with the matter urgently.**
>
> **44. I am aware that within a discussion between the Claimant and Mr.Nelson, also on 28th October and he was instructed to proceed and to do all the necessary due diligence so that this event could proceed on 5 November 2015 as planned.**
>
> **45. The following day, 29 October 2015, Mr. Chapman forwarded Mr Nelson a further email exchange between the Claimant and Adam Brook, page 725. Within this the Claimant had asked for more details of the golf simulator, and belatedly raised the issue of costs and charges for the event. However he was clearly also putting obstacles in the way of the event taking place. In my view he had taken a unilateral decision that the event was not good for the Market, rather than accepting the collective officer decision that it was. He was obstructive and should have acted more professionally.**
>
> **46. On 29th October, email correspondence took place between Adam Brooks and Mr. Chapman; the gist of which was that Mr Brook was incredibly unhappy with the fact that the Claimant had contacted Nick Salter, Senior Partner/CEO at Barnett Waddingham, about the event, A copy of the email between Mr Chapman and Mr Brook can be found at page 725,**

within which Mr Brook states "I am infuriated – how dare he email in Nick Salter, I am fuming. He cut me off, was rude and I fired back with both barrels. He said "I don't expect to lose any sleep over this". The Claimant's action necessitated management having to intervene so that the matter did not escalate further. It can be seen from the above email that the Claimant was not being co-operative and professional with Mr Brook. Again such behaviour had the potential to cause reputational damage to the Respondent. To be clear the Claimant had escalated his argument to Barnett Waddingham's CEO without discussing it with management or seeking their approval. I only learned of this after the event. I understand from Mr. Nelson, as stated in his statement, page 272 - 287 of the bundle, that when asked to explain why he had copied in Nick Slater, the Claimant responded that he thought Nick Slater should know what Adam Brook was getting Barnett Waddingham into, including holding an event without a risk assessment and without insurance.

47. This was not the end of the matter as I would have hoped and expected as I subsequently learned that the Claimant had sent a further email direct to Nick Salter shortly after his argument with Adam Brook, criticising Adam Brook's behaviour and stating that this did not reflect favourably on Barnett Waddingham, page 765.

48. Additionally, the Claimant failed to draft an Authorised Delegated Authority which was necessary to regularise the event despite having been instructed to do so by Mr. Nelson on 28th October. This was completed by Andrew Cross and signed on 4th November.

49. In my view the Claimant was obstructive and displayed a non-collegiate approach, and this coupled with his unnecessary argument with Adam Brooke which he unnecessarily escalated to Barnett Waddingham's CEO was a significant factor in creating the situation in the first place. Having weighed everything up, particularly the Claimant's approach to this event and the potential damage to relations with an external business. I considered that there was a real potential of damage to the Respondent's reputation. I therefore determined that the usual applicable fee would be waived and that the Respondent would recover only costs from Barnett Waddingham.

50. As with the Tudor Market and Monte Carlo or Bust events in this instance too the Claimant's conduct was far below that which I would expect from of a surveyor of his years of standing.

5.52 I should consider the CSFI allegation. Mr Gill deals with as follows:

CSFI Allegation

51. This allegation related to the Claimant's mismanagement of the CSFI rodent problem.

Allegation 3
That he caused a complaint from a tenant to the Chairman of the Policy and Resources Committee by sending an inappropriate email countermanding measures put in place by me to tackle a rodent issue without checking the position and thereby damaging the Corporation's reputation with CSFI.

52. I instigated a pest control action plan at the end of November 2014 in response to a complaint by CSFI and to help prevent an escalation of a rodent problem in the wider Market. The Corporation had already completed works in April 2014 to enlarge the communal bin store and to increase the number of bins. This was in response to a problem of tenants throwing

food rubbish into the ground floor room rather than placing rubbish in the appropriate bin. The waste food being the prime source of attraction for rodents. This has reduced the problem and CCTV has been installed to act as a deterrent but we are reliant on tenant's goodwill to self-police the bin store to a certain degree.

53. On the 27 October 2014 CSFI e-mailed Tina Garwood (City Facilities Manager) advising her of the evidence of mice and asking for pest control to visit. Tina Garwood's e mail response (28/10/14) advised that the Corporation's pest control had put more poison down, suggesting that CSFI arrange for corners of trunking in their office to be replaced to stop mice entering the office and that it was advisable that CSFI set up a pest control contract themselves.

