THE INDUSTRIAL TRIBUNALS

CASE REFS: 14280/20
17583/20

CLAIMANT: **A**

RESPONDENTS: **1. B Ltd**
2. C Ltd

JUDGMENT

The unanimous judgment of the tribunal is that:

1. That the claimant had not suffered an unlawful detriment as a result of a protected interest disclosure contrary to the Employment Rights (NI) Order 1996.

2. That the claimant had not been unfairly dismissed by B Ltd contrary to the 1996 Order.

3. That the claimant had been technically unfairly dismissed by C Ltd because of non-compliance with the statutory three step procedure contrary to the 1996 Order but, the compensatory award is reduced by 100% because of a ***Polkey*** deduction. Article 154(1)(a) requires that in these circumstances a minimum basic award of four weeks gross pay is awarded unless it causes injustice to the employer. The award is £2,120.00.

4. That the claimant did not suffer an unlawful deduction of wages by B Ltd contrary to the 1996 Order.

5. That the claimant had not been unlawfully denied the right to be accompanied at a disciplinary hearing by B Ltd contrary to the Employment Relations (NI) Order 1999.

6. That B Ltd did not fail to provide terms and conditions of service contrary to the 1996 Order.

CONSTITUTION OF TRIBUNAL

Vice President: **Mr N Kelly**

Members: **Mr A Barron**
Mr M McKeown

APPEARANCES:

The claimant appeared in person and was unrepresented.

Both respondents were represented by Mr O Friel, Barrister-at-Law instructed by Worthingtons Solicitors.

BACKGROUND

1. The background to these claims was unusual. It essentially involved three businesses together with the claimant and two former friends and colleagues, identified in this judgment as MT and DT. Relationships had soured between the three individuals as far back as 2017. MT and DT clearly believed that the claimant had been in the security services and that he had killed people. The claimant did not attempt at any point in the hearing to deny the truth of that belief. The tribunal was not drawn to any prior occasion when the claimant had denied the truth of the belief. In fact, the claimant appeared to actively reinforce that belief by references to his previous career, his *"colourful"* life, a security situation *"being in play",* the Armed Response Unit of the PSNI, etc.

   It was clear to the tribunal that MT in particular was wary of the claimant and concerned at the possibility of violence.

2. At the relevant times, three separate limited companies, identified in this decision as B Ltd, C Ltd and D Ltd were involved in different industrial processes in the same industry. Only B Ltd and C Ltd are respondents in this matter.

3. The claimant was the Operations Director for all three separate limited companies. At one point, he had been a statutory director of all three limited companies for the purposes of the Companies Acts. He had been a shareholder of C Ltd and D Ltd but not B Ltd.

4. The claimant alleged that he had made five public interest disclosures.

5. The claimant was dismissed as an employee by B Ltd on the ground of misconduct on 15 February 2020. He had been removed as a statutory director of B Ltd on 29 November 2019.

6. The claimant was dismissed as an employee by C Ltd on the ground of redundancy on 28 February 2020. He had been removed as a statutory director of C Ltd on 24 January 2020.

7. The claimant lodged two tribunal claims, which were consolidated and heard together. Those claims raised the following allegations for determination by the tribunal:

   (a) He alleged that he had been automatically unfairly dismissed by both B Ltd and C Ltd as a result of one or more protected and qualifying disclosures, contrary to the 1996 Order.

   (b) In the alternative, he alleged that he had been unfairly dismissed by both B Ltd and C Ltd contrary to the 1996 Order.

   (c) He alleged that he had suffered an unlawful deduction of approximately £5,000.00 by B Ltd from his final salary contrary to the 1999 Order.

   (d) He alleged that he had been denied his right to be accompanied at a disciplinary hearing by B Ltd, contrary to the 1999 Order.

(e) He alleged that he had not received statutory terms and conditions of service from B Ltd contrary to the 1996 Order.

8. The issues were identified and are contained in a document agreed between the claimant and the respondents. Where that document is unclear, the tribunal relies on the plain wording of the two claims, neither of which has been amended. It was made clear in the course of a Case Management Preliminary Hearing that no separate claim in relation to alleged detriment (other than dismissal) on the ground of public interest disclosures was being pursued by the claimant. With the exception of (c), (d) and (e) above, the bulk of the case was therefore restricted to the relevant dismissal procedure and the reasons for the claimant's dismissal as an employee by, separately, B Ltd and C Ltd. Evidence and argument should have been restricted to the relevant issues. Sadly, they were not.

9. The manner in which the claimant has conducted this litigation has been extraordinary. He deliberately sought at every opportunity to delay the hearing and to expand the case beyond the issues which were properly before the tribunal.

The tribunal notes that the claimant in a WhatsApp message on 16 February 2020 to DT, a director of B Ltd and C Ltd, referred to *"the retribution that has to follow".* He stated that that retribution *"will become a hobby"*.

The tribunal also notes that the claimant has lodged multiple complaints about the respondents, including complaints to the Hertfordshire Police, the Kent Police, the PSNI, Action Fraud, Companies House, the Insolvency Service, HMRC, Environment Agency, and the Health and Safety Inspectorate. There was no evidence that any of these complaints had resulted in either enforcement action or prosecutions.

10. In the current litigation, the claimant consistently and repeatedly failed to concentrate on any of the issues properly before the tribunal: which were principally his dismissal as Operations Director (or Operations Manager) by each of the two respondents, the reasons for those dismissals and the procedure in relation to those dismissals.

Instead, the claimant sought to introduce a plethora of unrelated allegations ranging from the alleged harassment of other employees to an allegation that details of his previous career in the security services had been given to someone who had then passed those details to someone in Armagh.

The claimant resisted all directions from the tribunal to concentrate on the matters properly before the tribunal and sought to delay and derail the hearing of his claims. It is highly improbable that the claimant had genuinely misunderstood those directions. The tribunal can only conclude that this had been a deliberate effort on the part of the claimant to disrupt the hearing and to increase the costs of the respondents as part of his *"hobby"* of *"retribution".*

PROCEDURE

11. The claim was heard between 29 November and 2 December 2021 in Adelaide House, Belfast.

12. On the first morning of the hearing, the respondents' solicitor, on the direction of counsel, informed the Tribunal Office, that she had received a telephone call from the claimant shortly before the hearing. That telephone call had been indistinct and difficult to understand. She stated that the claimant had warned her that there could be a police presence at the hearing, that he had mentioned the Armed Response Unit and that he had stated that he had had to move his family from their home at the weekend for security reasons.

    As far as the tribunal was aware, there was no police presence of any sort in relation to this hearing. The reason for that telephone call from the claimant to the respondents' solicitor was not clear. However, and in the absence of any obvious or logical reason, the tribunal concludes on the balance of probabilities that this had been an attempt by the claimant to unsettle the respondents and their legal representatives.

13. In the course of the Case Management procedure, directions had been given in relation to both the interlocutory procedure and the witness statement procedure. Those directions were eventually complied with by the parties.

14. The witness statement bundle included a statement from the claimant and statements from five other individuals on his behalf. Some of those witness statements were in the form of emails.

    The witness statement bundle also included four witness statements on behalf of the two respondents.

15. On 29 November 2021, between 10.00 am and 1.00 pm, the tribunal read the witness statements which had been exchanged between the parties and, to the extent necessary, parts of the exchanged documentation. At approximately 1.00 pm, the claimant swore to tell the truth and adopted his witness statement as his evidence in chief. The cross-examination of the claimant commenced and it concluded at 1.00 pm approximately on the following day.

16. Immediately before the tribunal started to hear evidence at approximately 1.00 pm on 29 November 2021, the claimant was asked to confirm that the witnesses, who had provided statements on his behalf, would attend the hearing to swear or affirm to their statements and to be cross-examined. He confirmed that they were *"on standby to come over"*. Those witnesses resided in Great Britain or Europe. He gave no indication that any witness was unable to attend the hearing or that any witness would only be able to attend remotely. He gave no indication that any witness had difficulties with illness, with travel or with travel restrictions.

17. On the next day, 30 November 2021, the claimant advised the tribunal that none of his witnesses could attend the hearing in Northern Ireland. This was a hearing which had been arranged in Adelaide House to facilitate an in-person hearing. Adelaide House does not have internet facilities for a remote hearing. The claimant had been legally represented for much of the case management process. His legal representative would have been aware of that fact and would have acted on the claimant's instructions. The claimant and his legal representative did not, at any stage in the case management process, indicate to the tribunal that remote attendance of witnesses was even a possibility. The claimant stated to the tribunal that he had simply *"assumed"* that remote attendance would be in order. However

he did not explain why this had not been raised in the course of the case management process or, at the very latest, on the previous day when he had been specifically asked to confirm whether his witnesses would attend the hearing to swear or affirm to their statements and to be cross-examined. At that point on 29 November 2021, the claimant had confirmed to the tribunal that the witnesses were *"on standby to come over"* (to Northern Ireland). That statement had been untrue. On 30 November 2021, the claimant put forward a variety of reasons for his witnesses' inability to attend the hearing in person, ranging from personal health issues to Covid travel restrictions. He confirmed that none of the personal health issues involved had arisen recently. There were no travel restrictions of any significance between Great Britain and Northern Ireland at this stage. No medical evidence or other supporting evidence for the witnesses' inability to attend the hearing in Northern Ireland was produced.

18. The claimant later stated that one of his witnesses would not be attending the hearing at all – even remotely. He stated that if the counsel for the respondent wished to do so, counsel for the respondent could telephone this witness who would be happy to confirm that his statement was true. The claimant would have been aware that this suggestion was nonsensical. The claimant was advised of the evidential value of an unsworn and unsigned witness statement where the witness, if he existed at all, did not adopt that statement and did not make himself available for cross-examination.

19. The claimant must have known on 29 November 2021, and indeed before that date, that his witnesses had had no intention of attending the hearing in Northern Ireland. They had not been *"on standby to come over".* The tribunal concludes that the claimant's statement on 30 November 2021 that the witnesses could not physically attend the hearing had been an attempt on the part of the claimant to disrupt and delay the hearing of this matter, to not just inconvenience the tribunal, but to cause additional cost, expense and trouble to the two respondents. To repeat what has been said above, the claimant had indicated in a WhatsApp message of 16 February 2020 that he would engage in *"retribution"* against the respondents and that it would be his *"hobby"*.

20. The tribunal set a timetable for the remote attendance of the claimant's remaining witnesses on the following day, Wednesday 1 December 2021. The hearing on that day was moved to Killymeal House to enable that remote attendance through video conferencing units. This caused considerable disruption to the work of the tribunal.

21. As set out above, the claimant's cross-examination took place during the afternoon of the first day (Monday) and the morning of the second day (Tuesday). When cross-examination concluded, the claimant appeared to have difficulty in understanding repeated directions about the nature and limitations of re-examination and, after several questions which were disallowed, he stated that he was *"done"*. At that point, the tribunal rose for lunch and directed the claimant that it would return at 2.00 pm, at which point it would hear from the claimant whether he had any further re-examination. At 2.00 pm, the claimant asked further questions on re-examination before concluding that re-examination.

22. At the conclusion of the claimant's cross-examination and re-examination on Tuesday, and in the absence of any of the witnesses that he was going to put forward on his behalf, the tribunal heard the first respondent's witness, out of the

normal sequence in cases of alleged public interest disclosure detriment, where all the claimant's evidence is usually presented first. Cross-examination and re-examination of that witness for the respondents took place until 4.00 pm on Tuesday, the second day of the hearing.

23. That cross-examination of that first respondent's witness proceeded for approximately 10 minutes. At that point the claimant stated that he was *"not feeling too well"* and that he needed a five minute break. The claimant did not appear to be visibly unwell. He had been cross-examining the witness without apparent difficulties. Nevertheless, he was granted five minutes and advised to return at that point. During that five minute break he sent a message through the tribunal clerk to say that he wished to speak to the Employment Judge in private about a *"security issue"*. He was advised that that was not possible and that any discussion that he wished to have would be with the full tribunal panel and with Mr Friel and his instructing solicitor present. That was apparently unsatisfactory to the claimant.

