EMPLOYMENT TRIBUNALS

Claimant: Dr J Aldiss	**Respondents:**	**1. Eville & Jones (GB) Ltd** **2. Mr R Jones**
Heard at Leeds ET	**On:**	**7, 8, 9, 12, 13, 14 and 15 (deliberations) September 2022**
Before		**Employment Judge Davies** **Mr M Brewer** **Ms L Fawcett**
Appearances **For the Claimant:** **For the Respondent:**		 **Ms A Niaz-Dickinson (counsel)** **Mr J Crozier (counsel)**

RESERVED JUDGMENT

1. The Claimant's complaints of direct disability discrimination are dismissed on withdrawal by him.

2. The Claimant's complaints of unfair dismissal, unfavourable treatment because of something arising in consequence of disability, failure to make reasonable adjustments for disability, unauthorised deduction from wages (accrued holiday pay) and wrongful dismissal are not well-founded and are dismissed.

REASONS

Introduction

1. These were complaints of unfair dismissal, direct disability discrimination, unfavourable treatment because of something arising in consequence of disability, failure to make reasonable adjustments for disability, unauthorised deduction from wages (accrued holiday pay) and wrongful dismissal brought by the Claimant, Dr J Aldiss, against (1) his former employer, Eville & Jones (GB) Ltd; and (2) (discrimination only) one of its joint chairs, Mr R Jones.

2. The Claimant was ably represented by Mr Crozier (counsel) and the Respondents, equally ably, by Ms Niaz-Dickinson (counsel). The Tribunal discussed reasonable adjustments with the Claimant at the outset. He did not identify any adjustment he needed. The Tribunal made clear that we would take

regular breaks and that the Claimant should ask if he needed a break or let the Tribunal know if he was struggling in any way.

3. The Tribunal was provided with a hearing file over 2000 pages long. We made clear that we would read those documents to which the parties drew our attention and we did so. We admitted a small number of additional documents during the hearing by agreement.

4. For the Respondent, the Tribunal heard evidence from Mr I Parsons (chartered accountant); Mrs N Saunders (qualified solicitor and HR consultant); Mr S Kingsnorth (HR consultant); Mr P Eville (joint chair of First Respondent); and Mr R Jones (the Second Respondent and joint chair of First Respondent). The Tribunal heard evidence from the Claimant on his own behalf.

Issues

5. The Respondent admitted that the Claimant was disabled at the time of the events complained about because of the mental health impairment of bipolar disorder. The claims and issues had been identified and agreed at preliminary hearings and were refined at the start of the final hearing. In closing submissions, the Claimant withdrew his complaints of direct disability discrimination. The issues for the Tribunal to decide were therefore as follows.

Unfair dismissal

5.1 What was the reason or principal reason for dismissal? The First Respondent says the reason was conduct or some other substantial reason. Did the First Respondent genuinely believe that the Claimant had committed misconduct or that there was some other substantial reason for dismissal?

5.2 If the reason was conduct or some other substantial reason, did the First Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant, in particular:

5.2.1 Were there reasonable grounds for its belief and were they based on a reasonable investigation;

5.2.2 Did the First Respondent act in a procedurally fair way;

5.2.3 Was dismissal within the range of reasonable responses?

Wrongful dismissal

5.3 Did the Claimant commit gross misconduct as alleged?

5.4 If so, was the First Respondent contractually entitled to dismiss him without notice?

5.5 If not, what damages are due to him in respect of the First Respondent's breach of contract?

Discrimination arising from disability

5.6 Did the Respondents treat the Claimant unfavourably by:

5.6.1 Suspending him;
5.6.2 Appointing Mr Parsons to investigate alleged misconduct;
5.6.3 Mr Parsons adding additional allegations against him;
5.6.4 Appointing Mrs Saunders to conduct the disciplinary hearing;
5.6.5 Dismissing the Claimant on 17 August 2020;
5.6.6 Appointing Mr Kingsnorth to hear the Claimant's appeal; and
5.6.7 Not upholding the Claimant's appeal?

5.7 Was the sending of an email to Mr Eville on 11 May 2020 something arising in consequence of the Claimant's disability, in that his disability caused his behaviour to be inappropriate on occasions and this was one such?

5.8 If so, was the unfavourable treatment because of the email?

5.9 Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aim was to prevent further acts of misconduct and protect the business and its reputation.
The Tribunal will decide in particular:
5.9.1 was the treatment an appropriate and reasonably necessary way to achieve the aim;
5.9.2 could something less discriminatory have been done instead;
5.9.3 how should the needs of the Claimant and the Respondent be balanced?

Failure to make reasonable adjustments for disability

5.10 Did the Respondents have a provision, criterion or practice ("PCP") of requiring the Claimant to work long hours and manage a heavy workload?

5.11 Did it put the Claimant at a substantial disadvantage compared with persons without his disability?

5.12 What was it?

5.13 Did the Respondents know or could they reasonably have been expected to know about the disadvantage?

5.14 When did the duty to make reasonable adjustments arise?

5.15 What steps could have been taken to avoid the disadvantage? The Claimant suggests:
5.15.1 Reducing his working days;
5.15.2 Reducing his working hours;
5.15.3 Arranging support (a PA or secretary);
5.15.4 Allowing a period of leave;
5.15.5 Varying or removing his duties;
5.15.6 Varying or removing his responsibilities (e.g. passing them to the joint Managing Director or someone else).

5.16 Was it reasonable for the Respondents to have to take those steps? When?

5.17 Did they do so?

Unauthorised deduction from wages

5.18 Did the First Respondent pay the Claimant less than was properly payable to him on termination of his employment, in that it failed to pay him for 60 days' accrued but untaken holiday? The Tribunal will decide:
5.18.1 What holiday had the Claimant accrued in the holiday year?
5.18.2 What holiday had he taken?

5.18.3 Had the Claimant accrued and not taken holiday in previous holiday years?
5.18.4 Was he permitted to carry it forward?

Findings of fact

6. We begin with some observations about the evidence of the witnesses. The Tribunal found that all of the Respondents' witnesses were doing their best to give honest and accurate evidence to the Tribunal. They made appropriate concessions in cross-examination and gave evidence that was broadly consistent.

7. By contrast, the Tribunal found the Claimant's evidence lacking in credibility in many respects. The Tribunal, of course, made allowances for the passage of time and for the Claimant's mental health condition. We did not consider that those matters accounted for the shortcomings in his evidence. He had a tendency to avoid answering the question or to answer a different question. He frequently gave evidence that was inconsistent with what he had said on other occasions. He made assertions that did not withstand scrutiny when properly examined. Some of his answers and explanations were wholly implausible. By way of example only:
   7.1 As explained below, one matter of concern that was addressed in the disciplinary proceedings that led to the Claimant's dismissal was the operation of what he referred to as a "shadow" Director's Loan Account ("sDLA"). In cross-examination, he said that the sDLA was to offset his 2018 bonus payment and the DLA was to offset his 2019 bonus payment. That had never been said before, throughout the disciplinary process. Different explanations were given during the disciplinary process, including that the sDLA was for payments that had VAT and the DLA was for payments that did not. This was an example of inconsistent evidence.
   7.2 The Claimant repeatedly gave evidence that the sDLA and the DLA were exactly the same. He was asked, if that was so, why he operated the sDLA at all. He was unable to provide a logical or consistent explanation. Invoices that were put through the sDLA included invoices for goods or services provided to an entirely separate restaurant business run by the Claimant. However, those invoices were not made out to that business, but to the First Respondent. There was contemporaneous evidence that the Claimant gave explicit instructions that some, at least, of the invoices should be prepared in that way. Again, he could provide no explanation why he had caused invoices that were properly payable by his restaurant business to be made out to his employer. These were examples of implausible evidence.
   7.3 It was put to the Claimant in cross-examination that he had provided no evidence that his bipolar condition caused him to "behave recklessly" or to "do stupid things", as he said it did. He said that he had. When asked, he said that it was in his psychiatrist's letters. He was taken to the first one (summarised below). He was asked where the letter included such information. He said that it was in the second letter. He was taken to the second letter (summarised below). He then said that the information was

readily available by googling bipolar disorder. This was an example of the Claimant asserting that the documentary evidence said something that it did not say when scrutinised.

8. The First Respondent is a provider of official controls in the meat industry, including on behalf of the Food Standards Agency. It is owned by Mr P Eville and the Second Respondent, Mr R Jones. The First Respondent has its origins in a small business set up by Mr Eville and Mr Jones. The Claimant started with the business in April 1995. It has grown over time and is now a large multi-national company with more than 700 employees and a turnover around £30 million. All parties acknowledge that at the time of the events in this claim, the company's governance and processes had not grown and evolved with the business as they should have done.

9. The Claimant was one of two Managing Directors of the First Respondent at the time of the events in this claim. The Respondents' evidence was that the other, Mr Avilla, had much narrower duties than the Claimant and the Tribunal accepted that evidence. It was consistent with the documents and with the Claimant's own account. The Tribunal had no doubt that the Claimant was the "lead" Managing Director. He described himself as the "face" of the company. The Claimant reported to the Board. Until about July 2020 there were two statutory directors, Mr Eville and Mr Jones.

10. There was no dispute that prior to January 2020 Mr Eville and Mr Jones had a very "hands off" approach to the company. They did not hold regular, formal Board meetings. They left the Claimant to run the business with complete autonomy. In his own words, "they left it for me to run" and had "no real involvement in the day to day running of the company."

11. The Claimant's evidence was that he had a "robust" relationship with Mr Eville and Mr Jones. He described it as akin to "squabbling brothers", who frequently fell out but always made up. Mr Eville and Mr Jones did not see it in quite those terms, but each described working with the Claimant for many years and coming to know that, while at times he could be charming and persuasive, at others he could be angry, aggressive and difficult to deal with. He did not like to be managed or questioned and they left him to run the business without close oversight, which was his preference. The Claimant and Mr Jones had differences of opinion or falling out over the years. The Tribunal had no doubt that there was a pattern of sometimes angry or challenging behaviour from the Claimant over the years that led to ups and downs in the working relationships, particularly between the Claimant and Mr Jones.

12. The Claimant had evidently experienced some mental health difficulties by early 2018 at the latest. His father died in May 2018, and that significantly affected his mental health, although he had experienced some symptoms prior to that. He was diagnosed with a bipolar condition in August 2019. The Tribunal was provided with scant evidence about the Claimant's condition and its effect on him. There were two letters from his consultant psychiatrist to his GP. The first was dated 23 March 2020. He described the Claimant's current state, having started new medication. The Claimant was "feeling fidgety" but his mood had not changed. He was still unable to enjoy anything he did. He felt as though his

brain was "like a fluorescent tube which he is trying to light." He said that he was still "losing his temper" although he had not been doing so when he was on a large doses of Venlafaxine. The second letter is dated 26 August 2020. The doctor principally discussed the Claimant's medication. He noted that the Claimant had run out of one of his medications and had told him that he became "extremely jealous and paranoid." The doctor said that his impression was that the Claimant had a Depressive Disorder, although at time it appeared to be more like Bipolar Affective Disorder.

13. There was, therefore, no detailed medical evidence about the precise nature of the Claimant's condition nor its effect on him. The Claimant gave brief evidence in his witness statement. He said that his condition meant that he could become extremely "hyper" and feel that he could take on the world. He could also become extremely low and suicidal. His behaviour could on occasion be erratic, anti-social and unpredictable.

14. Although the Tribunal was provided with limited evidence, medical or otherwise, we are able to take judicial notice of some of the common impacts of bipolar disorder. In those circumstances, we accept the Claimant's evidence that his bipolar condition meant that he could be erratic, antisocial and unpredictable.

15. The Claimant told Mr Jones about his diagnosis in a light-hearted email dated 8 August 2019. He wrote:

> *Just a quick note – I was eventually referred to a consultant psychiatrist who has diagnosed bi-polar disorder – probably no surprise to anyone …*
>
> *The drugs are shit in terms of my ability to concentrate, recall, focus, sleep etc. – just fucking perfect at tender time.*
>
> *Just thought you best know really … by the way he doesn't consider me dangerous to the general public … most of the time …*
>
> *Had to have a chuckle – I apparently specifically excluded psychiatric disorders on my health insurance cover when I renewed it last – nothing like a little foresight – I now have the pleasure of paying large bills to a man who says I'm radged … I'm sure I could have asked a number of people who would have confirmed the same for free!*

16. Mr Jones responded in kind: "Thanks for the heads up. As you say, could have given you that diagnosis for the price of a beer more than 25 years ago …" Mr Eville was told of the diagnosis at the same time.

17. Mr Eville's evidence was that the Claimant assured him that there was no impact on his ability to perform his role and nothing needed to change. He did not request any adjustments to his working arrangements or otherwise. He had complete autonomy so he could have made any adjustments he needed in any event. They were always very supportive. Mr Eville said in cross-examination that he did not accept that they should have commissioned a medical or OH report at that time. The impression he got from the Claimant was that he had had the condition for some time. It was not impeding his work, despite what he

said about the drugs. Although a condition had been confirmed, nothing really or practically had made any change. He did have general supportive conversations with the Claimant over the rest of 2019, particularly because he himself had some experience with mental health issues. Mr Jones's evidence was to similar effect – the Claimant assured him that the condition had no effect on his ability to fulfil his role; he could have made any changes or adjustments he wanted to as Managing Director with complete autonomy; and the Respondents were supportive of him, as they always had been. Mr Jones gave evidence that the Claimant would have taken any attempt to obtain a medical report at that time as a "personal affront" and would not have perceived it as supportive or helpful. They therefore relied on the Claimant to let them know if his prognosis changed or if he needed anything else from them. The Tribunal accepted that evidence.

18. Mr Jones also said that the Claimant would, at that time, often leave the office in the early afternoon, or only work at the office 2 or 3 days a week for a few hours at a time. The Claimant disagreed, and also said that he might be working at home if not physically in the office. The Tribunal saw the Claimant's diary, which was clearly far from comprehensive, and which did appear to contain a number of personal appointments or commitments. The Claimant had other business, professional and personal interests. The Tribunal found it more likely than not that the Claimant did not work in the office for the First Respondent full-time, and that he worked on his other interests during the working week as well. That was not a problem for the Respondents. They were satisfied that he was fulfilling his role and left him to it.

19. Mr Eville and Mr Jones both gave evidence that nothing really changed as a result of the Claimant's diagnosis. In Mr Eville's words, it was not a "pivotal" event. The Claimant had always been volatile and was presenting no differently following his diagnosis. Mr Jones said that the Claimant had always been "erratic and routinely inappropriate" but they did not take action and made allowances for him. Both Mr Eville and Mr Jones said that they continued to accept and support the Claimant for who and how he was, as they had always done. The Tribunal accepted that evidence, which was consistent with the Claimant's own account of the relationships over the years.

20. That is the background to the events that led to the Claimant's dismissal.

21. In January 2020 the Claimant was on business in Australia. He describes having a "nervous breakdown" although there was no medical evidence to that effect. However, it was clear that he experienced a significant downturn in his mental health and it appeared to the Tribunal likely to be linked with his bipolar disorder. We found that it was.

22. On 17 January 2020, Mr Haigh, of the First Respondent's external accountants/auditors emailed a number of people within the business to say that two of the group companies were, overall, showing a loss. Mr Jones replied on 18 January 2020, suggesting that this was "dire" and asking what had changed since they last spoke. He copied in the Claimant and others. Mr Haigh replied, explaining that part of the issue was that an extra contribution to the Claimant's pension account had not been included in the profit and loss (by

mistake) and part was a £30k corporate gym subscription for a gym that went bust before Christmas and had potentially been "over prepaid." Mr Jones replied on 20 January 2020 asking, "So suggestions as to how we deal with this please so FSA don't see a loss-making company with a negative balance sheet?"

23. The Claimant replied on 20 January 2020 (from Australia), "As usual you are all meddling without a fucking clue." He said that the £30k was in lieu of his 2017/2018 bonus and had nothing to do with the 2018/2019 profit and loss and gave an explanation in relation to the other payment. He said that he was sick to death of this panic every year and that it would no longer be his concern in the future.

24. The Claimant sent a second reply to Mr Jones's email on 20 January 2020. In that one, he wrote "We will resolve this when I'm back please Rob – it's merely an allocation issue." Mr Haigh replied to that email, "We can have a chat Wednesday when you're back." The Claimant responded, "Like fuck we can. I'll talk to you Friday."

