EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4103428/2020

Hearing held in Glasgow on 6 (pre-reading), 9 (case management), 10, 12, 13 and 16 May 2022, 25 May 2022 (deliberations) and 13 July 2022 (deliberations)

Employment Judge M Whitcombe
Tribunal Member EA Farrell
Tribunal Member AB Grant

Mr Gordon Gibb	**Claimant** **In person**
Glasgow School of Art	**Respondent** **Represented by:** **Mr N MacDougall** **(Advocate)**

JUDGMENT

The judgment of the Tribunal is as follows.

(1) The claim for automatically unfair dismissal for having made one or more protected disclosures, brought under s.103A of the Employment Rights Act 1996, fails and is dismissed.

(2) The claim for unfair dismissal contrary to section 98 of the Employment Rights Act 1996 also fails and is dismissed.

(3) The claim that the claimant was treated detrimentally for having made one or more protected disclosures, brought under ss.47B and 48(1A) of the Employment Rights Act 1996, also fails and is dismissed.

REASONS

Introduction and background

1. The claimant was formerly employed by the respondent from 12 January 2004 until 17 January 2020 as a member of its academic staff, holding the post of Director of Professional Studies at the Mackintosh School of Architecture. The claimant worked for the respondent on a permanent part-time basis and simultaneously maintained both a private architectural practice and also a career as an expert witness. The claimant's employment with the respondent ended on 17 January 2020 when he was dismissed without notice for gross misconduct.

2. The respondent is a well-known higher education institution specialising in education and research in the visual creative disciplines. It occupies several buildings in the centre of Glasgow. Its most famous building is the Mackintosh Building, often known affectionately as "the Mack". The Mackintosh Building was designed by Charles Rennie Mackintosh and is widely regarded as an iconic building of the Modern Style.

3. In recent years there have been two serious fires in the Mackintosh building. On 24 May 2014 the first fire destroyed the loggia, the top floor studios, the furniture store and the Mackintosh Library. The second fire on 15 June 2018 was catastrophic, destroying every combustible part of the building and spreading to several nearby buildings too. The Mackintosh building was devastated and only a burned-out shell remained.

4. That is the context of these claims. The claimant alleges that he made protected disclosures regarding the respondent's management of the building

and the conduct of senior figures within the organisation. The relevant disclosures were made not to the respondent itself, but rather to the Scottish Parliament's Culture, Tourism, Europe and External Affairs Committee ("CTEEA"), to the press and also on social media.

5. We would not wish our judgment to be misunderstood, or to be regarded as having decided issues that we did not, and could not, address. It is not the function of this Tribunal to investigate the causes of either fire, still less to attribute blame. It is not our function to decide whether the claimant's strongly held views regarding the loss of the Mack are correct. We are simply concerned with the claims and issues identified below. Our findings of fact and conclusions are tailored accordingly.

The hearing

6. This hearing was originally listed for 6 days plus a pre-reading day. An effective start was made only on the fourth of those days, partly because the claimant contracted Covid-19 shortly before the start of the hearing and also because, very sadly, he also suffered a bereavement. However, the parties agreed that a fair hearing remained entirely possible within the remaining 3 days and the case was timetabled and managed on that basis in accordance with rule 45. Both sides produced written submissions and made additional oral submissions.

Claims and issues

7. The claims are for:
    a. automatically unfair dismissal by reason of having made a protected disclosure, contrary to s.103A ERA 1996;
    b. alternatively, "ordinary" unfair dismissal contrary to s.98 ERA 1996;
    c. 14 instances of detrimental treatment prior to dismissal contrary to s.47B ERA 1996.

8. The following summary of the issues is based on the very helpful list agreed

prior to the hearing by the parties, but it also takes into account some further clarification, explanation and narrowing of those issues at the start of the hearing and concessions made by the end of the hearing.

9. In one respect identified below (paragraph 37) the claimant sought to expand one of the issues in his closing submissions. However, we refused permission for him to do that in a unanimous case management decision. Oral reasons were given at the time and there was no request for written reasons for that decision, but in brief we applied the overriding objective in rule 2 as well as well-known principles contained in cases such as ***Scicluna v Zippy Stitch Limited*** [2018] EWCA Civ 1320, paragraphs 14-17 and 22 and ***Mervyn v BW Controls*** [2020] EWAC Civ 393, although neither authority was referred to by the parties given the sudden way in which the point had emerged. All three members of the Tribunal consulted their notes and we agreed with the respondent that the point had been explained by the claimant in a much narrower and more limited way at the commencement of the hearing. We also noted that the claimant had conducted cross-examination in a manner consistent with that narrower position and had not put or explored the additional point that he wished to make in closing submissions with any of the respondent's witnesses. It would have been unfair to the respondent to allow the claimant to expand the point after all of the evidence had been heard and after the respondent had made its own submissions.

10. First of all, we will list the 9 disclosures on which this claim is based. This summary is based on the list of issues. As we will explain below, our findings of fact are in some respects different. Disclosures numbered 1 to 5 were made to the Scottish Parliament's Culture, Tourism, Europe and External Affairs Committee ("CTEEA"). Disclosures numbered 6 to 9 were made to the media or on social media.

Disclosures to the Parliamentary Committee (CTEEA)

11. **Disclosure 1.** An email dated 25 September 2018 provided to the committee including the words: "… we know that both fires were preventable. This is not

just about health and safety, but about the much older construction issue, always written into contract documents, called "*Protection of the works in all stages". One has to ask why the contractor's own offices were in the building when it was in an unsafe state, and why no effective building protection measures were prioritised by the contractor or by those in the school in charge of this project. I do not believe that enough lessons were learned from the first fire. In the GSA review of the fire report, management shortcomings were not addressed at all. Therefore, it is my view that those responsible for the recent stewardship of this part of our national heritage, given what could have been learned after the first fire, must surely bear a measure of responsibility for the fact that the second fire was not able to be prevented, contained or controlled at all.*"

12. **Disclosure 2.** This is intended to refer to the entirety of the report to the CTEEA Committee prepared by the claimant and dated 12 November 2018. The claimant disagreed with what had been said by the respondent about their fire protection preparations and the lessons learned by them from the first fire. It reproduced the respondent's document in black and added the claimant's comments in red.

13. **Disclosure 3.** This is a paragraph within the document referred to above as "Disclosure 2", in which the claimant stated: "*The combustibility of the building was known. The HSE guidance is clear that vulnerable buildings may not be occupied by temporary offices without appropriate measures being taken. No such measures were taken. The building was not compartmented, the ceilings of the parts of the building occupied were not fire protected and the structure was combustible. There were angled rooflights which would allow fire to leap from the occupied compartments to the remainder of the building. The smoke detectors were not working and there was no fire suppression system. The fact that fire protection was not prioritised by the client, in the clear knowledge of the danger to the building, shows inadequate prioritisation of the safety of the building in the hands of the GSA.*"

14. **Disclosure 4.** The claimant produced an additional paper on 16 January 2019 to clarify matters not addressed appropriately by the respondent before the committee and he also raised a number of concerns about the fire safety measures in place.

15. **Disclosure 5.** On 7 February 2019 the claimant lodged papers as evidence for the committee, as a response to the "Commentary by the GSA" paper lodged on 30 January 2019. The claimant noted errors in the respondent's evidence with regard to the status of the existing fire suppression system at the outset of the construction work. The claimant stated the following conclusion: "*The GSA instructed that a viable and near complete mist fire suppression system be stripped out and delayed the commencement of installation of an alternative. By so doing, the GSA failed to comply with the Joint Fire Code. Because of GSA's actions, the building did not benefit from the protection that a mist fire suppression system would have offered against the fire on 15 June 2018.*"

Disclosures to the media and on social media

16. **Disclosure 6.** The claimant wrote an article which appeared in the Sunday Post on 18 August 2019 titled "*In the ashes of the Mack, the board saw opportunity*".

17. **Disclosure 7.** The claimant made comments on Facebook in advance of an article published in the Sunday Post on 1 September 2019 regarding the allegation that the respondent's buildings and staff had been endangered.

18. **Disclosure 8.** This relates to various disclosures both on social media and also in the press in the period 27 May 2019 to 1 September 2019, including "*the Thunderer*" article in The Times newspaper in which the claimant was critical of the management processes leading up to the two fires and of the response by the respondent to both of those fires. In the end, the claimant limited the scope of this disclosure to "the Thunderer" article only.

19. **Disclosure 9.** The claimant commented in the press article "*Forced out: emails exposed turmoil at top of ravaged art school as director is told to go home against his will*" which appeared in the Sunday post authored by Mark Aitken.

Basis of protection

20. As we have already noted above, this is not a case in which any of the disclosures relied upon were made to the claimant's employer. The claimant relies on various aspects of s.43B ERA 1996 ("Disclosures qualifying for protection") and also on s.43G ("Disclosure in other cases"). He argues that the disclosures were of a type which qualified for protection under s.43B ERA 1996 and which gained protection because they met the requirements of s.43G ERA 1996. More specifically, the claimant relied on s.43G(2)(a) (subjection to a detriment if the disclosure was made to the employer or a prescribed person) and/or s.43G(2)(b) (concealment or destruction of evidence). He did not rely on s.43G(2)(c) (previous disclosure of substantially the same information to the employer).

21. None of the disclosures is alleged to have been made in accordance with s.43C ("Disclosure to employer or other responsible person"). The claimant had initially indicated an intention to rely on ss.43E ("Disclosure to Minister of the Crown") and 43F ("Disclosure to prescribed person") but abandoned those arguments before the evidence began.

Detriments

22. The claims include the following allegations of detrimental treatment.

23. **Detriment 1**. On 15 November 2018, a statement was made by the then Chair of the Board of Governors of the respondent to the Parliamentary Committee, naming the claimant and criticising him publicly, impugning him and his competence in a non-specific way which the claimant contends

impacted upon the perception of the claimant's credibility. The statement was televised and streamed both nationally and also live to an audience of the respondent's staff and students. The statement was not contradicted by the Acting Head of School of the respondent who was present on the same panel. The claimant contends that this caused him significant distress.

24. **Detriment 2**. Statements were issued by the management of the respondent to all staff members, critical of evidence disagreeing with the respondent's representations. Those comments, by implication, referred to the claimant in a demeaning and insulting way. The statements were also sent to staff members by email. The claimant contends that this caused him significant distress.

25. **Detriment 3**. The claimant had an annual review meeting with his Head of School in the architecture department in 2019. The claimant contends that at the review meeting, the Head of School advised the claimant that she was not interested in his achievements in education and the profession, which formed part of the agenda for the meeting, and that she used the meeting as a forum for criticism of the claimant. The claimant believes that this was done to marginalise the claimant because of the protected disclosures. The claimant contends that this lack of recognition caused him distress.

26. **Detriment 4**. On 30 January 2019, the respondent produced a public document which the claimant contends criticised him by implication, characterising his disclosures as "further rumours, supposition and speculation". The claimant contends that this caused him significant distress. We were not provided with the original document during the hearing and we refused to give the claimant permission to introduce it more than a week after the day on which the parties made their closing submissions, at a point when the Tribunal had already begun its deliberations. In the evidence that we *did* hear, this detriment is referenced in paragraph 2.2.9 of the document prepared by the claimant in support of his appeal against dismissal, dated 25 September 2020.