24. The cross-examination resumed with the full tribunal panel, the parties and witnesses present. The claimant immediately stated that there was "*a security issue in play*" and that he was on the *"watch list"* of the Armed Response Unit. He stated that he had been unable to contact his wife and that he was so distressed at what might have happened to his wife that he could not continue until he had contacted her. There was no mention of him being *"not feeling too well"* as he had stated a few minutes previously. Furthermore, the claimant had not been visibly trying to contact his wife during the start of the cross-examination of the first respondent's witness and he had made no application before that cross-examination had started for any delay because of a security issue or because he had been *"distressed"*. The claimant then stated that Hertfordshire Police were *"currently re-profiling an investigation"* into allegations of threats by one of the directors of B Ltd. He did not explain what *"re-profiling"* meant, but it sounded important. He stated he had had to take *"stringent measures"* to determine whether he and his family had been *"persons of interest"* to certain organisations. He did not explain what *"stringent measures"* he had taken, or identify the *"organisations"* but again it sounded important. He alleged that a witness for the respondents had disclosed *"certain information to unknown persons about my previous career".* He referred to *"certain individuals in Armagh".* He stated there *"was an ongoing investigation".* The tribunal took the view that this was another attempt to delay and disrupt the hearing of the claims to cause additional cost, expense and trouble to the respondents as part of his stated *"hobby"* of retribution. The claimant was directed to continue with his cross-examination. He refused to do so. The claimant was advised that he had ten minutes to contact his wife and that if that were not possible, and if he failed to return to continue the cross-examination of the first respondent's witness, his claims would be struck out by the tribunal without further notice.

25. The claimant returned after ten minutes to state that he had been able to contact his wife and was now happy to continue. Cross-examination and re-examination of the first respondents' witness concluded at 4.00 pm on Tuesday.

26. The tribunal moved to Killymeal House on Wednesday. The second witness for the respondents had travelled from England and had availability only on that day. That witness was heard next out of the normal sequence for witnesses. The

cross-examination was timetabled for one hour and the claimant concluded his cross-examination comfortably within that time limit.

27. The claimant's remaining four witnesses were heard remotely and were similarly timetabled for cross-examination and re-examination. Each concluded comfortably within the time limits set by the tribunal.

28. The third witness for the respondents then gave evidence and was cross-examined and re-examined. Again the cross-examination was completed within the time limit set by the tribunal.

29. At the conclusion of the third day (Wednesday), the parties were advised that the tribunal would resume at 10.00 am on the fourth day (Thursday), in Adelaide House, to hear the fourth and final witness for the respondent. The parties were also advised that the tribunal would hear all submissions from both parties starting at 2.00 pm on that day. The respondents would make their submissions first and the claimant second.

30. At that point, at the end of the third day, the claimant queried why he had not been cross-examined on his statement. It was pointed out to the claimant that he had been cross-examined on the afternoon of the first day and the morning of the second day. His response was *"but not on my statement!"*. The claimant appeared to be annoyed that the hearing was reaching a conclusion. The claimant was advised that he had been cross-examined.

31. On the fourth day (Thursday 2 December 2021), the final witness for the respondent was cross-examined and re-examined. As with the cross-examination of all the respondents' witnesses, the claimant appeared to either have real difficulty in understanding the nature of the claims he had brought and the role of the tribunal, or to be intent on wasting the time of the tribunal. Despite repeated directions, he raised unrelated and irrelevant allegations against the respondent companies and spent comparatively little time on examining the relevant issues including either the reasons for his dismissal from both B Ltd and C Ltd or his alleged protected interest disclosures.

32. The claimant continued to email the tribunal throughout this hearing with further documentation which was apparently entirely unrelated to the claims before the tribunal and without attempting to secure the agreement of the respondents and without even copying that correspondence to the respondents. He was directed to cease that practice.

33. Before the hearing commenced, the claimant had emailed the tribunal on 17 November 2021. He referred to evidence that he had believed the respondents would seek to present at the tribunal which in the claimant's opinion was not for public disclosure. That email stated *"the only genuine concern I have (and it is that of my family) is the issue and evidence that they will present which refers to a former role/career/vocation/duty that they claim I was involved in, namely my part and career within the security services".*

    The claimant asked that that their evidence should not be disclosed to the public.

At the direction of the Vice President and in response to that email, the parties had been provided with a copy of Rule 44 of the tribunal rules set out in the Schedule to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020. The parties were advised that the claimant's application would be considered at the full hearing. The claimant's response to that communication from the tribunal on 18 November 2021 was *"Thank you. My mind is at rest".*

34. When the matter was raised by the Vice President at the end of the tribunal hearing, on 2 December 2021, the claimant appeared to be unaware that he had made such an application. Even when the claimant was reminded of the nature of the application that he had made, his response was simply *"I was advised it was a public forum".*

35. The directors of the respondent clearly believed that the claimant had been in the security services and that he had killed people. The claimant appeared to be content with this belief and has never denied it. Indeed, he appeared to enjoy this belief and the fear that it engendered.

Under Rule 44, a tribunal may, on its own initiative or an application, anonymise the register and the judgment in order to protect the Convention rights of any person. The nature of the discussion in relation to the claimant's previous occupation as alleged (whether it had been true or not) was such that it would inevitably engage Article 2 (Right to Life). On that basis, and even though the claimant appeared confused about why or indeed if he had asked for anonymity, despite the clear terms of his email of 17 November 2021, the tribunal determined, in this particular circumstances of this case, that the decision should be anonymised on the basis of Rule 44(1)(b) and (3)(b).

RELEVANT LAW

Unfair Dismissal

36. The proper approach for an Employment Tribunal to take when considering the fairness of a misconduct dismissal is well settled and was considered by the Court of Appeal in ***Rogan v South Eastern Health & Social Care Trust [2009] NICA 47***.

37. Article 130 of the Employment Rights (Northern Ireland) Order 1996 provides:-

> *"130-(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 is either a reason falling within paragraph (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 paragraph if it –*

(b) relates to the conduct of the employee,

(4) where the employer has fulfilled the requirements of paragraph (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."

38. The Court of Appeal in ***Rogan*** approved the earlier decision of Court in ***Dobbin v Citybus Ltd [2008] NICA 42*** where the Court held:-

*"(49) The correct approach to [equivalent GB legislation] was settled in two principal cases – **British Home Stores v Burchell [1980] ICR 303** and **Iceland Frozen Foods Ltd v Jones [1983] ICR 17** and explained and refined, principally in the judgements of Mummery LJ, in two further cases **Foley v Post Office** and **HSBC Bank PLC (formerly Midland Bank) v Madden reported at [2000] ICR 1283** (two appeals heard together) and **J Sainsbury v Hitt [2003] ICR 111**.*

*(50) In **Iceland Frozen Foods**, Browne-Wilkinson J offered the following guidance:-*

"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by [equivalent GB legislation] is as follows:-

(1) the starting point should always be the words of [equivalent GB legislation] themselves;

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) 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;

(5) the function of an industrial tribunal, as an industrial jury, 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 the band the dismissal is fair; if the dismissal falls outside the band it is unfair."

(51) To that may be added the remarks of Arnold J in ***British Home Stores*** *where in the context of a misconduct case he stated:-*

> *"What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, it must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the tribunal would themselves have shared that view in those circumstances. It is not relevant, as we think, for the tribunal to examine the quality of the material which the employer had before them, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being "sure", as it is now said more normally in a criminal context, or, to use the more old fashioned term such as to put the matter beyond reasonable doubt. The test, and the test all the way through is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion."*

39. In ***Bowater v North West London Hospitals NHS Trust [2011] EWCA Civ 63***, the Court of Appeal considered a decision of the Employment Appeal Tribunal which had set aside a decision of an employment tribunal. The employment tribunal had determined that a remark made by a nurse in an Accident & Emergency

Department was not a sufficient basis for a fair dismissal. Lord Justice Longmore stated at Paragraph 18 of the decision that:-

> *"I agree with Stanley Burnton LJ that dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The EAT decided that the ET had substituted its own judgment for that of the judgment to which the employer had come. But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for the ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer."*

He continued at Paragraph 19:-

> *"It is important that, in cases of this kind, the EAT pays proper respect to the decision of the ET. It is the ET to whom Parliament has entrusted the responsibility of making what are, no doubt, sometimes, difficult and borderline decisions in relation to the fairness of dismissal."*

40. In ***Fuller v London Borough at Brent [2011] EWCA Civ 267***, the Court of Appeal again considered a decision of the Employment Appeal Tribunal which had set aside the decision of an employment tribunal on the basis that the employment tribunal had substituted its view for the decision of an objective reasonable employer. Lord Justice Mummery stated at Paragraph 7 of the decision that:-

> *"In brief the council's case on appeal is that the ET erred in law. It did not apply to the circumstances existing at the time of Mrs Fuller's dismissal the objective standard encapsulated in the concept of the 'range or band of reasonable responses'. That favourite form of words is not statutory or mandatory. Its appearance in most ET judgments on unfair dismissal is a reassurance of objectivity."*

At Paragraph 38 of the decision, he continued:-

> *"On a proper self-direction of law I accept that a reasonable ET could properly conclude that the council's dismissal was outside the band or range of reasonable responses and that it was unfair. If, as I hold, the ET applied the objective test, it did not err in law and there was no ground on which the EAT was entitled to set it aside or to dismiss Mrs Fuller's claim."*

41. In ***Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721***, the Court of Appeal again considered a decision of an Employment Appeal Tribunal which set aside the decision of an employment tribunal on the ground that that Tribunal had substituted their judgment of what was a fair dismissal for that of a reasonable employer. At Paragraph 13 of the judgment, Lord Justice Elias stated:-

> *"Section 98(4) focuses on the need for an employer to act reasonably in all the circumstances. In **A v B [2003] IRLR 405**, the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation*

where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite"

*"In **A v B** the EAT said this:- Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by laymen and not lawyers. Of course even in the most serious cases it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiry should focus no less on any potential evidence that may exculpate or least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."*

42. The Court of Appeal in Northern Ireland further examined the approach that a tribunal should adopt in claims of unfair dismissal in the case of ***Connolly v Western Health & Social Care Trust [2017] NICA 61***.

In that case, a nurse, who was on duty in a hospital ward and who was experiencing the symptoms of an asthma attack, used a Ventolin inhaler from the locked ward stock. She had intended to replace it with another inhaler which would have been supplied to her on her own prescription. She had not sought prior permission to use the hospital's inhaler; she had not approached any doctor in the hospital for assistance; she had not attended the Accident & Emergency Department for assistance. She did not disclose the use of the inhaler until her next day on duty two days later. It was not in dispute that there had been misconduct on the part of the claimant in using a prescription only medicine which was part of hospital stock. The issue in all of this was whether the misconduct had been sufficiently serious to ground summary dismissal for gross misconduct.

43. The WHSCT had been concerned that the claimant had intended to replace the inhaler from her own supply. That would have broken the chain of supply within the hospital and in the employer's view would have presented a serious risk to the health of patients. The employer was also concerned that the claimant had sought, in response to the disciplinary proceedings, to stress that Ventolin had not been a controlled drug (although it had been a prescription only drug). The employer felt the claimant still believed that her conduct was permissible in certain circumstances and that therefore the behaviour could recur. The claimant was summarily dismissed for gross misconduct.

