RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr A S Reed**

Respondent: **International Petroleum Products Limited**

Heard at: **East London Hearing Centre**

On: **9-11 October 2018**

Before: **Employment Judge Ferguson**

Members: **Ms L Conwell-Tillotson**
Mrs G A Everett

Representation

Claimant: **Mr J McMillan (Counsel)**

Respondent: **Ms S Clarke (Counsel)**

RESERVED JUDGMENT

It is the unanimous judgment of the Tribunal that the Claimant's claims are dismissed.

REASONS

INTRODUCTION

1. By an ET1 presented on 16 April 2018, following an early conciliation period from 16 February to 16 March 2018, the Claimant brought complaints of unfair dismissal, automatic unfair dismissal under s.103A of the Employment Rights Act 1996 ("ERA"), detriments on grounds of having made protected disclosures under s.47B ERA, wrongful dismissal and breach of contract. He also claimed that the Respondent had failed to provide him with a written statement of initial particulars of employment.

2. The issues were agreed at a preliminary hearing on 9 July 2018 as follows.

Breach of s.1(1) ERA

2.1 Did the Respondent fail to issue the Claimant with a statement of particulars of employment in breach of section 1 ERA?

Breach of contract

2.2 Were the following express terms of the contract of employment between the Claimant and the Respondent:

2.2.1 The Respondent would pay the Claimant a net monthly salary of £4,000; and

2.2.2 The Respondent would issue the Claimant with shares with a ratcheted effect up to 20% as the profitability of the company grew.

2.3 Did the Respondent act in breach of the Claimant's contract of employment by failing to issue the Claimant with any shares?

Detriments as a result of making a protected disclosure

2.4 Did the Claimant's email of 27 November 2017 to Mr Gordon Pirret constitute a protected disclosure within the meaning of sections 43A and 43B ERA?

2.5 Did the Claimant make the protected disclosure in good faith?

2.6 Was the Claimant subject to the following detriments as a result of his protected disclosure:

2.6.1 The Respondent's failure to make any payment in lieu of notice;

2.6.2 Mr Pirret's request for repayment of the £45,000 gift;

2.6.3 The Respondent's failure to provide him with a P45 on the day that his employment ceased or, alternatively, without unreasonable delay;

2.6.4 The Respondent's failure to pay him his full entitlement of holiday within a reasonable period of time and the failure to provide him with an explanation of how monies that were paid were calculated;

2.6.5 Being subject to unfounded allegations that he was improperly contacting Mr Phillips and other customers of the Respondent;

2.6.6 The Respondent's failure to comply fully with the DPA request, despite a further request;

2.6.7 The Respondent's attempt to rely on the purported service contract and thereby seek to diminish his legal rights;

2.6.8 The Respondent's attempt to rely on the purported grievance procedure and thereby seek to undermine his claim;

2.6.9 Mr Pirret's impugning of his personal and professional reputation to Mr Smith;

2.6.10 Victimisation by failure to comply with the DP request, despite further requests;

2.6.11 Harassment by:

2.6.11.1 The Respondent sending multiple letters of the Claimant via solicitors alleging a breach of duty;

2.6.11.2 Mr Pirret described the Claimant using words to the effect of 'bullshitter', 'charlatan' and 'chancer' at the Ecobuild Show in London on 7 March 2018.

Unfair dismissal

2.7 Did the Claimant's resignation on 29 November 2017 constitute constructive unfair dismissal:

2.7.1 Did the following constitute a repudiatory breach of the implied contract duty of trust and confidence by the Respondent:

2.7.1.1 The entry of a loan to the Claimant in the Respondent's accounts when he had no knowledge of any such loan; and/or,

2.7.1.2 The failure by the Respondent to provide an adequate explanation of the same when asked by the Claimant on 27 November 2017.

2.7.2 Was it the last in a series of incidents which justified him leaving? The Claimant relies on the following incidents:

2.7.2.1 The Respondent's repeated failure to provide him with written particulars of his contract despite several requests; and,

2.7.2.2 The Respondent incorrectly informing HMRC that the Claimant had two jobs.

2.7.3 Did the Claimant leave in response to the breach?

2.8 Was the Claimant automatically unfairly dismissed, pursuant to section 103A ERA? If not, what was the reason for dismissal, and if accepted as the reason, was it a fair reason to dismiss?

