EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102319/2017 Hearing at Edinburgh on 5 and 6 December 2017, and 4 January 2018

Employment Judge: M A Macleod (sitting alone)

David Findlay	Claimant In Person
Albatern Limited	Respondent Represented by Mr D Campbell Director

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claim of unfair dismissal succeeds, and the respondent is ordered to pay to him the sum of **Five Thousand Three Hundred and Sixty Four Pounds and Seventeen Pence (£5,364.17)** in compensation for his unfair dismissal.

REASONS

Introduction

1. In this case, the claimant presented a claim to the Employment Tribunal on 4 August 2017, in which he complained that the respondent had unfairly dismissed him, and unlawfully deprived him of wages to which he was contractually entitled.

2. The respondent submitted an ET3 response in which they denied that the claimant was unfairly dismissed, though admitting that he was dismissed, and denied that that they had made any unlawful deductions from wages.

3. A hearing was fixed to take place on 4 and 5 December 2017, but as it turned out, the case required to be listed for further dates, and it concluded on 4 January 2018.

4. The claimant appeared on his own behalf at the hearing, and the respondent was represented by Mr Campbell, their Financial and Commercial Director.

5. The respondent called as witnesses Mr Campbell, and Donald Houston, the (now) major shareholder in the business. The claimant gave evidence on his own account, and called his father, John Malcolm Findlay, one of the respondent's founder directors, as a witness.

6. Each party presented a bundle of productions, to which additions were made on application and with the permission of the Tribunal during the course of the hearing. References to documents will be prefixed either by "R" or "C" to denote which bundle they were taken from. There was, unfortunately but inevitably, some duplication in the documents presented.

7. It is appropriate to say at this stage that the Tribunal heard a very considerable amount of evidence which, in my judgment, did not directly assist it in determining the central issues in this case. The findings which follow represent the Tribunal's findings of facts relevant to those issues, rather than a summary of all of the evidence heard.

8. Based on the evidence led and the information presented, the Tribunal was able to find the following relevant facts admitted or proved.

Findings in Fact

9. The claimant, whose date of birth is 15 March 1981, graduated in 2006 from the University of Edinburgh with a first class honours degree in mechanical engineering. On graduating, he joined a company already owned and run by his father, John Findlay, Glenfin Contracts Ltd, as a director. He, his father and his brother were all involved in that business.

10. The claimant developed an interest in wave energy, a concept in which attempts have been made since the 1970s to find ways to harness the power of waves to generate energy for commercial use. The claimant began to work on a device which, if successful, could be implemented in a variety of sites. The device was to comprise a number of bodies floating together in the sea, reacting to the waves, and causing a relative reaction activating hydraulics. The claimant believed that this was a very unusual device, and was not aware of another device in existence which would operate in this way. Its development involved complex modelling and simulation. He described it as a very innovative early stage research and development project, pushing at the boundaries of what was understood at that time in the field of wage energy.

11. In 2010, the respondent company was established, with John Findlay as Chief Executive, the claimant as Chief Technical Officer and Mr Campbell as Chief Financial Officer.

12. The respondent, developing the work and research carried out by the claimant, sought to come up with a financially viable way of working on the device. At that time, there was considerable public funding given by the Scottish Government to two large wave energy companies, Pelamis and Aquamarine, but ultimately neither of those companies were able to continue.

13. A service contract was executed between the claimant and the respondent on 28 September 2011 (R3). That contract specified that the claimant's commencement date of employment was 1 September 2010, and that the date of his continuous employment (taking into account the service he had had with the previous company) was 1 July 2009. The claimant's salary commenced at £20,000 gross per annum, and increased to £36,000 per annum on 1 August 2011. His salary remained at that level until the termination of his contract.

14. A number of the provisions of this contract are of relevance. At paragraph 1.6, the respondent provided that, in relation to "Disciplinary Procedures", *"The Company shall follow the ACAS Code of Practice (as amended from time to time) in relation to disciplinary issues".*

15. Paragraph 4 specified the duties of the claimant's role, which included, under paragraph 4.5:

> *"…devote the Employee's whole working time, energy, attention and abilities to the carrying out of the Duties under this Agreement and spend such hours as may be necessary to perform the Duties beyond the Hours of Work without additional salary and not at any time while employed by the Company, without the prior consent of the Company, be involved, directly or indirectly, in any other business other than the business carried on by the Company (declaring that if the Employee is found to have taken up any employment or engagement as prohibited under this clause, this may result in disciplinary action which may result in dismissal). If the Employee, with the consent of the Board, accepts any other appointment he must keep the Company accurately informed of the amount of time he spends working under that appointment…"*

16. The contract also made provision for its termination, at paragraph 14. Paragraph 14.1 provided that the respondent would be entitled to terminate the employment of the claimant without notice and without payment in lieu of notice if the employee, among other offences, were guilty of *"any gross misconduct, which is, in the reasonable opinion of the Board, incompatible with the Employee's status and authority in the Company including without limitation physically or verbally abusive behaviour, intoxication from alcohol or drugs, or any breach of confidentiality."*

17. 14.2 provided, then, that:

> *"If the Employee resigns as a director of the Company or any Group Company (otherwise than at the request of the Company) he shall be deemed to have terminated the Employment with effect from the date of his resignation and the Employment shall terminate at that time, unless*

the Company agrees with the Employee that the Employment should continue, in which case the Employment may be subject to any terms and conditions stipulated by the Company in its absolute discretion. If the Employee resigns as a director prior to the expiry of the Notice Period at Clause 1.3.2 which the Company must receive, he shall be deemed to be in breach of this Agreement."

18. The claimant's primary activity was the development of the technology, and he supervised a team of specialist engineers who were engaged in the design and analysis of the devices. After Mr Campbell became involved in the company, the claimant would sit down with him and John Findlay, from time to time, in an office at the Roslin office, to discuss any issues which arose. These discussions were relatively informal and were not minutes. It was the claimant's view that he only required to tell the directors about matters which either related to the general progress of the engineering and research work, or had financial implications for the respondent.

