EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr D Thompson	and	Informatica Software Limited

Hearing held at Reading on: 21-25 October 2019
22 November 2019

Appearances:
For the Claimant: Mr A Burns QC, counsel
For the Respondent: Mr Z Sammour, counsel

Employment Judge: Vowles (sitting alone)

RESERVED JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties and determined as follows.

Automatically Unfair Dismissal - section 103A Employment Rights Act 1996

2. The Claimant was summarily dismissed on 24 October 2017 and that was the effective date of termination. The reason for the dismissal was not that he had made protected disclosures. The dismissal was not automatically unfair. This complaint fails and is dismissed.

Unfair Dismissal - section 98 Employment Rights Act 1996

3. The Claimant was summarily dismissed on 24 October 2017 and that was the effective date of termination. The reason for the dismissal was misconduct. The dismissal was not unfair. This complaint fails and is dismissed.

Public Access to Employment Tribunal Judgments

4. The parties are informed that all judgments and reasons for judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the Claimant and Respondent.

Reasons

5. This judgment was reserved and written reasons are attached.

REASONS

SUBMISSIONS

1. On 4 January 2018 the Claimant presented complaints of Automatically Unfair Dismissal and Ordinary Unfair Dismissal to the Employment Tribunal.

2. On 27 February 2018 the Respondent presented a response and all claims were resisted.

3. The claims and the response were clarified at a preliminary hearing on 2 January 2019 and in a case management order dated 20 January 2019 with an attached agreed list of issues.

EVIDENCE

4. The Tribunal heard evidence on oath on behalf of the Respondent from the following:

   Ms Louise Rourke (HR Director)
   Ms Maureen Brennan (Senior Vice President and Chief Human Resources Officer and dismissing officer)
   Mr Doug Barnett (Chief Finance Officer and appeal officer) (gave evidence by video link from the United States)
   Mr Nicholas Smith (Regional Finance Director)

5. The Tribunal also heard evidence on oath from the Claimant, Mr Derek Thompson (Vice President UK & Ireland).

6. The Tribunal also read documents in an extensive bundle which ran to 2,006 pages in five lever arch files. It also received written submissions from both representatives and heard oral submissions from both representatives.

7. From the evidence it heard and read, the Tribunal made the following findings of fact.

FINDINGS OF FACT

Background

8. The Respondent company, Informatica Software Limited, is the UK arm of the Informatica International corporate group which has its headquarters in California and operates in approximately 80 countries. The group employs over 4,200 employees and has an annual turnover exceeding US$1 billion. The group enters into data management contracts with many companies globally, including government and public sector organisations.

9. The Claimant was employed by the Respondent from 1 November 2013 to 24 October 2017, most recently as Vice President UK & Ireland. His principal focus was on sales. At the time of his dismissal, he had four direct reports and was responsible for a sales and pre-sales team comprising 41 employees. He reported in to Mr Steve Murphy (Senior Vice President and General Manager Europe, Middle East and Africa and Latin America). Mr Murphy reported in to Mr Lou Attanasio, Chief Revenue Officer, who was based in the US and was in charge of the group's worldwide sales operations.

10. One of the Claimant's reports was Mr Colin Gray who was employed as Sales Manager Public Sector UK & Ireland.

11. A significant proportion of the earnings of the sales teams was commission on sales.

12. The Respondent had three clear sales streams. Public sector sales, commercial sales and financial sales. The Claimant managed people selling in all three sales streams. Mr Gray dealt with public sector sales.

13. If two sales representatives are responsible for a deal, the commission would be split between them. This often happened with international sales involving sales representatives from different jurisdictions. The Respondent's policy for dealing with splits was set out in the "Global Deal Allocation Policy".

14. Initially, the two sales representatives would try to resolve the commission allocations between themselves. If they could not reach agreement, their respective country managers would become involved. If they could not resolve the matter, it would be escalated to a regional leader. Above the regional leaders, the matter could be escalated to the sales operations team. Above the sales operations team was Mr Attanasio. In practice, few disputes were escalated as far as the regional leader.

15. Between February 2016 and September 2017 the Claimant raised concerns with his superiors about the split of commissions regarding deals which had been concluded by various members of his sales teams. The Claimant claimed that these matters amounted to protected disclosures which in his reasonable belief were made in the public interest and tended to show breaches of legal obligations. The Respondent disputed that these concerns raised by the Claimant amounted to protected disclosures. This issue is dealt with below.

Pebble Beach Golf Club Expense

16. In 2006, the Respondent had completed a large software deal with Highways England, a government organisation charged with operating and maintaining England's motorways and "A" roads. It was a large deal with a

value of approximately US$4.8 million.

17. From 15 to 18 May 2017 the Respondent held a customer conference "Informatica World 2017" in California. Mr TM was the Chief Information officer and IT Executive Director of Highways England at the time and he was offered a speaking slot at the conference. Although he was given a complimentary pass to the event as a speaker, the Respondent did not pay for his travel and accommodation. In April 2017, before the conference, Mr Gray raised the possibility of hosting Mr TM at the Pebble Beach Golf Club in California immediately after the conference, at the Respondent's expense. Mr Gray had contacted the Claimant and eventually, the Claimant approved a visit for a round of golf and accommodation at the Pebble Beach Golf Club by Mr Gray and Mr TM.

18. The Pebble Beach Golf Club is a very expensive venue, and widely known to be so, being one of the top golf clubs in the US.

19. On 17 May 2017 Mr Gray hosted Mr TM at the Pebble Beach Golf Club. The visit involved an overnight stay at the Golf Club. The expenses incurred included a private car transfer, green fees, hotel accommodation and dining expenses. The total expense amounted to £4,241.