2.9 Was there some other substantial reason for the Claimant's dismissal? The Respondent maintains that it was entitled to rely on the advice of its accountant.

Wrongful dismissal

2.10 What was the Claimant's notice period?

2.11 Was the Claimant wrongfully dismissed?

3. At the start of the final hearing the Claimant applied for the Respondent's response to be struck out and/or for the Respondent not to be permitted to participate further in the proceedings because of breaches of the Tribunal's case management orders. We refused the application for reasons given orally at the time.

4. We heard evidence from the Claimant and, on behalf of the Respondent, from Gordon Pirret and Dawn Pirret.

FACTS

5. The Respondent is a company that supplies building products, including boards for insulation and cladding, to the building industry. The senior Director and majority shareholder is Gordon Pirret. It is a small family company with approximately ten employees.

6. The Claimant commenced employment with the Respondent in January 2014. It is common ground that it was agreed he would be paid £4,000 net a month. It is also not in dispute that Mr Pirret gave the Claimant £45,000 as an incentive to join the company. Mr Pirret says it was always agreed that this was a loan that would need to be repaid eventually. The Claimant says that Mr Pirret made it clear it was a gift that would never need to be paid back. Nothing was put in writing relating to the payment.

7. As part of the negotiations about the Claimant's salary Mr Pirret agreed that the Claimant would have a shareholding in the Respondent company, which would increase as the profitability of the company increased. The Claimant says it was agreed that his shareholding would start at 5%, rising to 20%. He accepts, however, that there was no agreement as to how or when any increases would take place or, for example, what would happen if he left the company. His evidence was that he had to start working and believed it would be sorted out with the solicitors within a short period of time. Mr Pirret could not remember any discussion about figures, but accepts that he promised to put a scheme in place that would give the Claimant shares. No such scheme was ever put in place.

8. The Claimant became a statutory director of the Respondent on 20 May 2014. In addition to the Claimant and Mr Pirret there were four other Directors, all members of Mr Pirret's family.

9. The Claimant claims he was never given a written contract of employment. The bundle contained two copies of a "service contract" between the Claimant and Respondent, one of which was signed by Mr Pirret and his wife, another Director of the company. Neither copy is signed by the Claimant. Mr Pirret accepted in his evidence that there was some delay in drawing up a written contract after the Claimant was taken on, but claims that it was eventually done. An email in the bundle shows that the Claimant had chased Mr Pirret for a contract on 8 September 2014 and Mr Pirret responded saying he had "left it with the lawyers". Mr Pirret said in cross-examination that this was not strictly true and that he was "fobbing off" the Claimant because he had a lot of other things to deal with at that time. He said that later in 2014 he drew up the

contract and sent it to the Claimant by post. He also said that in July 2016 he amended the contract to account for auto-enrolment into the pension scheme. The amended version was also posted to the Claimant. He says that neither version was ever signed or returned by the Claimant. The signed copy in the bundle is the version that was posted to the Claimant in 2016. The other copy is an earlier draft of the 2016 version and was never given to the Claimant. The original contract had not been saved. The Claimant believes that the Respondent fabricated the contracts in the bundle for the purposes of these proceedings.

10. In the absence of any documentary evidence of the contracts being sent to the Claimant or received by him, we find that he never received a written contract, but we do not accept that the Respondent fabricated the documents in the bundle. Metadata in relation to the signed version shows that it was created and last amended in July 2016. Further, had the Respondent fabricated documents one would expect it to have created a document purporting to be the original contract, and to have fabricated evidence of both versions being sent to the Claimant. As it stands the Respondent accepts that there is no evidence of the Claimant having received either copy and therefore does not contend that any of the terms contained in it are enforceable.

