EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

"This has been a remote hearing not objected to by the parties. The form of remote hearing was V – video, by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same."

Claimant: **Ms Murielle Maupoint**

Respondent: **Hope for Children**

HELD at Watford **ON:** **28 February to 4 March 2022 (in chambers 7 and 8 March 2022)**

BEFORE: **Employment Judge George**
Members: **Mr C Surrey**
Mr D Sutton

REPRESENTATION:

Claimant: **Mr A Donnelly, Solicitor**
Respondent: **Mr A McPhail, Counsel**

RESERVEDJUDGMENT

1. The claimant was unfairly dismissed by the respondent on 29 July 2019.
2. The claimant was wrongfully dismissed by the respondent on 29 July 2019.
3. The claims of detriment on grounds of protected disclosure and dismissal for the reason or principal reason of protected disclosure are not well founded and are dismissed.
4. Had the claimant not been unfairly and/or wrongfully dismissed, her employment would have ended on 9 August 2019, subject to an agreement that she be paid until 31 August 2019.

5. The remaining issues will be determined at a remedy hearing by CVP on **1 July 2022** with a time estimate of **3 hours.**

REASONS

1. The parties had prepared a joint bundle of documents for the final hearing to which a number of additions were made by consent during the course of the hearing. Page numbers in these reasons refer to that bundle. After those additions, the total number of pages in the bundle 380 pages and the contents were as set out in the updated index.

2. The claimant gave evidence in support of her case and was cross-examined upon a witness statement that she had provided and which she adopted in evidence. The respondents served the witness statements of six individuals: Neil Robertson, formerly the chair of the board of trustees of the respondent; Amanda Neylon, who at the relevant time was the vice chair of the board of trustees of the charity; Adrian May, who had become a trustee of the charity in about May of 2019; Emilie Giles, also a trustee of the respondent charity since December 2017; Georgina Irvine-Robertson who was a trustee at the relevant time and Helen McMillan, who has been chair of the charity since May 2020 and a trustee since 2008.

3. The hearing was originally scheduled to determine all issues relating both to liability and remedy. A successful application was made by the claimant to convert the in person hearing to CVP. She is now resident in Corsica. Unfortunately the parties did not appear to be aware at the time of the application that the case of Agbabiaka [2021] UKUT 286 (IAC) makes clear that, unless the parties are able to satisfy the Tribunal that the Foreign and Commonwealth Development Office have provided reassurance that the state in which the witness proposes to give evidence consents to that course of action, the proposed witness may not give evidence by video from abroad.

4. The claimant travelled to the United Kingdom on the first and second days of the hearing and gave her evidence from the jurisdiction starting in the afternoon of Day Two. This meant that there was a delayed start to hearing the evidence and we are grateful for the parties for the flexibility and co-operation with each other that they showed in adapting the timetable to take account of this. It was therefore necessary to hear evidence and submissions directed to liability only and Reserved Judgment on those issues. A provisional remedy hearing was set for 1 July 2022 with the agreement of the parties and at their convenience. Given the Judgment that we make above that provisional listing will be confirmed but it is the Tribunal's view that a time estimate of half a day is now sufficient given our findings.

5. In addition it emerged during the course of the hearing that AM was also abroad and unable to be in the jurisdiction of the Employment Tribunal to give his evidence and the respondent did not rely upon his evidence as a result.

The issues

6. Following a period of conciliation between 11 September and 26 September 2019 the claimant presented a claim form on 8 November 2019 and this was defended by a response entered on 16 December 2019. The complaints arose out of her employment as chief executive office by the respondent charity (sometimes referred to in the documents and in these reasons as "H4C"). She had been a trustee prior to becoming CEO. There was a disagreement between the parties about the start of her employment, with the claimant saying that that had been in December 2014 and the respondent saying that it was on 21 October 2014. That difference does not affect any of the issues in the case. We did not hear evidence about it and make no decision on it.

7. The claimant's employment ended on 29 July 2019 and she obtained a new job on 6 September 2019. On any view, therefore, she had four years' service at the date of termination of employment. Her employment ended with her resignation.

8. The case was case managed by Employment Judge Kurrein at a preliminary hearing which took place on 9 June 2020. The record of that hearing is at page 54 of the bundle. It is recorded that the claimant is bringing constructive unfair dismissal claims and claims that she has been subject to detriments as a result of public interest disclosures. She also argued that she had resigned in response to those detriments and therefore that there was a constructive automatically unfair dismissal under section 103A of the Employment Rights Act 1996 (hereafter the ERA).

9. The claimant had resigned on notice on 5 July 2019. By her contract she was required to give 12 weeks' notice but in circumstances which will be particularised below the parties agreed that she could be released from her obligation to serve that notice and an effective date of termination was agreed of 9 August 2019. The respondent agreed to pay her to the end of that month. Subsequent to that agreement the claimant resigned on 29 July 2019 with immediate effect.

10. There was also a complaint about that 29 July 2019 resignation without notice. The claimant alleged that there had been a repudiatory breach of contract between the date of her resignation on 5 July and her resignation on 29 July which separately entitled her to cut short her notice period (see paragraph 56 of the grounds of complaint at pages 25 to 26 of the bundle). In that paragraph she also claimed damages for breach of contract.

11. It was argued on behalf of the respondent that, viewed as a whole, the grounds of complaint only complained of unfair dismissal contrary to the ERA in respect of the resignation on 5 July 2019 and not in respect of the resignation with effect on 29 July 2019. The Tribunal were directed, in particular, to paragraphs 52 to 56 of the grounds of complaint under the heading "***The claims*"** (page 25). Under a sub-heading "<u>The Dismissal</u>" it reads as follows

    "53. The claimant claims that she was unfairly constructively dismissed.

    54. The detrimental acts of the charity are set out in paragraphs 22 to 35 above collectively amount to a breach of the implied term of trust and confidence between the claimant and the charity. The breach is sufficiently

serious to constitute a repudiatory breach. By the claimant's resignation dated 5.7.19, she accepted the breach. Accordingly the termination of her employment amounts to a dismissal within the meaning of section 95(1)(c) of the Employment Rights Act 1996.

55. The claimant claims that the dismissal is also unfair under section 103A of the Employment Rights Act 1996 ("ERA") in that one of the principal reasons for the dismissal was victimisation and/or detriments she was subjected to as a result of the claimant making protected disclosures under section 43B and 43C of the ERA as outlined herein."

12. The reference to paragraphs 22 to 35 is to a factual matrix set out further back in the grounds of complaint in a chronology the last date of which is 23 June 2019 (paragraph 35). The grounds of complaint continue at paragraph 56 as follows:

"*further and/or alternatively the further detrimental acts of the charity as set out in paragraphs 38 to 50 above which occurred during the claimant's notice period collectively amounted to a further fundamental breach of the implied term of trust and confidence in the contract between the claimant and the charity in response to which she cut her notice period and accordingly claims damages for breach of contract."*

13. The reference in that paragraph back to paragraphs 38 to 50 include a reference to paragraph 50 which provides as follows:

"*the claimant considered that these events and/or detriments were further fundamental breaches and/or the final straw. She therefore resigned with immediate effect by a letter dated 29 July 2019."*

14. It is argued on behalf of the respondent first, that to the extent that the claimant complains that she was unfairly dismissed with reference to the resignation on 5 July 2019, that cause of action misses the important element that her employment did not end as a result of that resignation. For reasons which will become apparent from our findings, we do not need to make a decision on that interesting argument.

15. The respondent next takes the point that the claimant's pleadings cannot reasonably be understood to argue in the alternative that she was unfairly dismissed with effect on 29 July 2019 because paragraphs 54 and 56, in particular, distinguish between unfair dismissal and wrongful dismissal. It is argued by Mr McPhail that, properly understood, the claim form brings a wrongful dismissal claim only based upon the resignation on 29 July.

16. The claimant's representative accepted that he could not change the claimant's pleaded claim and did not make an application to amend. However he argued that there must surely be regarded as being a dismissal claim based on the resignation on 29 July 2019 in the alternative to that communicated on the 5 July 2019. He referred to the fact that box 8 had been ticked complaining that the claimant had been unfairly dismissed. He argued that, in essence, the claim form should be regarded as alleging that if it was not a constructive unfair dismissal based on the resignation of 5 July it was in the alternative argued to be the constructive unfair dismissal based on the resignation of 29 July.

17. We do bear in mind that this is a professionally pleaded document. We accept that there could be greater clarity about the alternative pleading in

that it could have been said that paragraph 54 in the alternative was based on the resignation of 29 July. However it is clear that the claimant complained that there were fundamental repudiatory breaches of contract entitling her to resign with immediate effect on 29 July 2019 and the factual basis for that alleged dismissal is set out in paragraph 50. We consider that taken as a whole a fair reading of the claim form is that the claimant is complaining about a constructive dismissal based on her first resignation on 5 July and in the alternative on her second resignation on 29 July and that the unfair dismissal claim is brought in the alternative on the basis of those two different resignations. We therefore decide that the unfair dismissal claim is brought in the alternative and no amendment is needed. Indeed none was sought.

18. Judge Kurrein had appended the then agreed list of issues to his case management order but also directed that there should be further particulars given because he did not consider that there was adequate particularisation of the protected disclosures relied upon and in particular the basis on which it is said the information which was said to have been disclosed tended to show the prescribed wrong doing. Further particulars were provided that are at page 186. Reference needs to be made to those in order fully to understand the updated list of issues (page 190). It was confirmed by the parties that the updated list of issues at page 190 remained a definitive list of the issues to be decided. The original umbering has been retained below, for ease of reference.