44. This case was the subject of two separate appeals to the Court of Appeal. However, the later appeal is the one relevant to the present case. It was a split decision. The minority decision, reached by Gillen LJ, found that the tribunal decision had been correct, in that it had held that there had been a fair dismissal for gross misconduct. The hospital rules had made it clear that '*misappropriation*' of drugs was a potential offence. The claimant had not notified any other member of staff of her use of the inhaler before using it or for the rest of that shift. She had attended work for her next shift some two days later and had only then informed her manager that she had used the Ventolin inhaler from ward stock.

45. In essence, Gillen LJ determined that the decision to summarily dismiss the claimant in all the circumstances of the case had been a decision which a

reasonable employer could reasonably have reached, even if may not have been the decision that the tribunal or the court would have reached, had it been determining the issue at first instance.

46. After citing the usual authorities, Gillen LJ approved the following statement in the tribunal's findings:-

> *"It may not re-hear and re-determine the disciplinary decision originally made by the employer; it cannot substitute its own decision for the decision reached by that employer. In the case of a misconduct dismissal, such as the present case, the tribunal must first determine the reason for the dismissal: that is, whether in this case the dismissal was on the basis of conduct and must determine whether the employer believed that the claimant had been guilty of that misconduct. The tribunal must then consider whether the employer had conducted a reasonable investigation into the alleged misconduct and whether the employer had then acquired reasonable grounds for its belief in guilt. The question is not whether the tribunal will have reached the same decision on the same evidence or even on different evidence. The tribunal must then consider finally whether the decision to dismiss was proportionate in all the circumstances of the case."*

47. Gillen LJ then noted that the tribunal had determined that the employer had been concerned by the use of the prescription only inhaler from the ward stock which had been kept under lock and key, the claimant's intention to replace that inhaler with an inhaler from her own supply and that she knew the use of such medication was wrong. The tribunal had determined that the employer had held a genuine belief in gross misconduct which had been reached on reasonable grounds following a reasonable investigation and that it was not for the tribunal to substitute its own opinion or penalty for that of the employer in the circumstances of this case. Gillen LJ determined that:-

> *"49. I consider that there is no basis upon which this court could consider that this conclusion was plainly wrong or that it could not have been reached by any other reasonable tribunal. Taking a prescription drug from under lock and key for the appellant's own use is clearly an extremely serious matter which no hospital can or should tolerate. Not only was the appellant well aware that this was prohibited behaviour but it could easily have been avoided by seeking assistance from A and E or the duty doctor.*
>
> *50. It was not unreasonable to conclude that this was aggravated by her failure to report the matter until two days later. Moreover it was perfectly reasonable for the Panel, made up of employees of the Trust well versed in Trust procedures and policies, to take the view that intent to personally replace it infringed the pharmacy supply chain. Frankly it scarcely requires an expert to inform the court that decisions to replace prescribed medications in principle should not be taken at this level irrespective of how simple an exercise in replacement in individual instances may appear to be."*

48. Gillen LJ concluded:-

> *"57. Whilst this may not necessarily have been the conclusion that this court would have reached had it been hearing the matter at first instance, I find no basis for substituting our view for that of the Panel and the Industrial Tribunal hearing this matter. I therefore dismiss this ground of appeal."*

49. The majority of the Court of Appeal in ***Connolly***, Deeny LJ and Weir LJ, reached a different conclusion. Firstly, they concluded that the decision of the respondent to dismiss the claimant, in all the circumstances of the case, was not a decision which a reasonable employer could reasonably have reached. Secondly, it determined that the decision of the industrial tribunal was '*plainly wrong*'. That second decision is based on the facts of the ***Connolly*** decision and on the view taken by the majority of the Court of Appeal in relation to the wording of the tribunal decision in that case. The first decision, and the approach taken by the majority to the objective standard of reasonableness, is of primary importance to the present decision.

50. Deeny LJ stated that:-

> *"Reaching a conclusion as to whether the dismissal is fair or unfair 'in accordance with equity and the substantial merits of the case' as required by Article 130(4)(b) would appear to involve a mixed question of law and fact."*

51. Deeny LJ then cited the well-known paragraph in ***Iceland Frozen Foods Ltd v Jones*** (above) which sets out the '*reasonable responses*' test. He went on to quote further from that decision to include the following:-

> *"Although the statement of principle in **Vickers Ltd v Smith [1977] IRLR 11** is entirely accurate in law, for the reasons given in **N C Watling & Company Ltd v Richardson [1978] ICR 1049**, we think industrial tribunals would do well not to direct themselves by reference to it. The statement in **Vickers Ltd v Smith** is capable of being misunderstood so as to require such a high degree of unreasonableness to be shown that nothing short of a perverse decision to dismiss can be held to be unfair within the section. This is how the industrial tribunal in the present case seems to have read **Vickers v Smith**. That is not the law. The question in each case is whether the industrial tribunal considers the employer's conduct to fall within the band of reasonable responses and industrial tribunals would be well advised to follow the formulation of the principle in **N C Watling & Company Ltd v Richardson [1978] ICR 1049** or **Rolls Royce Ltd v Walpole [1980] IRLR 343**."*

52. Deeny LJ then pointed out that gross misconduct justifying dismissal must amount to a repudiation of the contract of employment by the employee:-

> *"So the conduct must be a deliberate and wilful contradiction of the contractual terms."*

53. Deeny LJ stated that:-

> *"The facts as found are that she [the claimant] took five puffs of this inhaler when undergoing an asthmatic attack, without permission. The tribunal accepted the Appeal Panel's view that this was aggravated by her failure to report the matter until two days later.*
>
> *It seems to me that, even taking into account the delay, for which an explanation was given and was not rejected as a finding of fact, that cannot constitute 'deliberate and wilful conduct' justifying summary dismissal. Her terms of employment do not seem to have expressly prohibited such a use. The Code of Conduct is ambiguous at best on the topic. If she had asked the Ward Sister for permission before she used the inhaler and the Sister had refused her permission and she had nevertheless gone ahead and had used it one might have had the sort of act of disobedience contemplated by the Court of Appeal in* ***Laws v London Chronicle Limited****. That would have been a deliberate flouting of essential contractual conditions, ie following the instructions of her clinical superiors. But that is not what happened here. Furthermore, I agree with the statements in Harvey … that dismissals for a single first offence must require the offence to be particularly serious. Given the whole list of matters which the employer included under the heading of Gross Misconduct it is impossible, in my view, to regard the nurse's actions as 'particularly serious'."*

54. Deeny LJ stated:-

> *"For this court to approbate the tribunal's decision upholding as within a reasonable range of responses the summary dismissal of an employee from her chosen profession on these facts without any prior warning as a 'repudiation of the fundamental terms of the contract' would be to turn language on its head. Employment law is a particular branch of the law of contract. With statutory interventions it has, of course, developed a character of its own. But any dismissed employee opting to go into a court of law and claim damages for breach of contract at common law against an employer who had summarily dismissed them for using a Ventolin inhaler while suffering from an asthmatic attack and delaying two days in reporting that, particularly when it was their 'first offence', could be tolerably confident of success before a judge, in my view."*

55. Deeny LJ held further that:-

> *"The interpretation of what, in this jurisdiction, is Article 130(4)(a) of the 1996 Order has been fixed by a series of appellate courts over the years, ie that whether an employer acted reasonably or unreasonably is to be addressed as whether an employer acted within a band of available decisions for a reasonable employer even if not the decision the tribunal would have made. That test, expressed in various ways, is too long established to be altered by this court, and in any event has persuasive arguments in favour of it. But it is necessary for tribunals to read it alongside the statutory provision of equal status in Article 130(4)(b), ie that that decision 'shall be determined in accordance with equity and the substantial merits of the case'. … ."*

56. The statutory test of unfairness in Article 130 of the 1996 Order (and in its predecessor) is in simple terms, and should be straightforward. It is difficult to see why it has generated such an extended discussion in case law over the last 40 years. The words of Article 130 comprise the only statutory test of unfairness. The formulation of the '*band of reasonable responses*' test, variously worded in different decisions, cannot be a substitute for the proper application of the statutory test. It may best be regarded as a double-check to be applied to ensure that, in applying the statutory test, the tribunal has avoided substituting its own views, on what it would have done in the relevant circumstances, for the decision of the employer. In other words it is, as the Court of Appeal (GB) stated in ***Fuller*** (above), a '*reassurance of objectivity*'.

It is therefore important to remember that the '*reasonable responses*' test, although long-established as pointed out by the Court of Appeal in ***Connolly*** (above), appears nowhere in the statute. This is a statutory tribunal whose function is to apply the statute. Non-statutory wording or non-statutory paraphrasing of the statutory test can only be of assistance where it is remembered that it cannot substitute for the statutory test which sets out the remit and the function of the tribunal. In ***Iceland*** (above), it was stressed that the starting point should be the words of the legislation. In ***Connolly*** (above) the Court of Appeal (Northern Ireland) emphasised the importance of applying the statutory test as set out in the words of Article 130(4)(a).

57. There is no difference between the formulation of the legal principles expressed in the majority judgment and in the minority judgment in the case of ***Connolly***. The detailed formulation of those principles set out by Gillen LJ at Paragraph 28(i) – (xvi) of the decision covers, in full, the procedure which should be adopted by an industrial tribunal in assessing the fairness or unfairness of a misconduct dismissal. It is not disputed or challenged in any way in the majority judgement.

58. In ***Reilly v Sandwell Metropolitan Borough Council [2018] UK SC16***, the Supreme Court looked at a case of alleged unfair dismissal. The facts of that particular case are not of assistance to the present matter. However it is notable that Lady Hale, the President of the Supreme Court stated;

> *"the case might have presented an opportunity for this court to consider two points of law of general public importance which have not been raised at this level before."*

The first point is not of relevance to the present matter. However, Lady Hale described the second point in the following way;

> *"nor have we heard any argument on whether the approach to be taken by a tribunal to an employer's decisions, both as to the facts under section 98(1) to (3) as the Employment Rights Act 1996 first laid down by the Employment Appeal Tribunal in* ***British Homes Stores Limited v Burchell [1978] ICR 303*** *and definitively endorsed by the Court of Appeal in* ***Foley v Post Office [2000] ICR 1283,*** *is correct."*

She went on to state;

> *"Even in relation to the first part of the inquiry, as to the reason for the dismissal, the **Burchell** approach can lead to dismissals which were in fact fair being treated as unfair and dismissals which were in fact unfair being treated as fair. Once again, it is not difficult to think of arguments on either side of this question but we have not heard them."*

59. Lady Hale went to state;

> *"34. There may be good reasons why no one has challenged the **Burchell** test before us. First, it has been applied by Employment Tribunals, in the thousands of cases which have come before them, for forty years now. It remains binding upon them and on the Employment Appeal Tribunal and Court of Appeal. Destabilising the position without a very good reason would be irresponsible. Second, Parliament has had the opportunity to clarify the approach which is intended, should it consider that **Burchell** is wrong, and it has not done so. Third, those who are experienced in the field, whether acting for employees or employers, may consider the approach is correct and does not lead to injustice in practice.*
>
> *35. It follows that the law remains as it has been for the last 40 years and I express no view about whether that is correct.*

60. Therefore, while the Supreme Court recognised the long standing of the ***Burchell*** test, and pointed out the significant difficulties inherent in challenging that non statutory test at this stage, it did, rather pointedly, indicate that they were not expressing any view about whether the non-statutory test is correct and they stressed that they had not heard any argument in relation to that point. At the least, the Supreme Court questioned whether the "reasonable responses" test should be challenged at the final appellate level.

Automatically Unfair Dismissal

61. Article 130A of the 1996 Order, as amended by the 2003 Order, provides:-

> *"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if –*
>
> *(a) one of the procedures set out in Part I of Schedule 1 to the Employment (Northern Ireland) Order 2003 (dismissal and disciplinary procedures) applies in relation to the dismissal,*
>
> *(b) the procedure has not been completed, and*
>
> *(c) the non-completion of the procedure is wholly or mainly attributable to failure by the employer to comply with its requirements.*
>
> *(2) Subject to Paragraph (1) [tribunal's emphasis], failure by an employer to follow a procedure in relation to the dismissal of an employee shall not be regarded for the purposes of Article 130(4)(a) as by itself*

making the employer's action unreasonable if he shows that he would have decided to dismiss the employee if he had followed the procedure."

