Case Number: 2204569/201

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	and	Respondents
Mr J Bagshawe		(1) Gatehouse Bank Plc (2) Mr F Boodai (3) Mr R Thomas (4) Mr M Carrington

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 19 November to 6 December 2012; 15 to 17 January 2013 (in chambers)**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mrs C Ihnatowicz, Mr D Eggmore**

On hearing Mr M Sethi, counsel, on behalf of the Claimant and Mr A Hochhauser QC, leading counsel, and Mrs J Russell, counsel, on behalf of the Respondents, the Tribunal unanimously adjudges that:

(1) The Claimant's complaints of unfair dismissal under the Employment Rights Act 1996 ('the 1996 Act'), ss103A and 98 are not well-founded.
(2) The Claimant's complaints of detrimental treatment under the 1996 Act, Parts IVA and V are not well-founded.
(3) The Claimant's complaints of unlawful discrimination under the Equality Act 2010 are not well-founded.
(4) Accordingly, the proceedings are dismissed.

A. M. Snelson

EMPLOYMENT JUDGE

Judgment entered in the Register and copies sent to the parties on .....

..... for Secretary of the Tribunals

Case Numbers: 2204569/2011

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr J Bagshawe		**(1) Gatehouse Bank Plc** **(2) Mr F Boodai** **(3) Mr R Thomas** **(4) Mr M Carrington**

REASONS FOR THE RESERVED JUDGMENT SENT TO THE PARTIES ON 11 FEBRUARY 2013

Introduction

1. The First Respondents are a Kuwaiti-owned Islamic investment bank based in London which offers Shariah-compliant investment services. We will refer to them as "the Bank". The Second, Third and Fourth Respondents were at all material times, respectively, the Kuwait-based non-executive Chairman, the London-based Chief Executive Officer (CEO") and a London-based non-executive director of the Bank.

2. The Claimant, who was born on 5 January 1959 and is described in his schedule of loss as a white British Christian, was employed by the Bank from its foundation in 2007 until his dismissal on 25 August 2011 on the stated ground of redundancy. Having initially held the position of Chief Financial Officer ("CFO"), he became came Chief Operating Officer ("COO") in August 2009, which role he continued to perform for the last two years of his employment. At the time of his dismissal he was earning an annual salary of £185,000 plus sundry benefits. Throughout, he was a member of the Board.

3. By a claim form presented to the Tribunal on 24 November 2011, the Claimant complained of detrimental treatment and unfair dismissal under the provisions of the Employment Rights Act 1996 ("the 1996 Act") governing public interest disclosure (for which, in the interests of brevity, we will employ the inelegant abbreviation "PID"). The disclosures were said to have taken place at meetings on 17 June and 7 July 2011, the former with a representative of Deloitte, the Bank's auditors, the latter with an officer of the Financial Services Authority ("FSA"). The Claimant also pursued a complaint of 'ordinary' unfair dismissal. In addition, he made claims for direct discrimination based on race and/or religion or belief.

4. The detrimental treatment relied on was set out in the grounds of claim, para 84 as follows:

84.1 the refusal to comply with the Claimant's requests for copies of or access to the KIA documentation signed at the June 2011 Board meeting, in breach of [the Bank's] statutory obligations and his rights as a director.

84.2 the failure to notify the FSA that the Claimant was no longer in active service between 25 July and 25 August 2011, despite the Claimant's repeated requests that it should so;

84.3 the accounts given to Ms Chastell by the Fourth Respondent and Mr Davies of the meetings with Deloitte and the FSA, and the First Respondent's failure to obtain clarification from Deloitte and the FSA of the discussions at these meetings;

84.4 the decision to dismiss the Claimant with immediate effect, with the result that he lost the benefit of certain benefits (including travel insurance) whilst on holiday;

84.5 the decision to treat the Claimant as a Bad Leaver in relation to his 666,000 shares in the First Respondent; and

84.6 the decision to deduct £6,600 from the final payments made to the Claimant in respect of the shares he had forfeited without repaying this sum as a part of his severance package.

5. Particulars of the discrimination claims were given in paras 89-90 as follows:

The Claimant relies in this respect on:

89.1 the decisions of the First Respondent, the Second Respondent and/or the Third Respondent to select his role for 'redundancy' and dismiss him on this purported ground without considering whether it would have been appropriate to put Mr Dhunnoo's role as [CFO] at risk and/or dismiss him on grounds of redundancy;

89.2 the failure by the Fourth Respondent in determining the Claimant's appeal to give any material consideration to the Claimant's contention that his race, nationality, ethnic background and/or religion or belief was a factor in his selection for redundancy rather than Mr Dhunnoo; and

89.3 the decision by the Respondents (or any of them) to treat the Claimant as a Bad Leaver for the purposes of his 666,000 equivalent shares, without giving any consideration to allow (sic) him to retain any shares.

90 The Claimant's comparator for the purposes of paragraphs 89.1 and 89.2 is Mr Dhunnoo. The Claimant's comparators for the purposes of paragraph 89.3 are Naji Nabaa and Nooman Haque.

6. By their response form the Respondents resisted the entirety of the Claimant's case, maintaining that he had been fairly dismissed for redundancy, denying that the 'disclosures' relied on for the purposes of the PID-based claims were protected, denying in any event any link between such alleged disclosures and the dismissal and/or alleged detriments and further denying discrimination in any form.

7. At a case management discussion ("CMD") on 3 February 2012 Employment Judge Clark formulated the liability issues in these terms:

Whistle-blowing

1. Did C make a qualifying disclosure within the meaning of section 43B of ERA 1996 in his conversation with Deloitte and R4 on 17 June 2011 and/or during his meeting with the FSA and Brandon Davies on 7 July 2011?

2. If so, did C make the qualifying disclosures in good faith to his employer within the meaning of section 43C of ERA 1996 and/or to a prescribed person within the meaning of section 43F of ERA 1996?

3. If so, did R1:

3.1 Subject C to the detriments set out in paragraphs 84.1-84.6 of the claim form (or any of them) on the ground that C made that disclosure?

3.2 Dismiss C with the reason or principal reason for the dismissal being that he had made that disclosure?

Unfair Dismissal

4. Did R1 dismiss C for a potentially fair reason within section 98(1) of ERA 1996, namely redundancy? In particular, had the requirement for R1 for employees to carry out work of the kind performed by C ceased or diminished?

5. If so, in all the circumstances of the case, including the size and administrative resources of R1

5.1 Did R1 act reasonably in treating it as a sufficient reason for dismissing C?

5.2 Did R1 carry out a fair procedure?

Direct Race Discrimination

6. Did Rs (or any of them) because of C's race, treat C less favourably than they treated or would have treated others by the acts and omissions set out in paragraphs 89.1-89.3 of the claim form (or any of them)? The racial grounds on which the Claimant relies are his colour and nationality, which he defines as white British. He compares himself to non-white Kuwaiti or Pakistani employees.

Direct Religion/Belief Discrimination

7. Did Rs (or any of them) because of C's religion or belief, treat C less favourably than they treated or would have treated others by the acts and omissions set out in paragraphs 89.1-89.3 of the claim form (or any them)? The Claimant's religion is Christian and he compares himself to Mr Haque and Mr Nabaa, whose religion is Muslim.