27. **Detriment 5**. On 8 March 2019 a statement was made by the then Chair of the Board of Governors of the respondent on BBC Radio 4 in which the claimant contends that he was named, criticised and insulted, and his professional status questioned. The claimant contends that this caused him significant distress.

28. **Detriment 6**. On 11 March 2019, there was an "All Staff Question and Answer Session" held in the Reid Lecture Theatre. When the claimant tried to ask a question, the Chair of the Board of Governors of the respondent stated aggressively in front of the entire school staff that "we are taking questions from all staff members except Gordon Gibb" and then went on to explain to the staff why the claimant should be marginalised. That position was supported by the Acting Head of School of the respondent. The claimant contends that this caused him significant distress.

29. **Detriment 7**. After the meeting referred to above, the claimant was subjected to discomforting conversations with other staff members regularly throughout the remainder of his employment, most of which were along the lines of "I am surprised you are still here" and "I thought that Muriel had fired you". The claimant contends that those incidents caused him considerable distress in the execution of his academic duties.

30. **Detriment 8**. On 17 May 2019, grievances having been raised by the claimant, the respondent issued two press releases, subverting the private process. Those press releases were critical of the claimant, insulted him and his professional competence and named him. The claimant contends that this caused him significant distress.

31. **Detriment 9**. On 26 May 2019, connected to the timing of the grievance process, the respondent issued a press release which was critical of the claimant, naming him, insulting him and questioning his professional competence as an architect and as an educator. The claimant contends that

this caused him significant distress.

32. **Detriment 10**. Mismanagement of the claimant's grievance process in respect of the above press releases. The claimant contends that this caused significant distress.

33. **Detriment 11**. Intentionally prejudicial destabilisation and unfair mismanagement of the claimant's grievance against the respondent's Head of HR and managers, including misconduct during the process. From the claimant's point of view the detriment was the respondent's tendency to schedule disciplinary meetings and grievance meetings at around the same time, either on the same day or within a day or so of each other. The claimant contends that this caused him significant distress.

34. **Detriment 12**. A departmental meeting was set up to discuss the results of a staff survey which had highlighted bullying and mismanagement and to seek views from staff. The disciplinary and grievance meetings were convened at the time of that meeting. The claimant believed that this was done by the respondent to prevent his attendance and to marginalise him. That alleged marginalisation from other staff members caused the claimant significant distress.

35. **Detriment 13**. This point concerned the Head of Department's alleged behaviour at the 2019 Christmas meal. However, the claimant abandoned this allegation of detriment before the end of the hearing.

36. **Detriment 14.** In an email dated 9 January 2020, setting a deadline for confirmation of attendance at a disciplinary hearing that the respondent knew could not be met because of the claimant's teaching commitments, then holding that disciplinary hearing in his absence.

37. The attempted reformulation of the issues referred to above concerned detriment 14. In the original written list of issues the claimant had referred

additionally to an undated "lack of confidentiality" about the disciplinary outcome. However, he did not pursue that aspect in the clarification of his case at the start of the hearing or in his cross-examination of the respondent's witnesses. We refused permission to revive the point in closing submissions for the reasons given orally at the time and also summarised in writing above (paragraph 9).

Relationship between disclosures and particular allegations

38. At our request, the claimant kindly produced a document explaining which disclosures were relied on in relation to each detriment, and dismissal. One change was made orally.

39. Detriment 1 is said to have been done because of disclosures 1 and/or 2.

40. Detriments 2, 5, 6 and 7 are said to have been done because of disclosures 1 to 5, or any subset of them.

41. Detriment 3 is said to have been done because of disclosures 1 to 5 and 8 (limited to "the Thunderer" article), or any subset of them.

42. Detriment 4 is said to have been done because of disclosures 1 to 4, or any subset of them.

43. Detriments 8, 9 and 11 are said to have been done because of disclosure 8, limited to "the Thunderer" article.

44. Detriment 10 is said to have been done because of disclosures 1 to 5 and also 8, limited to "the Thunderer" article, or any subset of them.

45. Detriment 12 is said to have been done because of disclosures 1 to 9, in other words, all of them, or any subset of them.

46. Detriment 13 is said to have been done because of disclosures 6 to 9 or any subset of them.

47. Detriment 14 is said to have been done because of disclosures 6 to 9, or any subset of them.

48. The claim for automatically unfair dismissal relies on disclosures 6 to 9, in other words the media disclosures, or any subset of them. It is not alleged that the parliamentary disclosures had any relevant bearing on dismissal.

Summary of liability issues

49. Once allowance is made for the reformulation of the claims during the hearing, the key issues are therefore:

a. whether any or all of the disclosures were *qualifying* disclosures under section 43B ERA 1996;
b. whether any or all of the disclosures were *protected* under s.43G ERA 1996 (no other section now being relied on);
c. was the claimant detrimentally treated in the alleged respects?
d. Are any of the detriment claims time barred? It is accepted that the claims in relation to dismissal were brought within time.
e. If disclosures 6 to 9 were protected, then was the sole or principal reason for dismissal the fact that the claimant had made one or more of those disclosures, contrary to s.103A ERA 1996?
f. If not, what was the sole or principal reason for dismissal, and has the respondent proved a potentially fair reason for dismissal? The respondent asserts that the reason for dismissal was the claimant's conduct.
g. If a potentially fair reason for dismissal is established, was the dismissal fair or unfair having regard to the test in s.98(4) ERA 1996 (including well known ***BHS v Burchell*** issues)?

Evidence

Documents

50. We were provided with two lever arch files of documents running to 1623 pages. The respondent also handed in a supplementary bundle taking the page count to 1633, but that included the wrong version of the respondent's whistleblowing policy. The correct version and the grievance policy were both supplied at our request. We are very grateful to all who made that possible at short notice. We know that requests from a court or tribunal for additional documents during a hearing put additional pressure on people who are already working on a great many other things at the same time.

Witnesses

51. We heard from the following witnesses, all of whom gave evidence on oath or affirmation, confirmed the accuracy of their witness statements and were cross-examined.

52. For the claimant, we heard from:

a. the claimant himself;
b. Dr Alison Robinson, who was a Research Developer at the relevant times;
c. Julie Ramage (by video link), formerly Senior Research Manager.

53. For the respondent, we heard from:

a. Dr Gordon Hush, Head of Innovation School, who carried out the disciplinary investigation;
b. Professor Sally Stewart, Head of School, Mackintosh School of Architecture, who was the claimant's line manager from 2017 and who took the decision to dismiss;
c. Keith Ross, self-employed HR Consultant, who chaired the claimant's appeal against dismissal together with Professor Paul Chapman.

54. The respondent was also prepared to call Susan Simpson, Interim HR Director, but the claimant indicated that he had no cross-examination for her and so we simply read her statement.

55. The same applied to Peter Trowles (formerly the Mackintosh Curator), Ian Martin (formerly an IT Service Desk Analyst working for the respondent), Professor Johnny Rodger (former colleague) and Jane Stickley-Woods (former colleague) who were prepared to give evidence for the claimant. The respondent indicated that it had no questions for them and so we simply read their statements. That indication was without prejudice to the respondent's argument that their evidence was not relevant to the issues we had to decide.

56. George Robertson, formerly the respondent's Health and Safety Officer, was due to give evidence for the claimant but withdrew his statement and so we did not read it.

Findings of fact

57. Where facts were contested, we made our findings on the balance of probabilities, in other words a "more likely than not" basis. We will only set out the facts which we found to be relevant to our conclusions.

The claimant's background, experience and expertise

58. It is necessary to set out a little more detail regarding the claimant's background and experience, none of which was disputed. He is an *alumnus* of the respondent, graduating in 1983. He became an architect in 1986 and a chartered architect in 1987. He has run an architectural practice since 1986. He was also trained in building forensics by his father, Dr William Gibb, who was a fuels specialist. From 1987 onwards they worked together on several court cases in which the claimant provided expert architectural technical evidence in support of his father's investigations into the causes of fires and explosions in buildings. The claimant specialised in the architectural component of contribution to combustion or containment of fire spread. His

career as an expert witness has continued and his areas of expertise have developed to include professional negligence, claims and building failures. The claimant has produced over 400 expert reports for use in legal proceedings since 1987. The claimant has also held a number of positions within the Association for Professional Studies in Architecture and has chaired that organisation. He has served as a member of the Investigations Panel of the Architects Registration Board, assessing claims made against architects in respect of professional conduct and competence.

The claimant's own investigations

59. Shortly after the second fire on 15 June 2018 the claimant began to carry out his own investigations into the cause of that fire. He investigated the differences between the respondent's statement regarding the first fire and that prepared by the Scottish Fire and Rescue Service ("SFRS"). He also examined drawings of the works on the Glasgow City Council website and studied the minutes of meetings in which decisions of the respondent's board and staff involved in the project were recorded. He studied footage of the progress of the fire and also witness testimony from that night. He concluded that the method of operation and site occupation following the first fire had put the building at considerable risk. Essentially, the claimant's view was that the first fire had nearly caused the loss of the building because of a lack of compartmentation and sprinklers, yet when restoration works commenced the fire alarm was not upgraded, the sprinklers were not commissioned, no temporary fire suppression system was installed and no compartmentation was put in place. The claimant's view was that the respondent and its contractor had been in breach of the Joint Fire Code from the design and planning stage of the project through to completion. He also concluded that neither the respondent nor its contractor had followed the guidance given by the Health and Safety Executive for works on vulnerable structures. The claimant concluded that lessons could and should have been learned from the first fire in the following respects: the sprinkler system should have been prioritised and operational by the time of the second fire; if wall panels had been put back in place after construction works had been left suspended the

fire would not have spread from its source and if the historic ducts had been sealed the fire would not have spread to the roof. If those lessons had been learned from the first fire then the second fire would have been contained and probably put out in the east wing air duct.

60. The essence of the claimant's position was known to the respondent. For example, on 17 September 2018 the claimant attended an event held in a marquee in Finnieston at which the whole of the architecture department were in attendance. Senior figures connected with the management of the school were also in attendance including the then Chair of the Board of Governors. When the claimant spoke he was highly critical of the stance taken by the Chair of the Board of Governors, stating that she was in denial and that the school had a duty to teach competent management skills to a future generation of architects who would have professional responsibilities. The claimant said that it was the school's duty to consider and foresee risk, and that if that had been done in the context of the fire then the Mack would still exist.

Scottish Parliament CTEEA Committee investigation

61. The above committee of the Scottish Parliament decided to carry out an investigation and advised that it would be calling for evidence relating to the management of the school with respect to the 2018 fire.

62. The claimant observed the meeting held by the committee regarding the fires on 20 September 2018. He was deeply unhappy about the views expressed on behalf of the school by those in charge and considered that the respondent had incorrectly reported facts relating to the first fire.

63. **Disclosure 1** was made to the committee in an email dated 25 September 2018. When printed the email covers more than three sides of A4 and it is too long to quote in full. The most important part, so far as the claimant is concerned, is a passage in which he stated, "*although we have not seen the report on the cause of the second fire, and therefore cannot yet determine*

who or what may bear responsibility, we know that both fires were preventable. This is not just about health and safety, but about the much older construction issue, always written into contract documents, called "Protection of the works in all stages". One has to ask why the contractor's own offices were in the building when it was in an unsafe state, and why no effective building protection measures were prioritised by the contractor or by those in the school in charge of this project. I do not believe that enough lessons were learned from the first fire. In the GSA review of the fire report, management shortcomings were not addressed at all. Therefore, it is my view that those responsible for the recent stewardship of this part of our national heritage, given what could have been learned after the first fire, must surely bear a measure of responsibility for the fact that the second fire was not able to be prevented, contained or controlled at all."

64. The disclosures listed as **disclosures 2 and 3** in the list of issues were made to the committee in a report dated 12 November 2018. Once again, it covers three sides of A4 and is too long to quote in full. The relevant passage, so far as the claimant is concerned, read as follows: "*The combustibility of the building was known. The HSE guidance is clear that vulnerable buildings may not be occupied by temporary offices without appropriate measures being taken. No such measures were taken. The building was not compartmented, the ceilings of the parts of the building occupied were not fire protected and the structure was combustible. There were angled rooflights which would allow fire to leap from the occupied compartments to the remainder of the building. The smoke detectors were not working and there was no fire suppression system. The fact that fire protection was not prioritised by the client, in the clear knowledge of the danger to the building, shows inadequate prioritisation of the safety of the building in the hands of the GSA.*"

65. On 15 November 2018 the committee held an evidence gathering session attended by several senior figures from the respondent. During televised evidence which was being viewed live at the School the Chair of the Board of Governors said in relation to the contractor and its track record, "*Gordon Gibb*

is entirely wrong on that and many other aspects". This is relied on by the claimant as **detriment 1**.

66. In mid-November 2018 the Chair of the Board of Governors made statements both in the Guardian newspaper and in the Architect's Journal in which she described the respondent's approach as "exemplary" and said that she had "no regrets". The claimant felt that those statements were inconsistent with what he knew about the respondent's approach. The claimant also disagreed with the contents of the respondent's written response to the committee (wrongly) dated 8 November 2018.

67. On 16 January 2019 the claimant made **disclosure 4** in the form of written evidence to the Parliamentary committee referring to the respondent's previous evidence. We understood the relevant section to be contained in the executive summary. Within that summary, the claimant stated as follows: "*in summary, there was a fire suppression system in place in the building, 95% installed from 2014 and capable of functioning, that could have been commissioned very easily to provide fire protection all through the works undertaken by Kier from 2016 onwards. It was not commissioned and was ripped out, even though the building was occupied by GSA staff and contractors, and even though the building was known to be at a high risk from fire, because of its construction. A new system was then installed much later, with that work starting 18 months after commencement of Kia's works on site. If it was felt appropriate to replace the system installed in 2014 with a new system with greater functionality, the new and old systems could have and should have been run in parallel to provide coverage of the building site until the new system was ready to be commissioned, at which time the old system could be removed or taken off-line. Such action would be in accordance with the Joint Fire Code and would have saved the building on 15 June 2018, either by inhibiting its spread until such time as SFRS could attend, or by extinguishing it.*"

68. It is alleged by the claimant that on 30 January 2019 the respondent

responded to the claimant's criticisms and evidence in terms which were detrimental to him. Allegedly, that written response stated that it addressed "*further rumours, supposition and speculation*". The claimant relies on this as **detriment 4**. However, the press release was not produced during the hearing and there was no direct evidence that the respondent had used those words at all, or of the context in which they were used. We refused to give the claimant permission to add additional documentation to the evidence after closing submissions because that would have been grossly unfair to the respondent and a significant distortion of the hearing process. Our reasoning on that application is set out in separate correspondence. Confining ourselves to the evidence considered during the hearing, the claimant has failed to prove the existence of this detriment on the balance of probabilities. However, we are aware that the claimant quoted from the press release in his appeal documentation and we consider that hearsay quotation in our reasoning below.

69. The claimant made what is alleged to be **disclosure 5** in a document dated 7 February 2019 which was intended to brief the Committee in advance of a further hearing. In it the claimant reasserted his credentials and stated that he had founded his conclusions on the available evidence, which included drawings in the public domain, information provided to the committee by the witnesses and his own investigations and knowledge of construction industry practice and regulation. The quotation relied upon in the agreed list of issues does not appear in the document.

70. The Parliamentary committee produced a report upon the fire on 8 March 2019 and titled "The Glasgow School of Art Mackintosh building: The loss of a national treasure". The chair of the Board of Governors was interviewed on BBC Radio 4 on the same day. The interview was repeated throughout the day on news bulletins and in the PM programme. She stated in the interview that "*Mr Gibb is not an expert*". The claimant relies on this as **detriment 5**.

Events following the publication of the Parliamentary Committee's report

71. On 11 March 2019 the respondent held an "All staff question and answer session" in its Reid lecture theatre. The respondent did not challenge the claimant's evidence regarding that meeting with direct evidence from anyone else present. We therefore accept the claimant's evidence on the balance of probabilities. During that session the Chair of the Board of Governors said that the Parliamentary committee was wrong and that the restoration of the building had been a "success". Some questions were taken from members of staff and at one point the claimant raised his hand to ask a question. The Chair of the Board of Governors then said, "*we are taking questions from all staff members except Gordon Gibb*". The claimant challenged that approach and was told firmly that no questions would be taken from him. In fact, no other members of staff asked any questions after that and the meeting ended after about 20 minutes. The claimant relies on this as **detriment 6**.

72. **Detriment 7** is alleged to be the fact that the claimant was subjected to discomforting conversations with other staff members throughout the remainder of his employment to the effect that they were surprised that he was still there and that they thought he would have been fired by the chair of the board. We accept the claimant's evidence that those conversations occurred.

73. On 15 March 2019 the claimant commenced a formal grievance process about the matters forming detriments 5, 6 and 7 above, together with a further allegation that a director had stared at him in a menacing and aggressive way. On 25 March 2019 the respondent replied confirming that the grievance would be dealt with in accordance with the Staff Grievance Policy and Procedure and that a panel of members of the Board of Governors would be convened for that purpose and would exclude anyone about whom complaint was made. Several witnesses, including the claimant, were interviewed on 14 May 2019. Additional witnesses were interviewed on 24 May 2019 and 31 May 2019.

74. On 15 May 2019 Professor Sally Stewart held a career review meeting with the claimant. This is the context of alleged **detriment 3**. The claimant's case is as set out in the list of issues and noted above. The essence of the alleged detriment is that Professor Stewart unfairly dismissed the claimant's achievements and focussed instead on other matters of greater concern to her. However, the claimant did not put any of that to Professor Stewart in cross-examination and did not explore the comments made by her at the career review meeting at all. The claimant did not suggest to Professor Stewart that he had been treated detrimentally. We were not provided with any notes of the meeting. In those circumstances we do not find this allegation proved on the balance of probabilities. While we accept that a career review meeting took place, the claimant has not established that Professor Stewart used the words attributed to her and we are not in a position to make any findings about the context of any words used by her either. The claimant has not satisfied us that he was treated detrimentally during the career review meeting.

75. On 17 May 2019 the respondent issued two press releases. The first of them was expressed to be a response to the Parliamentary Committee's report. It stated that "*further, it is somewhat surprising that in the report factual information provided by highly regarded organisations who had an intimate knowledge of the Mackintosh building should have had qualifications added to their submission, whilst unsubstantiated speculation was accorded the status of fact*". In the second release the respondent stated that it would "*strongly refute Mr Gibb's claim that the GSA did not comply with the Joint Fire Code… There was not a 95% complete mist suppression system following the 2014 fire*". The Claimant relies on both press releases as **Detriment 8**. We were only provided with a copy of the first of those two press releases. While we find the terms of the first press release proved on the balance of probabilities, we are not prepared to assume in the claimant's favour that the second of them contained the alleged quotation. With reasonable efforts it should have been possible for the claimant to have put that press release before the Tribunal and we are not prepared to accept a

hearsay substitute in those circumstances.

76. A further press release was issued by the respondent on 26 May 2019. We were provided with a near contemporaneous email from a third party summarising its contents which we treat as a reliable record on the balance of probabilities. In it the respondent stated: "*It is to say the least disappointing that both as an architect and an academic Mr Gibb has seemingly failed to read and understand the expert submissions made to the CTEEA committee, and made public, regarding the installation of first mist suppression system and the GSA management of the Mackintosh building. To be clear, this system was being introduced proactively by the GSA as an additional measure into what he should be aware was a fully fire compliant building. Given his position as Director of Professional Studies it is particularly important that he not only understands, but teaches the next generation of architects the roles of the client and the contractor. He should be aware that under the laws of Scotland, the client has to hand over to the contractor, in this case Kier, who had full day-to-day responsibility for it up until the time of the 2018 fire.*" The claimant relies on this as **detriment 9**.

77. On 5 June 2019 the claimant was informed that none of his grievances been upheld. The respondent's reasoning was set out in a report running to 13 pages. The claimant sought to exercise his right to appeal that decision. In an email dated 6 June 2019 he was informed that the respondent would need him to set out the grounds for his appeal in writing, following which the respondent would consider and advise on the most appropriate party to hear the appeal.

78. Disclosures 6 to 9 were made in fairly quick succession in the late summer of 2019.

79. **Disclosure 6** was an article written by the claimant for publication in the Sunday Post on 18 August 2019 called "In the ashes of the Mack, the board saw opportunity".

80. **Disclosure 7** (which is out of chronological order) was a Facebook post made on 17 August 2019 prior to the publication of the above article. Essentially the claimant previewed his own article, adding a call for resignations for the good of the school, its reputation, its future and for the good of staff and students.

81. **Disclosure 8** as originally defined was in fact three different disclosures, although (as noted above) by the end of the case the claimant relied only on the first element.

a. An opinion piece for the Times newspaper's "Thunderer" section published on 27 May 2019. We were not provided with the original.
b. A Facebook post made on 22 August 2019 in which the claimant discussed the remuneration of members of the Board of Governors and concluding that, "*So when you ask who the Glasgow School of Art is really for, Laura Weddell, I would suggest that, at least in the minds of the management and the Board, it is for the benefit of the senior management themselves, and certainly not for the lower orders, being the hard-working and totally demoralised staff, nor for the students.*
c. A Facebook post made on 27 August 2019 in which the claimant posted a picture of a retiring colleague. We were provided only with a truncated version of the original but it is quoted in full in the investigation report. In summary, the claimant suggested that the retiring member of staff had not been treated with consideration by the respondent's management team and that she was retiring early.

82. The only element of this disclosure pursued in closing submissions was not actually before us. With reasonable efforts it could have been. In those circumstances we are not prepared to make any findings as to the disclosures which might have been made in "the Thunderer" article.

83. **Disclosure 9** was a quotation supplied for an article in the Sunday Post

published on 1 September 2019 titled “Forced out: emails exposed turmoil at top of ravaged art school as directors told to go home against his will”. The quotation from the claimant within the article was as follows: “*There are now very clear and very serious questions about how the director left his position. I cannot see how the school can move forward without all those involved in his removal being held properly to account in giving the answers these questions demand.*”

Allegations of misconduct`

84. Professor Sally Stewart, Head of School, Mackintosh School of Architecture and the claimant’s line manager, was made aware of posts made by the claimant on Facebook and LinkedIn on 27 August 2019 in relation to the retirement of a certain member of staff. The member of staff was very angry about the posts and wanted Professor Stewart to know that the claimant was responsible. The post included a picture of the member of staff and was thought to suggest that she had somehow been forced out of her employment with the respondent. Allegedly, it also included personal details about the member of staff which had been shared without her permission.

85. At around the same time another member of staff approach Professor Stewart and told her that the claimant had posted something about him on Facebook on 22 August 2019. Although he was not named, he considered that people would be able to deduce that he was the individual referred to. The post was also considered to be very derogatory about certain senior managers.

86. Given those two complaints Professor Stewart decided to look through the claimant’s other social media posts and could see that others were highly critical of the respondent. It was also her view that although the claimant’s contributions to the press had originally been “fairly anodyne” they had become much more directly critical of the respondent and its management. In her view the press criticism had escalated and the claimant’s social media posts had begun to cause upset and anger among staff.

87. Professor Stewart met with the claimant on 4 September 2019 to inform him that there would be a disciplinary investigation into the following allegations of misconduct:

    a. that the claimant had posted on social media comments in which he had disclosed personal information about colleagues and made derogatory or false statements about their treatment by the School;

    b. that the claimant had made statements to the press or in written articles in which he had criticised the School. It was alleged that the claimant's criticisms had gone beyond his area of specialism and that disclosure to the press was not an appropriate means by which to raise those issues regarding the claimant's employer.

88. Those points were confirmed in a letter of the same date which also stated that the respondent "*reserves the right to add to these allegations as appropriate in light of the investigation*".

Disciplinary investigation

89. Gordon Hush, Head of Innovation School, was asked to carry out a disciplinary investigation. On 6 September 2019 he emailed the claimant to invite him to a disciplinary investigation meeting on 12 September 2019. The claimant did not respond to that email. On 10 September 2019 Mr Hush therefore sought confirmation of receipt of his previous email and confirmation of the claimant's attendance on 12 September 2019. There was no reply. In the absence of a reply, Mr Hush chased matters again on 11 September 2019. There was no reply to that email either. On 12 September 2019 (the day originally fixed for the meeting) Mr Hush contacted the claimant to say that the meeting had been cancelled and would be rearranged. The claimant did not reply to that email.

90. On 13 September 2019 the claimant was sent an email invitation to a rescheduled investigation meeting on 20 September 2019. The letter was

also posted to the claimant's home address. On 18 September 2019 the claimant emailed Mr Hush saying that he had just received the email of 13 September 2019 and that he could not attend the proposed meeting at such short notice. Although the claimant requested confirmation of the process in which he was engaged we think that was entirely clear from the correspondence. The claimant argued that "other unresolved matters" (which we take to be a reference to his grievance) had an impact on "whether or not the disciplinary proceedings can be engaged at this time". Mr Hush checked the position with HR and was advised that although the claimant had raised grievances they did not relate to the matters being investigated by Mr Hush. Mr Hush had no involvement with the grievances.

91. On 23 September 2019 Mr Hush emailed the claimant to invite him to a rescheduled investigation meeting on 26 September 2019. The claimant did not reply. Therefore, on 25 September 2019 that meeting was cancelled. The claimant did not respond to the email notifying him of that fact. Since Mr Hush had not received any replies to, or acknowledgement of, his correspondence he decided that he would have to move forward in the absence of a contribution from the claimant and would simply work with the materials he had been given.

92. Mr Hush concluded that the claimant was clearly receiving correspondence because he had replied on one occasion on 18 September 2019 and that the claimant was simply choosing not to engage. We find that Mr Hush's view of the situation was correct. We have not heard any credible explanation for the claimant's failure to reply to so many different and obviously important communications. We do not accept the claimant's explanation that he did not open the emails sent to his GSA email account because of concerns about security. The claimant knew that a disciplinary investigation would be taking place following Professor Stewart's meeting with him and confirmation letter of 4 September 2019 and we are satisfied that the claimant's unwillingness to open subsequent emails was the result of a conscious decision not to engage with the process. We therefore conclude, on the balance of

probabilities, that the claimant was attempting to slow down or frustrate the process by a deliberate refusal to engage with it. Our conclusion is strengthened by what followed.

93. Mr Hush prepared a draft report and then on 2 October 2019 emailed and wrote to the claimant to invite him to a fourth and final investigation meeting on 4 October 2019. The correspondence attached the draft investigation report. The claimant did not reply or otherwise comment on the draft report. In the absence of a reply, Mr Hush emailed the claimant on 3 October 2019 to advise that the meeting scheduled for 4 October 2019 had been cancelled. The claimant did not reply to that email.

94. In reaching his conclusions Mr Hush had regard to important principles of academic freedom which are highlighted in the claimant's terms and conditions of employment. Section 7 of the respondent's Statement of Terms and Conditions of Employment for Academic Staff, signed by the claimant on 23 January 2004, states as follows under the heading "Academic and Artistic Freedom": "*The School values and supports the intellectual, academic and artistic freedom to think, create, write, act, speak and teach. Academic and artistic freedom concerns freedom, within the law and one's own subject discipline and within validated academic regulations, to question and test received wisdom and to put forward new ideas and controversial and unpopular opinions without academic staff placing themselves in jeopardy of losing their jobs. In normal circumstances the exercise of these freedoms can contribute best, both to your own aspirations and the mission of the School, where the aspirations of the School and the individual are closely aligned and if they are exercised responsibly by both parties. In this respect the normal expectation of good faith, trust and confidence applies and it would be expected that you will not do anything that would damage the School's reputation or interests.*"

95. The Statement of Terms and Conditions also referred to the respondent's disciplinary and grievance procedures, reminding staff that "*the school*

reserves the right, however, to terminate summarily your appointment in the event of unequivocal gross misconduct or serious neglect of duties, breach of trust, confidence or good faith or any equivalent wrongdoing". Gross misconduct is defined in the Disciplinary Policy and Procedure as "*any act or omission on the part of an employee, which represents a breach of the contract of employment and is so grave that the mutual trust necessary between the employee and GSA is destroyed.*" As is customary, the Disciplinary Policy and Procedure went on to give a non-exhaustive list of examples of gross misconduct. Neither side suggested that any were directly applicable to the facts of the current case.

96. The respondent did not have in place a social media policy at the date of the alleged misconduct.

97. The investigation ended on 7 October 2019 and the investigation report was finalised. Mr Hush's conclusion was that there was a disciplinary case for the claimant to answer at a disciplinary hearing. While the report concluded that an article written by the claimant on 30 June 2019 related to his area of knowledge and specialism and was therefore not a disciplinary matter, the other material considered was.

98. The matters which proceeded to a disciplinary hearing therefore included the following:

a. that the claimant had made statements to the press/in written articles in which he criticised the School; that the criticisms went beyond his area of specialism and that disclosure to the press was not an appropriate means by which to raise issues regarding his employer. This allegation was primarily based on the claimant's comments in articles dated 18 August 2019 and 1 September 2019.

b. That the claimant posted comments on social media in which he disclosed personal information about colleagues and made derogatory or false statements about their treatment by the School.

c. That the claimant posted comments on social media criticising the

school and its senior management, that his criticisms went beyond his area of specialism and that disclosure on social media was not an appropriate means by which to raise issues regarding his employer. This concerned a number of social media posts totalling about 60 pages of A4 when printed along with the associated comments by others.

d. That the claimant had failed to follow reasonable management instructions to attend the disciplinary investigation meetings.

Attempts to arrange a disciplinary hearing

99. Professor Stewart wrote to the claimant on 5 November 2019 summarising the outcome of the investigation and informing the claimant that he was *required* to attend a disciplinary hearing on 8 November 2019. That letter enclosed a copy of the investigation report and accompanying evidence. It required the claimant to confirm his attendance by 12 noon on 7 November 2019. The claimant was reminded of his right to bring a colleague or trade union representative to the meeting. He was also warned of the need to cooperate with the process and that if he continued not to engage with it a decision might be taken at the hearing in his absence. The claimant was warned that one of the potential outcomes of the process was dismissal without notice or pay in lieu of notice if the claimant was found to be guilty of gross misconduct.

100. A few hours after that deadline the claimant emailed Professor Stewart confirming that he had received her letter the previous day but could not attend the disciplinary hearing arranged for 8 November 2019. The reasons given were ill-health, a lack of time to assimilate what had been sent to him or to make contact with his union representative and the need to deal with grievance matters for which a deadline of 7 November 2019 had been communicated on 6 November 2019. The claimant also denied receiving any more than one letter from Mr Hush. He explained that he had not opened other communications via email through the respondent's email system

because in his view it was not secure. We have rejected that explanation (see above).

101. All subsequent emails concerning the disciplinary process were sent both to the claimant's GSA email address and also to his practice email address, presumably in order to address the claimant's complaint that the GSA email system was not secure.

102. The disciplinary hearing was rescheduled for 22 November 2019 and the claimant was sent an invitation on 15 November 2019. On 21 November 2019 the claimant responded by email alleging that the recorded delivery letter had only arrived that day, after the deadline for a response. The claimant also advised that his trade union representative was not available on the relevant date and requested a rescheduled hearing on 5 December 2019 in order to suit his representative's availability. The respondent obliged and confirmed the new date in correspondence. However, on 2 December 2019 the claimant requested that the meeting should be rescheduled again because his trade union representative was not available. On 6 December 2019 Professor Stewart wrote to instruct the claimant to attend a rearranged meeting on 19 December 2019. The claimant did not respond to that email. On 16 December 2019 Professor Stewart wrote to the claimant asking him once again to confirm his attendance at the meeting on 19 December 2019. On 17 December 2019 the claimant replied advising that his trade union representative was on holiday and could not therefore attend the hearing scheduled for 19 December 2019.

103. On 19 December 2019 Professor Stewart emailed the claimant to invite him to a rescheduled disciplinary hearing on 10 January 2020. Again, it was made clear to him that if he failed to attend it would be held in his absence and that "a decision <u>will</u> be made". This rescheduled hearing was described as a "<u>fifth and final rearranged disciplinary hearing</u>". The claimant was asked to confirm his attendance by 5pm on 7 January 2020. The claimant did not reply to that email.

104. All of the respondents' letters about rearranged disciplinary hearings reminded the claimant that a potential outcome was summary dismissal for gross misconduct. They also included a paragraph emphasising that if the claimant did not attend and did not provide a good reason for non-attendance then a decision *would* be taken at the hearing in his absence.

105. On 9 January 2020 Professor Stewart wrote to the claimant by email (to both email addresses) noting that he had not confirmed his attendance by the specified deadline. It then read as follows, "*I would note that Friday's meeting was the fifth attempt made to meet with you, and it was made clear in the correspondence of the 19th Dec that your continued non-attendance at hearings was not considered ~~as~~ reasonable. Given the gravity of the allegations of misconduct raised, I am prepared to continue with the hearing if you confirm attendance by 4pm today, Thursday 9th. If I have not received any confirmation back from you by 4pm today I will have no option but to cancel this disciplinary hearing, and to proceed with the disciplinary process in your absence and without your input. As such the investigation evidence and report will be considered and a final decision made.*" The email was sent at 14:04 and therefore gave the claimant less than two hours in which to reply before the deadline. However, we also note that this short period represented an extension of the deadline for confirmation of attendance that had expired two days earlier, without any reply from the claimant. The original invitation to the meeting on 10 January 2020 was sent on 19 December 2019 and therefore gave 21 days' notice.

106. On 10 January 2020 the claimant replied by email. He asserted that he had "missed" all prior correspondence about the new hearing date. The claimant said that he was, "*tied up with teaching commitments, two court cases in the Court of Session, an adjudication and an urgent expert witness investigation. Because of the imperatives under which I have to work, my timetable is not my own, and I simply do not have the capability to commit a full day to your disciplinary hearing at this time. Perhaps once the current glut of work eases*

off, I may find some space in my timetable."

107. While it may be that the claimant can provide a blameless explanation for *some* of the missed emails and rearranged meetings, we do not accept that there was any proper excuse for a failure to attend a disciplinary meeting on any of the five dates offered. The tone of the claimant's email of 10 January 2020 was dismissive and suggested a failure on his part to treat the disciplinary proceedings with the necessary seriousness, or as something worthy of prioritisation. We have already found that the claimant had made a deliberate decision not to engage with the investigatory stage in an effort to delay or frustrate the process. We find that this pattern of behaviour continued once the respondent attempted to arrange a formal disciplinary hearing. The fact that on 9 January 2020 the respondent allowed only a very short period for the claimant to reply confirming attendance is not the point. By then, the claimant had already been given a more than reasonable period in which to confirm his attendance at that meeting and he had also been given a reasonable opportunity to attend a meeting on 4 prior dates.

Disciplinary hearing and reasoning of Professor Stewart

108. Professor Stewart had no confidence that the claimant would attend on alternative dates if the hearing were rearranged yet another time. Therefore, the meeting was held in the claimant's absence on 10 January 2020. Professor Stewart was supported by external HR support. She went through each of the allegations against the claimant, considering the investigation report, the social media posts and comments upon them, the relevant press articles and the claimant's social media accounts. Screenshots of the relevant posts had been taken previously and were taken into account when it transpired that some of the posts had since been removed.

109. The first allegation considered was the article in the Sunday Post published on 18 August 2019. Professor Stewart's reasoning was as follows. It was stated to have been written by the claimant and there was no evidence to the

contrary. It stated his role and linked him clearly to the respondent. It was highly critical of the respondent and specifically the Directorate and the Board. The comments did not relate to the claimant's specialism and therefore fell outside the area covered by academic freedom. Further, they had a negative impact on the reputation of the respondent in breach of contractual terms regarding academic freedom anyway. The claimant could and should have raised the issues with Professor Stewart as his line manager or through the grievance procedure but he had not done so. Going instead to the press was entirely inappropriate and unacceptable in the circumstances. Professor Stewart had specifically asked staff not to comment to the press but the claimant had ignored that instruction. He knew that what he was doing was contrary to his instructions and against his employer's interests. The respondent's reputation was damaged by the article and (if different) the respondent was brought into disrepute.

110. The second allegation considered concerned the article of 1 September 2019. Professor Stewart's reasoning was as follows. Again, it clearly stated the claimant's role with the respondent. His comments were highly critical of the respondent and its board. The claimant had also shared the article on Facebook widening the number of people who would see it. Once again, this was an example of the claimant choosing to air his view on a public forum in a way which affected the reputation of the respondent and was in breach of his contract of employment.

111. The third allegation concerned a social media post on 22 August 2019. Professor Stewart's reasoning was as follows. Personal and misleading information had been shared about an unnamed colleague and direct reference was made to the respondent's former director and deputy directors in matters of salary. Even though the colleague was not named, people within the respondent's organisation would be able to work out the identity of the person referred to. The post aimed to criticise the respondent and certain of its employees in public and contained information which was misleading. The claimant's comments were also clearly derogatory. The post was highly likely

to lower the reputation of the respondent in the minds of those who read it. The comments section bore that out. The claimant's Facebook page clearly stated his role with the respondent in the "about" section. The page appeared to be open to the public and therefore the posts could be read by anyone and not just the claimant's friends. The critical nature of the posts therefore had a much greater potential impact. The post was also a breach of the respondent's Acceptable IT Use Policy. Section 6 stated that where staff associated themselves with the respondent online they should act in a manner which did not bring the respondent into disrepute.

112. The fourth allegation considered concerned the social media post from 27 August 2019. Professor Stewart's reasoning was as follows. Personal and misleading information had been posted about a colleague without her knowledge or authorisation. The post suggested that the colleague had been forced to leave her employment due to her treatment by the respondent. It was posted both on LinkedIn and on Facebook. A photograph of the colleague named in the post was also included. The claimant's Facebook page was public. The LinkedIn professional networking page potentially brought post to the attention of alumni, professionals, students and prospective applicants to the respondent. The claimant had over 2000 connections on his LinkedIn page and it was also open to public view. Although the Facebook post had been removed following the commencement of disciplinary proceedings it had generated a number of negative comments towards the respondent with the perception clearly being that the claimant's colleague had been treated badly. Those comments demonstrated reputational damage. Further, the posts were misleading and once again a breach of the respondent's Acceptable IT Use Policy.

113. The fifth allegation concerned a social media post from 31 August 2019. Professor Stewart's reasoning was as follows. This post on the claimant's public Facebook page made numerous statements critical of the respondent referring to negligence, arrogance, bullying, payoffs, staff leaving, students wanting fees repaid, incompetence, disloyalty and endangerment. The

statements were hugely critical of the respondent, its senior management and board and in no way fell within the claimant's area of specialism. The likelihood of reputational damage would have been clear to the claimant. It was demonstrated by the comments made on the post. This represented a failure to adhere to the claimant's duty of fidelity to the respondent as his employer. Rather than acting in his employer's interests the claimant was working directly against them. The post appeared to be a list of issues the claimant had with the respondent which the claimant had published in a public forum for others to view, rather than raising them internally through formal processes. Through his post the claimant was actively lobbying to have colleagues removed. That was an unacceptable use of social media. Once again, the claimant was in breach of section 6 of the respondent's Acceptable IT Use Policy.

114. The sixth and final allegation concerned a failure to follow reasonable management instructions. Professor Stewart's reasoning was as follows. Four investigation meetings had been scheduled which the claimant had been asked to attend but had failed to attend. With the exception of the second meeting the claimant had failed to respond to the investigating manager's invitation letters. They had been emailed to the claimant's work email account. The claimant's position that he had received only one letter not several and that he had not opened the other communications because the respondent's email system was insecure was not a reasonable one.

115. The claimant had been invited to attend a disciplinary hearing on five separate occasions. His claim on 10 January 2020 that he had missed the most recent correspondence was not reasonable or acceptable. The content of the claimant's email on that occasion appeared to show that he was not willing to accept the seriousness of the situation or the reasonable management instructions that he must attend a disciplinary hearing. The words "*perhaps once the current glut of work eases off, I may find some space in my timetable*" were telling. Many of the meetings throughout the investigation and disciplinary process had been scheduled to take place when the claimant was

believed to be working for the respondent. He chose not to engage with the process despite numerous opportunities and that was unacceptable.

116. Overall, Professor Stewart concluded that the claimant's conduct was clearly in breach of his contract of employment and also the Acceptable IT use policy. His actions had been seriously damaging to the reputation of the respondent and its interests. The seriousness was such that the claimant's conduct amounted to gross misconduct. Professor Stewart considered whether dismissal was the appropriate sanction. No mitigating factors had been put forward because the claimant had not engaged in the process. His clean disciplinary record was noted but the seriousness of the misconduct was such that Professor Stewart considered that dismissal was justified. She took into account in particular a continued failure to engage with the process. There appeared to be no recognition on the claimant's part that his actions were wrong and he continued to show an unwillingness to be managed by way of disciplinary proceedings. That gave Professor Stewart no confidence that the claimant would be willing to modify his behaviour in the future. The outcome letter advised the claimant of his right of appeal.

Appeal

117. The claimant duly appealed. The respondent arranged for an independent person to chair the appeal panel. Keith Ross, a self-employed human resources consultant of more than 40 years' experience fulfilled that role. The other panel member was Professor Paul Chapman.

118. The claimant gave a presentation which lasted between two and three hours. It was essentially a chronology of events from the first fire through to his dismissal. He also presented a summary of his professional knowledge and experience. He accepted that he had contacted the press and that he was the source of the articles and posts which formed the basis of the allegations against him. His entire case on appeal related to the context of the events leading to the fires, events after the fires and his reaction to them. He believed

that he had been targeted because he was trying to publicise the failings of management. The claimant's strong belief was that the destruction of the building by fire was avoidable and had been caused by the acts or omissions of senior management, the board of governors and the contractor. He felt that those acts or omissions were being covered up and he was on a quest to publicise the truth so that the guilty parties could be held to account. The claimant argued that he was being unfairly targeted for disciplinary action because of that.

119. In relation to the allegation of non-engagement, the claimant confirmed that his work email account had been operational at all times. He had responded to other emails. The appeal panel concluded that the claimant had been receiving the emails relating to disciplinary issues but that he had been ignoring them until the last minute in order to delay any action.

120. Overall, the appeal panel concluded that the claimant was presenting to them a post-event rationalisation for his actions. He talked about public interest disclosures and whistleblowing and was aware of the whistleblowing policy. He was a union member and had access to advice. He was aware of and had used other organisational policies such as the grievance procedure. The panel therefore felt it was reasonable to believe that the claimant knew he could submit a whistleblowing complaint internally or externally via an appropriate route but had chosen not to do so.

121. At this point it is appropriate to refer to the whistleblowing policy. The version applicable at the time was obtained during the hearing. After a brief guide to the legislation the policy says this: "*the Glasgow School of Art (GSA) seeks to conduct its business honestly and with integrity at all times. It is committed to tackling any malpractice or wrongdoing, to promoting a culture of openness and accountability to prevent such situations occurring, and to addressing them when they do occur. This policy outlines how individuals in the GSA community (e.g. staff, students, members of the Board of Governors) may raise concerns about such matters.*"

122. The policy further states that, "*This policy should be invoked if a member of the GSA community has a genuine concern that there are reasonable grounds for believing that it is in the public interest report that…*" the various matters set out in section 43B ERA 1996 arose. The policy provided that if a worker had concerns about the way in which their disclosure had been handled those concerns could be raised with the Designated Officer. The respondent undertook to treat all disclosures in a confidential and sensitive manner. If a worker wished to raise a concern confidentially then the respondent would make every effort to enable the worker to do that.

123. The specified procedure for making a disclosure was as follows. Normally, disclosures should be made to the Registrar and Secretary, who acts as Secretary to the Board of Governors and is the principal Designated Officer for handling disclosures. The Director and Chair of the Board of Governors and the Chair of the Audit Committee also acted as designated officers. If a disclosure was being made about one of those Designated Officers then it could be made to one of the other Designated Officers who would comply with the policy. The policy also signposted an alternative way of making protected disclosures. It reminded readers that employees who made disclosures to the "Prescribed Regulatory Body" were protected under the law. So far as the respondent was concerned that was stated to be the Scottish Funding Council.

124. The reasoning of the appeal panel was essentially as follows. No part of the whistleblowing policy suggested that going to the press or posting disclosures on social media was ever appropriate. The claimant had crossed a line by going to the press and also with his social media posts. His conduct had led to a disciplinary process. The claimant expressed genuine regret about the social media post about his retiring colleague but did not regret anything else. It was clear that his views had not changed. The claimant's published comments and social media posts did not fall within the ambit of academic freedom. He was expressing a personal opinion about his employers. It had

damaged the reputation of the respondent.

125. The panel were satisfied that the conduct in question had taken place and that it breached the standards of conduct expected of an employee. The claimant had been specifically asked not to comment to the press but did so anyway. His actions were contrary to the respondent's interests and had caused reputational damage. They amounted to gross misconduct within the disciplinary procedure. His actions were intended to criticise the board and senior management in public and were part of a campaign to have them removed from office. The public expression of those views had caused an irreparable breakdown in the relationship. The appeal panel noted that the claimant had, with one exception, expressed no regret and that there were no mitigating factors. There was a complete breakdown in trust. The claimant did not recognise that he had done anything wrong and his views of management had not changed. The claimant had been dismissed because of his misconduct and not because he had made protected disclosures. On that issue the panel noted that the claimant had not been subjected to any disciplinary proceedings when he made disclosures to the Scottish Parliamentary committee. The appeal panel concluded that the appeal should not be upheld and that the decision to dismiss was appropriate.

Legal Principles

Detriment claims

126. Section 48(1A) of the Employment Rights Act 1996 ("ERA 1996") provides that a worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B. By virtue of subsection (2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

127. The default position is that an Employment Tribunal shall not consider a complaint under this section unless it is presented before the end of the period

of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them (see s.48(3)(a)). The tribunal also has jurisdiction if the complaint is presented within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months (s.48(3)(b)). Subsection (4A) provides the usual modification of those rules for ACAS early conciliation. For the purposes of subsection (3), where an act extends over a period the "date of the act" means the last day of that period, and a deliberate failure to act shall be treated as done when it was decided on. In the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with the doing of the failed act, or if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done. That rather wordy definition comes from subsection (4).

Protected disclosures

128. Section 47B ERA 1996 provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

129. For these purposes "detriment" simply means "putting under a disadvantage". It is not necessary that there should be physical or economic consequences. What matters is that the worker is shown to have suffered a disadvantage of some kind (***Shamoon v RUC*** [2003] ICR 337, HL and ***MOD v Jeremiah*** [1980] ICR 13, CA).

130. The test of causation is not a "but for" test and it requires something more than that the detriment is "related to" the protected disclosure. The protected disclosure has to be the real reason, the core reason or the motive for the

treatment complained of (***Aspinall v MSI Mech Forge Ltd*** (UKEAT/891/01), ***Harrow LBC v Knight*** [2003] IRLR 140, EAT). In ***Fecitt v NHS Manchester*** [2012] ICR 372, CA the Court of Appeal suggested (*obiter*) that the test was the same as is applicable in anti-discrimination legislation and that the employer must show that the detrimental treatment was "in no sense whatsoever" on the ground of the protected disclosure.

131. In some circumstances an employer might permissibly distinguish the disclosure itself from some separable feature of the disclosure, for example the way in which it was made. The leading authority for that proposition in cases about detriment (rather than dismissal) is ***Martin v Devonshires Solicitors*** [2011] ICR 352, EAT, which was concerned with victimisation claims under the Equality Act 2010.

132. The circumstances in which disclosures will qualify for protection are set out in section 43B ERA 1996, which we will set out in full.

43B Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

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

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

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

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

133. A disclosure must convey facts. Given the express terms of s.43B ERA 1996 only disclosures of *information* can be qualifying disclosures. Simply expressing dissatisfaction will not, without more, be enough. ***Cavendish Munro Professional Risk Management Ltd v Geduld*** [2010] ICR 325, EAT, explained the distinction between giving information and merely making an allegation in the following way. If a hospital employee were to say "the wards have not been cleaned for the past two weeks" or, "yesterday, sharps were left lying around" then that would convey information. In contrast, an employee who stated "you are not complying with health and safety requirements" would merely be making an allegation. As the law has developed since ***Cavendish Munro*** Employment Tribunals have been discouraged from adopting a rigid distinction between information and allegations since this would add an unnecessary gloss to the wording of section 43B(1). In ***Kilraine v Wandsworth LBC*** [2018] ICR 1850, CA, the Court of Appeal explained that "information" in the context of s.43B ERA 1996 was capable of covering statements which might also be characterised as allegations. Disclosures conveying information and allegations are not

mutually exclusive categories of communication. In the view of the Court of Appeal, ***Cavendish Munro*** was really saying that a statement which was general and devoid of specific factual content could not be said to be a disclosure of information tending to show a relevant failure.

134. The worker must reasonably believe that the information "tends to show" that one of the relevant failures has occurred, is occurring or is likely to occur. In order to be a qualifying disclosure the statement or disclosure must have sufficient factual content to be capable of tending to show one of those matters. This has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she 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 or her belief will be a reasonable belief (***Chesterton Global Limited v Nurmohamed*** [2018] ICR 731, CA). It may be necessary to consider one or more disclosures together to assess their cumulative effect and context (***Norbrook Laboratories (GB) Ltd v Shaw*** [2014] ICR 540, EAT, ***Kilraine*** (above) and ***Simpson v Cantor Fitzgerald Europe*** [2020] EWCA Civ 1601, CA).

135. The next question is whether a qualifying disclosure is also protected for statutory purposes. This is dealt with in sections 43C to 43H. The relevant section for present purposes is section 43G ("disclosure in other cases"), which we will set out in full.

43G Disclosure in other cases.

(1)A qualifying disclosure is made in accordance with this section if—

(a). . . . . .

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even

though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

136. The commentary in the relevant IDS Employment Law Handbook observes that the statute amounts to a tiered disclosure regime. The tiers are defined by the comparative ease with which the worker gets protection depending on the person or body to whom disclosure is made. A worker who makes a qualifying disclosure to his or her employer will have fewer hoops to jump through to secure protection than someone who makes a disclosure to a complete outsider. Between these extremes lies an intermediate tier covering disclosure to certain prescribed third parties. The statutory protection for whistle-blowers is designed to encourage workers to raise concerns about wrongdoing or malpractice within the organisation for which they work. Where there are good reasons why such concerns cannot be raised and resolved internally, the provisions set out a structure whereby the concern can be raised outside of the company or organisation. However, the conditions that must be met in order for such *external* disclosures to be protected are considerably more onerous than those that apply to internal disclosures (see ***Korashi v Abertawe Bro Morgannwg University Local Health Board*** [2012] IRLR 4, EAT). Arguably, the most stringent conditions for protection apply to disclosures to any other person or body (including the press), in other words, s.43G cases such as this one.

137. Where a worker relies on s.43G ERA 1996 he or she must first satisfy the four conditions set out in subsection (1). The worker must reasonably believe that the information disclosed, and any allegation contained in it, is substantially true. The worker must not have made the disclosure for the purposes of personal gain. One of the additional conditions in s.43G(2) must have been met. Finally, in all the circumstances of the case it must be reasonable to make the disclosure. The first two criteria relate to the quality of evidence underpinning the worker's belief and his or her motives for making the disclosure. The third criterion requires that one of three grounds for making an external disclosure applies. The fourth criterion imposes an overarching

requirement that, having regard to all the circumstances of the case, the making of the disclosure to an outside party was a reasonable thing to do.

138. The final and potentially overriding requirement is the overall assessment of reasonableness in section 43G(1)(e) ERA 1996. The Tribunal must take into account the six factors listed in section 43G(3). The assessment of reasonableness in this context is a matter for the Tribunal's own objective judgment. It must be assessed as at the time the disclosure was made and not with the benefit of any hindsight (***Jesudason v Alder Hay Children's NHS Foundation Trust*** [2020] ICR 1226, CA). ***Jesudason*** also suggests that a whistleblower must take some responsibility for the way in which complaints or concerns are framed and that section 43G enables a Tribunal to refuse to give protection to irresponsible disclosures.

Unfair dismissal

139. Section 103A ERA 1996 provides that an employee is to 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. The burden of proving this automatically unfair reason for dismissal is on the employee.

140. ***Bolton School v Evans*** [2007] ICR 641, CA establishes that an employee may be fairly dismissed for misconduct even where that misconduct is closely connected to a protected disclosure. In some circumstances the employee's conduct while making the disclosure is properly separable from the disclosure itself. This is the corollary of the ***Martin v Devonshires Solicitors*** point referred to above, in the context of detriment claims.

141. Otherwise, the reason for the dismissal is approached in the following way. The employer has the burden of proving a potentially fair reason for dismissal which is either one of those falling within section 98(2) ERA 1996 or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. The reason for

dismissal is the set of facts known to the employer or beliefs held by it, which cause it to dismiss (***Abernethy v Mott, Hay and Anderson*** [1974] ICR 323). This has also been expressed as the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss, or alternatively it is what motivates them to do so (***Jhuti v Royal Mail*** [2018] ICR 982). In this case the employer seeks to prove that the reason for dismissal related to the conduct of the employee, which would be a potentially fair reason within section 98(2)(b) ERA 1996.

142. In a case where the employee seeks to prove an automatically unfair reason for dismissal and the employer seeks to prove a potentially fair reason for dismissal the burden of proof on each of them is considered in ***Kuzel v Roche Products Limited*** [2008] EWCA Civ 380. Ultimately it was not necessary for us to rely on the burden of proof in the unfair dismissal claim and so we will not set out any passages from ***Kuzel***. This was not a case in which evidence was lacking and we were able to make firm findings regarding the reason for dismissal.

143. If the respondent establishes a potentially fair reason for dismissal then the test of fairness in s.98(4) ERA 1996 applies. On this issue the burden of proof is neutral. The question whether the dismissal was fair or unfair having regard to the reason shown by the employer depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. The statute requires that question to be determined "in accordance with equity and the substantial merits of the case".

144. The well-known case of ***BHS v Burchell*** [1978] ICR 303, EAT sets out some typical issues of fairness in a dismissal for misconduct. It is important to remember that the burden of proof on issues of fairness is now neutral whereas it lay on the employer when ***BHS v Burchell*** was decided. First, the employer must establish that it did believe the employee to be guilty of misconduct. In practical terms, that is no different from the need in every case

to prove a potentially fair reason for dismissal. Second, the employer must have reasonable grounds upon which to believe that the employee is guilty. Third, at the stage (or at the final stage) at which the employer formed that belief on those grounds the employer must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

145. It is well-established that a Tribunal must not substitute its own view for that of the reasonable employer (see e.g. ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17). The law recognises that different reasonable employers might have different reasonable responses to the same situation. The fairness of dismissal is therefore assessed by reference to a "range of reasonable responses". Put another way, if *some* reasonable employers would have dismissed in the same situation then the dismissal is fair. Only if *no* reasonable employer would have dismissed is the dismissal unfair. These principles apply as much to the procedure adopted in relation to the dismissal as they do to the overall decision whether or not to dismiss (see e.g. ***Sainsbury's Supermarkets Ltd v Hitt*** [2003] ICR 111).

Submissions

146. The parties made their submissions primarily in writing. The respondent prepared one set of written submissions on the law and another on the facts. The claimant relied on one set of written submissions presented in tabular form. Those submissions dealt principally with the disclosures. The claimant also relied on an additional written "position paper" which dealt with other matters. Both sides also made oral submissions at the end of the hearing.

147. In a case such as this it is inevitable that many of the submissions made by the parties are contingent on the Tribunal's findings on other issues. Therefore, rather than set out the parties' submissions in a separate section we will deal with the relevant ones in the course of our reasoning and conclusions. It would not add to the clarity of this judgment if we were to record submissions that became irrelevant.

Reasoning and conclusions

Disclosures

Whether the disclosures were qualifying disclosures

148. The respondent argued that none of the disclosures were qualifying disclosures because no information was disclosed within them, as the respondent put it they disclosed only "opinions not facts". We will analyse them individually on that basis below.

149. On the issue of reasonable belief the respondent did not specifically challenge the reasonableness of the claimant's belief in one or more of the six matters listed in section 43B(1) ERA 1996, but nor was any concession made. We will set out our own findings on that below.

150. The more general submission made by the respondent was that the claimant could not have had the necessary reasonable belief that his disclosures were made in the public interest. We reject that general submission because we find that all of the disclosures made were connected, in one way or another, with the loss of the Mack and responsibility for that loss. Those were certainly matters of significant public interest. There was a public interest in the steps taken by the respondent to safeguard an important cultural asset from the risk of destruction by fire. There had been two fires and substantial funds had been donated to restore the building. In those circumstances the claimant's belief that his disclosures were made in the public interest was reasonable.

151. Turning to the specific disclosures, we find as follows.

a. **Disclosure 1** has been defined in terms of a lengthy quotation and it is perhaps therefore unsurprising that it was a mixture of opinion and information. The disclosure certainly included information. The information conveyed was that the contractor's offices had been in the

building when it was in an unsafe state and that no effective building protection measures had been taken by the contractor or by the respondent. We find that the claimant reasonably believed that this information tended to show that the health or safety of an individual had been endangered, that legal obligations in relation to health and safety had not been complied with and that the (built) environment had been damaged. Accordingly, it was a qualifying disclosure on all three bases.

b. **Disclosures 2 and 3** (one is contained within the other) also contained information. That information concerned the combustible state of the building, that applicable HSE guidance had not been followed, that the contractor's offices should not have been in the building without appropriate protective measures, that the building was not compartmented, there were no working smoke detectors, there was no fire suppression system and that fire protection had not been prioritised by the client. Once again, we find that the claimant reasonably believed that this information tended to show that the health or safety of an individual had been endangered, that legal obligations in relation to health and safety had not been complied with and that the (built) environment had been damaged. Accordingly, it was a qualifying disclosure on all three bases.

c. The executive summary section of **disclosure 4** contained many facts. They concerned the fire suppression system and its state of completion and the fact that it could have been commissioned very easily to provide protection during the restoration works but had been removed. While it could be argued that the phrase "could and should" indicates an expression of opinion, we think that when read fairly and in context it was a further disclosure of fact regarding what would have been possible. Information was also disclosed about the requirements of the Joint Fire Code. Once again, we find that the claimant reasonably believed that this information tended to show that the health or safety of an individual had been endangered, that legal obligations in relation to health and safety had not been complied with

and that the (built) environment had been damaged. Accordingly, it was a qualifying disclosure on all of those bases.

d. We find that the claimant has not proved the essential parts of **disclosure 5**. The quotation contained in the list of issues does not appear in the document to which we were referred (page 1402 of the joint file of documents). Further, the facts contained in the document to which we were referred might have tended to bolster the claimant's own credibility as an expert but were not matters falling within section 43B(1) ERA 1996. For all of those reasons we find that the claimant has not established that disclosure 5 was made at all, or that it was a qualifying disclosure.

e. **Disclosure 6** contained facts and was not limited to opinion. It asserted that before the first fire warnings were ignored and that in 2014 a student was allowed to proceed with a dangerous installation. In our assessment those facts tended to show matters which the claimant reasonably believed fell within section 43B(1)(b), (d) and (e).

f. **Disclosure 7** was largely a mixture of allegation and opinion, unsupported by facts. To the extent that it does contain facts they do not support a reasonable belief in any of the matters listed in section 43B(1) ERA 1996.

g. **Disclosure 8** was eventually limited to "The Thunderer" article, although the list of issues initially put it more broadly. We were neither provided with the original of that article nor any verified quotation. The claimant put an alleged quotation from it in his tabular written submissions but it had not been dealt with in evidence. In those circumstances we find that the claimant has not proved the terms of this disclosure or that it qualified for protection.

h. **Disclosure 9** was a quotation from the claimant in an article written by the journalist Mark Aitken. It contained no facts and was an expression of opinion. Essentially it framed questions which in the claimant's view should be answered by the respondent about the departure of its director. The claimant has failed to prove that this was a disclosure of information qualifying for protection.

152. We therefore find that disclosures 1, 2, 3, 4, and 6 were qualifying disclosures. Disclosures 5, 7, 8 and 9 were not.

Whether the qualifying disclosures were protected disclosures

153. We concluded that none of the disclosures qualified for protection and that all of the claims based on protected disclosures therefore failed.

Concealment or destruction of evidence

154. Although the claimant submitted in his tabular submissions that the qualifying disclosures were protected under s.43G2(b) ERA 1996 (concealment or destruction of evidence), that was not a point raised in evidence during the hearing. The claimant gave no evidence to that effect and he did not put that case to any of the respondent's witnesses. We therefore reject that argument. No facts have been established which would allow us to find that the claimant could reasonably have believed that it was likely that evidence would be concealed or destroyed if he made a disclosure to his employer or in accordance with s.43F.

Belief that the claimant would be subjected to a detriment by his employer if he made the disclosure internally

155. We have considered whether any of the disclosures gained protection by virtue of s.43G2(a) ERA 1996.

156. We have concluded that the claimant could not have held a *reasonable* belief that he would suffer a detriment if he made a disclosure internally until after the moment on which he first experienced detriment as a result of disclosures he had made (whether or not those disclosures were themselves protected). The respondent had a whistleblowing policy which was some evidence that it took its obligations in relation to public interest disclosures seriously and

intended that the workers who made them should be protected against detriment. We did not hear any evidence to suggest that whistle-blowers had ever been detrimentally treated in the past or that the respondent's whistleblowing policy had ever been invoked but disregarded by the respondent. While we acknowledge that some of the claimant's witnesses spoke of a problematic workplace culture, low morale and stress at work, we are not satisfied that all or even the majority of the respondent's employees shared that view. Even if it did represent the majority view, in our judgment that does not justify the inference that whistle-blowers would be detrimentally treated and any belief to that effect would not, without more, be reasonable.

157. However, we find that there came a time when the claimant could have held a reasonable belief that he would be detrimentally treated if he made a disclosure to his employer. That was when the then Chair of the Board of Governors subjected the claimant to a detriment, because of his prior disclosures to the Parliamentary Committee, on 8 March 2019. That was the occasion on which she said "Mr Gibb is not an expert" and the incident is considered in more detail below. Also of relevance is the claimant's treatment by the Chair at the Q&A meeting a few days later on 11 March 2019. From that point onwards we consider that the claimant reasonably believed that he would be subjected to a detriment by the Chair of the Board of Governors if he made his disclosures internally. However, there remains the overarching test of reasonableness in s.43G(1)(e) and (3), to which we turn next.

The overarching test of reasonableness

158. In our judgment the disclosures made to the press or on social media (disclosures 6 to 9) failed to gain protection because they failed the overarching test of reasonableness in s.43G(1)(e) and (3) ERA 1996. That would be a barrier to protection even if they met the requirements of s.43G(2)(a) or (b) ERA 1996.

159. We considered all the factors listed in s.43G(3) ERA 1996. An internal whistleblowing procedure existed and was published in writing. The claimant

is and was a sophisticated and highly intelligent employee who could and should have been aware of its terms. The procedure provided a clear and credible route by which the claimant could have made the same disclosures internally. The policy defined the duties of the "Designated Officers" to whom disclosures should be made. There was no evidence to suggest that the relevant officers would have failed to comply with their clear duties under the policy. Those duties included deciding whether there was a case to answer and whether it should be investigated. Investigations could be conducted internally or an external party could be invited to investigate the matter on behalf of the respondent. The matter could also be referred by the Designated Officer to an external authority.

160. Further, the procedure signposted a means by which whistle-blowers could themselves raise concerns outside the respondent's organisation if necessary. The procedure advised that employees who made disclosures to the Scottish Funding Council would be "protected under the law". Whether that body was a prescribed body for the purposes of s.43F or not, the respondent had indicated another option which workers could choose, which was not the press or social media.

161. For those reasons we have concluded that it was not reasonable for the claimant to make disclosures in the press and/or on social media without first having tried to raise those matters internally, including by raising them in accordance with the whistleblowing policy. If he had done so, then the possibilities would have included an internal investigation, an investigation by an external party, referral by the Designated Officer to an external authority or a disclosure by the claimant direct to the Scottish Funding Council. While we have also found (above) that after 8 March 2019 the claimant might reasonably have believed that he would be subjected to a detriment by the Chair of the Board of Governors if he had made disclosures internally, the existence and terms of the whistleblowing policy provided a degree of assurance that any detrimental treatment for that reason would be detected, exposed and dealt with appropriately. The use by the claimant of the whistleblowing policy would also have been a significant deterrent to anyone

seeking to treat his detrimentally because of his disclosures. On the facts of this case, we are not persuaded that it was reasonable to go to the press or to use social media to make disclosures before the alternative options under the whistleblowing policy and been tried and had either failed or been exhausted. In terms of the statute, that means that even where the requirements of s.43G(2)(a) were met, the requirements of s.43G(1)(e) and (3) were not.

162. The position in relation to disclosures to the Parliamentary Committee (disclosures 1 to 5) is different. The Committee had called for evidence and was holding hearings in public. It was the means by which an important and democratically accountable public body investigated the loss of an important historical building. In those circumstances we find that it was reasonable for the claimant to make disclosures to the CTEEA, even if he had not already made substantially the same disclosures to his employer, or even tried to.

Summary of findings

163. In summary, we have found as follows:
    a. only disclosures 1, 2, 3, 4 and 6 were qualifying disclosures;
    b. none of those disclosures gained protection under s.43G(1)(b);
    c. only disclosure 6 met the requirements of s.43G(1)(a);
    d. disclosures 6 to 9 failed to meet the requirements of s.43G(1)(e) and (3).

164. Consequently, none of the disclosures made by the claimant were protected.

Detriments

165. Although the consequence of our findings above is that the detriment claims brought under s.48(1A) ERA 1996 must fail, we will set out our findings on the alleged detriments in case they were to become relevant in the future and in order to reassure both sides that we have considered the issues carefully. The existence of detriment also had an impact on our reasoning on s.43G(2)(a) ERA 1996 (see above). The issues are whether the alleged

detriment occurred, if so whether it amounted to a detriment in law, and if so the reason why the respondent subjected the claimant to that detriment.

166. Alleged **detriment 1** was not abusive or a vehicle for gratuitous criticism of the claimant. We have considered the transcript of the evidence and we do not think that the portrayal of the Chair's evidence in the list of issues is fair or accurate. The transcript reveals a high profile and public difference of opinion between the Chair and the claimant but it was not in our judgment something which passed the ***Shamoon*** test of detriment. The reasonable person in the claimant's position would regard it as a disagreement but not a personal disadvantage.

167. Alleged **detriment 2** was not proved on the balance of probabilities. The claimant accepted that it was not referred to in his witness statement and that there was no evidence in the joint file of documents to substantiate it.