54. CSFI sent an e mail in response (4/11/14) which copied in Mr Boleat, Policy & Resource Chairman, page 1111- 1112, stating that it is the Corporation's responsibility to organise pest control as they believed that the mice were coming from the communal bin store directly below them. They advised that the trunking was in the same condition as when they took their lease. CSFI also did not believe that it was their responsibility to "rebuild the office" – just to keep it in a reasonable state of repair. This e mail was copied into Mr Boleat. CSFI advised that if they did not receive a "proper response" they would take legal advice and "copy in their complaint more widely". Mr Boleat forwarded the e mail to Peter Bennett "to be aware".

55. I e-mailed Mr Boleat on 11 November 2014, and advised him that the Market leases do not oblige the Corporation to provide pest control services to the tenants but as their unit was located above the Market bin store, it could be claimed that the bin store is the source of the mice infestations. The Corporation's pest control regime at the Market is limited to common parts only, effectively the bin store. The reconfiguration of the Market bin store may have led to mice being disturbed and entering into the upper floors where the trunking at floor level provided a natural run and warm environment for nests.

56. In the circumstances I agreed that the Corporation would undertake works to the trunking in the office to make sure that they were sealed to prevent access by mice and provide a fortnightly pest control regime inside their premises (to be re-evaluated after a few months and the frequency amended as appropriate) and that the cost of these actions would "be non-recoverable".

57. On 19 October 2015 CSFI liaised with Darren Turner (City Facility Manager) about the rodent problem which appeared to have reoccurred. Mr. Turner arranged for the City's pest control contactor to visit site and top up the poison.

58. CSFI emailed Darren Turner on 3rd November 2015 asking for some dead mice to be removed, raising concern about hygiene and advising that they clearly still had a rodent problem. They also requested that the pest control contractor return to discuss how best to deal with the problem.

59. The Claimant then emailed CSFI on 4th November 2015, page 1189 of the bundle, advising them that the City only provided pest control services to common areas and that the tenant would need to make their own arrangements, effectively unilaterally withdrawing the measures that I had agreed to put in place. He also let them know that he would organise for the dead mice and poison to be removed. This email was terse and curt in the circumstances and likely to provoke a reaction from CSFI given the

history of the matter which the Claimant had failed to acquaint himself with before taking unilateral action.

60. Predictably, CSFI were upset and e-mailed Mr Boleat direct on 5th November 2015 copying in the Lord Mayor with a complaint. They advised that the rodent problem had become a big problem over the last couple of months and they pointed out that whilst the City had instigated a pest control regime inside their offices as it had undertaken to do a year ago, the trunking had not been replaced. They also took issue with the Claimant's e-mail.

61. Mr Boleat forwarded the e mail to Peter Bennett for comments. Lizzy Hand the City's head of IPG FM inspected the property and then discussed the action plan with me and I then e- mailed the plan to CSFI and Mr Boleat.

62. The City removed all facia to the trunking, to expose potential entry points which were then sealed and the facia refitted. The cost of this work was £5,018.70. The office areas were given a full clean and the baiting regime has continued as a precautionary measure. Sarah Goddard visited the tenant the week commencing 18/1/16 and they have not seen any more evidence of mice since the works have been undertaken. The tenant appears to be content.

63. It should be noted that whilst it is correct that the City is not contractually required to deliver a pest control service, given the proximity to the bin store and the number of food outlets in the market, management took the decision to step in to avoid a rodent population increase. In particular, regard needed to be had to the City's responsibilities not to cause nuisance and also its obligations as landowner to control mice in respect of the bin store. In addition the City as Local Authority has duties under the Prevention of Damage by Pests Act and can require a landowner to take steps to rid their land of pests.

64. Once again, within a short space of time, the Claimant's approach had provoked an unnecessary complaint from one of the Respondent's corporate tenants, which had the real potential of damage to the Respondent's reputation. He had failed to check the position with senior management before unilaterally withdrawing a service which was being appropriately provided.