19. In 2012, Donald Houston, an engineer with experience of running a number of businesses, became involved in the respondent's business. He had been approached by a firm of solicitors with whom he was involved, who suggested to him that he may be interested in investing in this business. He was impressed by the proposal being explored by the respondent, which struck him as a very clever approach to wave energy, and potentially more effective than other technologies. He was invited to become a non-executive director of the business, and accepted. He also invested £1,000,000 in the business, £900,000 of which was invested as equity, and the remainder on the basis of a convertible loan note.

20. In June 2015, the respondent was enduring severe financial difficulties The company was not at that stage in a position to earn any income, and therefore its funding came either from investments made by shareholders or grant funding from the Scottish Government or other agencies who were concerned to see wave energy advance in Scotland.

21. As at June 2015, the devices had been installed in the harbour at Kishorn, in Wester Ross, and the project undertaken there, which was to test the effectiveness of the devices, was nearing its conclusion. The respondent conducted a critical review of progress. Prior to the installation at Kishorn, the devices had been located in Muck from April to August 2014. In November 2015, the devices were moved to Mingary Bay, on the Ardnamurchan peninsula, adjacent to land owned by Mr Houston.

22. Mr Houston made further funds available to the respondent in the summer of 2015, on the basis of further convertible loan notes. He did so on the basis that a working device would be available as soon as possible, and that further external revenue was obtained in order to share the funding load with him. The project in Mingary Bay was considered by the respondent to be crucial in demonstrating to potential customers that the device could be effective. There was a delay in placing the devices in the water there to carry out the testing as the marine licence was not obtained by the respondent until July 2016.

23. In July 2016, Mr Findlay and Mr Houston had an exchange of emails in which they discussed the business plan which had been put in place for the company. Mr Findlay, concerned that the business plan in existence did not address the technical issues with which he was dealing, sought to provide an alternative. Mr Houston emailed the claimant on 31 July with his comments and observations (R26). He described the claimant's business plan as being not fundable by the private sector nor, probably, by the public sector. He went on to discuss the commercial viability of the "6S", the prototype being developed by the claimant:

> *"This opinion is based on what you guys have told me about the performance of the squid and the array when it was deployed. If this information is incorrect then my opinion may have to change, but as it stands, the 6S array is, potentially, commercially viable if it does what you all say it can do. The assertion that this commercial viability is only valid in a limited number of areas where it is not being asked to*

compete with 'grid' power has, although we have told everyone, been ignored or just doesn't register with most people as they are fixated on grid scale connection and competitiveness. We have all seen and looked at the potential for 6S arrays in numerous parts of the world and have, I think, all come to the conclusion that there is a massive potential for them in off-grid situations where the wave resource is appropriate.

The Due Diligence report suggested that the company should restrict itself to several more years of pure R&D. I think this is a bad mistake as, if what you are telling me about what the array can now do is correct and you can prove it, you have a saleable product. In no industry on the planet has there ever been a product taken to market that the R&D people wouldn't have liked to refine a bit more – but we are in the real world where R&D funds are not limitless and a demonstrably working array that can be proven to be commercially competitive in its application area and potentially also achieve other non-monetary objectives is as far as you need to go for the first iteration of a commercially saleable system…

Having now written rather more than I was hoping to do I will conclude by saying that at the moment the 100% focus must be on getting the array in the water and connected because without that, and in the absence of a fairy god mother with very deep pockets, the company will fail. We can then, on the basis of a successful installation, develop a proper and fundable (by both the private and public sectors) business plan with 2 interrelated but separate strands – Development of the 12S and sales (with continued development) of the 6S."

24. The claimant replied to this email on 3 August 2016 (R23). He described the existing business plan as *"wishful thinking with little cognisance of the technology, its state of readiness, or the underlying economic realities…"*

25. He went on to say: *"There is no clear cut commercial investment case that can be built on the existing business plan and justified with reference to the technology…None of this is likely to change following the Mingary*

Bay deployment…It is unrealistic to expect our estimates to be exceeded by any significant amount, and indeed, a prudent expectation would be marked down significantly." He indicated that he considered that there were unrealistically high expectations for the Mingary Bay deployment and an unduly optimistic view of the commercialisation process thereafter. He said that he remained more convinced than ever that the respondent could build on the Mingary Bay project with a strong, defensible commercialisation strategy but it needed a plan which was deliverable.

26. The claimant concluded by indicating his willingness to meet and discuss the matter with Mr Houston.

27. On 6 October 2016, a meeting of the management team took place in Edinburgh. That team comprised the claimant, Mr Campbell, Sandy MacKenzie (who was by then the Interim Chief Executive) and Donald Houston. No minutes were kept of that meeting, but following it, Mr Houston sent an email to the claimant, Mr Findlay, Joanna Dun, Sandy MacKenzie and Dennis MacPhail (C6).

28. In that email, Mr Houston stated that although those present still had disagreements about the ultimate direction the company should take, it was agreed that they should not put "all our eggs in one basket", and should look at a multiple route approach to how things should be developed. Mr Houston then set out his views as to that multiple route approach:

"1. Find and close deals with fully funded (cost plus) demonstration/awareness installations around the world for small S6 arrays to improve our understanding of the performance of arrays and get visibility out there. This could include further systems where the customer can justify the installation on grounds other than pure electricity price commerciality (political, environmental, learning etc)

2. Continue to look for opportunities and the funds required for large commercially viable S6 arrays probably 200+ arrays. Identifying a few of these potential opportunities should be included in any business plan.

