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EMPLOYMENT TRIBUNALS

Claimants: **Mr J Whitfield**
Mrs B Whitfield

Respondent: **Kennett & Lindsell Limited**

Heard at: **East London Hearing Centre**

On: **13 and 14 December 2018; 7 and 8 February 2019**

Before: **Employment Judge Reid (sitting alone)**

Representation

Claimants: Ms Ibrahim, Counsel
Respondent: Ms Ferber, Counsel

RESERVEDJUDGMENT

The judgment of the tribunal is that:

<u>The First Claimant</u>

1. **The First Claimant was unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996. Findings relevant to compensation are set out below.**

2. **The First Claimant was not wrongfully dismissed by the Respondent and that claim is dismissed.**

3. **The First Claimant breached the implied term of trust and confidence and the Respondent's counterclaim succeeds in relation to the personal Barclaycard expenses wrongly claimed by him (car expenses (excluding petrol) and personal travel expenses, both identified below) and in relation to the making of and removal of the Uniform Pleats mannequin.**

<u>The Second Claimant</u>

4. **The Second Claimant was unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996. Findings relevant to compensation are set out below.**

5. **The Second Claimant was wrongfully dismissed by the Respondent and is entitled to damages for breach of contract for the loss of her notice period.**

6. **Remedy hearing 22nd March 2019**

REASONS

Background

1 The First Claimant and the Second Claimant each brought claims for unfair dismissal and for wrongful dismissal on claim forms presented on 18th May 2018. Their claims for unpaid holiday pay were dismissed on withdrawal at the preliminary hearing. There was also a counterclaim against the First Claimant arising out of the claimed misuse by him of the Company Barclaycard and the taking of the Respondent's goods (mannequins), to which the First Claimant eventually provided a response on the first day of the resumed hearing. By the end of the hearing, the amounts claimed under the Barclaycard were £5,039.66 (highlighted in pink on the Barclaycard statements) plus Harwich petrol purchases of £2,592 and £4,686 plus VAT for the goods said to have been taken. The Claimants are married to each other.

2 The claims were originally listed to be heard on 27th September 2018 but the hearing was postponed and instead converted to a preliminary hearing. The hearing was relisted for 13th and 14th December 2018 but due to late disclosure on the first day by the Respondent of relevant documents (the Barclaycard statements), the hearing did not start until 14th December 2018 when I heard oral evidence from both the Claimants. The hearing was resumed on 7th and 8th February 2019 when I heard oral evidence from the Respondent's witnesses Mrs Leach, Ms Bunker, Mrs Fry and Mr Mullender and then from the Respondent's director Mr Andrew Kyprianou. I was provided with written submissions and also heard supplementary oral submissions. I reserved my decision. A remedy hearing has already been booked with the parties for 22nd March 2019.

3 There was a one file bundle (final page is page 216) to which various documents were added during the hearing. Both parties produced further disclosure during the hearing which caused delays.

4 Both Counsel provided opening submissions/ a skeleton argument identifying the issues, including in relation to any *Polkey* deduction and any reduction for conduct. In relation to the First Claimant the first issue was whether he had been dismissed by the Respondent, the Respondent saying that he had not been dismissed but had resigned. In relation to the Second Claimant the first issue was whether she had been employed at all by the Respondent, the Respondent saying that any arrangement to employ her was put in place by the First Claimant as a 'sham' arrangement in order to reduce the First Claimant's personal tax bill by in effect allocating some of his salary to her for which she did very little work. I also canvassed with the parties that one possibility might be that the Second Claimant might be found to be a worker and not an employee, if I accepted there

was a worker contract but not an employment contract. I identified with the parties that there did not appear to be any authority issues as regards the First Claimant's ability to hire new staff, because as Company Secretary he would have that authority.

5 A key issue was the credibility as between the accounts given by the First Claimant and by Mr Kyprianou taking into account the stark absence of any documents or emails showing what was going on. They were completely at odds in relation to a number of key factual matters including the First Claimant's salary orally agreed when the employment started, whether it had been orally agreed that the First Claimant could put personal spending on the Company Barclaycard, whether it had been orally agreed that the Second Claimant was also to be employed, whether Mr Kyprianou told the First Claimant to terminate the Second Claimant's arrangement when he later discovered it, whether there were discussions between the First Claimant and Mr Kyprianou in the latter half of 2017 about the First Claimant's failings, whether Mr Kyprianou dismissed the First Claimant or whether the First Claimant resigned.

6 I identified a further potential issue in relation to the calculation of the Claimants' basic award if they won their claims. This was that it appeared that the Claimants' previous employer, Eastman Staples Ltd, was an associated employer within s231 Employment Rights Act 1996 because it owns 100% of the shares in the Respondent. I did not hear submissions on this and did not explore whether there may have been a gap so as to break continuity of employment, but left this issue to be considered at the remedy hearing, if there was one.

7 An application was made on behalf of the Respondent to exclude the Second Claimant from the hearing whilst the First Claimant gave his evidence on the basis that otherwise she would hear his evidence in particular about the work claimed to be done by her for the Respondent and then adapt her own evidence to suit that. I decided not to exclude her because they are married and already had had plenty of time to discuss their evidence between them including each producing a witness statement; therefore, if they were going to collude they would probably already have done so and the Second Claimant hearing the First Claimant's oral evidence would not add to that.

Findings of fact

Acquisition of the Respondent by Eastman Staples Ltd in December 2015

8 I find that Eastman Staples Ltd purchased the shares of the Respondent on 1st December 2015 from the previous owners Mr David Lindsell and Mrs Angela Lindsell. Mr Andrew Kyprianou owns the shares of Eastman Staples. I find that Mr Kyprianou has known the First Claimant for many years (AK para 15) and that they had been friends for a long time, in the same line of business and working together prior to December 2015 at Eastman Staples. The Respondent is a small business employing around 15 employees (in 2017) and makes dummies/mannequins.