11. On Monday 27 November 2017 at 12:54 the Claimant emailed Mr Pirret in the following terms:

> "G
>
> I am emailing this from my personal email due to the nature of it, I was looking at the company accounts at the weekend for year end July 16 and noticed that I was put down as having a directors loan for £16,595. I believe that due to a change in the rules there will be a tax implication for me as the amount is over £15,000, also as I didn't actually have the loan and therefore wasn't aware of it I didn't put it on my tax return which could also be an issue.
>
> Do I have anything to be concerned about? could you explain this for me?
>
> Tony"

12. The figure the Claimant referred to was taken from the notes to the Respondent's accounts, published on the Companies House website. The relevant page contains a section entitled "Loans to directors" and states:

> The following directors had interest free loans during the year. The movements on these loans are as follows:

Description	**Opening balance**	**Amounts Advanced**	**Interest Charged**	**Amounts Repaid**	**Closing Balance**
	£	**£**	**£**	**£**	**£**
GM Pirret – Directors loan	(384)	36,969	-	31,300	5,285
AS Whittle – Directors loan	1,429	6,196	-	6,482	1,173
JJM Whittle – Directors Loan	36	1,081	-	1,091	26
SM PIrret – Directors loan	(232)	1,962	-	2,146	(416)
D Pirret – Directors Loan	(364)	3,401	-	3,423	(386)
AS Reed – Directors Loan	(54)	16,595	-	17,202	(661)
	461	**66,204**	**-**	**61,644**	**5,021**

13. There is no dispute that the Claimant did not have a loan from the Respondent in the year ending July 2016. The accounts had been signed off by Mr Pirret. Mr Pirret's evidence was that he understood that the "Directors loan accounts" were used to record any movement of funds between the company and the Directors, including expenses. He described it as "vagaries of accounting" and said that he trusted his accountants to present the figures correctly.

14. The Respondent's accountants, Rickard Luckin, subsequently explained the basis of this section of the notes in a letter dated 7 February 2018:

> "The loan accounts were prepared by extracting the balances from your Sage accounting software whilst preparing the accounts. The Sage reports show that the transactions represent credit card expenses incurred during the year and a small amount of private mileage.
>
> At the year ended 31 July 2016, the company owed Anthony Reed £661 compared to £54 at 31 July 2015.
>
> We also enclose a summary of all directors' loan accounts which have been prepared on the same basis. …
>
> As the company credit card had a separate nominal ledger code which did not have a balance at the year end and no credit card statements were provided, it was assumed that these credit card transactions were extracted from personal credit cards based upon their description in Sage."

15. The Claimant did not dispute that he may have incurred expenses and been reimbursed in the sums set out in the table, but he said he still did not understand why it was presented a loan from the company to him; if anything it was the other way around.

16. Mr Pirret forwarded the Claimant's email straight away to Dawn Pirrett, the Respondent's Finance Director, saying "We need to resolve this Dawn", and at 12:54 on 27 November Ms Pirret responded to the Claimant as follows:

> "Hi Tony
>
> Please see attached the notes for the year end 2016 financial statement. As you can see the loan has been repaid throughout the year and you currently have -661 against your loan account.
>
> I have raised the question again as we have previously asked for a breakdown of how they get to the figures.
>
> I hope this helps."

17. The Claimant responded, "thanks Dawn".

18. Later the same day the Claimant spoke to Mr Pirret on the telephone about the matter. Mr Pirret said that the account was used for various transactions and that he would find an explanation for the Claimant.

19. Over the following two days, 28 and 29 November 2018, the Claimant and Mr Pirret attended a shooting party with Adam Phillips and Cary Golding, senior managers of one of the Respondent's major clients, Stately Albion. There was no discussion of the "loan issue" during the two days. The Claimant said in his evidence that he was alone with Mr Pirret at various times during the two days.

20. At 22:07 on 29 November 2017, the Claimant emailed Mr Pirret as follows:

> "Gordon
>
> Following my email to you on the 27/11/17 asking you for an explanation for directors loan in my name that has been submitted to companies house in the accounts of International Petroleum Products Ltd.
>
> As you are aware I did not receive these directors loans and I am very concerned and distressed that this has been done in my name and without my knowledge.
>
> I had a brief discussion with you on the telephone after my email where you said that 'the account is used for various transaction and you would find me an explanation'.
>
> As I understand it there can be no legitimate reason for submitting inaccurate accounts to companies house, I also understand that this may cause me an issue with regard to tax implications and also as this is obviously not included in my tax return as I was unaware of it.
>
> I consider this to be a serious breach of the duty of mutual trust and confidence and as a result I have no choice but to tender my resignation with immediate effect."