5.53 The dismissal was appealed. It is common ground that the appeal hearing was chaired by Mr Peter Lisley who was assistant town clerk with the respondent. Neither party suggests that there was a rehearing. Indeed, the failure to rehear the dismissal is one the claimant's complaints. The respondent accepts that it was a review and in no sense at all a rehearing. In his evidence, Mr Lisley confirmed that he had no material difficulty with the original disciplinary and saw no reason to interfere with the decision. The claimant does not allege that a poor appeal made an otherwise potentially fair dismissal unfair. The respondent does not allege that a potentially unfair dismissal was cured by the appeal. I need consider it no further.

The law

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

Employment Rights Act 1996 - section 98

> **(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—**
>
> > **(*a*) the reason (or, if more than one, the principal reason) for the dismissal, and**
> > **(*b*) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
>
> **(2) A reason falls within this subsection if it--**
>
> > **(*a*) ..**
> > **(*b*) relates to the conduct of the employee, …**

6.2 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell [1980] ICR 303**, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the **EAT in Sheffield Health and Social Care NHS Foundation Trust v Crabtree EAT/0331/09**.

6.3 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones [1982] IRLR 439** and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many, though not all, cases there is a band of reasonable responses to the

employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

> **98 (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—**
>
> > **(*a*) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and**
> > **(*b*) shall be determined in accordance with equity and the substantial merits of the case.**

6.4 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.5 Section 43B Employment Rights Act 1996 defines when a disclosure is protected.

> **Section 43B Employment Rights Act 1996 - 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 has been committed, is being committed or is likely to be committed,**
> > **(*b*) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> > **(*c*) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> > **(*d*) that the health or safety of any individual has been, is being or is likely to be endangered,**
> > **(*e*) that the environment has been, is being or is likely to be damaged, or**
> > **(*f*) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.**
> > **…**

6.6 Section 103A Employment Rights Act 1996 states a dismissal will be unfair if the sole or principal reason for the dismissal is a protected disclosure.

> **Section 103A**

> **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.**

6.7 I need not consider case law in detail. I have regard to **Kuzel v Roche Products Limited [2008] EWCA Civ 380** the Court of Appeal held that it is for the employer to prove that it had a potentially fair reason for dismissing an employee. Mr McDonnell was employed long enough to claim ordinary unfair dismissal, and the burden of proof does not pass to him. He must produce some evidence supporting his assertion, but he does not bear the burden of proving that the dismissal was for making protected disclosures. I observe I am not bound to accept either party's reason. The true reason is a finding of fact for me.

6.8 The decision in this case does not turn on the burden. For the reasons I will come to, the respondent's own evidence establishes the true reason.

Conclusions

7.1 The central question I must resolve is what was the reason or principal reason for the dismissal.

7.2 I am concerned, essentially, with the thought processes of Mr Bennett. I have not found it possible to summarise Mr Bennett's evidence. Mr Bennett's evidence, whilst extensive, is lacking in factual detail, and hence why it has been necessary to quote extensively from his statement. A similar difficulty has arisen in relation to the other witnesses, and hence the need for extensive quotation from their statements.

7.3 Mr Bennett sets out the allegations at paragraph 21 of his statement, and later finds them to be substantiated. The allegations, to the extent they are set out by Mr Bennett, subdivide into two broad categories. The first category concerned the matters which arise out of identified factual events. The second category is a more diffuse, and ill-defined, reference to the claimant's general behaviour which incorporates his being "unprofessional," his "obstructive manner," and his failure to act in a "corporate and collegiate manner."

7.4 I should deal first with the first category. There has been no suggestion that Mr Bennett did not in fact believe that there was misconduct in relation to the matters he considered.

7.5 The fact that Mr Bennett may have had in mind a number of allegations of misconduct does not in itself prove what was the sole or principal reason.

7.6 I will consider what Mr Bennett found in relation to each of those specific allegations. Thereafter, I will consider the basis on which he considered there was a loss of mutual trust and confidence.

7.7 I do not doubt that Mr Bennett believed there was misconduct in relation to each of the matters he considered. His belief, of course, goes to establishing the reason. When considering the claim of ordinary unfair dismissal, it is necessary to consider the grounds for the belief, and whether there was a sufficient investigation supporting those grounds. That goes to the reasonableness of the dismissal. The grounds for his belief there was misconduct will assist with identifying the sole or principal reason.