8. As can be seen from this brief introduction, the case is not a particularly complicated one. Unfortunately, however, it has been prosecuted on both sides as if it were a Commercial Court action. Three CMDs were held and the Tribunal had to resist a request for a fourth. Contrary to what usually happens, the third, on 12 October 2012, seemed to stimulate an increase, rather than reduction, in expensive letter-writing. This activity included a sustained challenge on behalf of the Claimant to the Employment Judge's mild direction that the parties were free, but not compelled, to produce written openings. We shudder to speculate on how much money the parties have had to pay for this extravagant and pointless skirmishing. The Respondents shouldered the additional cost of the services of shorthand writers who produced an excellent transcript of the evidence and argument which filled a lever arch file. Witness statements filled another lever arch file – the Claimant's first statement alone exceeded 100 pages. It is sometimes forgotten that a claim does not become complex simply because, if it succeeds, it has a high value. Here the preparations, and costs thereby generated, were not at all proportionate to the issues that called for decision and not at all in keeping with the purpose of the Employment Tribunals, which is to deliver swift, economical justice in workplace disputes.

9. The case came before us for final hearing on 19 November 2012 with 12 sitting days allocated. The Claimant was represented by Mr Mohinderpal Sethi, counsel, and the Respondents by Mr Andrew Hochhauser QC, leading counsel, and Mrs Jane Russell, counsel. In the event it was necessary, and fortunately possible, to add one more day. After preliminary reading over more than two days, the evidence and argument occupied the balance of the allocation and we reserved judgment at the end of day 13. Without retracting our general remarks in the last paragraph, we record our thanks to counsel for co-operating to ensure that the hearing was completed within the available time. Our deliberations in chambers occupied three days in January.

The Law

The PID claims

10. By the 1996 Act, s47B(1), a worker has the right not to be subjected to a detriment by any act "done on the ground that [he or she] has made a protected disclosure". The same enactment, by s103A, makes a dismissal automatically unfair where the reason or principal reason is that the employee has made a protected disclosure.

11. Disclosures qualifying for protection are defined by s43B, the material provisions being the following:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –**
>
> **…**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …**

Qualifying disclosures are protected where the disclosure is made in circumstances covered by ss43C-43H. These include where the disclosure is made in good faith to the employer (s43C) or to a prescribed person (s43F). By the Public Interest Disclosure (Prescribed Persons) Order 1999, the FSA is a prescribed person in relation to the operation of Banks.

12. The Tribunal is given jurisdiction to consider complaints of PID-based detriments by s48(1A). Subsection (2) stipulates:

> **On such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.**

13. The PID regime came under valuable scrutiny from the EAT in *Cavendish Munro Professional Risks Management Ltd-v-Geduld* [2010] ICR 325. Giving judgment, Slade J stressed that the protection extends to disclosures of *information*, but not to mere allegations. Disclosing information means conveying facts.

14. In *Fecitt-v-NHS Manchester* [2012] IRLR 64, the Court of Appeal held that, for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the PID materially influenced the employer's action. The test is the same as that which applies in discrimination law. This, in the context of the PID jurisdiction, separates detriment claims from complaints for unfair dismissal under s103A: there, as we have stated, the question is whether the making of the disclosure is *the* reason, or at least the principal reason, for dismissal.

15. The question of the burden of proof in claims under the 1996 Act s103A was addressed by the Court of Appeal in *Kuzel-v-Roche Products Ltd* [2008] IRLR 530 CA. Giving the only substantial judgment, Mummery LJ made the following observations (paras 56-60):

> **The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.**
>
> **I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
>
> **Having heard the evidence of both sides … it will then be for the [Employment Tribunal] to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences …**
>
> **The [Employment Tribunal] must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the [Tribunal] that the reason was what he asserted it was, it is open to the [Tribunal] to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the [Tribunal] *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
>
> **… it may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side.**

'Ordinary' unfair dismissal

16. The 'ordinary' unfair dismissal claim rests on the familiar provisions of the 1996 Act, s 98 which, so far as material, state:

> **(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 –**
> **…**
> **(c) is that the employee was redundant …**
>
> **(4) Where the employee 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.**

Redundancy is defined in s 139. The relevant provisions are:

> **(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –**
>
> **…**
> **(b) the fact that the requirements of that business**
> **(i) for employees to carry out work of a particular kind …**
> **...**
> **have ceased or diminished or are expected to cease or diminish.**

17. We have reminded ourselves of the case-law on redundancy dismissals, particularly the guidance contained in *Williams-v-Compair Maxam Ltd* [1982] IRLR 83 EAT and *Polkey-v-A E Dayton Services Ltd* [1987] IRLR 503 HL. From the former we derive the important principle that it is not for us to substitute our view for that of the employer. Rather, our function is to ask whether the dismissal (including the process which led to it) lay within a range of conduct which a reasonable employer could have adopted.

Discrimination

18. The Equality Act 2010 ('the 2010 Act') protects employees and applicants for employment from discrimination based on a number of 'protected characteristics'. These include race (s9) and religion or belief (s10).

19. Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

We proceed on the footing that the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of' age etc in the pre-2010 legislation) effects no material change to the law.

20. Specified forms of discrimination, including direct discrimination, are prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

21. A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see eg *Shamoon-v-Chief Constable of the RUC* [2003] IRLR 285 HL.

22. The 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

23. On the reversal of the burden of proof, we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which, again, we do not understand the new Act to depart in any material way), including *Igen Ltd-v-Wong* [2005] IRLR 258 CA, *Villalba-v-Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing-v-Manchester City Council* [2006] IRLR 748 EAT, *Madarassy-v-Nomura International plc* [2007] IRLR 246 CA and *Hewage-v-Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions. We take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. The paradigm case is where the employer treats employee X less favourably than in like circumstances he treats employee Y, who does not share employee X's protected characteristic, but these are not the only circumstances in which the burden may shift. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered. In this regard we bear in mind the provisions governing codes of practice (see the Equality Act 2006, s15(4)) and questionnaires (the 2010 Act, s138) and the line of authority beginning with *King-v-Great Britain-China Centre* [1992] ICR 516 CA and ending with *Bahl-v-Law Society* [2004] IRLR 799 CA. We remind ourselves that s136 is designed to confront the inherent difficulty of proving discrimination and must be given a purposive interpretation.

Oral Evidence and Documents

24. We heard oral evidence from the Claimant and his supporting witnesses, Mr Richard Bishop and Mr Paul Farmer. Neither of these was employed by the Bank but they gave evidence in relation to the joint venture, Gatehouse Napier Ltd, to which we will refer in due course. On behalf of the Respondents, we heard evidence from the three individual Respondents and three other witnesses, Mr Brandon Davies, a non-executive director, Ms Ginny Chastell, HR Manager and Mr Twalha Dhunnoo, CFO. In addition to oral evidence we read the documents to which we were referred in the notably inscrutable eight-volume bundle, to which additions were made in the course of the evidence. We also had the benefit of the opening and closing submissions on behalf of the Respondents and the closing submissions on behalf of the Claimant, together with sundry other documents prepared on each side for our assistance including a chronology and two 'cast lists'.

