THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Alexander Nikolov Claimant

and

Netbase Global Limited Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central ON: 31 July, 1 and 2 August 2018

EMPLOYMENT JUDGE: Mr Paul Stewart MEMBERS: sitting alone

Appearances:

For Claimant: Mr Jonathan Meichen of Counsel

For Respondent: Ms Clare Darwin of Counsel

JUDGMENT

1. The claim of unfair dismissal succeeds with no reduction in the awards to be made other than 20% reduction in the compensatory award on the ground set out in section 123(6) of the Employment Rights Act 1996;
2. The claim of wrongful dismissal succeeds;
3. All other claims are dismissed; and
4. No order is made on the counter-claim.

DIRECTION

5. In the event that the parties fail to agree on the remedies for the two claims which have succeeded, they shall jointly seek a further hearing date on remedy and suggest case management directions that will assist the preparation for, and the efficient management of, a final Hearing on Remedy.

REASONS

introduction

1. The Claimant alleges he was unfairly and wrongfully dismissed. He also claims

unlawful deduction from wages in that commission he had previously been paid was deducted from his wages. Further, he seeks to have paid to him expenses incurred in the execution of his duty which were denied him because he submitted his claim for reimbursement late. The Respondent counterclaims for £370 being the deemed market value of a laptop which the Claimant failed to return to the Respondent in breach of an express term of his contract of employment to return immediately all company property upon termination of his employment.

2. This case was heard over three days. From 1020 hours to 1440 hours on the first day and with the agreement of the parties, I read the four statements of the witnesses who, in due course, gave evidence. Three of the statements were those of witnesses being called by the Respondent, namely Ms Kristina Du, Mr David Pefley and Mr Jose Puyol. Ms Du occupied the role of Human Resources Manager with the Respondent. Mr Pefley holds the position of Chief Financial Officer, in which role he is responsible for Finance and Administration (including Human Resources). Mr Puyol is the Respondent's Senior Vice President of Global Sales and is the Claimant's line manager. The fourth statement was that of the Claimant. Reading the statements necessarily entailed reading into the trial bundle comprising 712 pages.

3. The first witness, Ms Du, began her evidence at 1448 hours. By the conclusion of the second day of the hearing, her evidence and that of Mr Pefley had been completed. At that point, the Respondent through counsel conceded that the dismissal had been procedurally unfair by reason of the Respondent's failure to hold an investigation meeting with the Claimant before proceeding to a disciplinary hearing. However, there continued to be live issues in relation to, firstly, the *Polkey* point (Polkey v A E Dayton Services Ltd [1988] A.C. 344 being the authority for the proposition that the compensation to be awarded for a dismissal which was procedurally unfair could be reduced to reflect the fact that a fair procedure would nonetheless have resulted in dismissal) and, secondly, the question as to whether the Claimant had contributed to his dismissal in such manner as to warrant a reduction in the compensation to be awarded to him.

Late Disclosure

4. The evidence on the third day comprised that of Mr Puyol and that of the Claimant. The latter's evidence concluded at approximately 1615 hours. As there was insufficient time to hear submissions, I gave directions providing for the parties to send in written submissions and to allow the parties, if so advised, to submit rejoinders on matters of law.

5. Both parties provided written submissions by the set date, 3 September 2018. Along with the Claimant's submissions, there came a further 183 pages of documents which were described as "The Respondent's Late Disclosure". Copies of these pages had been provided to the Claimant's counsel on the morning of the first day of the hearing. However, they had neither been formally added to the trial bundle and nor had reference been made to them during the examination of any witness.

6. Counsel for the Claimant in his submissions asserted that:

> 6. Now that C has had the opportunity to consider the late disclosure with his lawyers it is clear that there are documents within it which are detrimental to R's

> case. For that reason, C attaches a copy of the late disclosure to these submissions … … R has been put on notice that this was C's intention and they have not objected (nor could they since this situation has been caused entirely by their own late disclosure).
>
> 7. C asked the tribunal to consider the late disclosure as part of the decision making and identifies the following pages as being particularly relevant:

7. The submissions continued to refer to some 9 pages in the late disclosure bundle which supported the case being argued for the Claimant. I duly read these pages. Only after doing so did I come to read the Respondent's Reply dated 5 September 2018 which solicitors for the Respondent had sent to the Tribunal on 10 September. In it, Ms Darwin for the Respondent took objection to the Claimant's application for the inclusion of the Late Disclosure bundle. Her first point was that her opposite number, Mr Meichen, had had the "entire morning" to read the late disclosure while I was engaged in reading into the case (in their later letter, the Respondent's solicitors asserted the timing of disclosure as being approximately 1100 hours).

8. She put the remainder of her objection thus:

> 5. C did not at any time make an application to admit the Late Disclosure into evidence (by adding it to the ET's bundle). Thus, the Late Disclosure was not before the ET, and nor was any of the Late Disclosure put to the R's witnesses. It was of course open to C to apply at any time up to until the close of evidence to admit the Late Disclosure.
>
> 6. C is unable to rely on the Late Disclosure now by sending it to the EJ attached to his closing submissions. It is trite law that C must put his case to R's witnesses. R's witnesses were not asked about the Late Disclosure at all, and it would be manifestly unfair to R if C were able to make points in his closing submissions that R's witnesses have not had the opportunity to address during their evidence.
>
> 7. Accordingly, the EJ must disregard the Late Disclosure emailed to the EJ and must disregard paras 4 – 7 of C's submissions.
>
> 8. R did not agree that C could rely on the Late Disclosure in his written submissions. R received the attached letter dated 30 August 2018, one working day before the written submissions were due, at 11.21 a.m. announcing C's unilateral decision to do so. R was not invited to agree to C's actions, and does not agree them, and accordingly did not respond to that letter.

9. This prompted the Claimant's solicitors to write on 13 September. They took issue with the reason that the Claimant had been given for the late disclosure and then said the following:

> In their Rejoinder Submissions the Respondent appears to be advancing a rather perplexing and fanciful argument that their own Late Disclosure cannot be referred to because an Application was not made by the Claimant at the Hearing for the documentation to be added to the bundle. This is most bizarre given there is an ongoing duty of disclosure and other additional documentation had previously been added to the Hearing Bundle as the case progressed in accordance with this ongoing duty to disclose.
>
> Further so, the Late Disclosure was paginated by the Respondent and therefore it is axiomatic that the documents formed part of the Hearing bundle. For the Respondent to suggest that the Claimant's conduct is unreasonable in referring to the Respondent's own Late Disclosure borders on the perverse and we must draw this issue to the Tribunal's attention.

> We also make the following points: –
>
> 1. The amount of documents disclosed on the Late Disclosure made it impractical to consider and take instructions during the Hearing itself.
>
> 2. Any disadvantage the Respondent says they have suffered as a result of the Late Disclosure is entirely of their own making as they are responsible for the Late Disclosure. It is not fair to effectively punish the Claimant by not allowing him to rely on the Late Disclosure when the fault lies entirely with the Respondent.
>
> 3. The Respondent's suggestion that the Late Disclosure needed to be put to the witnesses is in any event misconceived. The Claimant relies on what the documents say. It is not necessary to put to a witness what a document says. The Claimant's case was properly put to all witnesses. If the Respondent's witnesses wanted to comment on the Late Disclosure, it was up to the Respondent's legal team to put that in their evidence; they chose not to do so.
>
> 4. The Respondent should have put the Claimant on notice that they objected to him referring to the Late Disclosure when we told them that we intend to rely on it, on 30 August 2018. Instead, they just didn't respond.
>
> If the Tribunal considers it necessary for us to make an Application for the Respondent's paginated Late Disclosure to be included in the Hearing Bundle, then please accept this correspondence with that Application and we copy the Respondent's representatives in to the same and give them the right to object.

10. This letter led to further representations from the Respondent's solicitors being made in a letter to the Tribunal dated 19 September 2018. In it, they stated that the Late Disclosure bundle was handed to the Claimant's counsel at approximately 11 a.m. If that had not given him sufficient time to read the documents and take instructions, then it was open to him to ask the Tribunal for time. As for the admissibility of the Late Disclosure bundle, they asserted that the Claimant's solicitors were confusing the obligation to disclose documents, an ongoing obligation, with the separate question as to whether the documents had been admitted into evidence.

11. The Respondent's solicitors accepted they were under a duty to disclose the documents but said this:

> 7. It was at all times open to the Claimant's counsel to seek to admit the Late Disclosure into evidence. However, he chose not to do so. As such, the Late Disclosure was not provided to the Employment Judge and was not included in the agreed hearing Bundle. The fact that the Late Disclosure was paginated by the Respondent's solicitors does not mean that it formed part of the agreed hearing Bundle, it did not.
>
> 8. Further, it was for the Claimant to put his case to the Respondent's witnesses. He can't seek to rely on his written submissions on matters that he has not put to the Respondent's witnesses, and they have not had an opportunity to respond to. This is not the case where the documents speak for themselves as the Claimant suggests, since the Claimant seeks to make submissions on the basis of his interpretation of the documents.

12. The Respondent's solicitors went on to give their reasons for the Late Disclosure. Those reasons are not relevant for the task I have to decide which is, should I have regard to the Late Disclosure documents in determining the issues which remain, those being, in shorthand, the *Polkey* point and *contribution*? Or should I ignore the documents I have already read and such interpretation as counsel for the Claimant submits, I should place upon them?

13. In answering these questions, I bear in mind Rule 42 which provides:

> 42. The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.

14. And the principles contained in the overriding objective are set out in Rule 2:

> 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
>
> (a) ensuring that the parties are on an equal footing;
>
> (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
>
> (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
>
> (d) avoiding delay, so far as compatible with proper consideration of the issues; and
>
> (e) saving expense.
>
> A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

15. When Notice of the Hearing of this matter was given by the Employment Tribunal on 4 April 2018, Case Management Orders were made which provided dates by which certain measures were to be completed. The directions included disclosure by list of documents that the parties wished to refer to at the hearing or which were relevant to the case, the provision of copy documents on the list upon request and the preparation by the Respondent of sufficient copies of the bundle to be used at trial. The parties were referred to the Presidential Guidance – General Case Management that was issued on 13 March 2014 under the provisions of Rule 7. Of particular relevance was “Guidance Note 2: Disclosure of Documents and Preparing Hearing Bundles”.

16. This Guidance Note posed the question “Why have an agreed set of documents?” which it answered in the following fashion:

> 2. Early disclosure of documents helps the parties to see clearly what the issues are. It helps them to prepare their witness statements and their arguments. There is no point in withholding evidence until the hearing. This only causes delay and adds to the costs. It may put you at risk of having your case struck out.
>
> 3. Agreeing a set of documents means that all parties agree which documents are relevant and the Tribunal will need to see. It does not mean they agree with what the documents contain or mean.
>
> 4. It avoids problems at a hearing when a party produces a document which the other party has not seen before. This is unfair and may lead to the hearing being delayed or adjourned. This is costly to all concerned and may result in the offending party paying the costs of the adjournment.

