+RM

EMPLOYMENT TRIBUNALS

Claimants: **Mr K Hayler**
Ms S Bretherton

Respondent: **Annecto UK Limited**

Hearing: **24th and 25th January 2019**

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

Representation

Claimants: **Ms Coyne, Counsel (instructed by Birketts LLP)**

Respondent: **Mr Caiden, Counsel (instructed by Tandon Hildebrand)**

RESERVED JUDGMENT

1. **The First Claimant and the Second Claimant were not wrongfully dismissed by the Respondent and each of their claims for wrongful dismissal are dismissed.**

2. **The First Claimant and the Second Claimant were each unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996. Some relevant findings of fact regarding compensation are set out below.**

3. **The Second Claimant's claim for 3 days' unpaid holiday pay under Regulation 14 Working Time Regulations 1998 was conceded by the Respondent. The First Claimant's claim for unpaid holiday pay was withdrawn and is dismissed.**

4. **Remedy hearing already booked for 18th April 2019.**

REASONS

Background

1. The Claimants were employees and directors of the Respondent until May 2018 when they were both dismissed. They had also previously been shareholders of the Respondent until July 2016 when they sold

their shares to Jetpay Solutions Limited (Jetpay) a company ultimately owned by Mr Trent Voigt who is based in the US. Mr Voigt is also a director of the Respondent. The Claimants also live together as partners.

2. The Claimants brought claims for unfair dismissal, for wrongful dismissal and for unpaid holiday pay on claim forms presented on 6th August 2018. The unfair dismissal claim was later conceded by the Respondent in respect of both Claimants. The First Claimant's claim for holiday pay was withdrawn and it was agreed by the Respondent that the Second Claimant was owed 3 days' unpaid holiday pay.

3. There was an agreed list of issues, subject to three issues on which there was not agreement, identified on page 2 of the list. In relation to the first issue (para 4(2) (ii) consultancy fees) I allowed an amendment to the Respondent's ET3 to include this allegation. In relation to the second issue (para 4(2) (iii) sending business to another company) I did not allow the amendment to the ET3. In relation to the third issue (para 4(3) (ii) not retaining signed copy of contract) I decided that no amendment to the ET3 was required to include this allegation. I gave reasons orally at the hearing for these decisions.

4. There are ongoing county court proceedings between the parties which I was informed have been stayed pending these claims being decided. The proceedings are a claim by the Claimants regarding what they say they are owed from the Respondent's Directors' Loan Account and a counterclaim by the Respondent claiming damages for breach of directors' duties.

5. There was a 3 volume bundle up to page 1062. I heard oral evidence from Mr Trent of the Respondent, from both of the Claimants and from Mr Simon Tucker former Finance Director of the Respondent between March 2014 and December 2015. The Respondent did not call Mr David Wyllie, Finance Director of the Respondent from June 2016 to date.

6. I notified the parties at the beginning of the hearing that I had a past connection with the Claimants' solicitors, Birketts, because that firm had advised me in relation to two (non-employment) personal legal matters, the most recent being around 18 months ago regarding drafting of a new will and prior to that around 8 years ago. I gave the parties time to consider this and they all confirmed that they did not wish to make any applications for recusal.

7. The hearing did not finish until 545pm on the first day to enable Mr Voigt's evidence to be completed as he had a flight to catch the next morning and until 545pm on the second day to avoid the parties having to return another day. I was assisted by the parties' and their representatives' co-operation in this. I was provided with written submissions on both sides and heard oral submissions at the end of the second day, including in relation to *Polkey* and contributory fault, though remedy was left to be determined at the remedy hearing.

Findings of fact

Ownership of the Respondent and the Claimants' role in the Respondent

October 2012 to November 2014

8. The Claimants set up the Respondent in October 2012. They lived together as partners as well as being business partners at this stage and continue to live together. At this stage they were each a 50% shareholder in the Respondent and the First Claimant was also an employee. Both were also directors of the Respondent though the Second Claimant did not take a day to day role in the business until July 2014 when she started employment as office manager (later to become HR Director and also at the time of dismissal, acting Head of Operations) and entered into an employment contract with the Respondent (page 660, later version of original 2014 contract). Between October 2012 and September 2014 the business was the Claimants' own business and in terms of acting in the best interests of the Company theirs were the only shareholders' interests they needed to consider.

November 2014 to July 2016

9. In November 2014 the Claimants entered into an Investment Agreement (page 135) with Mr Voigt's company, Jetpay Solutions LLC, as part of a re-financing of the Respondent involving a number of loans to the Respondent, in return for which Jetpay Solutions LLC acquired an initial shareholding in the Respondent. By the time of dismissal that shareholding was held by Jetpay Solutions Limited (TV para 1.1-1.3). Mr Voigt and the First Claimant gave varying accounts of the extent of the Jetpay shareholding during this period (Mr Voigt saying he initially obtained around a 33% shareholding and the First Claimant saying it started at around 12% but then increased to around 30%). In any event I find that during this period Jetpay was a shareholder to the extent that it acquired a significant shareholding. During this period the Claimants as directors of the Respondent were therefore under a duty to also take account of other shareholders' interests and not just their own as they were no longer the only two shareholders. They also had to take into account, as part of acting in the Respondent's best interests, of the interests of employees of the Respondent. The Investment Agreement (page 143) (clause 6) expressly imposed an obligation on the Claimants to promote the company's best interests. Taking into account the findings set out below about the personal costs they claimed from the Respondent and the various explanations they gave in their witness statements, I find that they did not understand or accept that things had changed as they were no longer the only shareholders. They still saw the Respondent as their business.