3. Continue with research and development of S12 devices and arrays.

4. Seek both research and commercialisation monies through Grants or other means."

29. Mr Houston suggested then that it was necessary to do "10 basic things" to put the company in a position where it could attract funds from the public and private sectors, including sanitising the balance sheet, initiating a cost reduction study for S6 units and arrays, ensuring that the Mingary Bay site was operational and able to collect data and addressing the short term funding requirements.

30. The claimant replied on 7 October to say: *"Sounds like a plan"*, and to indicate when he could be available in Roslin to discuss the items on the list for which it was envisaged he would have responsibility or partial responsibility.

31. No meeting took place between the claimant and those with whom he was seeking to meet following that email.

32. A shareholder meeting was fixed to take place on 7 December 2016, at the offices of MBM Commercial in Edinburgh. Minutes were taken by Joanna Dun (R4). In attendance were Mr Houston, Mr Campbell, the claimant, John Findlay, Gerry Reynolds (on behalf of Scottish Enterprise), Sandy MacKenzie and Ms Dun. The meeting was chaired by Mr Campbell.

33. At the start of the meeting, Mr Houston was recorded as having read from an internal report that was produced by site staff at Mingary. The claimant said *"DH wasn't meant to have seen the paper which enraged DH. DH stated that DF is not providing full information to the Board and lying to suit his own agenda. DH reminded the meeting that Directors have a legal responsibility to be fully aware of all matters pertaining to the*

Company and one Director withholding such information was not acceptable. DH requested the immediate resignation of DF from the Board. DF agreed, but subsequently withdrew his resignation when he was advised that this was in his capacity as a Director and not in his capacity as an employee.

Evidence of the breakdown in relationship between Directors was obvious from the outset and the impact it is having on strategic decision making is clear."

34. The Tribunal noted this latter statement as having been included within the minutes, though it appeared to be an expression of an opinion rather than a record of something said during the meeting, and it is not clear whose opinion is being reflected by the note.

35. After this rather heated beginning, the meeting settled down into a lengthy discussion about the future of the company and the state of the projects.

36. Ms Dun provided a short financial update, and advised that the respondent was "technically insolvent", and that if further investment were not achieved immediately the company would require to enter into administration.

37. The technical update was provided by the claimant, and it was recorded as follows (R4.2):

"Update given by DF – the devices are installed but are not working however DF believes there are no major issues with them. DH voiced frustration as to why after so many months the devices are still not 'working'. DF stated that the length of time to achieve consent delayed progress and would rather have kept the devices in Kishorn.

DH again reiterated the importance of having the devices working as it will:

1. Allow data collection to verify performance

2. Give information to start looking at a reduction in capital costs.

… DF commented that the testing phase of the WES NWEC (12 Series Scale Project) is now successfully complete. Vast quantities of data was gathered with initial results within 10% of expectation and an indication of substantial cost reduction methods (up to 40%) which could be mirrored into the 6S.

DH emphasised and complimented the achievements of DF and his team."

38. Towards the conclusion of the meeting, the following was recorded as the "route forward":

"DH has maintained his principal conditions for continued investment were to have a demonstrably working device and another investor. Neither of these conditions have been met. DH still has faith in the technology and asked JF/DF/DC if there was the option for more investment for any of them – none was identified. SE [Scottish Enterprise] have not received an investable Business Plan from Albatern so they also would not be investing further at this stage.

DH did not look favourably on Albatern missing out on 2 WES [Wave Energy Scotland] project calls and SE having to withdraw W3 due to the failure of not achieving match funding. The fracture within the management team seems to have had various negative effects on the company and DF does not understand what DC and SM do, believes the failure to attract further investment is solely down to their inabilities and asks why they have not been to the office to try and agree a way forward.

Despite this disarray DH was prepared to interim investment, but only on the following conditions:

Conditions of the interim support by DH:

- *DH to convert sufficient amount of 2015 Loan Notes to give DH, whilst acting together with SE absolute majority control with just over 75% of ordinary share capital*
- *Reduce staffing to as low a level as possible*
- *DC and DF will receive no salary in this period*
- *Key staff to take a drop in salary (rate TBC) reduction will be accrued and therefore payable if company survives.*
- *Reconfigure Board of Directors so that it functions with collective responsibility and authority*
- *DH will resign from Board but maintain Observer Status*
- *2 candidates have been identified for CEO position – DH wants approval from SE of preferred candidate who will then be introduced to the company next week*
- *A commercial business plan will be produced within 4 months*
- *DH will fund, controlled by JD on a day to day basis, the company to allow it to operate for this period by advancing funds for purchase of the IP/assets of the company*
- *If Business Plan not agreed within 4 months, assets revert to DH*
- *If the above is not achieved, DH/SE convert 2014 Loan Notes, and create Options plan to reward key personnel who will take the business forwards*
- *'New' Management team to work together and follow rules of collective responsibility.*

Following discussion of this conditional offer, it was agreed by all shareholders that this offer should be accepted."

39. The claimant commented during this discussion that he would be unable to accept a situation where he was not paid, as he had "bills to pay". In evidence, he did concede that having said that the terms of the conditions put forward by Mr Houston were accepted. The claimant suggested that there was no choice available, but "Hobson's Choice" – that is, either these conditions were to be accepted or the company would require to be placed in administration.

40. The claimant continued to work on the projects for some weeks thereafter, but by the end of January, having gone unpaid for nearly two months, he became less involved on a day to day basis with the respondent. He confirmed that he remained available in the event that information or assistance were needed by the new Chief Executive, but he did not regularly attend the office.

41. On 23 January 2017, Mr Campbell sent an email to Mr Houston and the claimant to follow on from the meeting of 7 December (R6). In that meeting, he confirmed that at the shareholders' meeting of 7 December, it had been agreed that a conversion of loan notes would take place as a condition of further funding by Mr Houston. A written resolution of shareholders was circulated on 19 December to give effect to this decision, but while signed confirmations were received from Mr Houston, Scottish Enterprise and Campbell family shareholders, no confirmation was received from Findlay family shareholders and accordingly the resolutions lapsed on 16 January 2017. Mr Campbell went on to confirm that in the absence of further funding being secured by the company, it was insolvent, could not meet its obligations as they fell due, and that the directors could become personally liable for wrongful trading. A Board meeting was fixed to take place on 24 January, at which the allotment of 10,000,000 shares for £0.01 each would be covered, for conversion of £100,000 of the current balance of the loan notes held by Mr Houston's company, Rain Dance Investments.