20. Although the expenses bill was paid by the Respondent, there was concern about the nature and amount of the expenditure and the expenses were queried by the internal audit team. There was concern that there was a breach of the Respondent's internal policies and Ms Rourke was asked to investigate it.

Investigation

21. In the course of the investigation, Ms Rourke Interviewed the Claimant, Mr Gray and Mr Murphy on 9 August 2017. Ms Rourke also considered the Respondent's policies, principally the Anti-Corruption Policy, the Informatica Business Code of Conduct and the Travel and Expense Policy.

22. The interviews with the Claimant, Mr Gray and Mr Murphy were minuted and copies of the minutes were included in the bundle of documents before the Tribunal. Ms Rourke summarised these interviews as follows:

23. Claimant

"During the interview I provided the Claimant with hard copies of the Respondent's relevant policies and procedures, which had been highlighted at the relevant sections. These were the Anti-Corruption and Compliance Policy and Guidelines, the Global Travel and Expenses Policy and the Code of Business Conduct. He took highlighted copies of these away with him. I also provided the Claimant with copies of the emails between Colin Gray and Alex Soakell, arranging the expense (pages 1645-1651).

I asked the Claimant to explain how and why he had approved the Pebble Beach Expense. The Claimant explained that he was not aware of the final value of the Pebble Beach Expense until after it had been incurred, and that with hindsight, he did not give it enough attention. Whilst he had felt that the intended cost of the Pebble Beach Expense was significant and he was not comfortable with that, at that point, he considered it was too late to withdraw the invitation as the "cat was out of the bag" as [TM] had been invited to play golf at Pebble Beach Golf Club. He also explained that he knew there was a difference in the way public and private customers should be treated under the Respondent's internal policies, but that he did not know the details. He further confirmed that he did not speak to Steve Murphy about the Pebble Beach Expense."

24. Mr Gray

"I asked Colin Gray how and why he had sought approval for the Pebble Beach Expense. Colin Gray explained that he thought it would be a nice idea as he knew [TM] had not played at the Pebble Beach golf course before. Colin Gray advised that he has sought prior approval for the Pebble Beach Expense from his line manager, the Claimant, but that he was not aware of the final value of the Pebble Beach Expense at the point that he suggested it, and that it was more expensive than he had anticipated. He also agreed that it was "not reasonable".

I asked Colin Gray about the comments he had made in his emails to Alex Soakell on 11 and 12 April 2017, and Colin Gray explained that he had asked her to "be discrete" and not to forward the email on because he did not know what was and wasn't allowed. Colin Gray accepted that it may have been a poor choice of words but he was not trying to hide anything. He further explained that when he understood the cost would be significant, he still pursued the expense because it had already been mentioned to [TM] and so it was "difficult". He stated that he didn't want to go back on the idea once it had been mentioned to [TM]."

25. Mr Murphy

"I also interviewed Steve Murphy on the same day. During my interview with him, Steve Murphy only became aware of the final value of the Pebble Beach Expense during the investigatory interview at which point he expressed surprise at the value."

26. Having regard to the Respondent's policies, mentioned above, the nature and amount of the expenses involved, Ms Rourke concluded that there was a disciplinary case to answer by the Claimant and by Mr Gray. Ms Rourke did not draft a formal investigation report but presented her findings and recommendation verbally to the General Counsel of the Informatica Group.

Disciplinary Hearing

27. Ms Brennan was appointed to chair the disciplinary hearing.

28. In a letter dated 10 October 2017, Ms Brennan wrote to the Claimant to invite him to a disciplinary hearing as follows:

"I am writing to invite you to a Disciplinary Hearing on Friday 13th October at 2pm in the Oasis Meeting room located in the Maidenhead office.

At this meeting the question of disciplinary action against you, in accordance with the Company Disciplinary Procedure, will be considered with regard to your involvement in the Pebble Beach outing and related expense. A copy of the disciplinary policy has been enclosed for your reference.

The allegation is that, in violation of the Company's Code of Business Conduct, Travel and Expense policy and Anti-Corruption Policy (enclosed for your reference), you approved the taking of [TM] (a public sector customer representative), to Pebble Beach at the Company's expense.

An investigation packet including evidence in support of these allegations, and notes of relevant interviews that have taken place in this matter and additional supporting documentation will be provided to you separately. If there are any additional documents that you would like me to consider in advance of the hearing, please send these to me as soon as possible, and by and by Thursday 12th October (close of business) at the latest.

This is a serious allegation, and you should note that the possible consequences arising from this meeting could be a disciplinary warning up to and including dismissal for gross misconduct."

29. The Claimant was told that he could be accompanied by a work colleague or trade union representative but chose to attend alone. In advance of the hearing, the Claimant was provided with Ms Rourke's notes of her investigatory interview with the Claimant, email evidence relating to the expense, and copies of the Anti-Corruption and Compliance policy and guidelines, the Global Travel and Expenses policy and the Code of Business Conduct, the relevant parts of which were highlighted. Ms Brennan chaired the disciplinary hearing by telephone as she was based in the US but Ms Rourke attended with the Claimant in the UK to take notes of the hearing. During the hearing, the Claimant produced a pre-prepared script which he read out.