CLAIMANT'S UPDATED LIST OF ISSUES

Detriments as a Result of Public Interest Disclosure

1. *Did the Claimant make any of the following disclosures:*
    a. *On 31.5.19 during a conversation with Amanda Neylon regarding Mr Neil Robertson (ERA 43B)?*
    b. *On 31.5.19 by the Claimant emailing Mr Robertson and Amanda Neylon (ERA 43B)?*
    c. *On 11.6.19 by the Claimant a formal grievance regarding Mr Robertson (ERA 43B)?*
    d. *On 23.7.19 by the Claimant submitting a grievance regarding Amanda Neylon (ERA 43B)?*
2. *If so, were they qualifying disclosures for the purposes of:*
    a. *ERA 43 1(b) – that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject? And/or*
    b. *In respect of 3(c) above, ERA43 1(d) – that the health or safety of any individual has been, is being or is likely to be endangered?*
3. *In deciding that, did the Claimant have a reasonable belief that:*
    a. *The disclosures were made in the public interest? And/or*
    b. *Tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject? And/or*

c. *Tended to show that the health or safety of any individual has been, is being or is likely to be endangered?*

4. *In all the circumstances of the case, was it reasonable for her to make the disclosure(s), having regard to the identity of the persons to whom the disclosures were made?*

5. *If so, did the Respondent, because of the qualifying disclosures, do the following:*

   a. *On or around 3.6.19:*

      i. *By Mr Robertson indicate an intention to discuss the grievance at an emergency board meeting;*

      ii. *By Amanda Neylon become defensive and hostile toward the Claimant and*

      iii. *By the Respondent offer no support to the Claimant.*

   b. *On or around 4.6.19 by Amanda Neylon after the claimant objecting to the grievance being discussed at an emergency board meeting, state she would be continuing with the course of action regardless.*

   c. *On or around 5.6.19 failed to confirm the time, venue and agenda of an emergency board meeting.*

   d. *On or around 7.6.19 failed to respond to a request from the Claimant to Amanda Neylon seeking confirmation of how the Board intended to deal with the breakdown between her and Mr Robertson.*

   e. *On or around 11.6.19 refuse to allow the Claimant to attend an emergency board meeting, failed to provide an explanation for this, and failed to provide a copy of the meeting minutes when requested.*

   f. *On or around 11.6.19 put pressure on the Claimant to withdraw her grievance against Mr Robertson.*

   g. *On or around 12.6.19 agreed that the Claimant should go out for 'a drink and a chat' with one of the newest Board members, AM, to discuss her disclosures to try to 'smooth things over'.*

   h. *On or around 17.6.19 by Amanda Neylon, refused an annual leave request and repeatedly refer to a business trip to Ghana trip as a 'holiday' and annual leave'.*

   i. *On or around 5.7.19 by Amanda Neylon, refused to allow the Claimant a reduced notice period.*

   j. *On or around 11.7.19 following the Claimant's exit proposal dated 8.7.19, refused to email the Respondent's counter terms until 13.7.19.*

   k. *On or around 12.7.19 contacted the Claimant with a request for information whilst she was off sick.*

   l. *On or around 22.7.19 sent an email to the Claimant's personal email address, outside working hours:*

      i. *Requesting a 'back to work' meeting during her sickness and asking to discuss several issues.*

ii. *Advising that she should not share her resignation with external fundraisers or other organisations.*

iii. *Referring to a suggested conflict involving the Claimant related to historical dealings with an outside organisation.*

m. *On or around 26.7.19 by letter:*

i. *Suspended the Claimant from her duties with immediate effect.*

ii. *Stated that the Board felt her attendance at the office may be 'counter-productive' and have a detrimental impact on the Charity and its staff, and*

iii. *Suspended access to her emails;*

iv. *Requested that she did not contact any member of staff, project partners, funders supporters of beneficiaries, or come into the office;*

v. *Failed to confirm whether the Claimant would be paid during the period of suspension;*

vi. *Implied that the Claimant was unlikely to be reinstated;*

vii. *Failed to confirm who would deliver an independent investigation against the Claimant.*

n. *On or around 29.7.19 informed a former employee of the Charity that the Claimant had been suspended;*

o. *On or around 20.6.19, informed the Claimant that the Respondent had received an 'anonymous tip-off' when in fact the 'tip-off' originated from Helen McMillan who had received the information from Mr Robertson.*

6. *Does all or any of the conduct referred to above amount to a detriment?*

Constructive Dismissal

7. *Did the Respondent commit a fundamental breach of contract as alleged in paragraphs 22-35 of the Grounds of Complaint or at all?*

8. *If so, did the Claimant resign in response to that fundamental breach such that she is entitled to consider herself constructively dismissed pursuant to s.95(1)(c) of the Employment Rights Act 1996?*

9. *If the Claimant was constructively dismissed, was the dismissal unfair in all the circumstances?*

10. *If the Tribunal find that the dismissal was unfair, is it just and equitable to reduce the compensation on the grounds of the Claimant's conduct leading to the dismissal?*

11. *Should there be a reduction on the basis that the Claimant contributed to her own dismissal?*

Automatic Unfair Dismissal – Protected Disclosures Section 103A ERA

12. *If the tribunal finds that the Claimant made all or any of the public interest disclosures, was the reason or principle reason for the dismissal a public interest disclosure?*

Breach of Contract

13. *Did the Respondent commit a further fundamental breach of the implied term of trust and confidence in her contract (during her notice period) as alleged in paragraphs 38-50 of the Grounds of Complaint or at all?*
14. *If so, was the breach sufficient to justify the Claimant terminating the contract without notice?*
15. *If so, what was the Claimant's loss?*

Remedy

16. *If the Claimant succeeds, in whole or part, what is the just and equitable level of the award in the circumstances for:*
    a. *Injury to feelings?*
    b. *General damages for personal (psychological) injury?*
    c. *Loss of earnings?*
17. *In the event of a finding of unfair dismissal, what is the appropriate:*
    a. *Basic award?*
    b. *Compensatory award?*
    c. *Award for the loss of statutory rights?*
18. *Did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25% pursuant to s207A of the Trade Union & Labour Relations (Consolidation) Act?"*

19. During the course of closing submissions the claimant withdrew the allegation that her communication on 11 June 2019 had been a protected disclosure falling within section 43B(1)(d) ERA so Issue 2b above and Issue 3c above did not need to be decided by us in relation to the alleged disclosures.

20. A clarification was made at Issue 4 which was replaced with the following

    "*if any disclosures were qualifying disclosures were they protected disclosures because they were made to the claimant's employer within the meaning of section 43C(1)(a) ERA or a responsible person in section 43C(1)(b) ERA*."

21. In closing submissions, Mr Donnelly confirmed that Issues 5.f, i and j above were not pursued by the claimant and we do not need to make decisions on those. The original numbering has been retained in our conclusions section below for clarity.

22. In respect of all of the alleged disclosures the argument that the communications fell within section 43B (1)(b) ERA was as set out in the further and better particulars and was as follows:

    22.1. It was said that the claimant disclosed information that NR was attempting to obstruct the merger and/or a majority board decision and was attempting to do so using false information.

22.2. It was said that the claimant had a genuine and reasonable belief that this information tended to show that NR was in breach of or was likely to be in breach of a legal obligation. The legal obligations in question was said to be obligations on the chair of the charity to "*comply with and further majority board decisions, to act in good faith and to act in the interest of the charity*."

23. In respect of the claimant's communication of 23 July 2019 (see paragraph 17 of the further and better particulars) the claimant cross-referred to the earlier protected disclosures. Her argument was that by describing herself as a whistleblower in the grievances that she raised by that communication, the earlier alleged disclosures of information were embedded in the later communication. It was confirmed on the claimant's behalf that the arguments that the grievance of 23 July 2019 amounted to a protected disclosure were therefore exactly the same arguments as were raised in relation to the earlier communications.

Findings of fact

24. We make our findings of fact on the balance of probabilities taking into account all of the evidence both documentary and oral which was admitted at the hearing. We do not set out in this Judgment all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a Judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

25. There was a trustees meeting on 22 January 2019 when a decision in principle was made for the respondent charity, H4C, to merge with another charity called The East Africa Playground (or EAP) with effect from 30 June 2019. The claimant was directed to carry out due diligence enquiries on the proposed merger.

26. This proposed merger was re-visited by the trustees in their meeting on 19 March 2019, the minutes of which are at page 198. The claimant took those minutes in her role as chief executive officer. She presented her due diligence report (section 5 of the minutes on page 200). It is clear that, by then, NR had met with the then EAP chair and that the minutes record a general enthusiasm on the part of the board that the merger provided "*significant value to both organisations in merging and operating under the name of Hope for Children*". A board resolution was unanimously passed to merge with EAP subject to their annual accounts for 2017/18 being satisfactory. It was recorded that the claimant would instruct solicitors to proceed with the merger upon confirmation from EAP that they also wished to proceed. However, the trustees agreed that the issue of board membership should be deferred and noted that a full merger of both boards would result in more trustees than the respondent's articles of association permitted.

27. Based upon the claimant's oral evidence as well as her witness statement we find that she was frustrated by what she regarded as the length of time taken by the trustees to agree key details that would enable her to progress the merger (see her paragraphs 16 and 17). Conversely, the evidence of NR

- but also of AN and HMcM - was that they considered the claimant to be pushing them to agree to matters that they felt required greater consideration.

28. Our observation on this is that it is the trustees who have the obligation to ensure that the charity's funds are used in accordance with its objectives and who therefore needed to be satisfied that decisions were going to be in the interests of the charity. Whether a course of action is in the interests of an organisation is something about which honest people can reasonably differ. However it was not for the claimant alone to be satisfied that something was in the interest of the charity. However frustrating she may have found it if the board needed more time to consider a point, that was a matter for them provided that the risks of delay were pointed out to them and they agreed, explicitly or implicitly, to take them.

29. It is convenient here to record that the articles of association (hereafter the AoA - page 354), which were revised by the claimant in her role as CEO, make provision in clause 6.5 for how decisions are to be taken (see page 366). Every issue may be determined by "*a simple majority of the votes cast at a meeting*". The clause goes on to consider how votes may be taken electronically.

30. We consider that clause 6.5 means that measures passed electronically should be unanimous. The clause reads

"*a resolution in writing agreed by all the trustees (other than any conflicted trustee who has not been authorised to vote) is as valid as a resolution passed at a meeting of the Executive Committee*".

31. We read that as meaning a vote of all of the trustees, unless conflicted. We also read that as meaning that if the resolution is put to a meeting it can be passed by a simple majority but if it is to be passed electronically then it needs all of the trustees to vote and all of them need to vote in favour for the proposal to be passed.

32. On 18 May 2019 there was a meeting which has been described as the trustee's away day. The EAP trustees were invited. NR was absent so AN chaired the meeting (see minutes at page 194). She was meeting the EAP chair for the first time at this meeting. AM was nominated as trustee and joined the board at this meeting.