The Facts

25. Having regard to the overriding objective and in particular the principle of proportionality already mentioned, we will confine our narrative to what we regard as essential matters. The facts necessary to our decision, either agreed or proved on a balance of probabilities, we find as follows.

Background

26. The Bank was established by GSH KSC ("GSH") a Kuwaiti company and a subsidiary of The Securities House K.S.C. ("Securities House"), a Shariah-compliant investment company listed on the Kuwait stock exchange. Mr Boodai is the founder, Chairman and Managing Director of GSH.

27. The Bank is and always has been, in the scheme of things, a small concern. Over the first two years of its existence, the head count grew to a peak of 46 but adverse changes in market conditions reversed that trend rapidly from late 2009 onwards. By the date of the Claimant's dismissal in August 2011 there were no more than 24 members of staff.

28. The decline in the Bank's fortunes from 2009 onwards is well illustrated by its capital position. From initial working capital of £50m, the figure had fallen to £19m by December 2010.

29. The picture in terms of revenue was no better. The Bank never traded profitably and Mr Boodai told us without challenge that, by early 2011, its very survival was in question.

30. Measures were taken to address the Bank's growing difficulties. Minutes of a Board meeting of 25 November 2010 speak of an anticipated loss for the year of about £6 million and refer to cost-cutting measures already in place and to decisions to supplement those measures. In the ensuing months, the action taken included compulsory redundancies, two of which were effected by the Claimant himself in the first half of 2011.

Gatehouse Napier Ltd

31. In the first half of 2010 the Claimant became involved in discussions with Mr Richard Bishop (a witness before us), who had worked with his (the Claimant's) brother. Mr Bishop had a background in the insurance market and was from July 2010 onwards, employed by Paul Napier Ltd ("PNL"), a Lloyd's broking company. Out of these conversations, the idea emerged of a joint venture to set up a Shariah-compliant insurance brokerage, jointly operated by PNL and the Bank. The Claimant presented the proposal initially to Mr Thomas and subsequently to the Board of the Bank. It was favourably received and a company, Gatehouse Napier Ltd ("GNL"), was established in October 2010 as the vehicle for the proposed venture. The enterprise was approved at a meeting of the Bank's Board on 20 December 2010 and it was agreed that the Claimant and Mr Thomas should be appointed nominee directors.

32. There was controversy before us concerning a meeting on 17 January 2011. On this dispute we prefer the evidence of Mr Dhunnoo and Ms Chastell to that of the Claimant. We find that the Claimant convened an informal meeting with a number of his direct subordinates including Ms Chastell and Mr Dhunnoo, at which he announced that from then on he would be substantially involved with GNL and that the new venture would occupy most of his time. Accordingly his 'reports' would need to take on extra responsibilities to cover the gap which he would leave. Contemporary documents are consistent with the evidence of Mr Dhunnoo and Ms Chastell. Two examples are a projection attached to an email of 22 January 2011 from Mr Fiaz Mansha, Head of IT, which anticipated 80% of the Claimant's time being charged to the GNL project and the Claimant's email of 14 February to Mr Thomas and Mr Bhoodai noting an agreed assumption that 75% of his (the Claimant's) costs would be borne by the joint venture. Contemporary perceptions also fit with our findings concerning the Claimant's remarks of 17 January. In an email of 11 March Mr Thomas remarked out that the Claimant was "almost solely" devoted to the insurance project.

33. Matters progressed. By June plans had crystallised and decision-makers within the Bank, including the Claimant, were agreed that he would be seconded full-time to GNL with effect from 1 July 2011 and formally transferred at a later point. The minutes of the Board meeting of 2 June record a request for details to be delivered as soon as possible of the arrangements to complete his transfer to GNL. On 14 June Mr Boodai wrote to senior colleagues referring to the "formal transition of [the Claimant] and all related cost" to be completed by the month end.

34. The GNL plans failed. It is not necessary to decide why but the unchallenged evidence of Mr Bishop and Mr Farmer (also of PNL) was that the deal collapsed when they were made aware for the first time that the Bank was proceeding on the footing that the cost of employing the Claimant would be borne by GNL. Their evidence was that GNL had never contemplated undertaking such a liability, at least until some point in the future when the revenue generated by the joint venture might make that feasible. As Mr Farmer put it (witness statement para 14):

> **No company could have survived costs that were three times the level of its income at that time.**

35. The failure of the GNL project (at least as a joint venture involving the Bank) was confirmed to senior figures in the organisation on 5 July 2011.

36. In his amended witness statement served on 12 November 2012 the Claimant first asserted that it was envisaged that he would continue after 1 July 2011 to discharge all of his COO duties other than those related to his Company Secretary responsibilities and his membership of the Board (from which, it was agreed, he would resign). This, he said, would be the state of affairs until the GNL "concept" was "proved". We reject that late evidence as tactical and untrue. It would have been unthinkable that a key figure in the joint venture should retain the responsibilities of a senior post in another organisation (located elsewhere) at the time when the new undertaking was being launched and all efforts were required to make it a success. The view of the Bank's senior managers was, as we will explain more fully below, that the Claimant's position had largely disappeared and that GNL represented a new opportunity for him without which he would be left with precious little to do. As we will also explain, the Respondents envisaged that the Claimant's residual COO responsibilities could be covered by Mr Dhunnoo and other employees.

The alleged PIDs

37. As we have explained, the Claimant's case rested on two alleged PIDs. The first is said to have occurred on 17 June 2011. On that date, he had a meeting with Mr Stuart Barnett of Deloitte, the Bank's auditors. Mr Carrington participated by telephone. The principal subject of discussion was the attempt by Mr Bhoodai currently underway to negotiate an investment in the Bank by an organisation called KIA, based in Kuwait. The Claimant and Mr Carrington wished the opinion of Mr Barnett concerning the legal and regulatory implications of the proposed investment. In that context, it was made clear that there was scant hard information concerning the progress of Mr Boodai's discussions. In so far as the Claimant suggested, or might have suggested, that there was a "disclosure" that Mr Boodai was suppressing information or deliberately keeping the London executive and non-executive directors in the dark concerning the proposed investment, we reject that suggestion. Mr Barnett advised that the best course was to keep the FSA abreast of developments regarding the proposed investment.

38. There was also a brief mention of Mr Dhunnoo and the fact that he was shortly to be appointed a "CF1" (a category of finance officer carrying significant regulatory responsibilities). It was observed that Mr Dhunnoo was relatively inexperienced and might benefit from some support.

39. We find it unnecessary to make any determination on the question whether the conversation with Mr Barnett also touched on the fact of a number of recent departures from the Bank. Whether or not that subject was mooted, no concern was raised about the ability of the organisation to meet its legal or regulatory responsibilities.

40. Mr Barnett did not make a note of the conversation on 17 June. He did not regard it as a 'whistle-blowing' event.

41. Nor was there any behaviour on the part of the Claimant or Mr Carrington suggestive of either of them having regarded the meeting of 17 June as having been particularly significant. No contemporary record was shared with colleagues. Nothing was said at any Board meeting (the first opportunity was only four days later, on 21 June) to the effect that anything important had been disclosed.