10. As at June 2016 the First Claimant's salary was £130,000 pa and the Second Claimant's was £50,000 pa (page 627). In the early years of running the business together they had taken much lower salaries despite working long hours and sought to make up the difference to an extent in the way they routed certain personal costs via the Respondent

– see findings below. They had also however from time to time used their own money in the business (Directors Loan Account page 43A) and given personal directors' guarantees which they felt reflected that it was in some ways a two way street. They accepted that they had 'blurred the lines' between company expenditure and personal expenditure (KH para 88, SB para 29). I find however the fact they felt justified in dealing with matters in this way does not detract from the issue as to whether they breached their obligations as senior employees of the Respondent.

July 2016 to May 2018

11. In July 2016 Jetpay acquired their remaining shares from the Claimants (TV para 1.3). Their percentage shareholding in the Respondent had been reducing since November 2014 and now ended. They were both still employees and directors of the Respondent and their duties as directors continued to be to act in the best interests of the Respondent, the only relevant shareholder interests to be taken into account now being Jetpay's. They also still had to take into account the interests of employees.

12. The First Claimant at this stage entered into a Service Agreement with the Respondent (page 241). His duties and obligations were set out in clause 4 (page 244) including to abide by his legal duties ((d)), to comply with reasonable directions ((i)), to report to Mr Voigt ((j)), to report his own wrongdoing ((k)) and to promote the business ((i)). The Agreement set out non-exclusive grounds for summary termination (clause 16, page 250-251) and stated that any delay in exercising a termination right did not constitute waiver by the Respondent.

13. I find that even though the external shareholding was now 100% the Claimants still behaved as if the Respondent was still their own business. They were also still seeking to 'recoup' some of what they felt they were owed by the Respondent due to their past efforts – see findings below.

14. I find that Mr Voigt became increasingly dissatisfied with his investment and with the Claimants after acquisition of the Respondent's shares .I find taking into account his oral evidence, that he was particularly annoyed about not having known that there was a liability to HMRC for unpaid PAYE for around £250,000 (TV para 2.12, corrected figure at the hearing). He was also increasingly frustrated at the First Claimant's sales forecasts and that limits he said he had put on expenditure were not being adhered to by the First Claimant (see findings below) at a time when the Respondent needed further injections of cash from Jetpay. The Respondent did not however dismiss the First Claimant for poor performance or start any performance procedure or performance plan.

15. I find that Mr Voigt did not have an understanding of UK employment law taking into account the way he handled certain aspects of the Claimants' employment and later dismissal. This lack of understanding was to affect the way in which he communicated with the Claimants over various matters, as to which see findings below.

Mr Wyllie and his diary

16. Mr Wyllie (Finance Director) kept a diary of his work at the Respondent starting on 13th June 2016 when he started work (page 190A onwards). After only one week he had formed the view that the Claimants were on an 'ego trip' and that it was a lifestyle business (page 190A). From then on his extreme dislike of the Claimants (and it appears of many other people) is apparent from the diary including referring to the First Claimant a 'c$%t' (page 190M), calling them 'dumb shits' (page 190S) calling the First Claimant a 'stupid turd' (page 190T) and both of them 'F@*cking twats' (page 190T). Throughout the diary he is also repeatedly highly critical of both the Claimants' performance on particular issues in often offensive terms. I find this to be a very bitter and angry account. Because of the toxic nature of the diary, it does not follow that what Mr Wyllie was recording as happening is necessarily what was actually happening but if there are events Mr Wyllie was aware of which adversely affected the Claimants (or reflected badly on them), it is likely he recorded those events (or his perception of those events) because he did not like the Claimants.

17. It was suggested at the hearing that the reference in his diary to Mr Voigt needing Mr Wyllie's 'eyes and ears' (diary page 190U) was the start of a sinister thing (when read in conjunction with later entries) suggesting that Mr Wyllie was in some way starting to adversely and malignly influence Mr Voigt's opinion of the First Claimant. I find however that this comment arose due to the concerns about expenditure and most significantly not being able to run the payroll (entry 27th February 2017) and was not evidence that Mr Voigt had asked Mr Wyllie to be his 'mole' on the ground to feed him only negative things about the Claimants. In any event the Respondent conceded unfair dismissal.