21. There is a sharp factual dispute about what led the Claimant to send the email on 27 November and resign on 29 November.

22. The Claimant's case is as follows. He says that having been informed in September 2017 that the Respondent had had a successful year and all employees had been paid double their salary for the month, in October 2017 he downloaded the Respondent's accounts from Companies House. When viewing the accounts for 2016 he noticed the loan against his name (as set out above). He was "extremely shocked and concerned about the financial implications this would have" as he had not received such a loan and had not accounted for one in his tax return. His immediate impression was that this could be "something untoward" because he had not received a loan and it had not been discussed with him. He contacted various people including financial advisors, people he had known in business for a long time, solicitors and Action Fraud. He was advised by Action Fraud that "without hesitation it is Fraud". Everyone he sought advice from told him there could be no legitimate reason for the entry and that it could be fraudulent activity. He emailed Mr Pirret on 27 November 2017, believing that a criminal offence may have been committed or there had been a failure to comply with legal obligations. He considered that he did not receive a sufficient explanation despite his "numerous requests". The lack of transparency and potentially fraudulent activity eroded his trust and confidence in the Respondent so substantially that he could no longer continue as an employee.

23. The Respondent's case is that the Claimant wanted to resign in order to go into business with Adam Phillips and take Stately Albion's custom away from the Respondent. He was looking for a way to achieve this while protecting himself against any possible legal action by the Respondent. He seized upon the loan issue in the 2016 accounts for this purpose. The Respondent relies on the following agreed facts in support of this theory.

23.1 On 7 November 2017 a company called Phillips Reed Services ("PRS") was incorporated at Companies House. The Directors were named as Adam Phillips, Arthur Phillips (father of Arthur Phillips) and Carole Ann Reed, the Claimant's wife. Adam and Arthur Phillips held 25% of the shareholding in the company each. The Claimant's wife held the remaining 50%.

23.2 Adam Phillips and the Claimant have been friends for a long time. The Claimant brought Stately Albion's business to the Respondent.

23.3 There was a sudden increase in telephone calls between the Claimant and Adam Phillips in November 2017.

23.4 On 23 November 2017 the Claimant requested an advance on his salary, saying that he had "some extremely big car repair bills to pay this month". This was agreed and he was paid his salary on 24 instead of 27 November. On the second day of the hearing the Claimant produced an invoice dated 7 November 2017 for work on his car, in the sum of £490.97 including VAT.

23.5 Stately Albion's main business with the Respondent was the purchase of "Magply" boards. It provided approximately £1 million in business to the Respondent each year. The company is owned jointly by Adam Phillips's mother and one other.

23.6 Once PRS started trading, it started to supply Stately Albion with a similar product to Magply. On 12 January 2018 Cary Golding of Stately Albion wrote to Mr Pirret to give formal notice that it would cease purchasing Magply panels from the Respondent.

23.7 On 30 November 2017, the day after he resigned, the Claimant flew to Shanghai for one week. The Respondent's suppliers are in China.

23.8 On 13 February 2018 the Claimant attended a fire test carried out for PRS. The test report names him as a representative of PRS.

23.9 The Claimant is now working for PRS.

24. During cross-examination about his wife's involvement in PRS, the Claimant said that she had some previous experience in the building industry, but that she had not worked for seven years or so before starting the company. He acknowledged that she had never previously been a company director. He claimed not to know whether she had put any capital into the company; he believed that the capital had come from Adam and Arthur Phillips. He said his wife was receiving a salary, but it was "not large" and he did not know how much it was. He said he was "well aware" of what she and

Adam Phillips were doing, but she is "her own woman"; he "played no part" and "took no interest in it". When asked why she would have a majority shareholding in a company for which she had provided no capital, the Claimant said he believed it was because she was "doing most of the work".