> 5. An agreed set of documents – rather than each party bringing their own set of documents to the hearing – prevents uncertainty and delay at the hearing.

17. In this case, the Respondent duly prepared the agreed bundle of 712 pages but augmented it on the morning of the first day of the Hearing with another 183 pages. Quite clearly, this would have had the effect of making the task of the Claimant's counsel much more difficult. An advocate's preparation of a case for hearing entails a detailed examination of the witness statements and all the documents. Almost inevitably, that close examination creates a need to take further instructions. Whatever timetabling had been contemplated for this Hearing would have allotted a period of time on the first day of the Hearing for the judge to read into the case. Thus, it is not unreasonable for an advocate to anticipate being able to use that time to take the further instructions identified as required.

18. It is said that Counsel had the entirety of the morning to read the Late Disclosure bundle and take instructions. And, if he did not have enough time, he could have asked for longer time.

19. I think such criticism is misplaced and does not come well from the party who, for whatever reason, has failed to disclose a bundle of 183 pages of additional documentation until the morning of the trial. I have considerable sympathy for counsel for the Claimant. Asking for further time would have further jeopardized the time allotted for the Hearing: as it was, there was only time to conclude the oral evidence of witnesses but not for submissions or judgment.

20. However, the Respondent makes what seems to me to be a fair point in asserting that the Late Disclosure documents, while they were disclosed in a paginated form that anticipated being added to the trial Bundle, were never formally admitted into evidence with one result being that neither counsel sought to elicit the views of the witnesses on those documents. It is said on behalf of the Claimant that the Respondent's counsel could have asked questions of the Respondent's witnesses and thereby the documents could formally have been admitted into evidence. That's true but the fact is that she did not chose to do that! And counsel for the Claimant passed up both the opportunity formally adding the Late Disclosure documents to the bundle and the opportunity of cross-examining on them.

21. Formally adding the documents to the bundle would, I surmise from the pagination added by the Respondent ahead of disclosure, have been by agreement. In the civil courts, the parties are also urged to agree that the documents in an agreed bundle may be treated as evidence of the facts stated in them despite the absence there of service of notice under the Civil Evidence Act 1995, see The Queen's Bench Guide 2018 at 12.3.3 (White Book Volume 2, 1B-70).

22. The relevance of the Queen's Bench Guide to these proceedings might have been the subject of argument but what the admission of the Late Disclosure documents into the trial bundle would most likely have triggered would have been some questions of the witnesses, particularly those called by the Respondent, on the proper meaning and inference to be drawn from the documents.

23. In the absence of comment from any witnesses on these documents, I take the view that I should decline the invitation which counsel for the Claimant makes to

me to draw inferences from a perusal of the documents.

24. I therefore set out the facts which I find having heard the evidence from the four witnesses who gave evidence.

Facts

25. The Claimant was employed by the Respondent from 8 June 2015 until he was summarily dismissed by letter dated 1 December 2017 which stated his final day of employment to be 4 December 2017.

26. The Respondent describes itself as a "global company providing market research, customer service, sales, PR and product innovation support to clients across various sectors. The Respondent operates on a global scale and has headquarters based in Santa Clara, USA." It employs a total of approximately 125 employees worldwide, 7 of whom were based, as was the Claimant, in London in an office near Covent Garden.

27. The Claimant's direct line manager was Mr Jose Puyol who was based in Santa Clara as were the other two witnesses called by the Respondent. The Claimant's key responsibilities, as described by the Respondent:

> "were to drive revenue by developing new sales and performing demonstrations of the product with the objective of either meeting or exceeding his set annual quota. In this customer facing role, approximately 25% of the Claimant's responsibilities involved travelling to and to meeting with clients across the western European market, in order to develop strategic partnerships with them."

28. The culture within the Respondent company was that of a high-pressure sales environment with Mr Puyol being a driver of sales with an unquestioning approach to the way in which his sales staff might overcome any obstacles to success. The Claimant described him as expressing several mantras, one of which was "don't even ask me, I will approve everything as long as it gets the deal done".

29. The Claimant asserts the culture of the Respondent company was cut-throat and that employees were encouraged to steal competitor and client data simply in order to make money. Corroboration for this assertion is to be found in an interview that was conducted by Ms Nancy DuBois with Mr Puyol in or about the first week of November 2017. Ms DuBois was employed by Options4Growth, described by Human Resources Manager, Ms Kristina Du, as a third-party HR consultancy service. Ms DuBois' interview with Mr Puyol was pursuant to a grievance, which features later in this narrative, that the Claimant had lodged with the Respondent. In her note of the interview, the following exchange was recorded in which Mr Puyol, in his answers as noted, regularly (but not always) refers to himself in the third person:

> Q23 - Is it normal practice for this team members to give Jose contacts that they have brought over from a previous company?
>
> **Jose**: Yes, sometimes people bring their contacts with them. However, they may not be in their territory, so Jose will ask for the contacts to be sent to his personal email address. He would then enter the contact information into the NetBase system and assign them to the person in the particular territory. Jose said this is a regular practice and that Peter [*Caswell, the CEO of the Respondent*] knows about this practice.

> **Note**: I questioned Jose why he instructed them to use his personal email account.
>
> **Jose**: I asked employees to send this to my personal email so there is no internal tracking, to protect the company. He wanted to make sure that if there was ever an audit, nothing would show up that indicates the contacts were taken from a competitor. Jose mentioned that at one time Paige got a competitor's client list, sent it to Jose at his personal email address and that Peter is fully aware of this.

30. However, within this environment, the Claimant initially appeared to thrive. Mr Puyol emailed his team on 15 January 2016, copying it to members of the Respondent's Executive Team, inviting them to join in congratulating the Claimant and his colleague, Carla Da Graca, "on a FANTASTIC AND STRATEGIC deal with VCCP in London". In another email sent almost a year later on 4 January 2017 to the Claimant and copied to Mr Caswell and the other members of the Respondent's Executive Team, Mr Puyol said the following:

> Team,
>
> Please join me congratulating Alex on his first full year opening the UK market.
>
> – 109% of quota
>
> - $1,026,000 New bookings
>
> – 20 new logos
>
> Alex, you are an example to follow and a fantastic person to work with. Thank you for your drive, salesmanship, leadership, teamwork and dedication to NetBase. Looking forward to a great 2017!
>
> Jose

31. Notwithstanding being the subject of this effusive praise, the Claimant had started to notice that the good relationship he had enjoyed with Mr Puyol at the start of his employment had, in his words, started to go downhill. In early June 2016, the Claimant and Mr Puyol spoke by telephone for approximately an hour. The Claimant perceived Mr Puyol to be bullying him. In a one to one call in November 2016 conducted shortly after a team call announcing some company redundancies, Mr Puyol responded to a request by the Claimant for a raise by shouting, "How dare you ask for a raise?"

32. For his part, Mr Puyol had noticed that the Claimant had difficulties in building professional relationships with colleagues and often treated them in an aggressive and unreasonable manner. Mr Puyol believed initially he could independently coach and support the Claimant into improving these behavioural issues but, as time went on, he perceived the Claimant to be less receptive to receiving guidance and more confrontational. Twice in early 2017, Mr Puyol received complaints back from customers about the Claimant's behaviour and he also noticed that several members of the sales team who were resigning were prepared to cite the Claimant's conduct as being a factor in their decision to resign.

33. Mr Puyol flagged his concerns in July 2017 to Mr Caswell. Mr Caswell then asked Ms Du to commence an investigation into the Claimant's conduct in the workplace. It is of note that, in an email circulated to his team on 13 July 2017, Mr Puyol set out the "Performance vs Quota" of his team during the first half of 2017.

This showed that, of four Sales Directors whose performance was matched against their quotas, two had failed to achieve their quota. However, the Claimant was one of the two who had achieved their quota.

34. Mr Puyol would appear not to have concealed from the Claimant his annoyance with him because the Claimant recalls that, in a business trip they made together to Barcelona in March 2017, Mr Puyol said to him, “Can you shut up and fucking listen for a minute, Alex! It’s all about you”. Mr Puyol accused the Claimant of having “cost Mr Puyol $100,000 in recruiter fees”, a statement which upset the Claimant because he considered himself to be a good team player.

35. In or around 9 August 2017, the Claimant was sufficiently concerned about the way that Mr Puyol spoke to him that he secretly recorded a telephone call with him. In the course of the transcript, Mr Puyol expressed himself in very robust terms:

> **Jose**: Send the email that I asked you to. Follow my lead. That’s the last time I’m telling you – consider yourself warned. I won’t have this conversation again, Alex, I won’t.
>
> **Alex:** OK, first of all, I don’t understand what you mean by “this kind of conversation”. I am I accused of? What have I done here?
>
> **Jose**: I’m too busy, I got shit I need to do. I got other calls to do.
>
> **Alex**: OK, I don’t understand, I’m sending the email but what exactly are you accusing me of?
>
> **Jose**: Alright. When I’m telling you what to do – you fucking do it. I’m your boss, alright?
>
> **Alex**: I have not said I’m not gonna do it, I just don’t understand what you want me to do – to send the list of emails that she already has, fine. I’ll send it again.
>
> **Jose**: If I tell you to send it again, you fucking send it. And you don’t question me. You got it? Especially in front of other people. Are we clear with that?
>
> **Alex**: Sure
>
> **Jose**: Alright. Excellent. Send that email please. Thank you

36. The recording of this conversation indicates that Mr Puyol was indeed prone to adopt a dictatorial and foul-mouthed approach to managing the Claimant. It demonstrates also that the Claimant was not averse to being somewhat combative in his dealings with his boss, perhaps because he wanted, for the purposes of his recording, to provoke from Mr Puyol the angry swearing we see transcribed.

37. At any rate, the relations had become so relatively fraught between the two of them that, on or about 21 August 2017 approximately a month after Mr Puyol had flagged his concerns about the Claimant to Mr Caswell, the Claimant made contact with Ms Du, the HR Manager asking for a Staff Handbook. The Claimant indicated on 24 August 2017 that the policies he was interested in were “Bullying and harassment in the workplace, and a couple of other things".