42. That meeting took place on 24 January 2017 by telephone call. The claimant attended, as did Mr Campbell and Mr Houston, and the minute (produced at R6) records that the allotment of shares as suggested was agreed by the directors.

43. Following that meeting, and recognising the financial difficulties being faced by the respondent, the claimant emailed Mr Houston and Mr Campbell on 30 January 2017 with a proposal (R7). In that email, the claimant said:

"Further to the board meeting of 24/01/17, and following informal discussions with certain members of staff, it appears that there is little support for a plan that does not fully compensate staff according to the terms of their contracts and statutory entitlements. I would expect that if the plan as laid out at the board meeting is presented to the staff it will ultimately result in an insolvency event and uncomfortably legal process. With a view to avoiding this, I would like to present an alternative plan that could gain more support within the employee pool and provide a stronger foundation for future growth.

Given the board's stated preference to prioritise commercialisation of the 6S, I propose to establish a new company ('newco') to take forward the R&D activity on the 12S.

The newco would:

1. *Take over the research and development of the 12S through the NWEC program;*

2. *Take over the responsibility for the IDCORE team;*

3. *Enter into a licencing arrangement with Albatern to secure access to the background IP; and*

4. *Be in a position to offer consultancy services to Albatern to support the ongoing commercialisation of the 6S…*

I am prepared to take responsibility for securing the necessary start-up capital and ongoing financing for newco. As funding is secured, newco will be in a position to re-employ key R&D staff no longer essential to the ongoing activity of Albatern, yet with key expertise that would be very difficult, and costly, to replace if lost.

I believe this represents a win-win arrangement satisfying the interests of all parties, limiting staff redundancies and providing a strong foundation for future collaboration and mutual benefit. This would, of course, require your agreement and further discussion in order to flesh out the details…"

44. Mr Houston replied at 11pm that day. In that email, he said:

"Thank you for your email an (sic) proposal.

I fully understand that there would be little support for any plan that causes any of the staff to receive less than they are due and which would put them out of their jobs.

I have to say that this situation would not have arisen if firstly, there was a functioning array, and secondly if shareholder signatures had been forthcoming after the Board meeting in December – but we are where we are and I welcome your proposal for a possible way forward…"

45. He went through what he saw as the advantages and disadvantages of the plan. He concluded by pointing out that this plan was dependent on the claimant's ability to secure the necessary start-up funding, but that if he were confident he could do this, then the "ball is in your court". Finally, Mr Houston said *"Please get back to me as soon as possible about this and certainly before 10.00 am as tomorrow really is the deadline for consulting with the staff about their future with the Company and about the future of the company and technology itself."*

46. On 2 February 2017, the claimant responded to Mr Houston, again by email, and set out a number of "additional parameters", having spoken to various people. He put forward proposals of the terms of what he

believed was the only deal that might work. Having set out the proposals, he said that this offer would limit the respondent's exposure to ongoing research and development costs while maintaining access to any future "upside", while keeping both companies solvent moving forward. He finished by saying: *"I'm sure that we can both agree on the urgency of dealing with this now, and if this is not viable option then in my view, taking necessary action to put the company into administration…I am free to discuss at any time."*

47. The matter went no further. No agreement was reached between the claimant and the respondent as to the proposal. The claimant did not take any further action on the proposal. He did not take any steps to set up a "newco", and no such newco has been set up.

48. On 31 January, the respondent required to speak to the existing staff of the business. It was necessary in their view to reduce the staff to a small core team of 6 people. The ID core students were advised that the respondent would be terminating the arrangement with the University of Edinburgh on the basis that they could not longer fund it. They advised the staff that the options open to them were to continue to work with no pay, to consider setting up a newco as proposed by the claimant, or redundancy. Having considered the additional email received from the claimant on 2 February, the respondent decided on 17 February 2017 that the at risk staff required to be made redundant. The respondent was not in a position to pay the staff at all.

49. On 28 March 2017, Mr Campbell and Mr Houston met to discuss the ongoing actions they needed to take, given that they were then managing the company on an insolvent basis. They discussed the claimant's conduct, and his involvement with the company. Given their direct experience of the claimant's conduct, they reached a decision that his employment should be terminated, with immediate effect.

50. Mr Campbell sent an email to the claimant on 4 April 2017 (R8):

"David,

At a recent meeting of the other company directors it was decided that you should be dismissed as a director of Albatern Limited for gross misconduct on the grounds including but not limited to:

1. Deliberately misleading the Board and other management on the technical readiness of the Mingary array;

2. Setting up another entity to develop wave energy outside of Albatern which would potentially conflict with Albatern's business; and

3. Absence over the period of December and January and completely since 29 January 2017.

Dismissal is as a director which leads to dismissal under your contract of employment with immediate effect. This also applies to your directorships of other Albatern group companies.

You do have a right of appeal against this decision.

Please provide the reasons for your appeal in writing and I will arrange for an appropriate person who has some knowledge of the company to hear any appeal.

Regards,

David Campbell

Director"

51. There were matters other than those specifically listed in paragraphs 1 to 3 of the email which were not taken into account in the decision, such as issues of conflict and breach of confidentiality.

52. Mr Campbell, in evidence, explained what each of the paragraphs referred to.

53. With regard to paragraph 1, the respondent considered that the claimant had deliberately misled the Board by saying that the device which he was working on with his team would be working within a short period of

its starting in Mingary Bay, and it became clear that it was not ready to operate. This was at variance with the information and expectation provided earlier, and a lack of reports of technical progress. Given that having an operating device was crucial to bringing in funding, that struck at the heart of the company's ability to continue, in Mr Campbell's view.