9 The First Claimant and the Second Claimant had previously both been employed by Eastman Staples. I find that the Second Claimant acted as an administrative assistant

to the First Claimant at Eastman Staples but I find based on Mr Kyprianou's oral evidence that Mr Kyprianou had not been particularly aware of what the Second Claimant was actually doing, though he was aware that she was working with the First Claimant and, as he said, took the First Claimant's word for it. Prior to employment by the Respondent, the First Claimant had been working part-time at Eastman Staples around 1-2 days per week earning around £11,000 pa. The Second Claimant had also been paid around £11,000 pa.

10 I find that the First Claimant expressed an interest in the Respondent when hearing that Mr Kyprianou was interested in acquiring it and spent two weeks prior to the acquisition date observing the business. One of the reasons the First Claimant told Mr Kyprianou he was interested in the business was that it was local to where he lived.

11 I find that the First Claimant was employed as Company Secretary (with Mr Kyprianou and his brother Mr Peter Kyprianou as the directors). No written contract or any document evidencing the terms was issued. I find that the intention was that the First Claimant have the autonomy to run the business day to day and that he would not be subject to significant day to day supervision by the directors. The First Claimant had dealings with the group company head office in Huddersfield in relation to financial and other matters with the group accountant Mr Philip Houghton and with Mr Colin Werb. The Claimants' son James Whitfield also joined the Respondent as a laminator on a salary of £31,000 pa, an increase to his previous salary of £18,600 pa at Eastman Staples.

12 I find that the First Claimant and Mr Kyprianou orally agreed that the First Claimant's salary at the Respondent would be £60,000 pa. There was a direct conflict of evidence between them as to the amount, how that amount had been reached and whether it covered the First Claimant's salary only or also the Second Claimant's. I find that the First Claimant's salary at Eastman Staples of around £11,000pa was already very low taking into account his oral evidence that in practice he worked closer to full-time than part time hours due to the workload. It was not explicable that he would earn this amount in a management role and at the same time the Second Claimant earned around the same amount in an administrative role when he said he was working closer to full time hours in a management role and she was only working part-time doing administrative support. This was the context for the salary at the Respondent which were again claimed to be broadly the same for each Claimant. The First Claimant's oral evidence was that he took a lower salary at Eastman Staples because he thought he was a 40% shareholder of Eastman Staples (disputed by Mr Kyprianou) but I find that that reason, if it was one, could not have applied when he moved to the Respondent where he was not a shareholder. I find that the amount agreed for the First Claimant's salary at the Respondent was £60,000 pa firstly because it seems unlikely that he would accept what he said was the agreed salary (£24,600 pa, though initially lower while Mrs Lindsell did a handover period) if this was a full-time job taking responsibility for the Respondent taking up more of his time, secondly a claimed salary of £24,600 pa is very low for that degree of responsibility and thirdly it was his case that a salary of £23,000 pa had also been agreed for the Second Claimant who was at most to work very limited hours on administration support duties compared to him working full-time in a management role. It was in particular not credible that the First Claimant and the Second Claimant would be paid broadly the same level of salary for such different levels of hours and levels of responsibility. The fact that a similar

'matching' salary arrangement had been in place previously at Eastman Staples does not make the claimed arrangement at the Respondent more likely to have been agreed as a continuation, because the previous salary arrangements at Eastman Staples equally made no sense as regards their different roles. In making these findings I have also taken into account that it is unlikely to be a coincidence that the total of what the First Claimant says was his salary, the Second Claimant's salary and James' salary over £18,600 totals the £60,000 Mr Kyprianou says he agreed (AK para 29), made up of the £30,000 each earned he thought previously by Mr Lindsell and Mrs Lindsell, the previous owners. I find based on Mrs Lindsell's oral evidence that her previous salary before the handover reduced amount was around £25,200 pa because she said she was earning half her usual salary during the handover period and the First Claimant said he took a reduced monthly salary during the handover period of £1,000 per month (page 135) before it went up to £2050 per month (page 137) after Mrs Lindsell left; this means that Mrs Lindsell was earning £1050 per month during the handover period (half her prior salary) amounting to £12,600 pa during the handover. As Mr Lindsell and Mrs Lindsell were said to be a husband and wife shareholder/manager team taking an equal salary, their combined salary income of at least around £50,400pa was closer to Mr Kyprianou's £60,000 for the First Claimant to run the business than the £24,600 claimed to be the agreed salary of the First Claimant. I have also taken into account that the First Claimant did not arrange for any documents or letters recording what had been agreed, including in relation to salary, which he could have done.

13 I find that Mr Kyprianou did not agree that the Second Claimant could also be employed by the Respondent. He may have taken the First Claimant's word for it as to the working together arrangement when the Claimants' worked together at Eastman Staples but I find he did not agree that the Second Claimant could continue any pre-existing arrangement which had existed at Eastman Staples. I find based on Mr Kyprianou's oral evidence that he was not asked to also approve the employment of the Second Claimant doing administrative support for the First Claimant and that if he had his response would have been that the First Claimant did not need additional administrative support because there were two other employees at the Respondent, Helen Ball and Trudy Leach, who covered that work. In making this finding I take into account my further findings below about how the Second Claimant worked after the latter part of 2016, as regards limiting how visible the Second Claimant's role was, because I find that the First Claimant was aware that Mr Kyprianou had not agreed to the Second Claimant's employment and decided that he wanted to keep it 'under the radar'.