7.8 I will consider each of the four specific factual events relied on.

7.9 I consider first the Tudor Market allegation. Mr Bennett's evidence fails to set out with any accuracy, or clarity, either the specific factual circumstances relied on as misconduct, or the grounds for them. It can be ascertained that he believed there was some form of failure to follow a procedure, approve heads of terms, obtain delegated authority, or to promptly regularise the position - despite some form of management instruction. However, the detail of that is obscure.

7.10 He believed there was some form of procedural practice, but he never identified it, and instead relied on his own general understanding as to what would be a good procedure. No specific procedure or procedural breach was put to the claimant. It seems that his main complaint was that the claimant did not mark any documentation 'without prejudice' or 'subject to contract.'

7.11 It is clear that the claimant did regularise the position by putting into place a licence. However, Mr Bennett did not seek any adequate explanation from the claimant for any delay.

7.12 To the extent he considered the matter at all, he appears to have accepted what Mr Gill said. This is surprising given the criticisms the claimant made of Mr Gill, and the potential for Mr Gill being criticised for his involvement with Mr Chapman. Mr Bennett does not appear to have considered whether the claimant was truly at fault for allowing the market stalls to set up when they turned up without any license.

7.13 A reasonable investigation should identify evidence which both supports and undermines an employee. In Mr Gill's original report, and in Mr Cogher's subsequent report, there is no attempt to set out in detail the claimant's account, or to provide any evidence which may exonerate him. Mr Bennett failed to observe that deficiency at all.

7.14 The investigation was not sufficient to demonstrate which procedures had been breached, or to set out the circumstances surrounding the delegated authority, or to explain fully the difficulties the claimant had regularising the position such that it could be decided whether it could reasonably be said he had failed to follow a management instruction. Even a cursory reading of the investigation should have revealed the serious lack of balance. Any reasonable and competent manager undertaking a disciplinary should have observed that deficiency and sought to correct it.

7.15 The Monte Carlo Rally event was not pursued as an allegation against the claimant. However, it was an important matter which should have been considered by Mr Bennett. No reasonable employer would have failed to do so. It is clear from his evidence that Mr Bennett had it in mind, although what he made of it is not set out. The claimant had raised it as an example of Mr Chapman abusing his position.

7.16 Mr Bennett knew that Mr Chapman had abused his position: the independent committee had found that. The claimant said that both Mr Gill and Mr Nelson had bowed to pressure. What Mr Bennett made of that is unclear. There was prima facie evidence of Mr Chapman's wrongdoing and the potential involvement of Mr Gill and Mr Nelson. Mr Bennett appears to have been entirely unconcerned by this. This is particularly surprising given that the claimant's suspension, and ultimately the disciplinary proceedings, started as a result of Mr Gill's actions.

7.17 Mr Bennett's readiness to accept that Mr Gill's conduct should not be seen as blameworthy is both evident and surprising. There was clear evidence that the claimant had raised with Mr Gill and others potential wrongdoing. There was evidence of potential wrongdoing having regard to the findings against Mr Chapman. There was enough evidence to suggest that Mr Gill may have an ulterior motive, namely defending his own position. None of this appears to have troubled Mr Bennett.

7.18 The fact that the Monte Carlo point was not pursued as an allegation against the claimant does not mean it was not relevant or that it should not have been taken into account by Mr Bennett. The circumstances demonstrated clear evidence that could favour the claimant.

7.19 It is clear from Mr Gill's own statement that he had chosen not to charge a licence fee. This appears to admit the claimant's basic point: that Mr Gill was ignoring commercial considerations, and potentially acting inappropriately. There is a serious question about why he was doing that, but this was simply not explored. It is not for me to substitute my own view for the respondent's, but the failure of Mr Bennett to be troubled by these matters, and to address them, is a serious failure in his disciplinary procedure. No reasonable employer would have behaved in this way.

7.20 The next matter relied on is the Barnett Waddingham event. The claimant's basic complaint was that there was political interference again. That was directed at Mr Chapman. The claimant believed that Mr Gill and Mr Nelson had deliberately ignored the claimant's request that a licence fee be paid.

7.21 The allegation as identified by Mr Bennett lacks detail. There is vague reference to the claimant acting in an obstructive and unprofessional way. It is said he failed to act in a corporate and collegiate manner. What exactly is meant by this remains obscure. It may be that Mr Bennett considered the matters raised by Mr Gill. However, this is not clear.

7.22 It is for the employer to tell the employee what the allegation is. During the course of the proceedings, I referred to the 2015 ACAS code on disciplinary and grievance. Paragraph 9 makes it clear that the employee must be informed of the allegation and given sufficient information of the alleged misconduct, so that he may prepare for the hearing. It is not clear to me, even now, what is the alleged misconduct. It was never clear to the claimant.

7.23 It is clear that the claimant has some reservations about the event. He was concerned about fire regulations. The event needed a large tent. The market is access for fire engines. It is appropriate he should consider this. It is appropriate he should ensure insurance was place.

7.24 Mr Gill appears to question the claimant for asking for a licence fee. This is difficult to understand, particularly when compared to the Tudor Market event. The criticism of the claimant's involvement in the Tudor Market event includes his failure to put in place proper documentation and ensure that the fee was regularised. In the Barnett Waddingham event, he seems to be criticised for attempting to ensure the position was regularised and properly documented.

7.25 Paragraph 41 onwards of Mr Gill's statement makes it plain that Mr John Chapman was intimately involved in this event. Mr Bennett knew that Mr Chapman had been found to have acted inappropriately. The Barnett Waddingham may be one such example of wrongdoing. Moreover, if this was an example of wrongdoing of Mr Chapman, it may be appropriate to question Mr Gill's involvement and to ask why he proposed not to charge a fee.

7.26 It appears that the claimant's lack of corporate and collegiate manner stems largely from his questioning, quite appropriately, of Mr Chapman's inappropriate interference; interference which appears be supported by Mr Gill. It may be that some of the claimant's intervention and language was blunt, and possibly inappropriate. However, it was for Mr Bennett to identify the specific allegation and to satisfy himself of the surrounding circumstances. It appears he made no attempt to ascertain the relevant circumstances or to balance the claimant's potential inappropriate language against the difficulties he faced when dealing with a very difficult situation. It follows that Mr Bennett did not adequately identify the allegation against the claimant, the grounds that he relied on were unclear, and the investigation was inadequate, but also potentially inappropriate given Mr Gill's involvement.

7.27 The CSFI allegation largely concerns the claimant's intervention in relation to a tenant that had had difficulties with a mice infestation. The tenant's office was above the main garbage area. The garbage area had been badly kept and loose food had been allowed to gather. This has attracted rodents, including mice. The mice had found their way into the tenant's premises. It appears there were two sets of remedial action. The first involved replacing skirting to block holes left by trunking which may have

allowed the rodents to gain access. The second was by providing poison through a contractor.

7.28 The criticism of the claimant is that he sent an email which removed the tenant's right to receive the pest control services. It is said the claimant should have checked the position. It is said he should have consulted with senior management.

7.29 Mr Bennett's investigation into this matter was limited. He gives no detail in his witness statement. During his oral evidence, he confirmed that he never checked the lease. He did not check the file. He was unable to say what agreement had been reached, when, or how. He was unable to say why the claimant should have realised there was an agreement in place.

7.30 The claimant's point is that the tenant was given a favour which amounted to thousands of pounds, and he could not support it. It is not clear to me how much he knew about the background. It may be that he knew that there had been some sort of agreement with the tenant, but did not agree with it. The claimant's evidence, which was not challenged, was that there was nothing in the file. It is clear there was no agreement evidenced in the file. This fact alone should have led to more questions. Why was there no file? Who had authorised what and when? Why was there no written trail? Mr Bennett made no effort to check the position.

7.31 As there was no formal agreement, the claimant had no written basis on which he could continue what he saw as a favour, namely the provision of pest control. He simply asserted the position in the lease.

7.32 The tenant was very unhappy, as reflected in the tenant’s email. However, the tenant’s unhappiness revolved around the unravelling of an agreement he thought had been reached. That tells me nothing of the claimant's conduct. There was insufficient evidence before Mr Bennett to conclude that the claimant had done anything other than act in accordance with the obligations of his role. If it is suggested he was not acting in a corporate manner by objecting to inappropriate favours, it is difficult to see how that is a matter of misconduct on the claimant's part. It may be that the action he took was insensitive. However, Mr Bennett did not look at the detail of this and he was in no position to form a balanced, or reasonable, view. He simply accepted the criticism made by Mr Gill, which was supported by Mr Cogher.