38. At this time, Ms Du was in the process of carrying out the instruction which Mr Caswell had given her. In her words, she “initiated engagement” with

Options4Growth who had provided her with a Consulting Services Agreement, originally executed in June of 2015 but revised on 21 August 2017. Mr Caswell signed the Agreement on behalf of the Respondent and dated his signature merely August 2017. Ms Du spoke to Ms Lyda Prack, a senior consultant at Options4Growth and advised her of the concerns the Respondent had about the Claimant. Ms Prack suggested an initial investigation should be carried out which would entail discussions with the individuals whom the Claimant worked with. As a result, they identified seven individuals (both at peer and management level) they considered to be appropriate witnesses to comment, as Ms Du put it, on "the complaints". They decided they "would avoid causing any worry to" the Claimant by interviewing him. That might happen but only if the interviews with seven individuals showed there to be any merit in the concerns expressed about the Claimant's conduct.

39. When, on 24 August, the Claimant indicated to Ms Du the particular policies he sought in the handbook "Bullying and harassment in the workplace, and a couple of other things", Ms Du forwarded the correspondence to Ms Prack who then had a long telephone conversation with the Claimant on 29 August. It is important to note that this conversation related to what might be the subject of the Claimant's request for policies on bullying and harassment and not to the investigation Ms Prack was, at that time, conducting into the Respondent's concerns about the Claimant's behaviour. In that context, it is apparent that the Claimant indicated to her that he wanted to complain about being bullied by Mr Puyol.

40. On the day following the Claimant's conversation with Ms Prack, Mr Puyol called the Claimant and told him there was "a shit-storm coming" his way and that he could either "bend with the wind and survive it" or "keep resisting and break". The Claimant had no knowledge of what Mr Puyol meant by this but was sufficiently alarmed as to withdraw the complaint he had just made to Ms Prack about Mr Puyol.

41. Mr Puyol also indicated that he would coach the Claimant and help him and that he was "protecting" the Claimant from whatever the threat was. He persuaded the Claimant that it would be in his interests were he to contact the CEO of the Respondent and seek help. The Claimant, not properly understanding why it would be advantageous to him to seek help from the CEO, allowed Mr Puyol to help him draft an email to Mr Caswell which he sent on 30 August. However, the overall behaviour of Mr Puyol was such as to convince the Claimant that Mr Puyol was reacting to his formulation of a complaint to Ms Prack and, thus, on 4 September, he sent an email to Ms Du in which he articulated his grievance being about:

- Bullying and harassment by line manager;
- Raising a complaint then being victimised;
- New working practices / organizational chances;
- Work relations – implied trust being broken.

42. Ms Prack conducted her interviews with 7 employees between 23 and 31 August 2017. After concluding these interviews, she then produced a bullet point summary of her findings. These were as follows:

- Multiple employees state the following about Alex's behaviour.
  - Use of extremely explicit verbiage regarding previous employee – C…, Indian fat bitch.
  - Wearing apparel with explicit verbiage – C…
  - Crude and foul language
  - Alex is a blame shifter – if things go well, it's because of him. If things don't go well, it is somebody else's fault
  - Cheating – has taken two existing accounts and claimed selling licenses to them as new, thus "stealing" commission out of other employee's pockets
  - Several employees have stated they do not want to work with Alex and do what they can to avoid him
  - The situation is "caustic"
  - Abusive
  - Manipulative
  - Will throw anyone under the bus
  - Cannot manage his anger
- Employees feel that their complaints have been "pushed under the rug" because Alex is a high producer
- Employees feel leadership approves this type of employee culture
- Employees state that Alex's manager, Jose, does not handle the situation at all
- 2 employees recorded leaving because of Alex
- Alex's manager, Jose, states he has had a million and one conversations with Alex regarding this. However, not positive solution.
- Jose has stated that he has already started to confidentially look for a possible replacement for Alex.

43. Ms Prack then set out her "Recommended Next Steps". The first of these was to:

- Develop a succinct and strong Performance Improvement Plan (PIP) for Alex that addresses the behaviour issues. The PIP should include timeframe and expected / successful results from Alex with continual monitoring.

44. Other steps recommended were:

- Possibly change who Alex reports to.
- Begin an effort to replace and terminate Alex
- Managers need to work on a recovery plan to help employees overcome their disappointment in how these employees have been handled without any

results. This will assist in helping employees feel safe and comfortable at work.

- A priority would be coaching leadership and employees on proper conflict techniques to avoid escalation and legal impacts on the Respondent
- Instruct and coach managers on how to conduct and document corrective action plans and disciplinary actions
- Develop training solutions to build a collaborative workforce
- Provide assessment solutions to help identify strengths and areas of opportunity for development of employees
- Implement a performance management solution so conversations, feedback and behaviours are captured and addressed.

45. Ms Du discussed Ms Prack's findings and recommendations with Mr Pefley and Mr Puyol. Her evidence was that:

> We also considered that the recommended PIP may be a positive step to take with [the Claimant], as this would allow us to closely monitor and offer support to improve [the Claimant's] behaviour in the workplace. A draft PIP was prepared in the light of these discussions … …Prior to this plan being implemented however and upon receipt of advice in respect of UK procedure, it was decided by Mr Pefley and Mr Puyol and Options4Growth that given the extent and serious nature of the allegations that had been raised in the investigation by [the Claimant's] colleagues and managers, it was in fact necessary to progress these allegations to a disciplinary hearing.

46. Ms Prack had followed up her first recommendation by drafting, in conjunction with Ms Du, a PIP specifically tailored for the Claimant. It contained a note to the effect that the Claimant had submitted "a formal complaint regarding interactions with team members" [*i.e. his grievance concerning his line manager*] but that, and this appears to have been Ms Prack's understanding: "These complaints have been investigated, addressed and closed. This PIP addresses specific behavioural issues with Alex and is separate from any complaints put forward by Alex himself."

47. The note indicating Ms Prack's understanding of the closure of the Claimant's grievance dates the drafting of the PIP in the first week or so of September. However, on 8 September, the Claimant received a phone call from Mr Puyol in which Mr Puyol asked a number of questions which caused the Claimant to conclude his line manager knew he had raised a grievance. The Claimant's conclusion was probably right as it seems likely that Mr Puyol, who had been interviewed by Ms Prack on 23 August 2017 and who had discussed Ms Prack's findings on her investigation into the Respondent's concerns about the Claimant with Ms Du and Mr Pefley, did know by 8 September that the Claimant had submitted and retracted a grievance about Mr Puyol, information that was in line with Ms Prack's understanding.

48. After responding to some initial querying as to why a grievance which had been withdrawn was not being reinstated, the Claimant sent Ms Prack on 13 September a 10-paged letter setting out his concerns under the title "Formal Grievance".

49. Again, it is important to note that the Claimant had no knowledge at this time that Ms Prack had been retained by the Respondent to investigate concerns about his behaviour.

50. Ms Du's witness statement contained the statement that:

> Before we had the opportunity to raise our concerns with [the Claimant], he submitted a formal grievance on 13 September 2017. This grievance … … detailed a number of concerns that [the Claimant] had regarding his relationship with his Line Manager, Mr Puyol.

51. So, at this time when the Claimant submitted his formal grievance:

- the investigation into the Claimant's conduct had been concluded by Ms Prack;
- Ms Prack had made recommendations, the first of which was that the Claimant be put on a PIP;
- Ms Du, Mr Pefley and Mr Puyol had discussed Ms Prack's first recommendation and had adopted it;
- Ms Du and Ms Prack had drafted a PIP for the Claimant.

52. However, there was a change of mind. Ms Du in cross-examination was challenged as to whether it was the arrival of the Claimant's grievance on 13 September which caused that change of mind. She said that:

> The delay from 13 September to 4 October – we were deliberating whether PIP or disciplinary action. As more facts came out and more witnesses interviewed, we arrived at the conclusion there was overwhelming evidence of misconduct …
>
> … A PIP is like a final warning – we were advised that this would be the proper way to do it.
>
> We had Ms Prack (HR consultant) - We felt (the US team) that it was a performance issue – our UK advisers said it was not appropriate it should be dealt with in a disciplinary manner. UK advisers were Radius Worldwide. They advised this after receipt of the Grievance of Claimant and Radius were privy to the Grievance.
>
> … escalated from a PIP into a disciplinary – reason for that is not because the Claimant had sent in a Grievance.

53. Mr Pefley's written evidence was:

> 6. In accordance with Ms Prack's recommendation, I initially supported Ms Prack and Ms Du in preparing an appropriate PIP. A draft of this can found at pages… … As can be seen, under this plan our intention was to inform Mr Nikolov of the expected level of behaviour in the workplace and to monitor his conduct over a period of time via periodic reviews and catch up meetings. We considered that this would provide Mr Nikolov with a fair opportunity to improve his conduct in the workplace and to address the concerns that we had in this respect.
>
> 7. Following this discussion and before the PIP was distributed to Mr Nikolov, we became aware that the ACAS Code of Practice in the UK required conduct issues to be dealt with by way of a series of formal warnings, the level of such warning being dependent on the severity of the conduct displayed by the individual. Therefore, to ensure that we were conducting this matter in accordance with UK legal requirements, I decided that this matter should be dealt with by way of a formal disciplinary process. I advised Ms Du of this and confirmed that she should work with Ms DuBois of Options4Growth in order to progress the disciplinary process.

> 8. On 13 September 2017, I became aware that Mr Nikolov had raised a formal grievance against his line manager, Jose Puyol …

54. Mr Pefley was cross-examined on the afternoon of the second day of the hearing. The main challenge to his evidence related to the issue of the non-payment of the Claimant's expenses. He was not actually challenged on his written evidence regarding the change of approach that the Respondent adopted, the move away from the PIP to formal disciplinary proceedings. Although his evidence of the receipt of advice on UK procedure mirrored that of Ms Du, he did not assert, as she did in her oral evidence, that the continuing uncovering of facts as more witnesses were interviewed provided "overwhelming evidence of misconduct".

55. Mr Puyol's written evidence did not deal with the change of direction on the Respondent's part, from a PIP to disciplinary action, despite the fact that Ms Du had said he was one of those who had decided to adopt the recommendation of Ms Prack that the Claimant should be put on a PIP. He was not cross-examined on the issue.

56. I found the evidence of this change of direction unsatisfactory. I was not shown the advice on UK procedure whose arrival had preceded the decision to change direction. Ms Du said Radius Worldwide had provided the advice after the arrival of the Claimant's grievance. Mr Pefley had mentioned "Radius accountants" as having an integral role in the process of remitting expenses to employees. There was no suggestion that the advice from Radius Worldwide was legal advice. The advice was given after Radius Worldwide had been made privy to the Claimant's grievance.

57. Ms Du's assertion that "We arrived at the conclusion there was overwhelming evidence of misconduct" in the light of further information being uncovered provided a reason for the Respondent's change of direction which, on the face of it, did not need any bolstering by any other reason for the change. However, while there was some new information which came to light after Ms Prack had reported at the end of August, there is nothing to indicate that it had arrived before 4 October 2017. That was the date on which Ms Du wrote acknowledging receipt of the Claimant's formal grievance dated 13 September. Her letter was entitled "Invite to Grievance Hearing", the hearing being a conference call to be held on 9 October with Ms Du and Ms Nancy DuBois, an HR Consultant from the same organisation as Ms Prack.

