EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106784/2023 & 4106785/2023

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Held in Glasgow on 20, 21, 22, 28 May and 7 June 2024

Employment Judge B Campbell

Ms K Zakharova	**First Claimant** **In Person**
Mr J E Guerrero	**Second Claimant** **In Person**
Metix Limited	**Respondent** **Represented by:** **Ms J Sanderson-Brown – Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 1. Each of the claimants was fairly dismissed;

2. The complaints of unfair dismissal are therefore dismissed;

3. The claimants were not paid salary nor employer pension contributions in respect of the period between 6 and 13 September 2023, and their claims for breach of contract in this respect are successful;

30 4. The claimants were not paid in respect of accrued holidays to the date of dismissal and their claims in that respect are also successful;

5. Compensation in respect of 4 and 5, and any other aspects of remedy, will be determined at a future remedy hearing to the extent that the parties cannot agree on the relevant figures.

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REASONS

Introduction

1. These two consolidated claims arise out of the claimants' employment with the respondent, a limited company. Ms Zakharova is referred to in this judgment as the first claimant and Mr Guerrero is referred to as the second claimant.

2. Both claimants began their period of service with the respondent on 19 November 2013 and each had their contract ended by the respondent dismissing them on 13 September 2023. The respondent asserted that each was dismissed by reason of their conduct.

3. The hearing took place over five days, with the first day being spent on case management matters. Evidence was heard from the following individuals:

    a. For the claimants, each other - the first claimant and the second claimant in that order - and Mr Peter Street, an ex-employee of the respondent who became a contractor to it;

    b. For the respondents, the following (their titles at the time of the relevant events in brackets): James Thurlow (Director and Chairman), Julia Sanderson-Brown (External HR Consultant), Louise Nicholls (External HR Consultant), Andrew Round (Director), and Savvas Neophytou (Non-executive Director).

4. A joint bundle of documents was prepared. Numbers in square brackets below correspond to page numbers of the bundle.

5. The claimants each represented themselves. The respondent was represented by Ms Sanderson-Brown, who provides consultancy services to it. The respondent's witnesses were heard first, given that it had the legal onus of showing the reason for dismissing each claimant.

6. Owing to time pressures it was agreed that this hearing would deal with liability only, i.e. the merits of the claim. If they were successful then remedy

would be decided at a future hearing, unless the parties could agree any relevant amount(s) between them.

7. Similarly, the parties provided their submissions in writing after the hearing, which were considered before a decision was reached.

5 **Relevant law**

1. By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal.

10 2. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements 15 set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

3. Where the reason for dismissal is the employee's conduct, principles 20 established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

4. At common law, an employee will be entitled to a certain amount of notice of termination of their employment. That amount will be the greater of whatever 25 is provided in their contract, and their statutory entitlement under section 86 of the Employment Rights Act 1996. If they are not given adequate notice, or an equivalent payment in lieu if the contract allows, the employer will have breached their contract, often described as 'wrongful dismissal'.

5. Under the Working Time Regulations 1998, regulations 13 and 13A, an 30 employee accrues annual leave during their employment and under

regulation 14 they are entitled to payment on termination of employment for any leave accrued which has not been taken.

Legal issues

The issues which the tribunal had to decide, for each claimant, were as follows:

5 1. Did the respondent dismiss the claimant for a fair statutory reason according to section 98(1) and (2) of the Employment Rights Act 1996? The respondent argues that each claimant was dismissed because of their conduct.

2. Did the respondent act reasonably in dismissing the claimant for the reason it relied on, in accordance with section 98(4) of the same Act?

10 3. Did the respondent breach the claimant's contract of employment by not paying them in lieu of their entitlement to notice of termination of their employment?

4. Did the respondent breach the claimant's contract of employment by not paying salary earned before their termination date?

15 5. Did the respondent breach the claimant's contract, or fail to meet its obligation under the Working Time Regulations 1988, by not paying the claimant in lieu if accrued annual leave upon termination?

Findings of fact

The tribunal made the following findings, based on the evidence provided and as
20 relevant to decide the above legal issues. The findings were made on the balance of probability.

Background

1. The respondent is a company which develops new products for use in the medical sector. The claimants were its employees and two of its three
25 founders. They were also directors and shareholders. They continue to own approximately 28% of the issued share capital of the respondent. They were also each other's partners in a personal sense.

2. The respondent was founded in 2013. Around 2018 it was decided to seek external help and investment in order to allow the company to exercise better corporate governance, and to ensure its financial stability. It was still relatively new and was making financial losses, but had potential in the form of a particular product which was being developed which would allow for vital health readings to be taken in real time via a portable unit. A business named Deepbridge Capital LLP invested in the respondent. It first did so in 2018 and since then has provided around £7 million of investment.

3. Mr Savvas Neophytou joined Deepbridge Capital in 2016 and became a non-executive director of the respondent shortly after. He attended quarterly board meetings. Mr Jim Thurlow became a non-executive director and Chair of the respondent on 1 April 2020 under the terms of a letter of appointment [513-515]. Mr Thurlow was experienced in company board matters within the medical diagnostics industry. He was not an employee of Deepbridge Capital, but was recommended by them having worked with them on other similar appointments. As Chair of the board he was more actively involved with the respondent from day to day than Mr Neophytou had been. He continues in both roles.

4. The roles of the claimants developed with the arrival of new investment and board members. The first claimant was its Finance Director and de facto head of HR also. The second claimant was its CEO and he focussed on development of the company's main prototype product and attempts to secure investment and patent approval for it. On the advice of Deepbridge Capital new roles were created within the respondent, including Chief Operating Officer, Chief Technical Officer and HR Director.