25. As to the telephone calls, the Claimant accepted that there had been an increase, but said this was because there was issue at the time with faulty boards supplied by the Respondent.

26. The Respondent's case is that it found out about the trip to Shanghai because the Claimant had posted about it on Facebook, and that it was likely to have been a business trip for PRS because the factory that supplied the Respondent was near Shanghai. The Claimant did not mention the trip in his witness statement. In cross-examination he said it was a pre-booked holiday that Mr Pirret knew about (Mr Pirret denied this in his evidence). He had gone on his own to visit the Terracotta Army, but in the end he was unable to do so because he developed a toe infection and was stuck in the hotel in Shanghai. When it was put to him that the supplier's factory was in Shanghai he strongly denied it. He then said that the factory was half a day's travel from Shanghai, and when further pressed about the issue he accepted that one would need to fly to either Shanghai or Beijing to get to the factory.

27. As for the fire test, the Claimant's evidence was that he attended not as a representative of PRS, but because he was interested in the type of test that was being carried out. In cross-examination he denied that he was working for PRS at the time, and said that he was asked to witness the test because he had more experience than his wife.

28. On 7 March 2018 the annual "Ecobuild" conference took place in London. The Claimant attended with Adam Phillips and Cary Golding. The Claimant's case is that he was not working for PRS at the time, but it was a tradition for them to go to Ecobuild together; they had attended together for many years before he started working for the Respondent. Mr Pirret was also at the conference and had a conversation with David Smith about the Claimant. Mr Pirret does not dispute that he might have used words such as "bullshitter", "charlatan", or "chancer" about the Claimant. He says he was annoyed because Mr Smith told him that the Claimant said he had taken Mr Pirret's customers.

29. The Claimant says he started working for PRS on 1 April 2018, on a salary of £2,500 net per month. His evidence was that "they" (PRS) said when the company was incorporated that they would take him on as soon as they could afford to. He denied that there was any connection between that and his resignation three weeks later. Around four to six weeks before he started working there they told him that they were getting to the point where they could take him on full-time.

30. In terms of efforts to look for other work, the Claimant said he had approached two people he knew in the industry to ask whether he could work for them, one in January and one in February 2018. He said he was not looking for work in December 2017. When asked why not he said he was "trying to be selective" and that he "did not want to jump into any old position".

THE LAW

31. As regards protected disclosures, the ERA provides, so far as relevant:

> **43A Meaning of "protected disclosure"**
> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.
>
> **43B Disclosures qualifying for protection**
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
>
> …
>
> **43C Disclosure to employer or other responsible person**
> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure . . .—
> (a) to his employer, …
>
> **47B Protected disclosures**
> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
> …
>
> **103A Protected disclosure**
> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

32. As to s.43B, the definition has both a subjective and an objective element: the worker must believe that the information disclosed tends to show one of the six matters listed in sub-section (1), and that belief must be reasonable. A belief may be reasonable even if it is wrong (*Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026).

33. Pursuant to s.48(2) ERA, on a complaint under s.47B it is for the employer to show the ground on which any act, or deliberate failure to act, was done. The employer must prove on the balance of probabilities that the protected act did not materially influence the employer's treatment of the employee (*Fecitt v NHS Manchester* [2012] ICR 372).

34. Under s.103A ERA the burden of proving the reason or principal reason for

dismissal is on the employer.

35. Section 95(1)(c) of the ERA provides:

> **95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
> …
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

36. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

36.1 There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

36.2 The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

36.3 The employee must leave in response to the breach.

36.4 The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221; *WE Cox Toner (International) Ltd v Crook* [1981] ICR 823)

37. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in *Mahmud v Bank of Credit and Commerce International SA* [1997] ICR 606 and clarified in subsequent case-law as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (*Morrow v Safeway Stores Ltd* [2002] IRLR 9).

