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EMPLOYMENT TRIBUNALS

Claimant: **Mr G Moore**

Respondent: **Phoenix Product Development Limited**

Heard at: **East London Hearing Centre**

On: **Wednesday 1 May 2019 - Friday 3 May 2019**
Thursday 27 June 2019 - Friday 28 June 2019
Monday 1 July 2019 (Tribunal only)

Before: **Employment Judge Prichard**

Representation

Claimant: Mr R Powell (Counsel, instructed by Webster & Co, London, EC4)

Respondent: Mr D Stilitz (Queens Counsel, instructed by Brahams Dutt Badrick French LLP, London, EC3)

RESERVED JUDGMENT

The judgment of the Tribunal is that: -

The claimant was fairly dismissed and his complaint for unfair dismissal therefore fails and is dismissed.

Alternatively, if the claimant was unfairly dismissed, his compensatory award would be nil under the principle in *Polkey*, under s 123(1) of the Employment Rights Act 1996.

Likewise, his basic award would be nil because of his contributory conduct of 100% under section 122(2) of the Employment Rights Act 1996.

REASONS

1 The claimant, Garry Moore, is the inventor of a water saving sit-down toilet called

the Propelair Toilet. It works on the principle of substituting a lot of the water used in normal flush toilets, with air. It has an integral electric pump for the air. It is clearly a product for the moment, with growing concerns around water shortage and climate change.

2 The claimant spent some 8 years developing this from 2001 to 2009, receiving no income. Originally there was a company called Propelair Limited which is now a dormant company but which is an important vehicle for safeguarding the Propelair name. Phoenix Product development was incorporated in 1998 before the claimant started developing the toilet at East London University.

3 Like conventional toilets, the pans are ceramic. They contacted a pan manufacturer in China in 2010 to manufacture some pans to their spec. The first saleable pans arrived in the UK around 2012 and sales of the toilet did not start until the following year.

4 The development has been slow and problematic. As at 2016 a total of only 715 units had been sold even after £5 million has been invested in the company. As at today, £13 million has now been invested.

5 The claimant was the Chief Executive Officer of the respondent company from 2001 until 2017 when he was replaced by Dylan Jones. Apparently, the claimant consented. The claimant then formally stepped down as CEO.

6 He has had a service agreement since 2009 though the start of his continuous employment was in 2001. He continued under that service agreement until it was terminated on notice, with pay of lieu of notice, on 21 May 2018. His last day of active employment was therefore 21 November 2018. He was initially put on garden leave but subsequently that arrangement ceased and the claimant was paid the balance of his 6 months' notice in lieu.

7 Put shortly the reason for his dismissal was that he had fallen out irreparably with the Board who eventually decided that his presence in the company, at all, threatened to destroy the company itself.

8 The account leading to this dismissal is a mutually unhappy account of the claimant's reluctance, amounting to an inability, to hand over the reins of control to others. Despite that he had stepped down as CEO, throughout, the claimant continued to regard the company as his company, and his voice as the most important voice in it.

9 Over the years the claimant's 100% shareholding has been steadily diluted by new outside investors. Originally the first investor was NSF. NSF invested £0.5m conditional on the claimant matching their investment with an equivalent sum. He did. This was in 2009. The total shareholding consisted of £1.346 million.

10 At the time in 2009, the claimant had projected sales of 75,000 units in 2014 and was similarly optimistic by the time of the 2nd major investment round in 2014, then projecting sales of 85,000 units in 2017.

11 In early 2016, NSF became a shareholder making a substantial equity investment of £5m. At the same time Investec made a substantial equity investment and Mr Richard Smith of NSF (Nobel Sustainability Fund) and David Philips of Investec became non-executive directors on the Board.

12 Universal Partners, South Africa, completed their investment in July 2017 when Andrew Birrell of Universal was appointed as a non-executive director to the Board.

13 It is significant that David Phillips (Australia), and Andrew Birrell (South Africa), are from particularly drought-prone countries, where marketing prospects could be considerable. Richard Smith is UK based.

14 To date, a total of over £13m has been invested in Phoenix and successive rounds of investments pushed down the claimant's shareholding in the company by diluting it. In 2009, he had a controlling 58% of the shares. In 2014 that went down to 31% and in 2017 that went down to 10.3%. As of now, it is 5.3%. As of now, after the termination of his service contract, the claimant still has his shareholding but he has been removed as a Companies House Director.

15 The respondent company owns the patents for the toilet which the claimant has obtained and the the dormant company Propelair is a wholly owned subsidiary of Phoenix, the respondent.

16 By 2017, after the Universal Partners investment in July, the Board resolved that the claimant would be unable, as CEO, to take the company to success. If he had had the ability to do so, he would have come nearer to success by then. The 3 investors, and particularly Investec, who invest in developing companies stated that, where possible, they like to work closely with the founders of the companies in which they invest. However, it had become impossible to leave him in charge as the CEO. That was clear to them. The claimant agreed to step down. But after that there was a running dispute about his amended new job title.

17 The Board used the services of DRAX Recruitment, professional head hunters. Mr Dylan Jones emerged as a strong likely candidate. He has been a professional Chief Executive for a succession of companies many of which were large, and mainly blue chip. They interviewed a few potential CEO's. Ultimately, they chose Dylan Jones. One of the chief reasons for favouring him was that the Board considered he would be the candidate most able to get along with the claimant without upsetting him.

18 Even at that stage the Board were aware that there was an obvious potential for conflict in the future. As part of the recruitment process Mr Jones met with the claimant and they seemed to get on well together. The claimant told him that he would be focussing on the more technical aspects of the toilet. So, Mr Jones accepted the offer to be CEO. He started on 18 September 2017.

19 At that stage he was also appointed to the Board of directors. When he started, Mr Jones was concerned about the historic poor sales. He was also concerned over what he detected was a poisonous atmosphere within the executive management team.

20 However, he went along with one of the claimant's initial wishes which was to release Anthony Blaiklock, who at that time was the Financial Director. The claimant was very much the impetus for Mr Blaiklock's negotiated exit package.

21 Mr Jones found the claimant to be only half engaged in the company. He seemed to be spending a lot of time with his family and young children. However, he also started to detect the claimant's reluctance to let go. The claimant was constantly describing himself as the founder which Mr Jones found unhelpful. Of course, it is true that nobody could ever take that from him, as a matter of history. As a job title it was not helpful and it might have led outsiders, including other potential investors, to think that he was still the main voice in the company which, by the Board's agreement, he was no longer.

22 Mr Jones stated he was shocked by the claimant's attitude to the 3 investors. We accept his evidence in preference to that of the claimant, that the claimant did, in fact, refer to the investors as "fucking leeches". It was a clear remembered detail. We do not think he would have made this up, as he was generally restrained and understated in his account of events to the tribunal. At this hearing, the claimant toned this down saying he would not use that phrase. He said that he had been critical of investors, in the past, when he got the idea that they were trying to buy the company cheap out of insolvency. But that was never the case in this instance. There was no suggestion of imminent insolvency – just a lack of progress. This indicated that the claimant did not appreciate how the investors bailed his company out and stopped it from probably going into insolvency if it had overstretched itself in order to progress.

