



EMPLOYMENT TRIBUNALS

Claimant: Mr T S Ahmed
Respondent: Panache Leasing Ltd
Heard at: East London Hearing Centre
On: 1 and 2 June 2023
Before: Employment Judge Jones

Representation
Claimant: in person
Respondent: Mr K Uddin (Counsel) with Mr S Ahmed, Director

JUDGMENT

1. The Claimant was unfairly dismissed.

Remedy

2. The Claimant is entitled to a remedy for his unfair dismissal.
3. The Tribunal makes no deduction for *Polkey*.

Basic Award:

4. $1.5 \times 5 \text{ years} = 7.5 \text{ weeks} \times \pounds 538 = \pounds 4035.00$

Compensatory Award:

Loss of earnings (November 2020 – March 2021)	£10,920.00
Loss of earnings (March 2021 – March 2022)	£31,200.00
Loss of statutory rights	<u>£ 450.00</u>
	£42,570.00

$25\% \text{ ACAS uplift } \pounds 42,570 \times 25/100 = \pounds 10,642.50$
 $\pounds 10,642.50 + \pounds 42,570 = \pounds 53, 212.50$

5. The Respondent is ordered to pay the Claimant the total sum of £53,212.50 as his remedy for his successful complaint of unfair dismissal.

REASONS

1. The Claimant brought a complaint of unfair dismissal. The Respondent defended these proceedings on the basis that firstly, there was no time to conduct an investigation and the Respondent had to take swift action and secondly, even if they had followed a procedure and conducted an investigation, the Claimant would still have been dismissed.
2. By a judgment date 11 October 2021, EJ Russell decided that the effective date of termination was 4 March 2021 and that there was an element of backdating to 9 November 2020, which was the date the Claimant last attended the office. Although this claim was issued in 2021, the final hearing was delayed until this year because also at that hearing, EJ Russell decided that this matter should be stayed because of concurrent litigation in the High Court. It was appropriate because the alleged conduct by the Claimant was at issue in both sets of proceedings and it would not have been appropriate for the Employment Tribunal to make findings of fact which might affect proceedings in a higher court. The parties were asked to provide the court by 10 March 2022 with an update on the High Court proceedings and state whether the stay should continue.
3. The High Court hearing took place on 13 – 17 February 2023 before the Chief Insolvency and Companies Court, Judge Briggs, and judgment was handed down remotely on 3 March 2023. The Tribunal was informed that the Respondent has since applied for leave to appeal against the High Court judgment, but this Tribunal understands that there is no allegation of perversity or mistake of law, and the intended appeal will simply be a dispute on the factual conclusions reached by CICC Judge Briggs. The Respondent has since provided this Tribunal with a copy of the Grounds of Appeal and I can confirm that it is based mainly on challenging the findings of fact made by the High Court after a 5-day hearing, in which both parties were represented by Counsel.
4. As of today's date, the judgment of the High Court is as follows: -
5. That the Claimant was summarily dismissed without good reason and that he is entitled to the loss of earnings claimed, being 6 months wages. The High Court ordered the Respondent to pay the Claimant 6 months' salary.
6. That there was no evidence on the Claimant's part of an intention to permanently deprive the Company of any monies. There was no fraud, and the Claimant did not act dishonestly or misappropriate Company funds.
7. The Claimant is to pay the sum of £14,669.96 to the Respondent in respect of payments made for internet-based services.
8. This Tribunal is bound by the High Court's judgment. The High Court judgment also addressed other matters in dispute between the parties. Those matters are only referred to below if directly relevant to the matters before this Tribunal or if they provide context to the issues in this case or assist in the assessment of credibility of witnesses.

9. At the start of this hearing, we discussed what issues were before this Tribunal, given the findings and judgment of the High Court. The High Court is a superior court to the Employment Tribunal. There was no complaint of wrongful dismissal before this Tribunal and the High Court has already adjudicated on that matter and promulgated a judgment that the Claimant was wrongfully dismissed.
10. The Respondent wanted to proceed with today's hearing as they denied that the dismissal had been unfair and, because they wanted the Tribunal to consider the implication of the principles outlined in the case of *Polkey v AE Dayton Services* [1987] IRLR 503 as well as the effect of what they considered to be the Claimant's contributory fault.

Evidence

11. The Tribunal heard from Mr Syed Ahmed, the Claimant's brother who is also a Director in the Respondent and the Claimant's employer and Mr Syed Ahabab Hussain, Accountant, for the Respondent. The Claimant gave evidence on his own behalf. There was an agreed bundle of documents which contained the approved High Court Judgments and Orders. The Claimant had also put together a bundle of documents.
12. The Tribunal apologises to both parties for the delay in the promulgation of this judgment and reasons. This was due to pressure of work on the judge.
13. The Tribunal came to the following conclusions on the facts from the evidence presented in the hearing. There were many matters covered in the evidence. The Tribunal has endeavoured to make findings of fact on only those matters related to the issues in dispute between the parties that relate to the complaint of unfair dismissal and the remedy due to the Claimant, if that complaint is successful.

Findings of Fact

14. The Claimant and Mr Syed Ahmed are brothers. The Claimant and Syed Ahmed are joint owners of the Respondent company. It is a car rental business. Although there is no written shareholder agreement, the High Court's judgment confirmed that the Claimant is a 50% shareholder and was employed as Managing Director. Syed Ahmed owns the other 50% of the shares and also held the Claimant's share in trust for him because at the time, the Claimant had no money to put into the business. The business began trading at the beginning of 2016.
15. From January 2016 up to November 2020, when a restraining order prevented him from attending the premises, the Claimant as managing director, ran the Respondent business. Syed Ahmed was the sole director and held all of the issued shares in the company. He was more of a '*sleeping partner*' and did not take part in the day-to-day running of the business. In 2015, Mr Syed Ahmed provided a loan to the company, which allowed it to purchase motor cars that were then leased to taxi and private hire drivers. The explanation of why the Claimant's shares were held by Syed appears to relate to his conviction and prison sentence for fraud

relating to mortgages. It was the Claimant's evidence to this Tribunal and the High Court that he has subsequently satisfied two confiscation orders obtained by the Crown Prosecution Service in respect of his conviction. The High Court found his evidence to be credible, with which this Tribunal agrees.

16. In 2017, the Claimant's mother, Ms Khatun, deposited £74,381.05 into a creditors account in Panache Leasing, on the Claimant's behalf. Mr Syed Ahmed also had a creditor's account. Statements from both creditors' accounts were also in the main bundle. Mr Syed Ahmed confirmed in evidence that a creditor's account shows money that a director has put into the business and explains each withdrawal. In its findings of fact, the High Court confirmed that the accounts for the year ending 31 January 2018 provided a good illustration of the company's knowledge of its finances as Mr Syed Ahmed's account showed that he was owed £74,462 and the Claimant's account showed that he was owed £95,116.50, which is at page 369 of the trial bundle.
17. Mr Syed Ahmed also provided personal guarantees on all finance agreements for the vehicles, under the hire purchase agreements and gave personal guarantees for unsecured loans made the Respondent company. In the chronology formulated by the High Court, it acknowledges that by April 2020, the Respondent company had repaid £102,000 of the £200,000 advanced by Syed Ahmed. The Claimant was successful at running the business so that by the end of the first year of trading, the company had achieved a turnover of £225,751. At the start, the company was leasing 16 cars and by the time of the High Court hearing, it was the lessor of about 170 vehicles.
18. In the beginning, the Claimant worked 6 days a week, 14 – 16 hours a week. By the end of October 2019, the Claimant was able to reduce that to 5 days a week, working occasionally on Saturdays to catch up on work. The business continued to be profitable. This was unchallenged evidence.
19. Mr Syed Hussain is known to both the Claimant and Mr Syed Ahmed. Mr Ahmed wanted Mr Hussain to keep track of the company's finances. Mr Hussain arranged for one of his junior employees, Mr Shiju Matthews, to work for the Respondent at the company premises on one day a week to work on the Respondent's accounts. Mr Matthews worked for the Respondent one day a week and on weekends. He would produce trial balances and pass them to Mr Hussain so that he could use them when working on the year-end accounts. Mr Hussain would provide Syed Ahmed with the year-end accounts at a face-to-face meeting where he would agree them before signing. Mr Syed Ahmed was always presented with and signed his approval of the year-end accounts.
20. The High Court found that the company knew of the cash position and of the loan accounts. Mr Matthews kept a contemporaneous log of cash payments received and paid out, on an excel spreadsheet. This was part of the documentation provided to Syed Ahmed which he would consider as part of his approval of the year-end accounts. Syed Ahmed admitted that he did not always read over the accounts before signing, knowing that they

would be submitted to Companies House and Her Majesty's Revenue and Customs, which was his choice. He had other businesses both here and in Bangladesh which took up much of his time and attention and he left the running of the Respondent to the Claimant.