25. There was a third email chain on the same day. Because the correspondents were in different time zones, it is difficult to be clear which emails were sent first. In the third chain, the Claimant emailed Mr Jones asking if it was ok for him to "cash in some of my outstanding holidays?" Mr Jones replied, "I guess – although given the issues with our accounts it might be best to see how that all looks first." He suggested picking it up at their planned accounts meeting on 28 January 2020. The Claimant replied, "There's no issue apart from moronic fuckwits. The company owes me shit loads and I'm not going to take the shit I've dealt with and sit back and accept any more – I've had enough."

26. At some stage on 20 January 2020 the Claimant sent an email entitled "Me" to Mr Eville, Mr Jones and Mr Avilla, in which he said, "You've got your tender result I'm going." The Claimant accepted that this was his resignation. Shortly afterwards he emailed to say that they needed to start talking through lawyers going forward.

27. The Claimant had a separate email exchange with Mr Parsons on 20 January 2020. He was chasing information about his bonus entitlement. Mr Parsons told him that he was waiting for some accounts. He had spoken with Mr Jones and he thought the external accountants should have something now. He was going to chase Mr Haigh. The Claimant replied, "Total bollocks Ian. Please confirm if you are working for Rob personally or for the company as I feel there is a gross conflict of interest. However, it is of little consequence as I have given notice of intention to move on."

28. The Claimant's email correspondence was plainly highly abusive and inappropriate. He accepts that. He apologised after the event, when his mental health had improved.

29. Mr Eville, Mr Jones and Mr Avilla each sent warm and supportive messages to the Claimant when they received his original emails. Mr Jones emailed on 21 January 2020. He told the Claimant that he had their full support as friends not just colleagues. He said that nobody wanted the Claimant to leave and

suggested exchanging emails was not helpful. He said that they would support the Claimant whatever he decided to do – stay, leave or something in the middle. He noted that the Claimant was clearly under a great deal of stress and suggested that he should not rush into anything but take all the time he needed. He suggested they all sit down next week and talk calmly. Mr Eville (who was on holiday) replied on 22 January 2020. He said that he was sorry to hear of the Claimant's woes and that he understood very well. He offered to drive up at a time and place to suit the Claimant, just to listen. The Claimant expressed his appreciation.

30. On 22 January 2020 the Claimant sent an email to Mr Jones, Mr Eville, Mr Avilla and others saying that he was finding it increasingly difficult to hold it together mentally these days and that they needed to develop a strategy going forward. Mr Avilla replied again encouraging the Claimant to take time, do what was best for him and let them know when he was ready to talk.

31. Mr Eville spoke to the Claimant several times after his return and met him two or three times during the two weeks after his return. He offered him support and encouraged him to pull back from the pressures of work and focus on his health. With Mr Jones's full support, he offered him a sabbatical on full pay for as much as a year or more. His evidence was that the Claimant did not want to engage with that suggestion and kept on going into the office. By 29 January 2020 he was back doing his job. Mr Eville agreed in cross-examination that he and Mr Jones could in theory have imposed a period of time off on the Claimant. He said that he raised that in every discussion with the Claimant. However, despite his best reasoning and understanding, the Claimant was adamant that he needed to return to work. He did not agree to take time off. Mr Eville felt that if he pulled rank and forced him to stay away, it would exacerbate his condition. Mr Eville was asked in cross-examination whether the company ought to have sought medical advice at that time. He did not think it should. He said that the Claimant was seeing his consultant psychiatrist regularly. His conversations assured him that things were under control and his general demeanour had changed reasonably quickly on his return. Mr Jones too met the Claimant during that period. Mr Jones's evidence was that the Claimant did not want to take time away from the business. He wanted to be in control of it and felt it could not manage without him. The Claimant agreed in cross-examination that this was his view. Mr Jones said that they did not feel that they could force him not to come to work, because he would not respond well to such an instruction. The Claimant agreed in cross-examination that the Respondents could not have been clearer in correspondence at this time about wanting him to step back and look after his health. He agreed that there was no pressure from the Respondents for him to do any work.

32. Both Mr Jones and Mr Eville said that a number of the Claimant's duties and responsibilities were now being carried out by or channelled through Mr Stanford (Head of Operations) or Mr Garfield (Business Development Manager). Mr Jones said that he monitored this through trusted people in the business. The Claimant disagreed that this happened. The Tribunal did not have detailed or specific evidence about any change in duties. However, as explained above, we found the Claimant's evidence generally far less reliable

than that of Mr Eville and Mr Jones and we accepted that there was some reduction in the Claimant's duties as described.

33. Mr Eville then suggested a different alternative to the Claimant, which he described as more of an ambassadorial role. He and Mr Jones discussed that option with him. The idea was that the Claimant and Mr Avilla would both step back as Managing Directors and that a Chief Executive Officer would be appointed. The Claimant was to have a different role. He says he was offered the role of chair, Mr Eville and Mr Jones say that the discussion was about a non-executive role but that he was not offered the role of chair. In either event he was to keep his remuneration, despite reduced duties. The Tribunal does not need to resolve the question whether the Claimant was offered the role of chair. The plan was agreed in principle by the end of the first week in February and steps were taken to start recruiting a CEO. The Claimant suggested a candidate. The context of course was that the Claimant had resigned and the parties were agreeing a future role in the context of that resignation.

34. Alongside the agreement to recruit a CEO, there was agreement to introduce better structure into the business, for example by holding monthly shareholder/directors meetings. It seemed to the Tribunal that as a result of the events in January and since, Mr Jones was more closely involved in the business than he had been previously.

35. Mr Jones's evidence was that certain concerns about the Claimant's conduct arose in March and April 2020. The Tribunal accepted that those concerns arose and were known about by Mr Jones and Mr Eville at that time, in particular:
    35.1 The first was that on 14 March 2020 the Claimant sent emails to employees that were dismissive about COVID-19. The Tribunal saw the emails and noted that they were copied to Mr Avilla and Mr Garfield, among others. Mr Jones's evidence was that he was told of the concern by Mr Garfield or Mr Stanford at the time. He would not necessary expect there to be a written record of that.
    35.2 The second was that sometime in March the Claimant had sanctioned an unauthorised pay rise of 4% for all office staff. The Claimant accepted that he had approved such a pay rise. The Tribunal noted that there was no Board minute reflecting an agreed 3% pay rise, but we noted the evidence about the lack of official Board meetings at that time. Further, Mr Jones gave evidence that there was no official Board agreement, but that the contract provided for a 3% pay rise and they had agreed they would stick to that. "The ink was hardly dry on the contract" when the Claimant agreed the 4% increase.
    35.3 The third was that the Claimant had given an instruction to Finance and Payroll to furlough any staff who reported symptoms of COVID. The concern was that this was an unlawful use of the furlough scheme. Mr Jones's evidence was that Mr Garfield reported this to him verbally, and he questioned the Claimant about it at a director/shareholder meeting on 8 April 2020. The Claimant told him at that stage, "nobody will find out." The Tribunal accepted Mr Jones's evidence about this. We noted that when he was asked about it in his oral evidence, Mr Eville said that he was there and recalled the conversation happening. He recalled the

Claimant being questioned by Mr Jones and saying that nobody would find out. Mr Eville said that it was at this stage that his thoughts about improprieties were really raised for the first time. It knocked him back and he needed to take a bit of time to reflect. The Tribunal found that compelling evidence.

35.4 The Tribunal noted that Mr Eville's and Mr Jones's witness statements were in almost identical terms on these points. However, we did not consider that this reflected anything more than the involvement of solicitors in the preparation of both statements, as both described. That is how the wording came to be identical. The Tribunal was entirely satisfied on the basis of the documentary evidence and the oral evidence of the witnesses that the substance of their evidence was truthful.

36. Other concerns emerged in May. These included the Claimant making dismissive comments about COVID-19: that working from home was skiving or "taking the piss" and that it was "a cold, not Ebola." This culminated in an email sent to all office staff on 11 May 2020 saying that, where possible and health permitting, he would like to see them back in the office as soon as possible.

37. In addition, some financial concerns began to emerge. There was no dispute that there was an agreement, including from the Claimant, that Mr Jones and Mr Hamilton (Financial Operations Manager) would review spending in the previous year, so as to identify cost savings during the term of the new main contract, which had just started. This was routine. The Tribunal saw an exchange of emails between Mr Jones and Mr Hamilton between 1 May 2020 and 11 May 2020 about some items of expenditure. There was a series of questions and answers, then further questions and answers. Mr Jones was evidently not satisfied with the information Mr Hamilton was giving him and (with one exception) was in the Tribunal's view asking probing and direct questions of the company's Financial Operations Manager to find out the true position. One of the matters they were discussing was an invoice of £22,498 for training. Mr Jones asked why external trainers had been used. Mr Hamilton told him that the training was for staff who had been sent out to Australia. Mr Jones asked why this showed under GB expenditure. Mr Hamilton told him that the training took place in Australia. The invoice was paid by GB because the Australian company did not have the cash at the time. It was recharged to Australia. In relation to another of Mr Jones's questions – about the use of self-employed locums – Mr Hamilton had initially said that Mr Avilla or Eliza might be best placed to answer the questions. Mr Jones replied that it was part of Mr Hamilton's personal responsibility to ensure the company complied with the law and tax rules, so he could not simply push this on to others. Mr Hamilton replied to say that he was not doing so, but that it had come from Mr Avilla and the Claimant. Mr Jones response was, ""I was only obeying orders" – isn't that what the Nazis said before being executed?" He asked a couple of additional questions. The Tribunal found that that comment went beyond simply asking direct and probing questions, but we did not accept the Claimant's assertion that Mr Jones was calling Mr Hamilton a Nazi.

38. On 11 May 2020 Mr Jones asked Mr Hamilton for a time to go through the files, the following week. A short while later, at 09:47 hrs, Mr Hamilton forwarded the

email exchange to the Claimant. Three minutes later, the Claimant forwarded the exchange to Mr Eville and wrote:

Pete in order to avoid WW3 and me totally losing it can you call Rob off please – his behaviour is totally unacceptable – the way he speaks to staff is disgusting – he is clearly unstable and paranoid and he is damaging our business by the way that he is treating the team – I can't be held responsible for what happens if you don't intervene Pete.

39. The Claimant sent a further email five minutes after that:

This 'new model' is not working – I shall not step aside if this continues – I shall take over in full control unless we agree that rob backs off – he is clearly not well and needs to take some medical advice – I am rescinding my resignation with immediate effect – we must stop the recruitment process immediately.

40. Mr Eville replied to say that he would deal with it, and asked the Claimant if he was ok. The Claimant replied that he was, "good thanks." A couple of hours later, Mr Eville sent a further email, saying that the CEO recruitment was going ahead and that they all needed to accept it with good grace. The Claimant replied, "Not unless I agree Pete."

41. Mr Eville's evidence was that he, Mr Jones, Mr Stanford and Mr Garfield had several discussions in early May about the Claimant's conduct and concerns that were emerging. They felt that they needed formally investigating but were concerned about how the Claimant would react to being questioned about them. They were also concerned that he would interfere with evidence or obstruct the investigation. Mr Eville spoke to Mr Jones about these concerns more than once during the first week in May. Mr Eville said that when he received the Claimant's emails on 11 May 2020 the tone was inflammatory and derogatory but they were fairly typical of the Claimant and "just more of the same." He did not think too much about that at the time, but he did note that the Claimant did not want Mr Jones asking questions, and that raised his suspicions that he had something to hide. Mr Eville said that he spoke to Mr Jones that afternoon. He mentioned the emails but did not tell Mr Jones about the specific comments made about him. He said something like, "He's made some rude remarks about you too, but it will only wind you up if I tell you." He and Mr Jones agreed that he would speak to the Claimant to see if there was a more conciliatory way forward to avoid having to suspend him. Mr Eville did call the Claimant the next morning, 12 May 2020. The Claimant refused to allow further examination of the accounts and expenditure and insisted he would block the CEO recruitment. He was not willing to be reasonable or co-operative, so Mr Eville gave up. He called Mr Jones and they agreed that the only option was to suspend the Claimant so that the concerns could be investigated. Evidently legal advice was taken from Clarion as well.

42. On 13 May 2020 Mr Eville called the Claimant to tell him that he was being suspended and then confirmed that in writing.

43. The letter of suspension told the Claimant that he was being suspended so that four allegations could be investigated:

43.1 Seeking to use the Coronavirus Job Retention Scheme for incorrect purposes;
43.2 Instructing colleagues to return to work at the company's premises when social distancing measures were not in place;
43.3 Instructing finance/payroll and Mr Erasmus not to declare the private use of a company vehicle for tax purposes; and
43.4 Instructing the finance department to manipulate the accounts for Eville and Jones Australia.

44. The Claimant was told that these might amount to gross misconduct. He was also told that he must not communicate with any of the First Respondent's employees unless authorised by Mr Eville. We note at this stage that the Claimant subsequently repeatedly breached this instruction. He spoke to both Mr Grzelak and Mr Hamilton to discuss specific disciplinary allegations, and he sent numerous abusive and threatening messages to Mr Eville, Mr Jones, Mr Hamilton and Mr Avilla. The abusive and threatening messages may well have been connected with his bipolar condition, but nonetheless they suggested that the Respondents' fears about how he would conduct himself were reasonable ones.

45. Mr Jones's evidence was consistent with Mr Eville's. He described their mounting concerns and discussions about suspending the Claimant in the run up to 11 May 2020. He said that Mr Eville did not forward the Claimant's 11 May 2020 emails to him, but just mentioned that they included rude remarks about him. They were not the dominant feature of any of their conversations. Having now seen the emails, Mr Jones described them as "typical Jason." Mr Jones said that after Mr Eville had spoken to the Claimant on 12 May 2020, they spoke and agreed that they were left with no choice but to suspend the Claimant. They jointly decided to do so.

46. The Claimant's case is that the disciplinary allegations against him were "trumped up". The real reason for his suspension and the disciplinary process that followed was that Mr Jones did not like the way the Claimant communicated on 11 May 2020 and that the Claimant "stood up to him". He wanted him out and decided enough was enough. His case is that his disability caused his behaviour to be inappropriate on occasions and his emails of 11 May 2020 were one such occasion. In cross-examination it was put to Mr Jones that he wanted the Claimant out of the business because he wanted his unstable personality moved to one side. He disagreed. Various matters were put to Mr Jones that were said to support the suggestion that Mr Jones was asking people to find a reason to dismiss the Claimant and had decided that he must leave the business. In particular:

46.1 Mr Parsons gave evidence that sometime in May he was involved in recruiting a new financial controller for the company. At that time, Mr Jones told him that there were concerns about the Claimant's conduct in relation to tax and financial matters. His view was sought about whether this should be raised with the candidate before they accepted a job offer. Mr Jones could not remember the date but agreed that at some point he felt he had to bring the concerns to Mr Parsons's

attention because his firm was recruiting a new head of finance and Mr Jones was concerned about doing so without telling them they had concerns about financial conduct of their managing director. The Tribunal accepted that explanation.

46.2 Mr Jones was asked about a statement that Mr Garfield signed during Mr Parsons's subsequent investigation. Mr Garfield said that he had "at the request of Rob Jones" prepared a list of potential issues that required investigation and identified documents that support them. Mr Jones's evidence in cross-examination was that he had not sent Mr Garfield off to look for matters for which the Claimant could be disciplined. He said there was a continuation of events since the episode in Australia. Up to that he had little day to day contact with the business. After that he was dealing frequently with Mr Stanford and Mr Garfield. During those interactions over a period particularly Mr Garfield brought to his attention a number of things of potential concern. Immediately after the Claimant's suspension he came back to him with further concerns. Mr Jones told him that if he had something that affected the day to day operation he should tell him, but if he had concerns about the Claimant's conduct, he should tell Mr Parsons, come clean, tell him whatever he knew, be straight and truthful. Again, the Tribunal found this compelling evidence. It fitted with the unfolding of events and the evidence from the time. It seemed clear to the Tribunal that once Mr Jones became more involved in the business, senior members of staff began raising matters of concern relating to the Claimant with him. That is how the CJRS concerns and concerns about the pay rise came to be raised with Mr Jones. We accepted his evidence that once an investigation had started, he told Mr Garfield to direct those concerns to Mr Parsons.

46.3 Mr Jones was asked about a statement made by Mr Bell, of the First Respondent's external accountants and auditors, to Mr Parsons, in which Mr Bell described a transaction of concern involving the Claimant, and said that he did not hear any further until he "spoke to Mr Jones regarding the position with the Claimant and was made aware he was under investigation." It was put to Mr Jones that he spoke to Mr Bell looking to identify allegations for which he could be disciplined. Mr Jones disagreed. He said that it was his legal duty to inform the company's accountants and auditors that its Managing Director had been suspended on grounds of suspected illegality. That was a convincing explanation and the Tribunal accepted it.

46.4 Mr Jones was also asked about a letter from a security company that provided security services for the Claimant's home. The company had written to the Claimant at some point after his suspension telling him that they had been informed by the First Respondent that he had departed the company and that they no longer facilitated the administration and finances for his home address. The Claimant said that he had spoken to the security company and that they had been told by Mr Garfield that he had left the business. The First Respondent's explanation was that the security company had been told that the Claimant should be contacted at home. In cross-examination Mr Jones said that he could not really comment. He knew that Mr Garfield denied

telling the company that the Claimant had left, but in any event, he had not decided that the Claimant should be dismissed.

46.5 It was put to Mr Jones that two named employees had overheard him saying that the Claimant would be going. He denied it. The Tribunal places little weight on this matter. The two named employees could have been called to give evidence for the Claimant but were not.

46.6 The Tribunal noted that the Claimant was removed from the company structure on the website in about June 2020 when the new CEO was appointed. There was an obvious explanation for that – the new CEO was in place, so the new structure, with a CEO and not an MD, needed to be put on the website. There was no agreement at that stage about what the Claimant's role would be. There is, equally, a sinister explanation – that it reflected a foregone conclusion to remove the Claimant from the company. The Tribunal did not think it assisted either way in those circumstances.

47. The issue whether Mr Jones wanted the Claimant out because of disability-related conduct on 11 May 2020, and set about securing that outcome, or whether Mr Jones and Mr Eville instigated a disciplinary process because of mounting concerns about the Claimant's conduct both before and after 11 May 2020, was central to much of the Claimant's case. The Tribunal considered all the evidence carefully. We had no hesitation in accepting Mr Jones's and Mr Eville's accounts. We have explained why we accepted that concerns were being raised with Mr Jones and Mr Eville, in particular by Mr Garfield, once Mr Jones became more involved with the business. It is right that there is little contemporaneous documentary evidence, and no contemporaneous evidence of concerns being raised with Mr Jones and Mr Eville, but that must be viewed in the context of the undisputed evidence about the way the company operated. There were no formal board meetings with formal minutes, things were done informally, people did not keep formal notes of meetings. In that context, the lack of documentary records carries less weight. The exchange of emails about financial matters started on 1 May 2020, days before the exchange on 11 May 2020. The central message of the Claimant's emails on that date does appear to be a desire to "call Rob off" from investigating financial matters, and we accept that it was that aspect that raised further concern. We have explained why we accepted Mr Jones's straightforward explanations in relation to Mr Garfield and Mr Bell. But fundamentally, we accepted that the tone and language of the emails of 11 May 2020, on which the Claimant places so much importance, were simply unremarkable in the context of his communications with the Respondents over the years. The January 2020 emails are a stark illustration. In January 2020 the Claimant had referred to his senior colleagues as "moronic fuckwits" and had been met with nothing but sympathy and support. He had resigned, but his resignation had not been accepted. Mr Jones and Mr Eville had worked with him and accepted him for who he was for decades. They had known of his Bipolar diagnosis for months. They did not take the opportunity to get rid of him in January 2020. There was simply nothing to support the contention, in that context, that for some reason these two particular emails in May 2020 triggered an elaborate charade designed to remove the Claimant from the company. The Tribunal accepted the straightforward explanation. A disciplinary process was instigated because

there were genuine and serious concerns about the Claimant's conduct. The Claimant was suspended because there were well-founded concerns about how the Claimant would react to being questioned and whether he would interfere with evidence or obstruct the investigation.

48. We turn to consider the disciplinary process that followed.

49. Mr Parsons was asked to investigate the allegations. He is the senior partner in a firm of chartered accountants and is himself a chartered accountant. He became professionally involved with the Respondents in November 2017, when the First Respondent's previous, internal, accountant left and was not replaced. His firm was not the First Respondent's auditor. His firm provided advice on commercial matters.

50. The Claimant suggested that Mr Parsons was a "close personal friend" of Mr Jones, and was his "puppet." Mr Parsons said in evidence that he was not a close personal friend of Mr Jones, they had a good professional relationship from November 2017 onwards. He accepted that he was joint trustee of both Mr Jones's and Mr Eville's family trusts, which held their shares in the First Respondent. He had been appointed to that role in April 2018. He was asked about this in cross-examination and about why he had not mentioned either in his investigation report or in his witness statement that he was joint trustee of the entity that held the controlling shares in the business. He seemed almost bewildered by the question and explained that it simply did not seem relevant to him. It was a technical appointment as a professional trustee. He followed the instructions and wishes of the settlors in terms of the management of the trust. It was not relevant to any of this. The Tribunal accepted that evidence. The fact that it did not occur to Mr Parsons to mention this aspect was a genuine reflection of that fact that his role as professional trustee of those trusts was not in his mind when investigating the allegations. Mr Parsons said that he was aware at the time that the Claimant had described him as Mr Jones's "puppet" although he was not sure that the Claimant genuinely held that view. Mr Parsons accepted that he was appointed a statutory director of the First Respondent on 2 June 2020. The implication appeared to be that this was some kind of reward or incentive in relation to the investigation process. However, the Claimant subsequently accepted that it had been his suggestion that Mr Parsons be appointed a statutory director. The role plainly was not a reward of any kind, and was known to the Claimant at the time.

51. The Tribunal accepted Mr Parsons's description of his relationship with Mr Jones and the First Respondent. He was a professional advisor in his capacity as senior partner of a firm of chartered accountants. That relationship had been in place less than three years at the time of these events. He trusted Mr Jones and Mr Jones trusted him, but they were not close personal friends. He was evidently experienced, robust and straightforward.

52. Mr Parsons's evidence was that he started investigating on about 16 or 17 May 2020. He spoke to Mr Gale, Mr Garfield and Mr Hamilton, as well as to Mr Bell. He had more than one conversation with some of them. He kept notes at the time, which he subsequently destroyed. He prepared typed statements based on what those people told him and the statements were signed as true by each

person. Mr Parsons accepted with hindsight that it would have been preferable to keep the original notes. The Tribunal accepted that Mr Parsons had held initial conversations with at least some of the witnesses before 22 May 2020. The dates on their statements were the dates on which all discussions were concluded and the individuals signed the statements prepared by Mr Parsons.

53. The Tribunal noted in particular:

53.1 The statement of Mr Gale, Corporate Finance Manager, said that he had made several payments from the company bank account in respect of a restaurant business run by the Claimant on the Claimant's instructions. The payments were described by the Claimant as being in lieu of bonus and the Claimant asked him to keep a record of these "shadow directors loan payments", which he had done. He had kept copies of invoices. The Claimant had requested that these be treated as costs within the company accounts and not posted to his usual DLA. This was described to Mr Gale as a tax efficient method of bonus remuneration compared to simply paying it through payroll. These payments followed on from an initial £30k payment made to Body Transformation Gym. Mr Gale provided information in relation to other allegations, some of which was helpful to the Claimant.

53.2 The statement of Mr Hamilton, Financial Operations Manager, contained a number of statements that were helpful to the Claimant, e.g. making clear that Mr Jones, Mr Eville and Mr Avilla had all had personal payments processed by the company, just as the Claimant did. Mr Hamilton's statement said that he had been "instructed" by the Claimant to change the accounts of the Australian business to reduce losses by carrying these forward. He had also charged Australian training costs to the UK business and was aware that part of the salary of the Australian manager (Mr Grzelak) was paid by the UK company. These had been charged to the UK company at the Claimant's request.

53.3 The statement of Mr Garfield, Business Development Manager, referred to having prepared a list of issues to be investigated (see above). It said that Mr Garfield was aware that the company had made payments for the Claimant's restaurant business and that Mr Garfield had been asked to do some work for that business. Mr Garfield said that he was aware that a 4% pay rise was implemented for office staff by the Claimant in January 2020 and that this was larger than the 3% in the tender submission to the FSA. He was not aware that the board had formally adopted the 3%. Mr Garfield had noted unusual activity on the Claimant's company credit card, including large numbers of Uber rides between the Claimant's home and his restaurant business and Eurostar tickets to Paris for the Claimant and somebody who was not an employee of the business. Mr Garfield's statement said that he was aware that the Australian business was loss-making and that the Claimant requested that these losses were not reported as such but were carried forward in its accounts.

53.4 Mr Bell's statement said that one of his clients was the person who sold the Claimant his restaurant business. At the time of the sale Mr Bell became aware that the Claimant was asking his client to prepare an invoice in respect of the restaurant's stock in hand addressed to the First Respondent. Mr Bell emailed the Claimant asking him to discuss the

matter. Mr Bell provided relevant emails. Mr Bell said that he had spoken to his client's management accountant. The payment for the stock balance referenced invoice 71709. Mr Parsons had now shown him invoice 71709, which was addressed to the First Respondent.

54. On 22 May 2020, Mr Parsons wrote to the Claimant explaining that he had been asked to investigate the allegations against him. He said that further allegations had been brought to light, and added another seven. They were:
    - 54.1 Making significant payments from the company's account for personal use and manipulating the accounting records to conceal that fact;
    - 54.2 Highly irregular and inappropriate use of the company credit card for expenses that did not seem to be company business;
    - 54.3 Using the company's resources and staff to carry out work for his personal restaurant business;
    - 54.4 Running the restaurant business alongside his role for the company and dedicating more time to the restaurant business;
    - 54.5 Taking an external role as a university governor without prior approval;
    - 54.6 Implementing a 4% pay rise for office staff when fully aware that only 3% was agreed and approved by the Board; and
    - 54.7 Providing an iPad and sim card to his wife.

55. Mr Parsons's evidence was that these allegations were brought to his attention unprompted during his initial investigations, primarily by Mr Garfield. He added them as additional allegations without reference to Mr Jones or anybody else. He considered his remit was to investigate the Claimant's conduct. The Tribunal accepted that evidence. It was consistent with what Mr Jones said about his conversation with Mr Garfield, and was consistent with the statements written by Mr Parsons but signed by the individuals at the time. Mr Parsons was not adding the allegations to achieve a particular outcome, because of the Claimant's emails of 11 May 2020. He was adding them because he had identified material in his investigation that gave rise to additional concerns about the Claimant's conduct that he felt should be investigated.

56. Mr Parsons attempted to meet the Claimant to discuss the allegations. The meeting was postponed a number of times. On 29 May 2020 Mr Gilchrist, a senior employment solicitor, wrote to Mr Parsons to say that he had been instructed by the Claimant. He asked for the meeting to be re-arranged again, and indicated that he might need to ask for documents because the Claimant no longer had access to his emails. He mentioned that the Claimant suffered with mental health issues. Mr Parsons replied, agreeing to postpone the meeting again but indicating that it would not be postponed further. Mr Parsons said, in response to the request for documents, that this was an investigatory meeting only, to obtain the Claimant's version of events. He did not consider there was a need for documents at that stage. The Tribunal noted that from this point onwards, the Claimant was represented by Mr Gilchrist throughout the disciplinary process, save that Mr Gilchrist did not attend the disciplinary or appeal hearings themselves.

57. In the event, the Claimant was not able to attend the meeting on 5 June 2020 and Mr Parsons agreed with Mr Gilchrist that the Claimant would answer written questions instead. They were sent to him on 11 June 2020, together with some

relevant documentation. These included questions about invoices paid by the First Respondent, including in relation to the Claimant's restaurant business; questions about his sDLA; and questions about the Australia business. One of the documents provided was an email exchange between the Claimant and Mr Hamilton on 3 June 2019. Mr Hamilton attached "Australia accounts." He pointed out that there was a loss for the year of $148k but noted that this included all set up costs for the new plants. He said that Mr Jones was "on at" him to send them over and asked if the Claimant was happy for him to do so. The Claimant replied:

> *As discussed – strip out set up costs record these as a loan from E&J GB and then assess the underlying profitability going forward then send across.*

58. The Claimant provided written answers to Mr Parsons's questions on 19 June 2020. In particular:
    58.1 In relation to the "Australia" allegations he said that he had not instructed finance to manipulate the accounts and had no possible motive for doing so. The divisions overlapped and work was carried out for each other regularly so there was always a degree of cost sharing. He was not involved in the production of the accounts. Later in the response, he said that set up costs could not be allocated in a set of monthly management accounts, because that did not provide an accurate view of underlying profitability. The one off set up costs would be recorded as a total sum and apportioned across each month to be cleared over the subsequent three years. That was what his email to Mr Hamilton indicated. He said that he had no knowledge of the Australian training invoice nor how it was treated.
    58.2 In relation to the allegation about payment of personal invoices, the Claimant said that they were paid by the First Respondent because the invoices were made out in the First Respondent's name. He said that he ensured that they were all allocated to a loan account that he referred to as his sDLA because it was not his actual DLA. That was because the invoices were not made out to him personally. The company owed him approximately £60k as part profit share from the previous year and he used some of that to make these payments. It also owed him £10k from a previous year. He said that Mr Parsons was aware of this. He also said that Mr Parsons would recall "advising me to generate an invoice from another company in order to clear the previous year's profit share owing to me." He said that a sum of £30k owed to him was paid in that manner.
    58.3 The Claimant said that he requested that the invoice referred to by Mr Bell be paid on that basis following the "advice" he received previously from Mr Parsons to clear outstanding profit share due to him from previous tax years using invoices from non-related companies.

59. Mr Parsons's evidence was that he noted that the Claimant's response included the allegation that a payment of £30k to Body Transformation Gym was made on his specific advice as a tax efficient way of paying his bonus. Mr Parsons did not agree with the Claimant's assertion and felt that he should produce a statement setting out his version of events. He did so. It was dated 2 July 2020. Mr Parsons wrote that he calculated the bonus due to the Claimant for 2017/2018 in March 2019. He then entered into discussions with the Claimant

about tax efficient ways to pay it. The Claimant said that he wished to support a family member in business, which was the operation of a gym and personal training. They discussed the Claimant waiving part of his bonus and his family member providing wellness services and gym membership to staff members. This was agreed with Mr Jones and the invoice was included in the accounts to 30 April 2019.

60. Mr Parsons referred the Tribunal to his email exchange with the Claimant at the time. On 24 January 2019 the Claimant emailed Mr Parsons:

> *On a different subject – I understand there is an amount outstanding due to me from previous year's profit share - Rob has asked to liaise and consider tax efficient payment options. Hypothetically speaking if another company with which I have nothing to do were to invoice the value of this amount this could be charged out along the same lines as V&O does no? None of the money would come to me and I would not benefit so tax would not be payable. The company concerned would charge for advisory services and is not VAT registered.*
> *Would this be an issue?*

61. Mr Parsons replied:

> *There is an amount due to you that is outstanding from previous bonus years that I understand needs to be tidied up. In principle there is nothing to stop this being paid to a third party company for services provided the directors agree. We'd just need a board minute acknowledging the services provided. In those circumstances no tax would be payable by you as you have received no income.*
> *We'd just need to make sure some service was actually provided so the thing isn't a sham but I'm sure this can be arranged in the circumstances. …"*

62. We note at this stage that throughout the Tribunal hearing the Claimant referred repeatedly to Mr Parsons "advising" or "instructing" him to clear his outstanding bonus by providing invoices from external companies directed to the First Respondent. That was not an accurate characterisation of what took place: as the emails make clear, the Claimant asked whether he could waive some of his bonus in respect of this specific transaction and Mr Parsons said that he could, provided that he had Board agreement and that the arrangement was not a sham. Both those emails were referred to by Mrs Saunders in the disciplinary outcome report (see below) and it is clear that copies were provided to the Claimant before that time.

63. Returning to the investigation, Mr Gilchrist had sent Mr Parsons the Claimant's written answers to his questions in an email dated 19 June 2020. He did not ask for further documents to be provided. He suggested that in the light of Claimant's response to the allegations about third-party invoices, if those were to be maintained Mr Parsons would need to remove himself from the investigation as he would be conflicted.