23 It was noted that the claimant had failed to establish a company sales department. The company, in fact, used a sales partner, an organisation called Save Money Cut Carbon which was headed by Mark Sait. When Mr Jones visited SMCC and spoke to Mark Sait, it was clear that the relationship of Mr Sait with the claimant was extremely bad. On Mr Jones account, which I have accepted, Mr Sait had said, with no exaggeration, that he was not prepared to have Garry (the claimant) on his premises any more and would not speak to him as he found him so aggressive and rude.

24 The claimant, at this hearing, has said that he has an extremely good relationship with Mark Sait and invited him as his guest to a trade show called "Loo of the Year". I have no doubt that was true. People act that way when valued trade connections are at stake.

25 He also noted a poor relationship with the UK manufacturers of the toilet who were ENL. The pans were sourced from China but the rest of the production was with ENL in the UK.

26 Mr Jones visited ENL and spoke there to its head, Richard Gamble. Mr Gamble had made an investment in the company himself but he said something very similar to what Mr Sait at SMCC had said. He did not want the claimant on his premises again. So, Mr Jones formed the view that whatever else the claimant did, he should not be involved in sales or in production.

27 A problem with the relationship with SMCC was that Mr Sait, in the past, had suggested potential modifications and improvements to the Propelair which the claimant

apparently rejected out of hand. This is a theme that has manifested itself throughout, in different ways. The claimant was unable to brook any criticism of the design of the toilet, on the basis that it was perfect as he had designed it.

28 Mr Jones appointed Dave Mosscrop as the Operations Director in December 2017. At the time the claimant seemed happy with his appointment. At this hearing he described him as a "good guy" although he regretted the fact that Mr Mosscrop came from Wakefield which is a long way from company headquarters at Laindon. (Mr Jones himself came from Northamptonshire, and weekly commuted).

29 Mr Jones' relationship with the claimant gradually went downhill. It was evident that he was deferential and respectful towards the claimant and it appeared to the tribunal that he wanted this relationship to work. He was proposing to the non-executive directors that the claimant should be "boxed off" to where he was more useful. Mr Jones suggested the role of R&D (Research and Development) Director.

30 The claimant never really embraced this proposed job title and continued to describe himself as Founder-Director which Mr Jones and others objected to because they considered it gave out the wrong message to outsiders.

31 Consistent with that he had also taken on Mr Nigel Conder as Sales Director, to ensure that these areas were covered, so that the claimant would not think that they should still be carried out by him.

32 Despite the claimant's struggle to accept Mr Jones as CEO, Mr Jones was patient and did not seek to involve the non-executive directors' support. The claimant, by contrast, started complaining to the NED's. His preferred contact amongst them was Andrew Birrell from Universal Partners, South Africa, whom he had always found most sympathetic. In late February he telephoned him with several serious concerns about Mr Jones performance as CEO. These complaints came at a time Mr Birrell was away skiing. Mr Birrell therefore suggested that he and Dave Philips arranged to meet with the claimant when they were both were back in the UK. Neither Dave Philips, who is Australian, nor Mr Birrell, who spends a lot of time in South Africa, were often in the UK.

33 Mr Birrell met with the claimant on 9 March at Laindon. He subsequently described the meeting as "heavy-going" but nonetheless it is clear from his email of that same day that he accepted the claimant's criticisms as being potentially valid. One was that Mr Jones had taken on another CEO role elsewhere since he had joined the respondent, and that was against their agreement.

34 There was an allegation that Dylan Jones had failed to sign a purchase order for ENL meaning that production of the Propelair toilets would be considerably delayed. The claimant himself had signed the purchase order apparently. The claimant was also concerned that Mr Jones was "bringing in his own pals on soft deals". Apparently, Dave Mosscrop had been offered more favourable remuneration than the claimant, and he was also given equity in the respondent.

35 Mr Birrell proposed bringing in an outside HR consultant who was an acquaintance of his. Nicky Bicket apparently specialises in Organisational Development,

Conflict Resolution, and Team Building. Mr Birrell considered he was exactly what the company was looking for. He proposed to the other NED's that they should ask Mr Bicket to visit Laindon to look at the business plan and to see if Mr Jones would be capable of delivering it. He was actively considering reversing the appointment of Mr Jones. He stated to them:

> "Do we have the confidence that Dylan can lead the team to deliver the strategy. On performance to date (lots of excuses, little delivery), I am losing patience. We have had him in places for 5 months and he has now had time enough to find his feet. If we made a mistake appointing him we must undo this error asap".

36 Following that, the non-executive directors agreed to appoint Nicky Bicket to facilitate a review of the organisational and strategy issues. The review was scheduled for Monday, Tuesday 26 – 27 March 2018. (That review and meeting, which everybody attended, has been referred to as the "off-site").

37 As part of the preparation for this Mr Jones and the claimant had a pre-meeting around 20 March to see what they could agree to do in advance of the full review. The pre-meeting was not a success at all and Mr Jones recalls the claimant as saying that the role of a CEO was to do "everything I don't want to do, that is admin, HR, and budgets". But he then said he should be responsible for all other aspects of the company so this did not bode well for the forthcoming off-site.

38 In advance of the review the claimant sent a detailed critique of Dylan Jones as he had been requested to do when he earlier met with Andrew Birrell on the 9 March. He sent it on 22 March.

39 The following day Mr Bicket sent an email to the 3 non-executive directors which has become the document most read in these four trial bundles. Mr Bicket had carried out a preliminary review and had also spoken to ENL and SMCC, as well as the management team individually, including the claimant. He stated of the claimant:

> "The real problem (although Dylan has not dealt with it) is not Dylan but Garry and that, probably unwittingly (being generous), Garry would attempt to sabotage any CEO coming into the business."

And then:

> "I am neutral in all this and will suspend judgment on Dylan until the meeting next week. I'm not trying to defend him but I think he is a problem which can be solved. But Garry isn't. And while that's not a unanimous view it's close to it. There is little understanding of his role and the value … he adds to the company today. In fact, he is seen as aggressively obstructive and defensive (not a contradiction and certainly not great attributes for progress and growth). While his creativity and skills are acknowledged people (generally) think that the product he has created is basically still a prototype which has not benefited from material development improvement in many years."

Then Mr Bicket published a draft agenda for the off-site which was attached to that email.

40 Consequent on that review and during it, various steps were taken. On the second day of it, 27 March, the Board addressed Dylan Jones and the claimant. It was stated there very clearly that the claimant's role was agreed to be R & D director with a clear and unambiguous reporting line to Dylan Jones. Dylan Jones had responsibility for clarifying the claimant's deliverables and to hold him accountable. Mr Jones had the Board's support to hold "tough conversations". Further:

> "Both DJ and GM were told that acting in best interest of the company was paramount. Politics and finger pointing had no part in an acceptable constructive culture … both DJ and GM admitted that they had not got on top of either business performance or, in particular, the relationship between them. They agreed that they would work on this.
>
> … The Board informed both that their patience was wearing thin and that this review meeting was the last which would be held to discuss performance. The focus was on delivery."