58. The latter part of the letter was headed "Additional concerns" and indicated the Respondent's readiness to proceed with disciplinary action against the Claimant (although the Claimant was not to know that this represented a change from being prepared to deal with his conduct by way of a PIP). Ms Du wrote:

> I also wanted to take this opportunity to make you aware of a number of concerns that the company would like to address with you. These concerns are in respect of several acts for alleged misconduct by you that the company has been made aware of. Given the serious nature of a number of these incidents, these will be dealt with in accordance with the company's formal disciplinary process. We will write to you in advance of commencing any such disciplinary process in order to confirm sick allegations being raised against you and the potential outcome of any formal disciplinary action.

> In light of the above formal grievance that you have raised however, we have decided to pause the commencement of any disciplinary process against you in order to ensure a full and fair investigation is carried out and a considered outcome provided, in respect of your formal grievance.
>
> Yours sincerely
>
> Kristina Du

59. I conclude that the arrival of the Claimant's grievance dated 13 September materially contributed to the Respondent's decision to abandon the course of action that Ms Prack had recommended and to which the three witnesses from whom I heard had been party. The grievance highlighted the Claimant's belief that he was being bullied by Mr Puyol. Mr Puyol was party to the decision to put the Claimant on a PIP. It is difficult to believe he was not consulted on his views in the light of the grievance.

60. This acknowledgment of receipt of his grievance coupled with the news that the company was dealing with alleged misconduct on his part caused the Claimant to suffer a panic attack which resulted in him taking 4 days off work. Previously, the Claimant had not taken sick leave. This sick leave precluded him being able to participate in the conference call on 9 October. It did not, however, impede him from having his solicitors write to Ms Du on 9 October. They contended that the Claimant had been subjected to victimisation in a number of ways, 4 of which were cited as examples:

- Delay in responding to the Claimant's grievance;
- Ignoring the Claimant despite numerous chasing requests in respect of his grievance;
- Non-payment of expenses, rectified now but believed to have been deliberately withheld; and
- Further episodes of the Claimant's line manager ignoring him, treating him differently and ostracising him.

61. The solicitors asserted that it was evident from the Respondent's letter of 4 October that an investigation into the alleged misconduct had already taken place and the question was asked as to why the Claimant had not been invited to attend an investigation meeting in accordance with the ACAS Code. The failure so to invite was cited as a further act of victimisation.

62. The Respondent was requested to provide all documentation that had been gathered to date in respect of the allegations of misconduct so that the solicitors and the Claimant could consider his position further.

63. The solicitors also made it clear that the Claimant would not be attending the grievance investigation conference call on their advice pending the response to the requests made of them.

64. Along with their letter, the solicitors provided the Respondent with a document entitled "Grievance Addendum – Victimisation" which set out over three pages the Claimant's contentions in respect of victimisation.

65. Ms Du discussed this correspondence with Mr Puyol and with Mr Pefley, the former having been advised on 4 October that the Claimant had submitted a formal grievance about him.

66. On 13 October 2017, Ms Du sent two letters to the Claimant. The first contained details of the rearranged grievance hearing via a conference call. This was to take place at 5.30 p.m. UK time on 18 October.

67. The second letter invited him to attend a disciplinary meeting conducted via a conference call on 19 October again at 5.30 p.m. UK time. She acknowledged that the Claimant was currently signed off work until 14 October and might need to postpone the proposed meeting on health grounds. However, the disciplinary meeting was being called to consider 5 matters which she listed as follows:

> - Alleged inappropriate behaviour in the company of clients;
> - Alleged inappropriate behaviour and language including towards a colleague;
> - Alleged disregard for reasonable instruction by the Netbase management team.
> - Alleged wearing of inappropriate clothing within the workplace; and
> - Alleged taking of illegal drugs with work colleagues.

68. Ms Du enclosed with her letter the company's disciplinary procedure and witness statements. The latter were not really witness statements as might be used in a tribunal or court setting: rather, they were anonymized extracts of notes that had been made by Ms Prack in respect of conversations she had had with five employees in the last week of August 2017. The notes in respect of four of the employees were set out as being answers to a question posed to the employees – not necessarily the same question. Two were asked: "What conversations have you had with others regarding Alex's [*the Claimant's*] behaviour?", one was asked "What specific issues that need to be addressed about particular individuals?" while the fourth was asked: "What is your view of the concerns regarding Alex Nikolov?" The fifth employee's notes were written under the heading: "Comments about Alex".

69. The notes not only anonymized the individual employees to whom Ms Prack had spoken – they were given numbers e.g. Employee #1 - but also all other people mentioned in the notes, whether employees who were cited as "team members" or clients. No dates were given for any of the events or incidents cited in the notes.

70. Ms Du further informed the Claimant that he was:

> … suspended effective 13th October 2017 on full pay pending an investigation into the allegations of gross miss conduct made against you, noted above. The suspension is in order to allow us to conduct the investigation impartially and fairly, and is in no way a form of disciplinary action against you.

71. The Claimant responded on 17 October 2017 through his solicitors. They took issue with the fact that the rearranged grievance hearing was scheduled outside the Claimant's contractual hours - his contract stated his normal hours to be 9.00 a.m. to 5 p.m. Monday to Friday inclusive with the proviso that he was "expected

to work such additional hours as may be required for the proper performance of his duties" without payment for overtime. They also sought for the grievance hearing to be in person.

72. As regards the Disciplinary Hearing, they described the invite as:

> … detailing five broad and particularized and specious allegations of purported misconduct. For the avoidance of doubt, that invite is undoubtedly in breach of the ACAS Code. Despite making a serious allegation of drug use in the workplace, there is no evidence of the same. Subject to any subsequent withdrawal of the allegations, we will request that you provide all evidence that you hold in respect of this disciplinary forthwith, or failing that, confirmation that no such evidence exists.
>
> Equally alarmingly, the letter suspends our client. Quite simply put, there are no grounds to suspend our client, and we consider this active suspension is a breach of our client's employment contract entitling him to resign and claim constructive dismissal.
>
> We consider the sending of this letter, the failure to investigate properly and the active suspension without good reason to be further acts of victimisation and we invite you to withdraw the allegations and suspension with immediate effect.
>
> Given that you are clearly in no position to proceed with the disciplinary hearing (and indeed, our client will need a further five days to ensure that he can have a companion at the hearing), we await to hear from you.

73. It should be noted that the Claimant did not actually elect to resign. His solicitors' letter did have some effect on the Respondent: the time stated in respect of the conference calls was altered to 2.30 p.m. on the relevant days. On 17 October 2017 Ms Du repeated her letter of 13 October inserting the revised time for 19 October. The Claimant's solicitors sought a postponement that day on the basis that the Claimant needed to find a Trade Union representative or colleague to attend the Disciplinary Hearing. The Hearing was rescheduled by Ms Du for 27 October at 3.30 p.m. by letter dated 24 October using the same template of her previous letters. On this occasion, though, the "Witness Statements" which Ms Du supplied included an additional statement from a sixth employee, this being one paragraph in inverted commas giving the impression that it was a direct quote from Employee #6. However, as was the case with the notes of the other witnesses, the individuals in the narrative were anonymized.

74. The text of this "witness statement" contained the allegation that a work colleague had asked the Claimant who was working at home on Friday 4 August to buy cocaine for him ahead of the Claimant's birthday party that evening. The work colleague had gone home between leaving the office and attending the party for the express purpose of collecting money to pay for the cocaine. At the party, the work colleague "was giving everybody cocaine" which discomforted Employee #6 as he didn't "do drugs".

75. Ms Du also responded to the letters from the Claimant's solicitors on the same day asserting that it was the Respondent's right to correspond with its employee directly and not through legal advisers. Further, she denied such allegations as had been raised by them.

76. By then, on 26 October, the Claimant had written to Ms Du complaining about his treatment. He cited the failure of the Respondent to provide him with any reason or explanation for his suspension, the fact that he had been given inadequate

notice of the hearing scheduled for 27 October and that the Respondent appeared to have obtained further evidence (a reference to the witness statement of Employee #6). He categorised the Respondent's actions as unfair and said this (emphasising his words twice over by underlining them and using bold font):

> Given the nature of the "evidence" against me, I need to know who prepared the statements and when they were given. I also need to cross examine all the witnesses who have given "evidence". Therefore I request that you confirm whether I will be able to cross examine all the witnesses that have given evidence: please confirm your position by return. Until you confirm your position, I will not be attending. It is impossible to provide a written statement because what I will require is the opportunity to cross examine these witnesses to discredit them and discredit your process.

77. The Claimant attached to his letter a medical report from a Dr Chahal, a consultant cardiologist, dated 23 October which he had received on 26 October. The report recited symptoms reported by the Claimant which the cardiologist thought sounded "anxiety related".

78. Ms Du responded early the next day by pointing out that the Claimant had refused to attend any of the meetings to which he was invited, the purpose of which was to provide him with the information that he wanted and to give the Respondent the opportunity to hear any comments or questions the Claimant might have. She asserted that the Respondent had been following the ACAS process carefully and, if the Claimant was intending again not to attend, he should submit any statements he would like to have reviewed at the meeting. As regards the medical report, she noted that it did not excuse the Claimant from work.

79. The Claimant's response was to reiterate his position to be reasonable and to assert the Respondent to be in breach of the ACAS code and by extension in breach of contract.

80. On 27 October, Ms DuBois of Options4Growth sent an email to Mr David Pefley updating him with regard to the Claimant's Disciplinary and Grievance Hearings. In respect of the Disciplinary Hearing, she reported that, after rescheduling the meeting twice, she and Ms Du went ahead and held the disciplinary meeting without the Claimant. She told Mr Pefley that Ms Du would be scheduling an outcome meeting on Monday 30 October 2017 and their outcomes would be submitted for Mr Pefley's review. As for the Grievance meeting, she reported that the Claimant had failed to attend two meetings. She and Ms Du would be meeting that afternoon to review the grievance submitted by the Claimant.

81. Further correspondence failed to cause either the Respondent or the Claimant to move from their stated positions. Ms Du and Ms DuBois considered the Claimant's grievance once more and came up with questions for Mr Pefley and Mr Puyol which Ms DuBois put to both managers eliciting from both answers which, in the case of Mr Puyol, included the answers set out in paragraph 29 above. At a "Final Grievance Outcome Meeting" held on 14 November 2017, Ms Du and Ms DuBois concluded that, on the evidence that they had, they did not find clear evidence of bullying and harassment by Mr Puyol.