33. The section concerning the merger starts at section 7 on page 196 where the respondent trustees present are recorded as being enthusiastic about the prospect of the merger. A discussion about post-merger board membership is recorded at page 197:

"*trustees agreed that in the first instance NR should speak to each H4C trustee to determine who would be willing to step down. If no one wants to step down then the charity will need to change its MOA to accommodate the inclusion of the EAP trustees."*

34. The reference to MOA should be a reference to AOA. Two action points are recorded: NR should speak with the trustees as indicated and the claimant was to discuss possible changes to the AOA with solicitors.

35. Despite it not being what was recorded in the minutes, NR, who wasn't present, recalls the decision having been taken to reduce the number of

trustees to a 5/5 split (see NR statement paragraph 11). His oral evidence was that this had been agreed in principle. What clearly had been agreed was that the board of trustees of the merged charity should at the outset be comprised of 50% former H4C trustees and 50% former EAP trustees. But the minutes do not record a determination either by majority or unanimity that this should be achieved by requiring resignations from the existing H4C trustees. Had that been finally resolved there would have been no need for the claimant to find out about changing the AoA.

36. On 20 May 2019, AN emailed NR with her thoughts following the away day (page 294). She did not copy this email to the claimant. Her account of what was decided is the same as that recorded in the minutes. As this was not copied to the claimant she was therefore not aware that in the same email AN expressed reservations about staying on board to work with the then current chair of EAP if he took over as chair of the merged charity. The way she expresses her concerns are a bit nebulous, but she did say that if NR was himself staying on as joint chair until the AGM in December then she would be able to review her position after six months.

37. The claimant emailed trustees on 23 May 2019 with the result of her enquiries (page 142 amongst other places). In paragraph b. on page 143 she explained that, having sought legal advice, there were technical limitations on the charity's ability to increase the number of trustees temporarily. The practical consequences seemed to include that more actions would need to be postponed until a member's vote at the AGM. She concludes the mail by saying that "*trustees need to please urgently consider the following recommendations and let me know by Monday how you wish to proceed*:". The third recommendation that she put down was "*reduce H4C trustees to five and co-opt EAP trustees to the board*."

38. There was emailed response to the claimant's report from EG (at page 140 to 141 stating her agreement), DS (similar stating his agreement) and AM appears to have also agreed (see the claimant's email at page 302). AN responded (page 202) saying that she supported the three recommendations but would like to talk to NR to work out the best process for reducing the board to five. HMcM asked a number of question (see page 301) which the claimant responded to. However we have not been taken to an email that shows a clear acceptance by HMcM of recommendation No.3.

39. On 29 May 2019 NR wrote to all of the trustees and the claimant saying that the first two recommendations should be considered a decision but there were some reservations on recommendation No.3.

    "*I can see why and I think the most important question is getting the right mix for the new organisation. I will have trustee one to ones as the board agreed but we might have to revisit the articles (I suspect the members would not oppose).*"

40. The claimant's evidence was that she had not applied her mind to the provisions of the AoA concerning how resolutions should be passed when she decided whether or not there was a binding resolution in respect of recommendation No.3. The consequence of our conclusion on the meaning of clause 6.5 (para.31 above) is that we find that, on any view, there was not a binding resolution in favour of the recommendation No.3 because there

was not unanimity of all trustees, so far as we have been shown. On any view, NR and HMcM had not agreed in writing to the resolution.

41. The claimant appears to have thought that a majority view was sufficient for there to be a binding resolution.

42. In our view, what NR said at the email at page 202 does reflect the position at the time in that there were reservations on recommendation No.3 and there was no unanimity about how to achieve the five EAP trustees on the merged board. We are also of the view that by this email NR was not seeking to obstruct the claimant or the merger. He was trying to make sure that the merger happened on terms that worked for H4C.

43. In his oral evidence he explained to us that he saw the identity of the chair as being intimately linked with the reduction of the numbers of H4C trustees; as part of ensuring that there was the right mix of skills and expertise among the board. It was clear to us that trustees, including NR, AN and HMcM did not see that it was necessary to give a firm and binding decision that the articles of association should not be changed in order to progress with the merger.

44. The claimant responded to this email by contacting NR on 29 May asking him for clarification on "*where we stand on the issue of reducing the existing H4C trustees down to five*" arguing that his email "*appears to go against the consensus of the board*." She set out why she considered that five trustees have stated a support of her recommendation No.3 and that IS had said he would go with the majority.

"*With the board having agreed to reduce H4C trustees to five the option of revisiting the articles is no longer on the table. I have detailed in previous communications to the board why a change of articles at this time would negatively impact timelines for a successful merger."*

45. She then continued

"*since there is a clear majority, and my understanding of charity law is that the chair does not have the power to veto a majority decision taken by the board (section 6.5/6/6 H4C AOA), I will proceed with instructing the solicitors with the three recommendations so that we can move forward with the merger process."*

46. NR made a first response to what she said which is at page 333. "*This is incredibly confrontational and completely unnecessary. Do not make any such instruction to solicitors until I speak to trustees."* Then the following day (page 318) at 7.45 am he emailed again suggesting that they have a call either that day or the next.

47. During the course of 30 May 2019 the claimant was in WhatsApp communication with EG (see pages 119 to 121). At 12:42 the claimant texted to EG that NR was trying to revisit the decision the trustees took at the away day. A minute later, she wrote that she has a call with him later that day.

48. At 15.55 she texted EG saying

"*he's so slippery. He has said he has spoken to some trustees who have voiced grave concerns about the 50/50 split and therefore he wants to achieve that split by the AGM (now likely to be in March) rather than at the point of merger (despite what trustees voted on!)".*

49. There are a number of things that we note about this text. In the first place it is very unprofessional for the claimant to have described the chair of trustees to another trustee in these terms. Secondly, she appears to contact the trustees individually in an apparent attempt to discover what they individually think rather than accept the integrity of the board. Next, we noticed in oral evidence that the claimant referred to achieving a 5/5 board of trustees and a 50/50 split almost interchangeably as though the two things were the same. It is apparent that they were not. There was no doubt expressed in the communication to which we have been taken about the principle of a 50/50 split. Rather the doubt was expressed about whether that should be achieved by increasing the size of the board or decreasing the number of H4C trustees. Finally, this is her first description of the telephone conversation that she has just had on that day with NR. In it she says that she has been told that NR "*has spoken to some trustees*". Furthermore the earlier text the claimant refers to NR going against a decision at the away day when it is clear from her own minutes that there was no such firm decision.

50. Going back then to the conversation that took place on 30 May 2019 we read the email from the claimant at page 334 as suggesting that she regards as binding the email resolution when, objectively, it was not binding. By that email she informed NR that she is going to instruct solicitors to carry out an action which he does not think reflects the decision of the trustees. In those circumstances for him to tell her not to instruct solicitors is reasonable although his tone is confrontational.

51. Going back to the texts between the claimant and EG immediately following the telephone conversation with NR she says at 18:25 (page 121) that she has spoken to five trustees including EG herself "*who have said that they did not speak to [NR] about shifting the goal post.*"

52. In fact she had not <u>spoken</u> to trustees so far as we have been told. She had communicated with AN in WhatsApp messages that are at page 129 and 130 between 06:58 and 09:49. She started by asking AN if NR had been in touch with her. We have heard in evidence, but the claimant was not then aware, that one of the reservations received by NR had been from AN which she had relayed by email a few days previously. Asking the question whether NR had contacted her before sending email obtained the answer "No". This, of course, was true – AN had contacted NR. Incidentally we accept both the evidence of NR and AN to explain why AN thought that NR had not received that email although he had in fact done so and responded in a reply that went into an overlarge inbox that she didn't see immediately.

53. It seems to us that the way the questions were asked by the claimant produced answers that she then assumed demonstrated that NR had provided her with false information. She presumed from AN's answer that NR had not contacted her – without any follow up questions – that she could not be the source of any reservations and therefore that a statement by NR that he had spoken to female trustees (plural) had to be a deliberate untruth.

54. There is a lack of precision in the way she asked the questions and the way she talks which is also demonstrated by describing this WhatsApp conversation as having <u>spoken</u> to AN. Of course, in colloquial speech one often refers to a text correspondences with someone as if one had spoken to them. When drawing conclusions that NR had been deliberately

untruthful, more precision is called for in order for that conclusion to be a reasonable one to make.

55. We should record at this point that the texts at 09:24 and 09:49 are relied on as being the first communication of a protected disclosure. The respondent argues that the claimant is limited to relying on that at 09:49 on the basis of that being the specific part of the document referred to in her witness statement but we think it is important to read the exchange of WhatsApp messages as a whole. At 09:24 she recorded that NR

"*told me that he had spoken to a number of the trustees including several of the women who had voiced their concerns and that on that basis he wanted to achieve a 50/50 split by the AGM. I now know that this is factually untrue – the only one female he could have spoken to is Helen. I know for a fact he has not spoken to you, Emily, George or Adrian. He has no power to change a decision that was fully considered by the board and received a majority vote. The legal process has ground to a halt. The timescales for merger have been impacted. I have told Neil I can no longer work with him. He undermines decisions and obstructs process/progress – not just in relation to the merger. I am now considering my options including resignation as I cannot continue to work with someone who is having such a negative impact on my work life and health and the future of the charity*."

56. She also gives a detailed description of the call in her mail to Mr Robertson at 17:58 on 31 May which she copies to AN. There, she accused NR of saying that he would alter the decision to reduce to five trustees at the point of merger on the back of speaking to a number of trustees. She says that she has been in contact with DS, AM, GIR, EG and AN and they have all confirmed that they have not spoken to him. She also accuses him of saying he had spoken to a number of female trustees and of that being false information.

57. In oral evidence NR said that he had said two female trustees. The sources of his information that there were reservations were the email from AN and telephone call with HMcM.

"*What is right is I said to the claimant that I had contacted two trustees who had significant concerns. I mentioned female not because its particularly relevant other than the claimant had consistently implied that IS would just go along with what I said anyway. So I was saying significant trustees. You've seen the contact I have with AN already and I have a telephone call with H McN*".