41 Apparently, the claimant and Mr Jones shook hands at this point and agreed to attempt to make it work. It was also resolved that there would have to be a single Chairman of the Board of non-executive directors for the same of better communication with Dylan Jones.

42 There was a separate meeting, to which the claimant was not party, between Dylan Jones, David Phillips and Richard Smith discussing performance concerns. It was thought it would not be helpful to have him as a party to that meeting. They were critical of Mr Jones for failing to grasp some of the practical issues. It had been stated in the run-up to the off-site that Mr Jones was more of a "large company" man, and he may therefore have had a problem dealing with the particular problems of Phoenix which was a small company. After this session the non-executive directors were optimistic for the future of the company.

43 Following this, the claimant caused some consternation amongst the 3 non-executive directors by an email sent on 11 April 2018. He had just transferred £60,000 of his own money into the Phoenix current account as a director's loan. He stated:

> "I do not want Cheryl putting company expenses on her personal credit card again. I'm going away tomorrow until the beginning of May so wanted to make sure Cheryl has some runway before I get back although she did say she needs £120,000 before month end so she will probably need some more help before I get back …"

There was much speculation as to how this has come about including the following from Andrew Birrell:

> "Do you think Garry knew about the issue and has waited in order to show Dylan in a bad light, or has he just realised the severity of the situation and made the loan? … If he has authority to do a transfer why didn't he transfer enough funds from the deposit account to resolve the issue and if he is still able to in the office or away but with online access what is stopping him from doing such a transfer?"

44 Before he was made aware of this loan, Mr Jones sent an email early the next day. It was clear from this that his patience with the claimant had snapped anyway. Such was the sensitivity that he sent it from his private personal email. He started by commending the positive off-site session but then proceeded to talk about the claimant:

> "There are deep issues around attitude and mindset. Garry persisted this week and referring to himself as "Founder Director" despite the crystal-clear message to him that he is our R & D director.
>
> At the same time Garry's approach to collaboration is very blinkered and limited. There is no sense of urgency or accountability. Noticeably he persistently ducks efforts to pin him down on substance and timing of deliverables in the innovation field during our meetings. This reluctance was not evident among the other team members.
>
> What is more concerning to me however is that I do not believe that Garry is actually capable of

> providing the disruptive innovation we need to fuel our growth beyond model 1. The evidence is hefty - 19 years and £10m of cash burn has resulted in 1 product (described by our biggest customer SMCC as "still a prototype") which carries a large number of imperfections and cottage industry fixes which prevents us from being able to scale up production to meet serious demand. Garry is unwilling to accept any criticisms and advice round his "baby" and this is a major drag factor. He has been on this project for several years too long and has developed behaviours and attitudes which are totally incompatible with our aim to be a high-performance team.
>
> I have discussed all of this with Nicky who I found a great sounding Board and counsellor and have come to the point where I believe that the best interests of the company and our shareholders will be best served by Garry's exit from the business."

45 Following this, there was a conference call between Dylan Jones and the 3 non-executives. Mr Jones planned to import fresh talent from outside. He had sounded out the field in general with DRAX the consultancy through which he himself had been recruited to Phoenix.

46 From all the correspondence surrounding this call Mr Jones remained future-focused. As he himself put it: "I want to play the ball and not the man". He proposed a new role to be taken up by somebody else. He had come to the firm conclusion now that the claimant lacked the capabilities in terms of attitude, behaviour, and capability. He proposed the role of Director of Innovation.

47 At this stage a new Financial Director had been appointed initially on an interim basis - that was Tony Jones. It was agreed at the conference call on 18 April that he would start a recruitment process for a Director of Innovation. He had already talked to DRAX about sources of R & D excellence in Dyson, Acquilisa, Whirlpool, SodaStream, Bristan, Ideal Standard, Groehe, and Evac, all with compatible technologies.

48 It was shortly after this that the claimant and Ian Peck travelled to South Africa together, and met with David Vinokur who was the Chief Finance Officer in Universal Partners in South Africa.

49 After this meeting Mr Vinokur reported back to Andrew Birrell of Universal Partners. Copied in was Pierre Joubert, the Chief Executive Officer of Universal Partners. This caused enormous concern with the non-executive directors when it was forwarded to them. Mr Vinokur reported in his email of 25 April 2018:

> "They have still not applied for SABS [South African Bureau of Standards] approval and Garry seemed unsure how the process worked … The one thing Garry kept reiterating is that they are struggling to deliver their existing orders in the UK and he doesn't know how they going to deliver units in the short term in SA …
>
> He also indicated that the pipeline in the UK from a volume perspective is not good and that the Moto group order was an old relationship that has just been converted.
>
> He also indicated that Dylan joined 6 months ago and was not being monitored and he indicated that he has not delivered much to date.
>
> He said he was looking forward to understanding the outcome of the strategy session. It seems like there are people issues to sort out."

50 Notwithstanding that, Mr Vinokur arranged a meeting with Brett Solomon who is the Chief Executive of Vortex, a wholesaler of leading brands in the plumbing industry in

South Africa who have a very experienced management team. Mr Solomon had been in the industry for over 20 years. He himself was a mechanical engineer, the previous Head of Design with Vortex.

51 This email was what caused Mr Birrell's considerable patience to crack. Immediately he replied openly criticising the claimant to Mr Vinokur in the following terms:

> "As ever there is more than one side to a story. You have heard the world according to Garry. The Board has had independent advice that he presents the biggest disruption to the business and ability to deliver, and we have been advised to carefully consider his position.
>
> There is another side to the story. The Board is well aware of the issues and is dealing with them. We are managing Dylan who is doing what the Board needs him to do although Garry is sniping on the sidelines and not being at all constructive."

And further:

> "… Whilst Garry was part of this and supported the work [the off-site] he now seems to be saying something else, which brings his integrity into question.

52 Subsequently he forwarded the whole thread to David Phillips, Richard Smith, and also Nicky Bicket:

> "Fyi I am now clear we should proceed to exit Garry asap. He is as toxic to the business as Antony [Blaiklock] was, and feel that he has signed his own warrant with the feedback to my colleagues in South Africa, which brings into question his integrity given he was part of the strategy process."

53 Soon after there was an exchange between Dylan Jones and Dave Phillips. Dylan Jones, with an eye to the future, wrote an email on 26 April stating:

> "Delivering on our plans requires a high-performance collaborative and committed team. We are not there yet, although with Dave Mosscrop and Tony Jones, we're on our way. Ian shows all the potential of being integral too [Ian Peck Director of Partnerships], and the talent I reviewed at DRAX yesterday for our Commercial and Innovation Director roles is impressive.
>
> Garry is not close to being a valued or valuable member of the team. In fact, he is a drag and a destabilising and undermining influence – one which he is now openly being questioned on by Tony and Dave. A 50/50 chance of Garry working out is not only a lottery but not a realistic bet either. He won't change."