<u>Nature of any legal relationship between the Respondent and the Second Claimant</u>

14 I find that Mr Kyprianou had not agreed that the Second Claimant be employed. Notwithstanding it was a matter within his control (and I find that head office HR support was available or could have been arranged) the First Claimant did not issue (or ask or arrange for the issue of) to himself or the Second Claimant any documents recording the terms of the employment. The First Claimant arranged for the Second Claimant to start on the Respondent's payroll in December 2015 (page 138). From then on the Second Claimant was paid monthly, issued with a payslip, issued with P60s (page 142-143) and

ultimately given a P45 (page 132). I therefore find that the tax documents were consistent with her working at the Respondent and being paid for that work.

15 I find that Mrs Lindsell as part of her handover of the business remained working part-time at the Respondent until around September 2016. I find based on her oral evidence that she taught the Second Claimant how to use the Sage accounting/invoicing/payroll system between January 2016 and February 2016, with the Second Claimant attending the Respondent's premises one day a week for about 4 weeks. This work was consistent with the Second Claimant undertaking paid work for the Respondent at this time. I find based on the Second Claimant's oral evidence that the reason that the Second Claimant did not then go on to be in charge of the Sage system was because the First Claimant had initially thought that the Second Claimant could work on Sage from home. I find based on her oral evidence he also told the Second Claimant that it would be quicker for him to be in charge of Sage at work himself. I find that the First Claimant did not want the Second Claimant to be regularly in the office after those initial weeks of training (see also further findings below about the absence of contact by the Second Claimant with the office). I also find that his reason that it was quicker for him to do it does not stack up when they had invested the time in training the Second Claimant and the First Claimant would now have to be trained as well.

16 I find that the next distinct piece of work the Second Claimant did was assisting in inputting information from old customer files onto the Respondent's system. I find based on the oral evidence of Mrs Leach that a need had been identified to get information from the files onto the Respondent's database and that she saw boxes of files being taken home by the First Claimant and that she was informed that the Second Claimant was involved in this task. I find based on Ms Bunker's oral evidence that she was also allocated some of this work in around April 2016 and that she input details from the files onto a template she was provided with. I find however that she was not aware as to whether her work constituted all of the files which needed reviewing or just some of them. Helen Ball was the person said to have been in charge of setting up the template so that the files could be reviewed but there was no evidence from her. I therefore find that the Second Claimant did do some work completing the templates from the files taken home, in around April 2016. This work was consistent with the Second Claimant undertaking paid work for the Respondent at this time.

17 Apart from these two distinct tasks at the outset I find that the Second Claimant did the following other things until she left the Respondent.

18 I find that the Second Claimant produced brief one off one-page crib sheets for the First Claimant prior to a customer meeting containing brief details such as contact details, the names of contacts, what the customer did and an areas they might be expanding into (which information was contained in the trade magazine Draper's Weekly which the Second Claimant read instead of the First Claimant reading it). I find all these to be simple matters the First Claimant could have done himself but he asked the Second Claimant to do because he had a dislike of doing paperwork. Alternatively, he could have asked Helen Ball or Trudy Leach to do this if really not having the time to do it himself. I therefore find that there was no business need for the Second Claimant to produce these crib sheets or

to read Draper's Weekly because they were matters which he could do himself or could be done by colleagues in the office. Neither Claimant referred to the reading of Draper's Weekly in their witness statements which was said at the hearing by the First Claimant to involve hours of research from which I find it was not in fact something that took very long or one of them would have specifically mentioned it in their witness statement (the Second Claimant only refers generally to preparatory work in para 4). I also find that any post meeting notes that needed to be kept could have been made by the First Claimant.

19 It was also claimed that the Second Claimant attended meetings with the First Claimant and took notes, though no notes were available of these meetings. (BW para 4). I find based on both their oral evidence that the only customer meeting the Second Claimant actually attended (ie went into) was at Huntsman in Savile Row. It was therefore an overstatement in her witness statement that she attended meetings at which she took notes (para 4) because she only attended one customer meeting.

20 During the middle of her oral evidence the Second Claimant produced notes of an employment matter regarding Glen Philips she said she had helped the First Claimant deal with in January 2016 (pages 92A-E). This was despite the First Claimant having said earlier in his oral evidence that they had checked at home for any documents and could not find any. The documents she said she had produced at the time were the handwritten notes (page 92A) (based on the account the First Claimant gave her) and the typed up notes at page 92C. I find that the First Claimant could have handwritten his own account of the incident and did not need the Second Claimant to do this for him; it was only 2 pages. He also did not need the Second Claimant to type up the notes at page 92C as he had staff in the office who could have done so if he did not have time. I find that this is the only incident of the Second Claimant being involved with junior staff issues and her witness statement at para 4 is therefore an overstatement because it gives the impression of an ongoing staff role. The Second Claimant confirmed in her oral evidence that the only other junior member of staff she dealt with was James Whitfield but he is their son so she would inevitably have dealing with him and these dealings were not at work because the Second Claimant did not go to the Respondent's premises after around February 2016 except to attend the Christmas party.

21 The Second Claimant accompanied the First Claimant to some of his business visits in terms of travelling with him to the destination, waiting for him whilst he had the meeting and then travelling back with him. Over the 2 year period I find these to have involved going on around 4 or 5 visits a year based on the First Claimant's oral evidence which included occasions when the reason she went was to help carry mannequins because he was travelling by train. I find based on her oral evidence that that is not something which needed doing because the First Claimant was able to travel by himself to meetings. The Second Claimant suggested in her oral evidence that if driving to a meeting her 'duties' would be to input the postcode into the satnav and keep an eye on his phone as he was driving. Neither of these things were things the First Claimant could not do for himself and it was verging on the bizarre that the Second Claimant called this part of her duties as an employee. She also counted as a 'duty' if they were already out at a weekend and the First Claimant needed to stop and pick something up for the Respondent.