82. During the remainder of that month of November when the Claimant was off sick, there appears to have been activity on the part of Ms Du and Mr Puyol to resurrect complaints about the Claimant from the past. On 15 November, Mr

Puyol forwarded to Mr Pefley and Ms Du a message which one of his team had forwarded to him in April 2017. The message was from a dissatisfied potential customer, a Mr Yunus Akseki of Imperial Leisure Ltd, providing negative feedback on a call he had with the Claimant during which it was Mr Akseki's view that the Claimant had been condescending, had not been willing to provide a response to Mr Akseki's questions and was not willing to send Mr Akseki "more info or anything".

83. Ms Du on 15 November contacted a former member of Mr Puyol's team, Mr Roman Strobl, expressing curiosity as to why Mr Strobl had resigned. Mr Strobl said there had been a number of reasons for his leaving. There had been conflict in the office which could have been resolved more professionally. He had been hired as a contractor that was more hassle for him that what the "little extra money was worth". He felt his role had been too monotonous, a step backwards in terms of his own development and finally he had just wanted to take a little break and go away for a while.

84. Mr Strobl in the two emails he wrote never mentioned the Claimant's name but Ms Du asserted that "previous discussions led us to believe that he was referring to" the Claimant.

85. On 28 November, Ms Du wrote to Carla da Graca who had been interviewed by Ms Prack on 31 August. Edited extracts of her comments then had been provided to the Claimant as the comments of Employee #4. Ms Du quoted Ms da Graca that the Claimant had been "arrogant and rude in front of a client and they had left the room due to his behaviour and they had lost the account" and asked her to elaborate. The following day, Ms da Graca replied providing details at some length on two incidents, one involving a call to a team from Teleperformance in Portugal and another involving a visit to Lloyds Bank.

86. After receipt of this reply, Ms DuBois, Ms Du, Mr Pefley and Mr Puyol met and reviewed the evidence. Ms Du and Mr Pefley in their written evidence asserted the decision to dismiss was taken by Mr Pefley and Mr Puyol: in his written evidence, Mr Puyol was silent on the topic. Under cross-examination, Ms Du asserted that it:

> was a decision on management's part. David Pefley, Peter Caswell and also Jose Puyol. HR is one of the decision makers. Four of us in all plus the consultant Options4Growth.

87. Mr Pefley's written evidence was that:

> Mr Puyol and I reached the conclusion that Mr Nikolov should be dismissed from the business for reason of gross misconduct. As is usual practice within Netbase for serious cases such as this, Mr Puyol and I discussed our findings with Mr Caswell and informed him of our conclusion in this regard. Mr Caswell subsequently approved our decision to dismiss Mr Nikolov. Therefore, on December 1, 2017 a letter was prepared confirming the decision to dismiss Mr Nikolov for reason of gross misconduct and the rationale behind this decision.

88. Mr Pefley was not cross-examined on that part of his evidence.

89. Two letters were sent to the Claimant on 1 December. The first dealt with his grievance. The bulk of that letter was taken up with setting out the various allegations made by the Claimant. At the bottom of the 4th page, Ms Du ceased

rehearsing the allegations made by the Claimant and wrote:

> CONCLUSION
>
> In summary, our investigation has found that your relationship with Jose has at times been difficult and challenging, with the result that Jose has often find it difficult and stressful dealing with you, your unprofessional behaviour, your frequent insubordination and getting your agreement and recognition on important issues. We cannot however find any specific examples where Jose's management of you has gone beyond robust management and indeed, there examples where Jose has sought to protect you and treat you more favourably than other colleagues, and we therefore find your allegations are not upheld.

90. The second letter was the letter of dismissal. Again, it was written by Ms Du. She informed the Claimant that the rescheduled disciplinary hearing was heard in his absence. It was chaired, the letter said:

> … by me and our human resources consultant, Nancy DuBois, during which I considered each of the allegations against you as set out in our correspondence of 13 October 2017.
>
> At the conclusion of the hearing, I made the following findings in respect of each allegation.
>
> - Inappropriate behaviour with clients
>
> - In April 2017, the company received an email from Imperial Leisure a potential client that felt so offended as to call attention to your offensive interactions as "condescending" and questioning their motives, thus losing the company this prospect.
>
> - In July 2017, it was witnessed by a colleague that you behaved in a "rude and arrogant" way in front of TelePerformance, as prospective client during the meeting call, rudely challenging her knowledge to the point that she didn't "not appreciate your tone" and felt "very uncomfortable" and as a result the client abruptly left the room during the core and we lost the account.
>
> - In your August 2017 meeting with Lloyds bank, it was witnessed that the client said you were "quite arrogant" which had risked losing the account due to your behaviour.
>
> I am satisfied that the witnesses' account of what happened during these meetings are honest and genuine, as there is no reason for a customer to become involved unless they felt genuinely aggrieved about the situation. I have concluded that your conduct during these customer meetings fell well short of the standards that we would expect from an employee as well as in some cases negatively financially impacting the company, thus amounting to misconduct. We therefore uphold this allegation.

91. The letter continues to set out the findings Ms Du made on each of the other allegations that had been set out in the initial invitation letter, namely

 - Alleged inappropriate behaviour and language including towards a colleague;
 - Alleged disregard for reasonable instruction by the Netbase management team.
 - Alleged wearing of inappropriate clothing within the workplace; and
 - Alleged taking of illegal drugs with work colleagues.

92. The wording of the third of these allegations had been changed in Ms Du's letter

of 24 October 2017 to:

- Alleged wearing of vulgar wording on clothing within the workplace

but Ms Du reverted to the original wording in her letter of 1 December.

93. In respect of all of these allegations, the verdict was that the allegation was upheld. Ms Du then continued:

> Under the circumstances I have decided that each of the allegations against you shall be upheld and that consequently the appropriate action is that you be summary dismissed without notice or payment in lieu of notice, in accordance with the ACAS code of conduct.

94. I pause to comment on several things. First, it is strange that Ms Du attributes to merely herself the decision to uphold the allegations at the disciplinary hearing. She conducted that meeting along with Ms DuBois. It must be the case that the findings were both hers and Ms DuBois' otherwise it is difficult to understand for what purpose Ms DuBois was in attendance. Second, she did not make clear that the decision to dismiss was taken by 4 separate people and approved of by the CEO, Mr Caswell.

95. In respect of the first allegation – that of inappropriate behaviour with clients – the passage quoted above of Ms Du's findings identifies three clients. In the material provided to the Claimant ahead of the disciplinary hearing, the only paragraph that bears relevance to those findings was that contained the précis of evidence of Employee #4:

> Arrogant and rude in front of client or groups. Client left a room due to Alex's behaviour and they lost the account.

Quite simply, the Claimant could not have known which of his clients was being referred to in from that paragraph. He wanted to be allowed to challenge the people who had made allegations against him. That opportunity was denied to him. What he was offered was the opportunity to ask questions of these anonymised witnesses. He refused that offer. However, on the basis of what he had been told, while he might possibly have been able to ask questions of the assertion that a client left the room because of his behaviour, he could not have asked questions concerning the reaction of two other clients about which he was given no information.

96. The second allegation that had been put to the Claimant in the invitation to a disciplinary hearing was that he had used "Inappropriate behavior and language, including towards colleagues". Ms Du referenced a number of the anonymised statements but also cited several complaints of the Claimant's behaviour which did not appear in his disciplinary hearing invitation. "Manipulating a team member's calendar" and "feeding a new hire very negative information" are examples.

97. In respect of the third allegation - that he had shown a disregard for reasonable instruction by the NetBase management team - Ms Du informed him that Mr Puyol had reminded him many times that his role was to sell to new business prospects only, but he had continued to get involved after the signing of the accounts. She also referenced that, in March 2017, the CEO of the Respondent had emailed him a warning that he must keep his expenses up to date or the

Respondent would not pay them.

98. Neither of these matters had been put to the Claimant as being matters for which he was being disciplined. When Ms Du was challenged as to the evidence supplied to the Claimant as regards this allegation, she explained that Mr Puyol had been interviewed by Ms Prack on 23 August 2017. A note of that interview was in the bundle. She said she must have "inadvertently missed providing that statement". Three times when being cross-examined, she used the word "inadvertently". She denied that part of the reason for not disclosing the statement of Mr Puyol was the concern she, as an HR manager, had with Mr Puyol's description of the Claimant in Ms Prack's interview notes as being "very flamboyant – diva-like" which she acknowledged could be offensive as a stereotypical description of a gay man such as the Claimant acknowledged himself to be. Her reliance on mere inadvertence as being the reason for her non-disclosure lost some of its credibility when, under cross-examination, she said:

> We all know from the Claimant's grievance how he feels about Jose Puyol so we must have inadvertently missed providing the statement.

99. As for the warning that was contained in the email from the CEO about the Claimant's expenses, that had not been a matter which was cited by Ms Du when explaining to the Claimant the case he was being invited to a disciplinary hearing to answer. Self-evidently, such a warning contains its own threat of a sanction if the warning is not heeded. We did not hear from the CEO but he did not, in his letter, point out that failure to submit expenses might be considered an instance of gross misconduct. I infer that he probably thought that the sanction being threatened – non-payment of expenses - was quite sufficient to induce compliance with what was being required. Certainly, it is difficult to see how the recipient of such a threat could have foreseen that negligent failure to claim expenses was a disciplinary offence.

100. The fourth allegation in the invitation letter was: "Wearing inappropriate clothing within the workplace". This related to the wearing of a hat with the letters C U N T across the front. Ms Du stated this was investigated with third party witnesses who confirmed that the hat was worn during office hours. This was at variance with the only statement concerning the hat contained in the disciplinary invitation letter. The note of Employee #3 had stated:

> "Out one time with a group of my team members Alex had a hat on that had the letters C U N T. It is really ugly".

101. This referred to an occasion when the Claimant had been out with Carla, Nani and John Tyrell whose unredacted note of his interview with Ms Prack was included in the bundle. The Claimant in his oral evidence had accepted he had worn such a hat when he had been on a night out with friends: he asserted it was normal in a gay club. Counsel for the Claimant submitted:

> Absent a policy setting out the expectations of employees outside of work, what C chose to wear in a nightclub is his personal choice and not a misconduct issue which could possibly justify his dismissal.

102. I agree.

103. The final allegation contained in the disciplinary invitation letter was: "Alleged

taking of illegal drugs with work colleagues". In upholding this allegation, Ms Du said:

> It was alleged that you are involved in the supply and/or taking of illegal drugs with work colleagues. More particularly, it was alleged that on Friday 4th August 2017, a work colleague called you as you are working from home that day and asked you if you could buy some cocaine for him. It was then alleged that this colleague went home to collect money to give to you for the drugs that had been ordered from the office. Later at your birthday party, it was alleged that this colleague was witnessed supplying cocaine to everybody, which made the witness feel particularly uncomfortable.
>
> Further we understand there was a written complaint by an employee filed with the police, and we have been provided with a police report number [number specified]
>
> Based on the evidence, it is our reasonable belief that this witness was being truthful when alleging that you had been involved in the supply of drugs. The witness informed the company that he had filed a police report on this matter. We have not been able to identify any reason why this witness would wish to be untruthful about this allegation, and we therefore have a reasonable belief that this did occur. We therefore uphold this allegation of misconduct.