54 This was a view to which Mr Jones was eminently entitled given the history. There was some "pushback" from David Phillips who stated:

> "1. I agree Garry seems to unfortunately behave in a professionally immature manner it troubles me when that plays out externally as it appears to have done with the UP team in SA this week. It also concerns me if we receive the same or similar feedback on Garry from SMCC and ENL which via Nicky in particular seems to be the case.
>
> 2. What I don't know is whether anyone has ever spoken to Garry directly to give him this feedback. I have offered up to do it but Nicky suggested this would undermine Dylan's position and I know if Dylan feels the same way. I actually disagree, but let's leave that for a second.
>
> 3. When we last spoke, we agreed a course of action that we will see a new R & D hire that Garry would report into and that his roles and responsibilities will would be very clearly defined and agreed as part of that and that he would then be put on notice that there will be zero tolerance for what we considered to be bad or negative behaviour. This would be coupled with Garry coming off

> the Board once it was confirmed we can do this and it didn't breach any of the agreements. I understand we are still waiting on confirmation of this latter point. I also made it clear I would be supportive of this approach. I remain uncomfortable over moving quickly to a termination outcome without having tried the other approach which we had agreed. Based on everything I'm hearing I think we need to action this asap, as in straightaway ... My point is I don't see my suggestion as a second chance for Garry as he wasn't put on notice that he had blown his first chance. I believe we must do that."

Andrew Birrell agreed with this, subject to saying that the timescales needed to be tight.

55 This plan never boded well because the technical invention side of the toilet was the claimant's central interest, the one that he had initially reserved for himself, with the initial plan of making himself the director of R & D. That plan, however, was not working. This was Plan B now. David Phillips' "pushback" is a clear plea for fairness. His description of "professionally immature" probably seemed to the others as an understatement. They were thinking more in terms of destructive and destabilising.

56 Dylan Jones later caught the mood in an email also on 26 April to Nicky Bicket forwarding the correspondence regarding the plea for due process stating:

> "Nicky … it is essential that the non-execs understand that the demotion route will take months to come to an exit conclusion, not even days or week, would involve lengthy convoluted and expensive legals, prolong the presence of a proven cancer in the business, provide an impossible runway for an incoming Director of Innovation, and create an enormous and poisonous distraction for me at the very point of take off for the business.
>
> Much the better route will be to offer a dignified package and the mechanism of warrants which allows Garry to hang on to a proportion of his 10% option bucket in return for future good behaviour outside our employment."

57 Regarding the David Phillips' Plan B, Dylan Jones had proposed an alternative job title for the claimant as "Head of Projects", chosen because it avoided the word "Director".

58 At the time the claimant's shareholding was 10.5% which entitled him to a Board seat as an employee and holder of more than 6.5% he would also have been entitled to be on the Board. This was Richard Smith's contribution on 1 May.

59 Mr Jones planned a meeting with the claimant sometime week commencing 7 May between him, the claimant, and Richard Smith. He sent a proposed agenda for that meeting, and wrote a script, for himself including:

> "The Board is very disappointed by the derogatory comments you made to UP in SA recently. This kind of behaviour must stop instantly and a recurrence will be viewed very dimly. Performance from you has been lacking across a wide range of activities for example product approval for SA [SABS] accreditations, and we have lost our WRAS and BSI certifications ….. and progress reporting and tracking on H2020 [EU].
>
> … This conversation is the beginning of a month's opportunity to demonstrate significant improvement under a formal process. This process will be documented as will this meeting. DJ and you will meet weekly to review progress and daily at 8.30am to map out that day's activity and deliverables."

60 Dylan Jones received advice from Nicky Bicket that the proposed process was going to take longer than a month which was obviously realistic, given Mr Bicket's knowledge of ,and experience with, unfair dismissal law and practice. He stated that, if it

was done too quickly:

> " … you will open yourself to challenges which are tricky to defend – and it will then be better not to embark on this process at all and just go to the settlement agreement route."

Mr Jones forwarded that advice to the non-executives:

> "To be and to be seen as a genuine process it is going to take a considerable length of time. Nicky reckons 6 months and his expertise is exactly why we have enlisted his help …
>
> I still think that the dignity/respect hurdle is satisfied much more by an immediate negotiated parting than by a performance management programme with a very senior individual.
>
> In summary, our course chosen this morning is much more complex and lengthy than we anticipated and potentially expensive, and I therefore recommend that we reflect and regroup to discuss shortly."

61 In the tribunal's view the advice of Nicky Bicket seemed sound. Performance improvement processes, to be fair, usually have to take months. And there were not just capability problems here, but attitudinal ones too. Mr Jones was understandably concerned that if they were trying to onboard more new talent having a process like this continuing in the background could have been disproportionately disruptive.

62 Around this time there was a crisis with the toilets installed in McDonalds in the Strand. This was one of the respondent's highest-profile installations. On Saturday 5 May McDonalds emailed the respondent stating:

> "We have major issues with the customer female toilets again. The toilets are blocked and full of water with human faeces. The water is even overflowing to the point of spilling on the floors. Because of this we are forced to use the toilets upstairs for women which has also one blocked toilet. This morning we tried to resolve this using the plunger which didn't work. I don't have any number to call as we are no longer working with Drain Busters. How can we solve this?"

63 The following morning, after nothing had happened, the franchise owner of the McDonalds in the Strand, wrote an urgent email to Ian Peck, David Mosscrop, and Terry Reece at Phoenix:

> "David, Ian, Terry
>
> …. an update would be nice. I had to call Drain Busters again yesterday and need to do it once more this morning. The whole thing is a serious inconvenience to our customers and therefore our business."

64 At this point David Mosscrop took this up on Sunday morning, as a matter of urgency:

> "Morning all, and all get back to me re visiting the Strand. This is a concerning situation. I don't know whether the issues are related to our installations or the drainage system. We've bent over backwards in recent weeks to ensure that everything is as good as it can be. I can only presume that they didn't have this number of problems previously. Can someone get there today please. CAN YOU ALL PLEASE LET ME KNOW IF YOU CAN MAKE IT TODAY. We need either to state that the problems are nothing to do with our installation or accept that they are and consider replacing some toilets (e.g. half)."

65 One presumes that Mr Mosscrop had copied in the claimant to this

correspondence. He had also copied in all the field technicians. The claimant joined in, 2 hours later, in the following terms:

> "Dave
>
> I am very concerned that you are talking about replacing some of our toilets as you don't even know what the problem is yet and there are plenty of other solutions if water flow is a problem without having to remove toilets.
>
> Please establish the facts before talking to ANYONE about removing toilets as this would be extremely damaging for us. I trust that you will instruct the guys not to offer removing our toilets as a solution to anyone.
>
> Garry"

66 At that point Dylan Jones then stepped into the conversation:

> "Garry
>
> It is inappropriate to write to Dave in this tone and copy all of our technicians in. Dave is picking up a nightmare situation over a bank holiday weekend he needs support from you (which he asked for on an operational issue)…… and not a public bollocking.
>
> Best
> Dylan"

To which the claimant responded later:

> "Dylan
>
> it is inappropriate for anyone to suggest removing our toilets especially our Operations Director, and I'm frankly stunned that he even suggested it."