58. This oral evidence was the first time that his detailed account of this conversation had been set out. He did not set out a contrary view to the claimant's allegations in response to the email at page 151. He did not set out his detailed account in his witness statement although it was bound to have been a key element of the hearing. This absence is bound to cause us to question whether the reason for this omission is that he did not at that point in time in fact dispute what the claimant alleged. His explanation for the omission was

"*there had been multiple communications to challenge it at that point – it didn't need challenging again. My view was clear that what was being proposed was not acceptable in terms of the governance not the reduction to 5/5*".

59. We're bound to say that this did not answer the question about the omission. However he did also say that a childish backwards and forwards was not going to get them anywhere. This seems to us to probably be the explanation for him not responding with a detailed account of what he said had actually taken place in the telephone conversation.

60. The above details are also set out on the claimant's grievance at page 153 (section 2 at page 155). However, there she phrases it as none of the trustees had had any contact with Neil since the away day other than AN. She mades that comment without having checked with HMcM. That grievance indicates that by that point the decision that she accuses NR of seeking to undermine is a majority decision for the three recommendations. This contrast was the way that she describes it in the WhatsApp messages to EG. There is therefore another example of imprecision in the way that the claimant uses language.

61. We now set out our findings on what happened in the conversation on 30 May 2019 taking into account the different accounts we have heard and the different contemporaneous accounts. The claimant's first description was of NR saying "*some trustees*" and we think that that is probably the words he used. She interpreted that to mean a larger number than he had actually had contact with. We accept that NR made reference to having had contact with female trustees, as he has accepted. The claimant interpreted that loosely to mean speaking to a number of female trustees. Her communications with AN at page 129 and 130 lack precision and she drew the mistaken conclusion that AN could not have been responsible for the reservations described by NR because of the way that she asked the questions. She then repeated that mistaken conclusion as a certain fact when she did not have a good or reasonable basis for it.

62. We think it is probable that NR was not precise in the details he gave in the telephone conversation about how many people had provided information and by what method. A point is made by the claimant in the WhatsApp message at 09:49 on page 130 to AN "*we cannot proceed with legals until we know whether we will need to change AOA and whether EAP will accept waiting until AGM to have equal representation on the board*." This seems to presume that it is only NR's interjection which caused those matters to be hurdles. However his evidence was that, in any event, the AOA meant that members needed to make certain changes at the AGM with regards to the chair and he was frustrated at the claimant's inability or unwillingness to accept that. We are satisfied that the sum total of the various views expressed by the different trustees did not amount to clarity on whether the change to the AOA was necessitated.

63. Essentially, for the above reasons and because the claimant did not check with NR whether there were other concerned Trustees, other than in a brief phone call, because she did not check her presumption about the binding nature of the remote decision, we accept that the accusation made by the claimant that NR was using false information was her jumping to conclusions without making a full investigation of the matter. She did not have a reasonable basis for that conclusion.

64. However the exchange does demonstrate that the working relationship between NR and the claimant had broken down.

65. By 17:40 on 30 May 2019 the chair of EAP had written to NR copied to the claimant and it is apparent from point 3 of that email (page 207) that he was, by then privy to details about the majority view of trustees.

66. We note that AN's response to this when it is forwarded to NR (see page 206) was to say in response to point three that "*we have all agreed in principle to the 5/5 trustee model as it is sensible. But most of us have all said there needs to be some thought as to how and when*." This is consistent with her text messages to the claimant where she says she does not see that what NR said in his email was inaccurate.

67. When AN had said so clearly to the claimant that she did not regard NR's email of 29 May to be inaccurate this should have given the claimant pause for thought about whether she could reasonably accuse NR of acting contrary to the best interest of the charity.

68. NR's response to the claimant's email of 31 May is at page 148. It is dated 3 June. In it he notes that she is inclined to record a formal grievance and says "*this is of course very serious and I will be calling a board meeting as soon as possible to discuss*." This accurately reflects her final paragraph where she says she has told AN of her inclination to record a formal grievance against NR. The claimant responded to NR's request for her to check the current policies by stating that there is no written procedure for dealing with grievances at her level.

69. On 4 June 2019 (page 145) the claimant emailed NR (copied to AN) saying

    "*it is important for you to note that I have not raised a formal grievance, yet. I have offered you the opportunity to consider your position on the board so that this matter can be resolved expediently and not cause any further distraction from and delays to the merger, or any substantial and additional costs to the charity*."

70. Having consulted with HR legal consultants on the matter of process, she sets out what she considers to be an independent impartial and transparent process for handling agreements at this level and continues,

    "*I have been advised that in the event that a formal grievance is recorded against you, it is wholly inappropriate for the board to discuss this matter, as you propose you would do in your previous email*."

71. AN responded at page 144 the same day to say that it had been her suggestion to hold a board meeting "*this is not to discuss any grievance or not. It is to discuss our decisions around the merger and trustees/chair make up given the situation*."

72. This is alleged by the claimant to be a detrimental act on the basis that indicating that the grievance would be discussed at a board meeting potentially disadvantaged her because of lack of impartiality. We accept AN's evidence about the reason for the board meeting which was not to discuss the detail of the complaint. In the event, we are satisfied that matters were arranged so that the board's decision on the process that they should follow was made in the absence of both the claimant and NR. It was not only that the claimant was bringing a grievance against NR she was making it patently obvious that she thought that he should resign and that her continued employment was predicated on him resigning. We consider that calling a board meeting whether it was done at the suggestion of NR or at

the suggestion of AN was a sensible first step in order to prepare for a potential grievance.

73. The claimant also alleges that from about 3 June AN became defensive and hostile towards the claimant and the respondent and offered her no support. No specific incidents of behaviour which were alleged to have been defensive or hostile were put to AN or to any of the other witnesses. There was a general suggestion that she had been hostile and that there was a lack of communication but that was not borne out by the WhatsApp messages which continued to be appropriately friendly. In her oral evidence the claimant described AN becoming defensive in relation to the arrangements for the board meeting but as an allegation that overlapped with other allegations. We do not consider that AN's response on 4 June suggested any defensive or hostility.

74. Indeed we note that the claimant was saying that if there were a grievance then it would be inappropriate for it to be discussed at board level. There was no grievance so she was not in fact saying that it was inappropriate to have the first board meeting. We do not consider that any reasonable employee would consider themselves to have been disadvantaged by the response of AN on 4 June which, again, was a reasonable stance for her to take. By 9 June the claimant knew when the meeting was to take place. She complains that she was initially excluded and asks why that was. It does appear as though she was initially told that she could not come to the board meeting but at some point between 6 and 11 June she was told that she could come to part of it. We accept AN's oral evidence that it was a two part meeting and that NR and the claimant were excluded from the part which concerned the breakdown in the working relationship between them. We accept that they were present for the part concerning the merger process and the claimant's complaint that she was allowed in right at the end is rejected. There were no minutes produced and no agenda produced for this meeting.

75. The claimant complains of the passage of time on 7 June and asks AN to tell her how the board intends to address the breakdown in the working relationship. This email is sent on Friday morning. She receives a response at 6 o'clock on the Sunday evening the 9 June to reassure her that the board were taking it seriously and are meeting on Tuesday and will respond after that.

76. In circumstances where the individual trustees have their own careers and are volunteers in the charity, there does not seem to us to have been any appreciable delay in this response. We therefore reject the allegation that there was a failure to respond to this request. The claimant appears to be complaining that she did not receive a response in the timescale that she considered to be appropriate which is not to say that the timescale followed by the trustees was unreasonable or disadvantageous to the claimant.

77. The trustees remained unaware that the claimant had put in a formal grievance until after the board meeting on 11 June 2019. In the part of the meeting to which NR and C were not invited or did not attend it was resolved for AM to mediate between them. Although it may have been said by someone to the claimant that it was resolved that AM should go out for a drink and a chat with her, this was not put to any of the respondent's

witnesses as being something that had been said. The claimant appeared to accept that the resolution had been for AM to mediate.

78. It is clear from the contemporaneous correspondence that when AN is writing up her account of what was decided at the board meeting (see page 216) she had, by then and subsequent to the meeting, discovered that a formal grievance had been raised (page 153).

79. We see from page 230 that there had been a conversation between AM and the claimant on 11 June at a time when he was in ignorance that she had brought a formal grievance. By 9.00 pm immediately on hearing of the formal grievance, he wrote to say that H4C needs to address this more formally, that he understands two trustees need to be involved and that EG has offered to help him. It is clear, therefore, that contrary to the allegation set out in List of Issues 5.g., that by the time of that email AM was clear that he had to investigate a formal grievance and he and EG are tasked with doing so. That is inconsistent with the allegation made by the claimant. At the same time DS and HMcM were tasked with pursuing the merger.

80. In her grievance the claimant set out four categories of complaint:

(1) Undermining and obstructing;

(2) Breach of trust and confidence;

(3) Hostile working environment;

(4) Lack of support.

It is the first two which are the focus of the allegation that this grievance amounts to a protected disclosure. Against the background of numerous alleged instances where the claimant said she had felt undermined in her role she set out the history of correspondence surrounding the decision in relation to the size of the board of the merged charity. She stated that, at the away day, the board had unanimously agreed to reduce the trustee number to five "*to enable a 5/5 H4C and EAP trustee split at the point of merger."* She then focused upon 29 May 2019 communication from NR to the board suggesting that recommendation No.3 needed to be reviewed and the possibility of the AoA being revisited. She described NR's direction to her not to instruct solicitors in the way she had proposed to him to be "*a clear act of obstruction to prevent me to deliver the instructions that have been given to me by the board.*"

81. She also sets out in section 2 an account of the telephone conversation of 30 May 2019 to which we have already referred. She described this as a "*provision of false information to support [NR]'s perspective and decision to change the instructions of the board."* She stated that this was an abuse of power.

82. NR resigned as chair of the respondent on or about 14 June 2019 or shortly thereafter. By that date, the claimant was aware of his offer to resign (see the email at page 157) and confirmed that she agreed to withdraw the grievance on confirmation of his resignation. She was abroad on a business trip to Ghana from 15 June 2019. AN announced that she was taking the role of interim chair on 17 June (see page 158). An allegation dating from this period is that on or about 17 June AN refused the claimant's annual leave

request and repeatedly referred to a business trip to Ghana as a holiday or annual leave.