104. During the hearing, I heard evidence that the allegation about an employee phoning the Claimant and ordering drugs had been made had been made in the course of a grievance submitted to the Respondent by employee M about the behaviour of employee R. The emailed grievance included M's allegation that he had suffered sexual harassment from R, an allegation which appeared to counter a similar allegation that had been made by R about M. The grievance filed by M never alleged that the Claimant took drugs, merely that it appeared to M that cocaine had been purchased by the Claimant for R. Indeed, in a separate email sent after he had submitted the grievance about R, M asserted that the Claimant was a witness to R's "cocaine usage".

105. The difficulty with the finding that the Claimant had taken, as opposed to buying for another, illegal drugs does not just entail the wording of the charge. The Respondent appears to have had doubts over the allegation that M made. There was some suggestion that the Respondent realised M was submitting his grievance as an act of retaliation against R. What is clear, however, is that the Respondent did not consider M's assertions against R to be strong enough to warrant dismissing him – as Ms Du said in evidence: "M's email was not strong enough to dismiss R. We did not have hard evidence." Thus, R continued to work for the Respondent after M had left their employment.

106. Ms Du's evidence was that M never attended any meeting at which his allegations about drug dealing and consumption could be further investigated. Further, neither Ms Du nor Ms Prack interviewed R about the allegation contained in M's email that the Claimant was implicated in the sourcing of cocaine. Even if it had been considered unlikely that R would provide evidence in respect of the Claimant's willingness to supply drugs because that would implicate R, it might have been possible to seek some corroborative evidence that R had telephoned the Claimant from the office asking him to source cocaine. M's emailed grievance had asserted that R's request on the telephone had been very loud. However, when asked, Ms Du indicated no investigation was conducted into whether this loud comment was overheard by others in the office.

107. Ms Du asserted in her evidence that the Respondent had "a zero-tolerance approach to drugs": she also said that the emailed grievance of M was part of the evidence which was used to dismiss the Claimant, but not the main part. There appears to be a considerable disparity in treatment between that afforded the Claimant when compared to that afforded R. It did not appear that the zero-tolerance approach to drugs extended to all employees.

108. After receiving his letter of dismissal, the Claimant indicated, through his solicitors' email of 5 December 2017, that he wished to appeal. His solicitors indicated his grounds of appeal would follow. His letter of dismissal had given the Claimant 7 days within which to appeal. On 8 December 2017, his solicitors emailed Ms Du seeking quite a considerable amount of information which was required "in order to prepare the appeal". The Respondent refused to provide the same and behaved in a way which caused the Claimant's solicitors to complain that it was attempting to unilaterally withdraw the Claimant's appeal.

109. Eventually, an extension of time to prepare grounds of appeal but no information further to that provided by the Respondent for the Disciplinary Hearing was forthcoming. Grounds of Appeal were provided on 20 December 2017 and, within those grounds, the Claimant reiterated his request for further information.

110. On 8 January 2018, the Respondent informed the Claimant that it had appointed an independent consultant to hear the appeal. It acknowledged the Claimant to be permitted to call his own witnesses but indicated that the Claimant would not be permitted to directly interrogate the Respondent's employees "with the sole intention of discrediting and / or undermining the comments they have made". The Respondent offered the Claimant the option of submitting written questions to the employees concerned. That option might have been made more attractive if the identity of the employees whose evidence had been relied upon in the disciplinary hearing was disclosed – but it was not. As it was, the refusal to allow the Claimant to call and question those witnesses caused the Claimant to withdraw his appeal on 9 January 2018.

Conclusion

111. The Respondent admitted the dismissal to have been unfair during the hearing because of the failure to invite the Claimant to an investigation meeting. I take the view that the dismissal of the Claimant was also unfair in the following respects:

a) Failure to provide the Claimant with a copy of the investigation report from the consultant, Ms Prack;

b) Failing to inform the Claimant that Ms Prack had recommended the Claimant be placed on a PIP;

c) Victimising the Claimant for raising a grievance in that the arrival of the Claimant's grievance contributed to the decision to depart from Ms Prack's recommendation to place the Claimant on a PIP;

d) Departing from the Ms Prack's recommendation that the Claimant be placed on a PIP;

e) Anonymising the statements or interview notes provided to the Claimant as evidence of the allegations against him so that the Claimant did not know the

identity of either:

- the makers of the statements or interviewees
- the employees, clients or other people featuring in statements or interview notes;

f) Failing to allow the Claimant to call witnesses - the ACAS Code of Practice on disciplinary and grievance procedures provides that the employee should be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses;

g) Failing to provide to the Claimant any indication as to what evidence was that the Respondent was relying upon in respect of the "alleged disregard for reasonable instruction by the Netbase management team";

[*Note: I do not accept that Ms Du "inadvertently" omitted to include a summary of the interview Ms Prack had conducted with Mr Puyol: any summary of the evidence of his line manager would have revealed Mr Puyol's identity to the Claimant, something the Respondent had set its face against*.]

h) Using the warning that was given to the Claimant of the consequence of failing to submit his claim for expenses in time as evidence of the reasonable instruction by the Respondent's management that the Claimant had disregarded;

i) Failing to implement consistently the 'zero tolerance of drugs' policy said to justify the dismissal of the Claimant in respect of an allegation from employee M that he bought cocaine for, and at the behest of, employee R when R continued in employment despite the allegation against him from the same source, M, that he both used and distributed the cocaine that allegedly the Claimant had bought for him;

j) Failing to interview R in connection with the cocaine allegation;

k) Failing to seek corroborative evidence that R had telephoned the Claimant from the workplace asking that the Claimant buy him some cocaine given that M had asserted R's phone call was made in the office and R's request was "very loud" and caused loud neighbours to go "very quiet";

l) Failing to reveal that M's allegations concerning cocaine were made in his response to a complaint by R that M had sexually harassed him, which response included counter-allegations of sexual harassment of M by R;

m) Failing to reveal that M been dismissed after four allegations had been found to be substantiated, one of which was M's "admission in participation of illicit drugs with colleagues and not reporting immediately to management";

n) Failing to reveal that no action had been taken against R in respect of the allegations M made about R's involvement in purchasing cocaine through the Claimant and distributing it at the Claimant's birthday party;

o) Categorising the wearing of a hat exhibiting the letters C U N T as having occurred in the workplace when the evidence of Employee #3 on which the allegation of wearing "inappropriate", later "vulgar wording on", clothing had

been based showed that the hat had been worn when away from the workplace;

p) Failing to provide the Claimant with documentary evidence where it existed of the alleged offences, an example of which was the email from Imperial Leisure;

q) Dismissing the Claimant in respect of inappropriate behaviour and language but failing to institute any disciplinary measure against Mr Puyol whose language as reported by the Claimant fitted the description of inappropriate and whose behaviour, as revealed to Ms Prack, showed that he was prepared both to make use of a competitor's client list and cover up that fact by making sure that the list was sent to his private email address. It is difficult to see this behaviour as anything other than inappropriate.

112. I have been asked to state a view as to whether the Claimant would still have been dismissed if all the procedural errors had been corrected. That task is made somewhat difficult because of the sheer number of things that were wrong with the procedure leading to this dismissal. And there is the fact that, as the interview that Ms Prack conducted in August 2017 with Mr Puyol revealed, Mr Puyol had "already started to confidentially look for a possible replacement for Alex". This was ahead of the institution of disciplinary proceedings against the Claimant. It is difficult to avoid the conclusion that the whole of the disciplinary proceedings against the Claimant was pre-judged. Therefore, I do not regard this as being a case in which a *Polkey* reduction of the compensatory award is appropriate.

113. As to the contribution of the Claimant, I have no doubt that there were elements of his behaviour that made life sometimes difficult for his colleagues. I am referring to those aspects of his behaviour as revealed to Ms Prack which suggested to her that a PIP was appropriate. Had he not behaved in such a way, there might not have been the complaints which caused Mr Caswell to initiate an investigation into the Claimant's behaviour.

114. Taking all things into account and balancing the manifold aspects of his dismissal which made it unfair against the behaviour of the Claimant, I take the view that it would be just and equitable to hold that the Claimant had contributed to his dismissal and to reduce the awards which are due to him as a result of his unfair dismissal by 20%.

Wrongful Dismissal

115. None of the matters arising from the investigation of Ms Prack constituted gross misconduct. Had any done so, it would be difficult to understand Ms Prack recommending a PIP or, indeed, the Respondent for initially preparing a PIP. The further matter which arose out of the grievance employee M raised in an email about employee R was considered by Ms Du not to be strong enough to justify taking action against R: she accepted that the Respondent did not have "hard evidence". In the circumstances, the decision to base the dismissal of the Claimant in part on such evidence does nothing to avoid the dismissal being wrongful.

Expenses

116. The facts giving rise to this claim may be stated fairly briefly.

117. The Claimant's contract of employment set out at clause 8 that the employee:

> will be reimbursed for all hotel, travelling and other expenses properly and necessarily incurred in the performance of your duties upon production of valid receipts and submission of properly completed expense reports and subject always to the Company's policies with regard to business travel accommodation and expenses.

118. The Respondent had a policy which specified:

> Expense reports should be submitted to accounting within 30 days and in any case no more than 120 days. Failure to do so could result in delay of reimbursement due to additional approvals or no reimbursement.

119. There is no dispute that, on 19 October 2017, the Claimant submitted a claim for expenses amounting to £10,056.48 which was denied on the basis that the claim was submitted more than 120 days from the date they were incurred. The disallowed expenses had been incurred over the period from 12 January to 22 June 2017. The Respondent's Accounting Manager, Ms Maribelle Bobila, had confirmed to the Claimant on 19 December 2017 (15 weeks after his last day of employment) that the reason for withholding £10,056.48 was because of the corporate policy on the matter and the "multiple warnings you have received on this topic". One of these warnings had come from Mr Caswell, the Respondent's CEO, on 13 March 2017. Mr Caswell had written to the Claimant and another employee on the subject of "Expenses from last year":

> We're going to make a one-time allowance to let you hand in late expenses. This doesn't mean just dump them on the Admin team to clean up – it means they need to be cleaned up with clear receipts and allocations to expansible events as per our policy.
>
> These need to be handed in by the second week in April …
>
> … Going forward, you must keep your expenses up-to-date or we will not pay them. Letting expenses sit un-claimed is damaging to both yourselves, the company and your leadership who are compensated on Expense management.
>
> I know this might feel "harsh" to you folks – it's even harsher for Dave's [*Mr Pefley's*] team to have to re-state all our business numbers to our Auditors and our Board. So please take this seriously from now on.
>
> Finally, I believe you are all on Concur – that should resolve any issues you have with an expense system.