42. The second alleged disclosure is said to have taken place on 7 July 2011. On that date there was a meeting at a coffee shop attended by the Claimant, Mr Davies, Mr Patrick Young of the FSA and Ms Daniela Strebel of the FSA. Ms Strebel prepared a note of the meeting. The Claimant relied on his own note. Several matters were discussed at the meeting. Mr Davies and the Claimant explained that they had asked for the meeting in their capacities as UK-based representatives of the Bank. Mention was made of a large number of recent staff movements, resulting in a significant depletion of the cohort of 'Approved Persons' under the FSA regime. It was explained that these developments were linked to a change in commercial strategy, the intention being to focus the Bank's efforts on real estate financing which, it was explained, was the core "competency" of the organisation. There was a discussion about the regulatory implications of the changes in personnel and Mr Young gave some advice in that regard. Mr Davies and the Claimant then explained recent developments relating to the proposed KIA investment and its possible 'Change in Control' implications. Mr Young gave some technical advice concerning the notification obligations which might arise depending on the size of stake which any investment might produce. In connection with the proposed investment there was also some discussion about the composition of the Bank's Board. Mr Davies and the Claimant raised concerns about the independence of the Board and the capacity of Mr Boodai to discharge his fiduciary obligations in circumstances where KIA had declined an offer of a seat on the Board. Mr Young was asked if it was possible for a condition to be attached to the FSA's authorisation of a 'Change in Control' requiring the appointment of a KIA representative to the Board. Mr Young did not provide an answer to that question at the time, but (as we will mention) did so subsequently. There was also some discussion concerning the background, including the historical commercial relationship between KIA and Securities House, the parent company of the Bank. In addition the conversation touched on the Claimant's plans to resign as a director of the Bank and to move to GNL, as to which he requested Mr Young's views on timing. The reply was that it would be preferable to wait until the KIA transaction was complete.

43. In a letter dated 16 August 2012 to Mr Thomas, Mr Young made a number of points of which we need to mention only two. First, he recalled that, at the end of the meeting on 7 July, he passed a general remark concerning the protection under English law of 'whistle-blowers'. Secondly, however, he stated that he did not tell the Claimant that he regarded things said to him in the meeting as amounting to 'whistle-blowing' and did not invoke the FSA's 'whistle-blowing' procedure.

44. Mr Thomas was first made aware on 22 July that the Claimant was alleging that he had made PIDs at the meetings on 17 June and 7 July.

45. The Claimant suggested that Mr Boodai must have been aware prior to the meeting on 12 July 2011 (to which we will shortly come) of the substance of what was said at the meetings of 17 June and 7 July. That suggestion is not made out.

The redundancy process

46. We have mentioned the reference by the Claimant and Mr Davies at the meeting of 7 July 2011 to the Bank's decision to re-focus its activities. That strategy had its roots in planning over the preceding months at least. The strategy to concentrate on real estate business was formally considered and implicitly approved at a Board meeting on 2 June 2011, at which Mr Boodai formulated the new mission statement of the Bank in these terms:

> **To be the best real-estate Shariah compliant bank in the world with superior client relationship management**

Some five months earlier the Claimant had explained to Mr Steven Gulson that he was being made redundant because of the Bank's "new strategy of offering a relatively narrow but proven range of products". Later in the same letter he referred to the Bank having become, "smaller … with a smaller range of products …"

47. By an email dated 5 July 2011 Mr Boodai conveyed his thoughts on the Claimant's position in light of the collapse of the GNL joint venture plans, in these terms:

> **From the shareholder perspective we need to be very clear that JB [i.e. the Claimant's] role is only via GNL, and we have no other alternative here. Whether a business plan is feasible or not by [GNL] … we will not have JB cost as a burden on [the Bank's] account … I reconfirm that JB has no role going forward at [the Bank] both from a cost or resource level …**

48. Subsequent email correspondence evidences Mr Boodai's impatience to resolve the question of the Claimant's position within the organisation. As a result a telephone 'meeting' of senior figures was fixed for 12 July. Those attending were Mr Boodai, Mr Muhammad Al-Tahawy, the Securities House representative on the Bank's Board and a non-executive director of the Bank (based in Kuwait), Mr Thomas and Mr Carrington. The gist of what was said in relation to the Claimant was set out in a note initially in email form, distributed by Mr Thomas on 26 July, the material part of which reads as follow:

> **COO position. Following ongoing discussions since December of 2010 we reviewed the effectiveness and value add (sic) of maintaining the COO position, given JB's transitioning to GNL on secondment, initially for 75% of his time but latterly designed to be 100%. We discussed the fact that Paul Napier have declined to accept JB in that position in GNL and we discussed in some detail that the vast majority of COO's roles within [the Bank] have already been transitioned to CFO, CEO, Heads of Risk and Compliance with no undue stress or decline in efficiency or additional operational risk. The role of Company Secretary was discussed, responsibilities with respect to legal risks were covered under operational risk matters, and based on that discussion we have determined that this COO position must therefore be at risk of redundancy, and that CEO should notify COO of this fact.**

We find that this note fairly represents what was discussed and resolved.

49. Neither Mr Davies nor Mr Dhunnoo was available to participate in the meeting. Mr Davies shortly afterwards spoke with Mr Thomas and confirmed his agreement with what had been decided.

50. Mr Thomas telephoned Mr Young of the FSA on 13 July 2011. His principal purpose was to give advanced warning of the fact that the Claimant's role was seen as redundant. He repeated the point (already made on 7 July) that the Bank was intent on concentrating on its real estate business. Mr Young took the opportunity to pick up a loose thread left from the earlier meeting, offering the opinion that the FSA could not (at least without special authorisation) make it a condition of approval of a 'Change in Control' that any particular shareholder should take up a seat on the Board.

51. On 14 July 2011 at a short meeting attended by Mr Thomas, the Claimant and Ms Chastell, Mr Thomas advised the Claimant that he was at risk of redundancy, referring to the failure of the GNL plans and the Bank's doubts as to whether there remained a need for a COO given recent changes. The Claimant reacted with surprise but expressed a wish to approach the matter constructively and intimated an interest in a negotiated outcome. He added that he would be obtaining legal representation.

52. By a letter of 19 July Mr Thomas confirmed the fact that the Claimant was at risk of redundancy. He referred to the Bank's decision to focus on real estate business and stated that the judgment had been formed that the need for a dedicated senior operational position had reduced. He added that no final decision would be taken for the time being and that a consultation process would follow involving a search for suitable alternative positions, although he also observed that at that stage none existed. He went on to set a further meeting for 22 July and, looking further ahead, expressed the desire for a final decision to be made during the week commencing 8 August.

53. The meeting on 22 July was exceedingly brief. The Claimant explained that he was challenging the alleged redundancy and suggested that the motive behind the decision to place him at risk was that he had made protected disclosures, referring to the meetings of 17 June and 7 July. He declined to expand upon that assertion, saying that it would be formulated on his behalf by his lawyers. He also stated that he was anxious to see the entire matter resolved swiftly but that communication must be lawyer to lawyer.