64. Mr Parsons did not step aside from the investigation. He produced a detailed written investigation report, with supporting appendices. He sent it to the Claimant on 3 July 2020. In relation to the Claimant's assertion that he had arranged for invoices to be made out in the name of the First Respondent and paid by it on advice from Mr Parsons, Mr Parsons referred to the statement he had prepared (which was included as an appendix to the report) and stated that he could not come to a conclusion on this narrow point given that it concerned his alleged advice. Mr Parsons emailed Mr Gilchrist on 6 July 2020 explaining that this was his approach. Mr Parsons gave evidence to the Tribunal that he was content that he remained sufficiently independent to continue the investigation and make findings on all the other points. He considered it prudent to excuse himself from making findings on this particular issue but he did not consider there to be any impact on the wider investigation. He maintained that he conducted the investigation impartially and professionally.

65. Mr Parsons concluded that there was no case to answer on six of the allegations. He concluded that there was a case to answer in relation to:

    65.1 making personal payments from the company's account;
    65.2 using the company credit card inappropriately;
    65.3 using company staff and resources for his personal restaurant business;
    65.4 accepting an external role as a university governor without approval; and
    65.5 instructing the company's finance department to manipulate the accounts of the Australian business.

66. The Tribunal found that Mr Parsons carried out an open-minded investigation. He was not instructed by Mr Jones to reach a particular outcome and we accepted that he came to his own views based on the evidence he had identified. We had no hesitation in accepting that he genuinely believed there was a case to answer in respect of those five matters. Clearly, the Claimant had put forward explanations and there were some conflicts of evidence and evidence that pointed the other way. Mr Parsons was asked about this in detail in his oral evidence. He made the point more than once that it was not for him to resolve those disputes. His role was to identify whether there was a case to answer. None of the matters explored with him in evidence caused the Tribunal to doubt that Mr Parsons genuinely believed, on the evidence, that there was a case to answer in respect of the five allegations that he identified.

67. Mr Parsons noted that at no stage had the Claimant suggested to him that his judgment had been impaired by his mental health condition. Mr Parsons said that the Claimant's mental health condition did not seem to him to be relevant to the issues at all.

68. The Claimant was invited to a disciplinary hearing to take place on 10 July 2020 and Mrs Saunders was appointed to deal with that. Mrs Saunders is a qualified and experienced employment lawyer, who remains on the solicitors roll. Around 2015 she moved into HR and has held senior HR roles since. At the time of the events in this claim she was Director of HR Consulting at Clarion, the law firm that was advising the Respondents in relation to the Claimant's disciplinary proceedings.

69. Mr Gilchrist emailed Mrs Saunders on 7 July 2020. He suggested that because Mrs Saunders worked for Clarion, it was impossible for her to be independent. He said that the appointment of someone from the company's lawyers to deal with a disciplinary hearing did not look fair and asked for confirmation that Mrs Saunders would not be involved. Mrs Saunders replied the same day, copying in the solicitor at Clarion who was advising the Respondents. She told Mr Gilchrist that she sat entirely separate to the employment team at Clarion and was not in any way involved in advising the First Respondent. Her involvement was limited to considering the disciplinary papers, conducting the disciplinary hearing, and recommending an outcome. She was not privy to the advice that the First Respondent had sought or received. She was independent and had made her part in the process clear to the company. She gave an assurance that she was entering the process with an entirely open mind about the outcome. She suggested that ultimately it would be possible to argue that any third-party organisation paid by an employer to conduct a disciplinary hearing lacked independence but pointed out that case law made clear that this was reasonable. Mr Gilchrist and Mrs Saunders exchanged further emails, but this remained Mrs Saunders's position and she did not step aside.

70. Mrs Saunders gave compelling evidence to the Tribunal about the importance of honesty and integrity to her. She explained that she would never accept instructions from the client if she felt that her ability properly to deliver a piece of work would or could be compromised in any way. This had led her to decline being involved in matters where she got a sense that the client wanted to dictate or influence an outcome. She would have refused this appointment if the outcome was dictated to her by Mr Jones or anyone else, or if her independence or decision-making ability were to be fettered or influenced. Her evidence was that the findings she ultimately arrived at were hers alone and not influenced by anyone else. The Tribunal had no hesitation whatsoever in accepting that evidence. Mrs Saunders was a robust witness who stood her ground and was manifestly a person of integrity. Her evidence to the Tribunal made that clear. The Tribunal considered in detail all of the documentation relating to the disciplinary process she conducted. We considered that it was done with rigour. She questioned witnesses time and again as new information was provided and was diligent in copying all relevant material to the Claimant and his solicitor for their input.

71. Mrs Saunders reviewed the investigation report and appendices, and identified questions for Mr Jones, Mr Parsons and Mr Eville. She received responses, which she copied to Mr Gilchrist.

72. Mr Gilchrist emailed on 20 July 2020 requesting various documents on the Claimant's behalf. These included details of profit share (bonus) calculations for 2017/2018, 2018/2019 and 2019/2020. Mr Gilchrist said that the Claimant needed access to all his emails from September 2019 to date and asked for permission to discuss the case with witnesses. He said that the Claimant did not "necessarily" require any witnesses to attend the hearing but would want Mrs Saunders to speak to a few employees. Almost 300 pages of documents were provided to the Claimant in response to Mr Gilchrist's request.

73. Clarion, in their capacity as advisors to the First Respondent, dealt with request about email access and witnesses. They told Mr Gilchrist on 22 July 2020 that the Claimant should identify any specific email he needed and they would do their best to provide it. They said that all relevant witnesses had been interviewed. The Claimant was not provided with access to his email account. There were emails thereafter in which Mr Gilchrist requested emails, some of which were provided and some of which he was told could not be found.

74. Mrs Saunders's evidence was that she understood that the reference to all relevant witnesses having been spoken to related specifically to the allegation about expenses. She did not read it as saying that the Claimant could not speak to any witnesses and she repeatedly invited him to tell her who he wanted to speak to. The Tribunal noted that in the disciplinary invitation letter dated 3 July 2020 the Claimant was told that the company did not intended to call witnesses at the disciplinary hearing and that if he wished to do so he should provide their names as soon as possible. That was repeated in numerous emails thereafter. Following Clarion's email to Mr Gilchrist on 22 July 2020, Mrs Saunders emailed him on 23 July 2020 asking which witnesses his client would intend to approach and what they would be able to add to the evidence already adduced. She wanted to understand more in order to determine potential relevance. If she believed witnesses were relevant there were a number of ways in which they could obtain evidence from them; the Claimant approaching them personally was not the only way. Mr Gilchrist replied on 28 July 2020. He said that the Claimant's case was that his entertaining was legitimate and that his expenses related to contacts, clients and potential clients. If Mrs Saunders needed any of them to corroborate that they were present at the relevant dates and times, the Claimant would need to contact them. Mr Gilchrist said that with regard to some of the employees the Claimant was confident that if they were asked certain questions they would confirm his version of events. The alternative was for Mrs Saunders to carry out her own investigation after the hearing, "i.e. in light of what Jason says, you may want to speak with certain employees to clarify certain things." The Tribunal noted that Mr Gilchrist did not identify any witness the Claimant wanted permission to speak to nor any witness he wanted Mrs Saunders to speak to.

75. There were delays to the disciplinary hearing for a variety of reasons. Mrs Saunders agreed some adjustments with Mr Gilchrist, including that the hearing would take place on two separate days. We noted from the transcripts that she took care to ensure that the Claimant was fit and well enough to participate on each occasion. At the second hearing, she went as far as offering him the opportunity to call Mr Gilchrist if he wished.

76. The first hearing took place on 29 July 2020. The Claimant had provided a written statement in advance and was questioned in detail by Mrs Saunders. The Tribunal noted in particular:

    76.1 The Claimant told Mrs Saunders that he had wanted to talk to Ms Hilton, Mr Garfield, Mr Hamilton, Mr Gale, Abby, Alex and Mr Grzelak. We noted that no such list had been provided to Mrs Saunders by Mr Gilchrist, and that the Claimant was not asking Mrs Saunders to speak to those people.

76.2 The Claimant told Mrs Saunders that he had no idea what the training invoice for Australia was, so he rang Mr Hamilton to ask him (in breach of the terms of his suspension). He said that Mr Hamilton told him that he had instructed Mr Hamilton to pay the invoice from the GB account because there was no money in the Australian account, and to charge it back to Australia. In relation to Mr Grzelak's salary, the Claimant told Mrs Saunders that Mr Grzelak had previously worked for the First Respondent. He was unemployed in Australia when the Claimant was looking for a manager for that operation, so the Claimant approached him. He said that Mr Grzelak agreed, but told him "I'm not working out here so I need some of my … I need my salary paid through the UK account because that's where I'm structured at the moment." The Claimant said that they therefore paid the salary through GB on the basis it was charged back to Australia. Then, as Australia grew, they increased Mr Grzelak's salary. But he was also then working for UK recruitment as well under Eliza, so the Claimant agreed to pay part of his salary from the UK and part from Australia for a period. As regards the email to Mr Hamilton about the accounts, the Claimant said that this was about being transparent. The set up costs were stripped out to show the underlying profitability. He told Mrs Saunders, "I said, if I show Rob [Jones] that were losing 150,000 bucks he's going to go nuts, we'd all go nuts because that's not what was happening." Mrs Saunders asked him whether this was correct practice and he said that it was what they always did. They did it for the FSA contract. Not for the audited accounts, but for the management accounts.

76.3 The Claimant told Mrs Saunders that his mental health was relevant to the credit card allegations and to an occasion when he was trying to get the vendor of the restaurant he bought to invoice the First Respondent. After a lengthy discussion, he said that he did not remember giving the instruction for that invoice to be paid by the First Respondent. If he had authorised it, it would simply have been logged against his DLA.

76.4 Later in the discussion the Claimant told Mrs Saunders that invoices would come through wrongly addressed to the First Respondent because he used his work email address and people would mistakenly address the invoices to the First Respondent. If that happened, he would ask for it to be allocated to his sDLA. He said that was different from the DLA because if the invoices had VAT on them he needed Mr Gale to "extract the VAT" to "make sure that he got charged for it." He confirmed later on that the only reason he kept the sDLA separate was the VAT issue. If an invoice came in in the First Respondent's name, he would ask Mr Gale to pay it and "lob it against" his loan account. The sDLA had started about a year ago. Later on, the Claimant said that the DLA and sDLA were exactly the same. Mrs Saunders identified that a distinction appeared to be that for the sDLA invoices were brought into the company, marked payable by that company when in fact that company was not the beneficiary of the goods or services in question. The Claimant simply said that the company would pay the invoices and he would pay the company back out of his loan account, but because there was VAT on them, they kept them separate.

76.5 At one stage, Mrs Saunders told the Claimant that Mr Gale had said that he (the Claimant) had specifically requested that the items treated as sDLA payments were treated as costs within the company account and not posted to his usual DLA. The Claimant said that he did not recognise that. If that was Mr Gale's understanding it was the Claimant's fault but that was not how he wanted it.

76.6 The Claimant said that the First Respondent always owed him bonus – they operated about a year behind – so he dipped into that through his DLA. Mrs Saunders asked the Claimant about the shareholders' agreement he had signed, which included a requirement that bonuses be formally agreed before being paid. The Claimant accepted that it was in the shareholders' agreement but said that it was not the way they operated. Mrs Saunders noted that the Claimant was saying that the company owed him £60,000 bonus from the 2018/2019 and £10,000 from 2017/2018. Mr Parsons had said that he was owed £23,874 in unpaid bonus. The Claimant said that he did not recognise those figures.

76.7 The Claimant referred to the £30k payment to a fitness company. He said that Mr Parsons instructed him to get a third party to invoice the First Respondent for that payment.

77. Following the first day of the disciplinary hearing, Mrs Saunders asked further questions of the Claimant, Mr Parsons, Mr Jones, Mr Eville, Mr Garfield and others. The questions, answers and additional documents were all shared with the Claimant. In particular:

77.1 Mr Parsons told Mrs Saunders that Mr Gale had told him that the first invoice for the restaurant was dealt with by the Claimant telling him to deal with it "like that £30,000 invoice, just keep a track of it". Subsequent invoices he was told to do the same and add to the list. Mr Parsons said that the £30,000 to Body Transformation Gym was treated as an expense of the First Respondent and was meant to be, so was properly treated in the company's accounting records. Subsequent invoices were incorrectly treated in the accounting records of the company.

77.2 Documents relating to the £30,000 transaction were provided. They included emails between the Claimant, AT (his friend and business partner) and IK (accountant for the restaurant business). The documents included the following:

> **20 March 2019** Claimant to Mr Parsons
> *…*
> *Ref the repayment/reimbursement (pension and third-party supplier invoicing) method we discussed for me: have you agreed this with Rob [Jones]? If so could you advise Bob [Gale] accordingly in terms of what he needs to do. The company that will be invoicing is Unlimited Fitness for corporate membership – 6 x £7k.*
>
> **20 March 2019** IK to AT
>
> *Subject: Corporate memberships*
> *…*
> *Just a quick email to recap on the above.*

The corporate membership invoices are to be raised before end of Feb 2019 for the amount of £7000 each. The transfer can be done anytime from now (ideally in March).
Once this is in Unlimited Fitness account, Kirt can withdraw the funds and transfer to you.

20 March 2019 AT to the Claimant forwarding above email

7 each?

20 March 2019 Claimant to AT

You know this as part of a wider "programme" – so let me check that the team is underway as needs – for ref though it will be x 6 as I'm committed to payments into other "arrangements" – will confirm ASAP.

20 March 2019 AT to Claimant

All fine with me.

8 April 2019 13:36 Claimant to Mr Parsons, Mr Jones and Mr Gale

…
Thanks Ian – all good – only difference being the sum invoiced for the wellness days being £30k instead of £40k.

77.3 Mr Parsons told Mrs Saunders that Mr Grzelak left the UK business on 31 October 2017. Prior to that he had worked developing recruitment links in Poland and Albania. He joined the Australian business in December 2018. He did not undertake any work for the UK business once he was working in Australia. The activities described by the Claimant took place at different times. There was no overlap between his recruitment activities before October 2017 and his work in Australia starting in December 2018.

77.4 Mr Parsons gave Mrs Saunders information about the Claimant's historic bonus figures and also sums he owed the company through his DLA. Mr Parsons did not mention the bonus calculation for 2018/2019 (which had been finalised but not approved at that stage) nor the estimated calculation for 2019/2020.

77.5 Mr Hamilton told Mrs Saunders that he would have to get the Claimant's approval before sending any accounts information to Mr Jones. He would have liked to send the information to Mr Jones without having first to send it to the Claimant. Mr Hamilton told Mrs Saunders that the Australian training costs did end up being in the UK company accounts. This had been recharged to the Australian company after the investigation into the allegations against the Claimant. Mr Hamilton commented that Mr Grzelak's salary arrangement was unusual and he thought it may in part have been put in place for personal tax reasons for Mr Grzelak. He noted that Mr Grzelak had done bits of work for the UK company and was not clear when that was.

77.6 Mr Hamilton told Mrs Saunders that a normal DLA had a specific nominal code for accounting. The "shadow" payments did not. Mr Hamilton said it would not be possible to identify the invoices that were marked payable by the First Respondent but were in fact for goods or services for the Claimant's other business interests as being personal expenditure of his rather than legitimate company expenses. He thought it was set up that way for "tax reasons."

78. The second part of the disciplinary hearing took place on 3 August 2020. The Claimant evidently started the hearing angry and agitated, particularly about disclosure of documents. Mrs Saunders checked whether he was fit to continue and offered him the opportunity to call Mr Gilchrist. The Claimant wanted to go ahead. During the hearing, the Tribunal noted in particular:

78.1 Mrs Saunders asked again about when Mr Grzelak carried out work in Albania, Poland and Ukraine. The Claimant said that it was after 2017 and was last year. He said, "ask Alex." The Claimant told Mrs Saunders that the split salary structure was put in place several months after the start of Mr Grzelak's employment. He increased Mr Grzelak's salary at that point and asked him how he wanted to do it from a tax efficient point of view. He was doing some work for the UK. They agreed to carry on with the payments coming into UK and Australia. The Claimant asked whether anyone had spoken to Mr Grzelak.

78.2 The Claimant told Mrs Saunders that he had been in touch with former employees (Peter and Jane), as well as Mr Hamilton and Mr Gale.