62. The statutory procedure comprises 3 stages.

63. Step 1 requires:

> *"(1) The employer must set out in writing the employee's alleged conduct or characteristics, or other circumstances, which lead him to contemplate dismissing or taking disciplinary action against the employee.*
>
> *(2) The employer must send the statement or a copy of it to the employee and invite the employee to a meeting to discuss the matter."*

64. Step 2 requires:

> *"(1) The meeting must take place before action is taken, except in the case where the disciplinary action consists of suspension.*
>
> *(2) The meeting must not take place unless –*
>
> *(a) the employer has informed the employee what the basis was for including in the statement under paragraph 1(1) the ground or grounds given in it, and*
>
> *(b) the employee has had a reasonable opportunity to consider his response to that information.*
>
> *(3) The employee must take all reasonable steps to attend the meeting.*
>
> *(4) After the meeting, the employer must inform the employee of his decision and notify him of the right to appeal against the decision if he is not satisfied with it."*

65. Step 3 requires:

> *"(1) If the employee does wish to appeal, he must inform the employer.*
>
> *(2) If the employee informs the employer of his wish to appeal, the employer must invite him to attend a further meeting.*
>
> *(3) The employee must take all reasonable steps to attend the meeting.*
>
> *(4) The appeal meeting need not take place before the dismissal or disciplinary action takes effect.*
>
> *(5) After the appeal meeting, the employer must inform the employee of his final decision.*

Unfair dismissal/Selection for Redundancy

66. Article 130(1) of the Employment Rights (Northern Ireland) Order 1996 provides:-

> *"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 Paragraph (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"*

Article 130(2) of the 1996 Order provides:-

> *"A reason falls within this paragraph if it –*
>
> *...*
>
> *(c) is that the employee was redundant;*
>
> *... ."*

67. In ***Polkey v AD Dayton Services Ltd [1988] ICR 142***, Lord Bridge stated:-

> *"In a case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation."*

68. In ***Langston v Cranfield University [1998] IRLR 172*** the EAT stated:-

> *"Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer."*

69. In ***Mugford v Midland Bank [1997] IRLR 208***, the EAT stated:-

> *"It will be a question of fact and degree for the tribunal to consider whether consultation with the individual and/or his union was so inadequate as to render the dismissal unfair. A lack of consultation in any particular respect will not automatically lead to that result. The overall picture must be viewed by the tribunal up to the date of termination to ascertain whether the employer has or has not acted reasonably in dismissing the employee."*

70. Under the 1996 Order, as amended by the Employment (Northern Ireland) Order 2003, a dismissal will be automatically unfair if a three step statutory procedure is not followed by the employer. That, in summary, is writing to the employee with the

grounds of potential dismissal, holding a meeting with the employee, reaching a decision, and holding an appeal.

Protected Disclosures

71. The Public Interest Disclosure (Northern Ireland) Order 1998 amended the 1996 Order and introduced provisions protecting workers from suffering detriment on grounds of having made protected disclosures.

72. The provisions in the 1996 Order engaged in this case are Articles 67B(1)(a) (b) and (d) which list (in an exhaustive list) the categories of what are termed *"relevant failures".* The provision states where relevant as follows:

> *"67B. (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.*
>
> *….*
>
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered."*

Reasonable Belief/Public Interest

73. The claimant must hold reasonable belief at the time he raises issues of concerns that the information conveyed tends to show a relevant failure.

74. The following principles derived from ***Babula v Walthan Forest College [2007] EWCA Civ 174*** case are relevant to this case as follows:

(i) The test of reasonable belief involves both a subjective test of the worker's belief and an objective assessment of whether the belief could reasonably have been held. In other words what did the claimant believe at the time and was it reasonable of her to believe that.

(ii) The test of reasonable belief applies to all elements of the test of whether the information disclosed tends to show a relevant failure including whether the relevant legal obligation in fact exists.

(iii) The burden is on the worker making the disclosure to establish the requisite reasonable belief.

75. The disclosure must have been made in the public interest.

Detriment

76. Article 70B of the 1996 Order provides:

> *"A worker has the right not to be subjected to any detriment by any act or deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure".*

77. Detriment is determined using the ***Shamoon*** test which is whether a reasonable worker would or might take the view in all the circumstances that the treatment was to the claimant's detriment in the sense of being disadvantaged. It is not necessary to demonstrate some physical or economic consequence. The tribunal assesses this objectively from the claimant's point of view by assessing whether the claimant's opinion that she had suffered a detriment was a reasonable one to hold.

78. The burden of proof in public interest disclosure detriment cases is set out in Article71(2) of ERO and operates in the same way as it operates in Trade Union detriment cases and that differs from discrimination claims. The initial burden is on the claimant to prove that he made protected disclosures and that he suffered detriment due to an act and/or a deliberate failure to act on the part of the employer. If he proves those two elements the burden shifts to the employer to provide an explanation for the detrimental treatment which is not tainted by the fact of the claimant having made protected disclosures. In those circumstances, it would therefore be for the respondent at that point to prove that the treatment was in no sense whatsoever on grounds of the protected disclosures.

ANONYMITY ORDER

79. Rule 44 of the Industrial Tribunals Rules in the Schedule to the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020 provides:

> *"(i) A tribunal may at any stage of the proceedings, on its own initiative, or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings. Such an order may be made in any of the following circumstances—*
>
> *(b) in order to protect the Convention rights of any person;"*

80. Rule 44 also provides for the anonymisation of Judgments.

81. Given the evidence which the tribunal heard in relation to the claimant's previous employment, and given that evidence was not in any way rebutted or challenged by the claimant, the tribunal on balance concludes that it is necessary to anonymise the Judgment and the Register in this matter to protect the Article 2 Convention Rights of the claimant, and the Judgment and the Register is therefore anonymised.

CREDIBILITY

82. In ***Thornton v Northern Ireland Housing Executive [2010] NIQB 4***, Gillen J stated at paragraph 13 in connection with the problem of assessing the credibility of witnesses:

"The Court must pay attention to a number of factors which, inter alia, include the following:

- *the inherent probability or improbability of representations of fact.*

- *The presence of independent evidence tending to corroborate or undermine any given statement of fact.*

- *The presence of contemporaneous records.*

- *The demeanour of witnesses eg does he equivocate in cross-examination.*

- *The frailty of the population at large in accurately recollecting and describing events in the distant past.*

- *Does the witness take refuge in wild speculation or uncorroborated allegations of fabrication?*

- *Does the witness have a motive for misleading the Court?*

- *Weigh up one witness against another."*

Claimant and Claimant's Witnesses

83. The tribunal concluded that the claimant's evidence was not at all credible for the following reasons:

(i) In relation to a bank debenture, which had been executed by C Ltd in favour of B Ltd, the claimant had initially denied that the signature on the debenture had been his signature. He had stated that the signature had been *"close"* but it had not been his signature. The claimant alleged to Kent Police, Action Fraud, Companies House, the Insolvency Service and the PSNI that he had not signed the debenture and that his signature had been a forgery. However, the claimant readily accepted in evidence before the tribunal that the signature had been his and put forward an entirely different version of events ie that he had signed a blank debenture form. This was a simple issue and the claimant had clearly initially lied on repeated occasions about his signature on the debenture.

(ii) The claimant had initially denied that he had known he had been a statutory director of a further limited company E (UK) Ltd. He had stated that he had not known that he had been a statutory director of that company until 2019. Then he said that he had passed the house of CM, the then director of E (UK) Ltd one night and had called in. During that visit, he had signed a director's nomination form in case it was ever required. That nomination form had been blank. The claimant's explanation in cross-examination was that he had signed a blank director's nomination form and that until 2019 he did not know if it had ever been activated or even the particular limited company to which he had been appointed director. It seems highly unlikely that an experienced businessman would sign such a blank nomination form

(in the same way as the claimant also alleges he signed a blank debenture) thereby incurring potential civil and indeed criminal liability in respect of an unknown limited company. The tribunal concludes that the claimant's version of events was entirely untrue. Furthermore, this version of events was not supported by CM who the claimant had called on his behalf to give evidence to the tribunal. CM stated that he had asked the claimant to take over as sole statutory director when CM had decided to wind E (UK) Ltd up because CM had not been well. He had asked the claimant *"to take up the reins"* of that company. CM did not state that a blank nomination form had been signed earlier by the claimant and then activated without the claimant's knowledge.

Furthermore, the claimant was unable to explain how returns had been compiled during this period by the accountant for E (UK) Ltd at a time when the claimant had been sole statutory director, without the knowledge of the claimant.

The claimant also said in the course of the disciplinary appeal hearing held by B Ltd on 26 March 2020 that he had claimed expenses for work done on behalf of E (UK) Ltd. The claimant stated that those expenses were for *"the odd phone call, or a drive here or there in Northern Ireland or Ireland".* That statement was despite the claimant having told B Ltd during the earlier disciplinary hearing on 3 February 2020 that he had received no remuneration or payments from E (UK) Ltd. In contrast, CM, called on behalf of the claimant, had stated that the claimant and CM had been doing nothing in relation to E (UK) Ltd. CM had suffered a mental collapse during this period and had been incapable of work. He had been on medication and had been talking *"gibberish".* The company had been moribund and no work was being performed by that company. The claimant had done no work and had received no expenses. It was pointed out to CM, during his cross-examination, that the bank balance of this company had increased by approximately £12,000.00 in the relevant period. CM suddenly remembered that work had been done by this moribund company during this period but that he (CM) had done it all despite his previous evidence about being incapable on medical grounds. CM maintained that the claimant had done no work for this company and that he had been appointed as sole statutory director because it was *"good business practice"*.

The shifting nature of the claimant's evidence in this regard and the shifting nature of CM's evidence in this regard renders the claimant's denial of knowledge of his sole directorship of E (UK) Ltd as incredible and self-serving.

(iii) As recorded above, the claimant's behaviour at the tribunal was unusual. He had commenced his cross-examination of DT and after approximately ten minutes he told the tribunal that he was *"not feeling too well"* and asked for a five minute break. During that five minute break he asked to speak directly and in private to the Employment Judge and that was refused. On the resumption of the cross-examination, the claimant stated that he was under a security threat and that he could not contact his wife. He stated that he was on the Armed Response Unit watch list. He stated that he could not

continue with the cross-examination of DT until he had been able to contact his wife.

The claimant did not at that point mention *"not feeling too well"*. Furthermore there had been no indication during his cross-examination of DT, or earlier, that he had been trying to contact his wife and had been unsuccessful. There was no evidence to support any of his claims of an security risk. The tribunal concluded that the claimant had been simply trying to disrupt and delay the tribunal proceedings to cause the maximum disruption and inconvenience to his former employers. The claimant was advised that he had ten minutes to contact his wife, if that indeed had been a difficulty, and if he did not return in ten minutes to continue his cross-examination of DT, his claims would be struck out without further notice. He returned after ten minutes to state that he had *"been able to contact his wife"*.

None of the claimant's actions appeared genuine and were frankly bizarre

(iv) The claimant repeatedly alleged in the course of the tribunal proceedings that he had lodged an internal appeal against his redundancy from C Ltd. The claimant was quite specific, and in the unanimous opinion of the tribunal, deliberately untruthful:

Q. You didn't appeal?
A. I did – almost immediately.

Q. Did you appeal?
A. I did.

Q. Where is it?
A. If it is not in the bundle, it is not in the bundle.

EJ. Did you respond to (the Company Secretary) by 3 March 2020 with grounds? (as directed in the redundancy letter of 28 February 2020)
A. Yes I did.