54. On advice, the Claimant remained away from work after 25 July 2011.

55. In a letter of 26 July 2011, Mr Thomas referred to the meeting of four days earlier. He set out the Bank's reasons for regarding the COO position as redundant, citing the agreement (as he saw it) that GNL would carry 75% of the Claimant's costs from March and 100% from 1 July. He observed that, during the last three months or so, the Claimant had worked almost exclusively on the joint venture. That, he said, supported the view that the COO duties had considerably diminished. Mr Thomas expressed the view that the residual COO responsibilities could be absorbed by him, Ms Chastell and Mr Dhunnoo. He rejected the 'whistle-blowing' allegation, insisting (inter alia) that the decision to place the Claimant at risk had nothing to do with the things said at the two meetings relied upon. Mr Thomas did not exclude the possibility of a solution through GNL but observed that his understanding was that PNL held the majority of the voting rights (that was not disputed) and had to date shown themselves unwilling for the Claimant to be directly employed by the new

company. He added, however, that he was prepared to look further at that aspect if desired. He also confirmed that he would continue to explore all suitable alternative employment opportunities which might arise. A further meeting was set for 29 July.

56. On 26 July the Claimant wrote an email to Mr Thomas responding to a request for details of outstanding pieces of work. In relation to his COO function, he listed four items. The first of these was a committee meeting set for 28 July. He observed that Mr Dhunnoo could chair that meeting. Secondly he referred to certain HR matters, identifying the personnel handling them and observing that Mr Thomas would have to sign any relevant documents. Thirdly and more generally, he observed that Mr Dhunnoo and Mr Thomas could sign any approvals in his absence. Fourthly, he mentioned an outstanding issue concerning some fees claimed by a firm of solicitors, remarking that the details were known to Mr Dhunnoo and another member of staff and that they would be in a position to handle any developments. More generally, the Claimant remarked that:

> **All other day to day issues are handled by the respective Heads.**

We mention this correspondence because it is, we find, eloquent of the extent to which his COO duties had diminished.

57. By a letter of 28 July to those then acting for the Respondents the Claimant's solicitors reiterated and developed the arguments that there was no genuine redundancy and that the treatment of the Claimant was explained by his having made protected disclosures. Turning to matters of process, they requested a postponement of the second consultation meeting scheduled for 29 July and requested that the final decision be deferred until after the Claimant's return from a holiday booked for 13-27 August.

58. By a letter of 5 August the solicitors then representing the Respondents replied. They insisted that there was a genuine redundancy and that that was the reason why the Claimant had been placed at risk. They referred to interviews conducted by Ms Chastell with Mr Carrington and Mr Davies on 1 August, enclosing copies, on the strength of which they challenged the 'whistle-blowing' allegation, insisting in particular that there was no connection between the things said at the meetings of 17 June and 7 July and the decision to place the Claimant at risk. On the subject of further consultation, they referred to current vacancies for two positions, namely Vice President, Credit and Market Risk and Executive Vice President, Head of Compliance and Operational Risk. Job descriptions were attached which appeared to offer both positions at Vice President ("VP") level. On the subject of GNL, the Respondents' solicitors confirmed that, since PNL held the majority of voting rights, the Bank would not be able to insist on the Claimant being considered for any vacancy that might exist, but Mr Thomas would be happy to discuss any such possibility if so desired with PNL. A further meeting was set for Tuesday 9 August.

59. That date was, by agreement, changed to 10 August, but the meeting did not take place then because the Claimant informed the Respondents, on the day, that he was suffering from a stomach bug. He told us in his evidence that this ailment was fictional and merely a device on his part to win more time.

60. Following further email correspondence the Claimant's solicitors wrote to the Respondents' solicitors on 18 August 2011. They renewed the arguments concerning the existence (or not) of a genuine redundancy and the alleged PIDs. Turning to possibilities for alternative employment they noted the discrepancy in the reference in the letter of 5 August to a Head of Compliance and Operational Risk vacancy, pointing out that the letter referred to the an Executive Vice President ("EVP") position whereas the job description which accompanied it styled it merely a VP post. This distinction (it was said) would have a bearing on whether the Claimant would wish to be considered for the vacancy. He did not wish to be considered for the other (VP) position. The letter made a series of other points which is not necessary to recount. It ended with the request that, even if the decision was taken to confirm the Claimant as redundant on 19 August (the date which the Respondents had identified as the day on which they intended to take their decision), the dismissal should not take effect until after the Claimant's return from holiday. It was explained that this was to ensure that life assurance and health cover were maintained until he was able to make alternative arrangements. The letter also complained about the "unseemly haste" with which the Respondents were seeking to conclude the consultation process. It did not, however, contain any request for a further consultation meeting.

61. By a letter dated 25 August 2011 Mr Thomas gave his decision, which was to dismiss the Claimant summarily with payment in lieu of notice. He set out at some length the basis for the conclusion that his role was redundant, reiterating and developing points made in earlier correspondence. He rejected the suggestion that the alleged PIDs had any bearing on the decision to dismiss. He defended the redundancy process as fair and reasonable. Turning to the question of alternative employment, he addressed the one role in which interest had been expressed, explaining that the vacancy was for an EVP position (not VP) and that it carried a salary considerably lower than the Claimant's and would involve reporting to Mr Dhunnoo, an officer junior to him. In any event, Mr Thomas went on to say that, while he would have been happy to interview the Claimant, the post had been filled. He also stated that he had considered whether it would be reasonable to dismiss any current member of staff to make room for him but had concluded that there was no person whom it would be appropriate or justifiable for the Bank to dismiss for that purpose. He explained the severance payments to which the Claimant was entitled (which included an enhanced redundancy payment) and gave notice of his right of appeal.

62. The Claimant appealed by a letter of 9 September 2011. He repeated earlier arguments concerning the validity of the alleged redundancy situation. He challenged his 'selection' for redundancy and criticised the consultation process. He renewed the 'whistle-blowing' arguments. In addition he raised, for the first time, allegations of discrimination based on race, nationality, ethnic background and/or religion or belief. The discrimination claim was rested, in the first place, on the decision to dismiss the Claimant rather than Mr Dhunnoo. (The argument later divided into two related propositions: first that the two should have been 'pooled' for the purposes of redundancy selection; secondly, in the alternative, that Mr Dhunnoo should have been 'bumped' on the Claimant being found redundant.) In addition, it was argued that there was discrimination in the Bank treating the Claimant as a 'Bad Leaver' and the consequential forfeiture of his shareholding. (We will make our findings on this

subject under a separate heading below.) The letter of appeal raised certain other matters which it is not necessary to itemise here.

63. By a letter of 19 September the Claimant was advised that the appeal hearing would be conducted by Mr Carrington on 22 September. He was made aware of his right to be accompanied and invited to raise any queries about the appeal process in the meantime.

64. There followed some email correspondence involving Mr Young of the FSA arising out of the Claimant's request for a copy of Ms Strebel's note of the meeting of 7 July. Mr Young took legal advice. The matter was not resolved by the time of the appeal hearing and Ms Strebel's note was not copied to the Claimant until 7 October.

65. Prior to the appeal Mr Carrington was supplied with a file containing the documentation generated by the redundancy process, which he read.