21. Mr Syed Ahmed continuing role in the business was in all dealings with the HP lenders, providing security to them for new cars, signing the lease of the premises and some involvement in recruitment of some of the senior employees such as Mr Shiju Matthews and Mr Hussain.
22. The Claimant held all the other responsibilities to the Respondent company. From 2018 he has exclusive possession of the debit card associated with the company bank account. His evidence was that the people who worked in the office - approximately 4 people - could all use the bank card. The Claimant also opened a PayPal account in the name of the company. The High Court found that there was no agreement between the parties that the Claimant needed authorisation to do so, given that he had delegated responsibility to run the business. There was no record in any of the documents produced to the High Court or to this Tribunal that showed any limitation on the delegated responsibilities placed on the Claimant. This Tribunal agrees with the High Court that the Respondent has not shown that the delegation of responsibilities to the Claimant prevented the use of (a) a director's loan account or other loan account and (b) the use of cash for disbursements or (c) any other restriction such as the opening of a PayPal account.
23. The Claimant was also responsible for the day-to-day management of staff in the business. The Claimant was not the only person who had access to the Respondent's online bank account. Mr Omar Muhammed and Mr Sayad Miah both gave evidence to the High Court that they had access to it to pay suppliers, make purchase and pay for liabilities such as parking fines. It is unlikely that they had access to online banking. All payments were recorded and passed to the Claimant and Shiju Matthews, who produced the ledgers.
24. Between September and November 2020, the Claimant and the Respondent were negotiating the transfer or sale of Syed's share of the business to the Claimant. Mr Hussain was acting as a sort of 'go-between', between the Claimant and Syed Ahmed in relation to the sale as he considered that he was a friend of both brothers and wanted to see a positive outcome to the negotiations.
25. On 8 September 2020, Syed Ahmed sent a text message to Mr Hussain and instructed him to transfer 50% of the shares in the Respondent to the Claimant, for no consideration. Syed was seeking to exit the company and stated, '*I have made my final decision to pull out from this partnership*'.
26. It is likely that they subsequently reached an agreement about the sale on 24 September as on the following day, 25 September, the Claimant wrote an email to Mr Syed Ahmed and Mr Hussain to set out what he believed to be the agreed terms for Syed to exit from the Respondent. He also wrote this:

'Can I take this opportunity to thank Moni Bhai (a term of respect for Syed) for his kind support to establish this business. Without your support I would not have been able to come this far. You supported me when I was at my lowest point of my life and for this I am forever grateful indebted to you As mentioned I am forever grateful to you. It is somewhat sad that you decided to end your journey with me but I understand and respect your decision.'

27. The Claimant then spoke to Mr Hussain about transferring his shares to his wife. It is likely that Syed was not happy about this proposition. Mr Syed Ahmed asked Mr Hussain to telephone the Claimant to say that he had changed his mind about the amount and that he wanted to organise a valuation of the business. On or around 26 September, possibly at another meeting, Mr Syed Ahmed threatened the Claimant that if he did not increase his offer, the Respondent would put the business on the market and that as the Claimant was not a registered shareholder or Director on Companies House, he would not have any right to stop him from doing so and would not get anything.
28. It is likely that around this time, negotiations and the relationship between the Claimant and his brother, Syed Ahmed began to turn sour, possibly as Judge Briggs concluded, because Syed wanted more money to come out of the business, or for some other reason. This led to the meeting on 3 November, after the Claimant had completed a valuer questionnaire and returned it to Mr Hussain. In the questionnaire the Claimant wrote that he and Syed each owned 50% of the Respondent's share capital.
29. At the preliminary hearing before EJ Russell on 8 September 2021, Syed Ahmed's case was that he became concerned about the conduct of the Claimant in a meeting with the accountant on 3 November and about potential financial improprieties by the Claimant. He said that it was because of this that he obtained the business bank accounts from HSBC on 9 November 2020, which provided proof of significant financial impropriety and caused him, in an enraged state, to attend the Respondent's offices and told the Claimant that he was summarily dismissed.
30. In this hearing, the Respondent's position was different. It was Mr Syed Ahmed's position, supported by Mr Hussain that in the meeting on 3 November, the Claimant made specific threats to bomb the business and his home that could not be interpreted in any other way and that he had no choice but to immediately terminate the Claimant's employment to safeguard the business and his home.
31. In the response to this claim the Respondent has relied on both points as the reason for dismissal. At paragraphs 8 and 13, the Respondent stated that the Claimant's employment was terminated because he took cash monies belonging to the Respondent and rent monies from the subtenant in excess of £500,000 and also because of gross misconduct, viz. threatening to destroy the Respondent's premises and blow up the director's home with his family inside.

32. In the High Court hearing, the Judge found that it was unlikely that the Claimant made the alleged threats at the meeting on 3 November. Mr Hussain's evidence to the High Court was that at the end of the meeting he left it as a friend of both the Claimant and Syed Ahmed.
33. This Tribunal finds that Mr Hussain met with the Claimant on his own on 3 November. His evidence was that the purpose of the meeting was to discuss some accounting matters related to the sale and valuation of the business. Mr Uddin was also present, but he did not give evidence to this Tribunal. Mr Syed Ahmed was not present at the meeting. Mr Hussain's evidence to the Tribunal was that *'halfway through the meeting the Claimant began to behave erratically and that he turned aggressive, intolerable and abusive because Mr Hussain would not agree to his wrongdoings'*.
34. In addition to the live evidence from the Claimant and Mr Hussain, the Tribunal also had the benefit of contemporaneous emails sent around the time of the November meeting and a typed transcript from the Claimant's recording. The first email was from Mr Hussain to both the Claimant and to Syed Ahmed, sent at 3.48pm on 3 November, which stated as follows:

'Dear Mr Syed Ahmed,

I have had a brief meeting with Mr Tipu Ahmed this morning and discussed way forward, Mr Ahmed requested urgent attention to the matters below:

- 1) Valuation to be done before 15 November 2020*
- 2) Meeting with all parties to reach an agreement as soon as possible*
- 3) Final deadline to reach agreement is 30 November 2020.*

Kind regards,

Syed Ahabab Hussain'

35. It is likely that this was sent soon after the meeting. There was no mention of any threats having been made at the meeting or of the Claimant behaving in an abusive, aggressive or intolerable way.
36. The next email was a much longer email from the Claimant sent on the following day. The Claimant addressed his email to Mr Hussain and copied Mr Matthews and his wife, Ms Begum. The content of the email suggests that the Claimant was upset about the meeting from the previous day and what he saw as the Respondent's attempts to bully him. He recorded his understanding of what was agreed about the valuation of the business and that he believed that the reason for Mr Hussain's visit was that Mr Syed Ahmed had changed his mind about that. The Claimant then went on to say that in their discussion, Mr Hussain:

'told me that MB (Syed Ahmed) was the sole owner of the company as he is the registered director and 100% shareholder on the company house records. I believe this opinion is based on the lack of understanding of how corporate rule works and the law of the land works. This opinion has no

legal basis as MB is a trustee for my share of the business. I believe this was expressed to me so as to make me feel I have no legal ownership of the company and therefore to intimidate me and corner me'.