38. Pursuant to section 98 ERA it is for the employer to show the reason for the dismissal and that it is a potentially fair reason, including conduct, capability or "some other substantial reason". According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

39. As to the breach of contract complaint, the common law principles governing the enforceability of contracts are summarised in Halsbury's Laws of England as follows:

> "To constitute a binding contract there must be a concluded bargain; and a concluded contract is one which settles everything that is necessary, or essential, to be settled. This requirement may be expressed by way of a general rule that for the parties to be bound they must have finished reaching an agreement, so that it is possible to infer an intention on the part of both of them to be bound immediately, but even when such intention may be found the agreement may still be incomplete and therefore too uncertain to be enforced. It follows that, prima facie, there is no concluded contract where further agreement is expressly required…" (Volume 22, para 233)

CONCLUSIONS

Unfair dismissal/ wrongful dismissal/ detriments

40. Central to the unfair dismissal, wrongful dismissal and detriment complaints is the factual dispute about the Claimant's motivation for sending the email on 27 November 2017 and resigning two days later.

41. We are satisfied that the Respondent's suspicions about the Claimant's motivation are correct. We found the Claimant's evidence lacking in credibility in a number of respects.

42. First, we consider it wholly implausible that he was not involved in PRS from the start. The idea that he was aware of, but had "no interest" in, the fact that his wife was setting up a business with a longstanding friend in direct competition with the Respondent and intending to supply one of the Respondent's largest clients, is extremely difficult to believe. Similarly, the fact that his wife had a 50% shareholding in PRS, when she had provided no capital and had no experience of running a company, raises serious doubt as to the Claimant's version of events. The suggestion that she was given a majority shareholding was because she was doing "most of the work" is not credible, particularly given that she was also receiving a salary. We also note that the Claimant's wife did not give evidence to the Tribunal and the Claimant put forward no reason why she could not have done so.

43. We do not place any weight on the phone calls, given that Mr Pirret accepted there had been issues about faulty panels around the time that would have required communication between the Claimant and Adam Phillips.

44. We do, however, give significant weight to the Claimant's evidence about his "holiday" in China, which we found extremely unsatisfactory. We consider it so unlikely that the Claimant would go on a week's holiday alone to visit a tourist attraction, the day after resigning and shortly after claiming to have serious cash flow problems, that this version of events must have been invented by the Claimant to conceal the true nature of the trip. His evasiveness in answering questions about the location of the supplier's factory also supports the Respondent's suspicions that this was in fact a business trip. The only realistic explanation is that his trip to China was linked to his involvement in PRS.

45. We note the Claimant's admitted attendance at a fire test, carried out on behalf

of PRS, in February 2018.

46. We also consider that the Claimant's account of discovering the loan in the accounts and his subsequent reaction lacks credibility. We accept that discovering a reference to a director's loan in the accounts when there had been no such loan is likely to give rise to some concern, but we find that the Claimant's reaction was extreme and unlikely to have been genuine. To conclude immediately that "something untoward" must have been going on is extraordinary. There was no suggestion that the Claimant had any prior concerns about Mr Pirret's honesty. The entry appeared only in the notes to the accounts and had no material impact on the "bottom line", so it is difficult to see how it could have benefited the Respondent or any of the Directors. By far the most likely explanation was that there had been an error.

47. We also consider it implausible that the Claimant would contact so many external bodies for advice before mentioning the issue to Mr Pirret, with whom he had a close business relationship. It is also highly unlikely that any of them would advise "without hesitation", on the basis of that entry in the accounts alone, that this was fraudulent activity. We note that the Claimant has not provided any evidence of such contact with or advice from third parties. There are also two notable omissions from the list of people the Claimant claims to have consulted: HMRC and the Respondent's accountants, either of whom would have been a more reliable source of information and advice than the people he claims to have spoken to.

48. Finally, we consider the timing of the Claimant's resignation raises real doubt as to the genuineness of his concerns. There is a stark contrast in the tone of the email of 27 November and the resignation email two days later. In the first email the Claimant did not indicate any urgency or grave concern. He did not set a deadline for a response and certainly gave no hint that he might resign. There was then an email exchange with Dawn Pirret, in which she said she had made an enquiry with the accountants, and a telephone conversation in which Mr Pirret said he would find an explanation. The Claimant did not indicate in either case that he was unhappy with the response or that he needed more information by a particular date. He then spent two days with Mr Pirret at the shoot, during which he had ample opportunity to convey the seriousness of his concerns, but he did not mention the issue at all. On returning from the shoot, on the same evening, he wrote the resignation email claiming to be "very concerned and distressed" and alleging a "serious breach of the duty of mutual trust and confidence". We consider that the Claimant's behaviour and the correspondence are inconsistent with him having a genuine belief that there had been fraudulent activity. The request for an explanation was entirely understandable, but to resign without waiting for the answer and without any further warning suggests that he had an ulterior motive.