67 Later, Mr Jones responded to the claimant stating:

> "Garry
>
> You and I will discuss this privately.
>
> Best
> Dylan"

He then forwarded it, on the bank holiday Monday, to Nicky Bicket stating:

> "Nicky thanks very much for calling me. Attached is this weekend's exchange with Garry, which I mentioned when we spoke. I will refer to it when Richard and I read him the riot act over his behaviour in South Africa.
> Best
> Dylan"

68 To finish the account, the McDonalds issue did resolve itself and indeed it was not the fault of the respondent's toilets at all. It is known that irresponsible customers frequently put large objects down the toilet to deliberately vandalise the toilets. In this case the culprit was the head of a toilet brush which was recovered from the drains. There was a detailed Propelair incident report to the customer following an inspection on

Tuesday 8 May after the bank holiday.

69 It was clear that Andrew Birrell was increasingly frustrated by the impasse and lack of progress. He wrote an email to the non-executives on 7 May, it again calling for a sense of urgency, stating that a process that lasted at least 6 months would stop any company progress. Particularly worrying was the following:

> "The company is not yet in a strong position and will need to raise further funding to have adequate working capital. There is no way that I can propose this to UPL at present given the issues in the Propelair team and Garry's discussion with my colleagues. They will not support another penny going into the business at this stage. It is the only troubled business in our portfolio (the rest might have challenges but also have solutions). Not moving Garry on will thus impair our ability to support the business as required as I am sure is the case in respect of Investec and STIL (Sustainable Technology Investment Ltd / NSF).
>
> 2. … Ultimately, I represent a smaller shareholder than Investec or STIL so have less risk but I'm starting to believe that the investment has a limited prospect of return of capital let alone return on capital for every day that Garry is on the Board. It needs to break free from his disastrous legacy and start operating like a proper business."

70 Even then there was "pushback", this time from Richard Smith:

> "Andrew thanks for that summary I agree with your points. I remain uncomfortable with the potential that Garry will be "surprised" if we terminate although he was clearly told in our strategy day wrap up [the off-site] discussion that failure to work effectively with Dylan would probably result in him leaving but I don't want to risk the company progress on that.
>
> I wonder if there is a way which gives him and the company a softer landing, such as potential for consultancy or being paid for his Board position, if he is no longer employed".

71 David Phillips sought advice from his people at Investec, particular Investec UK. (The claimant's wife, Kim Moore, happens to work in Investec UK in London).

72 The meeting between Richard Smith, Dylan Jones, and the claimant took place on Friday at 10am at the Holiday Inn in Basildon. It seems at that stage, without deciding the matter formally, that there would have to be a meeting with the claimant at which they might try to map a way to the future, either by a termination, or a demotion and trial period in the role of Head of Projects. Despite "pushback" from both Richard Smith and Dave Phillips, they could all see that the prospect of a trial period of at least 6 months was very hard to countenance at that critical time.

73 At the meeting on 11 May in Basildon, the claimant was told that there would be a formal Board meeting concerning his future. Minutes of the meeting were recorded both by Richard Smith and Dylan Jones. They had no HR presence there in the form of Nicky Bicket. The claimant was combative. Richard Smith stated his desire to avoid the legalistic process and the claimant, apparently, commented:

> "Tough shit, I'm sure you would wish to avoid a legal fight".

74 The claimant also suggested making negative comments in the press, at which point he was reminded by Dylan Jones that he should be careful of his ongoing responsibility as an employee, director, and shareholder. The claimant reiterated that the company was "his life" and that it was not all about the money.

75 Andrew Birrell had commented in his contributions for the Jones script:

> "He is not the first founder to be asked to move on. He is in illustrious company with Steve Jobs, and Dave's hero, Elon Musk, who was asked to leave PayPal."

Ultimately, Mr Birrell's voice prevailed. He gave the sensible advice that to just to start a performance management conversation without giving the claimant the full context of where that move was coming from might well irritate the claimant more. At that stage they did not yet know if the claimant would perhaps want to leave anyway. They had not taken any soundings on such options.

76 The upshot of the meeting was a letter of the same day, the 11 May, convening a Board meeting on 18 May:

> "to discuss your employment with Phoenix Product Development Ltd in the light of serious concerns that have arisen regarding your performance and conduct as an employee and director of the company."

77 Specifics mentioned were: (1) the David Vinokur conversation in South Africa; (2) the director's loan of £60,000 without authorisation; (3) failure to observe key company values following the 4-day strategy workshop in April 2013 (the off-site and subsequent meetings); (4) lack of engagement and product development regarding quality of ceramic pans from Thailand; (5) recent lapse of 2 industry accreditations given your responsibility for intellectual property and accreditation; (6) delay in obtaining product approval from South Africa (SABS).

78 The letter contained a repeated warning about the consequences of the claimant causing "negative PR". It said he might find himself subject to an injunction.

79 The Board meeting was to be on Friday 18 May. In the end it was moved to the following Monday, 21 May. The claimant wished for Jo Smith, their retained HR professional, to attend. On advice, Mr Jones said it would be better if she was stood down. The Board were not going to be represented by lawyers or HR professionals, it was a Board meeting. The claimant then wished Ian Peck, Director of Partnerships, to accompany him. Mr Jones was agreeable to that. This was more like treating it as a *quasi* disciplinary hearing, where an employee would have a statutory right of accompaniment by a colleague.

80 The claimant wrote a closely typed 11-page refutation of the allegations against him. The claimant refuted all 6 allegations in considerable detail. He also raised other points including Dylan Jones' failure to disclose a new directorship as required by clause 18 of the service agreement. The claimant's summary focused on his perception of Dylan Jones' many failings. (For completeness, Mr Jones said he had later disclosed his new directorship to the Board, and had also resigned from it).

81 At the time he characterised his complaints about Dylan Jones as whistle-blowing. However, that is not an allegation which he brought to this tribunal in the form of public interest disclosure complaint under section 47B or section 103A of the Employment Rights Act 1996.

82 The most serious allegations of all the allegations against the claimant was the first

- running down the company's prospects to a strong potential investor, David Vinokur in South Africa. The claimant attempted to make the argument that it was his duty as a Board member to be frank about how he saw the company.

83 The claimant read his closing statement in full at the meeting. Andrew Birrell joined by conference call from South Africa. Richard Smith was there in person as was Dave Phillips. As often happens at these meetings the claimant sent his long submissions in about 15 minutes before the start time of the meeting. It clearly was not a last-minute submission as it contained an enormous amount of detail. It must have taken him hours to write.

84 As Dave Phillips remarked in his evidence to this tribunal, it did not seem to him at that meeting the claimant was trying to plead for his job. He simply wanted to engage with all the allegations made, and to refute them.

85 The Board also stated, according to the minutes:

> "The Board noted several times the long and committed service of Garry Moore. It was noted that there is no desire to see his reputation diminished through a painful public exit: rather that if possible as part of a compromise package this should ideally include positively framed external and internal staff communication."

86 The claimant did himself no favours by once again referring to the respondent as "my" company. This had been a source of much dissatisfaction with him over the whole period and the claimant clearly lacked the insight to see that.

87 At the end of the meeting 4 of the NED's all voted on a resolution that the claimant's employment should be terminated. All but the claimant supported that resolution.

88 The meeting took approximately 3½ hours including 45 minutes for the panel to separately consider the claimant's written submission even though the claimant himself read it aloud during the hearing.