83. In her evidence the claimant was vague as to when the conversation about which she complained had taken placed. She had had three weeks booked for some time and she took it after her return from Ghana. Her complaint was that there had been a conversation, according to her, when AN said that three weeks' holiday was too long. AN's evidence was that she had no recollection of a conversation about the leave that had already been booked but did recall communications about a separate request by the claimant to carry over 15.5 days' leave from the previous year. AN gave oral evidence that there was an email missing from the chain of emails at pages 244 to 255 in which she stated that she was agreeing to the carry over.

84. We note that it seems to be common ground that the respondent's policy was to permit the carry over of one week's leave so the claimant's request was to carry over more than was provided for in the policy. However she had been unable to take a planned period of leave around Christmas 2018 because of an emergency situation that had arisen in the charity. AN said that she had agreed to that carry over but asked that the claimant not take all of those days in one go. That would have been three working weeks. We think it highly improbable that AN would allow the carry over and yet penalise the claimant by commenting on the pre-booked leave and find that any request to not taking three weeks holiday was a reference to not taking all of the carried over leave in one go. We reject the allegation that AN refused an annual leave request by the claimant.

85. Similarly the claimant could not be clear when AN was said to have referred to the business trip as annual leave. There was evidence in the bundle that, in a written communication with HMcM, AN mistakenly stated that the claimant was on holiday in June when the absence abroad in June was on a business trip and the booked holiday was in July. She was immediately corrected in the exchange of emails by HMcM. There is no evidence to support a finding that a comment was made to that effect to the claimant let alone repeatedly said to the claimant and the claimant's own evidence does not support that. The claimant has not shown that the facts supporting this allegation took place.

86. Chronologically, the next allegation is list of issues 5.o where the claimant complains that "*on or around 18 June 2019*" the respondent informed the claimant that the respondent had received an anonymous tip off when in fact the tip off originated from HMcM who had received the information from NR.

87. The claimant received an email from HMcM on 18 June 2019 (page 335) informing her that an anonymous note had been received and providing a link to a report of questions raised about the then EAP chair. A WhatsApp exchange between EG and the claimant demonstrates that, when this was checked with the EAP chair, he provided what the H4C board regarded as a complete response.

88. As worded in the list of issues it is difficult to see how this amounts to a detriment to the claimant. She appears to be complaining that HMcM had not been transparent with her about the source of her information. We accept HMcM's evidence that, in conversation subsequent to the email, she told the claimant that she had been provided with the link and told about the

anonymous note by NR. We do not see how not providing information about the source in the initial email could possibly be a detriment to the claimant because the information wasn't about her. The link was to a report that was in the public domain so whatever the motivation of the person who originally provided the information to NR or indeed NR himself we do not see how providing information to the trustees that was in the public domain could be a detriment to the claimant. We do not think the reasonable employee would consider themselves to be disadvantaged by these events.

89. We also think that the information about the EAP chair might have been revealed had background checks been undertaken in due diligence. There may not have been a specific request by the trustees for background checks of their prospective fellow trustees in the merged charity but it appears that the claimant knew about this matter, judged it to be not a matter for concern and did not include it in her due diligence report. It might have been anticipated that a belated disclosure of something that required answering, even if a complete answer could be provided, had the potential to disrupt a smooth merger process. However at the time the claimant did not receive criticism for her due diligence and that is not her complaint. Her complaint appears to be that she was told that the tip off was anonymous when in fact it had come from HMcM. However she knew it had come from HMcM because the email had come directly to her from HMcM who was transparent about the source of the information in subsequent communications.

90. The claimant returned from her overseas business trip. On 5 July 2019 she resigned. The explanation for this decision which she puts forward in paragraph 47 of her witness statement is that, when the merger collapsed on about 23 or 24 June 2019 during her absence in Ghana, the charity was left in a precarious position and she was continuing to work for them "*where I felt unsupported, harassed and victimised for raising my concerns about NR*."

91. Viewed objectively we have found that the claimant was not unsupported, harassed or victimised. The charity's response to the claimant's grievance had been for AN to encourage NR to hasten his departure as to chair of the board. We can see from the correspondence that AN urged NR to reflect on his own position in the interests of the charity. This suggests that the remainder of the board viewed the claimant as more important than NR to the long term future of the charity. They were in favour of the merger, the claimant was clearly pivotal to that development because her remaining a CEO was something that EAP said they were keen to have. Apparently they regarded the claimant as having a greater experience at this level than their own senior management team. NR was due to step down at the end of the year in any event. So this may have been a pragmatic decision by the board. However we consider that for them to have taken this stance is inconsistent with not supporting the claimant, with harassing her or victimising her for raising her concerns about NR.

92. The claimant also said, when explaining her decision to resign, that she was suffering stress, anxiety and exhaustion. It was accepted by the respondent that the claimant was stressed and that loss of the merger was emotionally challenging for her. The reasons she gave at the time for her oral resignation are recorded in AN's paragraph 11 where she said that the claimant told her that she was "*exhausted and had run out of love with the charity*." EG, in her paragraph 11, refers to the text at page 126 which reads *"I'm completely*

burnt out and there's no way I can reclaim my passion or motivation for Hope anymore." In the same text the claimant talked about her perception that the charity will change its direction to a way that she is no longer interested in. The claimant resigned orally in a meeting with AN and AM and does not give an account herself of what she said at that time. She did not write an explanation.

93. Based upon the evidence of the text that she wrote and AN's evidence of the meeting, which we accept, taking account of our rejection of her allegation that she had in fact been victimised and not supported, we find that her reasons for resignation were nothing to do with anything that she perceived that the respondent had done to her. They were to do with, as she put it to EG, a loss of passion or motivation for the charity and the perception that with the merger having been unsuccessful the charity would not be moving in a direction that interested her.

94. There was then a period of negotiation between the claimant and the respondent about her exit package. Her contract said that she should serve 12 weeks' notice which would have been to the 29 September 2019. It was unsurprising that in the circumstances of the time, the respondent should have started from the position that they needed the CEO to remain in post to steady the ship and reassure other staff when the planned future for the charity had been thrown into doubt by the loss of the merger. They also needed the claimant to ease the transition to a new CEO. There was no internal candidate and that is consistent with there being internal vacancies that the claimant was covering. The trustees are volunteers with other careers and jobs and therefore were unable to step in full time themselves.

95. The agreement was reached that the claimant's employment should end on 9 August 2019 but that she should be paid until 31 August 2019 (pages 166 to 167). This was agreed on 17 July 2019. We consider that this was generous of the respondent in the circumstances but nevertheless this is clearly what was agreed.

96. The negotiations had taken place largely by email and involved detailed articulate responses from the claimant in relation to the issues. She was on sick leave at this time having taken a day's self-certified absence on 12 July. She had informed AN on 11 July that she had a migraine. She then described being told by AN that the board were being told on 11 July that there would be a phone call the next morning with EG on the call and being told that she could have somebody to accompany her. She describes herself as being surprised and concerned by this (see paragraphs 50 to 53) and asked AN for prior notice of a copy of the terms that the board had agreed so that she could see them in advance of the telephone meeting. She goes on in her paragraph 53 to say that she was caused stress and a migraine because AN did not provide her with that copy. Following that one day's self-certified leave on 12 July she went to the doctor and was certified unfit to work on 15 July for two weeks which would mean she was due to return to work on 29 July.

97. The claimant complained that despite AN knowing that she was self-certified unfit to work on 12 July 2019, she asked the claimant whom she had told of her resignation in a text timed at 13:34 on page 132.

98. The claimant accepted in cross-examination that AN had told her not to inform the charity's employees that she had resigned, that AN intended to be there when the claimant told the staff, and that this was not to be done until the notice deal was agreed. On 10 July the claimant wrote to HMcM, copied to AN, saying that she would like to tell an individual of her exit in person. We understand this individual to be one of the members. She asked when she can tell him.

99. She accepted in cross-examination that she was well aware that she had been given an instruction not to tell the staff or anyone outside the organisation of her resignation until the details had been agreed. As we have said those details and the claimant's final counter proposal were agreed by the board on 12 July. Sometime that day the claimant told the staff about her resignation or at least one of them.

100. The claimant's explanation was that she judged them to have run out of time to tell the staff when she had holiday coming up. However we accept the descriptions by HMcM of how unsettling and destabilising the period was with the staff having been told that the claimant had resigned and then the claimant suddenly being absent because she was unfit to attend work.

101. It is against that backdrop that at 13:34 on 12 July AN asked the claimant "*please can you let me know what staff have you told of your resignation. Thanks."* We consider it to be understandable that the respondent should want to know whom she had told. Some staff knew and some did not. It is apparent from the wording of the text the following Monday that the claimant told a member of staff and gave her permission to tell her team when she had known that AN wished to be present when the staff were told of this very important change. The claimant had taken it upon herself, in breach of a direct instruction, to decide to do so and to decide who to tell and on what terms. This was action which had the prospect of further destabilising the charity. Against the background of the other detailed discussions about the exit proposal it was not unreasonable for AN to think it appropriate to send the claimant this text despite knowing that she was unfit to attend work that day.

102. The claimant also complains about an email sent on 22 July 2019 (page 165) in which AN requested a back to work meeting. In the list of issues the complaint is phrased as being that the email was sent to the claimant's personal email address outside working hours, requested a back to work meeting, asked to discuss several issues, advised her not to share her resignation with external fundraisers or others and referred to a suggested conflict. However in cross-examination about her response to this and her objection to it, it was clear that it was in fact only the fourth paragraph which she considered to be detrimental to her. It reads as follows: "*one thing that has come up to give you a head's up on so we can cover it in our return to work conversation. We have been approached about an organisation called NeuRe International who are using some of our assets and appear to be connected to Hope. One of the companies we work with Add10 have said they have done some pro bono work on behalf of Hope for this organisation too. Yet none of the team seem to be aware of it so it's all a bit weird. Is this is something you are aware of as it is causes us some confusion? Be great if you know anything as we don't want to get too serious with them if they are known to us."*

103. The claimant agreed in cross-examination that it was not the fact that the email was sent outside work hours which she objected to. At 17:43 it was only just sent outside work hours. She agreed that there was no other aspect of it that she regarded as detrimental or disadvantageous. What is said in the above paragraph is that on her return to work AN would like to find out what the claimant knows about NeuRe.