49. We find that the Claimant sent the email on 27 November 2017 knowing that there was likely to be an innocent explanation for the entry in the accounts, but intending to use the possible irregularity as a reason to resign without notice. He did not allow the Respondent time to provide an explanation, and did not press for one, resigning at the last minute before his planned trip to China.

50. Further, if the Claimant genuinely had no intention of resigning before raising this issue on 27 November, and having said that he had cash flow problems which necessitated an advance on his salary in November, it is very surprising that he took no steps whatsoever to look for other work until January, and then only made two informal enquiries by telephone in January and February. We conclude that he made

no efforts to find other work because he was already working for PRS and, via his wife, had a stake in the ownership of the company.

51. It was submitted on behalf of the Claimant that the Respondent's theory was illogical because there was nothing preventing the Claimant from resigning and starting up a business with Adam Phillips, so there was no need for him to concoct the issue to do with the loan account. We do not accept that. We consider it highly unlikely that the Claimant believed he could leave the Respondent and immediately set up a business in direct competition, taking one of the Respondent's main customers, with no legal consequences. Even without enforceable restrictive covenants, he was a Director of the Respondent and making such plans would breach his fiduciary duties to the company. Resigning in the way that he did enabled him to leave without notice and immediately start working for PRS.

52. In summary, we find that the Claimant planned, before 7 November 2017, to set up PRS with Adam Phillips to supply products to Stately Albion. In order to protect himself against potential legal action by the Respondent, and to enable him to start working straight away, he concealed his involvement in PRS and searched the Respondent's accounts for any potential error or irregularity which could justify his resignation without notice. He seized upon the loan account issue and had no genuine belief that it tended to show unlawful activity.

53. These findings dispose of the unfair dismissal, wrongful dismissal and detriments complaints. Even if there were a fundamental breach of contract, it was not the reason for the Claimant's resignation. As he had no genuine or reasonable belief that the matters raised in his email of 27 November tended to show wrongdoing, there was no protected disclosure.

54. For the avoidance of doubt, we do not accept that the Respondent acted in breach of the duty of mutual trust and confidence. It was reasonable for Mr Pirret to rely on the Respondent's accountants to present the company's finances accurately and although it was a misnomer to refer to directors' expenses as loans from the company to the Directors, that had no impact on the bottom line and he had no reason to believe that there was anything unlawful about presenting the figures in that way. Nor was there any failure to provide an explanation, such that the Respondent could be said to have acted in a way that was "calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee". Enquiries had been made and the Claimant resigned before a response was received from the accountants.

Breach of contract

55. Even taking the Claimant's account at its highest, we find that there was no concluded agreement to provide shares. There is no dispute that Mr Pirret promised to put a share scheme in place, but in the absence of any more specific agreement that promise is not enforceable. It cannot be inferred that both parties intended to be bound immediately; it is obvious that further negotiation and agreement would have been required, at least as to the level of the shareholding, the mechanism for any increase and the effect of subsequent events such as the Claimant leaving the company, or additional shares being issued. Even if Mr Pirret said that the Claimant's shareholding would start at 5%, that does not amount to a concluded agreement and the Claimant cannot simply restrict his claim to 5% of the value of the company to overcome this

difficulty. The Claimant accepted in evidence that he was expecting the matter to be dealt with by the Respondent's lawyers soon after starting employment and that the agreement would have included terms about what would happen if he left the company. It was clearly therefore intended that there would be further agreement on the issue. There was no concluded contract and this complaint is also therefore dismissed.

Employment Judge Ferguson

Dated: 23 October 2018