66. The Claimant attended the appeal hearing on 22 September, accompanied by Mr Muhammad Shikder, a work colleague. Mr Carrington chaired the meeting and Ms Lia Pereira attended to take a note. A fair record of the meeting appears in the bundle. At an early stage, the Claimant expressed surprise that Mr Carrington had been appointed to hear the appeal and appeared to object to his participation in it but when Mr Carrington proposed adjourning the meeting pending appointment of another appeal officer, the Claimant declined the offer, stating that he did not wish the process to be delayed and that he had no confidence in the appeal being allowed, regardless of who heard it. The Claimant presented and developed the arguments already rehearsed in correspondence concerning the validity of the redundancy, the fairness or otherwise of the 'selection' and the consultation process and sundry associated matters. He also complained that the EVP vacancy was filled before he had had a chance to consider it. He went on to outline his legal claims, covering the same ground as in his letter of appeal.

67. Following the appeal Mr Carrington interviewed Mr Boodai on 28 September 2011, addressing five questions to him. Four related to the 'whistle-blowing' matter; the fifth asked why he had taken the view on 12 July that the Claimant's position should be placed at risk of redundancy. The gist of Mr Boodai's answers was that he had not been aware of the meetings of 17 June and 7 July until August, that he regarded the subject-matter discussed at those meetings (in particular the implications of the planned KIA investment in the Bank) as innocuous, and that the decision to place the Claimant at risk had been nothing to do with him and everything to do with his function: the senior management had become top-heavy and the COO role was seen as most apt for deletion.

68. Mr Carrington also spoke with certain other individuals. This emerged in cross-examination and was not referred to in his witness evidence. His somewhat hazy recollection was that he spoke with Mr Thomas, Ms Chastell, Mr Dhunnoo and perhaps Mr Davies. These conversations were not documented. We are satisfied that nothing of significance emerged from them.

69. By a letter dated 6 October Mr Carrington delivered his decision, dismissing the appeal. He dealt in detail with the points taken by the Claimant, giving detailed

reasons for rejecting each of the legal claims foreshadowed in the appeal letter and developed at the hearing. He dealt not only with the decision strictly under appeal (relating to the dismissal) but also with the ancillary complaints of detrimental treatment.

70. It is necessary to return to the question of alternative employment. Having rehearsed the relevant correspondence on that topic, we add here a little background. Mr David Dougan held the position of Head of Compliance and Risk, at EVP level. In the summer of 2011 he gave notice to resign. The job was advertised at the VP grade with a salary of up to £60,000 per annum but by 21 July Ms Chastell in internal email correspondence was registering concern that the advertisement was not attracting people of sufficient calibre. Accordingly, she remarked that it might be necessary to upgrade the role to EVP level and adjust the salary upwards to about £85,000 per annum. Mr Thomas appears to have approved the suggestion on or soon after 21 July 2011. Mr Asim Siddiqui applied. He was interviewed on three occasions, the first on 10 August and the last on 17 August. Ms Chastell made an oral offer to him on 19 August, which was confirmed in writing on the same day. The letter from the Claimant's lawyers dated 18 August had been received on the date it bore, one day before the offer was made to Mr Siddiqui. Mr Siddiqui accepted the offer.

PID-based detriments

71. In addition to complaining of the dismissal, the Claimant, as we have noted, relied on a number of detriments. The first of these (grounds of claim para 84.1) is said to have consisted of a failure by the Respondents to comply with his request for copies of, or access to, KIA documentation signed at the June 2011 Board meeting. He raised this subject at the first consultation meeting on 22 July. Mr Thomas's response following that meeting was that the material was commercially sensitive and he needed an explanation for the request before taking a decision on it (see the letter of 26 July 2011). The correspondence which followed was inconclusive. As we have recorded, Mr Thomas terminated the Claimant's employment in his letter of 25 August 2011. The question of disclosure of documents was not addressed.

72. The second pleaded detriment consisted of the alleged failure to notify the FSA that the Claimant was not in active service between 25 July and 25 August. In correspondence on 5 August the Respondents' lawyers purported to confirm that the Bank had notified the FSA that the Claimant had ceased to perform a controlled function. Under cross-examination, however, Mr Thomas could not substantiate that assertion. No corroborative document was produced. On the other hand, Mr Thomas did point out in evidence that in conversation with Mr Young on 13 July he had made it clear that the Claimant was at risk of redundancy and that there was a real prospect of his leaving the organisation soon. In addition, he rejected the suggestion that the absence of a formal notification left the Claimant at risk vis-à-vis the FSA in the last month of his employment, all of which period he spent away from work, half of it on leave.

73. The third alleged detriment (grounds of claim para 84.3) rests on the accounts given by Mr Carrington and Mr Davies of the meetings of 17 June and 7 July and the Bank's alleged "failure" to obtain clarification from Deloitte and the FSA of what was

said at those meetings. The only finding necessary under this head is to record that the Bank did nothing more to investigate the alleged PIDs above and beyond what we have already recorded.

74. The fourth detriment is located (grounds of claim para 84.4) in the "decision to dismiss the Claimant with immediate effect …" This is legally untenable. A claim based on a dismissal cannot be pursued under the detriment provisions (see the 1996 Act s47B(2)(b)). For completeness, we add the following. As explained by Ms Chastell (second witness statement, paras 7-9), the Bank accommodated the Claimant's requests for life assurance and private medical insurance cover to be extended until 25 November 2011. In keeping with standard procedure, he was compensated for the loss of other benefits in kind, for the notice period. He did nothing to alert the Bank to his wish (if it was his wish) for travel insurance cover, or any other benefit, to be extended.

75. The fifth and sixth detriments (grounds of claim paras 84.5 and 84.6) cite the decisions to treat the Claimant as a "Bad Leaver" in relation to his shareholding in the Bank and to deduct £6,600 from the final payment made to him in respect of the shares which he had forfeited, without repaying that sum as part of his severance package. It was common ground that at all relevant times the Respondents operated a uniform policy of treating every employee leaving the organisation as a "Bad Leaver" for the purposes of their Equity Incentive Plan. A consequence was that shareholdings in the Bank were forfeited and departing employees were required to account for the subscription price. Over time, a practice developed whereby the Bank, in order to offset the liability for the subscription price, artificially extended the leaving employee's termination date by such period as was necessary in order to cover the subscription price. But that practice was revoked from the start of August 2011 on legal advice. Thenceforth, all employees were required on termination to pay the subscription price of their forfeited shares without compensation. It was not in dispute that the revocation of the practice operated to exclude all leavers after the beginning of August 2011 from the benefit of the practice as it had applied up to then.

76. Despite this, the Claimant was able to retain a part of his shareholding on termination. He held a hundred million one penny shares. Of those, he retained 33.4 million pursuant to a deed of transfer executed in February 2010. He forfeited the balance and was required to pay the subscription price on termination in the sum of £6,600.

Comparators

77. Mr Dhunnoo, who hails from Mautitius, joined the Bank as EVP, Head of Finance, Operations & IT in September 2007 and was appointed CFO on 15 April 2011. He became a 'CF1' and Board member on 1 July 2011. He reported to the Claimant until he took up the CFO role. When promoted to that post, his annual salary was increased to £125,000.

78. Mr Naji Nabaa, who was dismissed for redundancy on 31 March 2010, was permitted on leaving to retain 2.5 million 1p shares. He is a British Christian of Lebanese origin. Mr Nooman Haque, a Muslim of Pakistani descent who left the

organisation by mutual consent on 26 April 2010, was also permitted to retain 2.5 million 1p shares.