Later, the claimant insisted again that he had lodged an internal appeal against the redundancy and that he wanted time to find the document. He asked for permission to *"come back to it".* He was told that the matter would be raised again after the lunch break which followed the end of his cross-examination on Tuesday. When the issue was raised again at that point, the claimant was unable to produce an appeal.

He had not lodged any such internal appeal and he knew he had not lodged any such appeal. When challenged, he could not identify any such appeal, either oral or written. He fell back on referring to his expressions of dissatisfaction with the potential redundancy which had been made before the redundancy decision. It was also clear on the evidence, and not rebutted by the claimant, that the claimant had been given a further opportunity by the respondents' solicitors, on 16 March 2020 to submit an internal appeal against his redundancy and he had again failed to do so.

That repeated assertion that he had lodged an appeal, when he clearly had not done so, and when he knew that he had not done so, can only mean that the claimant had been either completely detached from reality, or that he had been deliberately seeking to spin out the tribunal hearing and to cause further costs and disruption to the respondents. Having observed the claimant give evidence, the tribunal prefers the latter explanation. The claimant, throughout the hearing, appeared to regard the proceedings with a certain level of amusement.

(v) The claimant sent the following WhatsApp message to DT on 16 February 2020, just after he had been dismissed from B Ltd:

> *"D, from one so called friend to another, off my personal phone to yours and without prejudice. I have never experienced such betrayal in my colourful and well-travelled life. Your words of support have materialised into complicant (sic) lies. I have been treated like a dog yet I protected you, your business and made you and M very wealthy. From M, I am not at all surprised but you, such pontification and meaningless empty words I am speechless. The retribution that has to follow will not consume me, but it will become a hobby. The loss of my positions which I held so dear is now totally forgotten and worthless. I cannot express the total devastation your actions have impacted on us personally. I wish you luck but no success."*

When it was put to the claimant in cross-examination that this message sounded like a threat, the claimant's response was evasive and disingenuous. It had not been a threat. It had been *"a statement"*. It had been a *"biblical"* reference. *"I wished him luck".* It had been said *"in banter"*. *"It was not banter"*. *"You could deem it serious". "It is a serious matter". "Why would I wish him success?".*

The message had obviously been threatening; particularly given the view in the respondent companies that the claimant had been in the security services and had killed people, a view which the claimant did not deny or rebut. The claimant's refusal to accept that the message had been threatening impacted adversely on his credibility.

(vi) The claimant said in clear terms in WhatsApp messages on 20 December that had been heading towards Bangor in North Wales where MT, one of the respondents' directors, had resided. He had stated *"Mikes it is then",* clearly indicating that he was intending to visit MT. He then admitted *"so checked into Premier Inn en route to airport/ferry and card decline. Oh dear me. You guys obviously don't have my interests at heart and neither do I yours."*

The claimant in another WhatsApp message to DT, another director of the respondents, indicated clearly that he had got close to MT's house with the intention of causing him harm. He stated: *"DT, without prejudice, (funny as fuck but true) was talked down, got as far as Bangor, ferry crossing was up and down like a hoars (sic) drawers Yes, they were right. MT and the destruction of (B Ltd) and its people is just NOT worth it. Me going to jail or worse is not worth it. Just fecking home."* He therefore had stated in clear terms that he had changed his mind about approaching MT rather than end

up in jail. However in evidence to the tribunal he sought to allege that the entire WhatsApp message had been *"banter"* and entirely untrue. He stated that he had never gone to North Wales and there had been no threat. The claimant refused to see why his message could be reasonably construed as threatening.

That position is simply not credible, particularly given the belief of the directors of the respondents that the claimant had been in the security services and had killed people: a belief that the claimant failed to rebut or even challenge.

AP

84. The first witness called on behalf of the claimant was a former employee of the Automobile Association. It seemed to be the case that the claimant had called this individual to give evidence in relation to whether or not B Ltd had engaged in discussions with the AA about the prospect of battery recycling. That issue related to one of the misconduct charges on which the claimant had been dismissed from B Ltd ie the conflict of interest that he had allegedly created by being a sole Director of E (UK) Ltd which had been engaged in battery recycling. It was clear on the evidence that a director of E (Europe) Ltd had emailed the AA in 2005 about the potential for B Ltd engaging in battery recycling on behalf of the AA. It was clear from the correspondence shown to the tribunal and from the evidence of the respondents that that had been an active project and a potential line of business for B Ltd.

85. On behalf of the claimant, and in response to specific questions put to AP by the claimant, AP produced an email statement to the tribunal in which he said:

> *"To my knowledge, during the period, the AA did not enter into any trials for doing battery recycling."*

The tribunal was not taken to the questions that the claimant had put to AP to elicit such a response, but it was clear that this statement had been requested in those terms by the claimant to rebut the evidence to be produced on behalf of the respondent that B Ltd had had a potential and viable line of business in relation to battery recycling with the AA.

86. However, it was absolutely clear from the cross-examination of AP and indeed from the earlier part of his witness statement, that his involvement with the AA had been related solely to recycling fuel where vehicles had been mis-fuelled on garage forecourts. He had had absolutely no involvement with battery recycling. He had had no reason to have knowledge of any proposals to engage in battery recycling or of any trials in relation to battery recycling. In cross-examination, he made it clear that his only involvement with batteries had been in relation to torch batteries which had been used by AA patrolmen. AP's evidence, although honest and clear, added nothing at all to the determination of the claims before the tribunal and, in response to specific but unknown questions put by the claimant to AP, had been framed in a manner which was calculated to give a misleading impression to the tribunal. AP had had no involvement in battery recycling and would have had no reason to know of any discussions in relation to battery recycling and indeed of any

trials in relation to battery recycling. The time of the tribunal was wasted by the claimant in calling this witness.

CM

87. Similarly, the tribunal has concluded that the evidence of CM is simply not credible for the following reasons:

(i) CM maintained in cross-examination that E (UK) Ltd was not operating at all during 2017 and 2018 and that the claimant had been appointed as sole statutory director during this period simply because it had been *"good business practice"* and because CM had been incapable of functioning because of ill-health. He had been on Prozac and had been talking "*gibberish*".

(ii) When it was put to CM that the accounts for the relevant period showed an increase in the bank balance for that company of approximately £12,000.00, CM affected surprise and looked at other emails on a different screen to which the tribunal did not have access. He stated that he was "*surprised"* and that those emails disclosed that he had in fact dealt with deliveries of batteries for recycling and that the company had indeed been operating during this period.

(iii) The fact that CM could within a space of a few seconds access emails, which the tribunal could not see, and which radically changed his evidence was entirely unconvincing. Furthermore the fact that the bank balance of the relevant company had increased by that amount in such a short space of time indicated that there had been a considerable amount of battery recycling going on in 2017 and 2018. CM's evidence that he had been having a breakdown during this period, that he had been in Prozac, and that he had simply not been working, was not consistent with his revised evidence under cross-examination.

(iv) Similarly, there is no rational explanation for the claimant's appointment as sole statutory director of this company during this period unless he had been actively working for that company despite CM's clear denials. Furthermore the claimant had admitted in the internal disciplinary appeal to B Ltd that he had claimed expenses during this period and that he had worked, albeit intermittently, during this period for E (UK) Ltd.

88. CM's evidence was simply not credible.

JH

89. The next witness for the claimant had included in her statement a number of totally extraneous and irrelevant allegations. She was warned before commencing her cross-examination that those allegations had nothing at all to do with the current claims and that they would be disregarded by the tribunal. She was also advised that she would not be cross-examined or re-examined on any of these allegations.

90. JH's evidence had nothing of substance to add to the current claims. Again the time of the tribunal was wasted by the claimant in calling this witness.

RR

91. RR had no direct evidence to give in relation to the claims before the tribunal and was not cross-examined. It is not clear why he was called by the claimant. Again, the claimant wasted the time of the tribunal in calling this witness.

Respondents' Witnesses

DT

92. DT's evidence was clear and consistent throughout. It appeared entirely credible. He showed remarkable patience in responding to the questions put to him in the course of cross-examination by the claimant, even when the claimant repeatedly tried to refer him to documents which the claimant could then not locate or find in the bundle.

MT

93. Again MT's evidence was calm, consistent and clear throughout. It appeared accurate and credible. MT retained a remarkable level of calmness even when the claimant repeatedly sought to misrepresent answers which he alleged had been given previously by DT in his cross-examination and when, on each of those occasions, the claimant sought to disrupt the hearing by asking for the panel notes to be checked in relation to what he alleged to have been particular exchanges between him and DT.

FA and LS

94. FA and LS were two HR consultants engaged by the B Ltd to deal with, respectively, the disciplinary hearing and the disciplinary appeal hearing.

95. FA prepared a report and submitted that to MT who made the initial disciplinary decision. LS prepared a report on the appeal and submitted that to the company secretary who made the decision on the appeal.

96. Both had submitted detailed witness statements setting out their evidence in chief. The claimant cross-examined both individuals but could not point to any discrepancy or cause for doubt in relation to their evidence. Both individuals came across as credible and honest.

RELEVANT FINDINGS OF FACT

97. At all relevant times, the claimant had been the Operations Director for the three separate companies B Ltd, C Ltd and D Ltd.

98. It is clear that the relationship between the claimant, MT and DT had initially been close in 2015 and 2016 when the three individuals had worked closely together in the operation of these three companies.

99. It is equally clear that the relationships between the three individuals became strained after B Ltd did not accept a purchase offer from another party and the relationship between the three individuals deteriorated from 2016 onwards. That

had occurred some three years before any of the alleged public interest disclosures and before the dismissal of the claimant from B Ltd and C Ltd.

MT had called a shareholder's meeting for B Ltd to vote on the claimant's removal as a statutory director in B Ltd as far back as 25 October 2017 although he was not removed until 29 November 2019, over two years later. It is also clear that concerns had been raised in the Accounts Department of B Ltd on 17 September 2019 about director's loans taken out by the claimant. The Company Secretary of B Ltd advised the Accounts Department on 18 September 2019 that until the loans were repaid, no further funds should be made available to the claimant. There had also been serious concerns about the claimant's expenses claims as far back as 15 November 2019.

100. Given the approach adopted by the claimant to this litigation, it is difficult for the tribunal to isolate the relevant facts for the purposes of the claims of protected interest disclosure detriment and of unfair dismissal in this matter. Much of the claimant's own evidence and much of his cross-examination of the respondents' witnesses was related to various totally irrelevant matters which concerned the operation of the three companies. These matters had little to do with his alleged public interest disclosures and even less to do with his dismissal as Operations Director on conduct grounds from B Ltd and his dismissal on redundancy grounds from C Ltd.

101. The tribunal therefore does not propose to record or determine findings of fact on many of the matters raised by the claimant in the course of the hearing. However the following matters were raised by the claimant and were relevant.

Protected Interest Disclosures

102. The claimant, at a time when he had still been legally represented in the current litigation, stated that he relied on five alleged disclosures which were identified in a list of agreed issues.

103. The first such alleged disclosure was a disclosure to the company secretary of C Ltd on 10 and 11 December. The claimant stated that he had alleged to the company secretary that there had been dilution of the marker dye added to jet fuel. The dilution had involved the addition of kerosene to the marker dye and that this had been done to save money. The dilution of the marker dye was significant in relation to the HMRC and, if it were true, would have involved a criminal offence.