89 For the purposes of this tribunal's decision I do not need to go into great factual detail here.

90 The following day, 22 May 2018, the claimant was sent a formal letter by Dylan Jones terminating his employment on 6 months' contractual notice under his service agreement. Thus, his last day of service would be 21 November 2018. During that period, he was to be on garden leave during which time he would not come onto the premises. He would monitor and respond to work emails and pass them on to the relevant person in the company. He was to co-operate with the smooth handover of duties and responsibilities, and to answer honestly and helpfully any questions he was asked. Further he was to keep the company informed of his whereabouts and contact details, and he was not to work in any other company. He was reminded of his ongoing directorship and his fiduciary duties. The letter was sent and signed by Richard Smith.

91 One notes immediately that the claimant was offered no appeal against what, in any language, is a dismissal letter, even if it is the record of a Board meeting.

92 Ian Peck, who accompanied the claimant, expressed surprise that they carried on that the claimant had sent a detailed refutation about 15 minutes before the start time would need further investigation meaning that the hearing could not have continued on the same day. That may well have been the claimant's intention. The Board apparently made a conscious decision not to do so. They regarded it as important to press on as the situation was urgent.

93 Many subsidiary items which I could cover would result in a judgment that is far too long and complex. I could mention the unimpressive pan quality of ceramic pans manufactured in Thailand in April 23% were found to be perfect; in May 59% were found to be perfect; in June 52%. They needed regrinding. In April 1% were rejected, May 5%, June 1%. After the length of time these pans had been manufactured, it was an unimpressive record.

94 It is best to focus this judgment most on the most important allegation of all - the David Vinokur conversation in South Africa. It is extraordinarily hard to understand how anything good for the company could have come out of that conversation. Indeed, reading David Vinokur's account and reading the claimant's own account in his submission before the Board meeting, it was quite clear it was a continuing polemic against Dylan Jones and a desire to promote the claimant himself as the responsible figure within the business who places purchase orders on time etc.

95 The claimant had no need to tell David Vinokur that he had raised complaints against the continuing work or lack of work by Dylan Jones. It went further than Dylan Jones, it ran down the entire strategy of the company for which Dylan Jones was responsible. David Vinokur had been left with a very bleak outlook. Andrew Birrell's subsequent response to the feedback email made it clear that he, Mr Birrell, was in real trouble, and in an invidious position with the shareholders at Universal Partners.

96 Perhaps the second most important allegation, and it was a more general one, was allegation number 3 - failure to observe the company values agreed at the four-day strategy workshop in March, and a later one in April (the off-site). The "finger pointing" as it has been called, started soon after the apparently amicable agreement between the claimant and Mr Jones on 27 March. That was an important session attended by all. The company had invested a lot of money in getting the help of Mr Bicket to oversee this process. At the end of it they believed that it might turn the company in general, and the claimant in particular, around. But optimism was short lived.

97 The tribunal considers that the email sent to Dave Mosscrop about the toilets in McDonalds in the Strand was indeed a disrespectful email which was circulated far too widely to all field technicians (hence Mr Jones' reference to a "public bollocking"). A subsequent exchange between himself and Dylan Jones showed the claimant to be entirely unrepentant and lacking any insight into the tone of his mail. It could be seen, and reasonably was, as the claimant "pulling rank" over a newer recruit. His submission on the topic repeatedly harped on about his resentment of the fact that when this crisis was happening over a May Bank holiday, Dave Mosscrop was 200 miles away in Wakefield. That was not the point. Managers are hired to manage, wherever they live.

98 The claimant's submissions over the lapse of the accreditations was, not for the first time, he sought to shift the blame onto a more junior employee, Andy Bennett who was an engineer who worked for the claimant. This ignores the fact, as I find, that the

claimant had an ultimate responsibility for those accreditations. He might delegate the work but he would remain responsible.

99 Matters did not stop there with the claimant's dismissal. During the process the claimant had raised 2 major sets of complaints which the Board considered needed addressing.

100 On Friday 1 June, Mr Smith emailed the claimant and the other Board members, including Dylan Jones, to say he was following up on issues raised in his note to the Board. He finally responded on 25 July 2018. It was worth waiting for. It went into a good deal of detail. Mr Smith summarised he was responding to the notes addressed to Andrew Birrell of 21 March which listed the points raised with him, i.e. (1) complaints against Dylan Jones raised orally on 9 March meeting with Mr Birrell and (2) the notes provided to the Board shortly before the start of the Board meeting on 21 May 2018. These were grouped under four headings: (1) staffing issues; (2) management of female staff; (3) governance issues and (4) claimant's role and the decision to terminate.

100.1 *Staffing issues*

100.1.1 The claimant stated that the company had no authority to negotiate the severance package with Anthony Blaiklock. Mr Smith found that it was all openly disclosed to the Board and that they took legal advice in order to avoid risk of potential litigation.

100.1.2 Dylan Jones did not arrange financial control or a secretary. Mr Smith agreed that following Mr Blaiklock's departure arrangements to replace him had not been put in place and it resulted in overreliance on secretarial help from Cheryl Burn. This had been addressed at the off-site and, as far as Mr Smith was concerned, had been resolved. Tony Jones was now the successor Finance Director.

100.1.3 Dylan Jones threatened Nigel Conder who had been Sales Director. Mr Smith had looked into this and was satisfied that the claimant's account was not correct. Dylan Jones had to the address the historic bad sales record somehow.

100.1.4 Dylan recruited Dave Mosscrop with no search or process because he knew him. Mr Smith accepted that Dylan Jones had known Dave Mosscrop; however, he was not solely responsible for appointing him. Mr Smith himself had interviewed him, as had the claimant. He also came with DRAX' commendation at the same time as DRAX had been sceptical about the Sales Manager candidate. Mr Mosscrop was Operations Director and Richard Smith continued to express satisfaction with Dave Mosscrop's performance.

100.1.5 Dylan immediately increased Ian Peck's pay from £65,000 to £75,000 with no formal review. Richard Smith stated that this was within the CEO's discretion to make non-material budget decisions but stated that he proposed that in future Dylan Jones would report

all such changes to the Board at least annually. Material changes had to be reported as and when they arose.

100.2 *Management of female staff*

100.2.1 This was a detailed criticism that Dylan Jones was using the female staff particularly Cheryl Burn, and Sapphire Marchant as personal servants. Interestingly Mr Smith stated that both Sapphire and Cheryl had stated this might be due to the fact that Mr Jones worked in larger firms before where he had had a personal assistant. He stated that he would make recommendations to Dylan to improve his communication style and "personal connection". He stated that he did not find it to be sex discrimination, he would have been very sensitive to any such allegation and it was not motivated by gender but by their relatively junior positions.

100.3 *Governance issues*

100.3.1 He stated the complaint was that Anthony Blaiklock had transferred £1m out of the Investec Investment into a new bank account, and also that Dylan had not changed the bank mandate, and had not met the bank manager, had not organised himself as a signatory and allowed Cheryl to put £4,000 per month company expenses on to her credit card. He talked to Cheryl about this who stated that she had never been out of pocket and was always immediately reimbursed. He stated that despite efforts NatWest had been slow in responding to their request to transition the bank authorities. He suggested that these be dealt with at future Board meetings.