30. The record of the disciplinary hearing on 13 October 2017 included the following:

MB	*About Informatica's policy around ensuring managers have training. MB confirms taken note of his responses and comments.*

MB	*Reiterates question to DT (difference between public and private sector?)*
DT	*Confirms he does know there is a difference. Has some awareness/industry knowledge. Broadly knows there are some differences.*
MB	*Asks DT that if he didn't know the details of why did DT not check with legal, finance?*
DT	*Describes it as an informal take customer to a round of golf. DT confirms "we do it… customer entertaining". DT confirms that as can be seen from email threads, reasonable cost but agrees more than normal ad hoc entertainment. Cost however escalated. DT confirms that he didn't seek advice. But there was transparency. DT references emails. People copied on the emails, SVP copied, Exec assistants involved. DT confirms that Steve Murphy didn't flag anything to him. DT appreciate that it sounds like he is trivialising it. DT reiterate it being a round of golf. DT confirms that with hindsight he didn't give it enough attention.*
MB	*Tells DT that he signs a certificate of ethical conduct every quarter. Signs to confirm that it is read and acknowledged. Certifies will comply with the Code of Business Conduct annually.*
MB	*Confirms DT certifies that he has read, understands and will comply with our policies. Given this, MB asks DT to explain why he failed to adhere to them.*
DT	*Confirms this is a crucial point. DT describes this as a fundamental check as to whether there was any undue influence or gain. DT confirms he is familiar with ethics training. Conclusion of this check was no. No gain. Sufficient distance from deal. No up and coming transaction. DT confirms he remains of the same opinion. DT confirms that test did take place. DT confirms that on reflection he overlooked or was unaware of procedure or policy. DT confirms he exercised poor judgement. Would have led to a difficult customer situation if cancelled. DT confirms should have cancelled.*
MB	*Asks DT what he would do differently?*
DT	*Confirms he would do things differently. DT confirms that MB can see from his responses in email, there is surprise in responses. Sarcasm being used as a result of the cost. What is the cheapest option. DT confirms to MB that she can see him challenging these things. Hindsight confirms that the cost was more significant and at that point should have stopped it. DT confirms however that there has been no harm or damage done.*

31. On 24 October 2017 Ms Brennan wrote to the Claimant to inform him that he was to be summarily dismissed. The letter contained the following:

"I write further to the disciplinary hearing held on Friday 13th October 2017. As you know, the purpose of this hearing was to consider the allegation that, in breach of the Company's policies and procedures you were involved in and permitted the taking of [TM] (a public sector/government customer) with whom you had recently conducted business, to play golf and spend the night at Pebble Beach, at the Company's considerable expense, which was in the region of $5400. Further, if the allegation was found to be accurate, the purpose of the hearing was to consider whether disciplinary action should be taken against you as a result. …

Having considered the matters before me, I have decided that your actions constitute gross misconduct justifying summary dismissal by the Company, and for these reasons, I believe that there is therefore no alternative other than to summarily dismiss you on the grounds of gross misconduct. The gravity of your misconduct is such that the trust and confidence placed in you as a senior employee, in which you are expected to set an example for others, has been completely undermined.

- *You were in violation of the Company's Code of Business Conduct, Travel and Expense policy and Anti-Corruption Compliance Policy and Guidelines as a result of permitting the taking of [TM] (a public sector/ government customer), to Pebble Beach at the Company's expense. Such policies clearly limit gift and entertainment to a maximum of $150, and set out clear reporting lines for approvals, which you did not follow. Despite your comments that no harm or damage has resulted from the event, Informatica's policies and procedures are in place to protect the company and its employees from potential damage or harm. Your wilful disregard for these policies is taken extremely seriously and cannot be disregarded.*
- *As a VP, you also sign and accept every 90 days, via the Certification of Ethical Conduct, that you have read and will abide by Informatica's Code of Business Conduct, Travel and Expense Policy and Anti-Corruption Compliance Policy and Guidelines. You undertake an annual certification every year, as well as online training which reiterates these policies and procedures. It is therefore not accepted that you did not have sufficient notice of these terms and conditions.*
- *Having never entertained customers at Informatica to this level of extravagance, it is not understandable why you failed to seek appropriate guidance and approval to ensure it would be acceptable. You have said that when you realised the cost was too high, it was "too late", that the "cat was out of the bag" and that it would have been "damaging" to back out then. This would indicate that there was indeed a level of realisation that your actions were wrong, but that you chose not to act on this.*
- *Despite your comments in regards to your lack of training, it is my*

opinion from your interview responses and comments made in your disciplinary hearing, that you have sufficient understanding that there was a difference between public and private sector customers. It is my belief your knowledge that a difference existed should have resulted in you seeking counsel with regards to such an expense, such as consulting the applicable policies and obtaining the required approvals.

- *It was understood by you that Mr Malone was unable to expense his accommodation or travel in connection with his attendance at INFA World. Therefore, I conclude that it is reasonable that you ought to have known that you were acting in breach of company policy in allowing expenses for travel and accommodation related to the Pebble Beach excursion, and that this was not the type of expenses that would be approved.*
- *You were copied on an email from Colin Gray to Alex Soakell in which he asked her to "remain discreet" about the outing. You have said that you don't remember reading this email. I do not think this is an adequate explanation.*

Having put the specific facts to you for your comment at the disciplinary hearing, I decided that your explanation was not acceptable. In addition, having carefully considered the representations that you made at the hearing, I was not able to find any sufficiently mitigating circumstances.

Owing to the serious nature of your actions, this letter is to notify you of the termination of your employment with the Company, effective today, 24th October 2017."

Appeal

32. On 30 October 2017 the Claimant lodged an appeal against his dismissal which included the following:

"1. No breach of my contract of employment or policy took place, let alone a deliberate breach.

2. There is no evidence to support the assertion that there was wilful disregard to policy with regard to this matter.

3. The amount expensed by Colin Gray on the event in question and approved by me and my manager, Steve Murphy (SVP EMEA and LATAM), could be deemed to be high (I have never disputed that and have been wholly transparent about it from the outset), but that is not in itself a breach of policy. No further up-front approvals were required for this expense item.

4. The process was completely transparent with a number of parties, including my manager Steve Murphy, SVP EMEA and LATAM, involved in

the approval process. There is email and customer evidence to show that Steve Murphy was fully aware of this event well in advance. This goes back to the point that there was no wilful disregard of policy.