18. Likewise, it was suggested that the comments towards the end of the diary showed that Mr Wyllie was somehow involved in a pre-determined plan to terminate the Claimant's employment (page 190AL 'the wheels are in motion', page 190AS ' they don't have a f'@cking clue', page 190AT 'the dice has been cast', page 190AU 'today was the day!'). I find however that what Mr Wyllie was getting at on page 190AL was the then proposal that the Claimants might buy the shares back from Jetpay and the subsequent discussions culminating in a visit in May 2018 by potential Bulgarian investors. I therefore find that Mr Wyllie was somewhat gleeful at the prospect that their offer to re-purchase the Respondent was likely to fail and that that in practice this would probably mean their departure from the Respondent. However I do not find that this was part of a plan he had with Mr Voigt as regards the Claimants' dismissal as it was Mr Voigt finding out in April 2018 that the First Claimant's salary had not been reduced (see findings below) that was the trigger for the First Claimant's dismissal and then the Second Claimant's dismissal.

19. Mr Wyllie was not called as a witness by the Respondent (though he attended the hearing) so could not be asked questions about his role at the Respondent and about what he recorded in his diary. Given he was

Finance Director of the Respondent from June 2016 he would have been likely to be a witness with relevant evidence about how the sales forecasts sent to Mr Voigt were reached (because although sales being the First Claimant's particular expertise it is likely that there would have been some finance input to those figures and how they were monitored after forecasts were given) and to what extent any capital expenditure controls put in place by Mr Voigt were being adhered to by the Claimants.

Salary reduction discussions summer 2017

20. Mr Voigt met with both Claimants in around July 2017 to discuss reduction of their salaries and a performance related bonus element being introduced (TV para 2.15). Nothing was in fact agreed (page 923) though there were discussions about the terms of the performance related element (page 38-39).

21. Mr Voigt met the Claimants again in August 2017 for further discussions (TV para 2.16). The Second Claimant did not agree to any change (SB para 12) consistent with page 40 which only refers to the First Claimant in the email title and page 279 which only refers to the First Claimant. Matters as regards the First Claimant were however left more ambiguous. I find he said at the meeting that any change could be with effect from 1st January 2018 which I find him to be trying to give the impression that he was prepared in principle to consider a reduction and new bonus arrangement. The Claimant's case was however that he had not ultimately agreed to the salary reduction because his agreement at the meeting was conditional on agreeing the detailed terms of the bonus element. I find that rather than going back to Mr Voigt after the email (attaching the scheme's details) and telling him that it was not in fact agreed for this reason and that he would not therefore sign the memo at page 279, the First Claimant kept quiet. I find he was aware that clause 26.1 of his Service Agreement (page 254) required that any changes had to be in writing and signed by both parties, taking into account the promptness with which he raised that issue the day after he was dismissed (page 49). I find that had Mr Wyllie been aware that there was an agreed reduction he would have recorded this in his diary and I therefore find he was not informed of it by Mr Voigt and that it did not crop up in any discussions until April 2018. I therefore find that whilst the First Claimant had given the impression he was going along with the bonus idea he was aware that it needed his agreement and that that agreement needed to be recorded in writing and signed. He did not agree the change but did not tell Mr Voigt that he was not agreeing to it but kept quiet. Mr Voigt had been left with the possibly understandable impression that it had been agreed (taking into account the First Claimant's proposal of a start date of 1st January 2018) but in legal terms it had not, because not in writing and signed by both parties. However because the First Claimant had kept quiet and said nothing, Mr Voigt lost confidence in him when he ultimately found out in April 2018 that the salary had stayed the same – see findings below.

Sales forecasts and restrictions on spending

22. The First Claimant accepted that the sales forecasts he sent to Mr Voigt were not born out by the actual sales achieved. Whilst Mr Voigt was extremely frustrated by this and they may not have been soundly based by some considerable margin when comparing with actual sales achieved (TV para 2.4) I do not find them to be the 'lie' Mr Voigt claims them to be.

23. Mr Voigt said he had initially imposed a spending limit of £5,000 (TV para 2.10) though did not say when this was first put in place. Although I accept that Mr Voigt did much of his business dealings on the phone and in person and did not send the number of emails which might be expected of someone in his position (and working with that time difference), there was no email to either the Claimants or to Mr Wyllie (or a note of a call with them) confirming this specific limit. As Finance Director Mr Wyllie would have been an obvious person to specifically notify of this limit and yet there is no mention of such a limit in his diary though he often criticises the Claimants' spending (see eg page 190W). Mr Voigt made no mention of this initial limit in May 2017 (page 23) when later proposing a complete ban on new spending without prior approval. Had Mr Wyllie been informed of such a £5,000 limit, given the nature and tone of his diary, he would have recorded the Claimants as exceeding it. I therefore find that there was no specific instruction from Mr Voigt to the Claimants to limit capital expenditure to £5,000. However I find that subsequently in October 2017 (page 41) there was an instruction that from henceforth any expenditure at all required approval (TV para 2.10). Whilst the First Claimant was not copied in to that email and Mr Wyllie did not mention anything in his diary around this time about this (page 190Y) I find taking into account the existence of the October 2017 email at page 41 and Mr Wyllie's previous May 2017 email at page 23 (recommending that complete restriction) that the complete restriction was imposed. I find it likely that Mr Wyllie passed it on to the Claimants because given the tone of the diary and his criticisms of the Claimants' spending, he would have been pleased that the specific approval was now required for everything, as vindication of his own views expressed (at page 23) in May 2017 that approval be required for all spending.

Discussions March 2018

24. Mr Voigt met with the Claimants in early March 2018. He was still dissatisfied with the way the Respondent was going and increasingly concerned about the First Claimant's performance in particular (TV para 2.19). He purported to end the First Claimant's 6 month notice period by giving him 6 months' notice under the Service Agreement but without ending the employment (page 44) and tried to replace it without the First Claimant's agreement with 'employment at will' which is a concept which does not exist in UK employment law. This was all legally ineffective. Despite his concerns about the First Claimant's performance Mr Voigt did not terminate the First Claimant's employment at this point.

25. It was claimed in Mr Voigt's oral evidence that he raised her possible

departure with the Second Claimant at this stage and advised her she should start looking for another job because unless things improved, changes would be needed. The ET3 said that redundancy had been raised a number of times (ET3 para 20) before May 2018 but given Mr Voigt's lack of knowledge of employment law I find he did not express this as a potential future redundancy but as something much more vague, consistent with the Second Claimant's oral evidence that nothing about a possible redundancy was discussed at this time. Although Mr Wyllie had appeared pleased in June 2017 (page 190X) that Mr Voigt was contemplating the Second Claimant's departure, it is not suggested that anything was actually discussed with her at that time.

26. It was alleged that it was after this conversation that the Second Claimant changed her contract so that she had a longer notice period of 6 months (ET3 para 18). The Respondent referred to page 1061 in this respect as showing her contract was modified on 22nd March 2018. The Second Claimant's explanation was that she had set up a new computer the day before (page 1062) and that this may explain why her contract appears as modified on 22nd March, as part of that set up process transferring documents over. I find that the data about the contract on page 1061 gives three dates and times ie create date, last printed date and last modified date. These are all 22nd March 2018. The last printed time is shown as 15.45 which is before the last modified time of 15.46 and it is unlikely that the Second Claimant, if worried about her future and changing her notice period, would have printed it before changing it – the logical thing to do would have been to change it and then print it so that she had a copy. In the absence of any expert IT evidence that this document shows that the contract was in fact amended as claimed on 22nd March 2018 I find it is more likely that the appearance that the document was modified on this date is more explicable by the previous day's set up of the new computer and the transfer over of files as a result of that or by some other explanation.

27. I find that the Second Claimant's contract was physically amended by her to include a six months' notice period in 2016. I find based on her oral evidence that when this change was made she did not physically date the change but left the contract as dated 2014, only changing the notice period clause. I find she did not retain a signed copy of her contract in her own file and did not update the Respondent's Breathe HR system (to which only she had access) to show the increase to her notice period. This was particularly poor as she was not only HR director of the Respondent but should have acted in a more transparent way documenting what was happening. Further this increase was at a time when Jetpay was a minority shareholder in the Respondent (but before it acquired 100%) and yet in her oral evidence the Second Claimant said she had not thought at the time to discuss the change with Mr Voigt, demonstrating that she did not understand that he had any say in the matter or that it should be approved or that something like an increase to a director's notice period should be done in an open, approved, documented and transparent way. She also failed to properly record the First Claimant's notice period on Breathe HR because it was 6 months (page 244) and the system instead showed one month (page 696).

Taken in the round I therefore find that the Second Claimant breached her duties to the Respondent in changing her notice period in 2016 (even if the First Claimant agreed with it) and by not keeping proper records on what was an important matter. She also breached her obligations by not keeping a proper record on Breathe HR of the First Claimant's notice period. Notice periods for directors are not trivial matters and it again demonstrated that both Claimants failed to appreciate or accept that they no longer wholly-owned the Respondent.

28. I find that in March/April 2018 the Claimants were having discussions with the Respondent about buying back their shares in the Respondent (KH para 40). These discussions did not go anywhere as they were too far apart in relation to price. I find that as a result of this Mr Voigt chose not to tell the Claimants in advance about his visit in May 2018 with some potential Bulgarian investors (see findings below).

The Claimants' dismissals

29. Mr Voigt found out that the First Claimant's salary had not been reduced in April 2018 (TV para 2.20). Whilst the First Claimant had not legally agreed to the change (by instead keeping quiet and relying on not having signed anything), it was nonetheless a matter which resulted in a breach of confidence in him because of the oral agreement Mr Voigt thought they had. It was suggested that because the First Claimant was sending Mr Voigt regular updated figures for staff costs that the fact the reduction had not been made would have been obvious to Mr Voigt much sooner than April 2018 (pages 750, 757, 1021,930). However given the staff costs are expressed as a total and given Mr Voigt's understanding that an oral agreement had been reached I find that it was reasonably not immediately apparent to Mr Voigt that the reduction had not been made.

30. The Claimants were on holiday from 12th May 2018. The First Claimant notified Mr Voigt of this the day before (page 1051) sent at the very end of the UK working day. This was in stark contrast to his previous approach (page 41) to give much more notice of holiday. However, neither had Mr Voigt told the Claimants that he was arriving in the UK for a visit the following week so neither side were being particularly co-operative with each other. Mr Voigt left a blunt post it note for the First Claimant (page 558) criticising him for the late holiday notification and for taking holiday when the business was not doing well. The Claimants found out about the visit while they were on holiday.

31. On their return from holiday I find that Mr Voigt dismissed the First Claimant with immediate effect in a phone call on 21st May 2018 (TV para 2.22). He told the First Claimant that the First Claimant had been disruptive on his return from holiday and was being dismissed because he had 'embezzled' funds by not implementing the January 2018 salary reduction (TV para 2.20, KH para 47-48). The First Claimant asked for evidence of the claimed agreement to the salary reduction (page 49). The principal reason the Claimant was dismissed on 21st May 2018 was therefore because he had not implemented the salary reduction, which Mr Voigt thought had been agreed.

32. I find that Mr Voigt did not speak to the Second Claimant that day. I find that he however asked the First Claimant that they both leave the building and take their personal belongings with them ie expecting that instruction to be passed on to the Second Claimant. In respect of the Second Claimant it was inconsistent to later offer her a sales role as had that been the plan there would have been no need to remove her personal belongings at that stage or remove her access to the IT system (page 28). I find that Mr Voigt was in a state of some confusion as to what he was doing as regards the Second Claimant. The First Claimant interpreted the conversation as meaning the Second Claimant was also being dismissed with immediate effect for redundancy which was how the Second Claimant interpreted it (SB para 15), sending a confirming email the next day (page 628) to Mr Voigt. Mr Voigt did not respond and tell her that she had misunderstood the situation and that he had not dismissed her with immediate effect the day before. Mr Wyllie also did not correct her on this issue in his email on 23rd May 2018 (page 633). Meanwhile, Mr Voigt had sent an email to all staff (page 1053) referring to both of their 'departures' and saying that he had asked both to leave the company. This email was consistent with an immediate termination of both Claimants, though he sought in his oral evidence to explain the reference to 'leave the company' in relation to the Second Claimant as meaning leave the building not that the employment had been terminated. He however used the same terminology for both Claimants in the email to staff and he had dismissed the First Claimant with immediate effect. His oral evidence changed from saying he had dismissed her on 21st May 2018 to that he hadn't. He also accepted that he had 'messed up'. On 30th May 2018 he wrote to her putting her on garden leave from 22nd May 2018 (page 636). On 8th June 2018 he wrote to her saying she had been dismissed on 21st May 2018 (page 652). Looking at all this in the round I find that the Second Claimant's employment terminated with immediate effect on 21st May 2018 because a clear message was sent to her to leave immediately with the First Claimant; whether or not that is what Mr Voigt intended to do (or thought he was doing) is not relevant because the Second Claimant reasonably interpreted the instruction to leave immediately and take her personal belongings as an immediate termination, in circumstances where the First Claimant's employment was terminated with immediate effect. What Mr Voigt sought to do after the event was back track and try to present the situation as being that he had not dismissed her with immediate effect on 21st May 2018 but had merely said she would be made redundant. Alternatively he did not understand that what he had already done on 21st May 2018 was dismiss the Second Claimant with immediate effect. I therefore find that the effective date of termination for the Second Claimant was 21st May 2018 even though she was paid to 31st May 2018 (and even though that is the termination date she put in her ET1). The 31st May date was somewhat arbitrarily imposed after the employment had already terminated because nothing in fact happened on 31st May which could have amounted to a termination on that date. The Second Claimant reasonably interpreted an instruction to leave the building and take her belongings (albeit conveyed indirectly to her via the First Claimant) as an immediate dismissal when considered in the context that the First Claimant was in

fact being dismissed with immediate effect and no distinction was made between them at that time. Although the Respondent has conceded unfair dismissal, I find the principal reason for her dismissal at the time was her connection to the First Claimant who was being dismissed because he had failed to implement the salary reduction. Redundancy was therefore not the principal reason for dismissal of the Second Claimant.

Claimed repudiatory breaches of contract and gross misconduct– wrongful dismissal claim

33. I find that both the First Claimant and the Second Claimant acted in repudiatory breach of their contracts of employment (taking into account they were the most senior employees and were directors owing statutory and fiduciary duties to the Respondent) in relation to the following personal costs/payments which they caused the Respondent to pay without approval from the Respondent (save in respect of personal fuel costs which I find to be the only grey area). The First Claimant was also in breach of the express duties set out in his 2016 Service Agreement (see findings above) and the breaches were also in the context of the Investment Agreement obligation on both Claimants to promote the Respondent's best interests. These amounted to acts of gross misconduct. The effect of the payments was to put their personal interests in priority to other employees' salaries. These are repudiatory breaches whether taken individually or together. The costs were claimed after they ceased to be 100% shareholders in the Respondent in 2014 and the fact that most were pre 2016 before Jetpay acquired 100% of the Respondent does not mean they were not serious breaches. The fact that the Claimants did not take extra steps to cover up the payments is consistent with their view that the Respondent was still theirs, even though after 2014 it wasn't. The following matters (save in relation to the First Claimant's salary non-reduction) were issues discovered by the Respondent after their employment had terminated (TV para 2.29, page 80) and could not therefore have been affirmed by the Respondent. As regards payments already stopped earlier by Mr Wyllie (the cleaning costs) Mr Wyllie did not have authority to affirm that breach. I find that given they lived together and worked closely together that the Second Claimant was aware of the payments only made to the First Claimant.

34. Because there is no counterclaim in this claim against the Claimants I do not make findings on each and every item of expenditure they incurred on the Company credit card or their own credit cards (though the First Claimant has provided a detailed analysis page 574D).

35. The only two employees who were signatories on the Respondent's bank account were the Claimants. They were therefore in a particular position of trust as no-one else (eg the Finance Director) could activate payments out of the account (ST para 3).

Both Claimants

Payment of personal bills

36. In July 2015 the Second Claimant processed payment by the Respondent of the First Claimant's personal self-assessment tax bill (page 313,314). The Second Claimant said she did not 'benefit' from this transaction (SB para 28) but she was the one who approved the payment (page 314) and it saved the household a cost.

37. In February 2015 the Claimants caused the Respondent to pay for their council tax bill for their home address (page 317,318). Both benefitted from this.

38. In May 2015 the Claimants caused the Respondent to pay for their water bill for their home address (page 321,322). Both benefitted from this.

39. In October, November and December 2015 the Claimants caused the Respondent to pay for gardening costs at their home address (page 391,392, 394,395,396). Both benefitted from this.

40. Prior to and during the period between July 2016 and December 2016 the Claimants caused the Respondent to pay for cleaning costs at their home (page 649). Both benefitted from this. The Second Claimant promptly after dismissal offered to pay for these (page 649, July-December 2016 costs) but that does not mean that there had not been a past breach in claiming these costs, including prior to July 2016. They did not only become unjustifiable after Jetpay acquired 100% of the shares (KH para 63) because Jetpay was already a shareholder before it acquired 100%. Whilst this was a matter identified in around December 2016 by Mr Wyllie (page 190Q) who stopped the arrangement, the Claimants nonetheless did not repay even for the period July to December 2016 which they now accept they should have done. Taking into account Mr Tucker's oral evidence, I find that his view was that although the cleaning costs might be a 'grey area' in terms of costs incurred for example occasionally when working long hours and thus spending little time at home, he concluded it would not be a reasonable expense if paid regularly over a period without consideration of the relevant circumstances at the time (an obvious example being if on holiday so not at work). I therefore find that he would not have advised them that all these costs were costs which could legitimately be paid for by the Respondent in tax and accounting terms. In any event the costs had not been approved. Although Mr Wyllie stopped the arrangement that did not amount to affirmation by the Respondent and waiver of the breach because Mr Wyllie did not have authority to do so. In addition, the Claimants still did not repay the Respondent, even by then knowing the arrangement was not justifiable at least in accounting terms. In any event the payments had never been approved.

41. I find that it should have been clear to the Claimants that these items of expenditure were not properly payable by the Respondent and that specific approval was needed. Whilst they sought to argue that there was

a 'blurring' of Company and personal expenditure or that these were innocent errors (SB para 29, KH para 72) it should have been obvious to them that the above items were entirely personal matters and not something to be paid for by the Respondent (without obtaining specific prior approval which would not have been given).

42. Both also sought to argue that the payments were in effect in return for working long hours and drawing a lower salary (KH para 61, 67 SB para 29) but that sense of entitlement that they were 'owed' extra for their work (evident from pages 474M and 474AT) and a lack of understanding that things had changed in 2014 (when they ceased to own the Respondent 100% between them) does not make arranging for personal payments to be met by the Respondent any less of a breach of their obligations as senior employees of the Respondent.

43. Both also sought to argue that the payments had been approved and processed by the Finance Director at the relevant time (SB para 29, KH para 60) or were errors (KH para 83). The Claimants owed duties to the Respondent as senior employees (taking into account they were also directors) and the fact that members of the finance team processed payments does not detract from those duties or the breaches in putting forward those items for payments by the Respondent without approval in the first place. If there was no approval, the tax or accounting treatment of the payments was not relevant as the approval has to come first. It was not the role of the Finance Director to approve payments (ST para 3). A number of the above payments were made during Mr Tucker's tenure as Finance Director and he accepted in his oral evidence that certain of the payments (council tax, water bill, non-business flight costs and self –assessment tax bill) did not meet his principles identified in para 4 of his witness statement and that any consultancy fees paid to the First Claimant would not be properly payable to him if they overlapped with his salary and therefore were not in return for additional work not already covered by his salary and that they would need Board approval. I therefore find that the Claimants' explanations that they relied on advice from the finance team and that they were not alerted to the payments not being properly payable does not justify the payments they arranged to be made. In particular I find it not credible that any Finance Director would have in particular given the impression that a payment of a personal tax bill was in any way appropriate.

44. Personal guarantees, directors' loans to the Respondent by the Claimants and easing cash flow by making some Company payments themselves was also given as a reason to justify the payments (KH para 68,70, SB para 33). This is a sort of 'offsetting' argument that things went both ways and that this should be taken into account including the amount outstanding on the Directors' Loan Account as at termination (page 43A). However I find that whilst the Claimants assisted the Respondent's finances in these ways they were at the same time committing the above repudiatory breaches of contract and whether or not they also made personal sacrifices does not detract from those breaches and mean they are no longer breaches. It also does not turn them, given the nature of the payments, from being serious breaches into

being some lesser form of breach of contract.

Credit cards

Company credit card

45. The allegation was that the Claimants used the corporate credit card for personal expenditure. I find that the card was used for personal flights to Bergerac in June 2015 (page 365) and was not as claimed agreed by Mr Tucker (entry page 574F) because Mr Tucker's evidence was clear that he did not approve payments and payment for such a cost would not have been in line with his second principle as set out in para 4 of his witness statement. Both Claimants directly benefitted from this payment as they were flights for both of them.

46. It was also claimed by way of example that some expenditure regarding the First Claimant's car in July 2015 was wrongly paid for using the corporate credit card (page 304). I find based on Mr Tucker's oral evidence that he might have agreed at the time in accounting and tax terms that the costs were justifiably reclaimable from the Respondent (because of the extent to which the First Claimant was using his car for work purposes at that time and the need for him to have a car in good condition) but he did not give approval because on his own account that was not something he did. In any event however the payments were made without approval even if Mr Tucker did agree that for accounting and tax purposes they were justified. The Second Claimant indirectly benefited from this because it was one less cost for the household.

47. It was also claimed that the Claimants had claimed personal petrol costs by paying for all their petrol using the company credit card ie mixing up business petrol costs which were reclaimable with personal costs which were not. The First Claimant accepted that some costs were wrongly paid on the company credit card (KH para 61). I find that this was the only area in which the Claimants' explanation of 'blurring' the lines between the business related and the personal is slightly understandable because the car was being filled up for both purposes and the First Claimant did not separately claim business fuel costs (KH para 61). Given the matter was discovered and put right for 2016 (KH para 62) I find this not to have been a serious breach of contract by the Claimants.

Personal credits cards – payment of credit card bill by the Respondent

48. The First Claimant accepted that there were some payments on his personal credit card that he should not have caused to be paid by the Respondent (KH para 67). He sought to justify it as being in return for taking a low salary but this sense of entitlement does not mean that this was not a serious breach. The Second Claimant indirectly benefited from this because it was one less cost for the household.

The First Claimant

Reduction of salary

49. Taking into account the above findings as to the circumstances of the claimed agreed reduction I find that the First Claimant not implementing a salary reduction he had not agreed to in legally binding terms was not a serious breach of contract by him. It did however result in a significant loss of confidence in him because although Mr Voigt was wrong to assume it was a legally binding variation (because not in writing and signed) he nonetheless thought he had an oral agreement with the First Claimant and the First Claimant deliberately kept quiet about his lack of agreement. I therefore find that the failure to implement the salary reduction was not a serious breach of contract by the First Claimant, although in practice it lead to the final breakdown of the relationship with Mr Voigt and was the reason for dismissal at the time of dismissal.

Consultancy fees

50. It was not suggested by the First Claimant that he had done any extra specific work at the time of the invoices which justified the payment of consultancy fees but rather that they were justified because they were a 'recoupment' for a lower salary for the previous two years (KH para 64). I find that this too was made without approval and whilst Charlotte Smith (KH para 64) may have suggested a mechanism to do this in accounting terms, she was not authorised to approve such payments. The First Claimant was in serious breach of contract in causing the payment of additional remuneration to himself. The Second Claimant indirectly benefited from this because it increased the household income.

The Second Claimant

Creation of new employment contract

51. Taking into account the above findings as regards the change to her notice period in 2016 I find that the Second Claimant was in serious breach of her contract in 2016 in failing to obtain proper Board and shareholder approval for an increase to her notice period from a relatively short notice period to a much longer one and in changing her 2014 contract accordingly to show the new notice period of 6 months. Although the change was not necessarily legally binding (because not signed on behalf of the Respondent) she was nonetheless in effect representing that her notice period was now 6 months by changing that clause and did not record accurately when this was done as she left the contract dated 2014. However I have found that she did not make the change in March 2018 as claimed.

52. As regards the other allegation that she breached her contract by failing to retain a signed copy in the Respondent's files , I find that to be negligent taking into account her role as HR Director with particular responsibility for staff matters, particularly as it was important to show she herself was being transparent.

Relevant law

Wrongful dismissal

53. 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.

54. There is a right to terminate the employment without notice where an employee commits an act amounting to a repudiatory breach of contract or gross misconduct, even if that act is not discovered until after the employment was terminated, provided the breach is not affirmed (*Boston Deep Sea Fishing v Ansell [1888] 39 ChD 339*).

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*).

Unfair dismissal

56. The Respondent conceded unfair dismissal in relation to both Claimants (list of issues para 3(2)). Neither Claimant claimed reinstatement or re-engagement.

57. The effective date of termination (the EDT) is defined in s97 Employment Rights Act 1996. Where no notice is given it is the date the termination takes effect. It is a statutory construct and considers the reality of the situation not what the parties agree to be the EDT, think was the EDT or subsequently decide to make the EDT (*Heaven v Whitbread Group plc EAT 0084/10*, *Horwood v Lincolnshire CC EAT 0462/11*). The final date the employee is paid until is therefore not necessarily the EDT.

58. The basic award is calculated under s119 Employment Rights Act 1996. The parties agreed the calculation of the basic award (before any reductions) (list of issues para 10). 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*).

59. 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.

60. 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

Wrongful dismissal claims

61. Taking into account the above findings of fact, both the First Claimant and the Second Claimant committed repudiatory breaches of their employment contracts, being acts of gross misconduct justifying their dismissal without notice. The actions set out at paras 33-46,48, and 50-52 above (whether considered individually or taken together) destroyed the relationship of employer and employee (*Adesokan*) taking into account they were senior employees and directors of the Respondent. The payment in particular of the First Claimant's self-assessment tax bill would on its own have been sufficient a breach to amount to gross misconduct by both Claimants given it was the First Claimant's personal tax liability and it was the Second Claimant who processed it.

62. The First and Second Claimant are therefore not entitled to damages for breach of contract because the Respondent was entitled to dismiss them without notice.

Unfair dismissal claims

The Second Claimant's EDT

63. Taking into account the above findings of fact, the Second Claimant's EDT was 21st May 2018 because that is the date her employment was in fact terminated by the Respondent.

Basic award

64. Taking into account the above findings of fact, I find that the basic award for both Claimants falls to be reduced by 100% under s122(2) ERA 1996 on the basis of their conduct. It is just and equitable to do this because of the seriousness of the breaches and the positions they held in the Respondent. This means that no basic award is payable to either Claimant.

Compensatory award

65. Taking into account the way in which Mr Voigt approached the dismissals and the very abrupt way their employments were terminated and despite the gross misconduct justifying dismissal I find that this is not a situation where there should be no compensatory award at all on just and equitable grounds under s123(1) ERA 1996.

66. Taking into account the findings of fact set out above, I find that the Claimants would have been dismissed for the matters set out above discovered after dismissal in any event either for a conduct reason or for some other substantial reason, being a loss of confidence in them as senior employees and directors. It was suggested that the opportunity to explain their actions or an offer to repay might have meant they were not dismissed (C submissions para 41). I find this unlikely given the nature of the misconduct, their senior positions in the Respondent and the total breakdown in the relationship with Mr Voigt. I find that they would have fairly been dismissed within 2 weeks of when the Respondent found out about the past breaches of contract. This was around 26th May 2018 (page 80) when Mr Wyllie emailed Mr Voigt with his initial findings. The Second Claimant was in any event paid to 31st May 2018 so account would need to be taken of that payment.

67. Taking into account the complete absence of any fair dismissal procedure by the Respondent (and there was no reason why both Claimants could not have been suspended and asked to stay away from the Respondent's premises whilst this was carried out, if there were concerns about this) I find that there should be an increase of 25% to the compensatory award for an unreasonable failure to follow the ACAS Code of Practice, under s124A ERA 1996 and s207A Trade Union and Labour Relations Act 1992. It was unreasonable because Mr Voigt made no effort to find out how UK employment law worked before he dismissed them.

68. As regards any reduction under s123(6) ERA 1996 for contributory fault, in the light of the above findings of fact as regards the First Claimant, I find that the compensatory award should not be reduced on the basis put forward on behalf of the Respondent (R submissions para 43). The matters relied on in (a) (his way of managing the business), whilst forming the context of Mr Voigt's extreme dissatisfaction and frustration with him, were not the reason at the time he was dismissed because he was not dismissed for poor performance (though performance dissatisfaction was the context) but principally for failing to honour what Mr Voigt thought he had agreed with him orally about reducing his salary. The second matter (b) (failure to obtain approval for holiday), whilst not in line with his contractual obligations was not a significant factor in why he was dismissed at the time. The third matter (c)(not honouring the oral agreement to reduce his salary) was the thing which really caused his dismissal (hence being accused of 'embezzlement') and I have found that he did not agree in a legally effective way to the reduction in his salary though he kept quiet about the fact he was not agreeing to it. I therefore find that these three matters did not contribute to his dismissal because the root cause of the dismissal and what triggered it was the failure to implement the salary reduction which he had not in fact agreed

to. There therefore should be no reduction under s123(6) ERA 1996 for contributory fault for the First Claimant.

69. As regards the Second Claimant the basis for a reduction under s123(6) ERA 1996 was said to be the matters which came to light after dismissal (R submissions para 45). I have found the EDT to be 21st May 2018 and not 31st May 2018 as contended for by the Respondent. This means that as at the date of dismissal those matters were not known about so could not have contributed to her dismissal. There therefore should be no reduction under s123(6) ERA 1996 for contributory fault for the Second Claimant.

70. The upshot of these findings is that subject to any arguments about mitigation of losses immediately following termination, the relevant period of net loss for the Claimants' compensatory award ends 2 weeks after 26th May 2018 (subject to the Second Claimant giving credit for being paid up to 31st May 2018), then increased by 25% for an unreasonable failure to follow the ACAS Code of Practice.

71. A remedy hearing has been booked for **18th April 2019** should one be necessary but the above findings may assist the parties to reach an agreed figure on the compensatory award. They are asked to notify the Tribunal as soon as possible if that hearing is no longer required.

Employment Judge Reid

Date: 5 February 2019