Case number: 3307027/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Sutton**

Respondent: **Sequin Art Ltd**

Heard via CVP video link **On: Monday 27th February 2023 and Tuesday 28th February 2023**

Before: Employment Judge A Frazer (sitting alone)

Representation
Claimant: Ms J Bradbury (Counsel)
Respondent: Mr J Feeney (Counsel)

JUDGMENT

1. The Claimant's claims for unlawful deductions from wages and holiday pay are dismissed upon withdrawal under Rule 52.
2. The Claimant was unfairly dismissed.
3. There is a 25 % reduction to compensation to both the basic and compensatory awards owing to contributory fault.
4. There is no *Polkey* reduction.
5. The Claimant was wrongfully dismissed and his notice period is 6 months.
6. The matter shall proceed to the remedies hearing as listed.

REASONS

Introduction

1. The Claimant brings claims for unfair and wrongful dismissal arising out of his employment with the Respondent. I agreed the issues with the parties at the outset of the hearing as follows:

   1.1 Whether the Respondent had a potentially fair reason for dismissal namely misconduct.
   1.2 Whether it acted reasonably in treating that reason as sufficient having regard to the test in **BHS v Burchell [1978] ICR 303**.

1.3 Whether the decision and the procedure fell within the range of reasonable responses.
1.4 Whether there should be any deduction for contributory fault in percentage terms and if so how much?
1.5 Whether the Claimant would have resigned in any event. The Claimant's position was that if he had resigned it would be in response to the Respondent's repudiatory conduct.
1.6 Whether the Claimant was guilty of gross misconduct so that he was not entitled to any notice pay.
1.7 What the contractual period of notice was.

Disclosure

2. At the start of the hearing the Respondent raised a preliminary matter. It was submitted that the Claimant had waived legal professional privilege in relation to some email correspondence but instead of allowing the whole of the disclosure to be made to the Respondent he was 'cherry picking' what he said ought to be disclosed. The Claimant's position was that full disclosure had been made. In the circumstances Mr Feeney did not push the point and it was agreed that the appropriate way to deal with such issues was to cross-examine on the email correspondence.

Concession by the Respondent as to Procedural Unfairness

3. Prior to the parties' representatives delivering submissions Mr Feeney conceded that the Respondent had unfairly dismissed the Claimant but contended that *Polkey* and contributory fault remained live issues for the Tribunal.

The Hearing

4. I heard oral evidence from Jonathan Marcus, Patricia Marcus and Gemma Asplen for the Respondent. For the Claimant I heard oral evidence from the Claimant himself and from Edward Marcus. I had witness statements from Debbie Woods and Karen Howlett but their evidence went to character and there was no intended questioning of these witnesses. Accordingly they were not called. I heard oral submissions in closing from both parties' representatives and then reserved my decision.

Submissions

Claimant

5. On behalf of the Claimant it was submitted that it could not be said that the Claimant was guilty of any contributory fault. He had tried to work with Jonathan Marcus. He had brought a grievance that was ignored. He followed all instructions given. He didn't go into office when told not to. He waited to see what happened about the recruitment issue. He spoke freely in meetings when invited to. There were no allegations of behaviour outside of those meetings save for him recording the conversation. His behaviour had been

beyond reproach. On the contrary, Jonathan Marcus's high- handed behaviour was well documented throughout the statements.

6. None of the matters for which the Claimant was dismissed fuilfil any threshold for disciplinary action. Accordingly he can hardly be said to have contributed to his dismissal.

7. Ground 1 was from nearly a year prior when Mr Sutton believed he was a director. There was a robust discussion. The Respondent says 6 months later a formal warning was given. If it wasn't a proper warning what Mr Marcus has done has made up the fact of a formal warning. All of his credibility has been decimated. If it was a formal warning he should not be able to rely on it again. A concerned Ground 2 – the drive by shooting – this was not a genuine threat. It was a joke. He is being dismissed for a threat to a director's life. It cannot be said that this was a contribution to the Claimant's dismissal. To have blamed the Claimant for unsettling Alison Cutter was not acceptable or fair. The Trust case was public knowledge. Alison Cutter was around people who could reassure her. Ed Marcus went in the next day and talked too. It was not possible to gauge the extent to which what Claimant said affected her leaving. The recording of the conversation could not constitute a reason for dismissal even if it were true. The Claimant complained that the way he was being treated was going to lead him to bring a constructive dismissal claim. Jonathan took that as a threat and dismissed him. It was not possible for the Claimant to have contributed to own dismissal by expressing his legal rights. The allegation about the Claimant deleting emails after he was dismissed was a red herring. There was no evidence that the emails were important. There was no evidence that relevant business information had been deleted.