5. Informatica has made no attempt to treat all parties involved in this matter consistently. In fact, Informatica took pro-active steps to treat some parties very differently.

6. The investigation process was flawed, and has prejudiced me materially. …

7. Prior to approving this expense, I performed the fundamental check of whether any undue influence or gain could result. My conclusion was no and there is no evidence to support any other conclusion. …

8. The UK Finance Director, Nick Smith, confirmed to me that he performed the same "undue influence" ethical check prior to approving these expenses post submission by Colin Gray. He determined there was no issue and approved the expense claim from Colin Gray. …

9. In the months during which I am only now aware that the investigation was still ongoing, I have had multiple conversations with various senior members of Informatica. … all of which clearly and consistently lay out the position that after this issue was investigated (including by external parties) it was not serious in nature and would likely result in some minor education/corrective action. …

10. During my hearing of 13th October, I raised the significant issue of Informatica's obligations to provide adequate training for employees with Public Sector responsibilities. …

11. I have an impeccable record during my time at Informatica (nearly 4 years' service), with no previous HR related issues. …

12. If Informatica stands behind Maureen's decision that my actions in this matter are sufficiently serious to constitute gross misconduct it must follow that Informatica was negligent in its obligations to comply with the UK Bribery Act 2010 (and continue to be so).

13. The disciplinary hearing lasted all of 20 minutes. The manner in which Maureen Brennan has dismissed all points raised by me during the investigation and disciplinary hearings, her selective use of information provided in reaching her decision, combined with the extremely inconsistent manner in which she has treated other parties can lead to only one conclusion: that the reasons for her decision are based on other, significant factors.

In summary, Informatica has not established any grounds which would justify the termination of my employment in the circumstances let alone a

basis which would support a summary termination for cause (without notice) on the grounds of gross misconduct."

33. The appeal was considered by Mr Barnett at an appeal hearing held on 16 November 2017. Mr Barnett was based in the US and therefore attended the hearing by telephone. Ms Rourke attended as notetaker and again the Claimant chose not to be accompanied. The points raised by the Claimant in his appeal were discussed and Mr Barnett provided a written outcome on 15 December 2017. The appeal outcome letter also covered all the grounds set out in the Claimant's appeal letter with responses in detail. The appeal was refused and the decision to dismiss was upheld.

34. Mr Gray was also summarily dismissed for gross misconduct for his part in arranging, conducting and approving the Pebble Beach expense.

The Claimant's case

35. The Claimant pursued two claims:

    35.1 Automatic unfair dismissal by reason of having made protected disclosures – section 103A Employment Tights Act 1996;

    35.2 Unfair dismissal – section 98 Employment Rights Act 1996.

36. The Claimant claimed that the real reason for his dismissal was because he had made protected disclosures concerning failure to properly pay commission to members of his sales teams. Although there was no evidence that these matters had been raised directly with Mr Barnett, it was said that the matters came to Mr Barnett's attention and he thereupon became the controlling mind behind the investigation and the dismissal of the Claimant and of Mr Gray. Ms Brennan was said to be his "innocent dupe". It was said that this was the only inference which could be drawn from an otherwise incoherent and inexplicable dismissal of two senior employees on charges which did not justify either investigation or dismissal. It was said that there must have been a hidden agenda and that this hidden agenda must be the protected disclosures because there was no other possible reason why the Claimant should be dismissed in the way that he was. His protected disclosures were the only credible reason for his dismissal.

37. Additionally, even if the Tribunal found that the protected disclosures were not the reason for the dismissal, it was nevertheless unfair because there was an undocumented audit investigation to find some excuse to terminate the employment of the Claimant and Mr Gray, the HR disciplinary process failed to find any substantial breach of policies, the process failed to provide key documents to the Claimant, the dismissal failed to specify what breach of policy justified dismissal and the appeal decision was compiled by lawyers to try to devise some defence to the claims by the Claimant and Mr Gray.

The Respondent's case

38. The Respondent claimed that the alleged protected disclosures were not protected disclosures within the meaning of section 43B Employment Rights Act 1996 due to the lack of any basis for a reasonable belief that any disclosure was in public interest or was in breach of a legal obligation. A non-discriminatory reason for the dismissal had been established, namely the Claimant's gross misconduct in authorising a large expenditure at an expensive venue to entertain a public official. The Claimant does not dispute the facts of the alleged conduct and it amounted to a breach of the Respondent's policies.

39. The dismissal was not unfair. There was a reasonable investigation providing sufficient evidence on which to base a genuine belief in misconduct following a fair process.

DECISION

Protected Disclosures

40. Employment Rights Act 1996

Section 43A - Meaning of protected disclosure

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.

Section 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 information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

41. The alleged protected disclosures were set out in a list of further and better particulars provided by the Claimant during the course of the Tribunal proceedings at pages 77 – 82 of the bundle of documents. At paragraph 4 (a) - (mn) there was a total of 39 disclosures.

42. However, in cross-examination, the Claimant abandoned the first 21 disclosures (paragraphs 4 (a) – (u)) which were said to have been made in 2016. He also abandoned the disclosures at paragraph 4 (ff) relating to BP, and 4 (gg) and 4 (ll). The remaining disclosures described as "key breaches" in the Claimant's closing submissions were those related to the contracts with Trafigura, Highways England, Homebase, BP and DWP. They are set out in paragraphs 4 (v) – (mm) of the further and better particulars apart from those matters which were abandoned as referred to above.

43. The Claimant has said in his further and better particulars that he was unable to recall the exact and precise words that were used during each of his disclosures nor to recall with exact precision the date on which these disclosures took place. The list at paragraph 4 was provided to the best of the Claimant's recollection and belief. He said that all of the disclosures concerned alleged breaches of the contractual terms of the members of the Claimant's sales teams. They were allegations that members of the sales teams had not been paid commission to which they were entitled and that "split" agreements had been in breach of the Respondent's Global Splits Policy.