5. In late 2022 it was necessary to seek guidance from an insolvency practitioner to ensure that the respondent did not trade insolvently. From around that point the first claimant reported weekly to Mr Thurlow on spending being undertaken, to ensure that the respondent was operating within its means.

6. Mr Andrew Round joined Deepbridge Capital in early 2023 and immediately became involved in overseeing the respondent, as well as other companies

which Deepbridge Capital had invested in. Mr Neophytou became less involved with the respondent as a result. Mr Round specialised in developing businesses on behalf of venture capital investors. He was appointed a non-executive director of the respondent in June 2023.

5 7. A 'Disciplinary Policy' was introduced by the respondent on 6 October 2022, approved by the first claimant [542-547].

8. Between March and July 2023 the second claimant was located in the US where he was focussing on obtaining approval from the Food and Drug Agency (FDA) for the product which the respondent was developing.

10 9. On or around 23 June 2023 the second claimant ordered Mr Richard Smith, the company's Chief Operating Officer and Mr Elson Mourao, its Chief Technical Officer, not to report to Mr Thurlow until he, the second claimant, had given approval. Both individuals emailed Mr Thurlow to explain being so ordered on that day, using pro-forma wording the second claimant had given 15 them. This was indicative of growing tension between the second claimant and Mr Thurlow around the responsibilities and powers of each, and in particular who was managing and directing the individuals. The second claimant wished them to report through him, whereas Mr Thurlow believed they answered to the board. The email followed a board meeting earlier that 20 month which Mr Murao and Mr Smith had attended, and which the second claimant felt had gone badly, and had left before it had ended.

10. A board meeting of the respondent took place on 27 June 2023. Neither claimant attended. Minutes were taken and circulated, including to the claimants, on 5 July 2023 [411-414]. The second claimant was in Texas at the 25 time, progressing with his efforts to seek FDA approval for the company's product. He said he would be unable to join via video. The meeting had already been rescheduled in an attempt to allow him to join. Mr Thurlow believed that the second claimant did not want to participate and was not giving it due priority. He considered in reaching that view that the second 30 claimant had prematurely left the previous board meeting. Mr Thurlow noticed

that the second claimant had, over the period of weeks before, become more disengaged with the board.

Events of Friday 7 July 2023 and immediately following

11. On Friday 7 July 2023, around lunchtime, Mr Thurlow received a call from Mr Smith. Mr Smith was upset and sought assurance that he was not about to lose his job. Mr Thurlow did not know what he was referring to, but Mr Smith explained that he had been in a meeting with the second claimant who had been hostile, had forcefully tried to conduct an appraisal meeting, and had revoked his system access before agreeing to reinstate it. Mr Thurlow asked Mr Smith to provide a written account, which he did [435-436]. The matter related to Mr Smith's annual review, which process had begun in May of that year. The second claimant believed that Mr Smith was being obstructive in completing his part of the process. He had completed part of Mr Smith's form with comments critical of Mr Smith. Against six numbered objectives, four were denoted as 'failed', with one other partly achieved and the last achieved. The comments of the second claimant suggested strongly that the working relationship between the two had broken down. He wished to have a meeting as follow-up to that and intended that this would result in Mr Smith's termination of employment, either by being mutually agreed, or failing which implemented by the second claimant. He had asked Mr Smith via the respondent's HR advisor, Mr Atul Bharshankar, at 9am to complete the form by 9.30am when he would arrive at the office to hold the meeting. Mr Smith said that this was not enough notice and proposed meeting the following week. Again via Mr Bharshankar, the second claimant proposed meeting that afternoon. Mr Smith said again that this was not convenient, as there was too much priority work that day.

12. The second claimant arrived at the office and proceeded with the meeting, at which Mr Bharshankar was also present. Mr Smith had been unable to complete his review form and it was clear that the parties were not sufficiently prepared to have a full discussion. It was agreed that the meeting would be rescheduled to 11am the following Monday. The second claimant asked Mr Smith whether he would need a hard copy of the review form to complete,

because his system access had been removed. This was the first Mr Smith knew. The second claimant had instructed that that step be taken to avoid any retaliatory action from Mr Smith following the meeting. Mr Smith asked whether he could work from home for the rest of the day if he was being ordered to give priority to completing his review form. The second respondent declined. After the meeting Mr Smith's system access was restored with a new default password. When given this by Mr Bharshankar he slammed his had against the side of his desk in frustration.

13. On the same day Mr Thurlow next spoke to Mr Bharshankar, who told him that the claimant was planning to exit Mr Smith from the business. He also provided a note of what had happened [433].

14. Before Mr Thurlow could contact the second claimant, the latter sent an email at 2.41pm that day [436]. It was addressed to Andrew Round and copied to Mr Thurlow and the first claimant. In it, among other matters covered, the second claimant reported that Mr Smith had *'exhibited gross misconduct'* and *'will be leaving the company on Monday [at] 11am with either a dismissal (for which HR has confirmed is justified with all current evidence) or a resignation.'*

15. In point of fact, Mr Bharshankar had not advised the second claimant that dismissing Mr Smith was 'justified with all current evidence'. Mr Bharshankar had given advice to the second claimant about managing what he perceived to be Mr Smith's underperformance, but had explained that there needed to be a process, involving first the appraisal meeting so that each party could have their say, followed by an improvement plan and a period for Mr Smith to address the issues identified.

16. Mr Thurlow, based in England, could not speak to the individuals concerned in person on that day. He tried calling the second claimant but he did not respond. Late in the afternoon he spoke to Mr Round. Both were still not completely clear what had happened. They decided to contact Ms Sanderson-Brown who they used for external HR advice. They had a call with her around 5.15pm that day. She advised them that no proper process appeared to have been followed with Mr Smith, and that if he left the business the following

Monday he would be able to raise a claim of unfair dismissal. Neither Mr Thurlow nor Mr Round could be in Glasgow for the Monday morning and they had little confidence in the second claimant agreeing with them to refrain from dismissing Mr Smith. Based on Ms Sanderson-Brown's advice they decided to suspend the second claimant pending an investigation into the events. Mr Thurlow sent an email to the second claimant at 6.28pm to confirm that decision. The claimant was reminded of his obligation to keep company matters confidential.

17. Mr Thurlow decided that Mr Smith should also be investigated as a potential disciplinary case, over his behaviour that day and in particular his aggressive banging of the desk in close proximity to Mr Bharshankar. He considered however that Mr Smith should not be suspended. His reason was that he had already been subjected to stressful treatment by the second respondent, which suspension would make worse. Unlike the second claimant he had not been proposing to take action which needed intervention, and could go about his normal work without the same degree of risk while the process took its course.

Events of Wednesday 12 July 2023

18. On Wednesday 12 July 2023 around 35,000 files were downloaded from the respondent's computer drive, using the first claimant's access credentials. This included technical documents and schematics in relation to the respondent's products, and other intellectual property. It also included HR files and the personal data of staff. The Chief Technical Officer, Elson Murao, noted the download and prepared a report of what had been copied.

19. Mr Thurlow tried to contact the first claimant by email that evening on being informed, as he suspected the system had been hacked by someone outside of the company. He received no response and the next morning sent a further email at 8.09am asking her to contact him by 9.30am. There was no response to that. Mr Thurlow sought further advice from Ms Sanderson-Brown and decided to suspend the first claimant and carry out an investigation. By this time he had also found out that the claimant had come into the respondent's

offices the previous evening between 10pm and 12.20am. he now had a suspicion that she may have deliberately taken the company's files with a view to using them for unauthorised purposes, whether on her own behalf or involving the second respondent. He sent an email to her at 11.20am that morning to say she was under suspension. He mentioned three matters of concern – (i) contacting individuals being interviewed as part of the investigation into the second claimant, (ii) the download of files the previous day and (iii) her physical entry to the company's offices later that day. Her IT access was being suspended. The first of those matters was a reference to emails the first claimant had sent to colleagues, in which she asked them to provide statements in the investigation of the second claimant. In doing so she referred to the first claimant's email to two colleagues on 12 July 2023, in which she had asked them to provide her with an account of what she said was *'an incident'* involving *'Richard's violent attitude towards Atul'* [823].

20. As the first claimant had responsibility for finance matters, Mr Thurlow asked her in the email for the cards, devices and other information which would be needed to carry out the company's normal banking and other finance functions. He asked the first claimant to sign a bank mandate and also wanted to arrange recovery of her company laptop for reconfiguring. Mr Bharshankar went to the claimants' properties that afternoon but there was no answer at either.

21. With the exception of the bank mandate which she emailed, the first claimant did not provide these items at any later stage, causing difficulty for the respondent as it could not use its normal online banking functions and had to create new financial accounts. It was also unable to provide information requested by HMRC in relation to matters such as VAT charging and incurred penalties. It had difficulty filing accounts with Companies House and pursuing payment of invoices with creditors. Monthly payroll for employees was also disrupted, and they were paid late for August 2023 before the respondent had to switch to another external provider. Separately, the respondent could not calculate the claimants' final pay as it could not gain access to earlier pay

records in order to calculate the correct deductions for National Insurance contributions.

Disciplinary investigation

22. A colleague of Ms Sanderson-Brown named Hannah Taylor was asked to carry out the investigation into the claimants and Mr Smith. An external individual was chosen partly as the first claimant was the respondent's head of HR. Ms Taylor's main point of contact in the respondent was Mr Round. In response to a request from the claimants, Mr Thurlow agreed written 'terms of reference' for Ms Taylor – in effect the scope of the investigation she was to carry out [462-465].

23. Ms Taylor carried out an investigation into the potential misconduct of both claimants and Mr Smith. In the process she gathered documents and interviewed the following:

    a. The first claimant,

    b. The second claimant,

    c. Mr Smith,

    d. Mr Thurlow,

    e. Mr Round,

    f. Mr Bharshankar, and

    g. Mr Murao.

    A written statement was also taken from an employee named Christopher Creggan who had witnessed the conduct of the second claimant and Mr Smith on 7 July 2023.

24. Ms Taylor prepared a report documenting her investigation into each of the three individuals, each dated 26 July 2023 [475-486, 758-763, 813-822]. She recommended that each be invited to a disciplinary hearing where one or more allegations should be addressed. For the first claimant, this was

described as *'alleged inappropriate downloading of company intellectual property with the intention to use the content for personal gain.*' This was further clarified as an alleged failure to *'admit when questioned the true content of her download activity',* amounting to a breach of trust and confidence. For the second claimant, the allegation was framed as *'alleged gross negligence in your position as CEO, failure to act in the best interests of the company and a failure to work effectively with the Board of Directors to achieve the agreed business plan.'* This was further described to include his proposed action against Mr Smith on 10 July 2023 without due process, which was alleged to *'pose a significant litigation risk to the business and would not be in the company's best interests.'*

25. On the basis of Ms Taylor's investigations it was decided by the board to ask each claimant and Mr Smith to attend a disciplinary hearing and answer the allegations against them. Each received a letter dated 27 July 2023 inviting them to a hearing with Mr Round, which for the second claimant was to be at 1pm on 2 August 2023 and for the first claimant, 3pm on the same day. Mr Smith's hearing was scheduled for 12 noon. The hearings were scheduled for the same day at least partly as Mr Round was travelling to Glasgow from England to attend them in person, as was Ms Sanderson-Brown to be there in an advisory capacity.

26. Mr Smith's disciplinary hearing proceeded as scheduled. He was asked to respond to an allegation of serious misconduct, involving him allegedly displaying inappropriate and aggressive behaviour on 7 July 2023 by slamming his hand against his desk while speaking to Mr Bharshankar. He admitted he had done so, and in mitigation submitted that he had been very frustrated at the time as a result of his interactions with the second claimant and then having his system access removed at a time when he was busy. He acknowledged his behaviour was not appropriate in the circumstances. He was issued with a written warning which was to remain live for 12 months.

27. The claimants' disciplinary hearings did not go ahead as explained further below.

The claimants' grievances

28. On 28 July 2023 the second claimant sent 28 separate letters to the board, each containing a different complaint said to be a grievance. There was a degree of overlap between them. On the same day the first claimant emailed to Ms Sanderson-Brown and Mr Round 16 separate letters of grievance. On 1 August 2023 the second claimant emailed two further grievance letters.

29. In light of this it was decided to postpone the claimants' disciplinary hearings scheduled for 2 August 2023.

30. As a number of each claimant's grievances were against the board collectively, or its individual members, the respondent asked Ms Sanderson-Brown to investigate them. She reviewed each one and reached the view that some were in the nature of issues between shareholders of the company rather than complaints by the claimants as employees. She considered that other issues raised were complaints about the early stages of the disciplinary process itself, and would be more effectively addressed as part of that process rather than under any separate grievance process. She recognised that there remained some complaints by each claimant that were properly framed as employee grievances.

31. Ms Sanderson-Brown met with each claimant on 9 August 2023 to discuss their respective grievances. It was not possible to complete the discussions within their allotted times, and the meetings were continued via Teams on 18 August 2023. She issued a written decision to each claimant on that date [1005-1019, 1070-1079]. In each letter she identified the individual's points of grievance one by one and explained her response and, in some cases, some recommendations she would make to the respondent to improve matters such as communication, delineation of roles, internal processes and record-keeping. She did not uphold any point of grievance substantively.

32. The claimants both appealed against Ms Sanderson-Brown's conclusions by emailing their grounds to her on 28 August 2023 [1109-1115, 1155-1163].

33. Mr Round was appointed to hear the grievance appeals. The respondent's board asked a different consultancy named LN Consulting Limited to support him and arrange meetings with the claimants. Its director Louise Nicholls took the matter forward.

5 34. Mr Round and Ms Nicholls met with each claimant on 6 September 2023 to hear their submissions on their respective grievance appeals. Their meetings were recorded and transcripts prepared [1351-1365, 1366-1372].

Disciplinary hearings and outcomes

35. The claimants' disciplinary hearings had been rescheduled to 21 August 10 2023, but they emailed Ms Nicholls to say they did not wish to attend until their grievance appeals had been considered.

36. The respondent proposed to reschedule the claimants' disciplinary hearings to 7 September 2023, which would therefore be after the grievance appeal meetings but likely to be before any decision in relation to those appeals had 15 been issued. It was felt that Ms Sanderson-Brown was now too close to the issues, having heard the claimants' grievances, and she was to replaced by Ms Nicholls as the HR adviser to Mr Round, the chair.

37. The claimants disagreed with the respondent's approach, preferring that their grievance appeals be concluded in full before any disciplinary hearings took 20 place. The respondent took the different view that the processes were separate and so there was no need to do so. Ms Nicholls advised Mr Round to that effect. She felt that the remaining matters raised in the grievances would not overlap with the issues being dealt with as potential misconduct.

38. The parties were unable to agree on this point. Ms Nicholls encouraged the 25 claimants to attend their hearings as she believed that a number of points raised in their grievance appeals were about the disciplinary process, and could be raised in that context. She made clear that the hearings were not going to be postponed a further time, and would proceed the next day. The claimants confirmed by email that they would not attend.

39. As a result of the parties' failure to agree, the disciplinary hearings proceeded on 7 September 2023 in the absence of the claimants, after a delay of 30 minutes past their intended start time to be sure whether or not either claimant would join. They did not and Mr Round and Ms Nicholls attended alone. They considered the investigation materials, including Ms Taylor's reports, and submissions provided by the claimants, including in those of their grievance letters which related to the disciplinary case and process followed. Their discussions, deliberations and Mr Round's decision were recorded and transcribed [1373-1401, 1402-1434].

40. Mr Round's decision in relation to each claimant was issued by letter to them on 13 September 2023 [1165-1169, 1171-1176].

41. In relation to the first claimant, her explanation for the data download was considered. She had said that she was taking part in an exercise involving preparing a data room for an external investor to view. She had said that she had only downloaded the contents of her own personal drive and the HR drive. Mr Round accepted that the claimant had been given this task to perform, but noted that the records of her activity showed a substantially higher number of documents being downloaded, belonging not just to herself but the second claimant and others. He considered that they went beyond the scope of what was required for the investor to view, for example including product technical data which was confidential, and that she would have known that. The intellectual property which had been accessed could have been used to recreate the product which the respondent was developing and hoping soon to take to market.

42. Mr Round also noted that the first claimant had not initially been fully candid about her activity, releasing details as it became clearer what had come to light in the investigation. He considered the closeness in time of the download to the second claimant's suspension raised suspicion.

43. In conclusion, Mr Round reached the view that the first claimant had breached her duties as an employee and director in her initial conduct and by trying to conceal her true intensions when questioned. He considered that she had

breached trust to such an extent that summary dismissal was appropriate. He said that he had considered whether the claimant could be assigned to a different role, but the damage which had been caused to relationships with colleagues would make this unworkable.

44. For the second claimant, Mr Round reached the view that his relationship with Mr Smith had completely broken down. He had also disengaged with the board and negatively affected relations by asking his team not to communicate with them. As CEO, Mr Round thought he ought to be leading by example and had to meet high standards. His treatment of Mr Smith on 7 July 223 and his intention to end his employment without due process were unacceptable and would create unnecessary legal risk and cost for the respondent. Reputation and staff morale would also potentially have been impacted.

45. In summary, Mr Round concluded that the second claimant's conduct fell well below the expected standards of a CEO and had caused significant damage to trust and confidence. Mr Round also noted that in the time that had passed since his suspension, the second claimant had not indicated any acceptance of the consequences of his actions, or remorse. As with the first claimant, Mr Round considered whether there were any realistic alternatives to dismissal but could identify none, particularly given the damage caused to a number of relationships within the company. He intimated that the claimant was therefore being summarily dismissed.

46. Both claimants therefore left the respondent's service on 13 September 2023 by being dismissed.

Events following dismissal

47. The respondent led evidence on two things the second claimant did following his dismissal. It was accepted that they played no part in the decision to dismiss him, but submitted that they were relevant to how his appeal against dismissal was evaluated, and also had a bearing on the question of remedy if that were to be decided.

48. Firstly, around 13 September 2023 the second claimant instructed solicitors to provide him with advice in relation to his employment situation. He made a payment to them from the respondent's company bank account. His explanation when later challenged was that he used a banking app on his phone, and that his personal account was adjacent to the company account on it, resulting in him mistakenly making the payment from the wrong account. As such, he had not intended to use company funds to pay for his own legal advice.

49. Secondly, around 20 September 2023 he changed the properties of the respondent's website domain name so that, rather than link to the company's home page, they instead led to a YouTube clip from a film where a character spoke of 'coming back for the whole company. This was changed the following day to a link to his own LinkedIn page. He was asked to restore the link to the respondent's home page but did not do so. The respondent had to create a new domain name. This was believed to be potentially damaging to prospects of attracting external investors.

Grievance appeal outcome and Disciplinary appeals

50. Each claimant appealed against Mr Round's disciplinary decision by emailing him their written grounds of appeal on 14 September 2023 [1177, 1178]. Both referred to procedural defects in the process, particularly the decision to hold disciplinary hearings before concluding the grievance processes, and doing so in their absence. Both also said that their respective termination letters contained inaccuracies. Neither provided specific points of appeal in any more detail.

51. On 15 and 19 September 2023 Mr Round issued his decision in each claimant's grievance appeal [1186-1192, 1201-1210]. He had decided to uphold the decisions originally taken by Ms Sanderson-Brown at the previous stage of the process.

52. Mr Savvas Neophytou was appointed to deal with the disciplinary appeals. Appeal meetings were arranged for 3 October 2023. Mr Neophytou was supported by Ms Sanderson-Brown. The claimants were accompanied by a

colleague. Each meeting was recorded and later transcribed [1435-1449, 1450-1492].

53. The first claimant had a statement prepared which she read out. She emphasised that she believed the allegations against her to have been unfounded. She denied downloading 35,000 files as had been suggested. She said she downloaded a smaller number, only related to finance and HR, for a good business purpose. She believed there had been a plan to oust her and the second claimant from the company for the benefit of the other investors. In terms of the procedure followed, she said her suspension was a knee-jerk reaction and damaged trust in itself.

54. There then followed a discussion for the rest of the meeting. It was identified that what the first claimant was now saying about the number and type of files she downloaded was different to what she told Ms Talyor in her initial investigation. As a broader point, she did not accept that had she downloaded 35,000 files, this would have justified any concern on the part of the respondent. She returned to her argument that others in the company had been looking for a reason to remove her.

55. The meeting ended with a conversation about the first claimant returning her company laptop. She said that she had been liaising with Ms Nicholls to arrange a time to drop it in at the office, but an arrangement had not yet been agreed.

56. The second claimant also gave an opening statement. He spoke about the efforts he had made since the company's inception to assist its growth. He said that his chosen method of dealing with Mr Smith's appraisal was within his fundamental remit to manage and restructure his team. He argued that insufficient evidence had been provided to establish that he had irreversibly damaged the company's trust in him. Like the first claimant, he believed that there had been a calculated plan to remove the two remaining founders of the business in order to allow the remaining investors to exploit the potential value of the company. Similarly, he argued that in effect the respondent had damaged trust first by suspending him without good reason.

57. A discussion followed. The second claimant clarified that he was identifying Mr Thurlow in particular as the party motivated to remove him and the first claimant from the company. There was discussion about the level of involvement of Mr Thurlow in the running of the company, and whether it was appropriate. The second claimant maintained that too many of his own functions and responsibilities were being eroded by the presence of the Chair.

58. The second claimant also explained from his perspective the issues he experienced with Mr Smith and why he acted as he did in relation to the appraisal meeting. He spoke of his frustration at Mr Smith not completing his part of the process earlier, and how agitated Mr Smith had been on the morning of 7 July, leading him to revoke his system access temporarily. He clarified that he intended to remove Mr Smith from the business on grounds of underperformance, and that he discussed this with Mr Bharshankar who told him he was safe to proceed from an employment law perspective. Ms Sanderson-Brown put to him that he had not subsequently acknowledged the effect of his approach on other individuals, or the potential risk it created for the respondent.

59. At the end of the meeting Ms Sanderson-Brown brought up two new matters which had arisen since the date of the second claimant's dismissal – the payment to his solicitors using the company bank account and changing the website behind the respondent's domain name.

60. Mr Neophytou told each claimant he would explore some of the points raised, consider his decision and provide an outcome in writing.

61. After reviewing the issues and carrying out some enquiries, Mr Neophytou wrote to each claimant on 16 October 2023 [1238-1248, 1250-1262] to confirm his decision, which was not to grant their appeal and therefore to uphold the decision taken by Mr Round to dismiss them. This marked the end of the respondent's disciplinary process.

62. The respondent pays its employees monthly. The matters of each claimant's outstanding pay for at least part of September 2023 up to their termination date, as well as accrued holiday pay, remained outstanding. The respondent

conceded that these had not been paid. It maintained that it was not possible to calculate the sums, and specifically the relevant deductions to be made for National Insurance, as the first claimant had not provided the necessary code(s) or other information to allow the respondent to access the account it held with its external payroll service provider, who calculated and processed monthly payroll for all employees. The claimants also sought employer pension contributions going back to May 2023. Those were not the subject of evidence given that the hearing dealt with liability only.

The parties' submissions

63. The parties provided written submissions after the end of the hearing due to time pressure. Those submissions were considered carefully. In summary, the parties' positions were as follows.

64. Each claimant summarised the evidence they considered to be relevant to their claim.

65. The first claimant maintained that any documents she downloaded were in response to an instruction she had been given to populate a Dropbox account with items which potential investors needed to be able to view. She argued that there was therefore no data breach, and the respondent's request to her to return her laptop was to prevent her from accessing evidence to show that. She believed that her suspension so son after that of the second claimant indicated a co-ordinated attempt to remove both from the company.

66. She also argued that the respondent was trying to expedite her dismissal by arranging a disciplinary hearing on 2 August 2023, having been supplied with the investigation report six days before. She did not accept that Ms Sanderson-Brown's company were impartial in assisting with the process.

67. The first claimant did not accept that the respondent was entitled to separate her grievances into those which were complaints about the disciplinary process - which could be dealt with as part of that process - and other unrelated complaints. She did not believe that the respondent gave adequate consideration to her concerns. She believed that the decision to hold her

disciplinary hearing in her absence was unfair, as she was justified in not attending because her grievance appeal outcome had not been issued. Had the grievance process been exhausted first, the respondent would not have decided to dismiss her. She was not given unbiased consideration at her grievance appeal hearing.

68. She listed a number of alleged inconsistent findings in her disciplinary process. Those ranged from the number of files allegedly downloaded, to reliance on IP addresses, to the process used to download the documents. She also argued that the investigation was inadequate. Her main issue was that the respondent had not established with sufficient technical certainty what she had downloaded, or that she had downloaded anything at all using her work computer. The respondent did not genuinely believe that she was guilty of gross misconduct.

69. The second claimant emphasised the time and effort he had put into establishing the respondent and its early growth. He argued that, as CEO, he had power to recruit and dismiss employees and there had historically never been limits to that. He was entitled to follow any advice of Mr Bharshankar that he asked for and received, and did not need to involve anyone else in personnel decisions.

70. He stated that he believed there was a co-ordinated plan to restrict his involvement in the running of the company and ultimately remove him. This included Mr Thurlow supporting Mr Smith in stalling over his appraisal, which the second claimant was trying to complete. He believed that the whole disciplinary process was predetermined, going as far back as December 2022 when there was a board resolution to instruct an external insolvency specialist to help with the running of the company. At that time there was discussion of whether it might be suggested that certain roles were redundant. In 2023 Mr Thurlow became more 'hands on' in the running of the company and this impinged on his own role. That included in relation to dealings with external potential investors, and also senior employees reporting to the second claimant.

71. He also emphasised that, under a shareholders' agreement, he and the first claimant could be required to sell or forfeit some of their shares in the company by triggering 'bad leaver' provisions. The respondent invoked those provisions on 18 September 2023. By losing some of their shares the claimants would no longer be able to block motions requiring a special resolution of the company. This was part of their plan.

72. The second claimant explained his rationale for proposing to deal with Mr Smith as he had done. He said he had been experiencing and voicing concerns about Mr Smith's performance since February 2023. He asked Mr Smith to complete his appraisal form by some time in May but that was not done. The second claimant grew more dissatisfied with his performance and attitude. He asked Mr Bharshankar as the company's HR officer what the options were to deal with Mr Smith. He said that his preference was to terminate Mr Smith's employment. The response was to complete the appraisal process first. The second claimant therefore ordered Mr Smith the next day, Friday 7 July 2023, to complete his appraisal form and be prepared to attend a meeting to discuss it. Mr Smith refused to do so, triggering the further developments that day which were the subject of the disciplinary investigation. The appraisal meeting was rescheduled for the following Monday. Mr Bharshankar prepared two letters to be used at the meeting, one confirming Mr Smith's dismissal and the other accepting his resignation, depending on how the meeting went.

73. The second claimant outlined his criticisms of the disciplinary process. Those were similar to the issues raised by the first claimant. He believed the process was biased and designed to engineer reasons to dismiss him, rather than act as a fact-finding exercise.

74. Both claimants believed that the respondent's true motive was to remove them from the company just as its value was about to increase.

75. Ms Sanderson-Brown provided a note of submissions on the respondent's behalf. She argued that it had been unable to pay outstanding salary and accrued holiday pay to the claimants. It laid the blame squarely at the foot of

the first claimant who, without good reason, denied anyone access to the account with the external payroll provider.

76. The respondent argued that it genuinely concluded each claimant had been guilty of gross misconduct, and was entitled to do so after a sufficiently thorough investigation. The second claimant had proposed to summarily dismiss a senior employee without any process, ignoring HR advice to complete the appraisal process and then implement an improvement plan before taking any decision. The dismissal would have caused significant litigation risk and reputational damage for the respondent. He showed no remorse or awareness of the rashness of this course of action in retrospect. The first claimant had committed a significant GDPR breach just days after her partner's suspension, without being able to give a plausible reason why. The volume and nature of the documents downloaded was not consistent with her instruction to set up a data room for external parties to access. She had unreasonably refused to co-operate in the technical investigation of her actions, and would not return her equipment despite being given reasonable opportunity.

77. In both cases the respondent considered the seniority of each claimant, and the degree of responsibility and trust placed in them. It also found them lacking in appreciation of the consequences of their actions.

78. Further, the process followed was reasonable overall given the respondent's size and resources. This included issuing clear terms of reference for the investigation, appointing an independent external person to investigate the matters thoroughly, being prepared to hear the claimants' grievances before holding disciplinary hearings, rescheduling disciplinary hearings a number of times, providing detailed reasons for the decision to dismiss, provision of an appeal process overseen by a neutral director, and further investigating matters raised in the appeal hearings before a decision was reached.

Discussion and decision

Unfair dismissal claims

Was there a fair statutory reason for the claimant's dismissal?

79. The onus falls on the respondent to establish that each dismissal was for a fair statutory reason. The respondent contended that each claimant was dismissed for their conduct. Section 98(2)(b) of the Act confirms that conduct is a fair reason for dismissing an employee.

80. The claimants did not accept that they were dismissed because of their conduct. They believed that the respondent had decided it had reached a point where it could manage without them, and that it was more financially advantageous for them no longer to be employees and, potentially as importantly, shareholders with any significant influence.

81. The tribunal considered all of the evidence presented. It ultimately accepted that the claimants were dismissed because of their own actions. The respondents provided enough evidence, by way of documents generated throughout the processes followed and the oral evidence of witnesses at the hearing, to establish that this was the case. There may have been an indirect benefit to the other shareholders of the respondent caused by the claimants being treated as bad leavers under the shareholders' agreement, which in turn diluted their overall proportion of issued share capital, but that was not what motivated those who took the disciplinary (or grievance) processes from their inception to conclusion of the final appeals. Any such benefit was not tangible as the company was still in a vulnerable financial position. It was more likely, as the respondent argued, that the value, if not the future of the respondent as a company altogether, could have been damaged by the removal of the claimants.

82. In short therefore, it was accepted that conduct was the sole or principal reason for each dismissal.

Did the respondent act reasonably in implementing the dismissal?

83. The onus of proof is neutral in relation to this issue, meaning that no party is under a greater or lesser obligation to prove their side of the case. The longstanding authority of ***British Home Stores v Burchell [1978] IRLR 379*** is still the primary precedent. According to that authority three things must be established for a conduct related dismissal to be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

Burchell part 1

84. The respondent maintained that it genuinely believed the claimants were each guilty of misconduct.

85. The tribunal was satisfied that the respondent genuinely held this belief in relation to each claimant. This was the essence of the oral evidence given by Mr Round, the dismissing officer and also Mr Neophytou, the appeal hearer. Again, the documents generated during the disciplinary process support this. The issue was not significantly or persuasively challenged by the claimants.

Burchell part 2

86. The respondent argued that it had reasonable grounds on which to form its belief in each claimant's misconduct. The claimants disagreed.

87. The respondent's position was that there was sufficient clear and reliable evidence of each claimant. The claimants' position was that the evidence was manufactured, or exaggerated into something more serious than it genuinely was.

88. There was tangible evidence to support the respondent's belief in each case. For the first claimant, there was uncontested evidence of her downloading a large number of documents from the respondent's system outside of office hours just days after her partner, the second claimant, was suspended. She

also physically entered the premises late in the evening, which was not a usual practice for her. IT records, despite her refusal to accept them, showed that the number and nature of documents downloaded could cause the respondent damage. For the second claimant, he had openly proposed to terminate the employment of a senior colleague without any proper process following an escalating series of run-ins with the board of directors.

89. The tribunal was satisfied, on the evidence and considering the parties' submissions, that the respondent had met the requirements of the second limb of the Burchell test. There were reasonable grounds for holding a belief that the claimants committed an act or acts of misconduct.

Burchell part 3

90. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every stone, but no obviously relevant line of enquiry should be omitted.

91. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.

92. The respondent submitted that a sufficiently adequate investigation had been undertaken.

93. The claimants did not raise any specific criticisms about the extent of the investigation, beyond those noted above in relation to part 2 of the ***Burchell*** test. It was not suggested, for example, that the respondent should have spoken to any other witnesses or followed other lines of enquiry. The claimants' case was more about the conclusions drawn from the available evidence and how seriously the claimant's actions were treated, rather than there being obvious gaps in the evidence-gathering process itself.

94. The tribunal was satisfied that the respondent's investigation was reasonable. It took into account such factors as:

    a. The prompt gathering of statements, particularly in relation to the second claimant and the events of 7 July 2023;

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    b. The obtaining and analysis of IT and security records in relation to the actions of the first claimant;

    c. The appointment of an external individual to conduct investigations, with terms of reference which were explained to each claimant;

    d. The inclusion of Mr Smith in the investigations;

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    e. The range of individuals interviewed; and

    f. The opportunity given to each claimant to explain their position and respond to the allegations against them.

95. In each claimant's case, the issues were confined to clearly defined events. This allowed the investigations to be focussed and carried out in a relatively short space of time. Similarly, the key evidence was not disputed, and rather it was more the case that the claimants took issue with the degree of seriousness which the respondent attached to them.

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96. Therefore the tribunal accepted that a sufficiently thorough and competent investigation had been carried out to serve as a foundation for the respondent's conclusions.

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The band of reasonable responses

97. In addition to the Burchell test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

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98. The principle recognises that in a given disciplinary scenario there may not be just one single fair approach, and that provided the employer chooses one

of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

99. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) of the Act generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer's own decisions against the above standard.

100. The tribunal considered whether dismissal was within the band of reasonable responses to the conduct of each claimant. It considered how seriously their conduct was viewed, and what realistically were the alternatives to dismissal. Mr Round himself had considered those questions. He reached the view that both individuals had irreparably damaged the trust placed in them as two of the most senior employees of the company. He believed that the second claimant had failed to lead by example as the notional head of the company, and that the first claimant had attempted to steal the company's valuable product information. Given the evidence he was entitled to reach that view. He had also considered whether the claimants could be retained in another capacity, but believed that the damage they had caused to relationships with both the board and other colleagues rendered this unfeasible.

101. On the evidence heard, it is found that dismissal of the claimant was within the band of reasonable responses. Mr Round provided adequate justification for treating the claimants' evidenced conduct so seriously.

102. As a final matter, the tribunal considered whether the respondent had fallen outside of the band of reasonable responses in the procedures it followed. The main criticism from the claimants was that the respondent insisted on proceeding with their disciplinary hearings despite them saying that they

would not attend them until their grievance appeals had been fully dealt with. This breaks down into two separate issues – that the disciplinary hearings took place before the grievance process was exhausted, and that they went ahead without the claimants attending.

103. The claimants' grievances were separated out into ones which were not complaints by the claimants as employees against their employer at all, those which were employee matters but which could be dealt with as part of the disciplinary process, and those which were free-standing complaints. Only the latter category of complaint was pending final resolution at the point when the disciplinary hearings were held. There was no prejudice to the claimants in the disciplinary process as a result, because only their grievances about separate issues were awaiting final determination by way of the appeal process.

104. It is a significant step for an employer to proceed with a disciplinary hearing in an employee's absence, especially when dismissal is an option. In this situation however, the disciplinary hearings had been postponed twice as a result of the claimants submitting their grievances. They were given every opportunity to attend the hearings, and simply chose not to rather than being unable to. Even despite their absence, Mr Round still held the hearings, considered the relevant materials and reached a decision. The claimants were able to attend, and did attend, their disciplinary appeal hearings and matters were revisited thoroughly. There was no apparent denial of the chance to raise any matter then that they could have brought up with Mr Round, had they met with him. A critical factor for Mr Neophytou in upholding the dismissal decisions was that neither claimant expressed ant remorse or gave an indication that they were prepared to reconcile. That was unaffected by the process.

105. Based on all of the above, the tribunal's conclusion was that the dismissal of each claimant was fair.

Breach of contract and Working Time Regulations (Holidays) claims

106. By its own admission, the respondent had not paid the claimants their salaries for part of September 2023 or for any accrued untaken holidays up to their termination date. Whilst they had an ostensibly good reason for this, the tribunal must uphold their claims in this respect. It was unclear whether and to what extent the respondent had omitted to pay any pension scheme contributions on the claimants' behalf.

107. A set of orders is issued with this judgment, dealing with the issue.

Conclusions

108. The respondent has satisfied the tribunal that the claimants were dismissed by reason of their conduct. The tribunal also concludes that the respondent acted reasonably in the process it followed from investigation, to dismissal and through to appeal, and taking account of the timing and nature of its handling of the claimants' grievances.

109. It is not necessary to discuss in detail matters such as contributory fault, whether a *Polkey* reduction is appropriate, mitigation of loss or ultimate remedy. The claim therefore is unsuccessful and requires to be dismissed.

110. The claimants are still due to receive their final salary payment covering the date following their last salary payment, understood to be 5 September 2023 but to be confirmed, up to their termination date of 13 September 2023. They are entitled to the equivalent of the respondent's contributions on their behalf into its occupational pension scheme. They may be due the equivalent of earlier employer pension scheme contributions. They are also entitled to the monetary equivalent of their accrued annual leave up to their termination date. Those sums will be determined at a future remedy hearing should the parties be unable to agree the relevant amounts between them.

111. A set of case management orders will be issued along with this judgment.

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B Campbell

Employment Judge

13 December 2024

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Date

Date sent to parties 16 December 2024