22 I find that after the Second Claimant completed the Sage training in around February 2016 and it was decided by the First Claimant that he would take over the operation of Sage, the Second Claimant kept a very low profile for someone earning around £20,000 as a part-time administrative assistant to the First Claimant. The boxes of old files were brought home for her to complete some of the templates from the files and she did not go into the Respondent's premises except for occasional social events. She did not have her own Respondent email address and there was no contact between her and Mrs Leach (TL para 4-5,7) who as office manager would have been the obvious person to have at least some contact with. Taking into account the above findings as to their respective salaries, I find that this was because the First Claimant did not want the Second Claimant's role (to the limited extent there was one) coming to the attention of Mr Kyprianou or other members of staff. The Second Claimant never booked any paid holiday during the two years, consistent with a low profile approach.

23 Taking into account the above findings, I find that apart from the two specific tasks in early 2016 (training on Sage and completing some of the template sheets from the old files) the tasks the Second Claimant undertook thereafter were sporadic and irregular and did not involve significant hours. I find that despite her claimed role the Second Claimant did not have ongoing weekly or monthly responsibilities but she reacted when the First Claimant asked her to do something to help him with his paperwork. I find based on her oral evidence that she had little to do when he was for example in New York in early December 2017 which is inconsistent with there being ongoing regular duties which she could get on with in his absence. I have found that the help she gave him was not something he could not do himself or at most ask another colleague to help with. The fact that the Second Claimant was being paid £23,000 pa was an exceptionally poor bargain for the Respondent in the light of the minimal and sporadic work undertaken. A noticeable type of work missing from the claimed administrative help for someone who 'hated paperwork' was helping the First Claimant with his expenses and receipts – see findings below as regards use of the Barclaycard.

24 I find however that despite the minimal nature of the work, which could have been done by someone else, the Second Claimant felt obliged to do the tasks the First Claimant asked her to do and would not have done all of them if she had not been being paid for her time. I find based on her oral evidence that she would not have given up the time to travel to eg Sheffield and Derby if she was not being paid. I also find it is unlikely that she would have spent the time reading Drapers Weekly if she had not felt obliged to do so. The Second Claimant was naïve and failed to understand that the Claimants were not somehow replicating the Lindsells' previous husband and wife ownership (because the Claimants were not shareholders). However, she was not herself intending to create a false impression of her own situation because she was doing some minimal work, albeit it was a poor bargain for the Respondent as her work could have been done by someone else, principally the First Claimant himself. It was not the Second Claimant's intention to create a false impression by way of a sham arrangement because the obligations on her apparently present were to a degree in fact undertaken by her. However wrongly the First Claimant had set up the contract with the Second Claimant and misused his position, it is the contract between the Second Claimant and the Respondent which needs to be

considered and there was at least some work done for which she was paid. It was therefore not a sham arrangement.

25 Taking into account the above findings I find that the contract between the Respondent and the Second Claimant was an employment contract because the necessary elements for an employment contract were in place namely personal service by her, control (by the First Claimant) and mutuality of obligation. The way she was treated for tax purposes and the tax documents issued to her were consistent with employment status.

26 I find that Mr Kyprianou found out about the arrangement in late 2016 and asked the First Claimant to remove the Second Claimant from the payroll in around February 2017 (page 56). I find based on his oral evidence that when he first asked, the First Claimant said that he would do so. The First Claimant said that he had never been asked to do this but taking into account the above findings I find it very unlikely that Mr Kyprianou would not ask him to stop an arrangement which was of so little benefit to the Respondent. I find that when Mr Kyprianou asked again having found out he hadn't done it, that the First Claimant said that it would be disadvantageous tax-wise to do so.

27 I find based on Mr Kyprianou's oral evidence that the most senior laminator at the Respondent was Mick Hicklin who earned in the region of £33,000 pa and he had around 40 years' experience. Next in seniority after the First Claimant at the Respondent came Mrs Leach on around £32,000 and Mrs Fry on around £29-30,000 pa. This made James' salary of £31,000 inexplicable in the light of his previous salary at Eastman Staples of £18,600 (an increase of around 60%) as he was earning the same as the employees one level down from the First Claimant and nearly the same as its most experienced laminator.

<u>The atmosphere in the factory during 2017</u>

28 I find based on the oral evidence of Mrs Fry, Ms Bunker and Mr Mullender that there was a poor atmosphere in the latter part of 2017 despite the upbeat message communicated by Mr Kyprianou in March 2017 (page 114, first bullet point). I find that there was gossip and a feeling of uncertainty about their futures caused by the First Claimant saying to Ms Bunker (SB para 10) that the business was not doing well, by James Whitfield also making similar remarks (SB para 10, LF para 6) and by the First Claimant making disparaging remarks about various other people (DM oral evidence). It was also caused by the introduction by Mr Kyprianou in late 2017 of CCTV and a clocking-in system which made staff feel watched. This was then fuelled by the employees all then discussing these various incidents between them. The atmosphere was not then helped by the situation which arose over attendance by the staff at the Great British Sewing Bee (see findings below), which was supposed to be a reward to staff which they would enjoy.

29 Although I find that the First Claimant made the comment as claimed to Ms Bunker I do not find he personally was making this type of comment more widely (although James was). Although it was claimed that the purpose of the comments was to drive the potential price of the Respondent down so that the First Claimant could then purchase it at a reduced rate, I find it unlikely that the First Claimant would take the risk of

jeopardising staff relations by deliberately making them feel so insecure so that they might leave, because to do so would be to lose a key part of how the Respondent could be successful ie its staff and that would not be in his interests if he did become its owner.

The mannequins and conducting own business in the Respondent's time

30 I find based on the oral evidence of Mrs Leach that there was usually a clear paper trail from when a potential customer makes an enquiry to when an item is quality control checked prior to being sent to the customer. However, I also find based on Mrs Fry's oral evidence that if an order was urgent it might initially be noted as for 'John' ie the First Claimant's name would be used although the correct customer name would later appear on the production list. I therefore find that just because staff were seeing something denoted ' John urgent' (DM para 1) or asked to do a job immediately (LF para 7) it did not mean that the order was a personal one by the First Claimant either for himself or for his company Uniform Pleats Limited (or his other businesses). I therefore find that apart from the Uniform Pleats mannequin (see findings below) that the First Claimant was not putting through orders for other mannequins for his own purposes and then not paying for them.

31 I find on the evidence before me that of the other mannequins listed in the counterclaim set out on page 57 in the further particulars, these were not wrongly taken by the First Claimant save for the Uniform Pleats one. None of the Respondent's witnesses (who unlike Mr Kyprianou were in the factory daily) say that they saw anything being removed or disappearing. Mr Kyprianou's case on this issue was that they were there before and then were not there so it must have been the First Claimant who removed them. There was no identification of when it was they were taken. The only witness to refer to the mini mannequins is Mr Mullender who says that the First Claimant asked him to produce some (para 4) for a customer without charge. Mr Kyprianou's evidence was that there was no policy to give out free samples but given my other findings about the First Claimant I find it likely that the First Claimant did not always stick to Company policy. I therefore find that although the First Claimant may have asked Mr Mullender to produce them, on the evidence before me this was not because they were for the First Claimant's use in his other businesses and he did not then remove them.

32 I find that the perception that the First Claimant was conducting his own business using the Respondent's assets evident from the employees' witness statements was in part fuelled by the bad atmosphere set out above which meant there was a degree of suspicion in the air.

33 I find that the Uniform Pleats mannequin which the First Claimant asked Mr Mullender to produce (DM para 3) was for use by Uniform Pleats. This was the case whether or not it was produced before Uniform Pleats was incorporated on 10th August 2017 (page 213) because preparatory work can start before incorporation. Given Mr Kyprianou was aware that the First Claimant had other business interests (and was thus in principle happy for him to have them, provided they did not interfere with his working hours at the Respondent) it is odd that when the First Claimant incorporated Uniform Pleats he arranged for his sister to be the shareholder and not himself, only

becoming a shareholder and a director in August 2018 after he left the Respondent. I find this to be because he did not want it to be publicly known that he was setting up this new business. It was disingenuous to say in his oral evidence that Uniform Pleats was not his company when employed by the Respondent as his sister is the initial shareholder in 2017 and it was not suggested that she had any interest or experience in this type of business taking into account she stopped holding shares and being a director as soon as the First Claimant was appointed. Although legal ownership was with his sister until 2018, it was likely that the First Claimant was the driving force. I also find based on his oral evidence that Uniform Pleats was incorporated around the time in August- September 2017 when he and Mr Kyprianou were having discussions about the First Claimant possibly buying the Respondent; it is unlikely to be a coincidence that he incorporated this new company at this time, either as a possible vehicle for that acquisition or for another future new business.

34 The First Claimant's explanation in his oral evidence as to why the mannequin had his company's name on it was that it was a promotional thing so that a customer could be shown what a mannequin would look like with a different name on it, for example a Huntsman one for the customer Huntsman. The use of the Uniform Pleats name did not fit with his claim that he had had no involvement with Uniform Pleats until 2018 because there was no other reason apart from his connection with that company to use that name on the mannequin. It is also somewhat of a coincidence that the name he chose to use to illustrate the use of another name was the company then owned by his sister which he would later become a director and shareholder of after he left. I therefore find that the First Claimant asked Mr Mullender to produce this mannequin because the First Claimant wanted one as part of his preparatory steps to start up Uniform Pleats. As to what happened to that mannequin the First Claimant's oral evidence was that Mr Kyprianou had given his son James the mannequin to take home to the First Claimant around 2 months after he had left (ie around February 2018). I find this unlikely because one of the matters Mr Kyprianou had dismissed the First Claimant for (see findings below) was using the Respondent's time to work on Uniform Pleats business and I therefore find it unlikely that Mr Kyprianou would give away possible evidence of that. I therefore find that the First Claimant took it when he left or asked his son James to remove it.

35 I find on the evidence before me that apart from ordering the Uniform Pleats mannequin, the Respondent has not shown that the First Claimant was spending significant periods of time away on other business or doing his other business whilst at the Respondent's premises. Mr Kyprianou was not based at the Respondent's premises so would not necessarily know in detail whether the Claimant was there or not and the First Claimant's office was on the first floor away from the factory production room and Mrs Leach's office on the ground floor so he would not necessarily be seen coming and going. The evidence of the other employees on this issue was along the lines that the First Claimant was 'never there' (LF para 1, DM para 6) but I find that their view was tainted by the overall bad atmosphere and feeling insecure about their jobs. The allegation that the First Claimant was regularly not there and instead conducting his own other businesses (which to a degree he was permitted to do in his own time) is too unfocussed an allegation over a period of two years without more detailed evidence of actual absences and what

they were for; an overall impression that he was 'never there' is insufficient in the absence of such evidence.

The Great British Sewing Bee September 2017

36 I find that Mr Kyprianou made it clear in March 2017 that staff were to be invited to attend this important event (page 114). However, I find that the First Claimant did not then make the necessary arrangements which upset the staff and contributed to the bad atmosphere – see above. I find it was not for Mr Kyprianou to make the arrangements because the First Claimant was the sole day to day senior manager at the Respondent. I find based on Mr Kyprianou's oral evidence that the process was that the First Claimant should obtain tickets in advance from the organiser's office and the First Claimant did not do so. I find that the First Claimant then did not clearly communicate to staff the process by which staff could gain entry and I find that the staff were thereby not clear as to the procedure and were unsettled by this. I find that despite being asked by staff what was going on, the First Claimant did not tell the staff till the day before that that they should call Mr Kyprianou when they arrived at the venue and he would arrange for entry passes. I find the First Claimant failed to organise matters and this was unhelpful as regards staff morale, but it was not a significant breach when viewed in isolation. It did however add to Mr Kyprianou's other concerns he was raising with the First Claimant at this time – see findings below.

Barclaycard – expenses claims

37 I find there was no oral agreement as claimed that the First Claimant could put personal expenditure on the Company Barclaycard (JW para 6) (save in relation to one flight to New York in an emergency – see below). The First Claimant's description of the arrangement in any event was not a blanket agreement but on his own account was subject to him reporting such expenditure to Mr Kyprianou suggesting that a degree of after the event approval was required in any event. Given the nature of some the expenses claimed on the Barclaycard (personal car costs, personal travel costs) I find it unlikely that Mr Kyprianou would have given the blanket approval claimed by the First Claimant to have been orally agreed, taking into account the absence of receipts – see below. There is an implicit quid pro quo in para 7 of the First Claimant's witness statement ie he paid out some money in return for which his expenses then look more reasonable and I find he did not give an adequate explanation in his oral evidence of why the payment he said he made personally to secure an advantage to the Respondent was relevant to his expenses claims (JW paras 7-8).

38 Linked to this issue was the absence of any receipts to show the exact nature of the expenditure, the card statements only identifying the retailer but not what was bought. The First Claimant's case was that he had kept such receipts and they were stored in a box at the Respondent's. The Respondent's case was that they had looked for this box and it was not there. Given it was the First Claimant's case that there were receipts and they could have been looked at at the time, it is noticeable that that this is not an aspect of the First Claimant's paperwork which either claimed the Second Claimant helped him organise. Given the apparent helplessness of the First Claimant in dealing with his admin

and paperwork, I find that had the First Claimant been retaining and storing receipts as claimed, it was likely to be something the Second Claimant would have helped him with but neither of them claimed she did this. I therefore find that the First Claimant did not keep receipts for the Respondent to look at if necessary and did not store them at work in the way claimed. This meant that the Respondent did not have the ability to check the detail of the items claimed. As the First Claimant input these expenses onto Sage himself including the description of the item (see for example page 165) and was a senior manager I find it was not for Mr Houghton in Huddersfield to probe more deeply as it is standard business practice to keep receipts and so Mr Houghton in Huddersfield was entitled to assume that a senior manager would have filed the relevant supporting receipts. A degree of trust was placed in the First Claimant because he was the only senior manager and had day to day responsibility for the Respondent. I find that the First Claimant was not, as claimed, reporting his personal expenditure to Mr Kyprianou throughout the period.

39 I find that Mr Kyprianou gave prior approval for the Barclaycard to be used to book a flight to New York for the First Claimant in December 2017 in an emergency situation so that the First Claimant could visit his son.

40 I therefore find that the items relating to car expenditure (excluding petrol – see petrol findings below) were not authorised business expenditure. I also find that items relating to personal travel (flights, food costs at airports, travel insurance, travel agent's fees, DVLA car tax, bus lane usage fine) were also not authorised expenditure. This was a serious breach of contract by the First Claimant.

41 The petrol costs claimed to have been personal petrol costs were said to be when the First Claimant filled up his car in Harwich because it was said that the Claimants' holiday home was there and they usually lived in Gidea Park so the conclusion was reached that all Harwich petrol must be personal petrol. The Claimants said they lived in Harwich all the time and it was not a second home. I find the petrol costs claimed on the Barclaycard to be a mixture of that used for business travel and that used for personal travel (the First Claimant not suggesting it was all business petrol). Because I have not accepted the claimed agreement that personal costs could be claimed, claiming such costs was a serious breach of contract.

42 However, the proposition that all Harwich petrol related to personal use was flawed because some of it it could have been used subsequently and legitimately for business use, whether or not the Claimants' home in Harwich was their second home or their main home. Therefore, while I have found that the First Claimant wrongly used the Barclaycard for personal petrol I am unable to identify personal petrol on the evidence before me because it is mixed up with business petrol. Therefore, as regards the counterclaim, the Respondent has not shown the loss which flowed from the First Claimant's breach of contract.

43 The other payments said to be wrongly made on the card was the withdrawal of cash amounts (plus associated handling fee) in March 2016, September 2016, December 2016 (two withdrawals) April 2017 (two withdrawals) June 2017, July 2017, October 2017)

of varying amounts. I find based on Mr Kyprianou's oral evidence that there was a petty cash box, though items bought with that petty cash should also have been backed up by associated receipts. Given there was such a box, I find it legitimate that the First Claimant should take out cash on the Barclaycard to put in the petty cash box and taking into account the usual amounts of £50-£250 (except for the 20th December 2016 one of £500 which I find to be associated with staff Christmas costs) and the absence of any evidence as to what the box usually needed to contain, I find that the cash withdrawals were legitimately made by the First Claimant for use as petty cash.

Dismissal

44 I find that having raised it in early 2017 Mr Kyprianou continued to ask the First Claimant to end the arrangement with the Second Claimant. I find based on his oral evidence that Mr Kyprianou had also been concerned about the Respondent's profits levels and identified that the Barclaycard payments were high and he discussed this with Mr Houghton. Mr Kyprianou did not however start a formal investigation (contrary to the assertion on page 183) or ask Mr Houghton to do so but raised it with the First Claimant directly, amongst the other matters Mr Kyprianou was concerned about – see findings below.

45 Mr Kyprianou kept no notes of any of his discussions with the First Claimant about his concerns in the latter part of 2017 and there are no emails. The First Claimant's case was that there were no such discussions at all. I find it unlikely that having realised the arrangement with the Second Claimant had not been terminated and having identified the Barclaycard expenditure that Mr Kyprianou would not have raised at least these two matters with the First Claimant. I find he also criticised the First Claimant about his handling of the Sewing Bee tickets, criticised the First Claimant for contributing to the poor atmosphere and referred to the unauthorised making of the Uniform Pleats mannequin. Mr Kyprianou had been somewhat hamstrung by his friendship with the First Claimant in not dealing with these matters more quickly and effectively (for example by terminating the Second Claimant's arrangement himself or by requiring the return of the Barclaycard) but I find he continued to raise these issues until a final discussion around the end of November 2017 (Mr Kyprianou accepting in his oral evidence that the 12th December date on page 183 was at the time only his best guess at a date). I find that the above issues were not couched in the terms later used on page 183 (theft, lies, tax evasion) because had that been the case Mr Kyprianou would have been unlikely to authorise the New York flight. I find that by not dealing with these matters sooner Mr Kyprianou had not waived any breach because they were serious matters and he continued to raise them.

46 I find that at that final discussion the above issues were again raised. I find that whilst Mr Kyprianou said that the First Claimant could deal with the situation by resigning, the impetus for the First Claimant's departure came from Mr Kyprianou because he put serious allegations to him and then suggested he resign. The First Claimant was therefore dismissed by the Respondent. In practice he was given one month's notice. I find however that this discussion was reasonably civilised because shortly after the First Claimant felt able to ask Mr Kyprianou to cover the flight to New York. This request was also consistent with Mr Kyprianou having offered a resignation route out.

47 However, because Mr Kyprianou had presented his departure as a resignation and the discussion was reasonably civilised, I find that the First Claimant did not understand that he had been dismissed and thought that the final step ie a formal resignation by him, was a matter within his own control. I also find that he was trading on his friendship with Mr Kyprianou and relying on the fact that firstly he did not fact then expressly resign (so he thought that meant he was not going) and secondly on the fact that he thought that Mr Kyprianou would not actually dismiss him (even though Mr Kyprianou had in legal terms already done so). I find that this explains why he carried on as usual during December 2017 and then was a bit surprised to find he had been issued with a P45 dated 20th December 2017 (page 129). It was not however a complete surprise to the First Claimant as claimed because he knew that serious matters had been put to him at the end of November and he knew his departure had been discussed, albeit he thought that the fact he had not expressly resigned meant he was not in fact leaving.

48 Prior to dismissing him Mr Kyprianou had not conducted a formal documented investigation into the above issues and did not hold any formal disciplinary meetings with the First Claimant, although he put the allegations to the First Claimant. He dismissed him but there was no appeal offered. This was procedurally unfair and in breach of the ACAS Code of Practice 2015.

49 The Respondent dismissed the Second Claimant by issuing her with a P45 (page 131). I find that this, as with the First Claimant, did not come completely out of the blue because I find that the First Claimant told her about the prior discussions with Mr Kyprianou and had told her about Mr Kyprianou referring to an end of December departure date. However unlike the First Claimant, Mr Kyprianou had not dismissed the Second Claimant at the end of November 2017 because he had not made serious allegations to her and offered a resignation way out and he had no discussions with her at which she was dismissed. I therefore find that when issued with her P45 dated 20th December 2017 that was the date she was dismissed and she was dismissed with immediate effect. No dismissal procedure had been followed at all and her dismissal was therefore procedurally unfair and in breach of the ACAS Code of Practice 2015.

Relevant law

Dismissal or resignation

50 *East Sussex County Council v Walker 1972 ITR 280 NIRC* held that where an employee is told they have no future with the employer and are invited to resign, that is a dismissal. That is to be distinguished from the situation where the resignation is genuinely voluntary, in circumstances where there is no threat of dismissal if the employee does not resign, but instead that disciplinary proceedings would continue. *Martin v Glynwed Distribution Ltd 1983 ICR 511* decided that the question remains who in fact terminated the employment.

51 *LTE v Clarke [1981] IRLR 166* decided that a termination arises from the employer's acceptance of the employee's conduct as a repudiation of the contract.

Employment of the Second Claimant

52 In the context of the claimed sham arrangement I considered *Autoclenz v Belcher [2011] IRLR 820*, in particular para 23, and the meaning of a sham arrangement (where the sham does not arise because of a difference between the written terms and the reality of the true agreement because this was not a situation where there was a written agreement). I also considered *Uber BV v Aslam [2018] EWCA Civ 2748* which although looking at the situation where there is a difference between the written terms and the reality of the arrangement (and that was not the scenario here, where there were no written contracts), identified the need to look at all the circumstances (in that case including the written terms).

53 *Ready Mixed Concrete v Ministry of Pensions [1968] 1 All ER 433* sets out the tests for employment status.

Wrongful dismissal and counterclaim

54 The relevant law is the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 which provides that a breach of contract claim can be brought if it arises or is outstanding on the termination of employment. The amount which can be claimed is capped at £25,000.

55 In terms of the breach, the focus is on the damage to the employment relationship; acts of dishonesty or other acts poisoning the relationship fell within that but it could also include acts of gross negligence (*Adesokan v Sainsbury's [2017] EWCA Civ 22*).

56 No notice period had been agreed in relation to either of the Claimants. Their employments were therefore terminable on reasonable notice (subject to statutory minimum notice under s86 Employment Rights Act 1996). It was agreed at the hearing that reasonable notice for both was one month (which was what in fact was given to the First Claimant).

Unfair dismissal

57 The relevant law for unfair dismissal is s98 Employment Rights Act 1996 (fair reason and fairness of dismissal) and, in respect of the First Claimant, the test in *BHS v Burchell [1978] IRLR 379* for conduct dismissals, namely that the employer must have a genuine belief that the misconduct has occurred, on reasonable grounds and following a reasonable investigation.

58 The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt* [2003] IRLR 23.

59 The basic award is calculated under s119 Employment Rights Act 1996. The basic award shall be reduced under s122(2) ERA 1996 where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount. There does not have to be a connection between the conduct and the reason the employee was dismissed and conduct which the employer did not know about when it dismissed can be taken into account because any conduct at all can be taken into account (*Optikinetics Ltd v Whooley [1999] ICR 984*).

60 The compensatory award is calculated under s123 ERA 1996 and is such sum as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal in so far as that loss is attributable to the action of the employer. As part of the first 'just and equitable' condition, the Tribunal can take into account gross misconduct even if the claimant has been dismissed for another reason (*W Devis & Sons Ltd v Atkins [1977] ICR 662*). The compensatory award shall also be reduced under s123(6) where the Tribunal finds that dismissal was to any extent caused or contributed to by the claimant and the amount of that reduction is the proportion the Tribunal considers just and equitable.

61 The Tribunal can reduce the compensatory award to reflect the chance that the claimant would have been fairly dismissed in any event, and if so decide when that would have happened (*Polkey v AE Dayton Services [1988] ICR 142*).

Reasons

<u>First Claimant - wrongful dismissal – repudiatory breaches of contract amounting to gross misconduct and counterclaim (breach of implied term of trust and confidence)</u>

62 The Respondent dismissed the First Claimant because in reality it was the Respondent who ended the employment.

63 Taking into account the above findings I find that the Respondent was entitled to dismiss the First Claimant without notice because of the above breaches of contract amounting to gross misconduct (employment of the Second Claimant, personal expenses claimed on the Barclaycard and the Uniform Pleats mannequin). In practice he was given a month's notice in any event.

64 Taking into account the above findings I find that the First Claimant breached the implied term of trust and confidence in the way he used the Barclaycard for personal expenditure without approval and arranged for the Respondent to make the Uniform Pleats mannequin without paying for it which he then removed. In the response to the counterclaim the First Claimant put the Respondent to proof on the relevant issues but I find that the Respondent has discharged the burden of proof in relation to the non-existence of an oral agreement that personal costs could be claimed, that the Uniform Pleats mannequin was made for the First Claimant and he removed it and as to the areas of unapproved Barclaycard expenditure set out above. The loss sustained by the Respondent was the areas of unapproved Barclaycard expenditure set out above (car expenditure (but not petrol), personal travel (flights, food costs at airports, travel insurance, travel agent's fees, DVLA car tax, bus lane usage fine)) and the value of the Uniform Pleats mannequin. I have found that the Respondent has not discharged the burden of proof in relation to the loss in relation to petrol costs because the business petrol costs are mixed up with the personal petrol costs and the Respondent has not put forward a sustainable basis on which the two can be separated.

<u>First Claimant – unfair dismissal</u>

65 Taking into account the above procedural failings I find that the First Claimant was unfairly dismissed by the Respondent because it failed to follow a disciplinary or dismissal procedure with the First Claimant.

66 Taking into account the above findings I reduce the basic award by 100% under s122(2) ERA 1996 on the basis of his conduct. It is just and equitable to do this because of the seriousness of the breaches and the position he held in the Respondent.

67 I find however that even if a fair procedure had been followed that the First Claimant would have fairly been dismissed within 2 weeks for the serious breaches set out above (employment of the Second Claimant and failure despite being asked to terminate that arrangement, the Barclaycard misuse and the Uniform Pleats mannequin).

68 As regards any reduction under s123(6) ERA 1996 for contributory fault, I reduce the First Claimant's compensatory award by 100% because of his contributory conduct.

Second Claimant – wrongful dismissal

69 The Second Claimant was an employee of the Respondent and was dismissed.

70 Taking into account the above findings, unlike the First Claimant, the Second Claimant was not told she was dismissed until 20th December 2017. Mr Kyprianou had not given her a month's notice as he had in practice given to the First Claimant and she was therefore dismissed in breach of contract, without proper notice having been given. The Second Claimant had not committed any repudiatory breach of contract or act of gross misconduct so her dismissal was wrongful. Subject to any arguments about mitigation, the Second Claimant is entitled to damages (net loss of earnings) for her notice period. That notice period was said to be one month but that is subject to any further arguments under s86 ERA 1996 as regards any previous period of continuous employment at Eastman Staples under s231 ERA 1996 which would mean that one month is insufficient and that statutory minimum notice is longer than one month.

Second Claimant – unfair dismissal

71 Taking into account the above procedural failings I find that the Second Claimant was unfairly dismissed by the Respondent because it failed to follow a disciplinary or dismissal procedure with the Second Claimant.

72 The calculation of the Second Claimant's basic award depends on the issue (if there is one) under s231 ERA as affecting the relevant period of her continuous employment. I make no reduction to the basic award under s122(2) ERA 1996 on the basis of her conduct, taking into account the above findings.

73 I find however that even if a fair procedure had been followed that the Second Claimant would have fairly been dismissed within two weeks of when her employment was terminated either for some other substantial reason (the contract with her having been wrongfully set up by the First Claimant in the first place, there being no need for her to be

employed) or redundancy (the Respondent had no business need for her to do the work she was doing). However, that two weeks loss of earnings is recovered under the losses in the wrongful dismissal claim because she cannot get the same loss twice.

74 I make no reduction under s123(6) ERA 1996 to the compensatory award for contributory fault because although naïve and appearing be under a misapprehension that what the First Claimant had set up was a legitimate business arrangement, the Second Claimant was not the one submitting the claims for personal expenses on the Barclaycard (although she probably knew about them) and was not involved in the Uniform Pleats mannequin.

75 A remedy hearing has been booked for **22nd March 2019** should one be necessary but the above findings may assist the parties to reach an agreed figure on the compensation and the counterclaim. They are asked to notify the Tribunal as soon as possible if that hearing is no longer required or, given the relatively short gap between the hearings, if they need more time to try to reach an agreed figure.

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Employment Judge Reid
Dated: 21 February 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE