EMPLOYMENT TRIBUNALS

Claimant: **Mr B Bhagani**

Respondent: **Goldenway Global Investments (UK) Limited**

Heard at: **London Central** **On:** 25, 26, 27, 28 & 29 September 2023

Before: **Employment Judge Emery**
Mr S Aslett
Mr P Madelin

REPRESENTATION:

Claimant: In person
Respondent: Mr S Flynn (counsel)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed.

2. The complaint of automatic unfair dismissal is well-founded. The claimant was dismissed because he made qualifying public interest disclosures.

3. The complaint of breach of contract in relation to notice pay is well-founded.

4. The complaint of breach of the Working Time Regulations (failure to pay accrued untaken annual leave) is well-founded.

REASONS

1. The claimant was employed as the respondent's Compliance Director. The respondent is an FCA registered company. The respondent says it dismissed the claimant for gross misconduct, by failing to cooperate with or obey the line management instructions of its directors. The claimant says that the directors in question were not FCA registered, his controlled function role meant he could not do what he was asked to do. He says that the principal reason he was dismissed is because he made qualifying public interest disclosures to the FCA.

The Issues

2. Protected Disclosures

   a. R accepts that C disclosed information to the Financial Conduct Authority on 21 July 2022. The claimant says that the information tended to show the following legal and regulatory breaches and criminal offences:

      (i) Unauthorised appointments of two Hong Kong residents to Companies House without approval from the FCA (FCA regulation SUP (Supervision) 10C; FSMA Act Section 59). The respondent accepted on day 4 of the hearing that this was a qualifying protected public interest disclosure.

      (ii) Money laundering: CFD trading profits between the respondent's owner and a Vanuatu based company, GWFX, which C says is associated with the respondent, were transferred via disguised 3rd party payments to bank accounts in Hong Kong and Taiwan and London, designed to disguise the true origins and source of funds (Money Laundering, Terrorist Financing and Transfer of Funds (Information on Payer) Regulations 2017 (SI2017/692);

      (iii) Mr Andrew Luen is acting as an unauthorised person on behalf of the Respondent in Hong Kong undertaking duties as a director he was not authorised to undertake (FCA regulation SUP 10C (FSMA Act Section 63A);

      (iv) Mind and management of the firm is in HK where decisions are made by unauthorised persons (ss.15-52 Immigration, Asylum and Nationality Act 2006, 24B of the Immigration Act 1971, and Schedule 6 of the Immigration Act 2016; a breach of FCA regulation SYSC 22.

      (v) The respondent's corporate owner had caused the claimant to assist in gaining a UK visa for a Chinese espionage agent who was subsequently deported (information he says he was provided with by the UK

authorities); that the Group COO has *"requisitioned the visa for the Chinese Agent"* (Official Secrets Act 1911 and Official Secrets Act 1989).

(vi) Fraudulent intercompany loans. Connected with (ii) above, the CFD profits were loaned to a Group subsidiary, designed to create a false Capital Adequacy Ratio for that subsidiary, and the subsidiary had tried to withdraw these monies, that he had refused to allow this citing money laundering issues (criminal offence of fraud).

b. R accepts that the disclosure was to a prescribed person (s.43F ERA 1996). R says it was not aware this disclosure had been made when it dismissed the claimant.

c. Did this information say there were regulatory / legal breaches by the respondent?

d. Did C believe he was making a disclosure in the public interest?

e. Was that belief reasonable?

f. Did C believe that the information he was disclosing:

(i) fell within the remit of the FCA, and
(ii) that it was substantially true ?

g. Was that belief reasonable?

4. <u>Automatic unfair dismissal</u>

a. If the claimant made a protected disclosure, was the making of this disclosure the reason (or principal reason) for her dismissal?

5. <u>Unfair Dismissal</u>

a. What was the reason for C's dismissal? R asserts that it was gross misconduct in that C:

(i) Failed to cooperate with R's new directors.
(ii) Obstructed R's operations.
(iii) Failed to attend meetings and speak to new directors.
(iv) Failed to follow instructions on 21 and 22 July and failed to return documents when requested.

b. R must prove the reason for dismissal. The Tribunal will need to decide whether R genuinely believed C had committed misconduct.

c. If the reason was misconduct, did R act reasonably in all the circumstances in treating that as a sufficient reason to dismiss C? The Tribunal will usually decide, in particular, whether:

(i) there were reasonable grounds for that belief;
(ii) at the time the belief was formed R had carried out a reasonable investigation;
(iii) R otherwise acted in a procedurally fair manner;
(iv) dismissal was within the range of reasonable responses.

d. If the dismissal was unfair, did C contribute to the dismissal by culpable conduct?

e. Can R prove that if it had adopted a fair procedure, would have been fairly dismissed in any event (Polkey)? And/or to what extent and when?

6. ACAS Code of Conduct

a. Did R fail to follow a relevant ACAS Code of Practice?

b. If so, should any compensation awarded to C as a result of his allegations be increased, and if so by what amount?

7. Holiday Pay (Working Time Regulations 1998)

a. Did R fail to pay C for annual leave the claimant had accrued but not taken when their employment ended?

b. Were any days carried over from previous holiday years?

c. How many days remain unpaid?

8. Breach of Contract – wrongful dismissal

a. What was the claimant's notice period?

b. Was R entitled to dismiss the claimant without notice on grounds of gross misconduct?

Witnesses, disclosure, and evidence

9. We heard evidence from the claimant. For the respondent we heard from Mr Andrew Luen and Mr Feng (Tim) Liu: Both were appointed as directors to the

respondent on 20 July 2022, both were the subject of the claimant's purported public interest disclosure to the FCA about their appointment as directors; both were signatories on the claimant's gross-misconduct dismissal letter on 25 July 2022 and, they say, both made the decision to dismiss the claimant.

10. The Tribunal spent much of the first day of the hearing reading the witness statements and the documents referred to in the statements. There are many disputed issues, and we set out below our 'factual findings' in respect of all relevant issues.

11. There was an agreed bundle of 212 pages, the respondent did not object to a supplemental bundle from the claimant of 23 pages. The respondent applied to put in a bundle of new documents which had been prepared after and in response to issues within the claimant's witness statement. The claimant objected, arguing the documents were irrelevant and he had received them 10 days before the hearing. Mr Flynn argued they went to the engagement of Mr Luen and Mr Liu with the FCA, contrary to the claimant's contention they were appointed in contravention of FCA rules: *"it goes to the legality of their appointment as directors and the reason for dismissal"*.

12. Mr Bhagani argued he had not had an opportunity to consider these documents in his statement; in any event the chronology of these documents does not work for the respondent because his public interest disclosure was before these documents were written.

13. The Tribunal accepted that the documents were arguably relevant – both to the respondent's contention that the claimant was wrong in his arguments, and to the claimant's contention that he made a qualifying disclosure. We allowed their disclosure.

14. During the hearing, the respondent's witnesses made numerous references to legal advice the respondent had obtained from solicitors. The respondent witnesses said that this advice gave them the green-light to proceed to appoint directors under the 12-week rule and to dismiss the claimant. The tribunal warned witnesses about issues of legal professional privilege; the advice was still extensively referred to, although not all its detail could be recalled by the respondent's witnesses.

15. The Tribunal took the view that the respondent's witnesses referred to this advice and why the respondent relied on it extensively in their evidence and despite the Tribunal explaining legal professional privilege and giving appropriate warnings on several occasions. We considered that privilege was being waived by the respondent over this advice. The Tribunal raised this prospect on several occasions. Mr Flynn did not dispute that privilege had been waived over this advice, or that it was relevant to the respondent's evidence. The respondent gave indications it may be disclosed, it was never produced. The claimant disputes that

the advice could have said what the respondent's witnesses say it says, alternatively that the advice is wrong, and the FSA agrees with him.

16. Given the failure of the respondent to disclose advice over which legal professional privilege had been waived, we were effectively being asked by the respondent's witnesses to accept that it relied on legal advice which it was not prepared to disclose, and where the claimant disputed its existence or accuracy. We deal with this issue in more detail below.

17. Two further evidential and procedural issues arose during the hearing. On day 4 of the hearing, the respondent conceded that the claimant had raised a qualifying protected disclosure by alleging that the appointment of Mr Liu and Mr Luen as directors, was unauthorised. Mr Flynn referred to the FCA's letter to the respondent dated 9 August 2022 (264-6) which he accepted showed the FCA had significant concerns about the respondent's use of the "12-week rule" to appoint directors. As Mr Flynn put it, the FCA's stance was that *"it was not clear it was a legitimate use of the 12-week rule – i.e. not temporary or unforeseen".* Mr Flynn said the respondent *"conceded that the claimant made a public interest disclosure – i.e. he had a reasonable belief that it was substantially true that the use of the 12-week rule was not appropriate".*

18. After the claimant's evidence, the respondent withdrew an allegation relating to contributory fault and Polkey: the respondent's allegation that the claimant changed the respondent's address at Companies House. These points were being *"withdrawn completely"* as evidence in the claim because it is a *"live issue"* in county court proceedings the respondent brings against the claimant. Given this withdrawal, notwithstanding the claimant's evidence, we make no findings of fact on it.

19. This judgment does not recite all the evidence we heard, instead we confined our findings to the evidence relevant to the issues in this case. The nature of this case means that there is significant relevant background evidence, set out below.

20. The judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

21. The respondent provides foreign exchange brokerage services. The claimant's role was an FCA controlled function. Under the Approved Persons Regime his controlled functions were Executive Director (SMF3), Compliance Oversight (SMF16) and MRLO (SMF17). He was required to maintain the Compliance Monitoring programme and ensure policies were working as intended; he was required to deal with the FCA, auditors; maintain the Risk Register and ICAAP; supervise the training

and competence and fitness of individuals who hold FCA controlled functions; he was required to identify and manage money-laundering risks.

22. The respondent accepts it is a wholly owned by Goldenway Precious Metals Limited (Goldenway PM), a Hong Kong registered company. The claimant's case, which we accepted, was that Goldenway PM's control of the respondent was subject to the respondent's requirement to abide by its regulatory and legal responsibilities, including those set out in the FCA Handbook.

23. The claimant's early years in role were uneventful, he performed well in role.

24. A significant issue arose in December 2020 and into 2021. The claimant in his role as MRLO froze a multi-million sum which was being held in bank accounts of Goldenway PM.

25. The claimant's case is that this money related to a hedge the respondent placed on commission it receives. In this case the hedge counterparty was a company based in Vanuatu called GWFX Global Limited (GWFX), formed in 2018. No bank was willing to receive money for GWFX, it appeared not to have a bank account. The claimant sought documents on ownership, he discovered, he contends, that GWFX was owned by parties connected to Goldenway PM. The claimant contends that this was an *"illegal third-party payment"*, that GWFX was *"an affiliated company"* of Goldenway PM. For this reason, in his MRLO role he froze this sum (which was in different accounts in different countries), and he rejected several requests thereafter to unfreeze this money.

26. The claimant says that the only legitimate option was for this sum to be returned to an account of GWFX. At the date of his dismissal this money remained frozen. We note that the FSA eventually allowed this sum to be unfrozen to be returned to GWFX.

27. It was put to the claimant that this sum was cleared to be transferred based on legal advice from Pennington Manches to Mr Bayern Wong *"who sought advice and was told it is not illegal"*. Mr Wong left the company in January 2022. The claimant said, *"this advice was never shared with me", he said* he had frozen the monies on the basis that it was the suspected proceeds of crime, that Mr Wong *"never raised with me that advice had been received. If it had, I could have decided [what to do with this sum]. Legal advice should have come to me, and it did not."* He made the point that he told the FSA in his 21 July 2022 email that legal advice was not shared with him, and he would not have said this had he seen the legal advice. The Tribunal accepts that if legal advice did exist it was not shared with the claimant.

28. By January 2022 the respondent had four employees including the claimant, and he and Mr. Bayern Wong and the claimant were the respondent's two Executive Directors.

29. A further relevant issue arose in February 2022. Mr Bayern Wong had resigned in January 2022, meaning the claimant was the respondent's sole director. Mr Andrew Luen, then a Project Manager in a Hong Kong based Group Company (IX Capital Ltd) emailed the claimant saying he was taking over Mr Wong's directorship of the respondent and some of his role. He asked for the company bank card and password.

30. Not all the exchange which followed is in the bundle, but the claimant's email of 7 February 2022 states that *"it is not appropriate"* for Mr Luen to take over these duties, that he had previously applied for a SMF3 function but *"further to FCA queries"* he withdrew it. The claimant said that if Mr Luen performed Mr Wong's duties *"the regulators can take action under s.63A … as Mr Luen would be performing a Controlled Function without approval".* He said Mr Luen should take advice as this was risking his own, the firm and the Group's liability to fines from the regulators. He said if Mr Luen still wanted to proceed after this advice he should send him an email saying he accepted the risks (75). This application did not proceed.

31. In his evidence, the claimant said that in 2019 Mr Luen had applied for an approved person role, had been interviewed by the FCA who were *"not satisfied with his answers"* and he then withdrew his application. *"He was aware that he needed to be stationed in the UK."*

32. In his evidence Mr Luen said the application did not proceed because of Covid and his inability to travel to the UK. We note however that in his email on 7 February 2022 the claimant gave his reasoning to Mr Luen, and this was not disputed at the time by Mr Luen. We accept that a significant factor in Mr Luen's decision to withdraw his SMF3 application in 2020 was FCA concerns about his application.

33. An incident took place in on 6-7 June 2022. Not all the documents are in the bundle, the claimant explained the context. On 6 June Goldenway PM asked him to sign an appointment letter for a new employee: his response outlined concerns, mentioning regulatory issues including the capital market test.

34. On 7 June 2022 the claimant received a warning letter because he had not been *"cooperative on assisting the company to enroll appropriate staff"*. The covering email says that the respondent's shareholders (Goldenway PM) *"expressed their concerns on your recent performance"*, which was not acceptable *"we are very disappointed"*. It said that any further breach could led to suspension and termination of employment (77-8).

35. The claimant responded, arguing the appointment was not possible because of the lack of capital *"we are barely passing the Individual Capital Guidance";* there are stringent compliance checks required under immigration and regulatory rules. The claimant went on to say that he was *"wary of any recruitment"* by the Group,

because, he says, he was interrogated by the UK authorities because a person he was previously asked to sponsor by the Group *"turned out to be a Chinese Agent".*

36. The claimant set out *"other matters"* of concern which he said he believed was the reason he was sent the warning letter, *"to oust me".* He referred to the GWFX issue saying that he stopped *"illegal third-party payments by freezing the LP funds".* He said the warning letter breached the FCA Threshold Conditions, that *"mind and management"* of the respondent should be in the UK, that breach *"can result in the firm losing its licence."* He said he was *"exercising extreme restraint … and trying to steer the firm in the correct direction without involving the regulators…"* (79-80).

37. 3 days later, on 10 June 2022, Mr Luen emailed the claimant on respondent's letterhead stating that that Mr Tim Liu Feng had been appointed as a director of the respondent, and the claimant was asked to inform Companies House and then to assist with Mr Liu's FCA approval. At this date, Mr Luen was not a director of the respondent.

38. The claimant's response, in bold, was *"You know the procedure: you cannot be a director… before approval from FCA… Apply for FCA approval first."* Mr Luen asked the claimant to assist on the FCA approval. The claimant's response: *"Appoint solicitors. They will have to apply for six years referencing … education verification … Solicitors will know the process"* (81-2).

39. Mr Liu's evidence was that he was employed by Goldenway PM since 2020, he had been employed in different roles in different Group companies. Whilst employed at IX Capital, a Group company, he was contacted by Goldenway PM's HR who *"invited me to be a director"* of the respondent. Mr Luen's evidence was similar, he says he was invited to join the respondent as a non-executive director.

40. Mr Liu's evidence was that he understood a criminal record check was required to become a director of an FCA regulated company, he said that he gave HR in Hong Kong authorisation for such checks when he joined Goldenway PM in 2020 *"So in my understanding the criminal checks were done in 2020".* On the requirement for an authorised person to vet a potential director (s.60A FS&MA 2000), Mr Liu's evidence was the same – that this was done by Hong Kong HR when he joined Goldenway PM in 2020 *"HR asked me to provide cv and supporting documents in 2020".* Mr Liu corrected his answer to 2022, that when he was appointed to a director of the respondent in 2022, he was interviewed for the role and provided documents.

41. On the obligation to obtain 6 years references for a director or person performing a controlled function (SYSC 22.2.1), Mr Liu's answer was: *"In the UK it is different to Hong Kong. In Hong Kong we mention previous employers and their contact details on the cv; HR will make a call to get confirmation. … I'm not sure what HR did with it … I have the Hong Kong licence which is similar to FCA approval…".* He said that

when the 12-week application was made, his cv and *"all information"* was supplied to the FCA.

42. Mr Luen gave similar answers. He as he gave all relevant regulatory information to his Hong Kong HR team when he joined Goldenway PM in 2019. On his appointment as a NED under the 12-week rule, Mr Luen said the respondent was reliant on legal advice from solicitors.

43. In his evidence the claimant said the context of his email was a prior *"lengthy discussion"* about the reason why HK-resident directors would not obtain FCA approval – *"I knew that this was a futile exercise … we were told that the FCA would not authorise HK residents. … [a director] must be based in the UK…".* The Tribunal accepted that the claimant used similar language in his verbal discussions with Goldenway PM personnel on this issue. He said solicitors were needed to make the application because, as his email suggests, it was a *"complicated and lengthy process"* to obtain approval.

44. On 20 July 2022 the respondent by its owners passed the following written resolutions by way of a Director and Authorised Signatory of Goldenway PM, Yu Chung Ho. These were:

    a. to amend the respondent's Articles of Association to remove a director by way of a written notice signed by a director of Goldenway PM, to take effect on notification to the director concerned.
    b. to appoint Mr Liu and Mr Luen as directors of the respondent and remove the claimant as a director with immediate effect (87-88).

45. The same day the claimant was sent a letter by email and post by Mr Ho referring to the written resolutions, informing him he had been removed as a director *"with immediate effect*". He was asked to return all data in his role as director, including the FCA's online notification and applications systems. He was told his role as Compliance Director was not affected, and it specified terms of his employment contract he must continue to comply with (85-6). In a separate letter he was *"instructed that"* Mr Luen and Mr Liu *"should be appointed as Directors … with immediate effect. Please ensure the necessary filing requirements are carried out"* (87).

46. The claimant responded, saying that *"you cannot"* appoint Directors without FCA approval. He suggested a solicitor be appointed to obtain FCA approval. *"I cannot in the meantime hand over any documents to the proposed new directors until approval by the FCA".* There was a two and fro by email: the claimant was told *"we have taken advice… the FCA rules allow us to appoint directors who have not been approved in certain circumstances and we will be writing to the FCA…"* the letter said that FCA rules do not prohibit the respondent from changing its directors. The claimant was told *"this is the end of the discussion."* (90-93).

47. The same day, Mr Liu and Mr Luen in their capacity as Directors of the respondent sent a "Notification Form" to the FCA stating: the respondent intended to wind down its business, as a *"preparatory step"* new directors had been appointed *"we are relying on the 12-week rule with respect to their appointment".* It said that *"necessary corporate steps"* had been taken to remove and appoint directors, the new directors would start the winding-down process (226 – 232).

48. The claimant was not made aware the Notification Form had been sent to the FCA. In his evidence he said the 12-week rule could not apply, as this was to be used solely for unexpected emergencies, such as the sudden incapacity of a regulated person. He referred to the FCA Senior Managers Regime, 10C.3.13: the 12-week appointment can only cover a 'temporary' or 'reasonably unforeseen' absence of less than 12 weeks. He argued its use in this situation was inappropriate.

49. The next day, 21 July 2022 the claimant wrote to the Supervision Team, FCA by email and post. He stated he was disclosing in pursuance of *"Senior Conduct Rule 4"* the following information (97-99):

    a. Unauthorised appointments of two Hong Kong residents as directors to Companies House without approval from the FCA
    b. Money laundering: GWFX's profits from CFD trading with the respondent were transferred via disguised 3rd party payments to bank accounts in Hong Kong and Taiwan and London, designed to disguise the true origins and source of funds being GWFX in Vanuatu. The claimant says the respondent was seeking to move the money by appointing new directors.
    c. Mr Luen was based in HK but was undertaking duties as a director he was not authorised to undertake.
    d. The issue of alleged Chinese espionage which led to him being interviewed by the UK authorities: he states that the Group COO has *"requisitioned the visa for the Chinese Agent".*
    e. Mind and management of the firm is in HK where decisions are made by unauthorised persons.
    f. Fraudulent intercompany loans. Connected with (b) above, GWFX has *"no account anywhere in the world which would accept"* the CFD profits it made from its trades with the respondent. These profits, says the claimant, were *"loaned"* to a subsidiary of Goldenway PM, Goldenway Japan Co. (GWJ) and held in segregated client accounts in Hong Kong and London *"there is no rationale for holding these fundings … expect to provide a false impression to FSA in Japan of the [Capital Adequacy Ratio] of GWJ".* He said that GWJ had recently tried to withdraw these funds, but he did not authorise, *"citing money laundering issues."* He said his attempts to return these funds to GWFX *"have had no success".*

50. The claimant's case put to Mr Liu is that there was a similarity between the core allegations he made to the FCA (97-99) and what he was telling the respondent at the time, for example his emails at page 90 *"you cannot appoint directors to a UK*

regulated company without FCA approval"; and page *100 "I have discussed these matters with FCA…. Please obtain FCA approval first…".* Mr Liu accepted that the wording was similar *"I accept the sentences are pretty similar"*

51. The same argument was put to Mr Luen, that the claimant's email of 7 June 2022 letter was in similar terms to his 'disclosure' letter to the FSA on 21 July 2022. Mr Luen was taken through this paragraph by paragraph: he disputed that the letters were similar, but he accepted that money laundering, Chinese espionage, mind and management were mentioned in both. Mr Luen's view is that the letters' *"phrasing and meaning was slightly different"*.

52. A zoom meeting agenda was sent to various including the claimant on 21 July 2022, the agenda items included the requirement for the claimant to hand over all directorship related login and passwords to Mr Luen (95-6).

53. The claimant did not attend, it appears the WhatsApp message for the meeting was sent with little notice. In messages that followed the claimant said to Mr Luen *"you are nether an employee or director. I have asked the regulators to come in …. Please stop all communication with London staff. You will prejudice the regulators investigation".* In a later message he said *"I have called in the regulators and I am certainly not stepping down. I represent the FCA."*

54. On the same day Mr Liu emailed the claimant *"it is clear to us that you are deliberately obstructing the ability of the new directors to communicate with staff… We consider you to be acting in a way that does not comply with reasonable management instructions… if you continue to act in an obstructive way we will have no choice but to take disciplinary action."* (220).

55. The claimant responded: he said he had discussed these issues with the FCA, *"please obtain FCA approval first. I am the current director and have to protect the firm's interest. As soon as you obtain FCA approval I can then do the rest. I cannot attend meetings or hand over any documents etc without you first being approved by the FCA. To do that would mean I am dealing with an unauthorised person. … The firm can be fined or the group."* He suggested Mr Liu read a previous legal advice to the respondent on this issue.

56. The respondent's case is that the claimant was deliberately obstructing the respondent in his emails. The claimant argued that he was not – his emails were simply saying *"wait for the FCA … get the FCA permission and then remove me, that would have been the sensible thing to do…"*

57. On 22 July 2022 WhatsApp messages show the claimant was told to stop his messages, that they violated the respondent's code of conduct. All staff were informed that Ashurst LLP would handle all necessary filings. The claimant was told he would report to Mr Luen directly (93-6).

58. In separate emails later that day Mr Liu requested the claimant to attend a meeting to discuss the change of management, the change of directors; that the FCA '12-week rule' allowed him to be a Senior Manager; he wanted to understand the claimant's work responsibilities. The claimant's response on 23 July was that Mr Liu was not authorised to sign as a director; that the letters he had been sent "*are not enforceable".*

59. Mr Liu's evidence was that he was entitled to call this meeting and act in a senior management function while in Hong Kong because the application had been submitted to the FCA on that day *and "we rely on the 12-week rule".* He said his email at 102-3 was the claimant's notification of this fact. This email states*, "the FCA has a 12-week rule that allows me to perform a Senior Manager role"* (103).

60. Mr Liu accepted in his evidence that the claimant had the right to communicate with the FCA, but that the respondent had also taken advice; that when the claimant said it should seek FCA approval *"we consulted"* with solicitors and received advice it could proceed under the 12-week rule.

61. Mr Liu said that the *"unexpected event"* under the 12-week rule was *"We removed the claimant as a director and gave notice to the FCA, and this is the special event. … We need to wind down the company and so we need to take control of the company to do these things."*

62. The claimant was sent a letter by email on 26 July 2022 terminating his employment for gross misconduct. The letter said the claimant had failed to cooperate with Mr Luen and Mr Liu in their role as directors of the respondent: *"… and you have acted to obstruct our ability to carry out effectively the day-to-day operations of the company".* It was because of this *"continued obstructive behaviour and refusal to cooperate"* that the claimant's employment was terminated *"with immediate effect"*. (105).

63. Both Mr Luen and Mr Liu said they took the decision jointly to dismiss the claimant, that they also took advice from solicitors. They said that no disciplinary process was required: Mr Liu's evidence was that this was based on *"the claimant's conduct and a review of all the risks"* and consulting with solicitors about the ACAS Code of Practice. He said there was no investigation because *"based on his behaviour we find he tried to influence other staff. We are based in Hong Kong at this time, we can't come to the UK. Without local staff cooperation we can't do out duties. And on 21 July we had submitted Principle 11 – we have a tight time and need to move quickly and move forward."*

64. In answer to the Tribunal's question Mr Liu accepted that suspension was an option *"but based on the situation we had not much time to go through the whole process. After we consulted with lawyers they said yes, we can do this - we discussed this in meetings a couple of days before hand."*

65. Mr Luen said the reason for dismissal was *"simple and straightforward".* He referred to the fact that only directors can have full access to client monies, the claimant was no longer a director and from 21-25 July 2022 the claimant *"refused to pass up the bank access codes. This was a matter of urgency; they gave the claimant access to client money; we need to protect shareholders interests. What he said was not acceptable."* He said that the claimant *"cannot"* have bank access *"this is the main issue".*

66. On the failure of the claimant to provide bank log-in details, Mr Liu pointed to the WhatsApp meeting agenda – point 6, the request for the claimant was to provide *"all directorship related login and passcode"*. The tribunal also noted the requirement to return login and passcodes for Companies House and FCA systems in Mr Ho's 20 July 2022 letter.

67. Mr Luen accepted that the claimant was saying he is compliance manager, and he cannot give login details, he said the situation was *"frustrating and tense – we owe a duty to shareholders. On bank access we did seek advice from our compliance team and from external lawyers".*

68. The respondent's case to the claimant was that the companies house registration process for directors and the FCA approved person regime are separate issues, you can appoint and then register directors at Companies House without FCA authorisation. The claimant's answer was no – that the FCA *"regulatory obligations"* mean FCA approval is required before a company director can be appointed. He pointed to the FC&MA 2000 s.63A, the power to impose penalties on a person who has performed a controlled function without approval.

69. The respondent challenged the claimant on the time it took to raise the alleged money-laundering issue as a disclosure – from August 2020 to August 2022. The claimant argued that it was for him to resolve the issue internally and there were ongoing discussions within the Group. If the money was returned to GWXF there was no further issue. He said it is only if there are internal failings to inform the FSA.

70. The claimant rejected the contention he did not believe this to be a money-laundering issue, that he made-up this allegation *"to cause problems"* for the respondent. The claimant's answer was *"of course I did, this is why I froze the money [in 2020] … I would not have said this to the FCA if it was not true".* He referred to the issues with the authorities over the alleged Chinese agent. He reiterated that he *"did not want this money to be moved",* that there was *"no self-interest",* that if the money had been moved, *"I would have been asked [by the FCA] how…".*

71. In his evidence Mr Luen accepted that the FCA restricted movement on the funds the claimant had earlier frozen - *"We cannot do any transfer related to this amount"*, that there were conditions on this transfer. The FCA eventually approved its return to GWFX in Vanuatu.

72. On the suggestion that the issue of Chinese agents was not for the FSA to deal, he argued that this is about the conduct of the respondent, its fitness and propriety when it is applying for approval for two Hong Kong-based directors. He said there was nothing to report in June 2022 as he had stopped the appointment of Mr Luen; *"I was the buffer for unregulated activity".* But on 21 July 2022 he was aware he was going to be sacked to ensure Mr Luen and Mr Liu would be appointed; *"I wanted the FCA to be aware this is what happened in the past, now they are appointing new directors, it's then for the FCA to sort out"*.

73. The claimant argued in his evidence that the FCA *"never approved"* the respondent's application for Mr Luen and Mr Liu – *"they were not put on the FCA register";* the FCA placed restrictions on the respondent and *"took control":* of the company and its accounts, the Directors *"have no power".* The Tribunal accepted that neither Mr Liu nor Mr Luen appear to have any Controlled Functions.

74. The FCA wrote to Mr Luen and Mr Liu on 9 August 2022 following a conference call: *"We are concerned by recent developments … and are of the view that the … VREQ proposed is insufficiently robust given the present circumstances."* It said *"our immediate concerns include ..."* the recent removal of the claimant, *"the sole UK domiciled director and SMF holder … You are neither resident in the UK nor authorised within our regime. We are concerned that this leaves [the respondent] in breach of Threshold Condition COND 2.5 appropriate resources: non-financial resources. Our concern in this respect were supported by some of Mr Luen's responses … these providing a clear impression that he was not fully in command of all relevant facts…"*. It said, *"the only appropriate way to mitigate these risks"* was for the respondent to formalise its intention to cease providing regulated services (264-6).

75. The respondent placed a 'restriction on activities' on 11 August 2022

76. Mr Lieu accepted that the winding down process took longer than 12 weeks, but he said it was their intention to compete within 12 weeks and he reiterated that legal advice was that this was a legitimate process. He said that the FSA accepted this.

77. Following his dismissal, the claimant secured a role subject to references. The regulatory reference provided by Mr Liu states the claimant was dismissed for gross misconduct as not fit and proper. The claimant argued that FCA rules state that gross misconduct can only be mentioned *"if proven"*. Mr Liu's evidence was that the reference states the reason for dismissal in the termination letter. Mr Liu accepted the claimant was not given the opportunity to comment before this reference was provided. The job offer was subsequently withdrawn.

78. The holiday pay claim. the claimant said there was a spreadsheet in the office, which will be in the possession of the respondent. He said he rolled over 5 days

holiday from the previous year, that he took 5 days leave in June 2022, and he is owed his outstanding and untaken holiday entitlement.

Closing arguments

79. Mr Flynn provided a written submission. Mr Flynn and Mr Bhagani provided verbal arguments. These are summarised where appropriate in our conclusions section below.

The law

80. We set out below the legal principles required to address the allegations in the claim. We have not reproduced the legal and regulatory principles relied on by the claimant on the protected disclosure issue. We considered the relevant extracts in the bundle from the FCA Handbook, Handbook Annex, legislation, and European Banking Authority Regulations (120 – 147).

81. Employment Rights Act 1996

> 43A Meaning of "protected disclosure"
> (1) In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
>
> 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
> …
> 43FDisclosure to prescribed person
> (1) A qualifying disclosure is made in accordance with this section if the worker—
> a. makes the disclosure ... to a person prescribed by an order made by the Secretary of State for the purposes of this section, and
> (b) reasonably believes
> (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and
> (ii) that the information disclosed, and any allegation contained in it, are substantially true.

[It is accepted that the FSA is a prescribed person for the purposes of this claim.]
Dismissal

82. Employment Rights Act 1996 – Pt X Dismissal

s.94 The right

a. An employee has the right not to be unfairly dismissed by his employer

s.98 General

1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

a. the reason (or, if more than one, the principal reason) for the dismissal, and

b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2. A reason falls within this subsection if it—

a. …

b. Relates to the conduct of the employee

…

4. Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the issue

s.103A Protected disclosure.

1. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

83. Case law – PID

As well as the case law referred to by the parties, we considered the following legal principles:

a. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416 EAT* – the EAT provided the following guidance to tribunals:

(i) Each disclosure should be separately identified by reference to date and content.
(ii) Each alleged failure or likely failure to comply with a legal obligation should be separately identified.
(iii) The basis upon which each disclosure is said to be protected and qualifying should be addressed.
(iv) Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.
(v) The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, … whether it was made in the public interest.
(vi) Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant…
(vii) The Employment Tribunal … should then determine … whether the disclosure was made in the public interest."

b. *Chesterton Global Ltd v Nurmohamed [2017] ICR 731:* It is for the claimant to show the disclosure was in the public intertest. In a case of mixed interests, it is for the tribunal to rule as a matter of fact as to whether there was *sufficient* public interest to qualify under the legislation.

c. *Ibrahim v HCA International* [2019] EWCA Civ 207: The mental element imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing? The fact that a motivation for making the disclosure may be different: "the necessary belief [of the employee] is simply that the disclosure was in the public interest".

[note the claimant in the present case must meet the 'substantially true' test.

d. *Parsons v Airplus International Ltd UKEAT/0111/17:* The necessary reasonable belief in that public interest may arise on later contemplation by the employee and need not have been present at the time of making the disclosure. Where an employee makes a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a dispute with the employer, the tribunal was held entitled to rule that they were made *only* in her own self-interest – the fact that an employee *could* have believed in a public interest element is not relevant.
e. *Darnton v University of Surrey* [2003] IRLR 133 *EAT* - The test is whether or not the employee had a reasonable belief at the time of making the relevant allegations that they were true. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining

whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

f. *Harrow London Borough v Knight [2003] IRLR 140, EAT - The* act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial influence) the act complained of.

g. *Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73* – the tribunal must consider the employer's *motivation* for taking a particular course of action after a whistleblowing allegation; an employer who is motivated to act for reasons unconnected to the allegation will not have subjected to the employee to an unlawful detriment.

h. *Fecitt v NHS Manchester [2012] ICR 372 CA - s.48c* puts the burden on the employer to show on the balance of probabilities that the act complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the employee.

i. *Kuzel v Roche Products Ltd [2008] IRLR 530, CA*: If the employer fails to show an innocent ground or purpose, the tribunal *may* draw an adverse inference and find liability but is not legally bound to do so. *"Accordingly, if a tribunal rejects the employer's purported reason for dismissal [or detriment], it may conclude that this gives credence to the reason advanced by the employee, and it may find that the reason was the one asserted by the employee. However, it is not obliged to do so. The identification of the reason will depend on the findings of fact and inferences drawn from those facts. Depending on those findings, it remains open to it to conclude that the real reason was not one advanced by either side."*

j. *Yewdall v Secretary of State for Work and Pensions UKEAT/0071/05* – the initial burden on the claimant to show a prima facie case that they have been subjected to a detriment because of their protected act, *"… the burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment which requires to be explained"*.

k. *Panayiotou v Kernaghan [2014] IRLR 500* - it is a defence that the reason for the detrimental treatment was not the doing of the protected act in question, but the unacceptable way in which it was made – an employee's dismissal in part because of an obsessive pursuit of PIDs was "in no sense whatsoever connected to the PIDs: *"There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. … Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."*

84. <u>Dismissal</u>

a. *BHS v Burchell test - Graham v Secretary of State for Work and Pensions (Jobcentre Plus) [2012] EWCA Civ 903:* "35 …once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct.
   (i) did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case;
   (ii) did the employer believe that the employee was guilty of the misconduct complained of and,
   (iii) did the employer have reasonable grounds for that belief …

   The 'reasonable grounds' test requires the tribunal to consider the objective standards of the hypothetical reasonable employer, whether the employer has acted within a "band or range of reasonable responses"…. the tribunal must not substitute its own views; the tribunal must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice.'

b. The ACAS Code states that a properly conducted investigative process:
   - enables the employer to: discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;
   - secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and

- even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence and affect the appropriate sanction.

c. *W Weddel & Co Ltd v Tepper [1980] IRLR 96 at 101:*

"… [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, "gathered further evidence" or, in the words of Arnold J in the Burchell case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably'.'

Conclusions on the evidence and law

Did the claimant make a qualifying protected disclosure?

85. The respondent challenges the genuine and reasonable belief of the claimant of all bar one of his allegations made to the FCA on 21 July 2021. It does not accept that these allegations were substantially true. We considered it necessary to consider how it was the claimant came to form his beliefs.

Unauthorised appointments of Mr Luen and Mr Liu:

86. The respondent accepts that this was a qualifying public interest disclosure.

Money laundering of GWFX monies via disguised 3rd parties:

87. The respondent and its witnesses accept that the claimant froze this money; it did not dispute the claimant's assertion that attempts had been made within the Group to transfer it elsewhere, which he had blocked.

88. We concluded the respondent knew why the claimant had frozen this money. The respondent knew the claimant believed its transfer would amount to an act of money-laundering. The respondent did not seriously challenge the claimant's belief. The respondent had no evidence to suggest that what the claimant was saying in this disclosure - that the respondent had involvement with Goldenway PM in attempting facilitate the unlawful laundering of this sum - was not true. The funds

were returned to GWFX on the FCA's requirement. This is what the claimant had sought, it had not occurred prior to his dismissal.

89. We concluded that the claimant believed that the respondent had been involved in the past in attempts to facilitate the laundering of this sum; that by the appointment of Mr Lieu and Mu Luen the respondent would again attempt to do so. We concluded that the claimant believed that the respondent was involved in attempts to facilitate the laundering of this money. The claimant relies on s.63 Money Laundering, Terrorist Financing and Transfer of Funds (Information on Payer) Regulations 2017 (146).

90. We did not accept that the delay in making this disclosure meant the claimant did not reasonably believe this was a disclosure in the public interest. We accepted that his disclosure was motivated by the fact his removal as director would enable this money to be transferred, he believed unlawfully.

91. This was a disclosure to the FCA, a prescribed person. We accepted that the claimant genuinely believed that this was an issue which fell within the FCA's remit; he is an experienced Compliance Officer fully aware of the FCA rules. It did fall within the FCA's remit, it was a genuine belief and a reasonable one to hold.

92. Did the claimant reasonably believe this information was substantially true? We concluded yes. We accept that the claimant believed the respondent was not taking appropriate steps under s.63, that it was or was about to be engaged in money-laundering via the transfer of the GWFX monies. We noted the facts, particularly his involvement in freezing this money, the long-standing impasse over its return, and the circumstances of his removal as a director. We considered that the claimant was reasonable in believing his disclosure was substantially true, and that his dismissal as director was designed to expedite the transfer of these funds.

Mr Luen undertaking unauthorised activity

93. The respondent did not concede this as a disclosure. We noted the FCA's criticism of the respondent's use of the 12-week rule, Mr Luen's lack of knowledge, and its concern at the dismissal of the claimant. We note that the FSA's letter dated 9 August 2022 states Mr Luen and Mr Liu were not *"authorised within our regime".*

94. The respondent's case is that there was nothing stopping Mr Luen and Mr Liu being appointed as company house directors and performing activities as directors, they could request the claimant to carry out activities. The reason: there was nothing stopping the respondent from doing so, the only sanction would be an after the event fine. The FCA could not therefore prohibit the respondent from appointing directors. Mr Flynn also suggested that this meant the claimant was wrong in saying the respondent's actions amounted to a regulatory breach, this was not a reasonable belief.

95. We didn't accept this argument. Many acts are punishable by a fine or other sanction after the event because of a regulatory breach.

96. We accept that the claimant believed Mr Luen's appointment was unlawful and that he was undertaking unauthorised activities. The claimant's case is that FCA SUP 10C was engaged; rule 10.4(1) states that both the firm and the person can be subject to a penalty if that person performs a controlled function without approval. Mr Luen was conducting controlled functions without approval – he was directing the claimant and other staff in operational matters while based in Hong Kong and without the appropriate experience or approval to do so. We accepted that the claimant's belief that it was making this disclosure in the public interest was a reasonable belief.

97. We also accepted that the claimant reasonably believed he was disclosing information which fell within the remit of the FCA – in fact his belief was right.

98. It was also reasonable for the claimant to believe that this disclosure was substantially true: as with the directors' appointment, the FCA was critical of Mr Luen's involvement in the business, clearly concluding he should never have been appointed. The FSA agreed that Mr Luen was undertaking unauthorised activity. The claimant's belief that Mr Luen was undertaking a controlled function while unauthorised was a reasonable belief because it was true.

Alleged 'Chinese espionage'

99. We accept the claimant's evidence on the issue of the alleged Chinese espionage agent, that he was contacted by the authorities and informed this individual had been deported on this ground. The respondent's witnesses had no knowledge of this issue. The claimant's evidence was not seriously challenged. He referred to it in his email of 7 June 2021 responding to the written warning; he refers to it in his claim, including naming the individual said to have been deported.

100. The respondent was therefore on notice of the claimant's belief. It had the opportunity to raise evidence in rebuttal, for example that the individual concerned was not deported, that the claimant's belief was otherwise not genuine or reasonable; it has not done so. Given what the claimant was told about this individual, we conclude that the claimant had a reasonable belief at the date he made his disclosure to the FCA that the respondent had attempted to recruit a Chinese espionage agent.

101. We accept when the claimant wrote to the FCA that he had a reasonable belief that he was doing so in the public interest. The respondent raises the issue of timing, this was raised to the FCA over a year after the event. We accept the claimant's view that he had been given some information when being interviewed which, at that time, he did not feel needed to be disclosed to the FCA.

102. We accept that the timing of the disclosure was motivated by the claimant's belief that the FCA needed to understand the history of events and the potential implication - the reason why - Mr Luen and Mr Liu had been appointed, i.e. to facilitate the transfer of the GWFX monies, what the claimant descried in his letter to the FCA as *"… looking at devious methods of moving the money including appointing new directors"* (98).

103. We also accept that the claimant reasonably believed he was disclosing information which fell within the remit of the FCA. The claimant relies on the fact he is disclosing a breach of the 1911 and 1989 Official Secrets Act[s]; s.1 of the 1911 Act refers to penalties for spying. Clearly, 'spying' is not within the FCA's remit. Notwithstanding this, we accept the claimant genuinely believed he was disclosing information which fell within the remit of the FCA. This was that he believed there was a link between the alleged Chinese espionage agent and the appointment of Mr Luen and Mr Lieu. The issues are expressly linked in his letter to the FCA, which goes on to say the Group's application for Mr Luen and Mr Liu includes the COO *"…who has requisitioned the visa for the Chinese Agent".*

104. This was, on the facts known to the claimant, a reasonable belief, given the history of the GWFX monies and the way the claimant had been removed as a director and Mr Liu and Mr Luen appointed without FCA approval.

105. It was also reasonable for the claimant to believe that this disclosure was substantially true: the disclosure was that the respondent had appointed a suspected Chinese agent who had been deported, he had been given this information by the UK authorities, it was reasonable for him to believe it.

Threshold conditions - mind and management based in Hong Kong:

106. This is substantially the same allegation as Mr Luen undertaking unauthorised activities. At this time Mr Luen and Mr Liu were based in Hong Kong, and they were directing the claimant in his role, calling meetings, and directing the respondent's business. We accept that it was substantially true that at the date of his disclosure the respondent was conducting its management via Hong Kong.

107. The claimant refers to various legal provisions he considers were being breached. In his disclosure to the FCA he refers to one, SYSC 22.5 (99). This is the requirement to undertake a criminal record check for directors and people undertaking regulated activities. The claimant knew no criminal records checks had been undertaken, he knew Mr Liu and Mr Luen were undertaking regulated activities as directors, without yet being appointed to Companies House or approved by the FCA. We accept that the claimant believed it was in the public interest to disclose this information and, given the facts we have found, this was clearly a reasonable belief. Had he not disclosed this information he would have been in breach of his obligations as the Compliance Manager.

108. Clearly, it was reasonable for the claimant to believe that this was within the FCA's remit, as it was.

109. We accept that the claimant had a reasonable belief that this information was substantially true. Mind and management were at this time, as soon as he had been removed as a director, based in Hong Kong. The FCA pointed this out to the respondent in its letter of 9 August 2022.

Fraudulent intercompany loans:

110. The claimant makes specific allegations: GWFX has no bank account; the funds have been loaned to GWJ to provide a false impression of its CAR.

111. The claimant says that this is an allegation of fraud, and that it is true. Again, the respondent was on notice of this allegation, it was in the FCA letter, it was specified in the claim form. The respondent provides no witness or documentary evidence to rebut this allegation.

112. *The respondent does not accept the claimant had a reasonable belief this was in the public interest,* pointing to the timing of the allegation letter to the FSA. We accept that his letter was sent because of his removal as director and appointment of new directors in order, as he saw it, to facilitate the lifting on the freeze of the GWFX monies. We accept that his motive in doing so was to alert the FCA to what he believed to be ongoing actual legal and regulatory breaches.

113. There was no real challenge made as to whether or not the claimant had a reasonable belief in the issues he raised on 7 June 2022 in his email to the company. It was a response to a warning letter, but we felt it accurately set out the claimant's concerns, that he believed there would be an attempt to launder this sum. In his letter to the FCA, he repeats these issues. Again, the respondent has raised no evidence about this sum and its use by GWJ. There was, on the facts, a reasonable belief that he was raising issues in the public intertest.

114. We accept that this was an issue which the claimant reasonably believed fell within the remit of the FCA. While it was an allegation of a criminal act, the FCA is required to be informed if there was any possible criminal act being undertaken by a FCA registered company, and we concluded that the claimant had a reasonable belief that this was a matter which fell within the FCA's remit, as it did.

115. We accept that claimant reasonably believed this information was substantially true. Again, the respondent has provided no evidence to suggest the claimant's belief was wrong. He had repeatedly made these assertions having undertaken his own research in his role as MRLO. He had frozen this sum. It was reasonable for the claimant to conclude the disclosure he made to the FCA was substantially true.

Respondent's knowledge of disclosure

116. The respondent says that it had no knowledge the disclosure had been made to the FCA. Mr Flynn accepts that the respondent was on notice that information had been given to the FSA. The claimant asserted at various points in his evidence that he cc'd or forwarded the FSA disclosure to the respondent. We did not accept this. This was not stated in the claim, and it appeared for the first time in the claimant's statement.

117. We considered the wording of the claimant's emails to the respondent after his disclosure to the FSA, particularly those at pages 100 - 101. He says he was discussing *"these matters"* with the FCA. These matters included the fact Mr Lieu was acting while unauthorised, that regulators *"are coming in soon"* (101). He had previously made it clear in a summary of all his concerns on 7 June 2022 that he was "*exercising extreme restraint"* in not *"involving the regulators…".* These were the concerns he repeated to the FCA.

118. We conclude that the respondent had a very good idea of the nature of the claimant's disclosure to the FCA. The respondent knew the claimant was concerned about Mr Liu and Mr Luen's appointment, and it knew he was concerned about the GWFX monies; he had raised in his 7 June 2022 response all his issues of concern. In his WhatsApp message on 22 June 2022, he said that further involvement would *"prejudice the regulators investigation".*

119. We concluded that the respondent must have realised the claimant had discussed with the FSA the concerns he had repeatedly raised in and since his 7 June 2021 email. Notwithstanding his concerns and the *"restraint"* he was exercising, the respondent was now proceeding down a drastic route of changing its Articles expressly to remove the claimant as a director and appoint directors of its choice; and it commanded the claimant to pursue steps to appoint them on the FSA register and at Companies House. We concluded that when the claimant said he had written to the FCA, the respondent believed he had raised all the issues of concern set out in his 7 June 2022 email.

Dismissal

120. The next step is the dismissal letter: the reason is failing to cooperate with directors and obstructing their ability to carry out the day-to-day operations of the company; he had not retuned documents and materials despite clear instructions to do so.

121. The respondent says the genuine reason for dismissal is conduct. Mr Flynn points to the cases of Bolton Schools v Evans [2006] EWCA (Civ) 1653, and Kong v International Bank ULK Limited [2022] EWCA Civ 941. He argues persuasively that the acts of the claimant in failing to cooperate are divorced from the whistleblowing allegations. An act of misconduct is an act of misconduct, no matter if it is somehow related to an act of whistleblowing.

122. In the period 20-25 July 2022, from his removal as director to his dismissal, the respondent made no attempt to inform the claimant of the reason why it was appointing new directors, that they were being appointed under the 12-week rule, and why it he was no longer required as a director. We conclude that the reason why they did not inform the claimant is because the respondent knew the claimant would dispute the validity of their appointment. It had legal advice, the respondent says showing it was acting appropriately, it was not prepared to share this with him.

123. At the same time, the respondent wanted to keep the claimant in role and require him to undertake specific activities. We conclude that on 20 July 2022 the respondent believed the claimant had a continuing purpose in his Compliance Officer role, it still had confidence in him to perform this role.

124. Two things changed: the claimant refused to undertake specific activities as requested until the FCA gave approval, because he said it was unlawful; and he said he had reported the respondent's activities to the FCA. The respondent knew he had reported the issue of the alleged Chinese espionage agent, the GWFX monies, mind and management, as well as issues surrounding directors' appointments.

125. We do not accept the respondent believed the claimant was acting inappropriately in his role. It knew the claimant's concerns about the appointment of Mr Liu and Mr Luen. The claimant asked them to show they were authorised, and he would do the rest. We did not accept the respondent's analogy that his were acts of misconduct separate from the acts of whistleblowing. By not accepting Mr Lieu and Mr Luen had authority to instructing him to undertake certain activities, he was acting within the remit and authority of his role.

126. We conclude that the respondent knew the claimant was acting within his authority in his acts of 20-24 July 2022, that all that was required was for FCA approval to be gained, and the claimant would then act as required. This is because he was telling him this. They had the benefit of legal advice; the respondent's lawyers would have informed the respondent the claimant was acting within his authority until Mr Lu and Mr Luen were approved by the FCA.

127. We conclude that the main significant issue in the respondent's mind when it decided to dismiss the claimant was their knowledge that he had made a complaint to the FSA. Until this point, we concluded that the respondent believed it could address the FSA's concerns with the claimant in post. Indeed, noting the FSA's criticism in its August 12022 letter, it benefitted the respondent for the claimant to remain in post as the only UK based authorised person. We conclude that even though he was resistant to providing documents and bank log-in details, it suited the respondent for the claimant to remain in post, to provide continuity and to provide a veneer of authority, particularly in respect of FSA regulatory issues.

128. But, in making it clear he had complained to the FSA, we conclude that the claimant was seen as a threat and no longer an asset, that had he remained in post and continued to make these disclosures to the FCA he would have caused the respondent significant regulatory difficulties.

129. We therefore conclude that the substantial reason why the claimant was dismissed was because he had made whistleblowing public interest disclosures to the FSA. The claimant's claim of automatic unfair dismissal succeeds.

Unfair dismissal

130. We concluded that while the respondent was frustrated with the claimant, he was for the time being more of an asset than a liability to it. The claimant was still needed for FSA compliance purposes. As above we concluded the reason the claimant was dismissed was because he made public interest disclosures to the FCA.

131. We concluded that the respondent did not have a genuine belief that the claimant as committing gross misconduct; as above it knew he was acting within his authority as Compliance Director. The respondent knew the reason why he was saying he could not do what he was being asked to do, that they did not have authority to instruct him until the FCA said they did.

132. We accepted that this would be seen as obstructive, as it was. As Mr Luen said in his evidence, there was frustration, and we accept this. But the respondent was also aware that in being obstructive he was performing his role – see the Schedule to his job description, his responsibilities include: "*(2) dealing with … the FCA…; (4) supervision of Training and Competence and Fitness and Propriety of individuals … who hold FCA controlled functions…"*. We did not accept the respondent believed that the claimant's conduct from 20 July 2022 onwards amounted to gross misconduct.

133. We also noted that in their evidence a significant reason for dismissal was the claimant's failure to give bank access codes. We note that this was requested on one occasion, in the WhatsApp meeting agenda. We accepted that this was a factor on the respondent's mind, their wish for the bank access codes. But, again, we accept that the claimant was entitled to withhold such codes until FCA approval was gained, and we accept that the respondent was aware the claimant was acting within his authority in role in doing so.

134. The respondent says it took HR and legal advice in the UK and Hong Kong, that it says it was entitled to dismiss without a process. We do not accept that the respondent genuinely believed it could dismiss without a process. We do not accept the respondent had a genuine belief that the claimant was refusing to comply with an instruction which meant the directors could not carry out effectively the day-to-day ops of the company. It follows that the claimant's dismissal is unfair.

Polkey

135. We accept that we are required to consider Polkey in even the most speculative of circumstances. The respondent has failed to prove its genuine belief in the claimant's gross misconduct. We have concluded that the claimant was dismissed because the respondent was aware he had made a whistleblowing disclosure to the FCA. We conclude that the respondent knew the claimant was undertaking his role when he refused to carry out Mr Liu and Mr Luen's instructions. We conclude that there is no prospect there would have been a disciplinary process but for the claimant's disclosures. We make no Polkey reduction.

136. As the respondent is winding down its activities, at some point the claimant *may* have been made redundant. This, as well as issues the claimant relies on about the effect of his dismissal on his ability to obtain work, will be the subject of evidence at a Remedy Hearing.

Contributory fault

137. We conclude that the claimant was justified in his actions in not doing what Mr Liu and Mr Luen instructed him to undertake; we accept the characterisation of his regulator role as sometimes being required to say 'no' to directors or shareholders. We conclude that the texts and emails he sent immediately after he found out he had been removed as a director were, in the circumstances reasonable. He was not saying he would not act; he was saying he awaited FSA authority to do so. This was reasonable, it was an integral aspect of his Compliance Director role to say so. We conclude that the claimant bears no fault for his dismissal.

Wrongful dismissal

138. The claimant was dismissed with no process being adopted, in circumstances where the respondent had no genuine belief he had committed gross misconduct, and where the reason for dismissal was his public intertest disclosures. His dismissal was in breach of contract, and the claimant is entitled to his contractual notice pay.

Holiday pay

139. The claimant claims his statutory holiday entitlement under the Working Time Regulations. We accept he received no wages in lieu of untaken holiday entitlement on his dismissal. We are unclear on the number of days he is entitled to and will hear evidence on this issue at a Remedy Hearing.

Remedy Case Management Discussion

140. Notice of a Remedy Preliminary Hearing to discuss case management steps and to set a hearing date for a Remedy Hearing will be sent to the parties shortly.

Employment Judge Emery
4 December 2023

Judgment sent to the parties on:

04/12/2023

For the Tribunal:

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