Respondent

8. Employment is a master servant relationship which is subject to the implied term of mutual trust and confidence. It applies to the employer and to employee. From September 2020 the Claimant regularly and consistently breached trust and confidence. He did that motivated to support Edward to regain control. What Edward was doing in September 2020 was attempting to appoint directors to support him as that would give him a casting vote. At the meeting on 13th April the Claimant was not a director. He was no longer validly appointed. He directed a tirade that was likely to destroy relationship of trust and confidence. What he had said to Patricia was particularly alarming. The Claimant bullied Patricia on 24th May 2021. He did not apologise for his conduct. Jonathan Marcus saw the drive by shooting email as a threat. It was an inappropriate joke to make to refer to the director which has control of the company and it was sent to other employees. As concerned the Claimant's conversation with Alison Cutter, there was evidence that she was unsettled by the conversation. The question is why he turned up on 14th March when he had not been attending the office at all. He thought that the court case had resolved the situation and that Jonathan was going to be removed. To tell a junior employee about Jonathan being forced out is itself a breach of trust and confidence. His conduct has the effect of reviving the earlier breaches and the

decision to dismiss is justified. That disposes of the wrongful dismissal claim. There should be a reduction in compensation of 100 per cent and at the very least of 50 per cent.

9. As for any Polkey reduction it is necessary to have regard to the guidance in **Software 2000 v Andrews [2007] IRLR 569**. How long would the employment have lasted but for the dismissal? Any speculation as to future resignation would have to be premised on the assumption that the Respondent company had been acting fairly going forwards. The Claimant sent an email to Sharon at page 375 to say he could not put up with this idiot for another three weeks. The Claimant would have resigned if he were not dismissed once he realised that Jonathan was going to remain in the company. As for length of notice – the service agreements as proposed were bound up with appointment of individuals as directors. Edward Marcus put the contract before the board so that it was difficult for the Claimant to be dismissed. The original notice of three months stood.

The Law

Contributory Fault

10. Under s.122(2) ERA 1996 where a Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

11. Under s.123(6) where a Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of compensatory award by such proportion as it considers just and equitable having regard to that finding.

Polkey Reduction

12. In **Ventrac Sheet Metals Ltd v Fairly UKEATS/0064/10/**BI it was held that where the procedural failing was a heinous one it did not follow that the employer was to be deprived of a Polkey reduction. Punishment was not a relevant aspect of the assessment of compensation under s.123 ERA 1996.

13. The following guidance was set out in the case of **Software 2000 v Andrews** at paragraph 54. Some of the guidance concerned the old statutory dispute resolution procedures but it remains relevant as to the way Tribunals should direct themselves when considering what would have happened had the Respondent conducted a procedurally fair dismissal:

    (1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.
    (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have

regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) (However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and **Polkey** exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(8) (a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(9) (b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(10)(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the **O'Donoghue** case.

(11)(d) Employment would have continued indefinitely.

Wrongful Dismissal

14. A dismissal will be wrongful where the employer has not given sufficient notice in circumstances where summary dismissal is not justifiable. In **Enable Care Home and Home Support Ltd v Pearson EAT 0366/09** the EAT stated that the question was 'was the employee guilty of conduct so serious as to amount to a repudiatory breach of contract of employment entitling the employer to summarily terminate the contract?'

Findings of Fact

15. The Respondent is an arts and crafts manufacturer based in Norfolk which employs 19 members of staff. The company is essentially a family business, founded by Stuart Marcus who was the late father of Jonathan and Edward Marcus and late husband of Patricia Marcus. The majority shareholder of the

company is Kitfix Swallow Group Ltd which is owned by Edward Marcus, Jonathan Marcus, Patricia Marcus and the family Trust.

16. The Claimant was employed by the Respondent as Head of Sales on 7th January 2019. The Claimant's job description is at page 120. His responsibilities were for all sales, UK, Europe and worldwide. The job description paints a role with significant responsibility. The Claimant was accountable to the board and to provide sales forecasting and budgets so that the board had a true working picture of Sequin Art's progress throughout the year.