104. At this time, the claimant had been Operations Director of C Ltd and one of two statutory directors of that limited company. He had also been a shareholder. He had raised this allegation with the other statutory director of C Ltd, LB on 2 December 2019 by email and had suggested an internal enquiry. LB responded in writing and stated that he did not believe the allegation. LB's view was that it would have made no sense to dilute the dye in the manner alleged because such dilution would have inevitably caused the volume of the fuel to have been increased and that that would have been detectable. The claimant alleged in cross-examination, and apparently for the first time, that he had been subordinate to LB. However that does not appear to be the case from the relevant contemporaneous correspondence. In any event, the claimant escalated this alleged disclosure in a lengthy email to the company secretary on

11 December 2019 after having spoken to the company secretary on the previous day, 10 December 2019.

105. In that email, the claimant did not suggest that he had been subordinate to the other statutory director, LB. He acknowledged that he had been advised by company secretary to make a formal complaint to MT and DT, who were shareholders, but that he had refused to do so. He complained that he could not get MT or DT to acknowledge or see that they were *"friends".* He specifically asked the company secretary *"please do not take any external action on this."*

106. The claimant alleged in cross-examination, again for the first time, that he had raised this allegation with LB verbally before putting it in writing by email to LB on 2 December 2019. However it is clear from the terms of that email to LB and indeed from LB's subsequent replies, that the email of 2 December 2019 had been the first occasion on which LB had heard of this allegation. The tribunal does not accept the claimant's evidence in cross-examination that he had raised this allegation verbally at any earlier stage with LB.

107. It is also clear that LB, the other statutory director of C Ltd, had stated in clear terms in an email on 3 December 2019 that he did not believe that the allegation was possible because it would have made no sense. The dilution of the dye would have increased the volume of the fuel and that would have detectable. The claimant did not dispute this response at the time or, apparently at any stage subsequently, until in cross-examination he claimed, for the first time and without any evidence, that there had been a separate tank for the marker dye and that therefore the addition of kerosene to dilute that marker dye would not have increased the volume of the jet fuel. If that had been the case, and if the claimant had believed that had been the case, the claimant would have responded to LB in those terms on 3 December 2019, or shortly thereafter, and he did not do so.

    Furthermore, given the miniscule quantities of marker dye concerned, compared to the substantial quantities of jet fuel, any alleged dilution of the marker dye would have had minimal financial benefit and would have made absolutely no economic sense, even if it were possible in the way now alleged by the claimant. It is also notable that the claimant had not produced any witness statements or even correspondence from his two alleged informants either in December 2019 or subsequently and particularly in the course of the tribunal hearing. The claimant also appears to accept that one of his two alleged informants had denied making the allegation when challenged by DT. It is also entirely unclear how the second alleged informant, who the claimant stated had been the contractor who had originally installed the equipment, would have known of any such illegal practice.

108. The tribunal also notes that the claimant appeared in his email of 11 December 2019 to the company secretary to be as concerned about the fact that LB had raised the issue with MT and DT, than with any alleged illegality. He seemed particularly concerned with his ongoing disputes with DT and MT at that time and with his own *"options"*. It is clear that issues had arisen in relation to his directorship of B Ltd and that he had been removed from that directorship. He had reacted badly to the removal of that directorship and in correspondence from 2 October 2019, before this alleged disclosure had been made, he had talked of *"personal betrayal"*.

109. The tribunal does not accept that the claimant had had a *"reasonable belief"* that there had been a criminal offence or other relevant reason qualifying the matter as a protected interest disclosure. If the claimant had had such a reasonable belief, he would have responded to LB's clear statement that the allegation made no sense. The claimant would have obtained witness statements from his alleged informants and he would have taken the matter further rather than asking the company secretary not to take the matter externally. He would have acted in his role as statutory director and as Operations Director. Given the tribunal's conclusions about the claimant's credibility in this matter, which are set out above, the tribunal concludes on the balance of probabilities that this was an outworking of the claimant's dispute with MT and DT and that at the relevant times the claimant had had no belief, reasonable or otherwise, that any such alleged criminal offence had occurred. He had simply invented the allegation.

110. The second alleged relevant disclosure is a disclosure to MT, DT and the company secretary of B Ltd, on 14 December 2019 *"detailing non-compliance with legal obligations."*

111. The claimant confirmed in cross-examination that this disclosure referred to his removal, and the removal of LB, as Company Directors of B Ltd. That removal had occurred on 29 November 2019 following a decision of the shareholders.

112. In cross-examination, the claimant could not indicate what he alleged had been illegal or otherwise in breach of contract in relation to his removal as a statutory director from this limited company. He indicated that he had been *"incredibly unhappy*" about that removal. The claimant indicated that he was particularly annoyed that he had been recorded as *"resigned"* in the register in Companies House. However that is not a matter which could ground a protected interest disclosure.

113. The tribunal concludes that there had been no relevant disclosure in this respect. The removal of the claimant and LB as statutory directors had been, on the evidence before the tribunal, perfectly legal. The claimant had had no belief, reasonable or otherwise, that it been otherwise. Furthermore, the disclosure had not been made in the public interest. It had been a continuation of a long running private dispute between the claimant, MT and DT.

114. The third alleged disclosure was a disclosure to LB, the company secretary and one other person on 21 January 2020 detailing non-compliance with legal obligations and/or criminal activity and/or concealment of same.

115. The claimant clarified in cross-examination this alleged disclosure referred to a debenture which allegedly bore his signature. That debenture secured assets of C Ltd in favour of B Ltd. The claimant confirmed in cross-examination that he had signed the relevant debenture. It was in any event absolutely clear that he had done so. On 17 January 2018, MT had sent the debenture to the claimant by email and said *"Please sign, date, witness and return ASAP please".* On the same day, approximately 46 minutes later, the claimant had returned the debenture to MT stating *"My bit signed as a witness".*

This is in direct contradiction to the claimant's allegations to, amongst others, Kent Police, which stated that it had been a fraudulent signature. His evidence in

cross-examination is also in direct contradiction to an email he wrote on 21 January 2020 to the respondent's solicitor in which he stated;

> *"To my continued surprise I find that I had apparently witnessed and signed this document dated 17 January 2018. The signature is close but not mine and the handwritten text is not mine either, how could this be?"*

116. The tribunal concludes that this is not a relevant disclosure for the purposes of the legislation. The claimant accepts the signature of the debenture was his signature and that he had completed the document. There was no illegality and the claimant knew that that had been the case. The allegation that the signature had been *"close",* but not his signature, had been false. There had been no *"reasonable belief"* and in any event the disclosure had not been made in the public interest. It had been a continuation of a long-running private dispute.

117. The fourth such disclosure is the disclosure of the preceding allegation to Companies House on 26 January and to the Insolvency Agency on 4 February 2020.

118. For the reasons set out above, the claimant was clearly not telling the truth when making these allegations to Companies House and to the Insolvency Agency and the claimant had clearly been doing so simply to cause *"retribution"* to the two limited companies. B Ltd and C Ltd. It was not a relevant disclosure on either occasion. There had been no belief, reasonable or otherwise, and it had not been in the public interest.

119. The fifth such alleged disclosure is the disclosure to the respondents, by way of grievance on 14 February 2020, alleging that MT had dishonestly reported to his insurance company that the claimant had not been working on behalf of B Ltd when involved in an accident in Antwerp.

120. The tribunal concludes that the claimant had had no reasonable belief that MT had been acting in breach of legal obligations, committing a criminal offence or otherwise doing anything which could have grounded a protected interest disclosure.

121. The claimant had clearly been anxious that the insurance company should cover him for injuries and loss suffered in the course of this accident in Antwerp. However that accident had occurred on the premises of E (Europe) Ltd which was a related company to E (UK) Ltd of which the claimant had earlier been appointed sole statutory director. MT had informed the insurance company that the claimant had not been representing B Ltd at that time on that site. MT had stated that B Ltd had appointed specialist contractors to remove a fuel tank from that site and that the claimant had not been authorised or required to have been involved in the removal of that tank. The claimant had been injured by two batteries falling on him. B Ltd had not been actively involved in the recycling of batteries at that time although E (Europe) Ltd and E (UK) Ltd had been involved in that activity. It is notable that the accident had involved batteries and not the fuel tank which was the reason that the claimant alleged had caused his presence in Antwerp on behalf of B Ltd.

122. On the balance of probabilities, the tribunal concludes that MT had simply been responding to a request for information from the insurance company and that he had responded honestly to that request, entirely in accordance with legal obligations. It seems highly improbable that the claimant had been operating on that site on behalf of B Ltd. The trip had not been in the shared work diary. The claimant had produced no evidence to establish that fact to B Ltd. For example, he had not referred MT, or indeed the tribunal, to any written instructions, any travel arrangements put in place by B Ltd, any accommodation arranged by B Ltd, any email correspondence in relation to the removal of the tank which referred to the claimant's presence in Antwerp or indeed which required his presence in Antwerp. Above all, it seems highly improbable that the Operations Director of B Ltd had been required to travel to Antwerp to supervise specialist contractors in undertaking a simple logistics task ie the removal and transport of a fuel tank.

123. In summary the tribunal concludes that there were no relevant disclosures for the purposes of the legislation. The claimant had had no belief, reasonable or otherwise of any illegality, breach of contract or of anything which could have amounted to a relevant disclosure. The disclosure had not been in the public interest. It had been part of a long running private dispute.

DISMISSAL FROM THE POST OF OPERATIONS MANAGER IN B LTD

124. The claimant was suspended from his employment on full pay on 16 December 2019. The respondent wished to investigate concerns in relation to expenses claims and in relation to the possibility that fuel orders had been diverted from the respondent company to C Ltd.

125. Those charges were defined as potential gross misconduct and were at that stage described as:

- fraudulently submitting expenses to B Ltd; and

- diverting orders of B Ltd materials into a C Ltd job, going to (another company). Specifically on Sunday 15 December 2019, it was alleged that you diverted fuel into (another company) which is in direct breach of an instruction from the Board of Directors of B Ltd that were no longer dealing with (another company) as a client.

126. The respondent in the suspension letter specifically stated that it reserved the right to change or add to those allegations as a result of the investigation.

127. The claimant was invited to an investigation meeting with DT on Friday 20 December 2019. That meeting was rearranged at the claimant's request to 23 December 2019.

128. The claimant had been removed as statutory director of B Ltd in a shareholder's resolution of 29 November 2019. His employment as Operations Manager in B Ltd continued.

129. The investigation meeting took place on 23 December 2019. DT asked the claimant whether he had fraudulently submitted any expenses to B Ltd. His response was *"not to my knowledge"*. In the context of that particular disciplinary

charge, that was an unusual response. He would have known if he had submitted any fraudulent expenses.

130. DT asked the claimant if he had diverted orders of B Ltd materials to C Ltd and he denied doing so.

131. On 19 December 2019 the claimant made angry and derogatory comments about MT to DT. After that conversation, the claimant sent WhatsApp messages which showed flight details and which stated, following a discussion about the location of a meeting, *"Mike's it is then"*. DT reasonably took this as meaning that the meeting would be at MT's own house in Wales. The claimant further sent MT a calendar notification stating that he was coming to his house. That caused considerable distress to MT and indeed to members of his family who were residing in that location.

132. On 20 December 2019, the claimant sent a WhatsApp message to MT stating that he had been *"talked down"*. He stated that he had *"got as far as Bangor, ferry crossing as up and down like a whore's drawers, you, they were right, MIKE and the destruction of (B Ltd) and its people is just NOT worth it. Me going to jail or worse, just is NOT worth it."*

133. The tribunal accepts, having heard the evidence of the claimant and of DT and MT that this was intended to be, and had been correctly perceived to be a threatening message. The clear implication was that the claimant had been going to MT's house and that the claimant had intended doing MT harm which would have resulted, if he had gone through with that intention, in the claimant going to jail, or worse.

134. The WhatsApp message from the claimant continued in a peculiar vein. The claimant suggested that matters be resolved in return for the claimant remaining as a contracted consultant for the three companies with a retainer and *"the odd perk and expense claim".* He stated that *"there would be a Xmas bonus, there would be a business trip to Antigua"*.