7.33 I now consider the second category. I have already observed this is a more diffuse, and ill-defined, reference to the claimant's general behaviour which incorporates his being "unprofessional" and his "obstructive manner" and his failure to act in a "corporate and collegiate manner."

7.34 I have considered Mr Bennett's statement and his oral evidence carefully. I have tried to understand what, exactly, this was based on. It is clear that it goes beyond the specific factual matters I have outlined above. In his oral evidence, Mr Cogher said he had been referred to the claimant’s appraisals, starting in 2008. Mr Bennett also considered those. He never

put them to the claimant. He never identified any specific matter arising out of them. Instead, he appears to have been content to accept Mr Gill's general assertion that, in some manner, it showed poor conduct by the claimant. This was never put to the claimant what Mr Bennett had in mind remains unclear. A careful reading of Mr Bennett's evidence does provide some clarity. Paragraph 31 (e) says as follows:

> **e. the Claimant had demonstrated throughout the investigation and during the Hearing that he had no respect for or, trust and confidence in his Line Managers or Senior Managers, particularly Mr. Gill. That this was shown by the repeating of unsubstantiated allegations and by blaming them for his own shortcomings;**

7.35 He does not set out what he believes to be the repeated unsubstantiated allegations. Paragraph 6 of Mr Cogher's statement make specific reference to the counter allegations concerning Mr Gill and Mr Nelson. These encompass the allegations that they gave inappropriate favours to Mr Chapman, when instead they should have been reporting his political interference. Why Mr Cogher considered the claimant's allegations to be inappropriate is not explained. These are the allegations that Mr Bennett had in mind.

7.36 Mr Bennett also specifically noted the claimant's allegation that Mr Gill had wrongly authorised £750,000 worth of compensation. His statement is inadequate to demonstrate what investigation occurred into that allegation. At paragraph 33 of his statement, he refers to an investigation by Ms Al-Beyaerty, who found it to be untrue. It was, clearly, a very brief investigation. There appears to be no attempt to ascertain from the claimant the basis for his concern, or any attempt at a detailed investigation. However, it was assumed that the claimant had acted inappropriately and wrongly and that this was a further example of his behaving in an inappropriate way towards his managers, such as to damage mutual trust and confidence. Why such a negative view of the claimant should be taken, when it is absolutely clear that he had identified serious wrongdoing by Mr Chapman, which was confirmed following an independent investigation, is unclear.

7.37 What is clear is that Mr Bennett reached the conclusion that the claimant made inappropriate allegations and that those allegations had led to a breakdown of mutual trust and confidence. Paragraph 32 of Mr Bennett's statement makes that clear. He refers to being concerned by the claimant's retaliation. The retaliation was the repetition of whistleblowing disclosures. His statements says specifically that these allegations demonstrated a lack of mutual trust and confidence in the claimant and made it difficult for the managers to have trust and confidence in him. It goes on to say "this informed our view that dismissal was the appropriate sanction in this case."

7.38 When the logic of this is analysed it is clear that the following happened. Disciplinary proceedings were instigated against the claimant, initially by suspending him. Whilst suspension may be technically a neutral act, in no sense was it neutral in this case: it was the start of the inevitable process

of disciplinary proceedings. The claimant raised a number of matters which were accepted at the time by the respondent as examples of whistleblowing. They were accepted as disclosures. At least one aspect of that disclosure, the allegations against Mr Chapman, proved to be well founded. It is unclear what investigation was made in relation to Mr Gill and Mr Nelson, but there is at least the possibility that the allegations were well founded, as it does appear that a number of requests by Mr Chapman were agreed to by Mr Gill and/or Mr Nelson. The fact that the claimant had raised the allegations, i.e. the retaliation, was viewed negatively by Mr Bennett. He believed it demonstrated a breakdown of mutual trust and confidence, for which he blamed the claimant and sacked him. There is a direct causational link between the claimant's whistleblowing allegations and the dismissal. That is the only logical interpretation of Mr Bennett's own evidence.

7.39 There can be no doubt that this is an unfair dismissal. The respondent fundamentally failed to give the claimant sufficient information about the alleged misconduct such that he could prepare adequately for the hearing. Put simply, the respondent never set out the specific factual allegations the claimant was to answer. That breached paragraph 9 of the ACAS code. In this case the breach is fatal.