120. Mr Pefley, the Respondent's Chief Financial Officer, accepted that Clause 8 of the Claimant's contract of employment was not at the forefront of his mind when instructing Ms Bobila to withhold payment of the expenses which the Claimant claimed late. He did have regard to the Respondent's policy as regards late payment. He accepted that use of the word "could" in the policy suggested he had a discretion whether to allow reimbursement or not. He asserted that the rationale behind having a cut-off point was that it allowed the Respondent's accountants to remit payment on a timely basis.

121. On 19 October 2017, the Claimant had written to Ms Du confirming that he had submitted his expenses. He indicated he was aware that "the submission is technically late" but gave 5 reasons as to why this was so, one of which was that he suffered stress caused by Mr Puyol's treatment as described in his Formal Grievance submitted on 4 September 2017. He requested an extension of the 120-day limit citing his "disability" and the Equality Act 2010. His reference to

disability would appear to be a reference to a panic attack which he experienced on 10 October 2017 and which caused him to be referred for cardiac investigation and to be off sick when he was suspended from duty as from 13 October on 17 October 2017.

122. Mr Pefley said in evidence that he considered this email when taking his decision to withhold those expenses that were claimed late. He said:

> I considered this email when taking [*my*] decision - not that I was not sensitive to a lot of them [*the Claimant's reasons for late submission*] but a number did not seem to be valid. Other people are busy but no-one else received warnings from CEO – nobody else was failing to submit expenses so late.

123. He did not invite the Claimant to discuss his reasons for the late submission.

124. Mr Meichen for the Claimant argues that the Respondent was required to exercise its contractual discretion rationally and in good faith, this having been established in Braganza v BP Shipping Ltd [2015] UKSC 17. Because Mr Pefley had rejected all the reasons advanced by the Claimant for his late claim without having invited the Claimant to discuss them, his decision to refuse payment of the expenses was irrational, capricious and represented acting in bad faith.

125. Mr Meichen submitted:

> David Pefley did not have "*sufficiently cogent*" evidence on which to rely (which Braganza establishes is necessary) in refusing to pay C's as he never bothered to meet with Claimant in order to establish the reasons for his late submission of expenses and test any doubts he may have had about C's reasons. Therefore, R was in breach of contract by failing to pay C's expenses.

126. Mr Meichen pointed out that Mr Pefley had rejected, without calling for medical evidence, the Claimant's contention that one of his reasons for his late claim had been the stress he had suffered which led to his panic attack. Further, he appeared to have no regard for the fact that the Claimant was going through a stressful disciplinary process which resulted in his dismissal.

127. Ms Darwin for the Respondent, as might be expected, relies heavily on the Respondent's policy which required expenses claims to be submitted within a 120-day time limit and the warnings which the Claimant received about submitting late.

128. She cites some difficulty in understanding the reference to Braganza asserting that to be a case concerning an implied term of trust and confidence, a term which she asserts had not been pleaded in this case. She acknowledged that the Claimant did plead an implied term on the basis of an unspecified custom, conduct and practice of the Respondent but points out that this was not put to the Respondent's witnesses in cross-examination. She says:

> For the avoidance of doubt, the Respondent denies that there was any such custom, conduct and practice, and notes that it is inconsistent with the abundant documentary evidence that the Claimant had been warned that he would not be reimbursed for his expenses if he submitted them late.

129. She asserts that the Respondent was entitled to make the decision not to reimburse and relies on there being a good business reason for the policy, on the repeated warnings that the Claimant had received which he had ignored and on

the fact that, as she contended, the various excuses submitted by the Claimant for his late submission were not good reasons.

130. Mr Meichen, in response to Ms Darwin's submissions, points out that reliance on Braganza was pleaded in the ET1 as was, at paragraph 36 of the Grounds of Complaint attached to the ET1, the implied term in accordance with custom, conduct and practice of the Respondent, that all expenses would be paid that were genuinely incurred. He points out that this was not denied in the Response.

131. I accept that Braganza is authority for the proposition, as the editors of Harvey on Industrial Relations and Employment Law set out:

> that there is an implied term in contracts generally, including employment contracts, that where one party (*here, the employer*) has a discretion under the contract to make a particular decision or determination which may adversely affect the other party (*here, the employee*), the former must exercise that discretion lawfully and rationally 'in the public law sense that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose' (per Lady Hale at [30]).

132. I do not accept that, for the exercise of that discretion in this case to be lawful and rational, there needs to be some cogent evidence over and above that which Mr Pefley had in this case. The reference within Braganza for the need for cogent evidence was in the context of the investigation into the cause of death of a ship's Chief Engineer who had disappeared overnight while the vessel was in the mid-Atlantic. The investigation team which had been set up by his employer had concluded that the cause of death was most likely suicide. As a result, the employer's general manager concluded, for the purposes of the death in service benefit clause in the deceased's employment contract, that the deceased had committed suicide and that no benefit was payable to the claimant, the deceased's widow.

133. The Supreme Court held (and I quote from the headnote at [2015] ICR 449]:

> (1) that, where contractual terms gave one party to a contract the power to exercise a discretion or form an opinion as to relevant facts, it was not for the court to make that decision for them, but where the decision would affect the rights and obligations of both parties there was a conflict of interest and the court would seek to ensure that the power was not abused by implying a term in appropriate cases that the power should be exercised not only in good faith but also without being arbitrary, capricious or irrational in the sense in which that term was used when reviewing the decisions of public authorities; and that it followed that such a decision could be impugned, not only where it was one that no reasonable decision-maker could have reached, but also where the decision-making process had failed to exclude extraneous considerations or to take account of all obviously relevant ones.
>
> (2) that, applying that test, where the decision-maker was an employer it would be expected to be aware of the correct approach to the making of any decisions it was required or empowered to make under the terms of an employment contract; that the correct approach to an investigation into cause of death for the purposes of a death in service benefit claim was that suicide was such an inherently unlikely act that a positive conclusion as to its occurrence could not be made without cogent evidence to support it; that, on the evidence, the investigation team's report and conclusion did not amount to sufficiently cogent evidence to justify a conclusion by the general manager that the deceased had committed suicide; and that, accordingly, the general manager's decision could not stand, and the claimant was entitled to the contractual death in service benefit

134. In contrast, the possibility that the Claimant lacked good reasons for submitting a claim that he described as being "technically late" cannot be described as inherently unlikely. So, I reject the notion that it was necessary for Mr Pefley to have "cogent evidence" of the absence of good reasons on the part of the Claimant for his late submission.

135. Because Mr Pefley's decision would affect the rights and obligations of both parties, a court or tribunal should seek to ensure that the power was not abused by implying a term that the power should be exercised not only in good faith but also without being arbitrary, capricious or irrational.

136. Before considering whether that implied term was breached in this case, I should deal with the other term advanced in the Grounds of Complaint as being implied, to wit, "that all expenses would be paid that were genuinely incurred, in accordance with custom, conduct and practice of the Respondent and also in accordance with business efficacy".

137. The editors of Chitty on Contract Vol 1 at §14-033 remind me that:

> If there is an invariable, certain and general usage or custom of any particular trade or place, the law will imply on the part of one who contracts or employs another to contract for him upon a matter to which such usage or custom has reference a promise for the benefit of the other party in conformity with such usage or custom; provided there is no inconsistency between the usage and the terms of the contract. To be binding, however, the usage must be notorious, certain and reasonable, and not contrary to law; and it must also be something more than a mere trade practice. But when such usage is proved, it will form the basis of the contract between the parties, and:
>
> > "… their respective rights and liabilities are precisely the same as if without any usage they had entered into a special agreement to the like effect."

138. And, at §14-035:

> A custom or usage can only be incorporated into a contract if there is nothing in the express or necessarily implied terms of the contract to prevent such inclusion, and it can only be incorporated if it is not inconsistent with the tenor of the contract as a whole.

139. The Claimant at paragraph 53 of his witness statement accepted

> … that submission of expenses beyond 120 days could lead to "delay of reimbursement due to additional approvals or no reimbursement"

He then set out reasons why he was "constrained from complying with the 120 [*day*] window".

140. The Claimant's acceptance that late submission of expenses could lead to no reimbursement seems to me to contradict his pleaded case that there was a custom and practice in this company that all genuine expenses would be reimbursed. In effect, he is highlighting the express term which is inconsistent with the implied term upon which he relies. Therefore, I do not accept that I can or should imply such a term.

141. I therefore now turn to the question as to whether Mr Pefley, in rejecting the Claimant's application for his late submission of his expenses, was acting not only in good faith but also without being arbitrary, capricious or irrational.

142. The expenses claim was submitted on 19 October 2017. It included expenses with transaction dates extending over the period from 12 January 2017 to 22 June 2017 totalling £10,056.48. These were the expenses that had been incurred 120 days or more before the Claimant made the claim for reimbursement

143. The Claimant asserted he suffered stress from the unhappy events which gave rise to him lodging his formal grievance on 13 September 2017. But the stress he experienced did not prevent him from being able to lodge that formal grievance. This stress was compounded at being told on 4 October 2017 that the Respondent was addressing allegations of misconduct by him. This led to a panic attack experienced on 10 October which caused him to have a period of sick leave.

144. The Claimant described his condition at the time as suffering from a disability. He referred to the Equality Act. While he might have suffered a physical or mental impairment which had a substantial impact on his ability to undertake day to day activities, that condition was only 9 days old when he submitted his expenses claim. The Claimant was already over 120 days late for the expenses incurred in the period 12 January to 12 June when he suffered the panic attack on 10 October. I do not find it irrational that Mr Pefley did not seek medical evidence in such circumstances.

145. Nor do I find it irrational that Mr Pefley was not persuaded that difficulties that the Claimant experienced with the new system for submitting expense claims, Concur, were responsible for the Claimant being late. On 18 April 2017, the Claimant in correspondence with Ms Bobila had described Concur as being "a million years ahead of Nexonia (*the previous system for submitting expense claims*)" while, on 5 May 2017, he responded to Mr Pefley's emailed query about completing his expenses claim from the previous accounting year by saying:

> Yes, I am almost done! I can't wait to move back to Concur …

146. These indications that the Claimant received and understood the Concur system came after the Claimant had written to Ms Bobila on 15 April 2017 complaining that he "already so confused I want to cry". If the Claimant had, indeed, not waited to move back to Concur and had submitted his expenses claim by 11 May 2017 which was 23 days after he asserted he couldn't wait, all the expenses that were subsequently disallowed would have avoided being rejected because they were submitted late.