44. The Tribunal took account of the requirement for a reasonable belief in the public interest in making a disclosure and referred to the case of Chesterton Global Ltd v Nurmohamed [2018] ICR 731 in which it was said:

"The question whether a disclosure is in the public interest depends on the character of the interests served by it rather than simply on the number of people sharing it. CG Limited went too far in suggesting that multiplicity of persons sharing the same interest can never by itself convert a personal interest into a public one. The statutory criterion of what is in the public interest does not lend itself to absolute rules and the Court of Appeal was not prepared to discount the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest or reasonably be so regarded if a sufficiently large number of employees share the same interest. Tribunals should however be cautious about reaching such a conclusion. The broad intent behind the 2013 statutory amendment is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers even where more than one worker is involved."

45. The Court of Appeal went on to hold that where the disclosure relates to a breach of the worker's own contract of employment, or some other matter where the interest in question is personal in character, there may

nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.

46. There were then four factors which it was suggested might be relevant:

    46.1 First of all the numbers in the group whose interests the disclosure served.

    46.2 Second, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.

    46.3 Third, the nature of the wrongdoing disclosed.

    46.4 Fourth, the identity of the alleged wrongdoer.

47. During the course of the Tribunal hearing, as mentioned above, the Claimant abandoned many of his alleged protected disclosures. That was on the basis that he accepted that he did not have a reasonable belief in public interest regarding those disclosures. The Claimant did not deal directly with the public interest aspect in his witness statement. However, in the Claimant's closing submissions, he stated:

    "60.The Claimant was cross-examined closely about his belief that his disclosures were in the public interest. He was entirely candid in saying that the public interest was expressly not in his mind earlier in 2016. However his witness statement shows that he believed his complaints were made for the benefit of others – not his self-interest – which is what the amendment in the statute was intended to address (the Parkins v Sodexo [2002] IRLR 109 problem about whistleblowing about the employer's own contract). These other populations are reasonable to believe are in the public interest.

    61. For instance, C reasonably believed that it was of huge importance to the sales team (a section of the public as in Chestertons itself) and the public reputation of R that the Global Sales Policy was followed in good faith and R honoured the agreements (para 16). He reasonably believed that the split agreements were to protect R's employees (once again a section of the public) and that it was pointless having a policy that was not enforced by the highest levels of R's leadership (para 24). He reasonably believed these to be serious breaches (para 33). He reasonably believed that deliberate concealment was an "obvious reputation and litigation risk" to R (para 35) and was a matter clearly in the public interest. C's complaints about the SPIFF breaches were in the interests of "all sales employees" which was a large population within Informatica worldwide (para 44). In February 2017 he believed that his complaints were about "unethical conduct" and "wrongdoing" (para 48) matters which of an objective standard are reasonable to believe are in the public interest and which he also believed were in the interest of the "relevant UK reps, manager and pre-sales team" which is a section of the public (para 51). For those reasons he raised the matters with Mr Attanasio in March even though he was warned against doing so (para 54).

62. In cross-examination C gave more visceral examples of why in 2017 he believed his disclosures were in the public interest – such as "something was improper here" when the breach of the SPIFF policy was attempted to be covered up, the breaches involving Highways England and BP which he expressly believed were in the public interest. Highway England, as a public sector body, is funded by the tax payer who was spending in the region of £4m with R. C reasonably believed that it was in the public interest to disclose the fact that a corporation who was in receipt of such a significant amount of public money was improperly paying its staff. BP is an 'iconic British brand' which is invested in by UK pensions funds. C reasonably believed that it was in the public interest to disclose the fact that a corporation who was trading with BP was unlawfully paying its staff.

63. C's oral evidence was strong that he raised a range of increasingly serious internal breaches but in December 2016 the Trafigura and Highways England deals were so serious and with such public impact, that he expressly thought at that stage that it was a matter of public interest that he should raise complaints."

48. The Tribunal found that it was necessary for the Claimant to have had a reasonable belief in the public interest at the time he made the disclosures. As the Respondent submitted: *"it cannot assist the Claimant to argue that he developed and held such a belief after the disclosure was made."*

49. The Claimant set out in paragraph 61 of his closing submissions that he considered his complaints were in the interests of all sales employees, which is a section of the public, and there was a breach of *"good faith*", a failure to "*honour the agreements*" and that his complaints were about "*unethical conduct*" and "*wrongdoing*". It was said that there was a serious reputational and litigation risk to the Respondent, and there was an attempt to cover up the breaches of the SPIFF policy. And that a corporation which was trading with BP, an iconic British brand, was unlawfully paying its staff.

50. The Tribunal accepted that although the operation of the global splits policy applied to all the Claimant's sales teams, his complaints about alleged breaches related only to individual sales personnel. For example, the Highways and DWP deals related only to Mr Gray. In an email to Mr Murphy on 6 January 2017 the Claimant said: *"I think this is a Colin only issue"*.

51. Also, the Trafigura, Highways and BP deals involved concerns regarding individual sales persons dealing with each specific account.

52. The Tribunal found that there was no basis for a reasonable belief that it was in the public interest to disclose internal disputes over the payment of commission to individuals in the circumstances described by the Claimant.

53. The numbers of persons affected was a small group of individual sales people and the concerns were based upon specific deals. Only the personal interests of the individual sales people were involved. Trafigua, for example, was Mr Townsend's account and it was he who was aggrieved that commission had been paid to others. The splitting of commission between individuals was an internal matter which was apparently the subject of regular disputes. There was no evidence that the alleged breaches of the global split policy were conducted as a matter of course by the Respondent throughout its organisation. These were complaints by the Claimant regarding certain individuals on a number of specific deals and commission splits.