7.40 Mr Bennett did nothing to rectify the situation at the disciplinary hearing. In fact, even to the extent that he knew there were allegations, for example that there was a breach of procedure, he failed to identify the allegations adequately. He failed to identify the procedure. He failed to identify the relevant documentation. He failed to put the allegations adequately or at all to the claimant. That is also fatal.

7.41 The investigation itself was inadequate. The investigation failed to identify the relevant allegations and failed to ascertain the relevant facts that would both assist the respondent and assist the claimant. There was a lack of objective analysis and a lack of neutrality. The failure to identify the relevant facts was a breach of paragraph 5 of the ACAS code.

7.42 It follows that there were problems with the initial identification of the allegations, the investigation, and the disciplinary. The investigation was not one which was open to a reasonable employer. It was not adequate to establish the relevant grounds.

7.43 There may be occasions when an appeal may remedy defects in the disciplinary process, such that the dismissal can be found fair. This is not one of those occasions. There were serious and obvious failures of approach, as I have found. The deficiencies in Mr Bennett’s dismissal were obvious. No competent manager, acting reasonably, would have failed to observe the defects or taken action to rectify them. Mr Lisley saw nothing that needed to be addressed, and so failed to address the obvious unfairness.

7.44 I next consider the allegation of automatic unfair dismissal. I need to ascertain whether there were protected disclosures. It would be fair to say

that the claimant does not set out in any clear detail the specific allegations. The claimant accepts that his allegations were made after he was suspended and he is candid in accepting that, in some sense, they were retaliatory and were an attempt to prevent Mr Bennett from chairing the disciplinary hearing.

7.45 As to the specific disclosures, there is reference to whistleblowing in April 2013. That refers to a specific written complaint. The written complaint has never been produced to me and I cannot find that it was a protected disclosure.

7.46 It is clear that there were a number of disclosures of information in 2015 which were viewed by both sides as protected disclosures.

7.47 The respondent has not sought to defend this claim on the basis that there was no disclosure of information or that the disclosure of the information did not tend to demonstrate one of the matters outlined in section 43B. The defence has been run on the basis that disclosures were not in the public interest.

7.48 It is not for me to invent the detail that neither party has seen fit to present. It is clear that there were a number of disclosures of information. There is enough evidence for it to be clear that the claimant questioned on a number of occasions whether his senior managers were doing favours which were inappropriate. This is the foundation of the Barnett Waddingham and Monte Carlo events when no fee was charged.

7.49 A number of allegations were made concerning the action of Mr Chapman. It was alleged there was undue political interference. This included events such as the Barnett Waddingham event.

7.50 There were formal complaints about Mr Gill when he suggested he was committing fraud. Similar complaints were made concerning Mr Nelson. The respondent received a document (R1/356) which gave details of allegations against Mr Gill and Mr Nelson. The complaints concerned, particularly, the failure to deal commercially with the Monte Carlo event and the Barnett Waddingham event. He complained that Mr Nelson had given permission to Mr Chapman two weeks prior to the event without consulting the claimant.

7.51 It is clear the claimant believed there was no good reason not to charge fees, and he questioned the involvement of both Mr Gill and Mr Nelson. As I have noted, it is clear that Mr Chapman was found to have breached his own obligations as an elected member.

7.52 There can be no doubt that there were disclosures of information which were protected (subject to the dispute on public interest). There can be no doubt that Mr Bennett knew of the disclosures of information. It was the disclosures that he found to be false, at least in as far as they related to Mr Gill and Mr Chapman. It was the disclosures that led him to conclude

there was a loss of mutual trust and confidence. It is clear he took them into account when dismissing.

7.53 As to whether the disclosures of information were protected, the only defence advanced by the respondent is they were not made in the public interest. The basis for that is the claimant's admission that he made the complaints when he was suspended by Mr Gill. He accepts, to that extent, they are retaliatory.

7.54 Ms Omambala did not put to the claimant, at any time, that he failed to make the disclosures in the public interest. It follows that the respondent's position is a technical one. The respondent's position is that because the disclosures were raised in order to protect the claimant's position and prevent him from being dismissed, that should be seen as retaliation, and that it cannot be in the public interest.

