EMPLOYMENT TRIBUNALS

Claimant:		Respondent:
Mr R Harris	v	Avocet H2O Limited

Heard at: Reading On: 21 and 22 August 2019

Before: Employment Judge Hawksworth

Appearances
For the Claimant: Ms I Buchanan (counsel)
For the Respondent: Mr J Medhurst (solicitor)

RESERVED JUDGMENT

1. The claimant's complaint of constructive unfair dismissal succeeds. The claimant is awarded:

Basic Award:	£2,286.00
Compensatory Award (after s207A increase):	£8,677,80
Total unfair dismissal award	£10,963.80

2. The claimant's complaint of wrongful dismissal succeeds. No separate award is made in respect of this complaint.

3. The claimant's complaint of unauthorised deduction from wages is well founded. The claimant is awarded £5,000 in arrears of pay.

4. The claimant's complaint of unpaid holiday pay is well founded. The claimant is awarded £115.38 for 1 day's pay in lieu of accrued holiday.

5. The respondent was in breach of the duty to provide a written statement of employment particulars. The claimant is awarded £1,016 in respect of the breach.

6. The total award to the claimant is £17,095.18.

7. The respondent's complaints of breach of contract fail and are dismissed.

REASONS

Claim

1. The claimant worked for H2O Farm Limited, a company co-founded by his father, from 1 July 2013. The company was acquired by the Avocet group in 2015 and 2016. The claimant was employed by the respondent, an Avocet group company, until his resignation on 30 July 2018.

2. The claimant's claim form was presented on 26 October 2018 after a period of ACAS early conciliation from 27 August 2018 to 27 September 2018. The claimant complains of constructive unfair dismissal, wrongful dismissal, unauthorised deduction from wages, breach of contract, unpaid holiday and failure to provide written statement of particulars.

3. The Respondent defends the claim and pursues an employer's contract claim. It claims sums owed by the claimant which were outstanding at the termination of the claimant's employment. The claimant's claim and the employer's contract claim are being heard together.

Hearing and Evidence

4. At the start of the hearing I drew the parties' attention to the fact that the respondent's representative Mr Medhurst had previously worked at a firm of solicitors where I was a partner before I became a salaried judge. Neither party made any comment.

5. There was an agreed bundle of 221 pages.

6. On 21 August 2019 I heard evidence from the claimant. On 22 August 2019 I heard evidence from Mr Martin Frost, a director of the respondent and chairman of the Avocet group. Both witnesses had produced written witness statements which I read, together with the documents referred to in those statements.

The Issues

7. The issues for determination were agreed by the parties as set out below (numbering from the original list of issues has been retained).

1. <u>CLAIM</u>

Unfair Dismissal

1.1. Was there one or more repudiatory breaches of contract by R? In particular, without limitation:

1.1.1. Was R's failure to pay C's salary in May and July 2018 a repudiatory breach;

1.1.2. Did R demote C and/or fundamentally change the nature of his employment and if so did that amount to a repudiatory breach; in doing so, did R breach an agreed, or alternatively, an implied notice period;

1.1.3. Did R send intimidating and humiliating emails to C and did doing so amount to a repudiatory breach;

1.1.4. Did R fail to respond to C's grievances and did doing so amount to a repudiatory breach;

1.1.5. Did R breach the implied term of trust and confidence without reasonable or proper cause?

1.2. If yes, did C resign in response to that breach or those breaches of contract?

1.3. Was C constructively dismissed?

1.4. If yes, was the dismissal unfair?

1.5. If the dismissal was unfair, what is the just and equitable compensation to be awarded?

1.6. If the dismissal was unfair, would C have left R's employment shortly thereafter in any event, otherwise than in response to a repudiatory breach?

1.7. If the dismissal was unfair, was C guilty of any contributory fault such as to warrant a reduction of the basic and/or compensatory awards?

1.8. If the dismissal was unfair, to the extent that C was guilty of any misconduct prior to his dismissal that R was not aware of, should the basic and/or compensatory awards be reduced as per the case of Devis v Atkins?

1.9. Has C reasonably mitigated his loss?

Wrongful dismissal (breach of contract)

1.10. Was C wrongfully dismissed?

1.11. Was C entitled to 12 months' notice of the termination of his employment?

1.12. If not, what reasonable notice period was C entitled to?

Unauthorised deduction from wages (/breach of contract)

1.13. Did R make a deduction from C's wages in respect of salary for May 2018 and July 2018?

1.14. If the answer to 1.13 is yes, was R contractually or otherwise entitled to make such a deduction, or were the deductions made in respect of a reimbursement of overpayment of wage or expenses?

Failure to follow Acas Code of practice on grievance procedure

1.15. Did C raise a grievance in relation to overdue salary?

1.16. Did R fail to follow the Acas Code on Disciplinary and Grievance Procedures in respect of the grievance raised by the Claimant regarding not being paid overdue salary?