54. Taking account of the factors referred to in the Chesterton case quoted above, the Tribunal found that in the circumstances described by the Claimant in his account of the alleged protected disclosures, there cannot have been a reasonable belief that they were made in the public interest. There was no basis for such a belief.

55. The Tribunal also found that there were no grounds to conclude that the Claimant had a reasonable belief that the disclosures tended to show a breach of a legal obligation.

56. The alleged disclosures were said to have concerned breaches of individual employees' Incentive Plans, and breaches of the Respondent's global split policy. The policies involved were part of an internal dispute resolution mechanism and the payment of commission in accordance with the SPIFF involved discretionary bonus programmes. They were not contractual obligations nor did they impose any legal obligation on the Respondent to pay commission at a particular amount.

57. Clause 10 of the Claimant's own contract of employment makes clear that the Respondent's policies do not form part of his contract of employment unless they expressly state otherwise. In these circumstances, the Tribunal found that the Claimant could not have had a reasonable belief that there was a breach of legal obligations.

58. Accordingly, the Tribunal found that none of the disclosures made by the Claimant amounted to protected disclosures within the meaning of section 43B of the Act because there was no evidential basis for the Claimant to have had a reasonable belief that the disclosures were made in the public interest, nor any basis for a reasonable belief that the disclosures tended to show that there was a failure to comply with any legal obligation.

Automatically Unfair Dismissal

59. As the Tribunal has found there were no disclosures which qualified as protected disclosures, the complaint of automatically unfair dismissal under section 103A of the Act must therefore fail.

Ordinary unfair dismissal

Employment Rights Act 1996

60. *Section 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-

… (b) relates to the conduct of the employee, …

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

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

(b) shall be determined in accordance with equity and the substantial merits of the case.

61. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his employer.

62. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.

63. Firstly whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.

64. Secondly whether in the circumstances (including the size and

administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4), in particular did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.

65. Thirdly the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses test. That test applies to all stages in the procedure followed by the employer, including the investigation, the dismissal and the appeal.

66. In Santamera v Express Cargo Forwarding [2003] IRLR 273 the EAT said that fairness does not require a forensic or quasi-judicial investigation for which the employer is unlikely in any event to be qualified and for which it may lack the means. In each case the question is whether or not the employer fulfils the test laid down in British Home Stores v Burchell and it will be for the Tribunal to decide whether the employer acted reasonably and whether or not the process was fair.

67. In Taylor v OCS Group Ltd [2006] ICR 1602 the Court of Appeal held that an Employment Tribunal is required to assess the fairness of the disciplinary process as a whole. Where procedural deficiencies occur at an earlier stage the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker. Accordingly, defects in the original disciplinary procedures may be remedied on appeal. It is irrelevant whether the appeal hearing takes the form of a rehearing or a review, so long as it is sufficiently thorough to cure the earlier procedural shortcomings.

68. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.

69. The first issue to consider is what was the reason for the dismissal.

70. The Claimant claims that the true reason for the dismissal was because the Claimant had made disclosures regarding commission splits and payments (whether they amounted to protected disclosures or not) and that there was a conspiracy led by Mr Barnett to remove the Claimant from his employment with the Respondent.

71. There was no direct evidence to support the conspiracy theory. The Claimant submitted that it could, and should, be inferred that there was a hidden agenda behind the Claimant's dismissal arising from the disclosures regarding commission payments and splits. In the Claimant's closing submission, it was said at paragraph 69:

"The causal link was not apparent to C until he joined the dots afterwards. Of course, it does not need to be as causation is an objective test. C realised that his complaints had been a thorn in the side of R and particularly Mr Barnett. Mr Barnett feigned disinterest in the contents of the protected disclosures, but plainly knew more about them than he was willing to admit in evidence. Mr Barnett sought to disassociate himself from territorial commission disputes on the basis that the overall commission sum would remain the same. However, the two complaints that directly affected his 'bottom line' were Highways England and DWP and we know that Mr Barnett was directly involved in refusing payments for these breaches. The coincidence of timing is remarkable. The two people who were raising the HE and DWP breaches loudly in the summer of 2017 – two breaches which went to Mr Barnett's bottom line – were the two who were dismissed. For the reasons set out above and in the conclusion below, the inference that there was a hidden agenda and that this hidden agenda must be the protected disclosures (as there is no other possible reason why C should be dismissed in this way) is overwhelming. In short, Mr Barnett had had enough."

72. As submitted by the Respondent however, in the absence of any direct evidence, there were no facts from which the Tribunal could infer that there was a hidden agenda.

73. Mr Gray was one of the best performing salesmen in the company and the Claimant was also a well-regarded senior employee with a record of high performance. It was implausible that Mr Barnett should seek the removal of these two high-performing employees simply because he was irritated by complaints about commission payments. Mr Murphy had also raised issues about commission but he was not disciplined or dismissed.

74. Both Ms Brennan, who dismissed the Claimant, and Mr Barnett, who dealt with the appeal, said that they knew nothing about the commission split disputes on which the Claimant relied. As far as Ms Brennan was concerned, there is no evidence, documentary or otherwise, that she was ever told about a commission-related dispute in which the Claimant had raised a complaint. Although Mr Barnett had made a decision regarding the way the SPIFF policy ought to be interpreted, there is no evidence that he was directly involved in any of the commission dispute matters. He gave evidence that commission issues were not his responsibility and were resolved at a much lower level within the sales teams. The Tribunal found no reason to doubt there evidence on these matters.