17. At page 129 there is the Principal Statement of Terms and Conditions of Employment. The statement purported to include as the principal terms both the document itself and the employee handbook. The Claimant's employment is stated to have commenced on 29th January 2019. The core duties included managing and maintaining existing sales accounts (key UK accounts and exports). At paragraph 9 of notice provisions were one month notice during the probationary period and three months thereafter. At paragraph 15 the contract stated: '*if in the future there should be any change in the terms and conditions of your employment, or the policies and procedures, and benefits, you will be given prior notice of this in writing and in accordance with current employment legislation'*. The contract was signed by the Claimant on 7th January 2019 but the commencement date was expressed to be 29th January 2019.

18. On 19th February 2020 Stuart Marcus sadly died. Edward Marcus had had more day-to-day responsibility of the company during the early part of 2020 and subsequent alongside his wife Meryl Smith. Edward Marcus informed the Claimant that Jonathan and Patricia Marcus intended to take control of the company. Unfortunately relations between Edward and Patricia and Jonathan Marcus over the ownership and control of the company became soured. There is some dispute between the brothers about the basis for Jonathan's intention to have more control over the company. He contended that he was concerned about an unauthorised inter-company loan that was provided to the company by Kitfix Swallow Properties whereas Edward's position was that this had been authorised. However what is relevant is that from around the summer of 2000 onwards there ensued a change of control within the company from Edward to Patricia and Jonathan.

19. As a consequence of this change Jonathan and Patricia made some business decisions that proved unpopular with the Claimant and indeed, others. For example, they switched off the online banking facility which the Claimant says resulted in it being difficult for him to pay invoices and get components shipped.

20. The Claimant was given a new contract by Edward Marcus on 3rd September 2020. The difference between the two agreements was that in the original agreement the line manager was Neil Clark but in the later agreement it was to be Edward Marcus. It was also stated that the staff handbook was not part of the terms and conditions. The hours of work were less. The salary and

commission was greater. The Claimant's notice period was extended to 6 months from 3 months. The agreement contained an entire agreement clause. The contract was signed on behalf of Sequin Art on 4th September 2020 and by the Claimant on 4th September 2020. On 24th September 2020 Edward Marcus appointed the Claimant and Gemma Asplen as directors and were registered on Companies House as such. In my finding Edward Marcus as then director of the company had ostensible authority as the employer to contract with the Claimant. Both parties intended at that point in time to create a legally binding contract. Whatever the motives might have been on the part of Edward Marcus to regain power, there was nothing before me to suggest that the parties did not intend to create legal relations and that that agreement stood. This means that the Claimant's notice period is six months.

21. On 3rd March 2021 Patricia Marcus on behalf of the majority shareholder sent a special notice to Edward and Jonathan to state that the purported appointments of Gemma Asplen, Meryl Smith, Neil Clark and John Sutton were not valid and had been made in contravention of the company's Articles of Association and that the only directors were Jonathan, Edward and Patricia. Jonathan Marcus was authorised to represent the company at the general meeting. At a board meeting Edward Marcus had voted against the resolutions whereas Patricia and Jonathan voted in favour.

22. On 31st March 2021 the Claimant together with Gemma Asplen and Meryl Marcus submitted a collective grievance against Jonathan and Patricia. Within this grievance there were complaints about the employees being undermined, notably by the removal of their directorships without consultation, the failure of the company to sign off accounts and the increased involvement of Jonathan and Patricia in the day to day running which was impacting operations. Meryl Marcus, who was then responsible for HR issues, instructed Tony Perriman, HR Consultant, to investigate the grievance. He was unable to interview Jonathan and Patricia as they were unwilling to take part. At a board meeting on 21st April 2021 it was resolved to terminate the company's contract with the outside HR Consultant who was conducting the grievance. Instead it was determined that Jonathan Marcus would hear the individual grievances.

23. On 4th May 2021 Jonathan Marcus invited the Claimant to attend a grievance meeting with him on 10th May and on 17th May 2021 invited him to attend a grievance meeting to take place with him on 25th May 2021. The Claimant replied on 18th May 2021 to decline the appointment on the grounds that the grievance was against Jonathan and he had not engaged with the HR consultant who had all the details of the grievance. On 29th October 2021 Jonathan Marcus closed the grievance on the basis that the Claimant had now refused to attend two meetings with him to discuss the grievance.

24. The hearing of the grievance by Jonathan Marcus regarding complaints against himself would have been a conflict of interest. He would have been the judge in his own cause and perceived as such by the complainants. It was reasonable for the Claimant to have declined the invitation to the meetings in my finding. While of course it was a matter for the company as to whether it chose to pay for an independent consultant or not, it would have

been reasonable for there to have been someone impartial to have heard the complaint. In the circumstances the grievance went unheard and this would reasonably have affected the trust between employee and employer.

25. After the grievances had been lodged but before Jonathan Marcus had decided how to deal with them, the Claimant attended a board meeting on 13th April 2021. Present were Jonathan, Edward, Meryl and Patricia. At that meeting it is fair to say that the Claimant vented about Jonathan Marcus not signing the accounts off and then went on to state, *'the business needs to stop being undermined because if this business ceases I will personally take it extremely personally against you and Patricia. So you need to realise that and I will do whatever I need to do to find you two, and I will make sure that everyone knows the sort of games that you've been playing. And I think enough is enough now Jonathan, as an outsider, it's absolutely disgusting and reprehensible that you and Patricia should behave in this way. Patricia, the only reason you're a director is because who you were married to. OK. You haven't got any business acumen. The business was in the black previously OK? And that's because it is part of the bigger flow of the bigger picture before it was split off.'* It was said in the disciplinary (dismissal) letter that the Claimant was given a verbal warning but there was nothing in writing to confirm this or that there had been any kind of warning given under the disciplinary procedure which would have given it disciplinary effect.

26. The Claimant was also noted as saying '…*if Ed and Meryl are no longer in the business then you can rest assured myself and Gemma won't be, and you'll watch the business go tits up overnight.'* In my finding having regard to the context of the whole discussion the Claimant was effectively making the point that he and the others were important assets and that if they went, that may also affect the viability of the business. The nature of all comments were robust during that meeting. The context of that meeting was that it had been where the Claimant and his colleagues had been removed from office as directors of the company and where it had been declared that the appointments had been not valid because they had been made in contravention of the company's Articles of Association. The Claimant and others' grievance about this was extant. The Claimant, Meryl Smith and Edward Marcus aired their discontent at that meeting about the way they thought that Jonathan and Patricia were running matters. Unfortunately the grievances that they had raised went unheard.

27. The Claimant was not disciplined by the company after this meeting and the first time that a complaint about what he had said was brought to his attention was in the letter that was sent to him dismissing him on 15th March 2022, nearly a year later. That suggests that it was not considered to be sufficiently serious to warrant any formal action at the time.

28. On 24th May 2021 Patricia Marcus and Jonathan Marcus attended the office in Swaffham unannounced. There ensued a meeting with the Claimant, Gemma Asplen, Jonathan and Patricia. At that meeting the Claimant asked Jonathan Marcus why he was not wearing a mask and why he had not been self-isolating as he had been living in Germany. He also asked why Patricia

Marcus had ransacked the safe. She declined to answer and she was asked again. Jonathan said that she was still mourning the loss of her husband. Jonathan informed him that there were property deeds in it that she had needed. He queried with Patricia why she had switched off the online banking facility and she did not answer that question. Then notably at page 177 of the minutes the Claimant stated *'it was all underhand and that JM was asking both GA and JS to trust them and work with them going forward, but JS said they were both guilty until proven innocent.'* The Respondent took no action at that point in relation to the questions posed by the Claimant or the manner in which they had been directed towards Jonathan and Patricia. Again, that suggested the conduct was not seen as sufficiently serious to warrant any disciplinary sanction.

29. The Claimant asked why he and the others had been removed as directors and Jonathan Marcus said that they had not ever been directors as they had not been appointed properly. He sought to reassure them that it did not mean that they could not be appointed at some point in the future. The Claimant was asked whether he wanted to work with Patricia and Jonathan going forwards and he said that as they were directors of the business now they didn't have an option but that they would see what happened in the short term to see if they wanted to remain in the business. At that stage in my finding the Claimant's trust in the Respondent had been marred by what had recently happened. However despite some manifested antipathy towards the new ownership he was prepared to give the relationship a go and continue working for the Respondent. In effect, the slate was wiped clean to some extent.

30. The Claimant's case is that from that point onwards Jonathan Marcus micromanaged the Claimant by making him responsible for contacting four independent accounts across the country each day and for detailing all of the accounts that he had generated since the start of his employment. There is a slack message dated 4th March 2022 in which Jonathan Marcus requests the accounts from the Claimant's employment and queries whether he is contacting his four accounts per day. He stated that he needed this by 7th March 2022. The Claimant provided feedback on 7th March by email. There is certainly a display of tightness in this management approach. It may have been motivated by Jonathan's desire to control what was happening owing to the tension within the relationship between himself and the Claimant.

31. In January 2022 the Claimant saw adverts for sales roles for the Respondent in the recruitment section of Toyworld. There was an advertisement for a National Sales Manager which had as its purpose to 'contribute to the development and implementation of the sales strategy with responsibility for defining key customers, range plans, promotional execution and new business development'. There was also an advert for 'European Sales and Business Development Director' located in Poland. The Claimant was concerned that the adverts were for his job.

32. Following this and in February 2022 the Claimant sought advice from a solicitor and has disclosed this advice in email correspondence which is in the bundle. The solicitor's advice was that advertising someone's job without

discussing it was a strong argument for constructive dismissal and that the Claimant could either resign or effectively stand his ground. The Claimant emailed his solicitor on 16th February 2022 to say that he was going to stand his ground as the court case for Sequin Art was only three weeks away. He said 'as unpleasant as it is, I can stick 3 weeks more of this idiot. I'm not going to give him the satisfaction of my resigning. If the court case does not go the way we would all like it, then I will have no choice but to resign.' What the Claimant was referring to was litigation between the Marcus brothers to have Jonathan Marcus removed from the family trust. The Claimant thought that if he were removed it may affect his power hold within the company and the Claimant may be more inclined to stay. Having read the emails I find that the Claimant was genuinely seeking advice because he was shocked at learning about the sales adverts. I do not accept that he was building a case at that point in time. I do not accept that the roles were discussed with him at all.

33. In my finding, Jonathan Marcus had not informed the Claimant that he was recruiting a new sales manager nor had he discussed any of the proposed recruitment with him. I found this to be unusual. The Claimant was the Sales Director of the company yet at no point had Jonathan Marcus discussed anything with him about these roles or consulted with him. He said under questioning that there was a plan to involve the Claimant in setting up the new sales team but that recruitment was something that he decided to take ownership of. He said that the Claimant would keep new accounts but that the new employee would be on the road. He said that he had emailed the Claimant to say he would be getting him support as he was busy. I noted from the evidence that he had previously emailed the Claimant to that effect but there had never been any discussion with him of what sales roles he was intending on bringing into the company and how that would impact on the Claimant. In the circumstances I found that it was highly surprising that he had not involved the Claimant in any discussion about sales recruitment and had not informed him that he was advertising. The Claimant had had leadership of sales within the organisation and had been accountable to the board. I find that it was more likely than not that he had kept this information from the Claimant because he was looking to reorganise the sales function into those two roles and dismiss the Claimant, which he duly did on 15th March. Even if that were not the case and the roles were genuine, his conduct in not discussing the advertising of those roles with the Claimant was objectively likely to seriously undermine the trust and confidence between them.

34. On 14th March 2022 the Claimant came into the office and learnt from a new employee, Alison Cutter, that an individual named Chris Watts was due to start as a sales manager on 4th April. She had asked the Claimant if he was the new sales manager. There had been no discussion with the Claimant about this individual and the Claimant had not been involved in the recruitment process. It was clear from the correspondence that the Claimant had with his solicitor at this point that he was considering whether to resign owing to the Respondent's conduct as concerned the proposed recruitment of sales personnel that he had not been advised about or involved in. Further on 14th March Jonathan Marcus had obfuscated the recruitment of a new member of the sales staff from the Claimant leading him – quite naturally – to

query whether his job was secure. In my finding at that point in time the Respondent was in fundamental breach of the implied term of trust and confidence.

35. However I do accept that the Claimant said to Alison Cutter, a new recruit, that if he left the company he would be reinstated as soon as Jonathan was no longer director and had told her about the court case between the brothers. I accept that this did have the effect of unsettling this new member of staff and was to an extent a direct and insubordinate statement made to another member of staff against an existing director which would be objectively likely to have had the effect of unsettling her.

36. The Claimant stated in evidence that he became unwell that day and felt a migraine coming on. He then made an appointment to see his doctor. It is likely that the information about the new recruit may have affected him. He left the office but dropped into Kerrison's Toys. He also accepts that he called Edward about what he had learnt and then had a meeting with him for two hours.

37. Jonathan Marcus emailed the Claimant at 1336 to say 'Dear John, You are not answering your phone or replying to e-mails during the working day. I can see that you are refusing to work, or cooperate with demands for transparency on your whereabouts today. You are to call me using slack by the end of the day to explain yourself. Any failure to do so will be seen as a refusal to work, and to fulfil your contractual obligations towards the company. It is noted that you arrived at the office today, claimed that you would be staying all day, did not complete any work and left.' The Claimant replied at 1545 to say that he had tried calling Jonathan but had not been able to get hold of him. He gave him an account of his day. He said 'at the moment due to how I'm feeling I do not appreciate these threatening emails at this time. My phone is on and has been all day'.

38. There then ensued a phone call between the Claimant and Jonathan Marcus. The Claimant said that he was recording the call and Jonathan said that he did not consent. Jonathan told the Claimant not to unsettle staff namely Alison Cutter and the Claimant questioned Jonathan about the sales staff.

39. On 15th March 2022 Jonathan Marcus wrote to the Claimant summarily dismissing him for five allegations of misconduct. They were as follows.

    36.1 The Claimant's conduct at the board meeting on 13th April 2021;
    36.2 An email that the Claimant had written to Meryl, Edward Marcus and others in which he had said 'drive by shooting required'.
    36.3 The Claimant's conduct in providing Alison Cutter with false information about Jonathan Marcus' role as director which affected her security within her new position.
    36.7 The Claimant's statement that he had recorded the conversation that he had had with Jonathan Marcus even when he had not consented.
    36.8 The Claimant had threatened the business making references to advice that he had sought from a constructive dismissal lawyer.

40. In the letter the Claimant was informed that 'your access to company data will cease with immediate effect and you will be required to return any documents relating to the Company, whether held on paper or electronically and you are not permitted to retain copies of any documents relating to the Company's business'.

41. The Claimant was not given any right of appeal.

42. On 15th March the Claimant cleaned his computer of items including deleted items. There was insufficient evidence before me to suggest that this was done to conceal specific items which may have inculpated the Claimant in any way. It was a plausible explanation that this was done in order to prepare the laptop for return to the company.

43. The rationale given for the email that the Claimant had written mentioning 'drive by shooting' was that this was a threat to a director's life. Having had regard to the email and heard the explanation from the Claimant I accept that it was banter. However it demonstrated that the Claimant had no trust or respect in the new leadership and was taking sides with Edward Marcus against Jonathan Marcus. It was not directed at Jonathan but was later discovered by him and displayed a level of insubordination towards the new ownership.

44. I do not consider that the Claimant's conduct at the meeting of 13th April was something that he ought to have been disciplined about given that there was some consensus to move forwards after that point in time as the Claimant had indicated he would be willing to work with Jonathan. It was also a year prior and the Claimant had not been disciplined at the time.

45. However I do consider that the Claimant's conduct in drafting the email to the other members of staff to say 'drive by shooting' was insubordinate given that he was accountable to Jonathan Marcus at that that point in time.

46. I also find that the Claimant mentioned to Alison Cutter the recent litigation that the Marcus brothers had been involved in. Gemma Asplen's evidence was clear that this had unsettled Alison Cutter. The Claimant had explained to her that Edward had taken Jonathan to court and had been removed as a director. The Claimant himself said that he had said words to the effect of 'there was a light at the end of the tunnel' to Alison. This in my finding was equivalent to a statement that he wanted the existing director out. I find that it was perhaps unwise for the Claimant to have overspilled what was on his mind to the new employee in this way but I accept that he may have been 'reeling' from the news of the new recruit at that point in time.

47. In the circumstances I find that the Claimant has contributed towards his own dismissal to the extent that he was openly insubordinate towards Jonathan Marcus towards other members of staff including those who were also in conflict with Jonathan Marcus. In the circumstances I find that the level of contribution should be 25 %.

48. As concerns the allegation of recording the call with Jonathan Marcus on 15th March I find that by 15th March the relationship of trust and confidence had been destroyed by the Respondent advertising the Claimant's position/ not consulting him about the recruitment process. Therefore that conduct arose because of that fact.

49. As concerned legal advice the Claimant was entitled to seek legal advice and let the Respondent know. I do not consider that this was conduct which was sufficiently culpable to warrant any reduction for contributory fault.

50. The Respondent was in breach of the implied term of trust and confidence because of the recruitment decisions. There was some evidence to indicate that the Claimant was contemplating resignation in consequence and if he had done so in response and soon after finding out about matters on 14th March he would have found himself constructively dismissed. However the Respondent fired the first shot, so to speak, while it was already in breach. There was no investigation, no disciplinary hearing and no appeal meeting. The dismissal was unfair.

51. In the circumstances therefore I make no *Polkey* reduction.

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Employment Judge A Frazer

Date: 16th March 2023

JUDGMENT SENT TO THE PARTIES ON

17 March 2023

FOR THE EMPLOYMENT TRIBUNALS