7.55 I asked for a further submissions on this from the respondent. Respondent refers the case of **Chesterton Global Ltd and another v Nurmohmed 2015 ICR 1920**. There is some suggestion the question is not whether the disclosure was in the public interest per se, but whether the worker making the disclosure had a reasonable belief that it was in the public interest. There is a general question as to whether public interest in 43B refers to an objective test or whether what is envisaged is the subjective reasonable belief of the worker.

7.56 In this case, nothing turns on this point. I do not read section 43B as requiring me to analyse the principal motive of any claimant. There may be many occasions when there are mixed motives. In this case, it is absolutely clear that the claimant raised issues about the conduct of Mr Chapman, Mr Gill and Mr Nelson because he believed there was wrongdoing. His primary concern was a public interest concern. He believed there was undue political interference and inappropriate favours given to Mr Chapman. He believed such favours were wrong. It is clear that he had grounds to believe Mr Chapman's conduct was wrong. There is no doubt that his motivation for raising these matters was the public interest. I have no doubt that when raising those matters, as he clearly did, with his managers, he was making disclosures. He raised these matters long before the suspension. It may have been that his managers failed to act. His managers may have resented the claimant's intervention. However, the claimant's general objections were undoubtedly disclosures of information which were protected. Subjectively, the claimant thought there was a public interest. Objectively, there was a public interest.

7.57 Mr Gill was unhappy with the claimant. He felt that the claimant's disclosures were examples of the claimant not acting in a collegiate or corporate manner. There is no doubt there was conflict between the claimant and Mr Gill. Mr Gill, thereafter, suspended the claimant. The claimant retaliated by repeating his allegations in a formal context. I have no doubt this was a repetition of complaints which had been made previously to Mr Gill. There is no doubt that the claimant's primary purpose at that point was to protect himself. That is legitimate. That is

reasonable. It explains the timing of his action. The claimant's action was to escalate the disclosures which he had been making, in the public interest, all along. The suspension explains the timing of the formal complaint. The claimant's need to defend himself does not negate the claimant's underlying concern, which was based on public interest.

7.58 It follows that I find that the disclosures were made in the public interest. They tended to show a failure of duty. They were protected.

7.59 What was the sole or principal reason for dismissal?

7.60 There is some argument that the claimant was at times insensitive. There is some evidence that he could have acted in a more diplomatic way. However, he was not dismissed for being insensitive or undiplomatic. He was not dismissed for being rude. Had he been dismissed purely for such matters, I doubt very much it would have been within the band of reasonable responses.

7.61 The claimant was dismissed because it is alleged that there was a fundamental breakdown of mutual trust and confidence. That breakdown in mutual trust and confidence arises out of the alleged retaliation by the claimant and his previous protected disclosures. The alleged retaliation by the claimant is a shorthand reference to his protected disclosures. The causative link is made out. The sole or principal reason for his dismissal was the fact he made protected disclosures, which the respondent did not like.

7.62 My findings are based predominantly on Mr Bennett's own evidence. It is clear that Mr Bennett believed that it was appropriate to dismiss the claimant because his allegations against the managers were in some manner unfounded. He ignores the fact that the claimant's allegations against Mr Chapman were well-founded and appropriate. He ignores the fact that the allegations against Mr Chapman and those against Mr Gill and Mr Nelson were irretrievably bound together.

7.63 It appears to be the respondent's case that as Mr Bennett found that the claimant's allegations against Mr Gill and Mr Nelson were unfounded, it was reasonable and appropriate for him to dismiss. That is a fundamental misconception.

7.64 A disclosure is either protected or it is not. If it is protected, and an employer dismisses because the disclosure was made, there will be a finding of unfair dismissal. The fact that the manager believes it is untrue is irrelevant. The fact that the manager believes it is untrue does not make the disclosure any less protected. Even if the disclosure were to be untrue, it may still be protected. The only possible defence in this case was that the disclosures were not protected, as they were not made in the public interest. In this case, disclosing the wrongdoing of Mr Chapman, and the potential complicity of the claimant's managers, was in the public interest: it is exactly the sort of situation that the legislation was designed to protect.

7.65 I find that the respondent dismissed the claimant contrary to section 103A Employment Rights Act 1996.

Employment Judge Hodgson
6 April 2017