75. The Claimant pointed to an email exchange between Mr Barnett and Ms Brennan on 11 September 2017 while the investigation into the Pebble Beach incident was taking place. Mr Barnett raised the question of whether someone had talked to Mr Gray. Both Ms Brennan and Mr Barnett were questioned about this email exchange and both explained that they were referring to the possibility that Mr Gray had been told of the ongoing investigation into the Pebble Beach matter. Mr Gray was absent on sick leave at the time and not expected to return to work until 25 September 2017. The email exchange was very brief and provided no basis for finding that they were colluding to ensure the Claimant was removed from his employment. They were concerned that others had been talking to Mr Gray and the Claimant about the ongoing investigations.

76. The Tribunal could find no evidence to support the Claimant's submissions that Mr Barnett was the controlling mind behind the dismissal and that he acted because of the commission complaints. There was ample evidence of the alleged misconduct of Mr Gray in organising the Pebble Beach Golf Club trip and the conduct of the Claimant in approving it.

77. The facts relating to the Pebble Beach Golf Club trip were not disputed by the Claimant, as he accepted during the course of the disciplinary hearing in the extracts quoted above. He accepted that with hindsight he did not give the matter enough attention, that on reflection, he overlooked or was unaware of procedural policy, that he exercised poor judgment and should have cancelled the trip. He said that with hindsight, the cost was more significant and at that point he should have stopped it. There were therefore reasonable grounds for the Respondent's belief that the Claimant was guilty of misconduct.

78. The Tribunal found that the reason for dismissal was misconduct and there was no hidden agenda or ulterior motive for the dismissal and the rejection of the appeal.

79. The Claimant said that Ms Rourke's investigation was unreasonable and incomplete. The only written documentation from the internal audit investigation were the slides setting out Mr Gray's expenses and the legal department gave Mr Rourke a highlighted set of the Respondent's policies.

80. The Tribunal found Ms Rourke to be a credible witness whose evidence was supported by documentary evidence. She interviewed the Claimant, Mr Gray and Mr Murphy, and records of those interviews were produced in the bundle of documents. The amount of the expenses and the circumstances in which they were incurred were not disputed by the Claimant or Mr Gray. Both at the investigation meeting on 9 August 2017 and at the disciplinary hearing on 13 October 2017, the Claimant accepted that the expenses were much higher than they expected and with hindsight, the expenses should not have been incurred. The Claimant said:

"When started process thought would end up high end of reasonable in terms of an expense but the costs spiralled… Didn't know the total cost until it came through. Transport costs came as a shock. … Wasn't aware of the costs 'til they were expensed."

81. In these circumstances, it is difficult to see what further investigation was required as the conduct itself (though not its seriousness) was not disputed. The investigation was a reasonable one in the circumstances.

82. The Claimant also alleged a lack of clarity in the dismissal letter (quoted above) regarding the actual policy breached by the Claimant.

83. The Respondent's Anti-Corruption Compliance Policy and Guidelines includes the following:

"ANTI-CORRUPTION COMPLIANCE POLICY AND GUIDELINES
Adopted December 2011
(amended August 2016)

Informatica Holdco Inc., Informatica LLC, Informatica Ireland EMEA UC and their respective subsidiaries (collectively referred to as "Informatica" or the "Company") are committed to maintaining the highest level of professional and ethical standards in the conduct of their business in all countries in which they operate or otherwise have business connections, including the United States. The Company's reputation for honesty, integrity, and fair dealing is an invaluable component of the Company's financial success, and the personal satisfaction of its employees.

One of the U.S. laws directly relevant to that commitment is the U.S. Foreign Corrupt Practices Act, known as the "FCPA". The FCPA is a criminal status that prohibits all U.S. companies and persons from corruptly offering, promising, paying, or authorising the payment of anything of value to any foreign official to influence that official in the performance of his or her official duties. …

A similar law is the United Kingdom's Bribery Act of 2010 (the "UK Bribery Act"). Like the FCPA, the UK Bribery Act prohibits promising, offering, or providing either directly or indirectly anything of value to foreign (i.e. non-UK) government officials for the purpose of retaining business or obtaining business or a business advantage. …

C. Who is a Foreign Official?

The term "foreign official" is defined broadly under the FCPA. Foreign officials include all paid, full-time employees of a non-U.S. government department or agency (whether in the executive, legislative or judicial branches of government and whether at the national, provincial, state or local level). ...

A "Foreign Official" under the UK Bribery Act (and for the purposes of this Policy) carries the same definition as above, only such person must be a non-UK – rather than non-US – official. Any questions about an individual's potential government status should be raised with the Legal Department. …

D. Prohibited Payments

The FCPA and the UK Bribery Act prohibit offering, promising, or giving "anything of value" to a foreign official to get or keep business. …

2. Business Expenses for Foreign Officials and Private Parties

The FCPA permits companies, including Informatica, to provide certain types of entertainment and travel to foreign officials provided that such entertainment and travel expenses are: (a) bona fide and related to a legitimate business purpose (i.e. not provided to obtain or retain business or to gain an improper advantage); (b) reasonable in amount; and (c) legal under the written laws of the foreign official's home country. The UK Bribery Act does not specifically permit companies to provide entertainment and travel expenses to foreign officials. However, like the FCPA, if such expenses are reasonable and are not intended to improperly influence the official in the performance of his or her official functions, they will not be a violation of the UK Bribery Act. …

It is important to note that expenditures involving foreign officials are generally more heavily scrutinised by government authorities than expenditures involving private parties. Moreover, because both the FCPOA and UK Bribery Act prohibit improper provisions to foreign officials, one violation of this sort could expose the Company to liability in both the U.S. and the U.K. As a result, these requirements pertaining to foreign officials must be scrupulously followed by Informatica employees."

84. The Respondent's Global Travel and Expense Policy includes the following:

"10.2 Business Means and Entertainment
…
Entertainment expenses greater than USD 150 per person or over USD 1,000, or local equivalent, in total requires approval by a VP or above. …

All reasonable expenses incurred are reimbursable, provided they comply with the Company's Code of Conduct and Foreign Corrupt Practices And Policy."

85. The Respondent's Code of Business Conduct includes the following:

"Applicable Laws

All Informatica directors, officers and employees must comply with all applicable laws, regulations, rules, and regulatory orders. No matter where you are located, you must comply with laws, regulations, rules, and regulatory orders of the United States, including those regarding anti-corruption and anti-bribery, such as the United States Foreign Corrupt Practices Act, the United Kingdom's Bribery Act. You should read and be aware of Informatica's Anti-Corruption Policy and Guidelines."

86. The Claimant claimed that he was misled that Mr TM was a foreign official and that it must be fatal to the Respondent's position that the term *"foreign official"* does not feature in the Claimant's dismissal letter. It was submitted that the anti-corruption policy must be interpreted as setting US standards in the US, UK standards in the UK, German standards in Germany, etc. It was said that it would be a nonsense to suggest that the policy requires a German employee of a German company doing business in Germany to abide by US criminal law just because one of its parent companies is based in the USA. It was said that everyone knew that Mr TM was not a non-UK government official and the Respondent's interpretation would lead to the nonsense that every government official in the world was a foreign official under the policy.

87. The Claimant also said that there was no suggestion that there was a "prohibited payment" in this case. That is, an offer of anything of value to get or keep business and the Claimant was unchallenged when he said that he had carried out a fundamental check to ensure there was no Highways England potential work in the pipeline. It was also said that the Pebble Beach expenses were reasonable and customary.

88. Both Ms Brennan and Mr Barnett said during their evidence before the Tribunal that there was a breach of the Respondent's policies because Mr TM was a foreign official under the Respondent's policies.

89. The Tribunal found that it was reasonable for Ms Brennan and Mr Barnett to conclude that the Claimant had breached the Respondent's policies. It was not reasonable for the Respondent's policies to have been interpreted as a court would interpret a statute. The anti-corruption policy and the code of conduct cross-refer to each other and were intended to be read together. Under the section headed "Applicable Laws" quoted above, it is made clear that "*no matter where you are located, you must comply with all laws…*" including US law and UK law. It was reasonable for the Respondent to conclude that Mr TM was a foreign official and although the description "*a public sector/government customer*" was used in the dismissal letter, it is clear that was a reference to the status of "foreign official" mentioned in the Respondent's anti-corruption policy. It was the understanding of both Ms Brennan and Mr Barnet that the policies applied at all times to anyone who was a foreign official under either US or UK law and that was a reasonable interpretation of the Respondent's policies. In that respect, the dismissal letter was clear and not reasonably capable of

being misunderstood by the Claimant. There was nothing significant in the difference in language.

90. The Claimant also complained that in the course of cross-examination, Ms Brennan accepted the suggestion that the Claimant's conduct in approving the Pebble Beach Golf Club trip was careless rather than deliberate.

91. The Respondent's disciplinary policy includes a list of conduct which can amount to gross misconduct including:

"Wilful disregard of company policy, procedure or other reasonable instruction from a member of staff in a supervisory capacity;
…
Deliberate breach of company policies and procedures."

92. Notwithstanding that apparent concession by Ms Brennan, the Tribunal must take account of what factors were operating on the mind of the decision-maker at the time the decision to dismiss was made. The letter of dismissal clearly refers to "*your wilful disregard for these policies*". Whether or not Ms Brennan now takes a different view, at the time of the dismissal she clearly considered there was wilful disregard particularly in view of the Claimant's knowledge of the Respondent's policies and her view that despite that knowledge he acted in contravention of them. Given the circumstances which were admitted by the Claimant, it was reasonable for Ms Brennan, and later Mr Barnett, to take the view that it was wilful and amounted to gross misconduct.

93. The Claimant also complained that there was no investigation into how much was spent on entertainment of the Respondent's customers at other times, for example the Superbowl or US Masters as referred to by Mr Murphy during the course of his investigation interview. It was submitted that it was not unusual for the Respondent to have entertained top clients to sporting events worth many thousands of dollars.

94. The Tribunal did not find that a failure of the Respondent to investigate these matters was unreasonable. Ms Brennan said that this entertainment was public knowledge and such expenses were approved. Mr Murphy made clear that this was corporate entertainment of approximately 17 customers at the American Open in 2017. It was reasonable for the Respondent to consider whether the Claimant's admitted conduct in entertaining one individual [TM] was reasonable and not to look at other forms of group entertainment, of a quite different character, conducted at other times by the Respondent. The failure to investigate this matter did not make the dismissal unfair.

95. The Tribunal found that the "Burchell" tests were satisfied on the charges found proved by the Respondent. There was a reasonable investigation and the Claimant was informed of the evidence against him before the disciplinary hearing. He was given the opportunity at the hearing to give

his own account. The investigation provided reasonable and sufficient grounds to sustain the Respondent's genuine belief in the Claimant's misconduct. The outcome of the hearing was confirmed in a reasoned and detailed decision letter. The Claimant was allowed and an appeal hearing was held. The Claimant was given a written outcome in respect of the appeal.

96. The Tribunal did not find any procedural unfairness. The basic requirements of the ACAS Code of Practice on disciplinary procedures were complied with.

97. The Tribunal took account of all the above matters raised by the Claimant and found there was nothing which made the dismissal unfair. The dismissal was within the range of reasonable responses.

98. Having considered the disciplinary process including the dismissal and the appeal as a whole, the Tribunal found no evidence to support a finding or an inference of a conspiracy or ulterior motive as submitted by the Claimant. Looked at in the round, the dismissal was not unfair.

_____
Employment Judge Vowles

Date: ……12/02/2020

Sent to the parties on:

…….....

13/02/2020
For the Tribunal Office