37. The Claimant recorded in the email that Mr Hussain told him that if he did not buy the shares from Syed Ahmed at the asking price, then *'the whole company will be sold in the market'*. The Claimant felt that this was also said to bully and intimidate him into making a deal on the terms set by Syed. The Claimant was very upset by this and perceived it as a very real threat. He recorded in the email that Syed Ahmed had done other things that he perceived as undermining such as asking Mr Uddin about finances or calling the office to ask about wages, while at the same time, negotiating his way out of the business. The Claimant recorded in the email that Mr Hussain told him that unless he bought Mr Ahmed's share of the business at the price he set, Mr Ahmed would *'become awkward'* and pull out of the business and rescind his personal guarantees. The business would not have been able to function without those as the Claimant, with his criminal conviction would not have been able to give acceptable personal guarantees to the Bank and other creditors. This is confirmed in the Respondent's response, where the following is stated at paragraph 21:

'The Director had given personal guarantees on all finance agreements for the vehicles which are under hire purchase agreements, in addition the Director has also given personal guarantees for loans and other borrowing which are unsecured with various institutions. The Respondent avers that without the Director's personal guarantees the Respondent would not be in a position to operate due to the nature of the business namely weekly rentals of vehicles to private hirer drivers purchased under hire purchase agreements. The Respondent avers that the current value of the personal guarantees of the Director stands at approximately one million, five hundred pounds.'

38. In the meeting on 3 November, Mr Hussain also told the Claimant that Mr Syed Ahmed had asked him to carry out an audit of the company's finances. The Claimant felt that this was a suggestion that he had been dishonest in some way as Syed had never asked for this before. He also felt that Syed was threatening him, his job and the business in order to force his hand in the negotiations. Syed Ahmed already received and signed off regular accounts provided by Mr Matthews.

39. The Claimant ended the email as follows:

'Based on the above, I'll make my position very clear; I do not see how I have ripped off MB, I don't see the reason for an audit - this implies I have been dishonest- I have already asked MB to let me know his findings. I don't see the reason why the valuation has not been carried out despite being 6 weeks. I don't see the reason to speak to FB about finances and wages. I don't understand the purpose of today's meeting apart from to intimidate me. I don't see any reason to mention the legal ownership, to sell my shares without my consent, to obstruct me to run the business if I do not remove MB immediately from all PGs apart from to intimidate me and to force me to agree upon MB desired outcome whether it be justified or not. I have

expressed to AB that I cannot see why the valuation of the business cannot be carried out within a week. I also don't see why we cannot conclude this matter by mid-November. I have also explained if the matter is dragged on then the business will suffer and ultimately impact me and everyone that works for the company. If the matter is not concluded by mid-November I will do the following to safeguard my interest:

1- I will split the fleet into 2 equal size and value.

2- MB can choose which half he wants to take, I'll allow 24 hours for that.

3- I will deliver MB's half of the vehicle to his home address.

4- I will stop making finance payments to HP lenders until such time I have been reimbursed for the shortfall in my salary over the last 5 years. My salary under payment was picked up by Ahbab Bhai (Mr Hussain) before I mentioned it to him. According to the leading authority in recruitment Glassdoor, I should be paid £100 K pa to run a company of our size.

*Best regards
Tipu Ahmed'*

40. In addition to recording this meeting, the Claimant had also made a recording of the meeting with Syed Ahmed, held on 24 September. The Claimant arranged for the recordings to be transcribed by a professional transcriber who also translated the audio into English. The recording supports the Claimant's version of events. The recording of the meeting of 3 November, is extremely long. The Tribunal has read the transcript. The Respondent disputed the accuracy of the transcript but have not produced another version. Also, when the Respondent was given an opportunity to make comments on the transcript, in the High Court proceedings, they did not make any comment. The transcript demonstrates that this was a long and involved discussion between the Claimant and Mr Hussain about the business and Mr Syed Ahmed's desire to get out of it and how that could happen. The Claimant was becoming increasingly frustrated during the meeting so that by the end of the meeting, he was angry. He stated that if the valuation was not done by the end of the month he would split the fleet into two equal parts, let Syed decide which half he wanted and deliver half of the vehicles to Syed's home.
41. The transcript records that the Claimant swore in the meeting, especially when the discussion turned to the subject of the prospective valuer, David, who had written to him asking for information. The Claimant had responded to the email and sent the information but was not impressed with David's knowledge or abilities as a business valuer as he had not asked for a business forecast. The Claimant was also angry that Mr Hussain said that Syed owned the business 100%. Mr Hussain objected to the Claimant's language in that part of the discussion. The Claimant apologised to Mr Hussain for his language and stated that he felt that Syed was *'taking him for a mug'* and that he was not going to accept being treated in that way.

42. At one point in the meeting (page 158 Respondent's bundle), the Claimant stated that *'if too much trouble is created, I'll just close the company down'*. Later, on the same page he is recorded as stating *'If he wants to have this kind of conversation; don't get me wrong, I'm not threatening anyone here; if he would have threatened me, I will threat you, and I'll close it down. Tomorrow he will lose his house. What have I got to lose? I've got nothing to lose. I'll be able to go and earn money tomorrow.'* This was in response to being told that he would be made homeless, and that Syed would ensure that he was kicked out of his house. There were other occasions during the meeting where the Claimant stated that he was capable of closing the business down if challenged by Syed, and in response to being told that 100% of the shares in the business belonged to Syed. The Claimant sat down with Mr Hussain that day for a discussion in his capacity as a shareholder in the business, as he had in the previous discussions about the sale/purchase of Syed's share. The Claimant was clear in his evidence that this was not a discussion that an employee would have with his employer.
43. Mr Hussain's live evidence in the Tribunal hearing was that the threats to bomb Syed's home were made after the Claimant stopped recording the meeting and so are not on the transcript. The Claimant disputed that he had ever made such threats.
44. The discussion between the Claimant and Mr Hussain continued through email on the following day. Copies of that correspondence was also in the bundle of documents. In his response email to the Claimant dated 5 November, Mr Hussain made no reference to threats to Syed Ahmed's property or home. He also did not refer to any threats to the business. He complained about the Claimant's use of bad language in the meeting and denied that he had come to the meeting as Syed's representative but instead had attended in an attempt to act as mediator between two brothers. He stated that he no longer wanted to perform that role or take any further part in the mitigation process, from then on. The Claimant sent another email later that day to respond to some of Mr Hussain's points.
45. It is likely that the discussions on the sale of Syed's share of the business stalled around this time. On 9 November, Syed Ahmed requested company financial documents to review the Respondent's bank account.
46. On 13 November, with no notice to the Claimant, Syed Ahmed and the Respondent issue an application in the High Court for a without notice injunction to exclude the Claimant from the business and the premises. The evidence filed in support of the application alleged that the Claimant had stolen £106,075.96 from the Respondent company. On 16 November, Roth J refused to grant the without notice injunction and directed service by email for a hearing on the following day. On 17 November, Roth J granted the injunction on undertakings. The Claimant did not attend the hearing as he had not received the notice. The injunction was granted on the basis of the statements provided to Roth J. To the High Court the Respondent submitted Mr Hussain's statement, in which he stated that on 3 November, the Claimant had threatened to destroy the business and *'bomb both the business premises and Syed's main residential home'* and two statements

from Syed Ahmed, the second of which alleged that the Claimant presented a clear danger to the company.