1.17. If yes, what is the appropriate uplift to be applied in accordance with s207A TULR(C)A 1992?

Unpaid holiday

1.18. Was C entitled to be paid any accrued but unpaid holiday on the termination of his employment?

Written statement of particulars of employment

1.19. Did R fail to provide C with a written statement of particulars of employment, in accordance with section 38 of the Employment Act 2002?

1.20. If yes, what is the appropriate award?

2. <u>COUNTERCLAIM</u>

2.1. Were any sums owed by C to R outstanding at the termination of the employment, including without limitation:

2.1.1. an amount of £10,000 which C paid from R's bank account on 25 or 26 June 2018;

2.1.2. an amount of £14,332.50 in respect of fees paid by R regarding C's MBA course;

2.1.3. in the event C's claim for May and July's wages is successful, the amount of those wages as a debt arising from overpayments of previous salary.

Findings of fact

8. The claimant began working for H2O Farm Limited, a company founded by his father, on 1 July 2013, after he graduated from university. He was 21 years old at the time. H2O Farm Limited's primary product was a hydroponic fodder system, a system for the mass production of grain for animal feed. The system enables crops to be grown in water in a climatecontrolled environment.

9. H2O Farm Limited was run from the claimant's family farm. A hydroponic fodder demonstration system was set up on the farm and this permitted demonstration of the system to potential purchasers. The crop produced by the demo system was fed to the claimant's family's horses. The costs of grain, grain storage, electricity, water and additional labour for the demo system were met by the claimant's family.

10. The claimant's family also runs a company called One Juice Limited which sells wheatgrass juice made from wheatgrass grown using a smaller hydroponic system on the farm.

<u>The acquisition by Avocet Group</u>

11. In 2015 Martin Frost visited the claimant's family farm as a customer. Mr Frost is the chairman and majority shareholder of Avocet Infinite plc. Avocet is a group of companies whose businesses include three farms. Mr Frost bought a hydroponics fodder system from the claimant.

12. After Mr Frost's purchase of the hydroponics system, he and H2O Farm Limited began discussions which led to the Avocet group's acquisition of H2O Farm Limited. During these discussions, in about 2016, there was a

further visit to claimant's family farm by Mr Frost, this time with other Avocet group directors and major shareholders.

13. The claimant became a director of H2O Farm Limited on 1 January 2016. The acquisition by Avocet completed on 31 August 2016 and the business became a wholly owned subsidiary of the Avocet group. The claimant and his father remained as directors and employees, and continued to play a major role in day-to-day management, subject to the oversight of the Avocet group board of directors. Both the claimant and his father were authorised to use the business's bank account for any reasonable expenditure, subject to their fiduciary duties.

14. On 23 July 2018 H2O Farm Limited changed its name to Avocet H2O Limited (the respondent).

15. The acquisition was a fairly informal process and few documents were produced. There was a shareholder agreement signed by the claimant and the respondent (and others) dated 18 November 2015. The agreement provided for Avocet Agriculture Limited to acquire 75% of the shares in H2O Farm Limited, and for the claimant and his father to retain 10% of the shares each. There were to be two other shareholders. In the event this agreement was not fully implemented.

16. The agreement included a clause 10 which was headed 'Matters requiring consent of 76% or more of shareholders'. The clause provided that "should 76% of the shareholders not agree on any one item for a period of 12 months, then the power to decide shall revert to 75% of the shareholding". There was then a list of 24 matters that would require the consent of 76% of the shareholders, these included matters such as sale of assets, acquisition of another company or entering into a partnership.

17. Some of the listed matters requiring consent of 76% of the shareholders related to directors and employment matters. They included agreements that, without the consent of 76% of shareholders, the company would not:

> "a) vary the Emoluments and benefits of any of its directors or of any Shareholder or of any associate of a director or Shareholder;
>
> b) enter into any service agreement with any employee or director which is not terminable without payment of compensation on not more than 3 months' notice;
>
> c) dismiss any of its employees save in circumstances where the Company is entitled summarily to dismiss that employee;"

18. The claimant said that during the acquisition process, to alleviate the concerns of the claimant and his father about surrendering control of the

company they had started and grown from scratch, Mr Frost agreed to a 12 month notice period of any major changes to the business which the claimant and his father were not comfortable with.

19. The claimant says that Mr Frost gave two examples of major changes which were i) if Avocet decided to move all manufacturing to China and ii) if Avocet decided to cease the employment of the claimant and his father. The claimant said that this conversation gave rise to an entitlement on his part to 12 months' notice of termination of employment.

20. The claimant agreed that the conversation he was referring to was reflected in clause 10 of the shareholder agreement of 18 November 2015. He said, 'This was the way what [Mr Frost] presented to us was put into this agreement'.

21. I find that, although there were discussions between the claimant and Mr Frost about a 12 month notice period, this was in relation to director/shareholder rights. There was no written or oral agreement that the claimant was entitled to 12 months' notice of the termination of his employment.

The claimant's terms of employment and salary

22. The claimant said that he did not have a written contract of employment or a written statement of employment particulars at any stage of his employment. Mr Frost thought that the claimant had a written agreement before the acquisition of the business by the Avocet group. However, there was no copy of any written agreement included in the bundle. I find that the claimant did not have any written contract of employment or statement of employment particulars.