100.3.2 That Dylan had 21 other directorships including a new one he took three months after starting he has not declared. Mr Smith researched this at Companies House and found it was incorrect. He had 5 active directorships, 3 of them predated his recruitment and the company agreed he could maintain those. However, 1 which was Complete Business Solutions post-dated his appointment. Mr Jones agreed (as stated above) to stand down from this and it was done after the off-site. It was confirmed on Companies House on 9 April. Mr Jones also apologised for failure to disclose. He also recommended that there be a requirement for all senior staff to sign a confirmatory statement of adherence to company policy.

100.3.3 Non-executive directors now intend to pay 15% interest on the £2m loan into the business without obtaining necessary authority from Cheryl. Mr Smith stated: "I am surprised by this assertion which you are aware is factually incorrect".

100.3.4 There was a complaint over the Articles of Association.

100.3.5 The claimant stated minutes had been failing to accurately record the proceedings of Board meetings. Mr Smith again expressed

surprise because the claimant had been given an opportunity to correct these minutes, which were circulated.

100.3.6 There had been a failure to ensure an annual return was delivered to Companies House for Propelair Ltd. Mr Smith found out that the claimant had been responsible for this and he should have picked it up himself. For the future, this responsibility would be reallocated in necessary changes to take over some of the claimant's former duties.

100.3.7 Concerned a complaint about the change of job title from Founder Director to Director of Innovation. Mr Smith did not agree there was no consultation. He also stressed that the claimant was not demoted, and that his terms and conditions were the same.

100.3.8 Concerned the claimant's complaints about Dylan Jones not being passed on to the other non-executives and shareholders. Mr Smith completely denied this saying: "The Board took significant action in response to your concerns including engaging external assistance and holding an off-site". That is evident from the correspondence I have been shown.

100.3.9 Dylan never defining my roles and responsibilities and producing a log of unfounded performance-related issues and threatening to terminate my employment. Mr Smith stated that that was not unusual when the company was in a ramp-up stage. He also stated that the product design and sourcing of toilet pans remained the claimant's responsibility and that the number of these pans arriving from Thailand which were faulty and needed reworking, was excessive.

100.3.10 Concerned a complaint that, at the off-site, staff were not given the opportunity to freely express their concerns, and that debate was stifled. Mr Smith observed that this complaint had never been made before and referred to the end of the off-site when the claimant had said he was committed to "making it work", and that the claimant had shaken hands with Dylan Jones. It was also made clear that should Dylan Jones fail to perform, that would result in the termination of his employment. However, he contrasted this with the claimant whose conduct had not improved and he continued to engage in conduct which, in a number of ways, risked damaging the company's business prospects. These allegations had been set out in the letter convening the Board meeting dated 11 May 2018 and were discussed at the Board meeting on 21 May.

101 Finally, the claimant made the overall whistle-blowing complaint that his complaints against Dylan Jones had resulted in his own dismissal and his complaints amounted to protected disclosures, or whistle-blowing. Firstly, Mr Smith said that the appointment of Dylan Jones was a Board appointment and Dylan Jones was at the top of the list of candidates that the claimant had put forward himself. Once again, Mr Smith says the Board did not ignore these issues raised in the list of issues of 21 March 2018 stating also that Dylan Jones did not take the decision to terminate the claimant's employment, that

was taken by the Board of which Dylan Jones was just one member, and he reassured him that Dylan Jones' performance would continue to be monitored.

102 In summary, Mr Smith therefore rejected all the claimant's complaints.

103 By contrast with the termination letter after the Board meeting of termination, Mr Smith offered the claimant an opportunity to appeal against his grievance outcome, and invited him to write to David Phillips within 5 working days. It was a thorough communication. His detailed comments amounted to 13 pages. It is a fact that the claimant did not appeal against the outcome of the grievance from Mr Smith.

104 Subsequent to this, on 16 August 2018, half-way through the garden leave period, Mr Smith wrote to the claimant informing him that the Board had resolved to end his employment, and pay the balance of his pay in lieu but that he was still bound by fiduciary duties as a Director of the company and that he would be paid any expenses properly incurred in any continuing duties he had carried out for the sake of the company.

105 It may have come as some relief to the claimant during this tribunal hearing, when we were told that, subsequent to the claimant's departure, Mr Jones had given up on SABS accreditation in South Africa. SABS had proved to be to be quite impossible to work with and there were other standards available in South Africa that they would use instead.

106 Those are the facts on which I have to decide on the claimant's unfair dismissal complaint.

Conclusions

107 I consider it was perfectly proper for the grievance to be dealt with by Mr Smith who had also dealt with his termination as one member of the Board. Paragraph 46 of the ACAS Code of Practice on Discipline and Grievances at Work (2015) provides:

> "Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently."

108 In this case they were not dealt with literally concurrently, but they were not dealt with by a totally separate and individual manager. They were dealt with by Mr Smith who was also a member of the Board who made the termination decision.

109 Starting with the basics, under section 98 of the Employment Rights Act 1996, the reason for the claimant's dismissal is not easily pigeon-holed. If I had to choose one, I would choose conduct. There are elements of capability, particularly to do with the performance of his responsibility in respects of pan quality assurance. Much of the claimant's behaviour appeared to the respondent reasonably viewed as deliberate, and was therefore "conduct", namely (1) the David Vinokur conversation; (2) the finger-pointing following the outcome of the off site on 27 March 2018; (3) the Dave Mosscrop email giving him a public dressing down over the McDonalds incident. It was all symptomatic of a deep-seated inability or refusal by the claimant to let go of the reins, despite the fact that his shareholding was at the time of termination only 10%. (Since it has gone down to 5.3% and he therefore no longer has a right to be on the Board below 6.5%).

110 I am also invited by the respondent to find that this is a case of irreparable breakdown relations between the claimant and the respondent and as such, constitutes "some other substantial reason" for termination, or a breakdown of the implied term of trust and confidence which must subsist in a contract of employment.

111 This factor is one that could found a case for gross misconduct and certainly found a case for dismissal for a first offence, even if it was not considered gross misconduct for the purpose of paying no pay in lieu of notice. Lapse of accreditations, and the continuing poor pan quality would not be such reasons for termination.

112 By referring to the meeting at which the claimant was dismissed as a "Board meeting", the respondent seeks to characterise it as something other than a disciplinary hearing. It has been suggested in argument that this is why an appeal was not offered, but I have to view this through the lens of unfair dismissal under Part X of the Employment Rights Act 1996.

113 Latterly, as a matter of procedure, the respondent, through Mr Smith, stated that the respondent had made a conscious decision not to offer an appeal. Mr Smith confirmed that the respondent had taken legal advice on this.

114 Mr Powell has rightly cited the evidence surrounding his own detailed note of interchange between Mr Smith, himself, and myself as the Judge. Mr Powell put to him that under their disciplinary procedure there were 5 days to present an appeal against dismissal, that the appeal had to be dealt with 5 days after that. Mr Smith, rightly in my view, stated that despite these being indicative timescales it was likely that any appeal in this case would have taken up much more time. I consider that that was a correct evaluation by Mr Smith. I would also agree with him that it was likely, given the claimant's stance on the whole matter, evidenced by his submissions, that this would have taken a lot longer and the company would have incurred the same sort of planning blight that they had been in as long as the claimant's situation remained unresolved and he continued with behaviour which, as I have agreed, was destructive and destabilising, or as Mr Jones put it, a "drag factor".