47. Although the Respondent had claimed at the hearing before EJ Russell that the Claimant had been dismissed on 9 November, there was no letter of dismissal and none of the documents for the High Court produced around that time referred to the Claimant's dismissal. EJ Russell recorded in her decision that there was no mention of the Claimant's dismissal in the statement which Syed Ahmed made in early November 2020, for the injunction proceedings. As the application for an injunction was based on the Claimant's alleged financial misconduct, his dismissal for financial misconduct would have been relevant information to present to the High Court, if he had indeed already been dismissed.
48. The Claimant's dismissal was not referred to in any of Syed's statements to the High Court until 9 February 2021. EJ Russell recorded in her decision that the Respondent failed to pay the Claimant any salary after the end of November 2020. Mr Syed Ahmed's response was that the Claimant had been given his P45. The Claimant had not been given his P45 until much later.
49. It is unlikely that there was a meeting between the Claimant and Syed on 9 November, but Syed did go to the business premises on 19 November and put the injunction on the Claimant's desk, in the Claimant's presence. The Claimant left the premises, as the injunction ordered him to do. He was also ordered to stay away from the business, hand over all keys, vehicle logbooks and remote access of the vehicles, and to refrain from disabling any of the vehicles remotely. He was prohibited from accessing the Respondent's servers and computers at the business premises.
50. On 2 December 2020 the Respondent filed Particulars of Claim in the High Court alleging that the Claimant had stolen £943,980.05, comprising cash withdrawals and monies paid to individuals who were not employed by the company.
51. Chief ICC Judge Briggs stated in paragraph 31 of his assessment of the pleaded case that the Particulars of Claim failed to comply with the basic requirements of the serious allegations made within it. He also stated that those Particulars would be vulnerable to a strike out application as dishonesty was not the only basis to explain the payments from the Respondent's bank account. Documents in the possession of the company at the time the Particulars were drafted provide evidence of honest dealings, even if those dealings were mistaken.
52. Although the Claimant's P45 was dated 9 November 2020, there was no evidence that it had actually been issued at that time. EJ Russell decided that it was likely that the P45 had not been issued until 2021.
53. EJ Russell's decision was that the Claimant's dismissal took place in February 2021 but that the Claimant was not informed of his dismissal until 4 March 2021 by ACAS.

54. In its evidence to the High Court and to this Tribunal the Respondent stated that it was not until 9 November 2020 that the Respondent discovered that there had been several transactions by a PayPal account where the username was the Claimant's first name, *Tipu*, and followed by the Respondent's email address. The payments were for online pornographic services and online gambling. The Claimant's response in the High Court was that he could not be sure that the transactions had been carried out by him as others in the office had access to the company bank account. He denied the payments had been made by him. He also denied that he had misappropriated any of the Respondent's money.
55. It is surprising that the Respondent did not discover the transactions until 9 November 2020 when the company records demonstrated transparency. All money going out was recorded on an excel spreadsheet. Mr Uddin updated the spreadsheet on a weekly basis. All cash coming in was recorded and any cash Mr Uddin passed to the Claimant was also recorded. Mr Uddin's evidence in relation to the records he kept was accepted by the High Court and this Tribunal was given no evidence to challenge that finding.
56. The Respondent's Response to this claim relied on the following as evidence of the Claimant's gross misconduct: - payments to pornographic websites from the Respondent's bank account, payments to online gambling sites from the Respondent's bank account, dishonestly withdrawing money from the Respondent's bank account, dishonest appropriation of the Respondent's money held in the Respondent's bank account, threatening to blow up the Respondent's business and threatening to blow up the Respondent's director's family home. Having heard all the evidence and considered the relevant documents, the High Court's judgment was that the Claimant had not committed fraud and had not misappropriated funds. At the end of the Tribunal hearing, the Respondent's submissions were that the Claimant had been dismissed because of the threats to bomb the Director's home and to destroy the hard drive, as well as the inappropriate expenditure. There was less emphasis on the allegations of dishonestly withdrawing money from various accounts and appropriation of the Respondent's by the end of the hearing. Although those allegations were not formally withdrawn, the Claimant was hardly questioned about them. The focus was on the online gambling and pornographic transactions and on the allegations that the Claimant made threats to Syed's home.
57. The Respondent showed the Tribunal various transactions to online pornographic and gambling websites. It was Syed's evidence to the Tribunal that the payments had been made from the Respondent company's business account. For example, on 5 June 2019, there were three payments to JODIEJAMESO, ROSSIEHOT6 and ROXANALICIA, who were likely to be providing online pornographic content. On 22 July 2019 there were 11 payments to BGO ENTERTAINMENT, which the Claimant confirmed was an online casino or gambling site. The Claimant also confirmed that White Hat Gaming was an online gaming site. Those payments were reimbursed to the Respondent from the Claimant's creditors' account. (See page 376 - 377). The Claimant informed the High

Court that he had complained about a fraud on his personal bank account, to his bank and that he had been reimbursed the payments. The Claimant did not have the evidence of this at the High Court to show to Judge Briggs. The Claimant had some bank statements in the electronic bundle. At page 327, the bank statement shows that on 21 September 2020, White Hat Gaming paid the Claimant £200.

58. In a witness statement prepared for the proceeds of crime part of the criminal prosecution against the Claimant for mortgage fraud, a Financial Investigator called Andrew Lerner, who is accredited by the National Crime Agency, stated that *'There is evidence to suggest that the defendant is a prolific gambler and activity in his bank records indicates substantial interaction with gaming entities and a PayPal account.'*
59. The Respondent's PayPal account was also used for legitimate business expenses. The High Court accepted the Claimant's case that all payments to him were agreed, authorised and recorded in the company records. It was the High Court's judgment that the company records demonstrated transparency and that there was no intention to permanently deprive the Respondent company of any money. All these transactions were clearly and plainly showed in the Respondent's accounts at the time. There was unlikely any attempt by the Claimant to conceal these transactions as they were correctly named in the accounts. The Respondent simply credited them to his creditors' account.
60. There was no meeting between the Claimant and Syed or anyone else on the Respondent's behalf, whether on 9 November or at any other time, in which the Claimant was asked about these transactions or about what had occurred in the meeting with Mr Hussain on 3 November. The Claimant was not given an opportunity to explain his actions or agree or disagree with what he is alleged to have said.
61. The Respondent failed to show to the High Court or to this Tribunal that the Claimant had an addiction to porn or to online gaming. At the High Court and in this hearing the Claimant accepted that he was responsible to make good the impugned online payments for services, on the basis that they were made while he was managing the company. He therefore recognised a debt to the company but did not admit misconduct.
62. The outcome of the High Court hearing was referred to above. The Chief ICC Judge Briggs found against the Respondent and did not accept the case that the Claimant had committed gross misconduct and breach of fiduciary duty, theft and dishonesty. Instead, he concluded that the Claimant was summarily dismissed without good reason.
63. The Claimant was ordered to pay the Respondent for the internet-based porn and gambling services in the sum of £14,669.96, because he accepted responsibility for it as he was managing the office at the time that these activities occurred.
64. The High Court discharged the injunction obtained against the Claimant and dismissed the Respondent's claim. Chief ICC Judge Briggs also awarded

costs to the Claimant for the false claim against him and costs arising from the counter claim.

65. The transcripts of the meetings on 24 September and 3 November 2020 only became available in February 2021. The Claimant had them produced because he wanted to use them to support his resistance to the injunction and his application to have it set aside. The Respondent was resistant to the inclusion of the transcripts, but it was only at the point that they were produced that the Respondent added alleged threats made by the Claimant in the meeting on 3 November, to the reasons for dismissal.
66. On 18 February 2021, the Claimant emailed Syed Ahmed to ask for his outstanding wages to be paid to him. The Claimant did not get a response. On 8 March 2021, the Claimant checked his tax summary at HMRC, and it stated that his employment had ended on 9 November. The Claimant had been working up until 19 November 2020 when he was served with the injunction.
67. The Claimant contacted ACAS to complain about the Respondent's failure to pay him outstanding wages. On 4 March 2021, ACAS reported back to the Claimant that he had been dismissed. The Claimant brought this complaint of unfair dismissal on 12 March 2021. By her judgment dated 12 October 2021, EJ Russell decided that the Claimant's effective date of termination was 4 March 2021 as this was when the Claimant became aware of his dismissal.
68. The Claimant has had financial difficulties since the termination of his employment. He had to move out of his home and has living off borrowed funds from friends and family. The Claimant has spent considerable sums of money getting transcripts made of the meetings on 24 September and 3 November. When the Respondent disputed its accuracy, he spent a further sum getting it re-transcribed.
69. The Claimant has also made efforts to find alternative employment.
70. The Claimant's evidence was that between March and June 2021 he explored two business opportunities - to set up a hotel and to open up a storage business. The Claimant did his research and made business plans for both ideas. He managed to secure financial backing for these business ideas but neither went ahead because of the uncertainty caused by the ongoing Covid-19 pandemic. The Claimant produced evidence of the work he did on those potential businesses.
71. The Claimant also looked into the feasibility of a van rental business. The Claimant had experience of running the Respondent, which was also a vehicle leasing and rental business so this would be a reasonable choice for him. This plan also did not go ahead for reasons beyond the Claimant's control. The Claimant produced evidence of the work he did on this plan. This was in the bundle of documents.
72. In August 2021, the Claimant made efforts to set up a car rental business. Once again, he had contacted suppliers of cars such as Toyota, Kia and

Hyundai to check for availability of cars on the market. He developed a business plan and arranged finance. When the banks became aware of the ongoing High Court litigation with the Respondent, they withdrew their support.

73. The Claimant has worked on a self-employed basis with a friend, from January 2022 to January 2023. He acted as a consultant. The Claimant was unemployed at the date of this hearing and did not give evidence of any other efforts to find alternative employment.

Law

Unfair dismissal

74. In this case, the Tribunal is concerned with the question of determining the reasons for the employee's dismissal, since it is agreed that he was dismissed. The burden is on the employer to show the reason for dismissal and whether it is a potentially fair reason (one of the reasons set out in section 98(2) of the Employment Rights Act 1996), i.e., that it relates to the employee's conduct.

75. A dismissal that falls within that category can be fair. In order to decide whether it is fair or unfair, the Tribunal needs to look at the processes employed by the employer leading up to and including the decision to dismiss. In cases concerning the employee's conduct, a three-stage test must be applied by the Respondent in reaching a decision that the employee has committed the alleged act/s of misconduct. This was most clearly stated in the case of *British Homes Stores Ltd v Burchell [1980] ICR 303*, as follows. The employer must show that: -

- (a) he believed the employee was guilty of misconduct;
- (b) he had in his mind reasonable grounds which could sustain that belief, and
- (c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

76. This means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it which has been reasonably tested through an investigation.

77. If the Tribunal concludes from all the evidence that the dismissal was for misconduct and the three limbs of the *Burchell* test has been satisfied; then the next step for the Tribunal is to decide whether, taking into account all the relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, the employer has acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the Tribunal has to be mindful not to substitute its own views for that of the employer. Whereas the onus is on the employer to establish that there is a fair reason, the burden in this second stage is a neutral one. The

Burchell test applies here again, and the Tribunal must ask itself whether the employer's decision fell within "the range of reasonable responses" of a reasonable employer. The law was set out in the case of *Iceland Frozen Foods v Jones* [1982] IRLR 439 where Mr Justice Browne-Wilkinson summarised the law concisely as follows:

"We consider that the authorities establish that in law the correct approach for the ... tribunal to adopt in answering the question posed by [section 98(4)] is as follows:

- (1) the starting point should always be the words of section 98(4) themselves;
- (2) in apply the section (a) the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair;
- (3) in judging the reasonableness of the employer's conduct (a) tribunal must not substitute its decision as to what was the right course to adopt for that of employer;
- (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
- (5) the function of the Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable response which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

78. The tribunal is therefore not allowed to substitute its view for that of the employer. Instead, it should recognise that different employers may reasonably act in different ways to a particular situation. In the case of *Trust Houses Forte Leisure Ltd v Aquilar* [1976] IRLR 251 (EAT), Phillips J said:

"it has to be recognised that when the management is confronted with a decision to dismiss an employee in particular circumstances there may well be cases where reasonable management might take either or two decisions: to dismiss or not to dismiss. It does not necessarily mean that if they decide to dismiss that they have acted unfairly because there are plenty of situations in which more than one view is possible."

79. The Respondent referred the Tribunal to the case of *Strouthos v London Underground Ltd* [2004] IRLR 636 in which it was held that *'it is a basic proposition, whether in criminal or disciplinary proceedings, that the charge against the defendant or employee facing dismissal should be precisely framed, and that evidence should be confined to the particulars given in the charge.'* Pill LJ held that *'it does appear to me to be quite basic that care must be taken with the framing of a disciplinary charge, and the*

circumstances in which it is permissible to go beyond that charge in a decision to take disciplinary action are very limited.'

80. The Respondent submitted that the Tribunal should also consider the effect of the case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, in which it was held that where there are any findings of procedural unfairness, the tribunal must go on to consider whether such matters, if remedied, would have made any difference to the decision to dismiss. The *Polkey* reduction may be expressed as a percentage reduction or a limit on the future loss.
81. Lastly, where the tribunal finds that a dismissal was to any extent caused or contributed to by any action of the employee, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. The case of *Nelson v BBC (2)* [1980] ICR 110 established a three-step test for applying contributory fault reductions, as follows: (1) there must be some culpable or blameworthy conduct; (2) the conduct must have caused or contributed to the dismissal (not be irrelevant to it); and (3) it must be just and equitable to reduce the award.

Judgment

Credibility

82. When assessing credibility of the evidence given by the two main witnesses in this case, the Tribunal bore in mind that in the High Court litigation, the Respondent brought those proceedings because Syed Ahmed alleged that the Claimant had by various means, stolen significant amounts of money from the business. In November 2020, in an application for a without notice injunction to exclude the Claimant from the business, the Respondent alleged that the Claimant had stolen £106,075.96 from the business. By the time the matter came up for the final hearing at the High Court, the allegation was that the Claimant had, by various means, stolen a total of £945,980.05 from the business.
83. Following a multi-day hearing, due consideration of the company records and live evidence, the High Court ruled that there had been no intention on the Claimant's part to permanently deprive the company of any money. The Chief ICC Judge Briggs' judgment was that there was no fraud, and the Claimant had not acted dishonestly or misappropriated any company funds. The injunction was discharged, and the Respondent was ordered to pay the Claimant's costs. Mr Syed Ahmed's evidence was found to not be credible, in part, and Mr Hussain's evidence that the Claimant was a dishonest person and a bully, was treated with caution as it was unsupported by evidence. It was not accepted by the Court. Although the High Court judgment records that the Claimant had been intemperate in the 3 November meeting, his evidence was accepted. In contrast, Syed Ahmed was found to have made inconsistent or otherwise unfounded statements which were found to be incredible.
84. The Respondent's case was that the Claimant had been dismissed on 9 November when Syed attended the Respondent's premises and summarily

dismissed him because of the information discovered in the company accounts. At the preliminary hearing before EJ Russell, Syed Ahmed gave live evidence that he had dismissed the Claimant that day. That evidence was not accepted by EJ Russell or by the High Court. The Tribunal found it unlikely that there had been such a conversation between the Claimant and Syed Ahmed on 9 November. EJ Russell's judgment was the Claimant was not dismissed on that day. This means that it is highly likely that the Respondent put forward a case to the Employment Tribunal and to the High Court in the full knowledge that this had not happened. This Tribunal therefore treated the Respondent's evidence with caution.

85. The Tribunal found the Claimant to be credible. The High Court found his evidence reliable. The Respondent's main contention was that as he had been found guilty of fraud and had been sentenced to prison, that should lead the Tribunal to prefer the Respondent's evidence to his. It does not follow that a conviction for dishonesty in unrelated proceedings would necessarily lead another court to assume dishonesty. In this case, the Tribunal found that the Claimant's evidence was in line with the documents provided and that his evidence had been consistent throughout these proceedings.

Applying Law to the Facts found above

These are the Tribunal's decisions of the Issues which arise in this case

What was the Reason for Dismissal?

86. The Tribunal has to firstly decide what is the reason for the Claimant's dismissal. The Respondent's case is that the Claimant was dismissed for misconduct in relation to the following matters: -

Expenditure on gambling and porn sites

87. The Tribunal noted that any transactions relating to porn and online gaming were done in 2019 and that the Respondent was presented regularly with accounts of all expenditure from the company accounts on regular basis.
88. Mr Syed Ahmed signed off the accounts presented to him by Mr Hussain, including the accounts for 2019. Mr Matthews prepared the accounts and presented them to Mr Hussain who then took them to Mr Syed for approval. It is reasonable for the Tribunal to hold that the Respondent has had knowledge of these transactions since 2019 and did not find them objectionable or view them as misconduct, at the time. The Respondent had the opportunity to see these transactions as they were not hidden or concealed from the Respondent. The Respondent had all the information showing the transactions. There was no evidence of any attempt at concealment.
89. The Respondent failed to prove that it only became aware of the payments to the online porn and online gaming websites on 9 November 2020. In this Tribunal's judgment, it is more likely that the Respondent knew of the transactions at the time and simply credited them to the Claimant's loan

account as a way of making him pay them back to the Respondent. No other action was taken in relation to these matters in 2019 or even in 2020, or whenever Mr Syed Ahmed would have had sight of the accounts and signed them off.

90. This Tribunal is persuaded that the Respondent had all the necessary information and was aware of all transactions going in and out of this business.
91. In addition, the Respondent failed to put to the Claimant in a disciplinary or any other meeting, the question of the online gaming and online porn transactions, to give him a chance to answer the allegation that these were his purchases and that they were his acts of gross misconduct. The Claimant did not have that opportunity either at a disciplinary hearing or at any appeal. The Claimant was removed from the business as a consequence of the injunction which was obtained in relation to the allegation of misappropriation of funds.
92. The Respondent has shown that in the criminal proceedings, there was a statement that it is likely that the Claimant has a gambling habit. However, that does not prove that these transactions were his. There were other people who had access to the bank account and other people at the office may also have a gambling habit. There was no investigation into this matter, either before the Claimant's dismissal or subsequently.
93. In the High Court proceedings, the Claimant accepted responsibility for these payments because he considered that as the manager, he should have been aware of the activities of his staff. It was on this basis that the High Court Judge directed that the Claimant should repay the sums involved to the Respondent. There was no finding at the High Court that this expenditure was the Claimant's.
94. In the circumstances, it is this Tribunal's judgment that at the date of dismissal, the Respondent could not have had a reasonable belief that the Claimant had made these inappropriate transactions and that this was gross misconduct. The Respondent knew or it is reasonable to conclude that the Respondent knew of these transactions in 2019, at the time they occurred and at the time, did not consider them to be misconduct. In addition, since November 2020, the Respondent has still not carried out any investigation in relation to these transactions, apart from Syed requesting copies of the accounts which had previously been shown to him when he signed off the accounts.

Misappropriation of company funds

95. The Respondent's case at the High Court was that the Claimant had misappropriated £943,000. Initially, when the injunction was obtained, the sum referred to was £106,000. It dramatically increased thereafter. The Respondent presented all their evidence to the High Court in support of these very serious allegations. At the end of the hearing, Chief ICC Judge Briggs' judgment was that there had been no fraud, and the Claimant had not acted dishonestly or misappropriated company funds.

96. The Respondent did not rely on the same evidence in this hearing. In as much as the Respondent still relies on misappropriation of funds as a reason for dismissal, this Tribunal was not drawn to evidence of it in the hearing and the Claimant was hardly cross-examined on it. There was no explanation given for the huge discrepancy in the amounts claimed and no explanation of what the amounts claimed referred to.
97. The Respondent failed to put its case to the Claimant in this Tribunal hearing about misappropriation of company funds. In those circumstances, it is this Tribunal's judgment that at the time of dismissal, the Respondent did not have a reasonable belief that the Claimant had misappropriated the Respondent's funds.

Threats to Mr Syed's home and the Respondent business

98. The Respondent emphasised this at the hearing. It is the Respondent's case that Mr Hussain reported back to Mr Syed Ahmed that the Claimant made threats during their meeting on 3 November and that is why he was dismissed.
99. In this Tribunal's judgment, that does not accord with the facts found above. Firstly, it is this Tribunal's judgment that although the Claimant was angry at the meeting on 3 November, there is no record in the transcript of him threatening to blow up Syed's home or to destroy the business.
100. It was the Respondent's case in the hearing that the threats were made after the recording device was switched off. The Tribunal finds that wholly unlikely.
101. If that had occurred, and Mr Hussain and Mr Syed Ahmed had considered that the Claimant had made threats or credible threats to bomb the business or to bomb or blow up Syed's home, they would have taken immediate action then to dismiss the Claimant and to report the threats to the police. Instead, the Respondent sought an injunction at the High Court to debar the Claimant from attending the Respondent's premises because he had allegedly stolen from the business. The Claimant was not dismissed until much later. Contrary to Syed Ahmed's evidence, the Respondent did not tell the Claimant that he had been dismissed. He only found this out from ACAS on 4 March, when he contacted ACAS to see if they could help him get his outstanding wages. There was no evidence that Syed attended the business premises on 9 November and dismissed the Claimant. There was no evidence of any meeting on 9 November.
102. Secondly, Mr Hussain's emails to the Claimant and Syed after the meeting on 3 November give no hint that serious threats had been made in the meeting. In the first email sent on the same day - when what had been said in the meeting would have been fresh in his mind - Mr Hussain simply set out what the Claimant wanted to happen, while the negotiations continued. The only complaint Mr Hussain had about the Claimant's conduct on 3 November was that he swore in the meeting. There was no mention of any threats having been made at the meeting or of the Claimant behaving in an abusive, aggressive or intolerable way. If such threats had been made, the

Tribunal would expect Mr Hussain to have mentioned them and to have told the Claimant that he was going to report them to Syed. He would have told the Claimant that his conduct in the meeting was unacceptable and that it would not be tolerated in future. He did not do that. It is this Tribunal's judgment that he did not do that because the Claimant's behaviour in the meeting was not as it is now being portrayed.

103. Also, Mr Hussain told the High Court that he considered that when he left the meeting, they were still friends. That does not accord with his description of the Claimant behaving erratically or in an aggressive, abusive or intolerable way during the meeting.
104. The Tribunal considered that Mr Hussain's evidence in the hearing of the Claimant's conduct in the meeting does not accord with his emails and his conduct at the relevant time. It is likely that his recollection of the meeting has been influenced by discussions that he has had with Mr Syed Ahmed subsequently and the evidence that he gave at the High Court and what he knows of the deterioration of the relationship between the Claimant and Syed.
105. The Transcript shows that the Claimant clearly became frustrated in the meeting. This was due to the slow pace of the negotiations, because of what he saw as Syed changing the terms of their agreement as they continued to discuss the matter and because of the threats made to him that he would lose everything if Syed decided to '*become awkward*', pull out of the business and rescind his personal guarantees. The Claimant considered that Mr Hussain was making threats on Syed's behalf because without Syed's personal guarantees, he would not be able to operate the business. At the end of the meeting on 24 September, the Claimant believed that he and Syed had struck a deal. The subsequent discussions between them showed that he was mistaken, and that Syed wanted an independent valuation of the business, probably wanted him to increase his offer, and was not happy about the Claimant's proposal to transfer his shares to his wife. The Claimant was content to have the valuation. But he considered that Mr Hussain's statements to him in the meeting on 3 November, were messages from Syed and that he was being threatened with the loss of his share of the business. That was when he made similar threats in response.
106. It is therefore this Tribunal's judgment that in the course of that meeting and in subsequent emails, the Claimant was threatened with the loss of his likelihood and the business viz, that the business would be sold and that he would lose everything and that there was nothing he could do about it. In retaliation, in the email of 4 November – he set out what he would do, which was to split the fleet in two, deliver Syed's half to his home address and stop making finance payments to HP.
107. It is this Tribunal's judgment that the evidence does not support a conclusion that the Claimant threatened to bomb Syed's house and threatened to blow up or bomb the Respondent's business, on 3 November or at any other time before he was dismissed.

108. It is also this Tribunal's judgment that the statements made by both the Claimant and Syed in these negotiations, whether through Mr Hussain or directly to each other were part of these negotiations. The Claimant in the emails dated 3 November was writing as a shareholder in the business and not as an employee. The Claimant attended the meetings in September and on 3 November as a shareholder in the business and not as an employee. Syed made threats to the Claimant to ruin his livelihood and to sell the business and give him nothing and in return, the Claimant threatened to divide up the business and give Syed half of the stock. By the time the negotiations had got to this point, the relationship had turned sour, and it was unlikely that there was going to be an agreement reached between them. The evidence does not support a conclusion that the Claimant made real threats against the business or made any threats to Syed's home. Syed would have known that these were not real threats as he had also made threats to the Claimant. Also, he knew that the Claimant wanted the business to continue as he wanted to take it over. The evidence does not show that there was any chance of the Claimant actually destroying the business that he had spent years working hard to build.
109. In conclusions, it is also this Tribunal's judgment that the Respondent did not have a reasonable belief at the time of the Claimant's dismissal on 4 March 2021 or when the injunction was obtained in November 2020; that the Claimant had committed misconduct by – spending money on porn and gambling sites, misappropriating company funds, or by making credible threats to bomb Syed's home and the Respondent's business premises.
110. The Respondent had not carried out any investigation on which to base any conclusion that the Claimant had committed any of the above acts of misconduct. The Respondent had not put these allegations to the Claimant. It had not carried out any investigation into these allegations, apart from looking again at accounts which Mr Syed Ahmed had previously signed off. These were very serious allegations which the Respondent made against the Claimant without first conducting any substantive, reasonable investigation.
111. It is therefore this Tribunal's judgment that the Respondent did not have a reasonable belief that the Claimant was guilty of misconduct. The Respondent did not have in its mind reasonable grounds which could sustain a belief that the Claimant had committed misconduct and clearly had not, at the stage at which the Respondent decided to dismiss the Claimant, carried out as much investigation into the matter as was reasonable in the circumstances.
112. It is this Tribunal's judgment that the Respondent did not have a genuine and reasonable belief that the Claimant had committed misconduct which had been reasonably tested through an investigation.
113. It is this Tribunal's judgment that the decision to dismiss the Claimant was related to the failed negotiations and the fate of the Respondent business.
114. It is therefore this Tribunal's judgment that the Claimant was unfairly dismissed.

115. The Claimant brought a complaint of wrongful dismissal in the High Court and the High Court has already ruled on that complaint. This Tribunal makes no judgment on the complaint of wrongful dismissal.
116. The Claimant is entitled to a remedy for his successful complaint of unfair dismissal.

Law on Remedy

117. The Claimant seeks reinstatement as his remedy for unfair dismissal.
118. In a successful unfair dismissal claim, if the Tribunal considered that neither reinstatement nor re-engagement would be an appropriate remedy for the claimant, any award by the tribunal will be monetary. A remedy award in an unfair dismissal case is made up of two main elements: a basic award and a compensatory award.

Basic award

119. This is set out in **Section 119 of the Employment Rights Act (ERA)** and is calculated using a formula that relates to the age and length of service of the successful claimant. It is calculated in units of a week's pay up to a ceiling. If the amount of a claimant's week's pay exceeded that ceiling, then the amount of the award is restricted to it. The Tribunal can reduce the basic award in certain circumstances where it is expressly permitted by statute. This is where one or more of the following circumstances exist in the particular case: i.e. the claimant's conduct before dismissal makes a reduction just and equitable, the employee has unreasonably refused an offer of reinstatement, the employee has been dismissed for redundancy and already received a redundancy payment or the employee has been awarded an amount in respect of the dismissal under a designated dismissal procedures agreement.

Compensatory award

120. This is set out in **Section 123 and 124 of the ERA**. The amount of the compensatory award shall be such amount as the tribunal considers to be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. It should not be used to punish the respondent. There are two questions to be answered by a tribunal considering what should form part of a successful employee's compensatory award: firstly, whether the dismissal was the cause of the employee's loss and secondly, what compensatory award would be just and equitable.
121. Such losses as can be compensated would include not just wages lost due to being unfairly dismissed but also any additional benefits attached to the employment that had been lost i.e., company car, health benefits, pension, travel allowances etc. In addition, the tribunal can compensate the claimant for any additional expenses occasioned by the loss of employment i.e.

expenses incurred in seeking alternative employment. The compensatory award can take into account losses extending into the future. The Tribunal has to make findings of fact based on the evidence before it, in order to determine how much and for how long it would be just and equitable to award to the claimant compensation for such future losses.

122. The claimant is under a duty to mitigate his loss and the tribunal would need to consider whether this has been done when deciding on which losses will be compensated. This refers in particular to the duty on the claimant to make diligent searches for alternative employment following dismissal.
123. Section 3 of the Employment Act 2008 contains provisions giving employment tribunals the discretion to vary awards for unreasonable failure to comply with any relevant Code of Practice relating to workplace dispute resolution. This is enshrined in section 207A and Schedule 2 to TULR(C)A (Trade Union and Labour Relations (Consolidation) Act 1992). The relevant code is the ACAS Code of Practice of Disciplinary and Grievance Procedures.
124. Section 207A(2) TULR(C)A provides that an employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the ACAS Code on Disciplinary and Grievance Procedures.
125. The tribunal can also make reductions from the compensatory award. They can reduce it to reflect the fact that the claimant's conduct caused or contributed to his dismissal. The tribunal can also make a *Polkey* reduction (in reference to the case of *Polkey v A E Dayton Services Ltd 1988 ICR 142*) in certain circumstances. If the evidence shows that the employee may have been dismissed properly in any event, if a proper procedure had been carried out, the tribunal should normally make a percentage assessment of the likelihood and apply that when assessing the compensation due to the employee. In another case, it might be more appropriate for the tribunal to fix a date by which it is confident that on a balance of probabilities, the employee would have been dismissed anyway and to limit compensation to the period up to that date.
126. A *Polkey* deduction is not only applicable in cases of procedural unfairness and can also be made when the tribunal's judgment is that the dismissal was substantively unfair. The tribunal can also take into account the likelihood of the employee resigning to look for another job or the employer ceasing to trade and calculate the effect of that on the amount of compensation that should be awarded to the successful employee.
127. In the case of *Contract Bottling Ltd v Cave* [2015] ICR 146, Langstaff P gave general guidance on applying *Polkey*. The court stated that the percentage method was the normal practice. But that even if applying the dating method, it may be necessary to assess the percentage likelihood of the employment ending by the date in question. The court also stated that what the tribunal is aiming to do is to produce a figure which as accurately as possible represented the point of balance between the chance of employment continuing and the risk it would not. It was important for the tribunal to spell out what factors it took into account in determining why it

adopted a particular percentage. In doing so, the tribunal is not looking to decide the probability of a past event having happened. It is seeking to determine the likelihood in percentage terms of a future event occurring.

128. The parties made submissions on *Polkey* and on contribution during the hearing.

Remedy judgment

129. The Claimant has applied for reinstatement. The Claimant did not explain in his evidence how that would be possible since it is likely that the relationship of trust and confidence between him and his brother had completely broken down during the discussions about the sale of Syed's share of the business.
130. In this Tribunal's judgment, it is highly unlikely that the Claimant and Syed Ahmed or the Respondent would be able to establish a working relationship of employer and employee in the present circumstances. It appears that their working relationship and possibly their sibling relationship has been damaged by the events since 2020. It is unlikely that a relationship of trust and confidence, such as required between employer and employee can be re-established between the parties.
131. Re-engagement is not appropriate in this case as the Claimant did not point to a job in the Respondent any of Syed's other businesses where he could work. Those businesses are not part of the Respondent but are likely to be separate legal entities.
132. In the circumstances, this Tribunal does not order reinstatement or re-engagement at this time.

Basic Award

133. The Claimant is entitled to a Basic Award.
134. The Claimant was earning a salary of £3,378 gross. His date of birth was 19 February 1975. The Claimant was 46 at the date of his dismissal on 4 March 2021.
135. The Claimant was employed by the Respondent as managing director between 2016 – 2021 = 5 years.
136. The Claimant is entitled to a basic award of ($£3,378 \times 12/52 = £974.42$ per week) weekly amount capped at £538.
137. 1.5 weeks' pay for every year that the Claimant worked when he was over 41 years of age.

The calculation is therefore as follows: -

$$1.5 \times 5 \text{ years} = 7.5 \text{ weeks} \times £538 = \mathbf{£4035.00}$$

Compensatory Award

138. The Claimant set out his claim for compensation at page 11 of the bundle, as part of his ET1 claim.

Outstanding wages to date of dismissal

139. On page 11 of the bundle, the Claimant firstly claims 4 months and 4 days loss of wages from 1 November 2020 – 4 March 2021, his date of dismissal. The Claimant had been paid wages to the end of October. He worked to the 19 November in the office, at which time he was served with the High Court injunction, prohibiting him from coming to the office. The Claimant was not paid any wages in November, December, January, February or March. The Claimant was told on 4 March by ACAS that he had been dismissed in February. It is EJ Russell's judgment that he was dismissed on 4 March 2021.

140. The Claimant is therefore owed outstanding wage for November, December 2020, January, February and 1- 4 March 2021. The Claimant is entitled to his outstanding wages. The Claimant had been removed from his job by the High Court injunction, through no fault of his and he had not been allowed to work. He had not been informed that he had been dismissed. He was therefore not expecting to have to find alternative employment. The Claimant is entitled to his wages up to the date of dismissal.

141. Loss of earnings is awarded on net wages. The compensatory award is paid net of tax and national insurance contributions. The Claimant's net wages, according to his ET1 form are £2600.

142. The Claimant's entitlement is to 4.2 months at the rate of £2,600 = **£10,920**.

Wrongful dismissal

143. The Claimant's claim for notice pay because of his wrongful dismissal has already been the subject of the judgment and order of the High Court. This Tribunal makes no judgment in respect of wrongful dismissal as we decided at the start of the hearing on 1 June, that this Tribunal would only deal with the complaint of unfair dismissal.

Loss of Statutory Rights

144. The Claimant is entitled to a payment for loss of statutory rights. This is to reflect the fact that it will take him 2 years in a new job before he achieves the right not to be unfairly dismissed and therefore, job security. That payment is of **£450**.

Loss of earnings due to unfair dismissal

145. The Claimant had been managing this business and had worked hard to build it up over the years so that a short time after it was started, the business was able to repay Syed Ahmed half of his initial investment. The

company turnover at the end of the first year was very good. The Claimant was therefore good at his job.

146. The Claimant is entitled to loss of wages occasioned by his dismissal. The Respondent's case is that the compensation due to the Claimant should be subject to a *Polkey* reduction because the Claimant would have been dismissed even if the Respondent had conducted an investigation.

Polkey Reduction

147. It is this Tribunal's judgment that it is not possible to say what would have been the outcome of any such investigation. The facts which point away from any conclusion that dismissal was inevitable are as follows: - Firstly, the Respondent knew about the transactions with porn and gambling sites in 2019 or whenever they were put into the accounts for that year. Mr Syed Ahmed was presented with and signed off the accounts and Mr Hussain checked the accounts before handing them to Syed for his approval. There was no concealment and no attempt to hide any transactions. Mr Syed Ahmed simply debited the Claimant's loan account for the same sums. The Claimant paid those amounts back at the time. The Respondent was prepared to leave it at that at the time. Secondly, the Respondent failed to prove that the Claimant misappropriated company funds to this Tribunal. Thirdly, it is this Tribunal's judgment that the Respondent has failed to prove that there was any evidence that the Claimant had made threats to bomb/blow up the business or to blow up Syed Ahmed's home.
148. It is this Tribunal's judgment that if the Respondent had investigated these allegations, the Claimant would not have been found to have committed misconduct and would not have been dismissed. The Tribunal's judgment is that if the Respondent were treating the Claimant as an employee and not as a shareholder, and had conducted an investigation into these allegations, the Claimant would have been able to defend himself against the allegations. It is extremely unlikely that the Respondent had evidence on which it could base a conclusion that the Claimant had committed gross misconduct and on which it could reasonably have come to a decision to fairly summarily dismiss the Claimant.
149. It is this Tribunal's judgment that the Claimant had not committed gross misconduct or misconduct and that a fair and reasonable investigation would have come to that conclusion. The Tribunal makes no *Polkey* reduction in the compensatory award due to the Claimant.

Contributory fault

150. The Tribunal also make no reduction for contributory fault. The Claimant was in the process of negotiating to buy a share of the business from the Director, Syed Ahmed, who was also the initial investor. Those negotiations seemed to be going well but ultimately failed. The negotiations broke down around the time of the meetings in November and the subsequent emails between the shareholders and Mr Hussain. During the breakdown of the negotiations, threats were made by both shareholders to each other. There was no threat to bomb Mr Syed Ahmed's house or to bomb the business.

Ultimately, Syed Ahmed decided that he no longer wanted to sell to the Claimant or to do business with him. It is this Tribunal's judgment that these allegations of misconduct arose out of that breakdown in the relationship between the two shareholders.

151. There was no culpable conduct by the Claimant in November 2020 that led to his dismissal.
152. In this Tribunal's judgment the Respondent has failed to show that the Claimant has not mitigated his loss. The Claimant has done some voluntary work for a friend. He has tried to start a number of businesses and provided evidence of that in the bundle. Those prospective businesses failed or did not get off the ground because of the economic uncertainty due to the pandemic and the existence of the High Court injunction. The Respondent did not challenge this during the hearing. The Claimant is entitled to loss of wages for a year.
153. The Claimant is entitled to loss of wages from 5 March 2021. In his Schedule of Loss the Claimant has asked for one year's wages as he considered that it would take him one year to find suitable alternative employment. The Claimant was still unemployed at the date of the hearing. It is the Claimant's choice to continue to try to set up a business and not seek other types of employment. The Claimant did not give evidence of trying to find employment but of trying to set up businesses. It is likely that the Claimant is more comfortable with being his own boss and running a business than in being an employee but as he is required to do all he could to mitigate his loss, it is likely that he could have found employment after a year, if he had chosen to do so.
154. The Claimant is awarded one year's net wages 5 March 2021 – 5 March 2022 = **£31,200**.

Uplift for failure to follow any of the ACAS procedures.

155. The Tribunal is able to make a percentage increase or reduction up to a maximum of 25% to reflect an unreasonable failure by the employer or employee to comply with the ACAS code of practice on disciplinary and grievance procedures. In this case there was only a cursory investigation into the allegation of misappropriation of funds by looking at the bank statements. There was no investigation into allegations that the Claimant had made threats against Mr Syed Ahmed's home and the business. This was never put to the Claimant in an investigation meeting or in a disciplinary hearing or any other forum, until the matter came before the High Court in support of the Respondent's application for an injunction.
156. The Claimant was deprived of his right to defend himself against these allegations. The Respondent did not conduct any investigations of other staff in the business and did not consider who else might have been responsible for the expenditure on the porn and gambling sites.
157. The Respondent completely failed to comply with the ACAS code of practice on disciplinary and grievance procedures. This Tribunal does not agree

with the Respondent that it had no time to do so and had to act quickly. There was time to investigate but the Respondent did not do so and instead, dismissed the Claimant without telling him the reason for doing so and giving him an opportunity to give his side of any alleged behaviour that Syed had been told about.

158. It is this Tribunal's judgment that the Claimant is therefore entitled to a 25% uplift on his compensatory award because of the Respondent's wholesale failure to comply with the ACAS code of practice.

Remedy Calculations

159. The Claimant's compensatory award is therefore:
- | |
|-------------------|
| £10,920.00 |
| £ 450.00 |
| <u>£31,200.00</u> |
| <u>£42,570.00</u> |

160. 25% of £42,570.00 = £10,642.50. It is this Tribunal's judgment that the total award due to the Claimant is (£42,570.00 + £10,642.50) = £53,212.50.

161. The Respondent is ordered to pay the Claimant the sum of **£53,212.50** as his remedy for his unfair dismissal.

162. As the Claimant's remedy award is greater than £30,000, the sum due to the Claimant may need to be grossed up to allow him to pay the appropriate tax and still be left with the net remedy figure of £53,212.50. The parties are to make written representations to the Tribunal on the appropriate sum in terms of grossing up so that the remedy judgment can be amended accordingly. The parties are to write to the Tribunal by 15 January 2024 in respect of the tax position.

Employment Judge Jones
Dated: 8 December 2023