147. The Claimant presented, as an explanation of the late submission of his expenses claim, the amount of travel he had to undertake in his job. Mr Pefley took the view that other people were busy:

> but no-one else received warnings from CEO – nobody else was failing to submit expenses so late.

148. I do not find anything irrational, arbitrary or capricious in that rejection of the Claimant's extensive travel commitment as excusing his failure to get his expenses claim in on time.

149. Mr Meichen submits that Mr Pefley failed to consider:

> … the extremely harsh impact on the Claimant of refusing to pay 10K of expenses which he had genuinely incurred at a time when he had just been dismissed. This was undoubtedly a relevant consideration which was ignored by David Pefley. In the circumstances … … his decision was simply punitive. It was certainly irrational as at the time it was made the Claimant was no longer an employee, therefore the Respondent had nothing to gain by enforcing a strict interpretation of its policy.

150. If the Claimant had been continuing to be employed by the Respondent, my analysis of the decision that Mr Pefley made would have led me to the conclusion that it was not irrational. Does the fact that he made the decision at a time when he knew the Claimant to have been dismissed render an otherwise rational decision, one which was not arbitrary or capricious, into an irrational, arbitrary or capricious one?

151. The business reason for the rule was, as the Claimant accepted, the avoidance of the accounts team having to revisit management accounts figures that they had earlier produced. The fact that an employee who had submitted a late claim was in the process of, or had been, dismissed would not affect that business reason. Were the 120-day rule to be waived, the accounts team would have to revisit their figures whether the employee was dismissed or not.

152. Mr Meichen argues that the Respondent had nothing to gain by enforcing a strict interpretation of its policy but that suggests that a reason for the policy was other than the business reason which the Claimant accepted. There was no evidence that the reason for the Respondent enforcing the 120-day rule was *pour encourager les autres.*

153. And, if the business reason for enforcing the 120-day rule was unaffected by the fact that the erring employee was being dismissed, then allowing his discretion to be affected by the Claimant's dismissal would have exposed Mr Pefley to the accusation that his decision was arbitrary and capricious. Such a decision could be said to have been based on Mr Pefley feeling sorry for the Claimant. If I am wrong in that speculation in that no one could impugn a discretionary decision to waive the 120-day rule having regard to the employee's dismissal, it does not follow that a discretionary decision should be said to be irrational, arbitrary or capricious because the decision maker did not act on the whim of feeling sorry for the employee.

154. In all the circumstances, I am unpersuaded that Mr Pefley exercised his discretion in an irrational, arbitrary or capricious manner in deciding not to waive the 120-day rule and permit the Claimant to claim his expenses late.

Unlawful Deduction from Wages

155. On 26 July 2017, Burson-Marsteller (UK) Limited signed a contract with the Respondent that provided US$101,000 revenue to the Respondent. The Claimant had been involved in the selling operation as had Ms Arianna Bastianini, another sales director who was managed by Mr John Tyrrell. The selling roles performed by the Claimant and Ms Bastianini were different. The Claimant's role was to attract new business while that of Ms Bastianini was to sell to existing clients, a process referred to within the company as "Upsell"

156. Ahead of the actual signing of the deal, there had been discussions about which sales personnel would earn the commission. Acting on information concerning the

deal provided to him by the Claimant on 23 May 2017, Mr Puyol decreed on 24 May that Ms Bastianini would receive commission on £38,500 of the revenue and the Claimant would receive the rest.

157. However, Ms Bastianini was unhappy with that split. Sometime later – most likely in August 2017 – she raised the issue with her line manager, Mr Tyrrell. On 24 August 2017, he emailed Mr Puyol informing him of Ms Bastianini's view that US$47K of the revenue should have been Upsell for the London office. Mr Puyol responded by saying that the deal was worth US$101K but that the Claimant had "mentioned no licences go into the UK". However, the designated locations, Mr Puyol said, should be spelled out in the contract. The order placed by Burson-Marsteller had a table showing the "Topics Distribution" which showed as against the name of each of 7 countries the amount of the $101K that was allocated to that country. As against the UK, the amount was shown as 47: the total of the amounts allocated to the six other countries was 54.

158. Mr Puyol corresponded with the Claimant on 29 August 2017 informing him that he and Mr Tyrrell needed to connect with the Claimant "to better understand where the users / topics are used for" Burson-Marsteller and requesting a synopsis of what had been agreed in respect of locations and topics. When the Claimant queried as to whether there was a problem with payment, Mr Puyol wrote that:

> the AM team (*which I understood to be the team dealing with Upsell*) was concerned some of the topics $ should be allocated as up sell and not new business. Please provide the requested deal dissection prior to our conversation (what you agreed regarding locations and number of topics per location).

159. After obtaining further information from the Claimant, Mr Puyol along with Mr Tyrrell and Mr Pefley reviewed what was known about the transaction and determined that the initial commission allocations had been approved and paid in error based on the Claimant's incorrect allocation of new and existing business.

160. Mr Tyrrell warned the Claimant by email on 15 September 2017 that revenue and commission which previously had been allocated to him in respect of sales to Burson-Marsteller (UK) Limited was likely to move to Ms Arianna Bastianini. Confirmation that this would entail a deduction from the Claimant's wages came on 16 November 2017 when the Claimant received from Ms Du copies of his commission statements for the months of September and October. By that stage, he had been paid $4,056.10 (£2,920.96) commission which would be deducted from his remuneration at the end of November.

161. The Claimant submits that the person who made the decision that the commission he had earned from the Burson-Marsteller transaction would be deducted from his wages was Mr Puyol. He highlights that the warning given by Mr Tyrrell on 15 September was but two days after he had submitted a formal grievance against Mr Puyol. He suggests there to be a connection between his formal grievance being submitted and the warning of the reallocation of commission but two days later.

162. Mr Puyol was involved in the decision making which led to the reallocation of commission, something which had an impact on his own commission earnings. However, it is clear that the whole process which led to the clawing back of the

Claimant's commission originated with Ms Bastianini's unhappiness at the allocation of commission ordained by Mr Puyol on information supplied by the Claimant. Once she had raised the issue, Mr Tyrrell raised it with Mr Puyol on 24 August. That happened to be the day when the Claimant explained to Ms Du that the reason he had asked for a copy of the Staff Handbook three days earlier was because he was interested in the policies relating to "Bullying and harassment in the workplace, and a couple of other things". The Claimant would not disclose Mr Puyol as the object of any grievance until later.

163. I therefore do not accept that the process by which a decision came to be taken by three managers (including Mr Puyol) for commission originally allocated to the Claimant to be redirected to Ms Bastianini was influenced by the Claimant's submission of a grievance about Mr Puyol on 13 September 2017.

164. True, Mr Tyrrell's warning that the revenue and commission from the Burson-Marsteller transaction might move to Ms Bastianini did arrive with the Claimant 2 days after his submission of his formal grievance but it is clear that the investigation into whether the commission allocated to the Claimant was properly new business or not was well underway on 29 August which was the date on which the Claimant informally disclosed for the first time that he harboured a grievance about Mr Puyol.

165. Mr Meichen suggests that the Claimant's contract of employment did not provide for the Respondent to claw back commission that had been paid to the Claimant. However, the deduction that was duly made from the Claimant's wages on 30 November 2017 was in accordance with the Claimant's contract and the commission plan, which provide as follows:

> Contract, clause 7.3: "The Company shall be entitled to deduct any amounts owed to the Company by You from your salary".
>
> Commission Plan, 4.5: "Commission Errors – Employee shall promptly repay any unearned commissions that have been paid to Employee by Netbase. NetBase will promptly correct and pay any underpayments of commission."

166. I accept the contention of Ms Darwin that "owed" in clause 7.3 of the contract should be given its ordinary meaning to include sums that the Claimant was required (under the Commission Plan) to repay unearned commissions.

167. Ms Darwin also points out that the Claimant did not present any evidence of having moved his position as a result of the payment of £2,920.96 he had received in error.

168. Therefore, I reject the claim for unlawful deduction of wages.

Counter-Claim

169. On the first day of the hearing, the Claimant returned to the Respondent the laptop belonging to it. The Respondent therefore no longer seeks damages for the market value of the laptop but instead seeks a declaration that the Claimant breached clause 14.4 of his contract of employment between 8 December 2017 (the date by which the Claimant was asked to return the laptop) and 31 July 2018 (the first day of this hearing).

170. I have been referred to the Employment Tribunal Extension of Jurisdiction

(England and Wales) Order 1994 which provides the Tribunal with the jurisdiction to deal with a contract claim. It is clear from that order that "proceedings may be brought before an Employment Tribunal in respect of a claim by an employer for the recovery of damages or any other sum …". Nothing in the order permits an Employment Tribunal to start making declarations in contract claims.

171. If I am wrong about that, I adopt the point made by Mr Meichen that, in the way the claim for a declaration is now put, it cannot have been outstanding on the date of dismissal (1 December 2017) because he had not at that point failed to return the laptop on the date requested (8 December 2017).

172. I refuse the declaration and make no order on the Counter-Claim.

The ACAS Code of Practice

173. The Claimant withdrew his appeal against dismissal. I am invited by the Respondent to regard his withdrawal of his appeal as being a failure to comply with the ACAS Code of Practice and that failure as being unreasonable.

174. Paragraph 26 of the Code of Practice on Disciplinary and Grievance Procedures provides the following advice:

> Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.

175. An employee by that paragraph was required to do two things and the Claimant did both of them: he did appeal and he did inform the Respondent of his grounds of appeal. His subsequent withdrawal of his appeal could be argued to be a failure to comply with the ACAS Code of Practice.

176. However, I do not regard the withdrawal of his appeal as being an unreasonable refusal to comply with the ACAS Code of Practice thus meriting a reduction in the award I should make to the Claimant pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992. I form that view in the light of the continuing refusal of the Respondent to provide the identity of the personnel involved in making the allegations against him or the identity of the individuals involved in the events giving rise to the allegations against the Claimant and of the continuing refusal to provide any further documentation or material additional to that supplied for the disciplinary hearing.

Summary

177. The dismissal was both unfair and wrongful. The Claimant contributed to his dismissal to the extent that justifies a 20% reduction in any award. I do not reduce such compensation as should be awarded on the basis that a fair procedure would have resulted in a dismissal in any event.

178. If the parties cannot agree on the basic and compensatory awards that should be made in this case, they should write and request a further hearing date to deal with remedy and suggest the directions that would be helpful to prepare for such a hearing.

Signed: Paul Stewart

_____

EMPLOYMENT JUDGE

On: 6 February 2019

_____

DECISION SENT TO THE PARTIES ON

..... 7 February 2019.....

AND ENTERED IN THE REGISTER

.....

FOR SECRETARY OF THE TRIBUNALS