115 This has been the aspect of the case which has troubled me most and hence, in my judgment, I have given alternative reasoning, in case I am found to be wrong. The lack of an appeal is a serious procedural omission in any unfair dismissal case. I take into account the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 as I have to. Paragraphs 26 - 27 of the ACAS Code provide:

> "26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.
>
> 27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case."

116 It is a fact that the claimant did not appeal. The Code is phrased in such a way that it gives the claimant a right but does not give the respondent a corresponding duty to inform the claimant of the right, which is curious.

117 Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides:

> "207 (1) A failure on the part of any person to observe any provision of code of practice issued under this chapter shall not of itself render him liable to any proceedings.
>
> (2) In any proceedings before an Employment Tribunal any code of practice issued under this chapter by ACAS shall be admissible in evidence and any provision of the code which appears to the tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

118 The fact is, it is usual in a termination letter for the employer to expressly offer a right of appeal subject to time limits but it does not seem that the Code mandates that. I also note with interest that the claimant was given an express invitation to appeal the grievance outcome of 25 July and did not do so. I am therefore not convinced he would have appealed against his dismissal either.

119 The right under Paragraph 41 of the ACAS Code is in similar terms to Paraphs 26-7 in relation to disciplinary appeals:

> "Where an employee feels that their grievance has not been satisfactorily resolved they should let their employer know the grounds for their appeal without unreasonable delay and in writing."

120 If the claimant had expressly asked for an appeal and it had been refused it might be a different matter, but I only say "might". My primary determination is that this was a fair dismissal.

121 The respondent's counsel has referred me to authority - *Jefferson Commercial LLP v Westgate* UKEAT/1028/12, a case before Langstaff P and members. This involved a termination process where the claimant had been off sick. It had been argued in the tribunal, and before the EAT, that a further meeting in his case would have been futile and of no purpose given that there had been a total breakdown in trust and confidence. However, the tribunal in that case had said:

> "There was no further meeting, no further discussion and that cannot be a fair dismissal".

The EAT stated:

> "The tribunal appears to be stating a proposition of law. If so, it was wrong to do so. The law is contained in section 98(4). Section 98(4) does not in terms require a given or any procedure involving further meetings. That is not to say that in most contexts a decision would not be unfair if there were no such meetings".

Subsequently, paragraph 25:

> "It is no part of a fair procedure to be conducted for the sake of it if the procedure is truly [tribunal's emphasis] pointless."

122 Cited in that case was the earlier case of *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550 EAT, another case of dismissal on the grounds of some other substantial reason. The EAT in *Jeffrey* also confirmed that section 98(4) is the same regardless of what the category of dismissal reason is; conduct, capability or some other substantial

reason.

123 Mr Stilitz for the respondent urges me to find that this is such an exceptional case as *Jeffrey*. This was within the terms of section 98(4). I accept the legal premise and basis of the *Jeffrey* decision, as I must. It is not the first appeal case that has stressed the primacy of section 98(4) ERA (e.g. *Cabaj v City of Westminster Council* [1996] IRLR 399, EAT).

124 Even section 207 of TULR(C)A only requires that the Code shall "shall be taken into account". It can be taken into account, and then disapplied if the circumstances and the context are right. I consider that this is such an exceptional case.

125 I also consider that this was a case where trust and confidence between the respondent and the claimant had broken down irreparably. The numerous emails I have quoted extensively above, particularly from Andrew Birrell, and also Dylan Jones who was far closer to the situation in the UK, bear it out.

126 The claimant stated that his termination was somehow pre-decided by the Board. I cannot accept that. The termination at the Board meeting on 21 May was eventually held after a considerable amount of "pushback" from the non-executive directors, particularly Richard Smith and David Phillips. They both urged caution and a need to follow fair process. It was, following advice, when the NEDs realised how long this process could take (6 months or more), that they had to leave the option of an immediate termination open.

127 The final Board meeting had all options open but it clearly stated what the concerns were in the 6 allegations raised in the letter of 11 May convening that Board meeting. Mr Birrell had wisely said that just to put the option of demotion before the claimant without the whole context in which it arose would be wrong and unfair on the claimant. Eventually it was the wholecontext that caused the claimant's termination rather than any failed demotion/trial period. The claimant entered that Board meeting in a thoroughly confrontational mode and showing no insight, no regrets, no contrition, admitting no fault, and blaming others, particularly Dylan Jones.

128 That is just the sort of stance that tends to undermine trust and confidence. I consider that, had the claimant's tone been more conciliatory, the outcome might have been different but it had never been likely to be so. The last time he had stated a willingness to work together and collaboratively had been on 27 March and that had not lasted long at all. The prognosis was never good and Dylan Jones' assessment that the claimant could not change was accurate.

129 There was urgent financial pressure on the company which needed to improve immediately. When 2 out of 4 of the Board were pushing back on the termination option I cannot see how the claimant could persuade this tribunal that his immediate termination was pre-decided in any way.

130 Those emails are a genuine contemporaneous expression of views as they developed and evolved. They are potent source of reliable evidence. In a way it is fortunate that the NED's were so far apart in different time zones so this had to be conducted by email rather than telephone.

131 In this decision I do not need to precisely categorise all of the allegations against the claimant as relating either to conduct, capability or some other substantial reason under section 98(1)(b). There are significant conduct allegations which also fall under some other substantial reason that led to a breakdown between them justifying dismissal without a prior written warning. It is classic unfair dismissal law. Even though the claimant was paid his notice pay, and this was not treated as gross misconduct. An employer can do that without invalidating an argument, at the final tribunal hearing, that this was a breach of the implied term of trust and confidence.

132 Misconduct is also important when I come to my alternative analysis that I would have found that the claimant was guilty of 100% contributory conduct. As it started out, the investors all wanted to carry on working with the founder. That was the usual *modus operandi*. Dylan Jones was recruited because he was the candidate least likely to upset the claimant. Everybody wanted this relationship with the claimant to work.

133 That leads me to conclude that, if this relationship did not work, that was totally the claimant's fault. There was will in the Board to make it work. Despite Mr Powell's arguments I cannot accept that the claimant was not guilty of "culpable" conduct such as would found a total deduction for contributory conduct reducing any basic and compensatory awards to nil (*Nelson v BBC (No 2)* IRLR [1979], 346, CA).

134 Similarly, the respondent had good reason to dismiss the claimant as, and when, it did and therefore as in the above judgment the *Polkey* principle does apply. There were urgent financial concerns.

135 On the question of the disciplinary appeal, I note first that it is unlikely that the claimant would have appealed as he did not take that opportunity when invited to do so by Richard Smith in relation to the grievance outcome on 25 July 2018.

136 For all these reasons the claimant's unfair dismissal complaint fails and is dismissed.

Employment Judge Prichard

10 September 2019