54. With regard to paragraph 2, this referred to the claimant's proposal to set up the newco, which was another vehicle in a space overlapping with the respondent's interests. It could have been done, said Mr Campbell, without conflict, but it was inconceivable that the arrangement could have been achieved without a conflict of interest. Working for another company was prohibited by the claimant's contract without the express permission of the respondent.

55. With regard to paragraph 3, the respondent took the view that the claimant was simply not carrying out his duties under his contract of service with the respondent. There was no apparent attempt to carry out work for the respondent, and therefore the claimant had simply stopped working for the company.

56. The claimant received the email on 4 April. He did not profess himself to be surprised by the decision. He maintained in evidence that he expected the respondent to dismiss him as they wished him out of the company. He did not appeal against dismissal as he was extremely sceptical of the respondent's willingness to engage in an objective and fair appeal process.

57. Following the termination of the claimant's employment by the respondent, he carried out some work on behalf of his father, helping to move a yacht from Greece to Marseille. He was paid 1000 euros for 5 weeks' work, and also received full board.

58. Following his return from that journey, the claimant found that the wave energy sector was effectively closed off to him, as it is a very small sector where most people who have worked in it in Scotland for any length of time know each other. He has taken up, from time to time,

labouring work, and gardening work. He has also received monetary gifts from his parents in order to assist him to pay for his accommodation and the costs of daily living. He was unable to provide the Tribunal with any detailed information as to his earnings since his dismissal, but estimated that he had earned approximately £10,000 from labouring and gardening work.

59. He seeks an award of compensation for unfair dismissal. He made clear that he does not seek reinstatement nor re-engagement from the Tribunal.

Submissions

60. For the respondent, Mr Campbell opened his submission by arguing that the Tribunal lacks jurisdiction to hear this case as it is time barred. The basis for this submission was (as I understood it) that although the claim may have been technically lodged in time, it was only so lodged on the basis that the extension of time was granted to the claimant for having commenced the ACAS Early Conciliation process. However, it is clear from the ACAS correspondence produced by the respondent that the claimant did not wish to conciliate, and therefore only contacted ACAS in order to secure his extension of time. As a result, the Tribunal should not take that extension into account in determining this aspect of the case, and should reject the claim as being time barred.

61. Mr Campbell went on to say that it was the respondent's contention that up to 7 December 2016, the claimant was withholding key information about the technical readiness of the array. He said in evidence that there was no regular reporting to the Board of the technical progress, and what information was provided was not consistent with the expectations set.

62. He argued that the claimant committed himself to the position that within 7 to 10 days of the December meeting, the array would be functioning. 2 months later the work had still not been completed. The work was

eventually completed on 29 March, without significant input from the claimant.

63. Mr Campbell submitted that the respondent reasonably assessed on 28 March that gross misconduct had taken place. The claimant had failed to attend to his duties. He had agreed not to be paid under the conditions set out in the meeting of 7 December 2016, and he was deliberately frustrating the aims of the Board when the only alternative to securing new funding was insolvency. By actively pursuing the set up of a new company, the claimant was in breach of clause 4.5 of his contract of employment. He said that he was in a position to take over obligations of about £200,000 but that money was not available to support the respondent.

64. The reason why the Board did not convene a disciplinary hearing was that it would have been unduly disruptive due to the "projected conduct" of the claimant. The dismissal was fair in all the circumstances. Advice was sought as to how to deal with any appeal.

65. The claimant was summarily dismissed, with effect from 4 April 2017. The claimant did not, said Mr Campbell, appeal against the decision.

66. Mr Campbell then submitted that if the Tribunal were to find that the claimant had been unfairly dismissed, which was denied, then any award should be reduced by reason of Polkey, and to reflect the claimant's contributory conduct. It should be taken into account that the claimant was not earning a salary by the date of dismissal, having waived the right to receive salary at the meeting in December.

67. Mr Campbell invited the Tribunal to find in favour of the respondent.

68. The claimant made a short submission on his own behalf. He argued that there was no standard process followed in relation to his dismissal either as a director or an employee. The nature of the allegations made do not amount to gross misconduct.

69. The decision to dismiss was, he said, based upon events either 4 or 6 months prior to the decision, misconstruing the information being provided by him to the company.

70. The claimant submitted that when he told the Board that the work would be completed in 7 or 8 days, he meant that those days would not be consecutive, but would be dependent on weather, installing a transformer and obtaining good connections on site. It is likely that he made reference to 7 or 8 days but that he meant that the work would probably take about two months. He denied that he had ever knowingly misled the Board, nor withheld information from the Board.

71. With regard to the other two points, he observed that these were both "pretty much dismissed" by Mr Houston. He submitted that he did not set up another entity, but offered a route forward to preserve value, and showed information to the respondent in good faith. Once he knew the respondent's position on the newco, he took matters no further.

72. He denied that he was absent. He said, firstly, that his contract of employment said his place of work was "Roslin", and he maintained that since he lived there, he had never been absent from Roslin. Secondly, he maintained that he made himself available throughout the period from January onwards, and when he was asked for assistance, he responded positively and efficiently. He had told the respondent several times that he could not afford to go without pay.

73. He questioned whether Mr Houston and Mr Campbell had the authority to take the decision to dismiss him. He considered that information was withheld from the Board, and especially himself and his father, by the other directors.

74. The claimant described the company as to which to which he had given everything for 10 years. Its entire value was created, he said, by himself and his father. He maintained that the real reason for his dismissal was nothing to do with these disciplinary charges, but

because he was no longer useful. His dismissal was, in effect, part of a takeover of the company.

75. The claimant invited the Tribunal to find that he was unfairly dismissed.

The Relevant Law

76. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996 ("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employers undertaking), the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
>
> (b) shall be determined in accordance with the equity and substantial merits of the case."

77. Further, in determining the issues before it the Tribunal had regard to, in particular, *the cases of* ***British Home Stores Ltd v Burchell*** **[1978] IRLR 379** *and* **Iceland Frozen Foods v Jones [1982] IRLR 439**. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

78. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it

about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant's conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

79. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds the Tribunal that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that "the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party."

80. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

81. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

> *'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:*
>
> *(1) the starting point should always be the words of S.57(3) themselves;*

(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

Discussion and Decision

82. The first task for the Tribunal is to determine the reason for dismissal. In this case, the reason given by the respondent was that of conduct, namely that set out in the email of 4 April 2017 in 3 paragraphs. Conduct is a potentially fair reason for dismissal under section 98 of ERA.

83. Next, the Tribunal must consider whether the respondent had a genuine belief that the claimant had been guilty of the misconduct which they found him to have committed. At this stage, it is only the respondent's belief that the Tribunal must consider and not its reasonableness, to which I shall come.

84. In my judgment, Mr Campbell and Mr Houston were both convinced that the claimant was guilty of gross misconduct, and in particular that he had misled the respondent's Board by suggesting that the array would be completed and ready within a short space of time. I considered them both to be sincere in that belief, and accordingly I have concluded that the respondent did have a genuine belief in the guilt of the claimant.

85. It is worth addressing at this point the claimant's assertion that the respondent dismissed him not because of misconduct but because he had outlasted his usefulness to the business. There is no doubt that the relationship between the claimant and the company was one in which he had invested a great deal, having been central to the establishment of the original business with his father from which the concept of the wave energy device emerged. His strong feelings about the manner in which that family business had been taken over, and to some extent, in his mind, taken away from him and his family coursed through his evidence. However, the focus of the Tribunal must be on evidence which is relevant to the decision to dismiss him, and while both sides wished to state in evidence their strong disapproval of the actions of the other, much of the criticism which was made did not have an impact on the issue before me.

86. As an example, the claimant repeatedly criticised Mr Campbell for his financial management of the company, and in particular what he perceived to be his failures in obtaining licences and grant funding. He also spent a good deal of time exploring the corporate governance of the company, and the loan notes granted to Mr Houston in exchange for added investment. The Tribunal noted that evidence but found it to be of background interest rather than of direct relevance to the respondent's decision. Similarly there were serious criticisms directed at the claimant by the respondent which did not have a bearing on their decision to dismiss him.

87. The Tribunal therefore turned to consider whether the respondent had reasonable grounds upon which to conclude that the claimant had been guilty of gross misconduct.

88. It is notable that before setting out the specific grounds on which the respondent based its decision, it referred to those grounds as "including but not limited to" the three paragraphs which followed. When asked about this, Mr Campbell indicated that there were breaches of confidentiality and conflicts of interest which the respondent was concerned about. However, nothing more was said by the respondent in the email about this, to give any indication at all as to what else they took into account, leaving the position at best uncertain and at worst indicative of a decision which was based on unknown factors.

89. Dealing with the specific findings made, the first finding was that the claimant had been guilty of "deliberately misleading the board and other management on the technical readiness of the Mingary array". It appears that this related to the statements made to the board by the claimant on 6 October and 7 December 2016.

90. The evidence on this was a little unclear, but the claimant accepted that he did say, at the meeting of 6 October, that he thought that the array could be completed within 7 to 10 working days. The respondent interpreted this as meaning that within a fortnight of 6 October, the claimant and his team would have completed work on the array so that it would be ready to connect up to power supplies and start generating electricity. The claimant's meaning, on his evidence, was that there would be 7 to 10 days of work needed to complete the process, but that that might be spread over a period of months, depending on weather conditions, the installation of a transformer, and other factors outwith his control.

91. It is difficult to understand what the respondent was criticising here. There is no doubt that Mr Campbell and Mr Houston were anxious to move to the point where the company, which was in severe financial

trouble, could start to generate income from the work being carried out by the claimant and his team, which was central to their business. The claimant, in his evidence, understood that, but sought to convey to the other directors that the device on which he was working was a stage 1 prototype on which much further research and development was required. Communications between the claimant and the other directors were not effective during this period, as it is clear that each had a perfectly valid aim in mind, but neither seemed fully to comprehend the difficulties faced by each other.

92. It is my judgment that the claimant did not deliberately mislead the directors as to the likely timescale within which the array would be commercially ready. It seems clear to me that he believed he was keeping them informed as to the important aspects of his work, but that they did not truly comprehend the difficulties with which he and his team were faced. The directors were understandably anxious to receive from him a message that his work was reaching the point where devices could be put in the water, data collected from them and a "saleable product" be built.

93. There was, at best, a misunderstanding between the claimant and the directors as to what he meant at the October meeting when he referred to 7 to 10 days' work needed on the devices. What is, in my judgment, revealing is that in the meeting of 7 December, no reference is made to any promise or misleading statement made at the previous meeting by the claimant and relied upon by the directors. It is clear that by that stage the company was in severe financial difficulty and that income was required, but Mr Houston did give graphic evidence describing the frequent tension in a start up company between the financial and research sides of the business.

94. In my judgment, there is simply no basis for a finding that the claimant had deliberately misled the respondent as to the state of progress with his research. It appears that the directors simply ran out of patience with the claimant as they felt that he was not making the strides forward

he should have, and was not listening to them. This did not provide them with reasonable grounds upon which to base a finding of gross misconduct.

95. The allegation upon which this finding is based is, in any event, very vague, and does not specify precisely what statements the respondent was criticising, nor when they were made. The evidence has focused this a little more, but at the time it is not clear, and could not be clear, to the claimant what exactly he had been found guilty of doing, or failing to do.

96. With regard to the second allegation, the respondent's finding that the claimant had been guilty of "setting up another entity" in conflict with the interests of the respondent is, frankly, without any foundation. There was an exchange of emails between the claimant and Mr Houston in which the claimant proposed setting up a "newco" in order to separate out different parts of the business, as a solution to the ongoing impasse about the business plan. Mr Houston engaged, quite reasonably, in an open discussion with the claimant about this proposal, and even welcomed it. The claimant made clear, in both emails which he sent to Mr Houston with the proposal, that he knew that he required the permission of the respondent to set up such an entity, and that without it the matter would go no further. Essentially, it was left to the claimant to come up with the funding and to develop the idea, and for reasons which were not entirely clear, it went no further than that discussion.

97. In short, there is simply no basis upon which the respondent could reasonably find that the claimant had been guilty of setting up an entity in conflict with the respondent. He did not set up an alternative entity or company. He sought permission to do so; he explored and discussed with the respondent the possibility of doing so; his approach was welcomed by the respondent. To find, as they then did, that he had been guilty of setting up such an entity is an extraordinary finding, for which there is no evidence. The respondent accepted in evidence that no such entity was in fact set up. They seemed to consider that the

proposal was enough to amount to behaviour in conflict with the aims of the respondent. It appears that what caused this reaction was the fact that the claimant proposed that he could raise funding of approximately £200,000 for the start up of the newco, when that money was not made available to the respondent's company. However, that is not what he was found guilty of having done, but of having set up an entity. He did not set up any entity, and there is no evidence that he did. In my judgment, the claimant was blameless in this matter. He quite fairly and frankly approached the directors with a proposal. He was not encouraged to take it forward, though nor was he prohibited. He did not take it forward and the matter ended there.

98. Accordingly, there were no reasonable grounds upon which the respondent could make the finding they did under paragraph 2.

99. The third finding was that the claimant was absent from work during December and January, and completely since 29 January 2017. There is no doubt that after the meeting of 7 December, the claimant did not attend the Mingary site, and only occasionally attended the Roslin office. He did, on his evidence, make himself available to the new Chief Executive Officer, and from time to time he did attend at the office, to discuss matters with the CEO or to collect belongings.

100. It is difficult to know precisely what to make of this period. The claimant accepted at the meeting of 7 December that he would not be paid, but made it clear that this was not affordable for him and that he was accepting it under protest. There was very little communication between the claimant and the respondent at this time, but when there was (such as in the emails discussing the proposals relating to a newco) there appears to have been no criticism directed at the claimant for non-attendance at work. It may be that the respondent accepted that if he were not being paid, his regular attendance could not be demanded of him, but what appears to have emerged is that this absence from work was seized upon by the respondent as a reason to dismiss the claimant, when few efforts had been made to secure his attendance before then.

101. There is little doubt that the claimant, having accepted that he would not be paid, should still have understood that he was expected to contribute to the company, of which he was a director. It is perhaps the clearest indication of the breakdown of the relationship between the claimant and Mr Campbell and Mr Houston that he did not attend, nor was he told to attend. He maintained that there was no work for him to do, and that if he were not being paid, he could not afford to travel up to Ardnamurchan, but it was incumbent upon him to take steps to ensure that what was expected of him, and what he expected of the respondent, was clarified before he simply took the decision not to attend at work.

102. The claimant may well have been guilty of misconduct in this matter, but on the evidence there is a lack of clarity as to what kind of attendance was expected of him on a regular, day to day basis.

103. The next question for the Tribunal to address is whether the respondent carried out a reasonable investigation into the allegations, and, allied to that question, whether they followed a fair procedure in doing so.

104. There appears to have been no separate investigation into the claimant's alleged misconduct. Mr Campbell and Mr Houston proceeded on the basis of their own knowledge of the history of interactions between the respondent and the claimant.

105. It is difficult to establish what investigation was carried out owing to the lack of precise evidence as to what the respondent had found the claimant to be guilty of doing or not doing. It would, in my judgment, have been the action of a reasonable employer to ensure that in relation to each of the findings some record of what the claimant had done, or not done, would be placed before the directors. It is not clear precisely when the claimant is said to have misled them, for example, and it is not known what information the respondent took into account in reaching that view.

106. However, the greater difficulty for the respondent arises in relation to the procedure which was followed. The directors, being Mr Houston and Mr Campbell, met together on 28 March 2017. They were not the only directors of the company, the claimant being the third. During the course of that meeting, Mr Houston resigned as a director. Precisely what stage the discussion had reached is not clear.

107. However, the claimant was not invited to that meeting. It was constituted, however improperly (as the claimant alleges) as a directors' meeting, in the claimant's absence, but it amounted to a disciplinary hearing. The claimant was, in fact, completely unaware that such a meeting was to take place, or indeed that it had taken place, until he received the email of 4 April. He was given no indication that any allegations of misconduct had been made against him, and he had no opportunity to defend himself against such allegations. He was offered no opportunity to attend at the hearing, or to be represented or accompanied by someone acting in his interests. He was given no notice whatsoever that a hearing was to take place at which there was a possibility that a decision would be taken terminating his employment.

108. The respondent's failings in relation to the hearing of 28 March were comprehensive, and wholly unfair towards the claimant. The two reasons which were advanced by the respondent for having approached the decision in this way were, firstly, that had they invited him to a hearing, he would, according to his earlier behaviour, have responded very negatively, and an unwanted confrontation would have arisen; and secondly, that he would be given a right to appeal, and that having taken legal advice the respondent was assured that the appeal could resolve any unfairness arising from the first hearing.

109. The first reason advanced, that the meeting would not have been constructive because the claimant's likely reaction would have been confrontational, is, with the greatest of respect to the respondent, entirely without substance, and lacking in credibility. I found it very surprising that an experienced man of business such as Mr Campbell

would seek to advance such an explanation. From the evidence heard, the only person who had demonstrated any confrontational behaviour in the previous meetings was Mr Houston, when he reacted very strongly to a comment by the claimant at the start of the meeting of 7 December. There was no evidence that the claimant had even raised his voice before to the other directors. However, even if he had, that would still not excuse the failure to give him the right to be heard.

110. It is quite clear, in my judgment, that the reason why the respondent did not invite the claimant to a hearing on the allegations was that they did not wish to give him the opportunity to defend himself. It is difficult to conceive of a procedure which could have been more unfair to the claimant than this one. In my judgment, the basis upon which the respondent reached their conclusions was, in each instance, substantially flawed, and the claimant would have been in a position to defend himself robustly at a hearing had he been permitted to do so.

111. The second justification, that any flaw could have been rectified on appeal, is no justification at all for such a grievous failure to follow a fair procedure in the disciplinary decision making process. While it is true that an appeal can, by rehearing all the evidence available, remedy some of the flaws in a disciplinary procedure, that cannot cover for the complete failure to adopt any procedure in the initial hearing.

112. The respondent's disciplinary procedure essentially adopted the ACAS Code of Practice on Disciplinary and Grievance Procedures.

113. The ACAS Code provides, in paragraph 4, a summary of the steps which an employer requires to take:

"…whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- *Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.*

- *Employers and employees should act consistently.*

- *Employers should carry out any necessary investigations, to establish the facts of the case.*

- *Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.*

- *Employers should allow employees to be accompanied at any formal disciplinary or grievance hearing.*

- *Employers should allow an employee to appeal against any formal decision made."*

114. In my judgment, the respondent wholly failed to comply with the ACAS Code of Practice, by failing to establish the facts of the case, by failing to inform the claimant of the basis of the problem and give him the opportunity to put his case before any decisions were made, and failing to give him the opportunity to be accompanied at a hearing.

115. The respondent dismissed the claimant at a hearing which he was not even aware was taking place. They failed entirely to follow a fair procedure in this case.

116. Accordingly, it is my judgment that the claimant was unfairly dismissed by the respondent, both because they did not have reasonable grounds upon which to conclude that he had been guilty of gross misconduct under any of the three headings set out in the email of 4 April, but because they wholly failed to follow a fair procedure in reaching the decision to dismiss him.

117. It is necessary, then, to determine what remedy should be awarded to the claimant in this case. The claimant confirmed that he only seeks an award of compensation in this case, and does not seek to be reinstated nor re-engaged by the respondent.

118. The respondent must pay to the claimant a basic award. His employment endured from 1 July 2009 until 4 April 2017. The claimant's gross salary was £36,000 per year. As at the date of dismissal, the claimant was 35 years of age. His week's pay (gross) was £692.31. He had 7 years' completed service with the respondent, and accordingly, the respondent is required to pay to the claimant the sum of £4,864.17 by way of a basic award.

119. The calculation of a compensatory award is much more problematic. The claimant has not found steady employment since his dismissal by the respondent, but has worked for 5 weeks for his father, earning 1000 euros, transporting a yacht to Marseille, for which he also received full board; and approximately £10,000 since May 2017 by way of casual labouring and gardening work. He has found that the wave energy sector is closed to him owing to the knowledge, in a small industry sector, that he had been dismissed by the respondent. However, he has a degree in mechanical engineering, and it appears that he has made no attempt to secure alternative employment in the wider field of engineering. It is plain that the claimant is an intelligent individual with valuable, if specialist, experience, but in my judgment he has failed to take reasonable steps to mitigate his losses following the termination of his employment.

120. Accordingly, no compensatory award is made in favour of the claimant.

121. The claimant has suffered the loss of employment rights, for which an award of £500 is appropriate.

122. In my judgment, no reduction in the claimant's compensatory award is appropriate. There is no basis upon which the Tribunal can find that had a fair procedure been followed, the claimant would have been

dismissed. The matter is in considerable doubt. The failings in this case are not only procedural, but go to the heart of the reasons for the claimant's dismissal. There is no basis upon which it can be found, on the evidence, that the claimant would have been justifiably found guilty of gross misconduct under any of the headings in the email of 4 April, had a fair procedure been followed.

123. With regard to the claimant's conduct, again, it is not in my judgment appropriate in the interests of justice to reduce the claimant's award by reason of his contributory conduct. It is not at all clear that the claimant has by his conduct contributed to his dismissal. The responsibility for his dismissal lies squarely with the respondent, who have failed to justify the decision in any way.

124. One final point arises. Mr Campbell sought to argue that the claimant should be regarded as having been time barred in raising the claim during the extension period granted following his notification to ACAS under the early conciliation scheme. As I understand it, he argued that the claimant, having had no intention to conciliate, merely notified ACAS so as to obtain the extension, and therefore should forfeit the benefit thereby accrued.

125. This is not a submission which can be sustained, imaginative though it is. There is no evidence on this matter. There is, within the papers, an email from ACAS, but no witness spoke to that, and the claimant was not asked about it. In any event, the claimant required to notify ACAS under the early conciliation scheme that he intended to make a claim against the respondent; had he not done so, he would have been without an ACAS Early Conciliation number, and his claim would have been rejected.

126. The claimant is, in my judgment, entitled to rely upon the legal provisions in this area, which provide that an extension of time is granted by the Early Conciliation scheme rules. There is no authority of which this Tribunal is aware – and I was referred to none – which would

entitle me to disregard that extension, and in my judgment I would fall into error were I to uphold this submission.

127. Accordingly, it is my finding that the claimant submitted his claim within the statutory deadline, and the Tribunal has jurisdiction to hear this case.

128. The claimant's claim of unfair dismissal therefore succeeds, and the respondent is ordered to pay to him the sum of £5,364.17 in compensation for his unfair dismissal.

Employment Judge: Murdo A Macleod
Date of Judgement: 17 January 2018
Entered in register: 17 January 2018
And copied to parties