79. The exceptional treatment of Mr Nabaa and Mr Haque was the result of special requests on the part of Mr Al-Tahawy. The reasons were that Mr Nabaa was moving to an institution with which Securities House wished to develop a stronger business relationship and Mr Haque had carried out consultancy work for Securities House with which they were particularly satisfied. Mr Nabaa retained 25% of his shareholding and Mr Haque, 12.5%.

Miscellaneous facts

80. The Claimant set considerable store by what was referred to before us as the 'Pathfinder' document, dated 6 October 2010. Its principal purpose was to convey to potential investors a picture of the Bank's business and aspirations. It explicitly declared that it did not constitute or form part of an offer or invitation to sell or issue securities in the Bank. It stated in terms that it was an anticipatory document, and that its text included references to events which had not yet occurred at the time of distribution of the document. We were also referred to an addendum dated 12 April 2011, formally endorsed at the Board meeting of 20 June 2011. This anticipated a capital injection of £100m in or about May 2011. (In the event, an injection in that sum was made in late July 2011, the source being KIA.) Mr Sethi drew a number of points from these documents but it is sufficient here to note two. First, they identify the COO as an integral figure in the senior management of the Bank. Secondly, they talk up the prospects of a significant expansion in the scale and range of the business, including references to development of asset finance and capital markets business as well as the core real estate activity.

81. The Claimant was not replaced by the Bank and there was never any proposal that he should be. His functions were distributed as envisaged, wholly or very largely between Mr Thomas, Mr Dhunnoo and Ms Chastell.

82. The Claimant was subjected to uncomfortable cross-examination in which he was tested on his treatment of individuals whose redundancy dismissals he had handled. It was put to him that he had treated those individuals very much in the way in which the Respondents had treated him. Without raising any real challenge to that proposition, he maintained that his case was "different".

83. The Respondents do not operate any formal system of monitoring for equal opportunities purposes. It seems that employees are given the option of 'self-declaring' in respect of ethnicity, religion and, no doubt, other personal characteristics. We were told nothing of any equal opportunity policy.

84. The Claimant did not seek to rely on any 'background' evidence as tending to support the theory of unlawful discrimination based on race or religion or belief. We were told by a witness on behalf of the Respondents that the Bank had faced one previous Employment Tribunal complaint of unlawful discrimination, again pursued by a white non-Muslim employee (on this occasion a female). It seems that she made allegations of discrimination based on both race and religion or belief but withdrew her claims.

Secondary Findings and Conclusions

Unfair dismissal

85. Did the Claimant make protected disclosures? We have reminded ourselves of the language of the 1996 Act, s43B. The case was put on the footing that information was disclosed at the two meetings which in the reasonable belief of the Claimant tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation. We are satisfied that this does not correctly characterise what was conveyed at either meeting. The meetings were unremarkable. In both cases, the Claimant and another senior officer of the Bank wished to be advised, very properly, on matters of concern. They were keen to ensure that the Bank acted in accordance with its legal and regulatory obligations. On both occasions, they were reassured. In neither case was the information which passed believed, let alone reasonably believed, to tend to show the 'likelihood' of any legal obligation being infringed. The meetings were precautionary. The Claimant fails to surmount the initial threshold of demonstrating a disclosure qualifying for protection.

86. It follows that the claims for unfair dismissal under s103A and for detrimental treatment under s 47B are unsustainable.

87. In relation to the dismissal, we are left with a complaint under s98. What was the true reason for dismissal? We are satisfied that the reason was that the Claimant was redundant. He was redundant because the requirement for an employee to do work of a particular kind, namely the duties of a COO, had diminished to the point at which the role was superfluous. That state of affairs arose as a consequence of the decline in the fortunes of the Bank and the much reduced scale and range of its operations, centred on real estate finance. (The "Pathfinder" document and addendum were aspirational and certainly did not reflect the priorities of the Bank in the summer of 2011.) Faced with these circumstances, he sought to develop a new role for himself through GNL. When the GNL project exploded the senior figures in the Bank rightly recognised that the Claimant was left with very little to return to. In short, he was redundant.

88. For completeness, we should add that we are wholly satisfied that the fact of the Claimant's participation in the meetings of 17 June and 7 July 2011 did not influence to any extent whatsoever the collective decision to declare him at risk of redundancy or the ultimate consequence of that decision, his dismissal. To the extent that the decision-makers on 12 July even knew what had been discussed at either meeting (it seems unlikely that Mr Boodai or Mr Al-Tahawy did), no-one had any reason to regard the Claimant (any more than Mr Davies or Mr Carrington) as meriting censure for the part which he played. On the contrary, in so far as the decision-makers were aware of those conversations at all, there is no reason to suppose that they should have regarded them as anything other than instances of appropriate, prudent behaviour by senior officers acting in the best interests of the Bank. Moreover, the contemporary evidence makes it blindingly obvious that moves to delete the COO position were underway before the second alleged PID (see *eg* Mr Boodai's email of 5 July, referred to above).

89. Did the Respondents act reasonably in treating the reason as sufficient? We find that the Claimant's numerous procedural complaints concerning the redundancy process are unfounded save for those directed to the question of alternative employment. He was put at risk and made aware of the reason. He was given the opportunity to present his arguments, which he did at length, personally and through his legal advisers. His case was given careful consideration at first instance and on appeal. He was afforded ample explanation for the adjudications at both stages. There was, if anything, rather more discussion (and consequential expense on lawyers' fees) than was warranted in circumstances where scope for profitable debate was conspicuously limited.

90. We return to the subject of alternative employment. Ordinarily, the employer who fails to draw a redundant employee's attention to vacancies for which he may be suitable will not be found to have acted reasonably. On the other hand, there is obvious force in the argument that neither of the vacancies which arose was suitable for the Claimant. Even at EVP level, the one in which he claimed to have an interest would have involved reporting to Mr Dhunnoo, who was substantially junior to him at the time of the redundancy and accepting a cut in pay of over 50%. That having been said, the Respondents created a difficulty for themselves by inviting the Claimant to put himself forward for one or both of the vacancies. Having done so, they exposed themselves to an arguable complaint when, having first made the mistake of sending the wrong job description they compounded the error by ignoring the enquiry of 18 August. At that stage they were not committed to appointing Mr Siddiqui. They could have suspended consideration of his application and at least engaged in further dialogue with the Claimant to establish his intentions and, if he was genuinely interested, make a considered decision whether to entertain it.

91. Weighing these factors and considerations together, we have concluded that the Respondents did not deal with the question of alternative employment in an ideal manner but that, while this amounted to a procedural blemish, it was not such as to render the dismissal unfair. In line with the authority cited above, we have asked ourselves whether the procedural handling of the dismissal fell outside the range of reasonable responses open to a reasonable employer in the circumstances. We find, not without some hesitation, that it did not. Our primary reason for that conclusion is that neither vacancy represented suitable alternative employment for someone in the Claimant's position. In this regard, we have borne in mind particularly the observations in evidence of Mr Carrington, who has considerable City experience. His judgement was that a downward move of the order under consideration would have been, within the Bank as within any City institution, wholly impracticable. It would have humiliated the Claimant, lead to grave difficulties in working relationships and significantly destabilised the senior management of the organisation. We accept that view. We do not think that the Respondents acted unreasonably in failing to take steps to make it possible for the Claimant to prosecute an application for a role for which he was patently unsuited.