78.3 There was discussion of the £30,000 gym invoice, which the Claimant explained was offsetting some of his bonus. The Claimant said that Mr Parsons had said to get an invoice generated by a third party specifying wellbeing and gym services. "No wellbeing or gym services were provided but that was how it was paid out." Mrs Saunders clarified, "No wellbeing services were provided?" and the Claimant said, "No. I provided them separately for a different company entirely but the £30,000 certainly didn't provide well-being services to the company." Mrs Saunders asked who Body Transformation Gym were, and the Claimant said that it was a random company that he did not have any dealings with. Mrs Saunders clarified again that no service was actually provided. The Claimant said that the company belonged to a friend of a friend of a friend who needed some money. He did not know who it was and had never met him. He said that he forfeited £30,000 of his bonus and paid it to somebody he had no connection with and that he did that a lot. Later in the discussion, the Claimant said that the gym went bust subsequently. He did not say that that was why no services were provided.

78.4 There was discussion of an invoice addressed to the First Respondent. The Claimant said that happened because he was emailing using his work email address so the recipient generated the invoice naming the First Respondent. When it came through the Claimant therefore said, "We will pay it and log it against my DLA." Mrs Saunders suggested that this had been logged against his sDLA. The Claimant said, "They're the same thing."

78.5 There was a discussion about some without prejudice correspondence and the meeting then came to an end.

79. The transcript of the disciplinary hearing was circulated to the Respondents as well as the Claimant. That led to three further allegations being identified and notified to the Claimant on 4 August 2020. They all related to the £30,000 gym payment. It was alleged that the Claimant dishonestly misled the company about the ultimate recipient of the monies; that it was never intended to be used for corporate gym services and that the arrangement was fraudulent and a sham; and that the payment was to a private individual at the Claimant's request with the intention of him avoiding income tax. It is evident how those allegations arose in the light of what the Claimant said during the second day of the disciplinary hearing. The Claimant was invited to respond to the allegations in writing.

80. Mr Gilchrist provided further written representations on the Claimant's behalf on 12 August 2020. In relation to the £30,000 payment, the Claimant said that he had a history of being a "business angel" and he provided a list of substantial sums he said he had given or loaned to a variety of people. He said that the payment to Body Transformation Gym was made with no intention of its being repaid to him, the quid pro quo being that the First Respondent would benefit from the services offered by the gym. The payment was made into the corporate bank account of the gym and not into AT's account. The First Respondent had paid for fitness and well-being services for staff in the past. AT was a personal friend who provided mentoring services to a variety of businesses, including Body Transformation Gym. The Claimant had never met the owner of the gym. The Claimant said that AT and the director of the gym were working on a programme of services that could be delivered to the team in the office. Unfortunately, the director became unwell and was not able to deliver the services. The business was sold on 2 September 2019 and dissolved on 7 January 2020 with debts outstanding. Had things gone to plan, the First Respondent would have benefited from wellness services but for reasons beyond the Claimant's control this was not the case.

81. Mrs Saunders carried out further investigations. She interviewed Mr Eville, Mr Parsons and Mr Garfield and obtained further documents. All of this was shared with the Claimant on 14 August 2020. It included confirmation that £30,000 was paid to Body Transformation Gym by the First Respondent on 18 April 2019. This was preceded by emails between Mr Gale, the Claimant and AT asking for the relevant bank details because there was nothing on the invoice.

82. Mrs Saunders interviewed Mr Gale. He confirmed that he was keeping a tally of the sDLA payments so that they could be offset against the money the First Respondent owed the Claimant in due course. He thought that payments for a sizeable amount would go to the sDLA rather than the DLA. He said that payments marked payable by the First Respondent went on its profit and loss account.

83. Mrs Saunders interviewed Mr Garfield at length. Mr Garfield told her that Mr Grzelak had not worked for the UK company since joining the Australia company in 2018. £20,000 of his salary was deliberately put through the GB

books to keep the costs out of Australia and to conceal how much Mr Grzelak was earning. Mr Garfield said that he had queried this with Mr Grzelak that week and Mr Grzelak had confirmed that he had not done work for the GB operation since 2017.

84. On 12 August 2020 Mrs Saunders had emailed the team within Clarion advising the Respondents. One point she raised was that her original appointment envisaged her making recommendations to the First Respondent for them to determine any sanction. Given the assertions the Claimant had made about Mr Jones, Mr Eville and Mr Parsons during the process, Mrs Saunders thought that the First Respondent might prefer to have her, as someone independent, determine the outcome rather than merely make recommendations for them to decide. She asked the team to let her know if that was their preference.

85. Mrs Saunders produced a detailed outcome report, which was emailed to the Respondents on 14 August 2020. We do not set it out in detail here. Mrs Saunders upheld five of the allegations in full, two with mitigating features and one in part. In particular, she found that the Claimant had instructed the finance department to manipulate the Australia accounts and that this was gross misconduct in its own right; that he had made significant payments from the First Respondent's account for personal use and manipulated the accounting records to conceal that fact and that this was gross misconduct in its own right; and that he had deliberately and dishonestly misled the company in relation to the £30,000, including disguising the ultimate intended recipient. She found that the money was never intended to be used for corporate gym services for the benefit of the company and that the arrangement was fraudulent and a sham. This was gross misconduct in its own right. The Tribunal had no hesitation in accepting Mrs Saunders's evidence that this was her genuine view, reached after consideration of all the evidence. Mrs Saunders also reached the view the trust and confidence had broken down between the Claimant and the First Respondent. She recommended that the Claimant should be summarily dismissed for the incidents of gross misconduct she had upheld. In doing so, she took into account the Claimant's mental health, his long service and his clean disciplinary record, but given the gravity and number of the offences, she concluded that summary dismissal was the appropriate outcome.

86. When sending her report to the Respondents, Mrs Saunders again asked whether they wished her to take a decision on the company's behalf. Mr Jones replied to her on 15 August 2020 authorising her to make the decision on the company's behalf. It was, of course, clear what the decision would be. Equally, the Tribunal was entirely satisfied that it was Mrs Saunders's decision, reached for the reasons spelt out in detail in her outcome report. Mr Jones was not instructing her to reach a particular decision; he was authorising her to make the decision on the company's behalf, knowing what it would be.

87. Mrs Saunders wrote to Mr Gilchrist on 17 August 2020 confirming that she had been authorised to make a decision on the outcome of the disciplinary process, and enclosing a letter dismissing the Claimant with immediate effect, together with her report.

88. Mrs Saunders was cross-examined about specific aspects of her investigations and conclusions. The Tribunal noted:

88.1 Mrs Saunders accepted that she had not seen the Australia accounts annexed to Mr Hamilton's email, either before or after amendment. She had gone back to Mr Parsons and he told her that this was not a proper approach because there was no agreement for those monies to be loaned, so it was not factually accurate.

88.2 She said that she had considered what the Claimant was seeking to achieve in relation to the Australia accounts, and she had placed weight on the inconsistency between his saying on the one hand, that Rob would "go nuts" if he saw the division under-performing and on the other hand that he was doing this to be transparent.

88.3 She did not think she needed to see the accounts. She based her conclusion on the email itself and her follow-up investigations with Mr Hamilton, Mr Garfield and Mr Parsons. She noted Mr Hamilton's evidence that he would have preferred to send the accounts directly to Mr Jones and drew the inference that the position he presented made him "squeamish."

88.4 She did not accept that she was confused about whether the email referred to management accounts or statutory accounts. She satisfied herself that the management accounts were presented in a certain way to achieve a certain outcome and manage Mr Jones.

88.5 Mrs Saunders said that she did not accept the Claimant's evidence that there was a long-standing practice of stripping out start-up costs and spreading them over time. She had spoken to Mr Garfield about it, and she thought that he had referred to a historic practice that no longer reflected what was being done. She did not feel that she needed to get to the bottom of whether there was a historic practice, as that would not tell her whether it was right or wrong. Looking at the allegation she satisfied herself by asking Mr Garfield, Mr Parsons and Mr Jones. They did not accept that was what the practice was.

88.6 Mrs Saunders accepted that if there had been an instruction to charge the training cost back to Australia there would not have been a problem. She said that she had indirectly reached a conclusion about what the Claimant instructed or intended to be done. The findings she reached were that the Claimant's actions were with a view to making that business look more profitable than it was. This piece about where the training cost showed up, and the fact that it should be on the balance sheet and not in the profit and loss, was part of the findings.

88.7 Mrs Saunders thought that she had asked Mr Hamilton whether the Claimant told him to charge the cost back to Australia, because her note of their conversation went on to say that the charge back had happened after the disciplinary investigation.

88.8 In respect of Mr Grzelak's salary, Mrs Saunders agreed that she had not spoken to Eliza, Juan or Joe about where Mr Grzelak was working. She had spoken to Mr Hamilton, and then Mr Garfield at some length to get to the bottom of that. Mr Garfield was the Chief Operating Officer of the organisation and would have the knowledge. He had it at his fingertips. She pointed out that she had repeatedly told the Claimant

and his solicitor that they could identify witnesses and they had not done so.

88.9 As regards the payments into the sDLA, Mrs Saunders said that the DLA was not the issue. She noted that the Claimant said that the sDLA was the same as the DLA but she found that that was not the case. She did accept that the Claimant was owed some bonus money, but not as much as he claimed, and in respect of a previous period. She accepted what Mr Parsons told her. She was not aware that he had drafted (but not sent) a letter to the Claimant calculating his 2019 bonus (around £90k) and estimating his 2020 bonus (around £110k). However, she did not think that made a difference, because entitlement and crystallisation went hand in hand. The Claimant might have thought he was due a sum of money but until, pursuant to the shareholders agreement, it was confirmed, there was no entitlement, just a potential one. She thought she was aware that by custom and practice the Claimant received 10% of adjusted profits by way of bonus. Mrs Saunders agreed that the ordinary DLA was legitimate. But what went into the sDLA was invoices created as though the payor was rightly and properly the First Respondent. That was significant. Her finding was that there were repeated efforts to make it look as though the First Respondent should have paid those amounts. She accepted that Mr Gale had a running tally, but she said that she never got a satisfactory answer to the question, why would someone ask external third-party businesses to create invoices to look as though they were payable by a company when the goods and services were not provided to that company. She noted that Mr Gale told her that the Claimant had instructed him to treat the invoices as costs of the company. She also took into account Mr Hamilton's evidence that there was no way of identifying these as the Claimant's expenses in the company accounts.

88.10 As regards the £30,000 payment, Mrs Saunders said that she understood how the transaction was presented to Mr Parsons. Based on the emails and questions she asked, it was "murky" but it was easy to draw a compelling narrative. It was suggested to Mrs Saunders that the fact some of the money went to AT was irrelevant, provided that some service was provided to the First Respondent. She said that it was relevant. The understanding was that a wellbeing service was to be provided by a gym and that £30,000 was being paid to a family member of the Claimant. It was very material that the ultimate recipient changed depending on who she spoke to and when. It was suggested to Mrs Saunders that AT's "7 each?" email was just querying the invoices. She did not agree. She referred to the email to which AT was responding, with the reference to funds being transferred to AT once they were in the gym account, and said that this was all painting the picture that no wellbeing services were to be provided. She said that the Claimant's account was that he did not stand to benefit in any way. This was the evidence she relied on to conclude that that was not true. The Claimant said that he had given £30,000 to a random friend of a friend of a friend. He had previously said it was his nephew. In fact, it seemed clear from this email sequence that some money ended up with the Claimant, contrary to what he was saying was the case. Mrs Saunders said that

she rejected the Claimant's account as implausible. She concluded that the intention all along was for the £30,000 to be paid to an "on the face of it" arm's length legal entity that was not in fact arm's length. There was no intention of ever providing services. The money would end up circulating back to the Claimant, perhaps with some for AT as a thank you. It was a way for the Claimant to get money out in a tax efficient way. She did not seek information from AT herself. It was made clear to her that AT was the Claimant's close personal friend, so she was not sure how credible anything he might say would be. He was not an employee of the First Respondent and the evidence was pretty damning already.

88.11 Mrs Saunders was asked about her decision to proceed with the second disciplinary hearing. She said that the Claimant did not start out particularly agitated, but became so. She agreed that the Claimant had mentioned taking "horse tranquilisers" at one point and that he had said more than once that he was not fit enough and that they had discussed that. She said that he was not materially less coherent than at their first meeting.

89. Mr Gilchrist indicated an intention to appeal against Mrs Saunders's decision. Mrs Saunders forwarded the email to Clarion and Mr Jones, saying, "We will get the individual teed up to hear the appeal." In cross-examination, she said that, "We" was the employment team at Clarion. She said that one of the solicitors in that team asked her if there was anybody in her network who could hear it, and she confirmed that she could suggest somebody. She saw no difficulty with expressing a professional opinion on a suitable person to deal with the appeal. Mrs Saunders's evidence was that she knew Mr Kingsnorth as part of her professional network. She contacted him on 17 August 2020 to give him the brief background and see whether he would agree to conduct the appeal, and he did so. She did not tell him what the outcome should be.

90. Mr Kingsnorth is a human resources specialist, with an MA in Human Resources and CIPD qualifications to level 7. He has run an HR consultancy business for over 11 years, offering independent support to clients on a consultancy basis. He agreed with Mrs Saunders's account of their initial contact. He said that she did not seek to influence the outcome of the appeal and that he would not have agreed to work on the matter if she had. The Tribunal accepted that evidence. Mr Kingsnorth was another reputable and long-standing specialist. There was no basis for the suggestion that anybody had sought to influence him and it was clear that he had followed his own process and reached his own conclusions.

91. It was Mrs Saunders who sent Mr Kingsnorth the relevant documents and communicated with him initially about the arrangements for the appeal hearing.

92. Mr Gilchrist, on the Claimant's behalf, asked questions about any relationship Mr Kingsnorth had with the First Respondent or Clarion. He subsequently objected to Mr Kingsnorth's involvement, suggesting instead that an entirely unknown third party should be appointed. Clarion indicated that Mr Kingsnorth was part of their professional network, had no relationship with the First

Respondent and had the utmost integrity and skill to deal with the matter. They would not be appointing a different appeal officer.

93. Mr Gilchrist provided the Claimant's grounds of appeal in an email dated 3 September 2020. He said that the Claimant had been diagnosed as bipolar a couple of years ago. There had been a number of occasions where his behaviour had been inappropriate as a result of his condition since. He had had a nervous breakdown at the start of the year. The company allowed him to continue working. His condition and behaviour therefore worsened, which had a "seriously detrimental" impact on his relationship with Mr Jones. They had a "heated exchange" on 11 May 2020 and two days later the Claimant was suspended. Ultimately, none of the allegations for which he was suspended were pursued and the Claimant believed that the real reason for his suspension and dismissal was that Mr Jones was no longer prepared to accommodate his behaviour. The grounds of appeal also included the contention that there was an appearance of bias in Mrs Saunders conducting the disciplinary process, when she was employed by the First Respondent's legal advisors. Mr Gilchrist identified aspects of Mrs Saunders's approach that he said were indicative of bias. Mr Gilchrist made criticisms of Mrs Saunders for not investigating particular matters further and not speaking to witnesses such as Mr Grzelak, Eliza, Mr Avilla or AT. He criticised the conclusions she had reached, by reference to particular aspects of the evidence. His email set out the Claimant's account in respect of most of the allegations. For others, it said that he would address them at the appeal hearing.

94. After reading the grounds of appeal, Mr Kingsnorth emailed Mr Jones to ask him about the statement that he and the Claimant had had a heated exchange on 11 May 2020. He emailed Mr Parsons to ask him about the statement that the Claimant had dealt with financial reporting for the Australian business in the same way as Mr Parsons had done for the previous contract. Both replied by email, giving their version of events. Those emails were shared with the Claimant during the appeal hearing and sent to him afterwards. Mr Jones said that there was no heated exchange on 11 May 2020; indeed there was no communication of any kind between the Claimant and him that day. He outlined his account of events between January 2020 and May 2020, leading to the Claimant's suspension. Mr Kingsnorth said in cross-examination that Mr Jones's account matched the email evidence from the time.

95. Mr Kingsnorth decided not to conduct a full re-hearing of the disciplinary process. His evidence was that Mrs Saunders's report was probably the most detailed he had ever seen. Further, four months had passed since the investigation started. He decided to carry out a review, focussing on the grounds of appeal.

96. The appeal hearing was initially arranged for early September, but was moved for a variety of reasons. It eventually took place on 21 September 2020. The Claimant attended with a trade union representative. The hearing was recorded and the Tribunal saw a transcript. It lasted more than 3 hours. The Claimant gave Mr Kingsnorth a written document and some emails about the Body Transformation Gym transaction during the hearing.

97. After the appeal hearing, Mr Gilchrist and Mr Kingsnorth exchanged emails. Mr Gilchrist suggested that Mr Kingsnorth should speak to Mr Hamilton and one of the Regional Managers about the events of 11 May 2020, to corroborate the Claimant's account of a "heated exchange." Mr Kingsnorth explained that he would not be following up on the email. He said that one of the original allegations for which the Claimant was suspended *had* been upheld, in any event he was focusing on the reasons for dismissal, not the reasons for suspension. The Claimant had had the opportunity to invite witnesses to the disciplinary hearing and produce evidence from them, which he had not done. The appeal hearing had happened and he was now going to reach his decision. Mr Gilchrist sent a further email to Mr Kingsnorth asking him to contact Mr Grzelak. Mr Kingsnorth declined to do so.

98. Mr Kingsnorth produced a detailed outcome report on 1 October 2020. In outline:

    98.1 Mr Kingsnorth did not think it was necessary to pause the appeal process until the Claimant's subject access request had been dealt with.
    98.2 Mr Kingsnorth rejected the complaints of bias. He considered that Mr Parsons was appropriate to carry out the investigation. He noted that the Claimant had told him they "hated" each other. He could not determine whether Mr Parsons had asked leading questions of the witnesses. He concluded that it was "unfortunate" that Mr Parsons had been involved in one the allegations that later came to light but he did not think that precluded him from carrying out the investigation and he could not see any evidence of unfair practices, leading questions or bias in his approach.
    98.3 Mr Kingsnorth did not think that appointing somebody who worked for a company's solicitors was necessarily a problem. Ultimately, a company always decided who to appoint and paid them if they were external. This was not unusual and was perhaps more impartial than appointing a director to deal with the matter. Mr Kingsnorth did not see any difficulty in Mrs Saunders's appointment.
    98.4 Mr Kingsnorth dealt with each of the examples given by Mr Gilchrist in the grounds of appeal. He did not find any indication of bias by Mrs Saunders.
    98.5 In doing so, Mr Kingsnorth dealt with the complaint that Mrs Saunders should not have proceeded with the second disciplinary hearing because of the Claimant's health. He noted the conversations between them about that, including Mrs Saunders offering an adjournment and an opportunity to call Mr Gilchrist and the Claimant saying more than once that he wanted to go ahead.
    98.6 Mr Kingsnorth rejected the suggestion that the Claimant was being treated differently from others who had DLAs. He said that the circumstances were different. In particular, no other director had an sDLA. Sums invoiced by other directors were paid back and went through the books appropriately. Further, there was a much higher number of invoices for the Claimant, he was the sole authoriser, and the finance team was under his instruction. Mr Kingsnorth concluded that there had been a clear lack of governance and oversight, but that this did not make it right. The Claimant should not have needed the company to

tell him that treating invoices for the Claimant's restaurant business as costs within the company accounts was not acceptable.

98.7 Mr Kingsnorth found no evidence that the First Respondent had treated the Claimant's medical condition "with disdain". He rejected the suggestion that the Claimant's medical condition was the reason for his suspension, particularly given the response to the events of January 2020. In any event, he noted that allegations were later uncovered that led to the Claimant's dismissal. That was nothing to do with his medical condition. Mr Kingsnorth had seen no evidence of a heated discussion on 11 May 2020. Mr Kingsnorth did not think that more should have been done to force the Claimant to stay out of the business in January 2020 and, in any event, he noted that the allegations in many respects pre-dated January 2020.

98.8 Dealing with the specific disciplinary allegations, Mr Kingsnorth upheld the finding about the Australia allegations. He found the evidence referred to in the disciplinary report more compelling and said that the Claimant had not identified any new evidence or plausible explanation to support his assertion that he was not trying to manipulate the Australian accounts. Mr Kingsnorth concluded that this was gross misconduct, but noted the lack of scrutiny, governance and oversight from the Board.

98.9 Mr Kingsnorth also upheld the allegation about payments from the sDLA. He said that in the appeal hearing the Claimant could not account for how or why it was set up. He had said at the disciplinary hearing that the DLA and sDLA were no different, and also that the sDLA was about VAT. He had not said that in the appeal hearing. Mr Kingsnorth concluded that the sDLA was a way of extracting bonus without paying income tax. If invoices for the Claimant's restaurant business were charged to the sDLA and paid by the First Respondent, when the account was settled at the end of the year against bonus due, the bonus would have been paid without the Claimant paying income tax. Mr Kingsnorth found that this, too, was gross misconduct, but with the same observations about lack of oversight.

98.10 Mr Kingsnorth did not uphold the allegation about misusing the company credit card. In doing so he disagreed with Mrs Saunders's decision. He placed particular reliance on the lack of process and governance, and found that the mitigating features outweighed the conduct in this instance.

98.11 Likewise, Mr Kingsnorth did not uphold the allegation about governorship of Leeds Trinity University. He thought it was pedantic to rely on a clause in a very old contract.

98.12 As regards the £30,000 payment, Mr Kingsnorth noted the Claimant's account of being a "business angel." He said that the Claimant had said that he could get statements from the people to whom he had given money, and could not understand why he had not done so. The Claimant had provided some additional emails from 24 August 2020 entitled "The mysterious case of AT, BTG and the infamous £30k." They set out the Claimant's version of events, after the event. The Claimant had told Mr Kingsnorth that he had other emails. Mr Kingsnorth had asked him to provide them and he had not done so. Mr Kingsnorth could not understand why they had not been provided by now if they were

important to this issue. He upheld the findings relating to this payment. He agreed that, ultimately, money was to go to the Claimant and AT.

99. In cross-examination, Mr Kingsnorth gave the following answers:
    99.1 He accepted that he did not know when dealing with the appeal that Mr Parsons was a Director of the First Respondent. He said that it would not have changed his decision. He agreed that Mr Parsons's approach to obtaining statements was not the best way of doing it, but he noted that the statements were ultimately signed as truthful.
    99.2 He reiterated that he had no difficulty with Mrs Saunders's appointment in principle simply because she worked for the firm of solicitors advising the First Respondent.
    99.3 He explained that, in reaching a different view about the credit card transactions, he was able to relate to the expenses because of his background in business development. He did not see these as significantly serious issues. There were lax processes and procedures. They were not trivial; things about them worried him, in particular the lack of oversight, the fact the Claimant was the only person with a company credit card, and the way it was used.
    99.4 Mr Kingsnorth accepted that if Mr Gale had a tally of payments made through the sDLA and it were offset against the Claimant's bonus in the same way as the DLA, the Claimant would pay income tax. But his understanding was they were not accounted for in the same way. One was a DLA on the books, and the other was items put on the profit and loss of the firm and treated as costs of the First Respondent.

Holiday pay

100. The Claimant claims that he had 67 days' accrued but untaken holiday when his employment ended. He appears to have limited his claim to two years' alleged accrued holiday (although the two year limit does not apply to a claim for holiday pay accrued on termination of employment). In any event, it is for the Claimant to provide that he had 67 days' accrued but untaken holiday when his employment ended.

101. The starting point is to ascertain what the Claimant's annual leave entitlement was. Mr Jones said that it was 25 days plus 8 bank holidays, in keeping with all the First Respondent's employees. They started on 20 plus 8, and went up one day per year of employment, up to a maximum of 25 plus 8. Mr Jones said that he had found out more recently that the Claimant had increased eight people's leave entitlement in September 2019 to 30 days plus 8 bank holidays, including his own. He said that the Claimant did not have the right to increase his own contractual entitlement, did not seek permission to do so and was not given permission to do so. In cross-examination, the Claimant accepted that he did not seek permission to increase his contractual annual leave entitlement. The Tribunal therefore found that his contractual entitlement was to 25 days plus 8 bank holidays.

102. The Claimant's evidence was that he had taken only five days' leave plus four bank holidays in the last two years of his employment. Mr Jones said that it was not correct that the Claimant only took five days' leave in the last leave year. He

said that the Claimant was not in the habit of taking two weeks and sitting on a beach and he did not record his leave with HR, or very rarely did so. But Mr Garfield and Mr Stanford had told him that it was routine for the Claimant only to be in the office 3 or 4 days per week during 2017, 2018 and 2019. Their strong impression was that he had taken far more than he was due. Mr Jones was shown a letter written by the First Respondent's former Head of HR on 18 August 2021 saying that she did not record any holiday taken by the Claimant between May 2001 and July 2021 and was not made aware that he had taken any leave during that period. It was her understanding that his full entitlement remained at the end of each holiday year. Mr Jones said that Ms Hilton would say that because the Claimant did not record his leave, and she would never dare challenge him about that. It was suggested to Mr Jones that he could not identify a single date on which the Claimant was annual leave, when he said he was not. Mr Jones immediately referred to the Claimant and his wife taking a mid-week break to Marseille, which was not recorded. The Claimant's immediate response was that he had never been to Marseille in his life. Overnight, the Respondents produced relevant documents, including reservations for the Claimant and his wife to travel to Marseille for three days in 2018. Those reservations (together with the undisputed fact that the Claimant and his wife went to Paphos for a week in October 2019), as a minimum, supported Mr Jones's account that the Claimant did not report his annual leave to Ms Hilton. We considered that no weight could be attributed to her letter.

103. In cross-examination, the Claimant accepted that he had been to Marseille. He said that he had forgotten. He agreed that he had taken three days' holiday on that occasion. It was put to him that it was perfectly possible that he had forgotten to record other holidays too. He said, "It's perfectly possible I didn't." It was then put to him that he was taking time off as and when he chose, just as he had said in his initial letter to Mr Parsons in June 2020, "I would take holiday whenever it suited me without reference to a "higher authority." He said, "When I did I recorded them in my diary." It was then pointed out to him that he had just said that the only holidays he took were Paphos and Marseille. He did not have an answer. It was put to him that he did take holidays and was not owed any. He disagreed. He accepted that he had been paid for 16 days' accrued leave when his employment ended.

104. The Claimant said that there was a written policy limiting the carry forward of annual leave from one year to the next to five days, but that it was never applied in practice. In cross-examination he added that he "used to cash in my holidays regularly."

105. Taking all of that evidence, the Tribunal found that the Claimant had not satisfied us, on a balance of probabilities, that he had any outstanding accrued but untaken holiday owing to him. In particular:

    105.1 He was entitled to 25 days plus 8 bank holidays. It is not clear when his leave year was. In the twelve months prior to his dismissal he agreed that he had taken 5 days' leave to Paphos, and 4 bank holidays. He agreed that he was paid for a further 16 days when he was dismissed.

105.2 Ms Hilton's letter was not reliable. On his own account to Mr Parsons the Claimant did not record his holidays with anybody, and he had not recorded his Marseille trip with Ms Hilton.

105.3 The Claimant's assertion that he had only taken five days' holiday in two years did not withstand scrutiny. The Respondents were able to produce evidence of the Marseille trip because it was booked using the Claimant's work email. If he had forgotten that trip, he may have forgotten other leave.

105.4 The Claimant's personal, hand-written work dairy was plainly far from an accurate account of his daily activities. Many days had no entries. The Tribunal could not place weight on it as a document recording dates on which the Claimant took annual leave.

105.5 The emails about cashing in holidays do suggest that the limit on carrying leave forward to only five days may not have been observed. But they also suggest that the Claimant was not carrying all his holiday forward; instead he was cashing some in as he went along. His own evidence was that he "regularly" cashed it in. If he cashed it in, he was not entitled to payment in lieu for it when his employment ended.

105.6 There was evidence from Mr Jones about what he had been told by Mr Garfield and Mr Stanton. There was also evidence from the Claimant that was inconsistent with the assertion that he never took leave, e.g. that he was taking it whenever it suited him, or that whenever he did take leave he recorded it.

105.7 The Tribunal appreciated that the Claimant was seeking to prove a negative, i.e. that he had not taken leave. However, even allowing for that, we simply were not satisfied that he had any leave owed to him. His evidence was too unreliable, he could not produce a simple record of leave taken, and he was also regularly paid for untaken holidays.

Further findings of fact: wrongful dismissal

106. For the purposes of the wrongful dismissal claim, it is necessary for the Tribunal to make findings about whether the Claimant in fact committed gross misconduct.

107. We had no hesitation in finding that he did. We focussed on the £30,000 payment and we found that the payment to Body Transformation Gym was a sham arrangement. There was never an intention for wellbeing services to be provided. The business was a means through which the payment of the Claimant's bonus was to be channelled. Ultimately the beneficiaries were to be the Claimant and his business partner. This meant that no income tax was to be paid on the £30,000.

108. The Claimant's witness statement did not set out his version of events relating to the £30,000 payment. The Tribunal therefore started with the written documents.

109. We have set out above the email exchanges between the Claimant and Mr Parsons on 24 January 2019 and 20 March 2019. At that stage the Claimant said that the gym in question was "Unlimited Fitness." We pause to note that at

some stage it changed to Body Transformation Gym. The Claimant has been unable to give any explanation for that change.

110. Then there was the message from IK to AT on 20 March 2019, referring to the raising of corporate invoices before the end of the previous month for £7000 each, the transfer to be done any time, ideally in March and, "Once this is in Unlimited Fitness account, Kirt can withdraw the funds and transfer to you." That was forwarded by AT to the Claimant the same day, with the "7 each?" comment. The Tribunal found that the comment may have been about the amount to be put on each invoice, given what IK's email said. However, more importantly, the Tribunal concluded that the only sensible interpretation of the comment about Kirt withdrawing the funds and transferring them to AT was that the intention was to take the money out of the "gym" and pass it on to AT, the Claimant's friend and business partner. The Claimant's response to AT, on the same day, did not query that comment at all. Indeed, it confirmed "All fine with me."

111. The Tribunal was provided with a further chain of emails between the Claimant and AT. On 27 March 2019, in a further reply to the, "7 each?" email, the Claimant wrote to AT:

> *I think we are good to go on the invoicing my friend.*
> *A thought – how about we set up a "syndicate" – chuck in £10k each and have a flutter on some shares?*

112. AT replied on 28 March 2019, sending a draft invoice:

> *This is what I have been sent sir … thoughts? Can change anything and everything!*

113. The Claimant's response, that afternoon, was:

> *E&J (GB) Ltd please old boy.*
> *And suggest that PT is possibly a P11D issue – how about corporate membership and unlimited individualised wellbeing programmes.*
> *Ok?*

114. The following day an invoice was sent by "Accounts Dept, Body Transformation Gym" to Mr Gale, with bank details for payment. It appears that there was some issue with the invoice – Mr Gale deleted it because he thought it was fraudulent - and it had to be re-sent.

115. On 2 April 2019, the Claimant emailed AT, headed "invoice".

> *Accountant would like one invoice please young man – total amount (£42k?) – labelled as Corporate wellbeing services only please - ok?*

116. AT replied:

> *You'll be lucky but I'll try!*

117. The Claimant's response was:

The issue being the amount, the wording or the invoice?

118. AT's response was:

The company accounts (including your £7k) have been filed. So can we do two invoices? The 7k and the 35k? if so, let me know what date you want on the 35.

119. The Claimant responded:

Only if it doesn't cause you a bother – happy either way – forget it if it does – re date – use any – same as the £7k?

120. On 5 April 2019 "Accounts Dept, Body Transformation Gym" emailed AT attaching an invoice and writing:

Jason's [The Claimant's] invoice = £30,000. Dated today.

121. The Claimant confirmed in evidence that the email associated with the 5 April 2019 belonged to "Kirt". The invoice attached was made out to the First Respondent for £30,000 and referred to "Corporate Membership and Unlimited Individualised Well-being Programmes."

122. Mr Parsons emailed the Claimant on 8 April 2019 about a pension contribution that had been paid the previous week and with confirmation of various outstanding balances. The Claimant replied to agree with the figures, except to say that the sum invoiced for the wellness days was £30k instead of £40k. Mr Parsons provided a revised letter the following day. Mr Jones and Mr Gale were copied in on this correspondence.

123. On 17 April 2019 Mr Gale asked the Claimant to confirm the bank details to which payment for the Body Transformation Gym invoice should be paid, as there was nothing on the invoice. AT emailed Mr Gale with the details. The account name was said to be Body Transformation Gym Ltd. Mr Gale replied to AT confirming that, further to the Claimant's instruction, he had processed a bank payment for £30k as required.

124. What is striking in the emails is the total absence of any discussion about actual services to be provided by Body Transformation Gym Ltd to the First Respondent. On the face of the emails between AT and the Claimant, this is an exercise in deciding what an invoice should say for tax purposes, not because it is an invoice for actual services rendered or to be rendered. The tone of the emails is consistent with that too. They read as self-congratulatory emails between friends who are making money out of the transaction, not emails between people who are arranging a generous act to support a failing business, which is, in turn, going to provide gym services.

125. As we have noted, the Claimant did not give his account of these events in his witness statement. The Tribunal again noted what he said to Mrs Saunders. In the first disciplinary hearing, he told her that Mr Parsons "instructed" him to get a third-party company to invoice the First Respondent for this payment. We have already noted that that is not an accurate characterisation. The Claimant suggested doing this, and Mr Parsons agreed, provided that services were

provided and it was not a sham. At the second disciplinary hearing, the Claimant confirmed that AT was his business partner in his restaurant business. He told Mrs Saunders that Mr Parsons told him to get a third-party invoice for the £30k specifying wellbeing and gym services. "No wellbeing or gym services were provided but … that was how it was paid out." Mrs Saunders clarified, "No wellbeing services were provided?" and the Claimant confirmed, "No. I provided them separately for a different company entirely but the £30,000 certainly didn't provide wellbeing services to the company." The Claimant told Mrs Saunders that Body Transformation Gym was a "random company" that he did not have any dealings with. It was the company of a friend of a friend of a friend that was failing and needed some money. He had forfeited £30k of his own money. He did that a lot. Mrs Saunders asked the Claimant if the gym was actually trading and he said that it went bust subsequently. He made no mention of gym services being planned at any stage.

126. In his written statement after he was notified of disciplinary allegations in relation to the £30k, the Claimant gave Mrs Saunders a list of people he said he had helped as a business angel. He did not call any of those people as witnesses in the Tribunal and he did not provide any evidence of such philanthropy, beyond assertion in his witness statement. The Claimant went on in his written statement to Mrs Saunders to say that the payment to Body Transformation Gym was made with no intention of it being repaid to him; the quid pro quo was that the First Respondent would benefit from services provided by Body Transformation Gym. That company was being mentored by AT. AT and the Director were working on a programme of services that could be delivered to staff of the First Respondent, as per the invoice. Unfortunately, the Director became unwell, and sold the business for less than it was worth on 2 September 2019. It was dissolved on 7 January 2020. The Claimant said that AT could provide confirmation of this. He did not produce evidence from AT, either during the disciplinary process or during the Tribunal hearing. This was the first time this version of events was given.

127. The Tribunal noted that what the Claimant told Mrs Saunders was variable and inconsistent. He was asked about this transaction in cross-examination. We found his answers implausible and unconvincing. He accepted that when he told Mrs Saunders that the gym belonged to a friend of a friend of a friend that was inaccurate. He agreed that he had misled Mrs Saunders. He was asked about the email of 20 March 2019 about "Kirt" transferring funds to AT. He said that he, "did not know how much it was, it was nothing to do with me" and that it was not his bonus after it had been transferred to the gym. This was wholly implausible, given that AT copied the email straight to the Claimant, and given the detailed emails between AT and the Claimant about the invoicing after that. If the transaction had been as he described it, the obvious response would have been to query why funds were being transferred to AT. The Claimant was asked about the later emails between him and AT. It was put to him that he was seeking to evade tax by having his bonus paid through his friend and business partner AT. He said that was, "Incorrect." He had, "every intention" to provide services and did not see any of the money. He was asked about the email referring to a P11D issue. It was put to him that they were looking for a way to invoice the company. He said, "On instruction from Mr Parsons." That was incorrect. He then suggested that they were putting together a package for gym

memberships to be provided to staff on Tuesdays and Thursdays. He added, "That's what I was putting together. Kirt was. He was the specialist. AT was advising." That answer seemed to the Tribunal to be illustrative of the Claimant making it up as he went along. He seemed to realise part way through his answer that the suggestion he was putting together a package for services on specific days was inconsistent with his case that this was all entirely arm's length – he provided the money and that was it. It seemed to the Tribunal that the Claimant was unable to square the documents from the time with his case to the Tribunal, and that was because his case to the Tribunal was not true. If he had been giving up £30k of his bonus altruistically to help a company that was mentored by his friend and business partner AT, with the intention that that company would provide gym services, the Tribunal would not expect to see email correspondence about money being transferred to AT, nor about how to label the invoices. Nor would the Tribunal have expected him to say something different to Mrs Saunders. Furthermore, it would have been straightforward to call AT, Kirt and/or IK to give evidence to the Tribunal.

128. For all these reasons, the Tribunal found that the Claimant did commit gross misconduct in relation to the £30,000 transaction. In those circumstances, it is not proportionate for us to make detailed findings about the other allegations of gross misconduct. We do note that we found much of the Claimant's evidence about the sDLA and the invoices for the Claimant's restaurant business presented to the First Respondent as if they were its own invoices equally implausible.

Legal principles

Unfair dismissal and wrongful dismissal

129. The right not to be unfairly dismissed is set out in s 94 of the Employment Rights Act 1996. Under s 98 the employer must show the reason for dismissal and that it is a potentially fair one, which includes a reason relating to the employee's conduct. The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.

130. If the employer shows that the dismissal is for a potentially fair reason, the Tribunal must then decide whether in the circumstances the employer acted reasonably in treating it as a sufficient reason to dismiss. Reasonableness is assessed by reference to the range of reasonable responses: the Tribunal must not substitute its own view, it must decide whether a reasonable employer might have acted as this employer did. This applies to all aspects of the dismissal, including the procedure followed. The question of what is a reasonable investigation in all the circumstances depends on the context, including the gravity of the charges and their potential effect on the employee. Serious allegations of criminal misbehaviour will call for the most careful and conscientious investigation, with the investigator taking care to focus on evidence that points towards innocence as much as on evidence that points towards guilt: see *A v B* [2003] IRLR, 403, EAT.

131. Unfair dismissal is quite distinct from wrongful dismissal and the Tribunal must take care to approach them in separately. In the unfair dismissal complaint, the Tribunal is considering whether the employer acted within the range of reasonable responses; in the wrongful dismissal complaint the Tribunal must reach its own findings, on the evidence, about whether the employee committed gross misconduct such that he could be contractually dismissed without notice: see *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA.

132. The knowledge and motives of a person in a position of authority and influence over the decision-making process may taint the ultimate decision and make it unfair: see *Uddin v London Borough of Ealing* [2020] IRLR 332, EAT.

Disability discrimination

133. Claims of disability discrimination are governed by the Equality Act 2010. The Equality and Human Rights Commission's Code of Practice on Employment is relevant to discrimination claims and the Tribunal considered its provisions.

134. The burden of proof is dealt with by s 136 Equality Act 2010. The Tribunal had regard to the authoritative guidance about the burden of proof in *Igen Ltd v Wong* [2005] ICR 931. That guidance remains applicable: see *Royal Mail Group Ltd v Efobi* [2021] ICR 1263. However, as the Supreme Court made clear in *Efobi*, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

135. Discrimination arising from disability is governed by s 15 Equality Act 2010. Under s 15, unfavourable treatment does not require a comparator. It is to be measured against an objective sense of that which is adverse compared with that which is beneficial: see e.g. *Trustees of Swansea University Pension and Assurance Scheme v Williams* [2015] IRLR 885. The EHRC Employment Code advises that this means that the disabled person "must have been put at a disadvantage". If there is unfavourable treatment, it must be done because of something arising in consequence of the person's disability. There are two elements. First, there must be something arising in consequence of the disability; secondly, the unfavourable treatment must be because of that something. The unfavourable treatment will be "because of" the something, if the something is a significant influence on the unfavourable treatment; a cause which is not the main or sole cause but is nonetheless an effective cause of the unfavourable treatment: *Pnaiser v NHS England* [2016] IRLR 170; *Charlesworth v Dransfields Engineering Services Ltd* [2017] UKEAT 0197_16_1201.

136. Failure to make reasonable adjustments for disability is governed by s 20-21 and schedule 8 Equality Act 2010.

137. The Tribunal must consider the PCP, the identity of non-disabled comparators where appropriate, and the nature and extent of the substantial disadvantage suffered by the Claimant. It should analyse what steps would have been reasonable for the Respondent to have to take to avoid that disadvantage. The

burden is on the Claimant to identify, at least in broad terms, the nature of the adjustment. It then shifts to the Respondent to show that the disadvantage would not have been eliminated or reduced, or that the adjustment was not reasonable: see *Environment Agency v Rowan* [2008] ICR 128, EAT and *HM Prison Service v Johnson* [2007] IRLR 951, EAT.

138. A PCP denotes no more than a "state of affairs" indicating how similar cases are generally treated. A practice connotes some form of continuum, in the sense that it is the way things generally are or will be done: see *Ishola v Transport for London* [2020] ICR 1204, CA. The Tribunal must judge objectively what adjustments were reasonable and may substitute its own view for the employer's: see *Smith v Churchills Stairlifts plc* [2006] ICR 524, CA. The EHRC Code of Practice on Employment (2011) advises at paragraph 6.28 that the factors that may be relevant to an assessment of reasonableness include: whether taking any particular steps would be effective in preventing the substantial disadvantage; practicability; financial and other costs and disruption; the employer's financial and other resources; the availability of financial and other assistance and the type and size of the employer.

Wages

139. Complaints of unauthorised deduction from wages are governed by s 13 and 23 Employment Rights Act 1996. They can include complaints of failure to pay for accrued but untaken holiday to which the worker is entitled under the Working Time Regulations 1998 or the contract of employment.

Application of the law to the facts

140. The Tribunal's detailed findings of fact are set out above. We can deal with the issues much more briefly, because many of them turn on the findings of fact.

Unfair dismissal

141. We start with the unfair dismissal complaint. The reason for dismissal is a question of fact. For the reasons explained in detail above, the Tribunal found that the reason was misconduct. Mrs Saunders genuinely believed that the Claimant had committed misconduct and decided that he should be dismissed for that reason. On appeal, Mr Kingsnorth agreed. We have explained in detail why we rejected the Claimant's contention that this was a sham, designed to get rid of him for disability-related reasons, and why we accepted that neither Mrs Saunders nor Mr Kingsnorth was influenced in making their decisions by anybody else. Mr Jones did authorise Mrs Saunders to take the decision, knowing what it would be, but it was her decision, reached independently.

142. The Tribunal therefore considered whether the First Respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant. We found that it did. Dismissal was within the range of reasonable responses in all the circumstances.

143. In outline, and having regard to the need for most careful consideration where the allegations are grave and the consequences serious (*A v B*) there were reasonable grounds for believing that the Claimant had committed misconduct, based on a reasonable investigation and following a fair procedure. The key evidence ascertained in the disciplinary process in relation to the allegations that were relied on by Mrs Saunders and upheld by Mr Kingsnorth is summarised in the findings of fact. Dealing with the particular criticisms made on the Claimant's behalf:

    143.1 As explained in detail in the findings of fact, the Claimant's central contention, that this was a "sham" process, designed and manipulated to remove him from the company because they had lost patience with his disability-related behaviour, was comprehensively rejected by the Tribunal. That underpins many of the Claimant's criticisms and, consequently, the Tribunal's rejection of those criticisms. The Tribunal found, as explained, that this was a genuine process, carried out by people of integrity, doing their best to follow a fair process and reach decisions based on that process. Neither Mr Jones nor Mr Parsons was seeking to manipulate the process or mislead.

    143.2 The Tribunal found that it was entirely reasonable to appoint Mr Parsons as investigator. He was not Mr Jones's "puppet", he was an external accountant who had advised the company for just three years. He acted as a professional trustee for the two shareholders, implementing their instructions when he did so. He was appointed statutory director in June 2020 on the Claimant's suggestion and with his knowledge. None of these things made it unreasonable for him to be the investigator. In the normal run of events, disciplinary allegations are investigated by a paid employee. Here, with potentially serious allegations against the Managing Director, a different approach was taken. The Tribunal found that it was a reasonable one. Mr Parsons was sufficiently senior and sufficiently independent.

    143.3 The potential conflict relating to Mr Parsons, because the Claimant was relying on advice he said Mr Parsons had given in relation to the gym transaction, only emerged at a very late stage in the investigation. The Tribunal found that it was reasonable, at that stage, for Mr Parsons to proceed as he did, by reaching a view on all the other allegations, and providing his own account in relation to the remaining one. The alternative would have been for the investigation to be abandoned and re-started. That was not ideal either. In those circumstances, Mr Parsons's approach was reasonable. Of course, he was not reaching a decision on any disciplinary allegation, he was simply investigating and deciding whether a formal disciplinary process should follow.

    143.4 It is not best practice for the investigator to draft statements for those interviewed and dispose of original interview notes. Mr Parsons now understands and accepts that. However, the Tribunal did not consider that this made the investigation or disciplinary process unreasonable overall, notwithstanding the seriousness of the allegations. Importantly, all the witnesses did read and sign the statements. Further, they were questioned, in more detail, after that, by Mrs Saunders and Mr Kingsnorth.

143.5 The Claimant was not provided with copies of the investigation interviews before being asked to comment on the allegations, but he was provided with them subsequently. It is not unreasonable to ask an employee about allegations without providing copies of what others have said. The Claimant had a full opportunity to comment on the content of the investigation interviews during the disciplinary hearing and appeal.

143.6 The Claimant was not given access to his email account. Mr Parsons responded to Mr Gilchrist's original indication that he might need such access by saying that he did not think the Claimant needed documents at that stage. Clarion dealt with Mr Gilchrist's subsequent email (20 July 2020) on 22 July 2020, asking the Claimant to identify any specific email he needed. Mr Gilchrist subsequently requested specific emails, some of which were provided and some of which he was told could not be found. This does not appear to have been pursued further. The Tribunal's attention was not drawn to an occasion on which Mr Gilchrist subsequently requested that the Claimant be permitted to access his email account. The Claimant's detailed grounds of appeal against Mrs Saunders's decision, prepared by Mr Gilchrist, raised no issue about the Claimant not being provided with access to his emails. The Tribunal concluded that in those circumstances the First Respondent's approach was reasonable.

143.7 The Tribunal also considered that the First Respondent's approach to witnesses was reasonable. Mr Gilchrist asked for permission to discuss the case with witnesses in his letter of 20 July 2020. It is right that Clarion replied to say that all relevant witnesses had been spoken to. Mrs Saunders interpreted that as relating to the expenses allegation only. Even if Mr Gilchrist did not, it is clear that the consideration of witnesses did not end there. Mrs Saunders repeatedly invited the Claimant to provide the names of any witness he wanted to attend the disciplinary hearing or to name witnesses the Claimant thought she should speak to. Mr Gilchrist did not identify any witness the Claimant wanted to speak to, nor any witness he wanted Mrs Saunders to speak to, prior to the disciplinary hearing. During the hearing, the Claimant named people that he had wanted to speak to. He did not ask Mrs Saunders to speak to them. He went on to tell Mrs Saunders that he had in fact spoken to one of them anyway (Mr Hamilton) and, in the second disciplinary hearing, that he had been in touch with Peter, Jane, Mr Hamilton and Mr Gale. He said during the second disciplinary hearing that she should "ask Alex" about when Mr Grzelak had worked in Albania, Ukraine and Poland. Mrs Saunders did not ask Alex, but she did ask Mr Garfield. The Tribunal considered that Mrs Saunders's approach was reasonable. Fundamentally, the Claimant had the opportunity to identify any witnesses he wanted to attend the disciplinary hearing. Neither he nor his experienced solicitor did so. No specific allegation or issue was identified in respect of which the Tribunal concluded that it was unreasonable for Mrs Saunders not to speak to, or give the Claimant the opportunity to question, any witness.

143.8 The Tribunal considered it reasonable for Mrs Saunders to be appointed and for her not to step aside, notwithstanding her connection

with Clarion. Again, a normal disciplinary process would be conducted by another employee of the employer. Given the seriousness of the allegations and the seniority of the Claimant, the First Respondent rightly appointed somebody external. This was an experienced legal and HR professional with obligations to her professional body. Neither she nor the First Respondent's legal advisors saw any difficulty with her acting. A proper division of responsibilities was put in place. This approach was not unreasonable, nor was it unreasonable for Mrs Saunders not to step aside, just because the Claimant had raised concerns. As the Tribunal's detailed findings of fact above make clear, we concluded that Mrs Saunders acted with integrity, thoroughness and independence. The Tribunal did not consider that by expressing a view on trust and confidence, inviting the First Respondent to authorise her to make the decision, or referring to Clarion as "we" when progressing the appeal, Mrs Saunders was in any way revealing an inclination to make decisions favourable to the First Respondent.

143.9 It is unusual, but not unheard of, for the disciplinary officer to recommend an appeal officer where external HR consultants are involved. However, the Tribunal did not consider that the First Respondent acted unreasonably in appointing Mr Kingsnorth in those circumstances. He and Mrs Saunders were experienced professionals in their field. Mr Kingsnorth acted independently throughout. He overturned some of Mrs Saunders's findings.

143.10 The Tribunal found that there were reasonable grounds for Mrs Saunders's conclusions in relation to the Australia allegations, based on a reasonable investigation. Her reasons are set out fully in her outcome report. The Tribunal considered the detailed analysis in Mr Crozier's closing submissions. We do not go through that line by line here. Mrs Saunders had the email exchange between the Claimant to Mr Hamilton dated 3 June 2019 and the Claimant's written explanation to Mr Parsons about that. She also had what the Claimant told her at the disciplinary hearing – that this was about being transparent, and that if he showed Mr Jones that they were losing 150,000 bucks he would "go nuts." She also had Mr Hamilton's account, that he would have liked to send accounts information to Mr Jones without getting the Claimant's approval but could not do so. Mrs Saunders explained in cross-examination that she placed weight on the inconsistency between the Claimant saying that he was being transparent and saying that Mr Jones would "go nuts" if he found out. She explained why she did not think she needed to see the accounts themselves and she explained that she placed weight on Mr Hamilton feeling uncomfortable about not being able to send the accounts straight to Mr Jones. She also explained why she did not accept the Claimant's evidence that there was a long-standing practice of striping out start-up costs and spreading them over time. All of those matters were relevant to her assessment of the email exchange on 3 June 2019, and her conclusion that the Claimant was seeking to manipulate the accounts. The Tribunal found that these conclusions were reasonably open to her on the evidence. The gravamen of the allegation was about the instruction the Claimant

was giving Mr Hamilton in the email exchange. That was what Mrs Saunders addressed.

143.11 Mrs Saunders's conclusion about the Australian training invoice was that the Claimant knew about it at the time, he requested that it be charged to the UK company because there was not enough money in the Australian company to pay it, it was not properly identified in the UK accounts because it did not relate to expenses incurred in the UK, and it was only after the disciplinary process started that it was charged back to the Australia company. The Tribunal found that that was a reasonable conclusion on the material before her. She accepted in cross-examination that if there had been an instruction to charge back to the Australian company, there would not have been a problem and she said that she had indirectly reached a conclusion about what the Claimant intended. Her conclusion was that the Claimant's actions were with a view to making the Australian company look more profitable than it was. The Tribunal found that Mrs Saunders had reached a conclusion about the instruction given by the Claimant, and that it was a conclusion that was reasonably open to her.

143.12 Mrs Saunders's conclusion in relation to the part-payment of Mr Grzelak's salary from the UK was that it was driven by a number of factors, including a desire to make the finances of the Australian company look better than they were, a wish to disguise how big Mr Grzelak's salary was, and for Mr Grzelak's personal tax reasons. The Tribunal found that this conclusion was reasonably open to Mrs Saunders on the evidence before her. That included Mr Hamilton telling her that Mr Grzelak had done "bits of work" for the UK company; Mr Parsons and Mr Garfield telling her that he was not undertaking any meaningful duties outside of Australia; and the Claimant's own account in the disciplinary hearings about Mr Grzelak saying that he needed to be paid through UK because that was where he was structured. The Tribunal found that it was reasonable for Mrs Saunders to conclude that she did not need to speak to Eliza, Mr Avilla or Joe about where Mr Grzelak was working, because she had obtained clear information from Mr Garfield, the Chief Operating Officer. Mr Garfield told her that Mr Grzelak had not worked for the UK company since joining the Australia company in 2018. Mr Garfield told Mrs Saunders that he had queried this with Mr Grzelak that very week, and Mr Grzelak had confirmed that he had not done work for the GB operation since 2017.

143.13 Mrs Saunders upheld the allegation relating to the sDLA – making significant payments from the company's account for personal use and manipulating the accounting records of the company to conceal that fact – on two bases. She said that it did not appear to her that the Claimant was owed £60,000 in bonuses and in any event, this was not an appropriate way to recoup monies owed. She concluded that the Claimant was trying to avoid the sums being attributed to him as expenditure at all, or was trying to pay himself a bonus without paying income tax on it. The Tribunal concluded that it was reasonable for Mrs Saunders to conclude – on the evidence before her – that the Claimant was not owed £60,000. She did not know that draft calculations had been done for 2019 and (in estimate) 2020, but she did know that

bonus was not due until it had been crystallised in accordance with the shareholders agreement. The evidence in relation to the Claimant seeking to avoid repaying the money at all was weaker. Mrs Saunders was aware that Mr Gale was keeping a running tally of the sDLA payments. This undermines the possibility that the Claimant was trying to avoid the expenditure being attributed to him at all. However, any shortcoming in that respect was addressed at the appeal stage, because Mr Kingsnorth did not uphold this allegation on that basis. Further and in any event, it was not the sole basis upon which Mrs Saunders upheld this allegation. For the reasons explained in detail in her outcome letter, she found that if the sDLA was not meant to avoid the Claimant repaying the money at all, it was intended to avoid him paying income tax on his bonus. The Tribunal found that that conclusion was reasonably open to her. Key evidence was that the invoices were made out as though payable by the First Respondent when the payor was in fact the Claimant's restaurant business; that the Claimant could not give any satisfactory explanation of that; that Mr Gale had told her that the Claimant instructed him to treat the invoices as costs of the company; and that Mr Hamilton told her that there was no way of identifying these as the Claimant's expenses in the company accounts. This was evidence that reasonably supported the conclusion that the sDLA was fundamentally different from the DLA. The DLA was accounted for as such in accordance with accepted practice, meaning that income tax was properly dealt with. It was reasonable for Mrs Saunders to conclude that the sDLA would not be properly subjected to income tax in the same way, on the basis of that evidence. Overall, the Tribunal therefore concluded that there were reasonable grounds for upholding this allegation, based on reasonable investigations.

143.14 The Tribunal found that Mrs Saunders's conclusions in relation to the £30,000 payment to Body Transformation Gym – that this was a sham transaction with the ultimate recipient disguised – was reasonably open to her on the evidence before her. That evidence included the Claimant's account at the second disciplinary hearing; his different account subsequently in writing; and the email of 20 March 2019 about Kirt transferring monies to AT. The Tribunal considered it reasonable for Mrs Saunders not to try to speak to AT. AT was the Claimant's friend and business partner. It was absolutely clear to the Claimant and his solicitor that he could provide evidence from AT if he wished. He did not do so. Nor did he provide any other evidence from Body Transformation Gym, AT or anybody else he claimed to have supported as a business angel. In those circumstances, the Tribunal concluded that it was reasonable for Mrs Saunders to reject the Claimant's account and to find that this was a sham designed to withdraw bonus without paying tax, by funnelling it through a seemingly arm's length entity.

143.15 The Claimant (and his legal representative) had the opportunity to make all the detailed evidential points made in these proceedings to Mr Kingsnorth in his appeal. No criticisms were made of Mr Kingsnorth's approach in the Claimant's closing submissions. The Tribunal noted that Mr Kingsnorth carried out a thorough consideration of the grounds of appeal, accepting some points and rejecting others, but reaching the

same conclusion, that the Claimant should be dismissed for gross misconduct.

144. The Tribunal took care to step back and assess the reasonableness of the process and the decision overall, having regard to the Claimant's disability, the approach in *A v B*, and the (relatively few) shortcomings we found. We were quite satisfied that the process followed by the First Respondent fell within the range of reasonable responses; there were reasonable grounds for the conclusions based on a reasonable investigation; and dismissal fell within the range of reasonable responses. Given the seriousness of the misconduct found by Mrs Saunders and the seniority of the Claimant, dismissal was plainly reasonable. The Claimant accepted as much, in principle.

Wrongful dismissal

145. For the reasons explained in detail in the specific findings of fact relating to wrongful dismissal, the Tribunal found that the Claimant did commit gross misconduct in relation to the £30,000 payment to Body Transformation Gym. As explained, we found that the transaction was a sham; he was not acting as a business angel and there was no intention for wellbeing services to be provided to the First Respondent. Rather, this was a device designed to enable the Claimant to receive his bonus indirectly and without paying tax on it. That was clearly gross misconduct on the part of the Managing Director.

146. As such, the First Respondent was contractually entitled to dismiss the Claimant without notice and his wrongful dismissal complaint does not succeed.

Discrimination arising from disability

147. The Respondents did treat the Claimant unfavourably by suspending him, by Mr Parsons adding additional allegations against him, by dismissing him, and by Mr Kingsnorth not upholding his appeal. The detailed findings of fact relevant to this treatment are set out above. Measured against an objective sense of that which is adverse compared with that which is beneficial, these matters amount to unfavourable treatment.

148. The Tribunal found that the Respondents did not treat the Claimant unfavourably by appointing Mr Parsons to investigate, Mrs Saunders to conduct the disciplinary hearing and Mr Kingsnorth to conduct the appeal. As we have found, by doing so it was appointing people of integrity, external to the company, to carry out each stage of the disciplinary process. That was not unfavourable. The Tribunal found that there was no attempt to influence any of the three individuals to reach a particular outcome. The conflict in relation to Mr Parsons only emerged late in his investigation. The Tribunal considered that the Claimant's concerns about the independence of Mrs Saunders and Mr Kingsnorth were not objectively reasonable and did not make it "unfavourable" to appoint them.

149. As explained in the findings of fact, there was scant evidence in relation to the Claimant's disability. There was no medical evidence about his precise

diagnosis, nor how it affected him. However, the Tribunal found on a balance of probabilities that it did on occasions make him behave in a way that was erratic, anti-social and unpredictable. On that basis, although the evidence was slim, the Tribunal was prepared to accept that the abusive and threatening tone of the Claimant's emails to Mr Eville on 11 May 2020 was something arising in consequence of his disability.

150. However, the Tribunal had no hesitation in finding that the tone and abusive nature of the emails had nothing whatsoever to do with the unfavourable treatment (or the other matters unsuccessfully relied on as unfavourable treatment). As explained in detail in the findings of fact, the Tribunal found that a disciplinary process was instigated because of mounting concerns about the Claimant's conduct, before and after 11 May 2020. The tone and abusive nature of the emails was unremarkable in the context of his communications with the Respondents over the years. The only aspect of the emails that caused concern was that they added to the sense that the Claimant did not want Mr Jones to investigate the finances. The Claimant did not suggest that his unwillingness to have Mr Jones investigate the finances was something arising in consequence of his disability. As explained in the findings of fact, the Tribunal rejected the Claimant's case that the 11 May 2020 emails lay at the heart of a decision to suspend him, instigate a "sham" disciplinary process, and manipulate that process to achieve his dismissal. That, in essence, is why his complaints of unfavourable treatment do not succeed. For completeness, in relation to each aspect of treatment complained of:

150.1 Suspending the Claimant was unfavourable treatment. The decision to suspend the Claimant was taken by Mr Eville and Mr Jones because there were well-founded concerns about how the Claimant would react to being questioned and whether he would interfere with evidence or obstruct the investigation. This had nothing to do with the nature or tone of the 11 May 2020 emails.

150.2 Appointing Mr Parsons to investigate was not unfavourable treatment. Even if it had been, it was nothing to do with the nature or tone of the 11 May 2020 emails. Mr Parsons was appointed as an external person to investigate the allegations, not as someone who could be or was manipulated to achieve a particular outcome.

150.3 Mr Parsons adding additional allegations was unfavourable treatment, but it was not because of the 11 May 2020 emails. Mr Parsons was not adding the allegations to achieve a particular outcome. He was adding them because he had identified material in his investigation that gave rise to additional concerns about the Claimant's conduct that he felt should be investigated

150.4 Appointing Mrs Saunders to conduct the disciplinary hearing was not unfavourable treatment. Even if it had been, it was nothing to do with the nature or tone of the 11 May 2020 emails. Mrs Saunders was appointed as an external person of expertise to conduct the disciplinary hearing, not as someone who could be or was manipulated to achieve a particular outcome.

150.5 Dismissing the Claimant was unfavourable treatment, but it was nothing to do with the nature or tone of the 11 May 2020 emails. Mrs Saunders reached her own decision to dismiss the Claimant and she did so

because she genuinely believed he had committed the misconduct identified in her outcome report and letter.

150.6 Appointing Mr Kingsnorth to conduct the appeal was not unfavourable treatment. Even if it had been, it was nothing to do with the nature or tone of the 11 May 2020 emails. Mr Kingsnorth was appointed as an external person of expertise to conduct the appeal, not as someone who could be or was manipulated to achieve a particular outcome.

150.7 Not upholding the Claimant's appeal was unfavourable treatment, but it was nothing to do with the nature or tone of the 11 May 2020 emails. Mr Kingsnorth reached his own decision to dismiss the appeal and he did so because he genuinely believed the Claimant had committed the misconduct identified in his outcome letter.

151. For these reasons, the complaints of unfavourable treatment because of something arising in consequence of disability therefore do not succeed. It is not necessary or proportionate to consider whether any of the treatment was justified in those circumstances.

Failure to make reasonable adjustments for disability

152. The Tribunal found that the Respondents did not have the PCP relied on by the Claimant, of requiring him to work long hours and manage a heavy workload, at any relevant time (from August 2019 onwards). There was no such state of affairs or practice. Again, the detailed findings of fact are set out above, but the Tribunal noted, in particular:

152.1 The Claimant was the lead Managing Director. Prior to January 2020 Mr Eville and Mr Jones left him to run the business with complete autonomy and he did so. He managed his own working hours and workload. He did not work full-time in the office for the First Respondent and worked on his other interests during the working week as well. He determined his own workload. He had authority to delegate work. He could have recruited. There was no requirement on him to work long hours and manage a heavy workload or state of affairs in which he was expected to do so.

152.2 From January 2020 onwards Mr Eville, Mr Jones, Mr Avilla and others encouraged the Claimant to take time away and pull back from the pressures of work. He was offered a paid sabbatical of a year or more. The Claimant accepted that the Respondents could not have been clearer at this time about wanting him to step back and look after his health. He agreed that there was no pressure from the Respondents for him to do any work. The Respondents took steps to reduce his workload anyway, by channelling some duties and responsibilities through Mr Stanford and Mr Garfield. Again, there was simply no requirement on the Claimant to work long hours and manage a heavy workload, nor any state of affairs in which he was expected to do so.

153. Even if there had been the PCP, and assuming that it put the Claimant at a substantial disadvantage because of his disability (in the form of reduced ability to concentrate and focus, worsening behaviour at times of pressure, poor sleep, and/or impact on his mood/personality) the Tribunal would have found that the

Respondents did not fail to take any step that it was reasonable for them to have to take to avoid the disadvantage. In particular:

153.1 The Claimant was the lead Managing Director. He had complete autonomy over his own working days and working hours and could have reduced them himself at any time. He did not work full-time hours for the First Respondent during the relevant period. It was not reasonable for the Respondents to try and force the Claimant to reduce his hours. They knew that he was seeing a consultant psychiatrist regularly. Neither he nor his doctor recommended such a step. It would have been counter-productive, as Mr Eville and Mr Jones explained.

153.2 The Claimant treated Mr Garfield as his PA or secretary. If he needed additional PA or secretarial support, it was for him as Managing Director to arrange that. He could have done so at any time.

153.3 The Claimant could and did take leave whenever he wanted. From January 2020 onwards, he was offered and encouraged to take a year or more on full pay. It was not reasonable for the Respondents to try and force the Claimant to take time off. They knew that he was seeing a consultant psychiatrist regularly. Neither he nor his doctor recommended such a step. It would have been counter-productive, as Mr Eville and Mr Jones explained.

153.4 There was no indication of any need to vary or remove duties or responsibilities from the Claimant prior to January 2020. From January 2020 onwards (and in the context that he had resigned), some of the Claimant's duties were removed. Further, the Respondents agreed with him by the first week in February 2020 that he would step back to a more ambassadorial role on the same pay, and steps were promptly taken to recruit a CEO.

Unauthorised deduction from wages

154. For the reasons explained in detail in the findings of fact, the Tribunal found on the balance of probabilities that the Claimant did not have any outstanding accrued but untaken holiday on the termination of his employment for which he was not paid. His complaint of unauthorised deduction from wages does not succeed.

Employment Judge Davies

11 November 2022