168. Alleged **detriment 3** concerns the annual review meeting. It was not covered during the claimant's cross-examination of Professor Stewart. The claimant's version of events was not put to that witness and it was not suggested to her that it amounted to detrimental treatment. There are no notes of the meeting to indicate what might have been said. We find that the claimant has failed to prove the alleged detriment on the balance of probabilities.

169. The original document containing alleged **detriment 4** was not produced during the hearing. It is referenced in the claimant's appeal documentation, but the alleged words "*further rumours, supposition and speculation*", if used, do not refer to the claimant by name or by necessary implication. We note that in his appeal documentation the claimant said that it "presumably" referred to him. We find that the claimant has failed to prove on the balance of probabilities anything which would pass the ***Shamoon*** test of detriment.

170. We find that alleged **detriment 5** occurred and that it was a detriment as defined by ***Shamoon***. The gist of the interview appears from the grievance report. The part of the interview which cast doubt on the claimant's expertise

in fire management was detrimental to the claimant because, whatever view the Chair of the Board of Governors held about the validity of the claimant's opinions, he was undoubtedly a fire management expert. The public assertion that he was not an expert in that field constituted something which a reasonable person would regard as a disadvantage. That is quite different from respectfully disagreeing with the claimant, despite his expertise.

171. We are also satisfied that **detriment 6** occurred and that it constituted a detriment in law. The claimant was singled out and treated in a demeaning way in front of all present at the meeting, without any explanation or qualification. A reasonable person would regard that as humiliating and disadvantageous.

172. **Detriment 7** is put rather differently in the list of issues from the way it is put in the claimant's witness statement. Our finding is that whatever fellow employees and co-workers said it, was not detrimental to the claimant. The remarks were intended to be supportive in a context of perceived mistreatment of the claimant by the respondent. A reasonable person in the claimant's position would not have thought that those remarks put them at a disadvantage.

173. So far as **detriment 8** is concerned, only one of the press releases was in the joint file of documents. We find that it was detrimental to the claimant. While the press release made no reference to the claimant by name, we think that anyone who had followed the evidence previously given to the CTEEA committee would understand it to be referring him, and that many readers would associate the detrimental words "unsubstantiated speculation" with the claimant and his views. The claimant could reasonably feel that put him at a disadvantage. Detriment 8 is therefore proved in part.

174. **Detriment 9** concerns the terms of a further press release on or about 26 May 2019. It referred to the claimant by name and said that he had "seemingly failed to read and understand" the respondent's submissions to the CTEEA committee. Further disparaging remarks were made about the claimant,

suggesting that he had not understood the position and that he was not aware of relevant law, despite his obligation to teach the next generation of architects the role of client and contractor. Any reasonable person in the claimant's position would feel that they had been placed at a significant disadvantage by that very personal criticism in a press release, which was by definition intended for public consumption. It amounted to insulting and humiliating treatment, casting doubt on his intelligence, understanding, expertise and competence to teach.

175. **Detriment 10** concerns "mismanagement" of the claimant's grievance process. We are not persuaded that there was any such mismanagement, amounting to a detriment. In our judgment (which draws on the industrial experience and expertise of the non-legal members of the Tribunal) there was nothing disadvantageous about the respondent running the grievance process in parallel with the disciplinary investigation. They were about different things and the outcome of one did not have a bearing on the outcome of the other.

176. The claimant's submissions also appeared to criticise the grievance process on the basis of delay, although that was not a point pursued with any vigour during the hearing. The Tribunal did not consider the delay excessive in all the circumstances. The grievance process commenced on 28 May 2019 but it was not until 23 August 2019 that the claimant confirmed that he wished to proceed formally. Delays then resulted from the claimant's own lack of availability and criticisms of the process. Not only was the claimant often unavailable for meetings, he also frequently failed to reply to correspondence. The claimant failed to attend a single one of the investigation meetings arranged and he bears considerable personal responsibility for the delays in the grievance process. We are not persuaded that the claimant was detrimentally treated in terms of delays to the grievance process.

177. **Detriment 11** was explained in terms of scheduling conflicts as a result of the decision to run the grievance process in parallel with the disciplinary process. We reject the suggestion that the respondent *intentionally* created scheduling

conflicts. To the extent that certain meetings or deadlines in one process fell close to important dates in the other process, it was open to the claimant to request a postponement, as he sometimes did. The possibility of postponement was the remedy for any disadvantage in terms of scheduling. We are not persuaded that there was mismanagement at all, still less the sort of mismanagement which a reasonable person would consider put them, or might put them, at a disadvantage.

178. We are not persuaded that alleged **detriment 12** met the ***Shamoon*** test of detriment. The respondent gave a reasonable management instruction when it required the claimant to prioritise the disciplinary process over a departmental staff meeting. A reasonable person would not regard the situation as detrimental to them, they would understand that disciplinary proceedings could properly take priority over other meetings they wished to attend.

179. **Detriment 13** was dropped.

180. **Detriment 14** concerns the scheduling of the final disciplinary hearing and the decision to proceed with it in the claimant's absence. We are not persuaded that the respondent acted detrimentally towards the claimant. A reasonable person in the claimant's position would also know the whole of the background to that final disciplinary meeting, the amount of notice given, and the many previous meetings that had been arranged but which had not taken place. A reasonable person in the claimant's position with knowledge of the background would accept that they were not placed at a disadvantage given the history of the matter. This is dealt with in more detail in our findings of fact (above) in the section "*attempts to arrange a disciplinary hearing*".

Summary of findings on the alleged detriments

181. In summary, we find that the only detrimental treatment was that contained within numbered detriments 5, 6, 8 (in part) and 9.

182. Since we have not found any of the claimant's disclosures to have been

protected we will not go on to consider the reason why the claimant was subjected to those detriments. We merely record that the respondent did not call evidence from the relevant actors to explain the reason why the claimant was subjected to those detriments, so it was not in a position to discharge the burden of proof if we had found that any of the claimant's disclosures were protected.

Dismissal

The reason for dismissal

183. Having listened carefully to the relevant decision makers and having considered their reasoning and the evidence in support, we are quite satisfied that the sole reason for the claimant's dismissal was not the fact that he had made protected disclosures, but rather a belief in his misconduct. We do not accept that the detailed reasoning set out in the dismissal letter and in the appeal outcome letter was a disingenuous smokescreen. We accept that those documents accurately set out the facts which caused the respondent to dismiss. This is a case in which it is quite possible to distinguish the fact that the claimant had made disclosures (even if they had all been protected) from the manner in which he had made them. In our judgment this is a ***Bolton School*** situation (see above, in the section dealing with applicable legal principles).

184. The respondent has satisfied us on the balance of probabilities that it had an honest belief in misconduct and that this was the reason for dismissal. The claimant has failed to satisfy us on the balance of probabilities that the reason for his dismissal was the fact that he had made protected disclosures.

185. The claim for *automatically* unfair dismissal therefore fails. We will go on to consider the fairness of the dismissal having regard to the fact that the potentially fair reason for it was conduct.

Investigation

186. We find that the respondent's investigation fell well within the reasonable range. It considered all of the claimant's statements in the press and on social media. They were considered in their published context. The applicable policies were also considered. The efforts made to establish the claimant's response to the disciplinary charges were more than reasonable and it was the claimant's lack of engagement rather than any failing on the respondent's part that meant a decision was reached without having heard directly from the claimant. Further, even if there had been any procedural failing in that respect it was corrected by the appeal process, during which the claimant made a lengthy oral and written presentation.

Grounds for a belief in guilt

187. We find that there was compelling evidence of misconduct which gave the respondent reasonable grounds for a belief in guilt in relation to each of the disciplinary charges.

188. We have set out the respondent's reasoning above in the section titled "*Disciplinary hearing and reasoning of Professor Stewart*". In our view every one of the charges was amply supported by evidence that a reasonable employer was fully entitled to accept and find persuasive. Having considered the raw material and assessed it from the point of view of the reasonable employer, we find that many reasonable employers would have taken the same view of the evidence that Professor Stewart did. We consider that the dismissal letter is a fair summary of the evidence and that reasonable employers could have viewed the claimant's posts and articles just as Professor Stewart did. The claimant had made numerous public statements which undermined the reputation of the respondent and its board of governors. He openly called for regime change and asserted serious wrongdoing. He expressed no regret for that. He also shared personal information about co-workers online, without their permission and in circumstances which caused them embarrassment. He failed to follow

reasonable instructions to participate in the disciplinary process. There were reasonable grounds for a belief in guilt of all six charges.

Whether the sanction of dismissal fell within the reasonable range

189. We have concluded that many reasonable employers would have dismissed in these circumstances. The claimant's clean disciplinary record was not a factor of great weight in the overall assessment given his sustained and public attack on the respondent's senior management, accusing them of serious wrongdoing and calling for their replacement. The claimant's conduct was in breach of the respondent's policies and in no way fell within the ambit of academic freedom. It breached principles set out in his terms and conditions of employment. If he had wished, the claimant could have made disclosures in accordance with the respondent's whistleblowing policy rather than resorting to public criticism in the press and on social media. If he had done so, then reputational damage could have been avoided. The claimant's actions were always likely to cause significant reputational damage to the respondent and we have no doubt that they did. The claimant expressed only limited regret and clearly felt that his public criticisms of the respondent and its management were correct and justified. In those circumstances a reasonable employer could conclude that the claimant was not likely to refrain from similar conduct in the future. The claimant's actions had destroyed the trust and confidence which underpins the employment relationship.

190. The position was so serious that in our judgment a reasonable employer could have dismissed for any one of the disciplinary charges, and all the more so for the cumulative effect of all six.

Other procedural matters

191. The claimant did not really raise any other procedural criticisms. We have already rejected the argument that it was unfair to him to allow the grievance process and the disciplinary process to overlap. We have already rejected the

argument that the respondent denied the claimant the chance to contest the charges. The claimant argued that his status as a whistle-blower amounted to a mitigating circumstance but we think that reasonable employers would be fully entitled to take a different view for the reasons set out above. Firstly, for the reasons set out above, the claimant did not make any protected disclosures. Secondly, the disclosures or statements that he did make involved serious misconduct. Thirdly, even if those disclosures had attracted protection in some way, the sustained, damaging and public way in which the claimant made them was separable from the disclosures themselves. Dismissal for that conduct fell well within the reasonable range. A reasonable employer could regard it as gross misconduct.

192. Since there is no claim for notice pay (wrongful dismissal) it is not necessary for us to go on to state whether we also regard the claimant's conduct as amounting to a fundamental breach of contract entitling the respondent to dismiss without notice, but if there had been such a claim, that would have been our conclusion.

Contributory fault

193. Although the issue no longer arises given our other findings, we can indicate that if we had found the dismissal to have been unfair in any way then we would have reduced both the basic and the compensatory awards by 100% to reflect the claimant's own culpable and causative conduct. Having surveyed the evidence we are quite satisfied that the claimant was guilty of repeated misconduct so serious that dismissal was the appropriate sanction. He had made multiple serious allegations about his employer in the press and on social media. He did so without using the procedure set out in the respondent's whistleblowing policy. He conducted a series of battles with senior management in the press and on social media and did so in a way which was always certain to cause very serious damage to the relationship of trust and confidence between employer and employee. He was solely to blame for his dismissal.

Employment Judge: Mark Whitcombe
Date of Judgment: 31 July 2022
Entered in register: 02 August 2022
and copied to parties