92. For all of these reasons, we find that this dismissal was not unfair.

91. We should add, in case we are wrong and the dismissal was unfair on any procedural ground, that we are quite satisfied that the Claimant suffered no loss as a consequence. In the first place, we strongly doubt whether he would have pressed

the application. Secondly, we find in any event that, if faced with a serious application by the Claimant, the Respondents would have declined to appoint him and that decision would have been reasonable in the circumstances. On the first point, we were again impressed by evidence given by Mr Carrington. Based on his personal acquaintance with the Claimant, he considered it most unlikely that he would have been prepared to accept the huge drop in income and standing which appointment to the EVP role would have entailed. Having had the advantage of seeing the Claimant giving evidence over an extended period, we can see much force in Mr Carrington's assessment. On the second point, we are satisfied that, had the recruitment of Mr Siddiqui been suspended on 18 August 2011, and had the Claimant pressed an application for the EVP vacancy, the Respondents would have judged that he was not suited to the role for the reasons already summarised, and would have declined to appoint him. That judgment would have been, to put the matter at its lowest, a permissible one.

PID-based detriments

93. We have already held that there was no PID. Accordingly, the detriment claims based on that head are unsustainable and must fail.

94. The Claimant's difficulties do not end with the rather fundamental obstacle of the absence of any PID. The first detriment relied upon is not, in our judgment a detriment. There was a dialogue concerning the disclosure of information and, later, documents. It was overtaken by the Claimant's dismissal. The position taken by the Respondents' up to the dismissal was not unreasonable and the Claimant was not subjected to any material disadvantage in his capacity as the Respondents' employee or as a director.

95. The second alleged detriment was also no detriment. The essence of that claim was that the Claimant was put at risk of being held accountable for matters outside his control as a consequence of his position as an 'Approved Person' under the FSA regime. As we have recorded, the FSA was aware in early July that he was at risk of redundancy and that there was a real prospect of his leaving the organisation. The fact that no written notification was sent of the fact that he was physically away from the workplace for the last month of his employment was not a detriment to him.

96. As to the third detriment, here again no arguable detriment is established. We find that Mr Carrington and Mr Davies gave sincere accounts of their recollections of the meetings of 17 June and 7 July. The Bank did obtain the observations of Mr Young of the FSA. The fact that they did not obtain the views of Mr Bennett of Deloitte is incapable of amounting to a detriment to the Claimant. There might, perhaps, have been an arguable detriment if, overall, the Bank had not sufficiently examined and investigated the 'whistle-blowing' complaint, but we are satisfied that there was no such failure.

97. As we have already held, the fourth 'whistle-blowing' detriment is outside the Tribunal's jurisdiction, being based on the dismissal itself. The claim is a bad one on the facts in any event. As was common ground, the Respondents accommodated the Claimant's request for private medical insurance and life assurance cover to be

extended until 25 November 2011. There was no reason to think that he wished for any other benefits to be extended and the Respondents simply applied their ordinary practice in respect of those.

98. The final two alleged 'whistle-blowing' detriments relating to the shares are not tenable as detriments. If the Claimant genuinely harbours a sense of grievance, it is not a justified one. The treatment complained of was entirely in keeping with the Bank's processes and the way in which it dealt with other leavers (we will deal shortly with the exceptional cases of Mr Nabaa and Mr Haque, in the context of the discrimination claims).

99. Even if we had found any arguable detriment, the 'whistle-blowing' complaints based thereon would have failed for the further reason that the treatment complained of had nothing to do with the fact that the Claimant had been privy to the conversations of 17 June and 7 July. Our reasoning above in respect of the unfair dismissal applies equally here: the alleged 'whistle-blowing' was neither *the* reason for dismissal nor *a* reason for any of the alleged detriments.

100. In summary, we find that there was no 'whistle-blowing' event, that there was no detriment and that in any event there was no link between the matters relied on as detriments and the matters relied on as 'whistle-blowing' events. The treatment complained of, so far from being based wholly or primarily on the supposed 'whistle-blowing', had nothing whatsoever to do with it. These conclusions make a finding on good faith superfluous.

Discrimination

101. Here again we have reached a very clear conclusion. We are satisfied that the Claimant wholly fails to establish facts from which an inference of unlawful discrimination could in any circumstance be drawn. No 'background' fact points towards the possibility of discrimination. The Claimant is left with the immediate circumstances of his own case.

102. The first allegation is that the decision not to place Mr Dhunnoo in a pool for selection with the Claimant, alternatively not to 'bump' Mr Dhunnoo, was an act of unlawful discrimination. The pleaded case on racial discrimination alleged that the discrimination took the form of a bias in favour of persons of Kuwaiti or Pakistani origin. The Claimant was, however, apparently undeterred on discovering that Mr Dhunnoo is of Mauritian descent. In our view, the Bank's treatment of the Claimant's position as unique for the purposes of the redundancy exercise was wholly unremarkable. We would have regarded it as most surprising if Mr Dhunnoo, recently appointed to the key financial position of CFO and with impressive recent experience in finance work, had been placed at risk of redundancy. Had he lost his job to the Claimant in such circumstances, it seems to us that he would have had a powerful claim for unfair dismissal. There was no good reason to displace him in favour of a significantly more expensive executive who did not have recent finance experience. We are quite satisfied that it was open to the Respondents to look at senior figures in the Bank as independent players and to eschew the option of pooling. Absent any question of pooling, the notion of 'bumping' Mr Dhunnoo would have been all the more extraordinary and all the more calculated to expose the Bank to a valid claim by

Mr Dhunnoo. In short, it was, to put it at its lowest, manifestly within the Bank's discretion to consider the Claimant's case in isolation and there is nothing remotely odd or unusual about the fact that Mr Dhunnoo was not drawn into the area of risk as a consequence of the Claimant being redundant.

103. As for the treatment of Mr Nabaa and Mr Haque, again there is nothing in the facts which is capable of sustaining a *prima facie* case of unlawful discrimination. Those two individuals were the beneficiaries of favourable treatment resulting from exceptional requests made on behalf of Securities House. There is simply no basis for supposing that if the Claimant had been of different race (including colour) or religion or belief he would have received special treatment where others in circumstances the same as his did not. The comparison with Mr Nabaa and Mr Haque is not a "like for like" comparison as the legislation requires (see the 2010 Act, s23(1), which stipulates that there must be "no material difference" between the cases of the complainant and any comparator). The Claimant received standard, orthodox treatment of which no sensible complaint can be made. There is nothing pointing to unlawful discrimination and no basis on which an inference could be drawn. The burden does not shift. Even if it were upon the Respondents, we would find it amply discharged.

Outcome

104. For all these reasons, we are satisfied that the claims are unfounded and they are dismissed in their entirety.

A. M. Snelson

EMPLOYMENT JUDGE

Reasons sent to the parties on

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for Secretary of the Tribunals