104. The background to this request is in HMcM's evidence at paragraphs 12 and 13. She stated that the staff had told the board that they were concerned that the claimant had set up another potentially competitive organisation by that name using the charity's resources. The claimant accepted that, had she done that, it would have been in contravention of her contract of employment. Ms McMillan further said in her statement, and confirmed in oral evidence, that she had searched on the internet and found that an organisation by that name did appear to be connected with the claimant. We stress that it was not by the time of this hearing suggested to the claimant that she had done anything wrong in connection with this organisation but it was argued on behalf of the respondent that it was perfectly proper, given what they knew at the time, for them to ask her what she knew.

105. When asked for an explanation about the inclusion of this paragraph in her email, AN referred to discussions she had had with the claimant around 11 and 12 July for the telephone meeting due to be heard on 12 July about the exit proposal. We note that, at 19:04, she provided an explanation of the purpose of the call the following day following the claimant's request. The claimant responded by saying that she would like to see the proposal in writing because it would reduce her stress as opposed to exacerbated and ensure she can give a considered response. AN said that the purpose of including it was advance notice that she wished to know what the claimant knew about this topic so that the claimant who had been unwell would not be taken by surprise.

106. There is not enough in the paragraph included in the email to say that it was a direct accusation. The claimant says that she was accused in that of having a conflict of interest but that is not a fair reading of the paragraph in question. If the staff have come to the respondent's board saying that there is an organisation that they don't know anything about that has benefited from work which H4C has paid for then there is nothing wrong in wanting to ask the outgoing CEO about it. If it is a project that the charity is involved with they need to know what is necessary in order that they could take it on in the future.

107. We have considered the wisdom of putting it in a communication in advance when the claimant was still in a period of sickness absence rather than asking her about it without warning on the Monday. On balance, we consider it not to have been unreasonable to ask her. They had a proper reason to ask the question. If they had had a meeting and not warned her beforehand she might have complained about being ambushed. They had an actual reason to be concerned that she would take it that way because of the earlier communications that AN referred to. We accept that that is why it was carefully worded in the email. We conclude they had reasonable and proper cause for the enquiry.

108. The claimant put in a grievance against AN (page 170) complaining about bullying and harassment. It is relied on as a protected disclosure on the

basis that there are references to her having blown the whistle on an earlier occasion. For example "*I am left feeling that I am being victimised for having whistle blown in relation to the actions of the previous chairman and for having resigned from my position."*

109. By this email, the claimant asserted her status as a previous whistle-blower and complained about treatment said to have been received as a result. The document is headed formal grievance and, in it, she complained about other matters which she alleged to have been bullying and harassment by AN. She specifically referred to the email of 22 July 2019 and asked that AN do not contact her while she is signed off sick. She asked for a detailed brief of what had been done in her absence so that she can return to work and work effectively the following week and for a point of contact from the board.

110. The grievance was acknowledged (see page 172).

111. On the same day the respondent sent a letter suspending the claimant (page 173). They argue that the claimant's contract did not permit them to require her to stay at home on garden leave. There is not a copy of the employee's handbook in the bundle. There is a copy of the trustee's handbook. The contract at page 62 includes at clause 16 discussion of the provisions for termination. That includes at clause 16.5,

"*the organisation shall have the right to suspend you (with the continued payment of your salary and any other contractual benefits) pending any investigation into any potential dishonesty, gross misconduct or other circumstances which might lead to dismissal for such period as it thinks fit."*

112. The respondent may not have had the power under the contract to require the claimant to stay at home on garden leave if not suspended but they could have asked whether she would agree to that. The evidence of the respondent was that it did not occur to them.

113. We consider the evidence put forward by the respondent of their reasons for the suspension. The starting point is the letter itself. It says that she is suspended ""*pending discussions and investigation of a number of matters*" but does not give any specifics about what those matters might be. It then goes on to say "*given your comments about your lack of confidence in the board we feel that any further work based interactions may exacerbate your stress levels."* There is no suggestion that the claimant was seeking or required or had medical evidence to support a medical suspension. The respondent goes on to say that, since her last day of employment is just two weeks away, they have put cover arrangements in place and feel that her attendance at the office may be counterproductive and have a detrimental impact on the charity and its staff. They say they have been advised it is not appropriate for her to return to work during this time.

114. There were the usual consequences of suspension in that her access to the server and emails and the IT system was suspended and she was asked not to contact staff or external partners or fundraisers. She was told to contact HMcM if she needed to come into the office.

115. The oral evidence and statement evidence of the respondent's witnesses was not consistent about how the suspension was decided upon. One thing that GIR and EG were clear about was that the board were at least consulted. GIR did give clear evidence that the decision to suspend had been taken by

HMcM and AN. However we find that AN was credible in her insistence that, as soon as the grievance arrived she stepped back, because she recognised that it could potentially undermine any investigation or adversely affect the apparent impartiality of the decisions if she was to be involved. Notwithstanding that, even if AN did not have a role in the decision as GIR described, it does appear that HMcM was leading on this.

116. Her own evidence was to the effect that the claimant would be a destabilising influence on things. In her paragraph 11 she said the decision to suspend was unanimously agreed by the members of the board during an emergency telephone conversation. She did not exclude AN from that unanimity. She continued

"*it was becoming clear that the Claimant was undermining the board's efforts to implement an interim plan and calm and manage the staff team who were understandably disconcerted. The board had lost confidence in the Claimant's ability to act upon its instruction or for the best interest of the organisation, as despite having agreed not to inform the team of her resignation until exit arrangements were agreed, the Claimant went ahead and told them, making the already difficult situation even harder to manage. We felt that there was a high risk of her continuing to undermine our actions and that this posed a threat to the future of the organisation and therefore it was necessary to implement the suspension."*

117. The board knew by 12 July 2019 that the claimant had informed staff of her departure in breach of their instruction. There is a communication between the claimant and HMcM about it on 15 July. We were not taken to any specific action by the claimant after that date which caused a conclusion that the claimant was undermining the board's efforts to implement an interim plan.

118. In AN's statement at paragraph 20 she says that the claimant was suspended in order for an investigation to be carried out into comments that the claimant had made about the organisation. She also states that the comments "*involved her emailing a staff member on 24 July 2019 to the effect that she was fighting the good fight with trustees and was querying their compliance with child safeguarding training."* We have not been taken to that particular piece of correspondence to see the context of it but are aware from other evidence in the bundle that there are periodic references to encouraging all of the trustees to carry out child safeguarding training and to keep that training updated. In those circumstances we do not think that this comment in AN's statement can be taken as evidence that reasonably leads to the conclusion that the claimant was seeking to undermine the board simply because she used the phrase fighting the good fight. This is particularly the case since AN says that she was not involved in the decision to suspend and therefore her evidence about the reason for it carries less weight.

119. There are also notable omissions from some of the respondent's statements. EG doesn't mention the suspension. She refers to the resignation in paragraph 11 but not to the process of the suspension despite saying in oral evidence that she was involved in some way in a consultation with the board before the decision was taken. We would expect the bundle to contain some email trail or for communications setting up the meeting to be referred to in someone's statement. Although AN explained that she had lost access to a previous email account there were a total of six trustees and we would expect

that reasonable enquiries could have found some remaining documentations but none is in the bundle.

120. Overall the evidence from the respondent about the reasons for the suspension is unsatisfactory. We have not been provided with documentary evidence relied on to evidence what the claimant was suspected to have done and given AN's statement about the communication we would have expected that. It is not clear that the board are saying that the claimant was suspended so that they could investigate NeuRe. There is no minute of the meeting at which she was suspended or at which the decision was taken to do so. The wording of the letter of suspension where it says that attendance at the office may be counterproductive and have a detrimental impact on H4C and its staff points to R suspecting a breakdown in working relationship rather than to a disciplinary matter. There was not the consistency in the respondent's evidence on this point that one would expect had it been clear what the claimant was suspected to have done and why a suspension was necessary.

121. It is true that in HMcM's statement she refers to the claimant having told the staff and it is true that that action was done in breach of direct instructions. When it was put to HMcM in cross-examination this amounted to her saying that the claimant had told the staff so they suspended her, her answer was that there was a lot more to it and described the trustees being seriously concerned about that action in circumstances where they had just had the merger collapse, the CEO had resigned, they had virtually no notice of it and had negotiated an exit. HMcM described finding the staff in utter disarray, distressed and, in some cases, angry with the way that they felt they had been managed. Those staff were throwing allegations at the Trustees. She said that they felt they needed to suspend the claimant to protect the team and the organisation as a whole and that they had to undertake the investigations for that. She explained that the reason that the investigations did not take place was that the claimant she then resigned bringing short her notice period.

122. There were only two weeks left of the claimant's employment in any event and it would have been difficult to complete the investigation in that time. This throws into doubt whether suspension was in fact taking place in order for investigations to take place. That is particularly so since the suspension letter does not set up an investigation meeting. HMcM was also asked why the claimant had been suspended on 26 July 2019 when they had known about her telling the staff on 12 July 2019. Her explanation was that it had been

"*because we were finding it increasingly difficult to manage the situation and just felt that we had to get control of one of the elements. We needed to investigate and needed to let the staff know what was happening. They were increasingly unhappy that we weren't taken seriously what they were saying and that made the whole job of calming them down and managing them more difficult."*

123. This explanation was not backed up by consistent evidence of the respondent's other witnesses or in emails. Neither was it consistent with HMcM's written statement itself which, in paragraph 11, seems to refer to the reason being the risk of the claimant undermining the trustee's actions rather than the need to investigate. She refers to the NeuRe matter as being

"*further evidence that the claimant had lost the focus and commitment to her role.*" However given that they were unable to carry out more than very rudimentary investigations of this, there was no reasonable justification for her to conclude that.

124. It was suggested to HMcM in cross-examination that the comment about lack of confidence in the board in the suspension letters were a reference to the grievance and she said "*I don't believe so."* However she could not point to what those comments were or where they were to be found. The grievance itself does not make an allegation that the claimant has lost confidence in the board but it is apparent from it that she had lost confidence in the acting chair.

125. Given the timing of the suspension the lack of satisfactory evidence from the respondent to consistently explain the decision or the circumstances in which it was taken and in particular the inability of HMcM to explain why what the comments were that apparently betrayed a lack of confidence in the board we've come to the view that the respondent did suspend the claimant in response to her grievance against the acting chair, AN.

126. Following the suspension HMcM contacted a former employee to ask if he could provide immediate interim support. HMcM explains in her paragraph 9 that she told him that the claimant had been suspended in order to explain the urgency of the request. Nonetheless we consider this to have been a breach of confidence. It was quite possible for HMcM to have said that the claimant had resigned and was not working out her notice period. She did not have to say that the claimant was suspended and we accept that there is potential reputational damage to the claimant in that information being given to someone outside the organisation but inside the industry.

127. The claimant resigned with immediate effect by a letter that's at page 181. She refers to a number of matters. The last bullet point in section 21 page 182 reads "*I was suspended and this information has been disclosed to ex-employees and other parties, which could be detrimental to my reputation in the sector and negatively impact my career and future employment. This is deliberate and calculated to destroy the confidence and trust between us."*

128. We are satisfied that her suspension and the disclosure of that information to the former employee were part of the reasons for her resignation on 29 July 2019.

Law applicable to the issues in dispute

129. The structure of the protection against detriment and dismissal by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B ERA and (for the purposes of the present case) is made by the employee in one of the circumstances provided for in s.43C ERA. In the present case, the claimant relies upon 4 communications made or alleged to have been made either directly to her employer or to another responsible person.

130. Section 43B(1), as amended with effect from 25 June 2013, so far as relevant, reads as follows,

"In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made

in the public interest and tends to show one or more of the following —

(a)…,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)…."

131. Section 43C reads as follows,

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —
(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—
(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility,
to that other person.
(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer."

132. An earlier communication can be read together with a later one so as to enable the later communication to be regarded as a protected disclosure even where either communication, taken on its own, would not fall within s.43B(1): Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540, EAT (see, in particular, para.22 where this was referred to as the earlier communication being embedded in the later one). The decision in Norbrook was held by the Court of Appeal in Simpson v Cantor Fitzgerald Europe [2021] ICR 695 CA to be "plainly correct" and, while making clear that whether two communications are to be read together is generally a question of fact (see para.41 of the judgment) we note that at para.43 Lord Justice Bean comments about the communications in Norbrook that

"The three communications, two on the same day and one a week later, were all on the same subject and the second and third disclosed information which the claimant reasonably believed tended to show a risk to health and safety."

133. It is clear, therefore that the question of whether a communication can be regarded as a protected disclosure because it should be read with an earlier communication is a question of fact. It seems to us from the above dicta that relevant matters when consideration that question include whether the communications are on the same subject, and whether the timing of the communications tend to suggest that they should be read together.

134. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 Sales LJ rejected the view that there was a rigid dichotomy between communication of information and the making of an allegation, as had sometimes been thought; that was not what had been intended by the legislation. As he put it in paragraphs 35 and 36,

"35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). …

36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in [Nurmohammed], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

135. The structure of s.43B(1) therefore means that the tribunal has to ask itself whether the worker subjectively believes that the disclosure of information, if any, is in the public interest and then, separately, whether it is reasonable for the worker to hold that belief. Similarly, we need to ask ourselves whether the worker genuinely believes that the information, if any, tends to show that one of the subsections is engaged and then whether it is reasonable for them to believe that.

136. The reference to Nurmohammed is to Chesterton Global Ltd v Nurmohammed [2017] I.R.L.R. 837 CA, where the Court of Appeal gave guidance to the correct approach to the requirement that the Claimant reasonably believed the disclosure to have been made in the public interest at paragraphs 27 to 31 of the judgment. Those paragraphs can be summarized as follows:

a. The Tribunal has to ask, first, whether the worker believed, at the time that he or she was making it, that the disclosure was in the public interest and secondly whether, if so, that belief was reasonable.

b. The second element in that exercise requires the Tribunal to recognize that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is

perhaps particularly so given that that question is of its nature so broad-textured.

c. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking but only that that view is not as such determinative.

d. The necessary belief on the part of the worker is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters.

e. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.

f. The essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

137. In RSA para.17 Mr McPhail directed us to Darnton v University of Surrey [2003] ICR 615, in particular para 29 where the EAT explained that the factual accuracy of the disclosure will, in many cases be an important tool in determining whether the worker had the reasonable belief that the disclosure tended to show a relevant failure. It was pointed out that it would be extremely difficult to see how a worker could reasonably believe that a disclosure tended to show something when they knew the factual basis was false, absent an honest mistake on their part.

138. If the worker has made a protected disclosure then they are protected from detriment and dismissal by s.47B and s.103A of the ERA respectively. In this context, detriment has a broad meaning, as it does in Equality Act 2010 cases. The Tribunal must find that, by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work: De Souza v Automobile Association [1986] IRLR 103, CA.

139. S.48(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment on grounds that he or she had made a protected disclosure.

140. Section 103A, so far as is relevant, provides that:

"An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

141. In the present case, the claimant alleges that she resigned in response to actions which were detriments on grounds of protected disclosures and therefore that she was entitled to consider herself to have been automatically dismissed contrary to s.103A ERA.

142. Section 95(1)(c) of the Employment Rights Act 1996 makes it clear that a dismissal includes the situation where an employee terminates the contract of employment (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. This is commonly referred to as constructive dismissal and the leading authority is Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 CA. If the employer is guilty of conduct which goes to the root of the contract or which shows that he no longer intended to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance of it. The employer's conduct must be the cause of the employee's resignation and thus the cause of the termination of the employment relationship. If there is more than one reason why the employee resigned then the tribunal must consider whether the employer's behaviour played a part in the employee's resignation.

143. In the present case the claimant, separately to the protected disclosures claim, argues that she was unfairly dismissed because she resigned because of a breach of the implied term of mutual trust and confidence; a term implied into every contract of employment. The question of whether there has been such a breach falls to be determined by the authoritative guidance given in the case of Malik v BCCI [1998] AC 20 HL. The term imposes an obligation that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. One question for the tribunal is whether, viewed objectively, the facts found by us amount to conduct on the part of the respondent which is in breach of the implied term as explained in Malik v BCCI. Whether the employment tribunal considers the employer's actions to have been reasonable or unreasonable can only be a tool to be used to help to decide whether those actions amounted to conduct which was calculated or likely to destroy or seriously damage the relationship of trust and confidence and for which there was no reasonable and proper cause.

144. In the case of a claim for unfair dismissal, once the tribunal has decided that there was a dismissal they must consider whether it was fair or unfair in accordance with s.98 ERA 1996.

145. There was an issue in the present case as to whether the claim includes complaints of unfair dismissal contrary to s.98 ERA 1996 both in relation to a resignation on notice on 5 July 2019 and the later resignation with immediate effect on 29 July 2019. The respondent relies upon the

drafting of the List of Issues although that is not a pleading, it is a case management tool. The respondent also argues that the grounds of complaint themselves do not include unfair dismissal claims based upon both resignations.

146. When considering whether the ET1 contains a particular complaint that the claimant is seeking to raise, reference must be made the claim form as a whole. The ticking of a particular box is only one feature of construing whether as a whole the claim form does include a particular complaint.

Conclusions on the issues

147. We now set out conclusion on the issues applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the Judgment but we have them all in mind in reaching those conclusions.

148. We start by considering our findings in relation to the four alleged disclosures and reach conclusions on sections 2 and 3 of the list of issues. We consider whether any of the disclosures communicated information which in the reasonable belief of the claimant tended to show,

148.1. that NR was attempting to obstruct the merger and/or a majority board decision and was attempting to do so using false information, and

148.2. that this was or was likely to be in breach of a legal obligation on the part of NR to comply with and further majority board decisions to act in good faith and to act in the interest of the charity.

149. We accept that as a matter of fact NR was not attempting to obstruct the merger and our findings are that he was attempting to give effect to reservations that had been expressed to him by members of the board about the identity of the chair but more relevantly about whether it was best for the charity to achieve parity on the board of former H4C and EAP trustees by reducing the number of H4C trustees or by increasing the number of total trustees. We also accept that he was not attempting to obstruct a majority board decision. The decision of the board of 18 May 2020 had not been to the effect that parity was to be achieved by reducing the number of H4C trustees to 5 and the emails did not amount to a binding decision in accordance with the AoA. We have sympathy with his position that in his role as chair it was his obligation to challenge appropriately and we repeat that we do not see his actions as going against what had been decided by the trustees.

150. We are mindful that the claimant had not seen the emails that AN sent expressing reservations about working with the then EAP chair. It is important when considering what the claimant genuinely and reasonably believed that she was communicating that we do not take those into account.

151. Our finding on the content of the phone call of 30 May 2019 is that NR said “some trustees” and referred to female trustees which the claimant interpreted to mean a larger number both of trustees and of female trustees than he intended to communicate. We have reference to our findings on the investigations that the claimant made into those statements which can be summarised as being that the claimant jumped to conclusions that NR has

given her false information about the number of trustees that he has spoken to. Our view is that the claimant did not reasonably believe that NR was using false information because she jumped to conclusions following a cursory investigation in which she used imprecise language. This meant that the answers she received could not support the conclusion she drew from them.

152. We also consider that the claimant did not reasonably believe that NR was seeking to obstruct a majority board decision. Despite relying on clause 6.5 in her grievance letter, that clause does not support her argument because it does not refer to electronic decisions being binding if they are taken by a majority. We think that her anxiousness and passion for the merger caused her unreasonably to lose sight of the detail.

153. It is argued by the respondent that the claimant did not genuinely think she was acting in the public interest on the basis that the email to NR himself contains an implicit suggestion that he resign which is taken up and made explicit in the email at page 145 where she sets a deadline for his resignation (see RSA paragraphs 45 to 50). We remind ourselves that in the text at page 123 to EG at 12:05 the claimant described herself as a whistle-blower.

154. We accept that she did desire to push NR out of his role as chair of the charity. She accepted that she wished him to resign and we agree that was an objective. However this does not, of itself, preclude the communication being made in the public interest. She sets out in her statement paragraph 29 the reasons why she argues her actions were in the public interest and we take that to be her evidence as to why she believed at the time that they were.

155. However, even if she genuinely did believe these matters she did not have a reasonable belief in NR's wrong doing and therefore no reasonable belief that his wrong doing was deliberate. It was her opinion that the continued uncertainty about whether parity was to be achieved by reduction of H4C trustees or by amendment to the AoA would affect the timescale to the point where the merger's integrity was affected and the merger might have been destabilised. In our view, as CEO, she was in a position to smooth things over to try to work to avoid that. We accept that there was a small element in her reasoning that genuinely believed it to be in the interests of the charity for the merger to be achieved and that includes an element of public interest given the objects of the charity.

156. However we do not consider that this was a reasonable belief for her to have. She overstates in the matters referred to in her paragraph 25, as we have already said. There was no deliberate wrong doing and the claimant could not have reasonably believed so. NR had the support of a number of trustees and it was not the claimant's position to choose the chair. As we understand it was for the members of the charity to choose the chair but not for the CEO. Furthermore, her failure to check directly with NR about whom he had spoken to and the extreme conclusions she drew from imprecise enquiries undermines the reasonableness of the belief in the information she says she was communicating and therefore in the reasonableness of her belief that that communication was in the public interest. For those reasons, we conclude that the first three communications were not protected disclosures because they were not qualifying disclosures.

157. We do not need, therefore, to consider whether, had they had been qualifying disclosures, they would have been protected disclosures within the meaning of section 43C ERA. Nevertheless, we have taken into account the whistleblowing policy of the organisation. In effect, the claimant by her text and the email of 31 May 2019 communicated to the then chair and vice chair the information that she relies on and we consider that that amounts to a communication to her employer. Given that the policy suggests that communication in the first instance to the CEO and if the CEO is involved to the chair of trustees it seems to us to be a reasonable interpretation that the appropriate person to go to if the CEO wishes to blow the whistle would be the chair but where the chair is implicated to the vice chair. In any event the grievance of 11 June 2019 being sent to the vice chair expressly in that capacity should be regarded as a communication to the employer.

158. As to the fourth alleged protected disclosure, the claimant argues that by describing herself as a whistle-blower in relation to NR within the body of the grievance at page 170 that should be read as having the earlier communications embedded into them. As we have found that the earlier communications weren't qualifying disclosures this argument fails.

159. In any event our view is that the concept of an earlier communication being embedded in a later one does not cover the situation. Whether or not communications can be read together is a question of fact. This is a completely different complaint about a different trustee. The claimant is complaining of different behaviour, it is addressed to the whole board where the earlier communications are addressed to individuals. The link is that she is saying that she has the status of whistle-blower because of the previous communication. She refers to having blown the whistle on actions which were damaging to the charity and its CEO and then complains about personal matters of behaviour towards her that she said resulted from it. She is not repeating any earlier communication of information and the purpose of the communication is to complain about something different. Had it been the case that we considered the earlier communications to be protected disclosures we would not regard this as being a protected disclosure in any event.

160. We turn then to the alleged detriments. LOI5.a.i We consider that no reasonable employee could consider themselves to be disadvantaged by a board chair calling for a board meeting to decide on the process and what the potential ramifications of a potential grievance might be in the circumstances that were then current for this respondent. This was not a detriment.

161. So far as LOI5.a.ii and LOI5.a.iii are concerned these allegations have not been upheld by us on the facts and, regardless of our decision that there was no protected disclosure, these fail for that reason.

162. As to LOI.5.b, we do not consider that any reasonable employee could reasonably consider themselves to be disadvantaged by the board meeting as we have already explained. Therefore for AN to say that there would be a board meeting, when it which was not to discuss the detail of the grievance (which had not been made at that point) is no detriment.

163. We consider LOI.5.c. d. and e. together because they all concern the arrangements for 11 June 2019 board meeting. In essence we have found

that this amounts to the claimant not finding out information about the date of the board meeting and other matters at the time that she would have liked to. She could not point to a particular failure to provide information about the time venue and agenda of the meeting on or around 5 June 2019 and she did find out the time and date of the meeting shortly thereafter. We do not consider this to have been a detriment and the allegation is not made out. By 9 June 2019 she knew when the meeting was to take place.

164. LOI5.d. has not been made out as a matter of fact because AN did respond (see page 214) and in the circumstances that response was an acceptable one. The response was two days after the date on which she claims there was a failure to respond but as we say this amounts to the claimant not being told things at the time that she thinks she ought to have been told them. There was no action by the respondents that an employee would reasonably consider themselves to be disadvantaged by and the underlying facts are limited to the respondent taking two days to provide her with a response.

165. As to the meeting itself she did not take part in that part of the meeting which concerned the board's response to the fact that the CEO had intimated that there was a relationship breakdown with the chair of the board of trustees and she was considering bringing a grievance. Neither did NR. The claimant was not excluded from a grievance hearing and she was in attendance at the other part of the meeting which was the part that it was proper for her to attend. No reasonable employee would reasonably consider themselves to have been disadvantaged by this.

166. The allegation at LOI5.g. that on or around 12 June the respondent agreed the claimant should go out for a drink with AM is not made out on the facts. AM was appointed to mediate between the claimant and NR at a time when the board was unaware the claimant had brought a formal grievance. By the end of 11 June AM had arranged for himself and another trustee to carry out the formal investigation of the grievance.

167. As to LOI.5.h. we have found that AN did not refuse an annual leave request and did not repeatedly refer to the claimant's trip on the respondent's business to Ghana as a holiday or annual. This allegation is not made out.

168. As to LOI5.k. and l we have concluded that there was reasonable and proper cause for contact by AN to the claimant and for the requests that she made during the claimant's sickness absence. No reasonable employee would regard themselves as disadvantaged in all of the circumstances which include that staff had raised questions with members of the board about a particular organisation saying that it was unknown to them and the trustees wished to know what the claimant knew about it.

169. We also consider that LOI5.o. is the allegation that there was a detriment to the claimant in relation to the communication about the anonymous tip off. This is not something that an employee would reasonably consider themselves to being disadvantaged by. There is no criticism of the claimant in relation to the tip off. It is not even said that in the communication by HMcM that there was criticism of the claimant for not informing the trustees about the matter when it came to her attention. HMcM did tell the claimant that NR was the source of her information but we do not see how that could have disadvantaged the claimant even had she not been aware of it.

170. That leaves issues LOI.5.m and n. We consider that it was a detrimental act to suspend an employee in these circumstances. It may not be a disciplinary act in itself but if one considers the power to suspend that is put in the employee's contract it is implicit that there is suspension in circumstances of suspected misconduct. It reinforces the view that in the case of this respondent's suspension is decided on in cases which might lead to a disciplinary process. We do not consider that suspending the claimant's access to her emails and requesting that she did not contact any member of staff or external partners or bodies are separate detriments. They are consequences of the suspension itself and part of what makes the suspension a detriment in these circumstances. The statement that her attendance may be counterproductive made by her employer we do consider the claimant would reasonably consider to be a detriment. Any implication that the claimant was unlikely to be reinstated is a factor of the short remaining period of time of her employment and not a separate detriment. We consider that the failure to confirm whether she would be paid during the period of suspension does not add anything to the suspension itself because the power to suspend in the contract is on full pay and we also consider that the absence to set out the basis of the investigation is not a separate detriment but an aspect of the respondent having written the letter in those terms to suspend the claimant.

171. We also consider that the claimant could reasonably consider herself to be disadvantaged by having the respondent tell EF that she had been suspended.

172. Although we do not consider that these matters were done in response to or on the basis of or because of a protected disclosure (because we have found that there was no protected disclosure) we have found that the suspension was probably in response to the grievance. We have reference to our findings above on why we have reached that conclusion.

173. It is not in every case that a suspension done in accordance with the terms of the contract is an action by an employer which would breach the implied term of mutual trust and confidence. The question for us is whether viewed objectively in the circumstances of this case the sending of the letter of 26 July 2019 by which the claimant was suspended and communicating that she had been suspended to a former employee were actions which were likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent and whether they were done without reasonable and proper cause. These are matters for which the claimant needs to satisfy us.

174. In our view the respondent was in breach of the implied term of mutual and trust and confidence by these actions. The claimant was in a senior position. She was suspended in part because she had brought a grievance and the letter of suspension stated the respondent's view that her presence was likely to be counterproductive and have a detrimental impact on the charity and its staff. There was a breach of confidence in disclosing the fact of the suspension to EF. We considered that these were actions for which there was not reasonable and proper cause. The bringing of the grievance was not a reasonable and proper cause for suspending the claimant. The reasons put forward for doing so were contradictory and in part relied upon the claimant's action in informing the staff of her resignation but there was

no explanation as to why it took the respondent so long to act upon that. The claimant has shown that this was something that the respondents did not have a reasonable and proper cause for.

175. We have decided that part of the reasons why the claimant resigned was in response to the suspension and breach of confidentiality. We conclude that there was a separate repudiatory breach of contract by the respondent during the notice period which entitled the claimant to resign and bring the notice period to end immediately. However it is clear that the employment was going to end on 9 August 2019 on the agreed terms that the claimant would be paid until 31 August 2019 in any event. We have found that that agreed termination did not involve any unlawful act on the part of the respondent. There was no repudiatory breach of contract by the respondent before the first resignation which was not because of any act of the respondent (see para.93 above).

176. It was argued by the respondent that the claimant only relied upon the second resignation as a wrongful dismissal and not an unfair dismissal. For reasons which we set out above we accept Mr Donnelly's argument that the claim form should be regarded as including an unfair dismissal based on the later date as well.

177. We therefore find that the claimant was dismissed on 5 July 2019. That was a wrongful dismissal because the respondent was in repudiatory breach of contract and did not pay her the balance of her notice pay.

178. We need, in relation to the unfair dismissal claim, to go on to consider what the reasons were for the dismissal and we are mindful that we did not hear express argument on this point. However it would be for the respondent then to show the reason for their actions that led to the resignation and therefore the reason for the dismissal. We do not consider that the decision to suspend was on reasonable and proper grounds. The respondent's evidence on this has been inconsistent and the reasons included the grievance against AN. We therefore conclude that the respondent has not shown a potentially fair reason for the actions in response to which the claimant resigned. Therefore, the dismissal with effect on 5 July 2019 was unfair.

_____

Employment Judge George

Date: 15 June 2022

JUDGMENT SENT TO THE PARTIES ON

17 June 2022

FOR THE TRIBUNAL OFFICE

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