135. The claimant's threatening behaviour was added to the disciplinary charges.

136. On or about 7 January 2020, MT discovered that the claimant was listed on Companies House as a statutory director of a company called E (UK) Ltd. That company specialised in battery recycling, an area in which the B Ltd had plans to expand and where negotiations had been conducted earlier with the AA. It had also had discussions with E (Europe) Ltd.

137. It was specifically part of the claimant's contract with the respondent that he should not hold any position which was wholly or partly in competition with the respondent. The respondent decided to add that conflict of interest to the disciplinary charges.

138. The respondent engaged an external HR consultant 'FA' to conduct the disciplinary hearing.

139. On 21 January 2020, the claimant was invited in writing to a disciplinary hearing on 27 January 2020 to be held at Gatwick Airport. That letter expressly stated that the

purpose of the hearing was to consider allegations of gross misconduct. Those allegations were:

> *"1. Fraudulently submitting expenses to B Ltd between December 2017 to the present date and included seven specific examples.*
>
> *2. Diverted orders by B Ltd's customers into your own company D Ltd and giving two examples.*
>
> *3. Making threats of violence and acting in a threatening manner towards one of the B Ltd's Directors MT on or around 19 December 2019.*
>
> *4. Setting up a company* E (UK) Ltd*, in competition with B Ltd without disclosing your interest in the company to B Ltd in breach of your contract of employment and duty of trust and confidence."*

All relevant documentation was attached to that letter.

140. The claimant sought to postpone that hearing by suggesting that he had a medical appointment arranged on that date. He was asked to produce evidence of that medical appointment. That evidence was not produced. He attended that meeting but refused to go ahead without a companion. He indicated that his chosen companion was Mr John Larkin QC the then Attorney General for Northern Ireland but that Mr Larkin QC had already left Gatwick airport. It is notable that no correspondence has been produced from Mr Larkin QC indicating that he had flown to Gatwick Airport to represent the claimant in an internal disciplinary hearing, or that he had ever had any intention of doing so.

141. On 28 January 2020, the claimant was advised in writing that the disciplinary meeting had been rescheduled to 3 February 2020 again at Gatwick Airport. The claimant sought to have two different individuals as his companion. Both individuals refused to act as his companion and the respondent offered to allow the claimant's wife to act as his companion. This was refused by the claimant. The claimant sought to pursue different queries with the respondent's solicitor which included a subject access request, an allegation that no evidence had been presented in the investigation meeting, a request for an explanation as to why there was a one month delay after the investigation meeting, an allegation that he was forced to attend a disciplinary hearing against medical advice (where no such medical advice had been furnished) and requesting acknowledgement of *"this grievance"*.

142. The respondent informed the claimant that an immediate family member could attend as his companion. He was reminded that a legal representative would not be permitted and that Mr John Larkin QC was not a suitable companion. Eventually the claimant was permitted to have his son accompany him to the disciplinary hearing and the disciplinary hearing proceeded on 3 February 2020.

The disciplinary outcome report issued on 14 February 2020.

143. In relation to the first charge ie fraudulently claiming expenses from December 2017 to the present date, FA concluded that gross misconduct had not been established.

She concluded however that there had been acts of misconduct and that there had been numerous occasions where the claimant had not shown due care and attention in relation to expenses claims.

144. In relation to the second allegation (diverting orders to D Ltd and thereafter to (another company)), FA concluded that there had not been gross misconduct but rather misconduct in that the claimant had not disclosed his actions to MT or DT in advance of these transactions. Those transactions had involved companies with whom B Ltd had been in dispute.

145. In relation to the third allegation (making threats of violence and acting in a threatening manner towards MT in or around 19 December 2019), FA concluded that it had been an act of gross misconduct and that it had destroyed the relationship of trust between the claimant and MT.

FA concluded that the WhatsApp message on 20 December had made it plain that the claimant had intended to do something in relation to MT and to B Ltd. In the tribunal hearing the claimant did not deny that he had sent the WhatsApp message to DT which DT had forwarded to MT. When asked by FA if the WhatsApp message had been from him he had stated *"it might be"*. That was an extraordinary response. The claimant knew that he had sent the WhatsApp message.

146. In relation to the fourth charge (setting up a company E (UK) Ltd in competition with B Ltd without disclosing his interest in the company to B Ltd) FA concluded that there had been gross misconduct which destroyed the necessary relationship of trust and confidence.

FA reported to MT who made the decision to summarily dismiss the claimant for gross misconduct.

147. The claimant appealed the decision to dismiss him on the grounds of gross misconduct. The appeal was heard by another HR consultant, *"LS".* She prepared a report for the company secretary who made the decision on the appeal.

148. He did not provide clear grounds of appeal but those grounds of appeal were further defined in the appeal meeting in the following way:

(i) That he had not set up E (UK) Ltd and it was not his company.

(ii) E (UK) Ltd was not in competition with B Ltd.

(iii) That he told LB that he was a Director of E (UK) Ltd some years ago.

(iv) DT had been a Company Director in other companies.

The claimant further alleged that the WhatsApp messages had been taken out of context and a story fabricated to remove the claimant from his role at B Ltd.

149. The claimant further queried the misconduct findings in relation to his expenses claims and the diversion of work to D Ltd but those were not matters which

impinged on his dismissal and can be disregarded for the purposes of the present decision.

150. LS confirmed that LB had no recollection of ever being told by the claimant that the claimant had been a director of E (UK) Ltd. LS also confirmed that DT had never been a director in any company in competition with B Ltd. She also confirmed that B Ltd had been actively pursuing diversification into battery recycling which is what E (UK) Ltd was set up to perform and that the claimant had been aware of that intention.

LS upheld the disciplinary charge in relation to E (UK) Ltd.

151. In relation to the allegation of threatening behaviour and conduct against MT, LS confirmed that the claimant argued that the WhatsApp messages had been taken out of context and that a story had been fabricated to remove him from his role in B Ltd. The claimant however acknowledged that the WhatsApp message had deliberately given the impression that he had travelled to England to MT's house and that he had to be talked down before going to that address. The WhatsApp messages had included a screenshot of an EasyJet flight itinerary from Belfast to Liverpool on 20 December 2019 and the calendar invite that the claimant sent to MT invited both MT and DT to a meeting on 20 December at 11.00 am where the venue was stated as *"near Mike's house".*

MT confirmed to LS that he regarded the claimant as being volatile and that he had recalled the claimant telling him that he had been ex-army and that he used to kill people. MT further gave examples of where the claimant had smashed the boardroom table in anger and MT stated that he was still fearful and worried that the claimant might turn up at his door one day.

152. LS concluded that it was reasonable to conclude that the language used in the WhatsApp messages had been threatening and that gave the impression that the claimant had intended to travel to England on 20 December 2019 to meet MT and DT near MT's family home. The use of the wording *"had to be talked down"* and *"I would have ended up in jail"* was concerning and it had it been reasonable for DT and MT to take from this that the claimant had intended to cause harm to MT. The WhatsApp messages could reasonably be regarded as threatening and intimidating and by the claimant's own admission they were sent to cause worry and upset to MT. The disciplinary charge was upheld.

153. LS prepared a report upholding the summary dismissal and that decision on appeal was confirmed by the company secretary.

C LTD

154. The claimant was placed on precautionary suspension on full pay from his role as Operations Director in this company on 14 February 2020.

155. MT and DT, the shareholders and Directors of this company had been advised that the claimant had been discussing the sale of C Ltd assets to an unrelated company at a time when those assets had been secured by B Ltd by a debenture. They had further been informed the claimant had behaved in a threatening manner on a supplier's premises and had damaged property.

156. Disciplinary action in these respects was eventually discontinued but the claimant was removed as a statutory director of the limited company on 5 May 2020.

157. On 20 February 2020, the claimant had been advised in writing by DT that it had become *"questionable over the last few months as to whether (C Ltd) needs an Operations Director. I am writing to advise your role is at risk of redundancy.*

> *After considering what your role actually is consisted of in relation to (C Ltd) over the last few months, it is clear that such role is no longer required in any reporting you previously undertook is largely automated and can be dealt with by the accounts staff. Your role is therefore provisionally selected for redundancy. We can consider with you whether there is any suitable alternative employment within C Ltd and any possibility of avoiding your role of being made redundant.*
>
> *Please write to us with your views on whether you see there is another role you can undertake by 5.00 pm on Monday 24 February 2020 and we will consider any possibilities you suggest and consult with you, if appropriate, before any decision is finally reached."*

158. The claimant replied on 24 February 2020 at 16.59 (ie one minute before the deadline):

> *"As you may appreciate, this has become a bit of a shock that over the past few months you have been considering this option.*
>
> *I would like to propose an alternative position of Ops Director, that I be considered as Business Development Director. This is a role I have a proven track record in both B Ltd and C Ltd. Could this be a consideration, if not, what alternatives do you suggest.*
>
> *So I may consider further the above prove not to be an option for the business could you kindly present me your proposals as to what a redundancy package may look like, please."*

159. It is clear that the claimant did not suggest in this reply that his role as Operations Director was not redundant. He did not suggest that the business needs of C Ltd required his retention in that role.

160. It would appear that there were some form of discussions or meetings between DT and the claimant thereafter. The notice of termination of employment issued by DT on redundancy grounds on 28 February 2020 commenced:

> *"Further to our discussions and email exchanges regarding the provisional selection of your role as redundant, I am writing to confirm that C Ltd has decided to make your role redundant".*

The claimant did not suggest in response to that notice that the discussions, expressed to have followed the provisional selection of his role as redundant, had not taken place.

161. On the balance of probabilities, it would seem that the claimant had not been invited in writing to a meeting to discuss the termination of his employment on the ground of redundancy, as required in the first step of the statutory procedure set out in Schedule 1 to the Employment (NI) Order 2003.

162. The notice of termination stated further:

> *"We have taken time to consider your request that you be considered for a business development manager role within (C Ltd). As you are aware, (C Ltd) already employs a Business Development Manager. We have considered whether it would be appropriate to consider you for this role. We have considered your skills and expertise, but unfortunately note that you do not have detailed knowledge of wholesale fuel supply and clean fuel sales markets, the sectors in which (C Ltd) operate and therefore do not have the requisite knowledge for a business development role within this company. We therefore do not consider it appropriate to consider you for this role. Unfortunately we have not been able to identify any suitable alternative employment for you or anyway in which the termination of your employment could be avoided. (C Ltd) is terminating your employment with immediate effect from today's date by reason of redundancy and will pay you in lieu of your basic salary (less nominal deductions) for your notice period of two months."*

The claimant was offered the opportunity to appeal against his redundancy decision.

163. The claimant did not take up that offer of an appeal. However he persisted in alleging that he had done so. On 2 March 2020, in an email to DT he stated *"I have already made an appeal for the redundancy at C Ltd".* The claimant was advised by the respondent's solicitors on the following day, 3 March 2020 that *"we note that no appeal in relation to your redundancy has been received."*

164. Again on 3 March 2020 the claimant stated again:

> "*There was an appeal lodged and questions raised -"*

On 23 March 2020 the claimant again alleged that he made an appeal against his redundancy. He stated:

> *"I was invited to appeal the decision to earmark me for redundancy in a letter sent to me by DT. This I duly did and within the context of that communique I have also since submitted an appeal to the board of (C Ltd) and brought into question the reasons for my redundancy, there has been no feedback to date from the board on this."*

165. The claimant was advised by the respondent's solicitor on 16 March 2020 that no appeal had been received:

> *"We note your comments that you appealed your redundancy during the redundancy procedure. For clarity, it is not possible to appeal an outcome before it is provided. If you wish to submit appeal grounds against your*

redundancy please submit them in writing by email to me, by 4.00 pm on 18 March 2020."

The claimant did not respond to that second invitation for an appeal. Despite that fact, the claimant insisted in cross-examination before this tribunal that an appeal had been lodged when it had clearly not been lodged. He argued at one point that his arguments against his selection for redundancy during the course of that procedure were sufficient to constitute an appeal after the procedure had been completed.

DECISION

Claim of Unlawful Detriment (Dismissal) as a Result of a Protected Disclosure.

166. Article 67(B)(i) of the Employment Rights (Northern Ireland) Order 1996 requires that a qualifying disclosure is:

(i) made in a reasonable belief of the claimant; and

(ii) made in the public interest.

167. For the reasons set out earlier in the decision, the unanimous decision of the tribunal is that the five alleged disclosures relied on by the claimant in these claims, and set out in the agreed list of issues, are not qualifying disclosures for the purposes of the 1996 Order and that they therefore do not attract the protection of Part VA of that Order.

168. The first alleged disclosure was made to the company secretary of C Ltd on 10 and 11 December 2019. That disclosure had alleged that the claimant had been informed by a contractor and by an employee that marker dye used in jet fuel had unlawfully been diluted by the addition of kerosene.

169. The tribunal concludes, after observing the claimant giving evidence and being cross-examined, that the claimant had not reasonably believed that the information which she had disclosed tended to show that a criminal offence had been committed or that otherwise Article 67(B)(i)(a)-(f) had applied:

(i) The alleged addition of kerosene would have made no economic or other sense given that any potential financial benefit would have been infinitesimally small.

(ii) The claimant, although he was a statutory director of the company and although he was the Operations Director of that company, did not pursue the matter further with the statutory authorities. In fact he asked the company secretary not to pursue the matter outside the company and appeared more interested in his ongoing dispute with MT and DT.

(iii) The claimant did not, at the time, rebut the assertion of the other statutory director that the addition of kerosene would have increased the volume of jet fuel and would have been easily detectable. He did not seek to rebut that assertion until his cross-examination, when he attempted to do so without producing evidence to support his position.

(iv) The claimant did not obtain any witness statements from the contractor or the employee to establish the allegation, despite his position as one of two statutory directors and the Operations Director of the relevant company. The claimant furthermore did not seek to call either the contractor or the employee as a witness to the tribunal, even though he called several witnesses who had had absolutely nothing of any relevance to say to the tribunal.

(v) The claimant alleged in evidence that he had earlier and verbally reported the allegation to the other statutory director when it was absolutely plain, from the content of the emails between that other statutory director and the claimant, that he had not done so.

170. The tribunal also unanimously concludes that the alleged disclosure had not been made in the public interest. Given the tribunal's conclusions about the credibility of the claimant throughout this matter, it determines on the balance of probabilities that the alleged disclosure had been part of the ongoing dispute between the claimant and MT and DT and in particular his feelings of *"personal betrayal"*.

171. The second alleged disclosure relied on by the claimant in these claims related to his removal as a statutory director of B Ltd in a shareholders meeting on 29 November 2019. The claimant could identify no alleged criminal offence or illegality in this respect. He had simply been displeased with the decision of the shareholders which appears to have been entirely in compliance with companies' legislation. Therefore the tribunal concludes that the claimant had had no belief, reasonable or otherwise, that any such disclosure had been a qualified disclosure for the purposes of the Order.

Similarly any such disclosure had not been made in the public interest, it had been part of the claimant's ongoing dispute with MT and DT.

172. The third and fourth alleged disclosures related to the alleged forgery of his signature on a debenture between C Ltd and B Ltd. The claimant accepted in evidence to the tribunal that the signature on the debenture had been his signature. This was despite his previous assertions that the signature had been *"close"* but not his signature.

Again, the tribunal concludes that the claimant had no belief, reasonable or otherwise, that the alleged disclosure had been a qualifying disclosure for the purposes of the Order. Furthermore the disclosure had again not been made in the public interest. It had been made as a part of the ongoing campaign of retribution conducted by the claimant.

173. The fifth alleged disclosure had related to the report compiled by MT about the accident in Antwerp. That report had been compiled at the request of the insurance company acting on behalf of B Ltd. The tribunal concludes that that report had been compiled honestly and correctly and that it showed no criminal offence or other illegality. Again the tribunal concludes that the claimant had had no belief, reasonable or otherwise, that the disclosure had been a qualifying disclosure for the purposes of the Order and further that the claimant's allegations

in this respect are no more than a continuation of his dispute with MT and DT. The disclosure had not been made in the public interest.

174. Even if any of the five alleged disclosures had been qualifying disclosures for the purposes of the 1996 Order, it is clear that the claimant had been in a bitter personal dispute with MT and DT from 2016 and that the disclosures were no more than a continuation of that dispute. The decision to dismiss the claimant for gross misconduct from employment by B Ltd and to make him redundant by C Ltd, had been reached solely on the grounds of misconduct and redundancy respectively and had not been affected by any of those alleged disclosures.

175. The tribunal therefore concludes that the claim of unlawful detriment as a result of protected interest disclosures, contrary to the 1996 Order, is dismissed.

Alleged Unfair Dismissal by B Ltd

176. The tribunal concludes that the respondent has shown that the reason for the claimant's dismissal had been his gross misconduct and no other reason. The respondent had reasonably believed that the claimant had been guilty of gross misconduct.

177. The statutory dismissal procedure had been followed correctly by B Ltd and a decision to dismiss the claimant was not therefore automatically unfair in that respect. The disciplinary meeting and the appeal meeting had been conducted correctly and the procedure throughout had been fair. The dismissal had therefore not been unfair for any other procedural reason.

178. The tribunal concludes that the decision to summarily dismiss the claimant from his position as Operations Director was a decision which a reasonable employer could reasonably have reached in all the circumstances of this case for the purposes of the 1996 Order.

179. The claimant had clearly issued WhatsApp messages to DT which contained threats to MT and which were extremely disturbing. Those messages had rightly been perceived by MT to be threatening. They amounted to gross misconduct and, on their own, would have justified a finding of summary dismissal.

180. The other finding of gross misconduct related to the claimant's involvement with E (UK) Ltd. It is clear that the claimant knew that B Ltd had been engaged in discussion with the AA and in particular with E (Europe) Ltd in relation to the potential for recycling batteries. He had been involved in the initial discussions with E (Europe) Ltd. It had also been clear to the respondent that the claimant had been in 2017 and 2018 the sole Director of E (UK) Ltd which was engaged in precisely that operation. The respondent reasonably reached the conclusion that the claimant had not disclosed this information to either MT, DT or indeed to the other statutory director in C Ltd. There clearly had been a substantial conflict of interest and the claimant's conduct as a senior employee of B Ltd justified his summary dismissal from that role.

181. The claim of unfair dismissal against B Ltd is therefore dismissed.

Allegation of Unfair Dismissal by C Ltd

182. The claimant had been made redundant by C Ltd.

183. Having heard the evidence of the claimant and of DT and MT, the tribunal concludes that the claimant had had very little operational involvement with C Ltd for some time and that his post had in effect been redundant. In the holiday pay calculation following his redundancy from C his holiday pay entitlement for C Ltd was set at 20% of the total to be allocated between B Ltd, C Ltd and D Ltd. The claimant did not dispute that fraction at the time and indeed appeared to accept it as accurate during his cross-examination of DT.

184. The tribunal concludes that the respondent has established that the reason for the claimant's dismissal had been redundancy and for no other reason.

185. It would appear from the evidence and from the documentation that the statutory three step dismissal procedure had not been followed in full by C Ltd in that the claimant had not been invited in writing to a meeting to discuss his potential dismissal. That is a common error made by employers who are based in Great Britain, where the three step statutory procedure for terminating employment is no longer a legal requirement. That said, the respondent had invited the claimant to comment in writing on the proposed redundancy and indeed to put forward alternatives to that redundancy.

186. The tribunal therefore concludes that the redundancy dismissal had been technically unfair for the purposes of the 1996 Order because the three step procedure had not been complied with in full, although that procedure no longer applies in GB where the respondent company was based.

187. That said, the tribunal concludes that the claimant would have been dismissed from his role in any event if the full procedure had been correctly performed. The tribunal accepts the evidence of the respondent that the claimant's post had been redundant and that no alternative employment had existed in C Ltd. The tribunal therefore concludes that dismissal on the ground of redundancy had been inevitable.

188. The tribunal therefore concludes that, subject to the requirement for a minimum basic award, the compensatory due in that respect should be reduced by 100% to reflect a ***Polkey*** deduction. The claimant would still have been dismissed on the ground of redundancy, at the same time, if the correct statutory procedure had been followed.

189. Article 154(1)(a) requires a minimum basic award of four weeks gross pay unless that would cause injustice to the employer. Injustice has not been demonstrated. That minimum basic award is calculated as

£2,500.00 x 12 = £576.92 + £2,307.70 per week.

The maximum weekly pay at that time for a basic award was £530.00

£530.00 x 4 = £2,120.00

Allegation of Unlawful Deduction from Wages by B Ltd

190. The onus of proof is on the claimant to establish any unlawful deduction from wages. The claimant led no evidence in chief in this respect to establish any such loss and did not address it in his final submission. In a response dated 23 September 2021 to the respondents' request for additional information, the claimant asserted that expenses amounting to circa £5000.00 had been deducted for his final pay and that a bonus was not paid. As indicated, no evidence was given by the claimant in relation to either matter. In contrast, MT gave uncontested evidence that a £2,500.00 float had not been returned to B Ltd by the claimant, that the claimant had owed sums amounting to £875.00, £30,086.79 and £27,004.05. On 27 February 2020, MT had written to the claimant indicating that the salary due up to 15 February 2020 had been £2,083.22 but that the monies owed by the claimant exceeded that sum. On that basis no final salary was paid by B Ltd.

On the basis of the evidence to hand, and on the basis of the tribunal's conclusions on the credibility of the claimant, the tribunal unanimously dismisses this claim. The claimant has not discharged the onus of proof in this respect.

Right to be Accompanied at a Disciplinary Hearing by B Ltd

191. It is clear that the respondent company had made extraordinary efforts to allow the claimant to be accompanied at a disciplinary meeting and equally clear that the claimant had tried throughout to frustrate those efforts. He came up with first of all with the extraordinary suggestion that Mr John Larkin QC, then the Attorney General for Northern Ireland, was going to attend a disciplinary meeting at Gatwick Airport. He then asked for the attendance of the other statutory director in C Ltd when he knew that he had been in a heated personal dispute with that individual and he asked for the attendance of yet another person who refused to act on his behalf. He was then offered the attendance of a family member which goes far beyond what is required in these circumstances. He refused the attendance of his wife but eventually agreed to the attendance of his son.

192. The tribunal concludes that the claimant has not established that he was denied his statutory right to be accompanied at the disciplinary meeting contrary to Article 12 of the 1999 Order. He had no right to insist on a legal representative and indeed no right to insist on the attendance of any family member although that was eventually allowed. The legal right to be accompanied at a disciplinary hearing is a right to be accompanied by a Trade Union representative or by a colleague; no-one else.

193. The claim in this respect is therefore dismissed.

Terms and Conditions of Service – B Ltd

194. The claimant alleged that he had not received the statutory terms and conditions of service from B Ltd, contrary to Article 33 of the 1996 Order Again the claimant did not lead any evidence in this respect and did not cross-examine any respondent witness in this respect. It is however clear that the claimant had signed a detailed contract of employment, entitled *"Service Agreement"* on 1 December 2012. That contract appears to comply with Article 33. Furthermore, the tribunal has not upheld any relevant claim against B Ltd and the tribunal therefore has no

jurisdiction to make any award in this respect under Article 27 of the Employment (NI) Order 2003. The tribunal therefore dismisses that claim.

195. This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990.

Vice President:

Date and place of hearing: **29 November 2021 to 2 December 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: