



# EMPLOYMENT TRIBUNALS

BETWEEN  
AND

Claimant  
Mr G Pass

Respondent  
NVC Lighting  
Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL RESERVED JUDGMENT

HELD AT Birmingham ON 6 – 9 & 13 November 2017  
29 & 30 January 2018

### EMPLOYMENT JUDGE GASKELL

#### Representation

For the Claimant:

Mr R Bailey (Counsel)

For Respondent:

Mr M Duggan QC (Counsel) 6 – 9 November 2017

Mr D Read QC (Counsel) 29 & 30 January 2018

### JUDGMENT

The judgment of the tribunal is that:

- 1 The claimant was fairly dismissed by the respondent: his claim for unfair dismissal is not well-founded and is dismissed.
- 2 The claimant was lawfully dismissed in accordance with his employment contract: his claim for breach of contract (wrongful dismissal) is dismissed.
- 3 The claimant's claim for unlawful deductions from wages is not well-founded and is dismissed.

### REASONS

#### Introduction

1 The claimant in this case is Mr Gary Pass who was employed by the respondent, NVC Lighting Limited as General Manager and later Managing Director from 1 June 2009 until 5 September 2016 when he was summarily dismissed. The reason given to the claimant at the time of his dismissal was gross misconduct.

2 By a claim form presented to the tribunal on 5 January 2017, the claimant claims that he was unfairly, and wrongfully, dismissed; and that there has been an unlawful deduction from his wages. The claimant does not accept that the true reason for his dismissal related to his conduct: and further argues that the respondent was fully complicit in the conduct relied upon; which cannot therefore be said to amount to *misconduct* for dismissal purposes.

3 In its response presented to the tribunal on 8 February 2017, the respondent admits that the claimant was dismissed; but maintains that he was dismissed for a reason relating to his conduct and that the dismissal was fair; the respondent maintains that the claimant was guilty of gross misconduct and had therefore himself committed a repudiatory breach of the employment contract such that the respondent was entitled to dismiss him without notice; finally, the respondent maintains that there are no outstanding sums due to the claimant and there have been no unlawful deductions from wages.

4 In addition to its substantive denials of the claimant's claim, the respondent also raises the question of whether the employment tribunal has jurisdiction to entertain the claim since the respondent's case is that, on the claimant's account (not accepted), the performance of the employment contract was tainted by illegality. The claimant's case is that, in the performance of the employment contract, the parties behaved illegally he maintains that the respondent was wholly complicit in the illegality. Mr Bailey concedes that, under the law as it was understood prior to the Supreme Court decision in **Patel -v- Mirza [2016] UKSC 42**, the tribunal would be deprived of jurisdiction to consider the claims because of the illegality. The claimant's case is that, following **Patel**, such is no longer the position and the employment contract can be legitimately enforced.

5 The misconduct found against the claimant comprised three elements which can be summarised as follows: -

(a) **Wives' Salaries:** The respondent claims to have become aware that the claimant had arranged for the respondent to pay a salary to his wife albeit that she was not a genuine employee of the company. The claimant had taken a corresponding reduction in salary: the net effect of the arrangement was to reduce the claimant's liability to tax. The claimant admits the arrangement and that it constituted a fraud on the revenue: his case is that the respondent was fully aware of and complicit in the arrangement; and that similar arrangements were in place with Ms Weiping Shi (the wife of Mr Henry Hangmin Sun - Chairman and Director) and Mrs Shelley Jacobs (the wife of Mr Steven Jacobs – Director). The respondent admits that Ms Shi and Mrs Jacobs were in receipt of salaries but it's cases that they were genuine employees.

(b) **False Expense Claims:** The respondent claims to have discovered that the claimant was making false claims for expenses which had not in fact been incurred. The claimant admits that this was the case: but again, he claims that the respondent was fully aware of and complicit in the arrangement.

His case is that he had been entitled to a bonus payment of £25,000; he did not wish to receive the payment because of what he regarded as the penal tax regime which would have applied to it; he claims that it was then agreed that he would take part of the bonus by way of excess expense agrees that the arrangement constitutes a fraud on the Revenue. The respondent denies any complicity in the arrangement

(c) **Cobra Cable Management Limited (Cobra):** The respondent claims that the claimant was effectively running his own (non-competing) business using the respondent's warehouse and office facilities; vehicles; and time. And that, on two occasions, he improperly intervened in the respondent's

business to the advantage of Cobra. The claimant admits a certain amount of activity on behalf of Cobra in the respondent's time and using the respondent's facilities. He claims this was done with the respondent's agreement: and that, in any event, his use of such facilities was within his personal authority as Managing Director. He denies any impropriety in his interventions in the respondent's business.

### **The Evidence**

6 Dismissal having been admitted, the respondent presented its case first. There were four witnesses: Mr Henry Hangmin Sun - Director and Chairman; Mr Terry Page - Financial Controller; Mr Steven Jacobs – Director; and Mr Anthony Tan – Vice-President and Chief Finance Officer of NVC Lighting Holdings Limited - the sole shareholder of the respondent.

7 the claimant gave evidence on his own account he did not call any additional witnesses

8 In addition to the oral evidence, the tribunal was provided with an agreed bundle of documents running to more than 750 pages. I have considered the documents from within the bundle to which I was referred by the parties during the hearing.

9 In all respects save for one, I found Mr Sun to be a truthful witness upon whose evidence I could rely. However, I have concluded that Mr sun and Mr Jacobs were not truthful in the evidence they gave regarding the employment of their wives. The reality is that there is no evidence to indicate that either Ms Shi or Mrs Jacobs were genuinely and actively employed in the respondent's business.

(a) The respondent's case is that Ms Shi was employed as an HR Officer: but she has no HR qualifications; she worked entirely from home; she did not have an official email address; or a company mobile telephone; there were that she worked on average 8 - 10 hours per week but her salary was £36,000 per annum.

no training, holiday

(b) A similar position prevails regarding Mrs Jacobs: she was said to be employed as Mr Jacobs' PA; but she worked exclusively from home; she had no company email address; no company mobile telephone; and there were no training, sickness, or holiday records pertaining to her. She had another job working 6 - 12 hours per week as a Care Worker; and it was stated that she worked 10 - 15 hours per week for the respondent. At the time of the claimant's dismissal she was earning £18,500 per annum.

(c) Mrs Pass, Ms Shi and Mrs Jacobs were the only employees on the respondent's payroll who were not entitled to the bonus payable on either of two schemes. The explanation given by the respondent was that this was because they worked from home - (but it was also acknowledged that of the bonus schemes).

other employees w

10 On the balance of probabilities, my conclusion is that these three senior directors of the respondent company had agreed to pay bogus salaries to their wives to reduce their own tax liabilities.

11 I have considered the extent to which this finding should impugn Mr Sun's credibility overall: I have concluded that in all other respects I found his evidence to be reliable; it was internally consistent; and it was consistent with contemporaneous documentation.

12 Mr Page's evidence was not particularly controversial: he made the payments of wives' salaries; he split bonus payments between the claimant and his wife; and he was aware of the excess expenditure claims made by the claimant purportedly to offset his bonus. But, in all material respects, Mr Page acted on the claimant's instructions: he accepted that it was Mr Sun who ultimately authorised payments from the bank; but he did not believe that Mr Sun diligently scrutinised those payments before authorisation unless there was a reason to question them.

13 In all respects I found Mr Tan to be a wholly reliable and truthful witness whose evidence I accept. His evidence was internally consistent, and consistent with contemporaneous documentation.

14 I found the claimant to be quite unsatisfactory witness: he agreed that he had made false statements during his appeal hearing with Mr Tan and that he had fabricated the extent to which his wife was actively employed in the business; he further accepted that at the disciplinary hearing he had lied about the extent of his involvement with Cobra; all of this was in addition to his admission of active participation in two frauds on the revenue. I found the claimant to be evasive and defensive as a witness; and in part his evidence was internally inconsistent and inconsistent with contemporaneous documents presented to him.

15 Based on of my assessment as to the reliability of the various witnesses I have made my findings of fact.

## **The Facts**

### *Chronology*

16 The respondent was incorporated on 31 May 2007 as a wholly owned subsidiary of NVC Lighting Holdings Limited (Holdings). Mr Tan was a Director and Chief Finance Officer of Holdings; Mr Tony Wang was the ultimate owner of that company. When the respondent was incorporated, Mr Sun was appointed as a Director and Chairman. On 18 June 2007, Mr Jacobs was employed as Director of the OEM Division. On 1 June 2009, the claimant was employed as General Manager: he was later promoted to Managing Director and appointed as a Statutory Director; at that time, April 2011, Mr Jacobs ceased as a Statutory Director.

17 Although Mr Sun was recognised as the senior of the three; and was effectively the claimant's line manager, the claimant; Mr Sun; and Mr Jacobs were of broadly equal status - they were the three most senior employees in the UK. Their salaries were broadly equal (in 2009 Mr Sun and Mr Jacobs £63,000; the claimant £62,000: in each case, plus bonus). It is common ground that the equal salaries were to reflect their broadly equal status.

18 In January 2010, Mrs Jacobs was formally employed by the respondent as Mr Jacobs' PA - based at home. And Mrs Pass was formally employed as a Health and Safety Officer - also working from home. Mrs Jacobs started to receive a salary of £1416.66 per month: Mr Jacobs took a corresponding reduction in salary. Mrs Pass started to receive a salary of £2000 per month: the claimant took a corresponding reduction in salary. Mr Sun's salary remained unchanged. The effect of this was that, broadly speaking, the combined salaries of Mr and Mrs Jacobs, and the combined salaries of the claimant and Mrs Pass, remained equal to that of Mr Sun. It is common ground between the parties that Mrs Pass' employment was entirely bogus: the arrangement was intended simply to divert salary from the claimant to her for tax evasion. It remains a matter dispute between the parties whether Mrs Jacobs' employment was similarly bogus or genuine.

19 In January 2012, Ms Shi was formally employed by the respondent as an HR Officer - working from home: Ms Shi was paid a salary of £2916.67 per month. At the time of the commencement of his wife's employment, Mr Sun received a modest increase in salary of approximately £300 per month; the claimant and Mrs Pass both received substantial increases. The effect of was that the combined salaries of the claimant and Mrs Pass remained broadly equal to the combined salaries of Mr Sun and Ms Shi. For reasons which are unclear, by this time, the Jacobs' combined salaries had fallen behind.

20 It was the respondent's practice to defer payment of up to 20% of the salary due to the claimant and to Mr Sun - to be paid at the end of the calendar year unless good reason was established to withhold it. The legal basis for this arrangement is unclear but it is immaterial for present purposes. It became the practice for the balancing payment (bonus) payable in January each year also to be divided between the claimant and Mrs Pass also for tax evasion.

21 The claimant's son Samuel, now aged 21, had worked for the respondent as a casual employee for several years: starting when he was still at school; and continuing through his university days. It was not unusual for senior employees of the respondent to have their adult children working on a casual basis and it is not suggested that there was anything improper in the claimant's employment of Samuel or that Samuel received any favourable treatment. Mr Sun's evidence was that he became concerned that the extent of Samuel's employment was such that he might acquire employment protection rights contrary to the respondent's intention. And so, in early 2016, when Samuel had not been in the business for some time, Mr Sun directed that he be issued with a P45 suggesting the termination of his employment. The claimant later re-employed Samuel and this led to a disagreement between the claimant and Mr Sun which was fully aired in a telephone conference with Mr Tan. Mr Tan had no objection in principle to Samuel's continued employment so long as there was a business need: however, Mr Sun took the decision that Samuel's employment should be terminated and he drafted a dismissal letter which he passed to the claimant on 30 June 2016. These events appear to have coincided with a general deterioration in the relationship between the claimant and Mr Sun. There were some profound disagreements between them as to business strategy: including overall labour costs; and what the claimant regarded as excessive stock levels.

22 In the case presented to the tribunal, the claimant suggested that this deterioration in the relationship was the true reason for his dismissal and that what he regarded as the unacceptable treatment of Samuel was intended to try and provoke his resignation.

23 On 19 April 2016, Mr Sun first interviewed Mr Joe Clark who would, in October 2016, become the respondent's Chief Executive Officer. In his resume of Clark, the recruitment agent described him as "*a very all-round CEO and a very capable person*". The claimant presents this as evidence that, by April 2016, a decision had been made that he was to be removed from office; and the search for his successor was underway. Mr Sun's evidence was to the effect that the respondent was contemplating an expansion of its activity in the European market; and was investigating the availability of suitable candidates to head-up such an operation.

24 On 15 July 2016, Mr Sun circulated all managers by email advising them that Mr Tan was visiting the UK the following week. He asked the managers to attend a meeting with Mr Tan at 3pm on 27 July 2016. He confirmed that the agenda for the meeting would include: "*An update on the business situation of NVC group; Personnel changes; Direction of strategy and NVC group's future plan.*" In the light of subsequent events, the claimant presents this meeting and the reasons given for it as evidence for the respondent's intention to have removed him from his position by the date of that meeting; and that his removal and replacement would be the "*Personnel changes*" referred to. Mr Tan explained that he had become aware that, because of certain recruitment developments outside the UK, it had been rumoured that he would no longer be responsible for the UK business, and the purpose of the meeting was to reassure managers of his continuity. I find nothing sinister in the fact of this meeting and it certainly does not establish what the claimant claims, although, it is clear that, by 15 July 2016, Mr Tan and Mr Sun would have been aware of possible disciplinary proceedings against the claimant and clearly this may have been relevant for discussion at the meeting. In my judgement, it is significant, and it undermines the claimant's interpretation of events, that the claimant was himself on the distribution list for the invitation to the meeting.

25 Without warning, on 22 July 2016, the claimant was summoned to a meeting with Mr Sun, Mr Tan, and Mr Mel Northfield - an external HR Consultant. The claimant was handed a letter inviting him to a disciplinary hearing on 27 July 2016 at 12 noon: the letter contained a Schedule of nine disciplinary allegations; the claimant was warned that if the allegations were found to be true they were likely to be deemed gross misconduct and immediate dismissal was possible. The claimant was also told that he was being suspended with immediate effect and that appropriate steps were being taken to remove him from his position of Statutory Director of the respondent. In fact, the steps taken to remove the claimant as Statutory Director can properly be described as *inappropriate*: he was simply removed without a formal meeting of shareholders and without the opportunity to speak at such a meeting as is required by Section 168 of the Companies Act 2006.

26 Eight of the nine allegations involved the claimant's activities on behalf of Cobra: these included the appropriation of company materials for Cobras benefit; the use of company vehicles for Cobra purposes; the unlawful and unlicensed use of the company

forklift truck; using the company warehouse to stock Cobra materials; arranging for the company to be invoiced for the couriering of Cobra materials; and using the company photocopying facilities for Cobra purposes. There were two allegations of the claimant intervening in the respondent's business for Cobras benefit: the details are set out below. The ninth allegation was the recruitment of Samuel pass without justification and without business need.

27 The intervention allegations related to the relationship between the respondent and a customer, CLE Electrical Wholesale Limited of Sheffield (CLE). CLE was also a customer of Cobra. (There is no suggestion that Cobra and the respondent were competitors: they supplied different types of goods to CLE who were an electrical wholesaler.) It also emerged that the proprietor of CLE had given assistance to the claimant and his son when Cobra was established by providing them with details of wholesale prices charged to them by their competitors. Mark Smith the respondent's Commercial Manager complained to Mr Sun that, in November 2015, the claimant had instructed him to reduce the price quoted by the respondent to CLE - who in turn were quoting for work with the Printworks in Sheffield. The intention was that, by providing CLE with lower prices than their competitors, CLE would secure the contract. It was alleged that this action displaced one of CLE's competitors who were also customers of the respondent - but who had been quoted a higher price; with a potential opportunity loss to the respondent of £12,000. Mr Smith further complained that, in June 2016, the claimant had instructed him to delay the provision of a quotation to Pulse Electrical who was seeking to win a deal with Jaguar Land Rover in the hope that the deadline for Pulse Electrical's quotation would pass and CLE would succeed.

28 The meeting of the 22 July 2016 was very brief: the claimant was presented with full details of the allegations but he was not asked for any comment; he was merely told that there would be a disciplinary meeting five days later. However, on 26 July 2016, solicitors instructed on behalf of the claimant wrote to the respondent suggesting that a disciplinary meeting was premature; and ant such meeting should be preceded by a detailed investigatory meeting. Accordingly, the meeting on the 27 July 2016 went ahead as an investigatory meeting only.

29 Present at the investigatory meeting were Mr Northfield, Mr Sun, and the claimant. The meeting was recorded and the transcript is very lengthy. Of the allegations of the appropriation of company materials for Cobras benefit; the use of company vehicles for Cobra purposes; the unlawful and unlicensed use of the company forklift truck; using the company warehouse to stock Cobra materials; arranging for the company to be invoiced for the couriering of Cobra materials; and using the company photocopying facilities for Cobra purposes, the claimant was highly dismissive. He did not dispute the basic facts: he expressed the view that, as the Managing Director of the company, it was within his authority to use company assets for his own purposes. He was insistent that he had told Mr Sun about Cobra: he later accepted that he had told Mr Sun that Samuel was thinking of establishing a business and asked if Mr Sun had any objections to Samuel using the same IT supplier as the respondent. The claimant now admits that, during the meeting, he did not tell the truth: he stated that the business was not his - whereas in fact he was a Director of Cobra and owned 62% of the shares. The claimant stated that where he had used company materials, or where he had caused the company to be invoiced for courier services and the like, he would in the fullness of time

offset such expenses against his unpaid bonus. He went on to explain an arrangement he claimed to have reached with Mr Tan whereby, instead of receiving the whole of his £25,000 bonus in January 2016, he was making excess mileage and expense claims as a way of receiving the bonus tax-free. The respondent's case is that Mr Sun had no knowledge of any such arrangement.

30 Following the investigatory meeting, a disciplinary hearing was scheduled for 7 August 2016: an additional disciplinary allegation was added (allegation 10) which was that the claimant had been using his NVC computer for the purposes of Cobra business during office hours. The meeting was later rescheduled for 10 August 2016: present were Mr Sun, Mr Northfield, and the claimant. The claimant had been given the opportunity to be accompanied but had declined. The meeting was very lengthy (more than 3½ hours); it was recorded; and the transcript runs to over one hundred pages.

31 Following the meeting on 10 August 2016, Mr Sun undertook further investigations. On 16 August 2016 Mr Sun wrote to the claimant adding a further disciplinary allegation - Allegation 9(a) which related to the submission of false mileage claims for mileage not actually incurred. This had arisen directly from statements made by the claimant at the investigatory meeting on 27 July 2016. The claimant responded in writing alleging that the respondent had been aware of the expenses arrangements throughout; that "*it had been approved by Anthony Tan*"; and "*was done with the full knowledge of Terry (Page)*". Mr Sun's investigations revealed that, whilst Mr Tan had agreed to the claimant receiving his bonus in a tax efficient way, he had not authorised any fraudulent arrangements.

32 There was a further disciplinary hearing on 22 August 2016: principally to deal with the question of false expenses claims. It was during this meeting that the claimant raised the issue of "wives' salaries": stating that the wives of Mr Sun, Mr Jacobs, and the claimant had been bogus employees for some 5 or 6 years as a way of reducing tax liabilities. The claimant stated that he saw the mileage arrangement is a slight extension of the same - and that the respondent knew and approved of the arrangements.

33 It is the respondent's case that this was the first time Mr Sun realised that the employment of the claimant's wife was bogus. The respondent's case is that Ms Shi and Mrs Jacobs were legitimately employed; and that, until then, Mr Sun believed that Mrs Pass was also legitimately employed.

34 On 5 September 2016, Mr Sun wrote to the claimant advising him of his findings regarding the disciplinary allegations. Mr Sun found that the allegations were all substantiated save for that of employing Samuel - that allegation resulted in no action being taken. Mr Sun's conclusions were that the claimant's conduct amounted to gross misconduct: and the claimant was summarily dismissed. The claimant was dismissed for the disciplinary charges found against him - which did not include the bogus employment of his wife. The claimant's final salary included a deduction of identifiable payments made to him against false expense claims.

35 The claimant submitted an appeal by email the same day: the appeal was heard by Mr Tan; Mr Tan was in China; and the appeal was heard by way of a telephone conference call; Mr Northfield was also engaged in the call to facilitate and take notes;



the claimant was given the opportunity to be accompanied but he declined. The meeting lasted more than three hours; it was recorded; and the transcript runs to 78 pages. In his witness statement, Mr Tan carefully records and analyses some 33 different points raised by the claimant in support of his appeal.

36 In evidence before the tribunal, the claimant admitted that his wife's employment was bogus: indeed, his case was very much to this effect (although he claimed that Ms Shi and Mrs Jacobs were similarly bogus employees); but curiously, in the appeal hearing, with Mr Tan the claimant indicated that his wife's employment was not bogus; and that she was genuinely engaged health and safety duties. During the appeal the claimant argued that his dismissal had been pre-ordained because of strategic differences between him and Mr Sun earlier in the year. He was also concerned at the fairness of Mr Sun having been the dismissal officer bearing in mind that the claimant's case was that Mr Sun had agreed to his involvement with Cobra and that Mr Sun was party to the payment of wives' salaries.

37 Mr Tan decided to uphold the disciplinary decision to dismiss the claimant: he found that the disciplinary allegations upon which the dismissal was founded were correct and that together they amounted to gross misconduct justifying summary dismissal. Mr Tan's decision was communicated to the claimant by letter dated 21 September 2016 dismissing his appeal. In the same letter Mr Tan advised the claimant of his findings regarding the wives' salary issue: Mr Tan had investigated and had concluded that, whilst Mrs Pass was a bogus employee, Ms Shi and Mrs Jacobs were not.

38 On 5 October 2016, the respondent made a formal offer to Mr Joe Clark of a four-year fixed term position as Chief Executive Officer. The letter provided a job description containing a list of duties: during cross-examination before the tribunal, Mr Sun and Mr Tan effectively accepted that, although the duties were not identical to those of the claimant, and the job title was different, Mr Clark did, in fact, ultimately, replace the claimant.

#### *Cobra*

39 The claimant's defence to the *Cobra* allegations was essentially twofold: firstly, he claimed that his activities with Cobra had been approved by Mr Sun. And, secondly, and in any event, he claimed that it was within his authority as Managing Director to authorise the use of company property for such purposes.

- (a) As to the first of these lines of defence, it is clear on the evidence that he had *mentioned* to Mr Sun that *Samuel* was establishing a business which would not be in direct competition with the respondent; and he asked if it was permissible for them to engage the same IT consultants as used by the respondent. But, I find that the claimant did not inform Mr Sun that he was to become a Director of Samuel's company; still less, that he would own 68% of the shares; or that he would be as engaged as he clearly was in the running of the business.
- (b) As to the second of these lines of defence: questions put by Mr Bailey during cross-examination of the respondent's witnesses cited hypothetical

examples for of perhaps needing to use a company van to move a bulky personal item; or photocopying a personal letter on the office photocopier; or using the telephone to make a personal telephone call. The respondent's witnesses agreed that none of these things would be thought objectionable particularly for an employee of the claimant's seniority. But what Mr Sun (and later, Mr Tan) found at the disciplinary and appeal hearings was that the claimant's activities went far beyond such examples: office; the respondent's office facilities; the respondent's warehousing; and the normal conduct of the respondent's sales business with a view to benefiting one potential customer over another for the ultimate benefit of Cobra.

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### *False Expense Claims*

40 The claimant's case is that the arrangement to take his bonus tax-free by making false expense claims was specifically sanctioned by Mr Tan. Having considered the claimant's evidence, and that of Mr Tan, as a matter of fact, I reject the claimant's case; I accept Mr Tan's evidence. The claimant did speak to Mr Tan and made it clear that he had no interest in receiving the bonus because of the punitive tax regime which would apply to it. Mr Tan authorised the claimant to take the bonus in a tax efficient manner: but this did not amount to authorisation to commit a fraud on the Revenue. Mr Tan did not approve the claimant drawing expenses on a false basis; and Mr Sun explicitly disapproved such arrangement. Mr Page's knowledge of the arrangement is irrelevant: Mr Page acted throughout on the claimant's instructions.

### *Wives' Salaries*

41 The claimant was not dismissed for the bogus employment of his wife. But, he relies on the respondent's approval of such an arrangement as evidence in support of his claim that the respondent approved of him claiming false expenses. In my analysis of the reliability of witnesses at Paragraph 9 above, I set out why I reject the respondent's case on this I find that all three wives were bogus employees. However, in my judgement, this does not establish the respondent's complicity in the arrangement; or any propensity for the respondent to partake in fraudulent tax saving activities. It is clear to me that this arrangement was one made between three senior employees; but Mr Tan was clearly unaware of it; and this is evidenced by the fact that, during the appeal hearing, the claimant chose to tell lies about his wife's employment. At best, what the claimant establishes is that Mr Sun and Mr Jacobs were also guilty of misconduct in this regard: but this does not, in my judgement, impugn the fairness of the claimant's dismissal: -

- (a) The claimant knew he was participating in a fraud of which the Chinese owners of the company were unaware.
- (b) I accept Mr Tan's evidence that he investigated the involvement of Mr Sun disagree with this conclusion; and his investigation was cursory to say the least; but I accept that his conclusion was genuine.

and Mr Jacobs and

*Joe Clark*

42 Having considered the evidence on this, I find nothing inherently sinister in the fact that, in April 2016, Mr Sun interviewed Joe Clark and another candidate for a potential unspecified senior position within the respondent organisation. In my judgement, the evidence does not suggest that the respondent was, at this stage, seeking a replacement for the claimant. After all, it was not until six months later that an offer of employment was made. I accept the evidence of the respondent's witnesses that the initial interviews in April were of a general nature; to establish the calibre of potential candidates; with a view to expansion of the respondent's business in Europe or possibly the Middle East. It became convenient to appoint Mr Clark as CEO after the claimant's dismissal.

43 In his closing submissions, Mr Bailey suggests that during cross-examination on this issue, the tribunal fell to the wrong side of an acceptable line by refusing to draw an appropriate inference from the interview of Mr Clarke in April; and from the recruitment agent's description of him as a "*very all-round CEO.....*". This criticism of the tribunal is ill-conceived: I intervened during Mr Bailey's cross examination because, in my judgement, the questioning was unfair. I had not, at the time of the intervention, either agreed to draw, or refused to draw, any inference. I was concerned that Mr Bailey was suggesting to a witness who was giving evidence other than in his native language that the description given by the recruitment agent was not open to any interpretation other than that the respondent was seeking the appointment of a new CEO. I intervened to point out that other interpretations were possible - nothing more. It is then suggested that during the cross-examination of Mr Tan there was an admission that the respondent was seeking to appoint a CEO. Mr Tan's evidence was that this was likely to be for a division of the organisation such as "NVC Europe" - to take over the expansion of European business. There was certainly no concession that the interview of Mr Clark was with a view to appointing a replacement for the claimant.

44 I accept that the interpretation contended for by Mr Bailey is available: but as he concedes in his closing submissions the evidence is not conclusive. And, in my judgement, the evidence does not establish that, in April 2016, the respondent was seeking a replacement for the claimant.

## **The Law**

### *Unfair Dismissal*

#### 45 **Employment Rights Act 1996 (ERA)**

##### **Section 94: The right not to be unfairly dismissed**

(1) An employee has the right not to be unfairly dismissed by his employer.

##### **Section 98: General Fairness**

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) .....where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

#### 46 **Cases on Unfair dismissal**

##### **ASLEF -v- Brady [2006] IRLR 137(EAT)**

The tribunal is concerned with the actual reason for the claimant's dismissal. The reason for the dismissal may not in fact be a potentially fair reason even in cases where a potentially fair reason exists. The question is whether the employer has proved that the potentially fair reason was the principal reason for the dismissal.

##### **British Homes Stores v Burchell [1978] IRLR 379 (EAT)**

In a case where an employee is dismissed because the employer suspects or believes that he or she has committed an act of misconduct, in determining whether that dismissal is unfair an employment tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First, there must be established by the employer the fact of that belief. Second, it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

**Iceland Frozen Foods v Jones [1982] IRLR 439 (EAT)**  
**Post Office –v- Foley & HSBC Bank plc –v- Madden [2000] IRLR 827 (CA)**

It is not for the tribunal to substitute its own view but to consider whether the respondent's decision came within a range of reasonable responses by a reasonable employer acting reasonably.

**Sainsbury's Supermarkets Limited –v- Hitt [2003] IRLR 23 (CA)**

The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed.

**Agoreyo -v- London Borough of Lambeth [2017] EWHC 2019 (QB)**

Suspension from duty is not always a neutral act: on the facts of this case, the suspension of a teacher pending investigation was a breach by the employer of the implied term of trust and confidence. The teacher's subsequent resignation was a constructive dismissal.

47 **The ACAS Code**

I considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

*Wrongful Dismissal*

48 The wrongful dismissal claim is a simple claim under the law of contract: under the terms of his employment contract the claimant was entitled to a period of notice of termination of his employment. In his claim form the claimant contends for a notice period of six months but this was not pursued by him at trial: the written contract contained in the bundle provided for a notice period of three months. If he was to be dismissed with a less than that period of notice he is entitled to claim damages for the losses arising from the breach of contract. Frequently such a claim can be quantified by a payment equivalent to the wages which the employee would have earned during the notice period.

49 The only effective defence to the wrongful dismissal claim (and the only potential defence advanced in this case) is that, by his conduct, the claimant was himself in repudiatory breach of his employment contract; and that, by dismissing him, the respondent merely accepted the breach and chose not to waive it.

50 The principal burden of proof is on the claimant to establish that he was entitled to a period of notice - in this case, the a period of three months is not in dispute. It is the respondent who asserts that the claimant was in repudiatory breach; and the burden of proof is on the respondent to establish this on the balance of probabilities.

51 The test which the tribunal must apply to the claim for wrongful dismissal is very different from that to be applied to the claim for unfair dismissal. In the wrongful dismissal claim the tribunal is not concerned with the reasonableness or otherwise of the respondent's decision; but must make its own findings as to whether the claimant had acted in repudiatory breach of contract.

*Unauthorised deductions from wages*

52 Section 13 ERA provides so far as relevant:

- (1) An employer shall not make a deduction from wages of a worker employed by him unless –
- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
  - (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

53 Section 13(3) provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated of the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion. "*Properly payable*" in Section 13(3) means payable under a legal, though not necessarily a contractual, obligation: **New Century Cleaning Company Limited v Church [2000] IRLR 27**.

*The Drawing of Inferences*

54 **Re Mumtaz Properties Limited [2011] EWCA Civ 60**  
**(Also known as Wetton -v- Ahmed)**

Contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence.

*Illegality*

55 It is common ground between the parties that the fraudulent nature (at least on the claimant's account) of the payment of wives' salaries and excess expenses would, as the law was until recently understood, be such as to prevent the claimant from enforcing any aspect of his employment contract, or bring a claim for unfair dismissal, for public policy reasons. However, it is equally common ground that the landscape has

changed following the decision of a nine-judge Supreme Court in the case of **Patel -v- Mirza**.

56 **Patel -v- Mirza [2016] 3 WLR 399 (SC)**

The rule that party to an illegal agreement cannot enforce a claim against the other party to the agreement if he must rely on his own illegal conduct in order to establish the claim does not satisfy the requirements of coherence and integrity of the legal system and should no longer be followed. Instead the court should assess whether the public interest would be harmed by the enforcement of the illegal agreement: which requires it to consider (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim; (b) any other relevant public policy on which the denial of the claim may have an impact; and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework various factors may be relevant, but the court is not free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of those considerations rather than by the application of a formal approach capable of producing results which may appear arbitrary; unjust; or disproportionate.

**The Claimant's Case**

57 The principal case argued by the claimant is that the misconduct identified against him was not the true reason for his dismissal: he was dismissed as a matter of convenience arising in-part from strategic disagreements between him and Mr Sun. Without more this would not be a permissible reason for the purposes of Section 98(2) ERA: and his dismissal would inevitably be unfair.

58 The claimant urges this conclusion on the tribunal by reference to the following factors: -

- (a) Mr Sun appears to have become aware of the claimant's Cobra related activities as early as January 2016: but he took no action; instead it is suggested that he preserved evidence to build a case.
- (b) Mr Sun created an unnecessarily hostile environment for the claimant by his treatment of Samuel.
- (c) Mr Sun was interviewing Joe Clark as early as April 2016: the claimant relies on the recruiting agent's description of Mr Clark as a "CEO" and also invites the tribunal to draw an inference from the lack of any disclosure from the respondent as to his instructions to the recruitment agent or as to what was discussed in the interview.
- (d) It is the claimant's case that Mr Northfield's involvement has been shrouded in secrecy by the fact that at all times he was working under the direction of a solicitor and communications between him and the respondent therefore claimed to be protected by legal advice or litigation privilege. It is suggested that adverse inferences can be drawn from this and it is claimed that the cases of **Chhabra -v- West London Mental Health NHS Trust [2014] ICR 194 (SC)** and **Ramphal -v- Department of Transport [2015] ICR Digest 23 (EAT)** apply.

- (e) The claimant claims that a false reason was notified for Mr Tan's visit the UK and the meeting on 27 July 2017. The inference to be drawn being that the respondent anticipated that the claimant would either have resigned in advance of that date, or would have been dismissed at the disciplinary hearing originally scheduled for 12 noon on that day.
- (f) The claimant relies on the pre-emptory way in which he was removed as a Statutory Director without following the procedure prescribed by statute.
- (g) The claimant maintains that he was suspended unnecessarily.
- (h) The claimant's case is that the respondent sanctioned the illegal payment of wives' salaries and the excess expense claims: and this being true, it is highly unlikely that the respondent would then regard the conduct alleged against the claimant to be grounds for dismissal.

59 Even if the tribunal finds that the claimant was dismissed for a reason relating to his conduct, the claimant maintains that the dismissal was unfair for the following reasons: -

- (a) The alleged conduct had been condoned by the respondent's senior executives: Mr Sun in respect of Cobra and the payment of wives' salaries; and Mr Tan in respect of the payment of excess expenses.
- (b) Mr Sun, who dealt with the disciplinary hearing, and Mr Tan, who dealt with the appeal, were both conflicted and should not have taken part: Mr Sun because he was party to the agreement to pay wives' salaries and because it was at least alleged that he had full knowledge of the claimant's Cobra activities; Mr Tan because it was alleged that he had agreed to the payment of excess expenses.
- (c) In any event, the sanction of dismissal was outside the range of reasonable responses.

60 The claimant claims that in these circumstances he was also wrongfully dismissed: and that he was entitled to a payment in lieu of notice due under his contract. In the claim form, he asserts that this is a minimum period of six months: this is not a matter which it was pursued at the trial; and the contract contained the trial bundle provides for a three-month notice period.

61 Finally, the claimant claims that, if he is not to receive the balance of his bonus via the payment of excess expenses, then the balance remains due and properly payable to him, and that the respondent's failure to pay is an unlawful deduction from wages.

### **The Respondent's Case**

62 The respondent's case is that the claimant was very clearly dismissed for reasons relating to his conduct. The particular information coming to Mr Sun's attention in June 2016 related to the claimant's intervention in the respondent's sales procedures for the apparent benefit of CLE. This is what prompted Mr Sun to investigate further and to take legal advice - resulting in the appointment of Mr Northfield. Matters which were already known to him regarding the claimant's activities (and which were a cause for concern), were now open to a more serious interpretation.



63 There is not the slightest evidence to link Mr Clark's interview in April 2016 with the claimant's dismissal. If the dismissal was contrived, and if the respondent had got their man in April, why would they wait until July to commence a disciplinary process?

64 The respondent did not condone the illegal activities admitted by the claimant: Mr Sun believed that the claimant's wife was a genuine employee like Ms Shi and Mrs Jacobs; Mr Tan agreed to the claimant's bonus being paid in a tax efficient manner - but this is not to condone illegal activity; Mr Sun had been told that the claimant was assisting his son in establishing a business - he was not told that the business would be 68% owned by the claimant; that the claimant would be a director of it; and that it would be effectively run out of the respondent's premises and at the respondent's expense.

65 The suggestion that the dismissal was pre-determined is not borne out by the fact that an exhaustive process was followed resulting in two disciplinary hearings after the investigation meeting. There is actually no reason to question Mr Northfield's independence; and this was not questioned by the claimant at the time.

66 The claimant was lawfully dismissed: he is not entitled to a payment in lieu of notice. His illegal activities were clearly a fundamental breach of the employment contract such that he is not entitled to rely on the contract for his own benefit. The respondent is not liable to give, or to pay in lieu of, any notice period.

67 The claimant's case is that he rejected the bonus payment: he only agreed to receive it if it could be paid through expenses on a tax-free basis. The respondent's case therefore is that unless it is established that the respondent agreed to pay the bonus on such a basis then there is no legal basis for the bonus to remain payable. The respondent's failure to pay is not a failure to pay wages which are "*properly payable*".

68 If the claimant's account is to be accepted, then the tribunal should find that it lacks jurisdiction to hear the claims on the basis that the employment relationship was entirely tainted by illegal activity. This point applies with greater emphasis to the claim for the balance of the bonus since the claimant's own case is that the only basis upon which the bonus was to be paid was through a fraudulent scheme.

## **Discussion & Conclusions**

### ***Unfair Dismissal***

#### *The Reason for the Dismissal*

69 I am satisfied on the evidence before me that the sole reason for the claimant's dismissal related to his conduct: namely his activities as a Director of Cobra; and his submission of false expense claims. He was not dismissed because of the bogus employment of his wife.

70 The evidence available does not persuade me that the dismissal was pre-determined; or that it was in any way related to the interview of Joe Clark. I have heard the witnesses give evidence: and, on this matter, I accept the truth of Mr Sun's evidence. At the time of the initial interview with Joe Clark, the respondent was merely considering

a possible change of strategy to enhance its position in the European market; had the plan gone ahead it would have affected the claimant's position and the claimant would have been consulted; but the plan did not go ahead.

71 There is a clear and identifiable incident prompting the investigation commencing around the beginning of June 2016. Mr Sun could not have predicted those events; and, even on the claimant's account, it was unusual for him to intervene in sales decisions. It is true that Mr Sun had already noted concern regarding the claimant's use of vehicle etc. but it was only when Andrew Murphy and Mark Smith were angry at the claimant's interventions that the position became clearer.

72 Mr Sun commenced an investigation and a subsequent disciplinary process on the basis of the claimant's Cobra activities only: it was the claimant who introduced the payment of excess expenses. He claimed that this was done with Mr Tan's agreement - Mr Sun investigated this and found it to be untrue. It strikes me as inherently unlikely that the decision to dismiss was pre-determined if based solely around Cobra activities if the more serious allegation relating to false expense claims was already known to Mr Sun.

73 With regard to the non-disclosure of documentation relating to Joe Clark; and to the appointment of Mr Northfield; I am unimpressed by the claimant's submissions. At no stage has the claimant made a proper and detailed application for disclosure of documents; he has not identified documents which he claims should exist; and has not sought to test any claim for privilege around Mr Northfield. It is unsatisfactory for the claimant simply to leave matters such that he can make vague generalised assertions as to non-disclosure and expect the tribunal to draw adverse inferences as a result. I accept Mr Sun's evidence that the initial meeting with Joe Clark was an entirely informal affair with no specific role or job description in mind and it is quite likely that no documentation was generated.

74 Mr Tan fully explained the reason for his visit and I accept his evidence. There were rumours about possible personnel changes and he wished to set the record straight. This is actually consistent with what Mr Sun had said about the reasons for the Joe Clark interview in April.

75 I am satisfied that the respondent did not sanction the payment of false expenses claims; and that the payment of wives' salaries was a dishonest conspiracy involving three individuals only. The claimant was not dismissed for the bogus payments to his wife.

76 the claimant suspension coming when it did appears to me on the evidence to be entirely appropriate although evidence had been gathered and in and an investigation had been conducted it was only on 22 July 2016 that the claimant became aware that he was under investigation and the nature of the allegations suspension at that time appears appropriate to ensure that he did not have the opportunity to interfere with evidence or witnesses prior to the disciplinary meeting which had been planned

78 Whilst I can fully appreciate the claimant's outrage at being removed as a Statutory Director without the appropriate procedure being followed, this sort of conduct on the part of a relatively small company is not unusual and in my judgement, throws no

light on the dismissal decision. The claimant did of course have a remedy elsewhere but, so far as I am aware, he did not pursue it. Ultimately, such decisions would lie with the majority shareholder – who, in this case, acted through Mr Tan. The suggestion from the claimant that if there had been a shareholders meeting he might have procured a different outcome is fanciful.

*Fairness*

79 When he came to give evidence before the tribunal, the claimant admitted that he had never disclosed to Mr Sun the full extent of his involvement with Cobra. Indeed, he admitted that he had lied to Mr Sun during the investigatory and disciplinary meetings: it had been left to Mr Sun to discover that the claimant was a director of the company. Mr Bailey relied on examples such as occasional use of company vehicles for private reasons; occasional use of the office computer and photocopier; the occasional storage of private goods in the warehouse; and so on. But, Mr Sun's findings were that the claimant was effectively running Cobra as a business using the respondent's vehicles; warehousing; office; and other facilities. And, that he had intervened in the respondent's business to advantage CLE - a Cobra customer. In my judgement, there was ample evidence for Mr Sun to reach the conclusions that he did; and I am satisfied that he had conducted a sufficient investigation; he was not assisted by the claimant's dishonesty when challenged.

80 So far as the payment of false expenses is concerned, the claimant admitted this: very little investigation was required beyond the essential enquiry of Mr Tan as to whether it had been sanctioned. Mr Tan was clear that it had not.

81 In respect of the two areas of misconduct for which the claimant was dismissed, I am satisfied that the respondent meets the three limbs of the ***Burchell*** test.

82 As to the sanction, Mr Sun found this to be serious misconduct which fundamentally undermined the implied term of trust and confidence between the parties. In my judgement, Mr Sun was entitled to come to this conclusion: there is no merit in any suggestion that the decision to summarily dismiss the claimant was outside the range of reasonable responses.

*Procedural Fairness*

83 It is suggested that Mr Sun ought not to have conducted the disciplinary investigation because of the claimant's assertion that he was aware of the Cobra activities and because he was implicated in the payment of bogus wives' salaries. It was not until the disciplinary investigation was underway that Mr Sun could have known of the extent to which it was to be suggested that he knew of the claimant's Cobra activities; and he was well placed to deny such knowledge which was not supported by any other witness or documentation. In my judgement, the fact that during the course of the disciplinary investigation the claimant made allegations does not disqualify Mr Sun from conducting the disciplinary hearing. The question of wives salaries was not raised by the claimant until the very end of the process: and he was not dismissed because of this.

84 It is suggested that Mr Tan or not to have conducted the appeal because of the claimant's assertion that he had approved the payment of bonus through false expense claims. Again, I cannot accept the proposition that each time a manager is made the subject of an allegation which is unsupported by evidence that that manager must automatically recuse himself from further participation in the process. Mr Tan was very clear that he had not authorised false expenses; there was no evidence to support the proposition that he had; and I found Mr Tan's evidence to be truthful.

85 In these circumstances, I find that the respondent applied a fair procedure which complied with the ACAS code.

86 I have already recorded my findings with regard to the payment of wives' salaries: the issue is largely irrelevant to the unfair dismissal claim. I find that Mr Sun and Mr Jacobs were complicit; and that Ms Shi and Mrs Jacobs were bogus employees as well. But these findings have no relevance to the question of whether or not the claimant was unfairly dismissed.

87 Accordingly, and for these reasons, I find that the claimant was fairly dismissed. His claim for unfair dismissal is not well-founded; and is dismissed.

### ***Wrongful Dismissal***

88 My judgement is that, in conducting his Cobra business as he did, and in particular in intervening in the respondent's sales decisions for the benefit of CLE, the claimant acted in serious dereliction of his duties to the respondent and, as such, was in breach of the employment contract. Likewise, I find that his submission of false and inflated expense claims was dishonest and was also a breach of the employment contract. Although not part of the reason for the claimant's dismissal, I also find that his involvement in the conspiracy to pay bogus wives' salaries for the purpose of tax evasion was a serious breach of the implied term of trust and confidence and therefore a breach of the employment contract.

89 The claimant having acted in such flagrant breach of the employment contract, it is my judgement, that the respondent was entitled to summarily dismiss him without notice and, in any event, the claimant cannot now rely on the contract for his own benefit. The claim for wrongful dismissal is accordingly dismissed.

### ***Unlawful Deductions from Wages***

90 The claimant's evidence before the tribunal was clear: he had refused the payment of £7000 of a bonus which might otherwise have been due to him in January 2016. My judgement is that, once the bonus was refused, it was no longer "*properly payable*": the fact that the claimant chose to seek payment in a false and dishonest way by inflating his expense claims is not to the point. The respondent's failure, and refusal now, to pay the balance is not, in my judgement, an unlawful deduction from wages. The claim for unlawful deduction is accordingly dismissed.

### ***Illegality***

91 In view of my findings above, the question of illegality is otiose. It was the respondent who asserted illegality if the tribunal found the claimant's account to be correct: but I have found against the claimant in respect of both the false expense claims and the payment of wives' salaries. In my judgement, the question of illegality would arise in a case where both parties were party to the illegal scheme. But, my judgement is, that the respondent was not party to the illegal payment of expense claims and that the respondent properly described wasn't not party to the payment of bogus wives' salaries. The first of these schemes involve the claimant alone - and was simple dishonesty on his part to defraud the revenue. The second involved a conspiracy of three senior officers of the company, but cannot be said to have been condoned in by the respondent itself.

92 In the event that I had found that Mr Tan had approved the recoupment of bonus through false expense claims, then my judgement would have been that the claimant's entitlement to the bonus was an element of the contract of employment which was clearly so tainted by the illegal scheme as to render it unenforceable. And this aspect of the claim would have been dismissed for want of jurisdiction.

**Employment Judge Gaskell  
26 April 2018**