23. The claimant was provided with an Avocet Group staff handbook in a draft format. It included at Schedule 3 a 'Register of Interests Policy'. This stated at paragraph 2.1:

> "Directors of Avocet group and certain persons occupying senior roles shall be requested as part of their terms of engagement within the Avocet Group to register in the Register of Interests all relevant interests…"

24. The claimant did not have any terms of engagement.

25. The claimant was paid in arrears. Prior to the acquisition by the respondent, he received his salary on the 10th of each month for the month

before. I find that it was agreed between the claimant and the respondent that after the acquisition of H2O Farms Limited the claimant's salary would be £30,000 per year ie £2,500 per month before tax. This was reflected in the claimant's P60 and payslips. After tax the claimant's monthly pay was £1,847; his weekly pay was £576.92 gross and £426.23 net.

26. The Avocet group first began paying the claimant on 8 August 2016, in respect of his salary for July 2016. From August 2016 until July 2018, the claimant was paid by cheque from various Avocet bank accounts. The salary payments from the respondent between August 2016 and July 2018 were often received later than the 10th of the month, and sometimes much later, for example the payments made on 25 April 2017, 22 January 2018 and 23 February 2018.

27. Also, the amounts of the salary payments to the claimant between August 2016 and July 2018 varied quite considerably. The claimant was often paid more than £1,847 per month. However, the payments were not (other than the final payment to the claimant in July 2018, which was 9 pence short) below £1,847. Other than his final pay, the lowest payment received by the claimant was £1,860 (paid on 22 January 2018) and the highest was £3,500 (paid on 23 April 2018).

28. Of the 23 payments made to the claimant by or on behalf of the respondent between August 2016 and July 2018, more than half (14) were for amounts over £2,000 and more than a third (8) were for amounts over £2,500. There were 3 which were of £3,000 or above. There was no month prior to May 2018 when the claimant did not receive any pay or when he received less than £1,847.

29. Given the absence of a written contract of employment or statement of written particulars and the pattern of payments to the claimant, I find that it was reasonable for him to assume that some months he would be paid more than his £2,500 salary and that the additional payments represented a combination of expenses, compensation for late salary payments, and bonuses for good work.

30. I find that there was no written or oral agreement between the claimant and the respondent that the claimant would be overpaid in some months and underpaid in others. I accept the claimant's evidence that there was no agreement that any salary payments of more than £2,500 gross per month would be set off against future salary.

31. The claimant's evidence is consistent with the pattern of payments and in particular with the fact that during the time he was paid by the respondent, there was no set-off of any of the salary paid to the claimant. Prior to May 2018, there were no months when the claimant did not receive any pay or

when he received payments of salary below £1,847, even after one or more months when much larger payments were made.

32. In addition, if it had been agreed that the claimant would be paid less in some months to account for any previous payments over £2,500 (gross), I would have expected to see a written record of this agreement, which there was not. I would also have expected that the respondent would have referred to the existence of an agreement about this, when the claimant queried his pay in July 2018, but it did not do so.

33. The respondent operated a PAYE system for the claimant's pay. However, the PAYE deductions were not accurate: the claimant's P60 for the tax year to 5 April 2018 said that he was paid £30,000 before tax when he was paid £34,470.40 after tax. Most of the payments to the claimant were in round figures (for example in round hundreds of pounds, with no pence). This also suggests that PAYE deductions were not being properly made by the respondent.

Agreement to fund the claimant's MBA fees

34. In late 2017 Avocet Infinite plc agreed to fund course fees for an MBA course for the claimant at the University of Manchester. Avocet Infinite plc wrote to the university on 14 December 2017 confirming that it would sponsor the claimant's full course fees in the sum of £28,665, over a period of two years' study.

35. Also on 14 December 2017 the claimant and Avocet entered into an agreement under which training course fees paid by Avocet Infinite plc for the claimant would be repayable if the claimant left employment with the Avocet group. There was a sliding repayment scale linked to when the claimant left employment.

36. Clause 1.3 of the agreement between the claimant and Avocet provided that the claimant (referred to as 'you') would not have to repay any costs if:

> "you terminate your employment with the Company and or any of its subsidiary or affiliate companies in response to a fundamental breach by the Company or any of its subsidiary or affiliate companies whichever is your employer at the time."

Visit to the claimant's family farm

37. In early 2018 Mr Frost and a number of other directors and shareholders in Avocet group visited the claimant's family farm. Mr Frost said that he discovered on this visit that the claimant was carrying out work for two

other businesses: the production of fodder for horses and the production of wheatgrass juice for sale to the public.

38. Mr Frost agreed that the claimant and his father did not make much effort to hide what they were doing. This suggests that they thought Mr Frost was already aware of the businesses, or that they assumed there could be no objection. However, Mr Frost said he was unhappy that he had not been told about the other businesses much earlier. He said it was the policy of the respondent that interests of this nature should be declared in the register of interests.

39. I find that Mr Frost was aware of the other businesses which were operating from the claimant's family farm from his two previous visits to the farm. There were two hydroponic systems operating in connection with these two businesses. The respondent's acquisition of H2O Farm Limited was prompted by interest in and a purchase of a hydroponic system, and so these systems must have been the focus of Mr Frost during the visits.

40. I find that the claimant was not told that he was required to record these businesses in the register of interests. The handbook given to the claimant was in draft form. It suggested that directors would be requested in their terms of engagement to register all relevant interests, but the claimant had not been given any terms of engagement. Further, I find that the claimant thought that Mr Frost was already aware of these businesses.

41. I do not agree with Mr Frost's suggestion that the extent to which the claimant was keeping these two businesses separate from the respondent's business was very murky. There was no evidence of any overlap in the bank statements. I do not find any misconduct on the part of the claimant in relation to the other businesses run from his family farm. The businesses were beneficial to the respondent in that they enabled the claimant to show potential customers two working hydroponic systems on different scales and using different grains.

Incidents in May/June 2018

42. On 22 May 2018 the claimant was working on a project with a director of another Avocet group company. They had a disagreement about the design of a concrete floor for a building. During their disagreement, the other director lost his temper and threatened the claimant that he would 'Knock his fucking head off'. The claimant responded to this threat by shouting back at his colleague, saying 'Bring it on'. John Commins, the respondent's Head of Agriculture, was present and intervened.

43. The claimant made a complaint by telephone to Mr Frost about the incident. Mr Frost told the claimant that he should excuse his colleague's actions because of his ill-health. The claimant said this was unacceptable.

On 4 June 2018 the claimant sent an email to Mr Commins. The claimant said that he was awaiting a decision from Mr Frost about this matter. The claimant said that ill-health was 'not an excuse for complete and utter unprofessionalism' and 'it is costing the company time and money'. He concluded by saying that he felt it was 'unwise for us to delay any resolution until next month'.

44. The Acas Code of Practice on Disciplinary and Grievance Procedures says that grievances are 'concerns, problems or complaints that employees raise with their employers'. I find that it was clear from the claimant's telephone complaint to Mr Frost and the email to Mr Commins that, although the claimant did not use the term 'grievance', this was a complaint which the claimant expected the respondent to address and to which the Acas Code applied.

45. Mr Frost said that the other director was not an employee of the respondent, or connected with the claimant's employment in any way. However, the Acas Guide makes clear that issues raised by employees about matters not entirely within the control of the organisation, such as client or customer relationships, should be treated in the same way as grievances within the organisation. I find that the same would apply to a complaint about the director of a group company.

46. On 10 June 2018 the claimant did not receive his salary for May 2018.

47. On 22 June 2018 the claimant and his father received an email giving formal notice of three directors' meetings and three shareholder meetings for 3 group companies including the respondent. All the meetings were due to take place on 6 July 2018 at the respondent's solicitors' offices in London and the respondent's solicitor would be attending. The agenda showed that the claimant would be required to make a report on current business finances and prospects.

48. The claimant thought the invitation was very strange as he had not been invited to any meetings at the respondent's solicitors' offices or with the respondent's solicitor before.

49. Mr Frost asked an Avocet group company secretary to undertake an investigation into the complaint raised by the claimant about the incident on 22 May 2018. On 24 and 25 June 2018 she interviewed the other director and two other colleagues who had been present at the time. She did not interview the claimant or have any meeting with him about the investigation. The claimant was aware that some steps were being taken because one of his colleagues told him that he was interviewed on 25 June 2018. The company secretary prepared a report of the incident; the claimant was not provided with a copy of the report. The failure to have a

meeting with the claimant was a breach of the Acas Code (paragraph 33 of the Code).

50. The respondent's James Willoughby told the claimant that no formal action was to be taken because both the claimant and the other director against whom he had made a complaint were directors of Avocet subsidiary companies, and so the usual employee action could not be taken. The claimant was not informed of this decision in writing; this was a breach of the Acas Code (paragraph 40). The claimant was not told of any right of appeal; this was also a breach of the Acas Code (paragraphs 40 and 42).

51. In his evidence, Mr Frost said that fundamentally there appeared to him to be no real incident to be investigated, and that if all such incidents prompted full enquiries it would be difficult.

52. On 26 June 2018 the claimant made a payment of £10,000 from the respondent's Barclays Bank account in the name of H2O Farm Limited. The payment was made to a Barclaycard account in the name of H2O Farm Limited because its balance had reached £10,877.87 and it was approaching its credit limit. The card was used to pay company suppliers and expenses. There was no evidence that the balance on the card was built up as a result of any improper expenses or misconduct on the part of the claimant.

53. I find that the payment by the claimant to the respondent's Barclaycard was a payment he was authorised to make as he was a director of the respondent at the time and had authority to pay the respondent's credit card.

The meeting on 6 July 2018

54. The claimant and his father attended the directors' meeting on 6 July 2018. The meeting was divided into three parts, with a meeting of the shareholders taking place in the middle of a directors' meeting in two parts.

55. During the first half of the directors' meeting the claimant gave a powerpoint presentation in which he raised his concerns about 'inconsistent and irregular pay', including the fact that he had not been paid his salary for May 2018. The claimant also repeated his concerns about the incident on 22 May 2018.

56. The claimant and his father left the room during the shareholder's meeting as they were not shareholders of the respondent.

57. When he returned for the second part of the board meeting, the claimant was told that the shareholders had decided that both he and his father were to be removed as directors with immediate effect. The claimant would

continue as an employee, and his father would continue in a consultancy capacity. The claimant would no longer have authority on the company bank account. He would no longer report to the board of the Avocet parent company but would instead report to Mr Commins.

58. The claimant was shocked and felt this was a demotion. He resigned as a director but asked for the weekend to consider whether he wanted to continue in the proposed new employee role.

59. The claimant and his father met Mr Frost in London on Sunday 8 July 2018 to discuss the claimant's new role. Mr Frost sent a summary of that meeting in an email to Mr Commins on 9 July 2018 (the summary was not sent to the claimant). In the email, Mr Frost said that the claimant was 'expected to work to [Mr Commins'] order for the next 18 months'.

60. On 9 July 2018 the claimant telephoned Mr Commins. He said that despite serious reservations, he would continue in the new role and see how it went, on a trial basis. He said he must receive his missing wages for May 2018.

61. On 10 July 2018 the claimant received a payment of £1,846.91 via a BACS transfer. This was the claimant's salary for June 2018. All other employees of the respondent received their pay that month by BACS, for the first time.

62. As the claimant's May 2018 pay was still outstanding, he emailed Mr Frost on 10 July 2018 to remind him that he was still owed his wages for May 2018. He did not receive any reply.

63. The claimant sent a further email reminder to Mr Frost and others on 19 July 2018. He said 'I would appreciate a swift response on this'. Mr Frost sent an email response on the same day which dealt with a number of other matters but did not reply to the claimant's request for an update on pay.

<u>Email exchanges between the claimant and Mr Frost</u>

64. On 23 July 2018 Mr Frost sent an email to the claimant, copying in Mr Commins and three other colleagues. It was apparently prompted by a weekly review report prepared by the claimant which was forwarded to Mr Frost by his assistant. Mr Frost's email to the claimant said:

> "Dear Rob
>
> A gentle hint.
>
> I along with Bob Jennings and John Commins would be more mindful to place trust in your business ability if we saw any

> evidence of your claimed proficiency. I refer to your promise to John Commins regarding a hydroponics manual; again I note that no effort has been made to render 'movement mapping' for Sunwick or Harcarse.
>
> I expect Bob, John, Ross and Sarah to echo my concerns – no doubt you can explain matters to them.
>
> Best regards
>
> Martin"

65. The email says that the respondent has not seen any evidence of the claimant's proficiency. It strongly suggests that the respondent has no trust in the claimant's business ability. The claimant felt humiliated and undermined by this email. He thought the criticism of his work was unfair as he had already provided the respondent with an operations manual, including sending it to Mr Commins on 5 June 2018, and at this stage had not been told what further work was required on it. He was going to work on the movement mapping. I accept the evidence of the claimant that the criticism of his work was unfair.

66. Also on 23 July 2018 Mr Frost received an update from the respondent's company secretary about the respondent's attempts to obtain the statutory books from the claimant and his father. Mr Frost said that he thought that the claimant and his father were being deliberately evasive about this. The company secretary's email does not however support this; the claimant was said to have been uncertain about the location of the books, and the claimant's father said he would look into it.

67. On 24 July 2018 Mr Frost sent an email to the claimant which said 'You have my permission to make payment for your college fees from the Barclays hydroponic account.' The claimant made this payment. I do not understand the respondent to have suggested that it was improper of the claimant to do so, but if this was being suggested I do not accept that it was. The claimant was an employee of the respondent on this date, and payment of the fees was in accordance with the sponsorship agreement. He had obtained permission from Mr Frost.

68. On the same day, the claimant sent an email to Mr Commins and some colleagues (not including Mr Frost) with bullet point notes on the 'movement mapping' issue which had been raised in Mr Frost's email of 23 July 2018. Mr Commins replied:

> 'This will be for discussion at the agriculture meeting on Tuesday and I will welcome everybody's input. Following the meeting [NT] and I will assess sites and develop plans'.

69. On 25 July 2018 Mr Frost sent an email to the claimant, copying in 6 colleagues including one of the claimant's peers. The email said:

> "Dear Rob
>
> I am concerned that you have not answered the requests for the hydroponics manual nor where you are upon the proposed layout proposals [movement mapping]….
>
> Kind regards,
>
> Martin
>
> Hint: concentrate on your duty to Avocet!"

70. The claimant felt, and I accept, that in this email Mr Frost was unfairly criticising his work. The claimant had been told that he was to report to Mr Commins. The claimant had already provided the manual to Mr Commins, and had sent comments on the movement mapping to Mr Commins the previous day. Mr Frost's email strongly suggested that, in the way in which he was carrying out his work as an employee, the claimant was not concentrating on his duty to the respondent. Again, I accept the claimant's evidence that this was not fair criticism.

71. The claimant sent a reply to Mr Frost on 26 July 2018. He copied the same colleagues as the email from Mr Frost. In his email the claimant provided updates on the various tasks he was working on. He concluded his email by saying:

> "Please, I do not appreciate this repeated criticism and insinuation that I am not acting in the best interests of Avocet. I continue to put myself forward for jobs where I feel I can provide value, but for the moment I have been told by Jon to wait for the Irish projects to be further established before I become involved.
>
> Once again, I would appreciate an update on my missing wages for May."

72. Mr Frost replied to this email on 26 July 2018. The same six colleagues were copied in, as well as the claimant's father and one other. The email read:

> "Dear God
>
> For those that trespass against us….

> You have until Monday to provide your so-called 'lost operational' manual.
>
> Howe does the hydroponics impact on farm work flow and method study?
>
> Next time you attempt to rebuke me – you shall be publicly dismissed. In my opinion your work performance & attitude is terrible and as far as I can see your time sheets are an otiose creative work of fiction. So please improve young man! You have ability – so use it.
>
> Martin Frost
> Chairman
> Avocet Infinite plc"

73. In this email, Mr Frost threatened the claimant with 'public' dismissal because of his response to the previous emails. He said that the claimant's work performance and attitude were terrible and that Mr Frost thought the claimant had lied in his timesheets. The part said by the respondent to be encouraging better performance comes across as patronising ('So please improve young man!'). For the reasons set out above, I accept the claimant's evidence that this email was not fair criticism of his work.

74. The claimant was shocked and upset by the email. He emailed Mr Commins at 12.48pm the following day, which was a Friday. He complained about Mr Frost's email of 26 July 2018, asked for Mr Commins support and set out what work he had done. He continued:

> "With regards to this email from Martin yesterday, to which he copied in everyone, I am tired of being Martin's whipping boy….Meanwhile, I have still not received my wages for May. A point that Martin continues to ignore despite repeated polite requests.
>
> ….
>
> I feel Martin's behaviour towards me is unacceptable. I don't understand what his desired outcome is for his widespread criticism of my work and attitude, considering I am merely following your instructions.
>
> I feel that our current working environment is not beneficial to either myself as an individual or Avocet as an organisation. Do you think I should take the weekend to consider my position?"

75. Mr Commins sent the claimant an email later the same afternoon. He did not reply to the points in the claimant's email. He asked the claimant to

organise some essential work matters. He added 'At meetings will email or talk later'. The claimant did not receive any further contact.

76. I find that the claimant's email to Mr Commins contained a grievance (in the sense used in the Acas code of 'a concern, problem or complaint') about Mr Frost's behaviour. The complaint was raised in writing and set out the nature of the claimant's concerns.

77. I also find that the claimant's emails of 19 and 26 July 2018 relating to his unpaid salary were complaints which should have been treated as a formal grievance in accordance with the Acas Code. The email of 10 July 2018 was expressed as a 'reminder', but the emails of 19 and 26 requested 'a swift response' and 'an update'. The Acas Guide makes clear that grievances may include issues about terms and conditions of employment.

78. To comply with the Acas Code, the respondent should have arranged for a formal meeting with the claimant to address his complaint about pay, to have been held without unreasonable delay (as required by paragraph 33 of the Code). The respondent did not acknowledge the claimant's complaints or treat them as a grievance and did not arrange a meeting after receiving the claimant's emails of 19 and 26 July 2018. This was a breach of paragraph 33 of the Acas Code.

<u>The claimant's resignation</u>

79. After the exchange of emails between the claimant and Mr Frost, the claimant decided that, because of the non-payment of his salary and the way he had been treated, he could no longer remain employed by the respondent. He sent his formal letter of resignation to Mr Frost on 30 July 2018. He said that he was resigning with immediate effect in response to the fundamental breaches of contract by the respondent and Mr Frost in particular.

80. The claimant's employment terminated on 30 July 2018. He was 26 years old at the time.

81. After the claimant left his employment, he had a number of exchanges with Mr Frost and the company secretary about the handover of statutory books and records for the respondent. I do not find that the claimant was being uncooperative or evasive during these exchanges.

82. The claimant did not receive his pay for July 2018. Mr Frost said in his evidence that this was because of the level of payments which had previously been made to the claimant.

83. The claimant's holiday year ran from 1 July to 30 June. He accrued 2 days' holiday during the period 1 July 2018 to 30 July 2018 (30/365 x 20, rounded up). He said he had only taken one days' holiday during that period.

84. Mr Frost said that the claimant did not have any untaken holiday when his employment terminated. There were no records to show the dates on which the claimant took holiday. I find that the claimant is more likely to be correct about this point. It is unlikely that without access to records Mr Frost would be able to accurately recall how many days holiday the claimant was entitled to and how many he had taken.

85. After his employment with the respondent terminated, the claimant was out of work for 17 weeks. He obtained new employment at the same or higher salary on 26 November 2018. I find that the claimant took reasonable steps to mitigate his losses.

86. I do not find that, if he had not been dismissed, the claimant would have shortly left the respondent's employment in any event. I have not made any finding of misconduct. I find that the claimant's decision after the meeting on 6 July 2018 to continue in the new role and see how it went on a trial basis was a genuine one and that, if it had not been for the employer's conduct which led to the claimant's resignation, he would have been able to stay on in the respondent's employment for a period of at least seventeen weeks.

The law

Constructive unfair dismissal

87. The definition of dismissal in section 95(1)(c) of the Employment Rights Act includes constructive dismissal which is a dismissal where the employee terminates the contract of employment in circumstances where they are entitled to terminate it without notice by reason of the employer's conduct.

88. Weston Excavating v Sharpe sets out the elements which must be established by the employee in constructive dismissal cases. The employee must show:

88.1. that there was a fundamental breach of contract on the part of the employer;
88.2. that the employer's breach caused the employee to resign; and
88.3. that the employee did not delay too long before resigning and thereby affirm the contract.

89. The breach may be of an express term or an implied term of the contract. The Claimant relies on breaches of the employer's contractual obligations, including as to pay. He also relies on a breach of the implied term of trust and confidence. This is a term implied into all contracts of employment that employers (and employees) will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

90. In cases where a breach of the implied term is alleged, 'the tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it' - Woods v WM Car Services (Peterborough) Limited.

91. In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 Underhill LJ set out a series of questions to be considered where an employee claims to have been constructively dismissed and where there are said to be a number of repudiatory breaches. Those questions are:

    91.1. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    91.2. Has he or she affirmed the contract since that act?
    91.3. If not, was that act (or omission) by itself a repudiatory breach of contract?
    91.4. If not, was it nevertheless a part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence?
    91.5. Did the employee resign in response (or partly in response) to that breach?

92. If a constructive dismissal is established, the tribunal must also consider whether the reason for the dismissal is a potentially fair reason, and whether the dismissal is fair in all the circumstances, pursuant to section 98(4) of the Employment Rights Act 1996.

93. A constructive dismissal where the employee resigns without notice will also be a wrongful dismissal, ie a dismissal by the employer in breach of the contractual requirement to give notice.

Unauthorised deduction from wages

94. Under section 13 of the Employment Rights Act 1996, a worker has the right not to suffer unauthorised deduction from their wages unless the deduction is required or authorised by a statutory provision or a relevant provision of the employee's contract. 'Relevant provision' is defined in section 13(2).

95. Section 14 sets out deductions which are excepted from section 13 and which the employer is therefore permitted to make. It includes the following at sub-section (1):

> "Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of –
>
> a) an overpayment of wages."

Pay in lieu of untaken holiday

96. Under Regulation 14 of the Working Time Regulations 1998, a worker who leaves employment mid-way through a leave year is entitled to be paid in lieu of untaken annual leave as provided for in a relevant agreement or in regulation 14(3)(b).

Acas Code of Practice on Disciplinary and Grievance Procedures

97. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 applies to proceedings set out in Schedule A2, which includes those relating to complaints of unfair dismissal, breach of contract, unauthorised deduction from wages and unpaid holiday pay. Sub-section (2) provides:

> "If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
>
> (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
> (b) the employer has failed to comply with that Code in relation to that matter, and
> (c) that failure was unreasonable,
>
> the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%."

Written statement of particulars of employment

98. Section 38 of the Employment Act 2002 applies to proceedings including complaints of unfair dismissal, breach of contract, unauthorised deduction from wages and unpaid holiday pay .

99. Where, in proceedings to which section 38 applies,

a) a tribunal finds in favour of an employee or makes an award to an employee in respect of the claim to which the proceedings relate and,
b) when proceedings were started the employer was in breach of the duty under section 1 of the Employment Rights Act 1996 to provide a written statement of particulars of employment,

then the tribunal must make an award equal to two weeks' pay and may make an award equal to four week's pay. The award is subject to the statutory cap on a week's pay. At the time of the effective date of termination of the claimant's employment, a week's pay was capped at £508.

Conclusions

100. I have applied these legal principles to my findings of fact as set out above, in order to decide the issues for determination. I have followed the order of the issues in the list agreed by the parties and set out above.

THE CLAIMANT'S COMPLAINTS

Constructive dismissal

101. I have dealt with points 1.1 to 1.3 of the list of issues together, by considering the questions set out by Underhill LJ in Kaur.

102. First, I have considered the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation.

103. This was said by the claimant to be the respondent's continued failure to pay his May 2018 salary. (It cannot be the failure to pay his July 2018 salary, as this was not due to be paid until 10 August 2018, which was after he resigned.)

104. Next, I need to consider whether the claimant has affirmed the contract since the omission to pay the claimant's May 2018 salary. I have concluded that he has not.

105. The claimant's salary was due to be paid on 10 June 2018. By the time of his resignation on 30 July 2018 it was still unpaid. The claimant did not

immediately chase it up. However, he was used to his salary payments being made late and in those circumstances it was reasonable for him to wait to see if he would be paid. Immediately after payment of his salary for June 2018 was made on 10 July 2018, leaving a month's pay still outstanding, the claimant made four written requests to the respondent for payment of his May salary. These requests were made on 10, 19, 26 and 27 July 2018.

106. Next, I have considered whether the non-payment of the claimant's salary for May 2018 was by itself, a repudiatory breach of contract. I have concluded that it was. Although the claimant did not have a written contract of employment, I have found that it was agreed between the claimant and the respondent that the respondent would pay the claimant for his work, and that there was no agreement that deductions could be made by the respondent by way of set-off of earlier payments above £2,500. The obligation to pay an employee for their work is a term at the heart of the employment contract. The failure to pay the claimant his May 2018 salary was a breach of that term and a repudiatory breach of his contract of employment.

107. In case I am wrong about this, I have gone on to consider whether the non-payment of the claimant's May 2018 salary was part of a course of conduct comprising several acts and/or omissions which, viewed cumulatively, amounted to a breach of the implied term of trust and confidence. I have concluded that it was. I conclude that the following acts, viewed cumulatively, amounted to a breach of the implied term:

    107.1. The way in which the respondent dealt with the claimant's complaint about the incident on 22 May 2018, including the interview of a colleague on 25 June 2018 which the claimant became aware about from that colleague;
    107.2. The failure to pay the claimant his May 2018 salary which was due on 10 June 2018, and the failure to provide the claimant with any explanation for this; these failures were on-going up to the point of the claimant's resignation;
    107.3. The emails to the claimant sent by Mr Frost on 23, 25 and 26 July 2018 and the failure by Mr Commins to reply to the question at the end of the claimant's email of 27 July 2018.

108. The claimant's complaint about the incident on 22 May 2018 was not described as a grievance but I have found that it was clearly a complaint in respect of which the claimant expected the respondent to take action and to which the Acas Code applied. The claimant raised it by telephone with Mr Frost and with Mr Commins in writing and he continued to raise concerns about this incident at the meeting on 6 July 2018.

109. Although an investigation into the claimant's complaint was carried out on behalf of the respondent, it was flawed in a number of respects. The respondent failed to hold a meeting with or interview the claimant to discuss his complaint, failed to provide him with written confirmation of the outcome of the investigation or the outcome of his complaint, and failed to provide him with a right of appeal. The claimant was aware that an investigation was being undertaken and that he was not being included, because a colleague told him that he had been interviewed but the claimant was not interviewed.

110. These failures were likely to and did seriously damage the trust and confidence between the claimant and the respondent and contributed to the cumulative breach of the implied term of trust and confidence. Further, these failings amounted to breaches of the Acas Code of Practice on Disciplinary and Grievance Procedures, to which I return below.

111. The respondent's failure to pay the claimant his salary for May 2018, together with the failure to provide the claimant with any explanation for the non-payment, was also part of a course of conduct which amounted to a breach of the implied term of trust and confidence.

112. The emails sent to the claimant by Mr Frost also formed part of that course of conduct. The language, tone the large number of addressees and the unfair criticism in the emails meant that they were likely to destroy or seriously damage the relationship of trust and confidence between the claimant and the respondent. The email of 23 July 2018 strongly suggested to the claimant that the respondent had no trust in the claimant's business ability and proficiency. The email of 25 July 2018 included a clear implication that, in the way in which he was carrying out his work as an employee, the claimant was not concentrating on his duty to the respondent. The email of 26 July 2018 threatened the claimant with public dismissal because of his response to the previous emails.

113. The claimant emailed Mr Commins on 27 July 2018 after receiving the email from Mr Frost. Mr Commins' failure to reply to the last paragraph ('Our current working environment is not beneficial… Do you think I should take the weekend to consider my position?') was a failure by the claimant's manager to reply to a question asked by the claimant which went to the heart of the employment relationship. This failure to reply was also likely to seriously damage the trust and confidence between the claimant and the respondent, and so was part of the course of conduct which amounted to a breach of the implied term of trust and confidence. The cumulative effect of the respondent's course of conduct over the period 22 May 2018 to 30 July 2018 was such that the claimant could not be expected to put up with it.

114. Lastly on the question of constructive dismissal, I have to ask whether the claimant resigned in response (or partly in response) to that breach.

115. The non-payment of the claimant's May 2018 salary was referred to by the claimant in the opening paragraphs of his resignation letter of 30 July 2018. He said that he regarded this as a fundamental breach of his contract, and that the failure to pay him his due wages for May 2018 had left him with no choice but to resign.

116. The claimant also referred to the series of emails from Mr Frost on 23, 25 and 26 July 2018 in his resignation letter. The claimant says that he cannot continue to work in this 'toxic and unprofessional environment' as he feels that all trust and confidence is irretrievably broken.

117. The claimant also says in his letter that his complaint about the incident on 22 May 2018 'has been swept under the carpet' and that this has resulted in a lack of trust on his part of the organisation's internal procedures, care for him as an employee, and its ability to resolve serious issues.

118. I have concluded from the claimant's resignation letter and from the timing and chronology that the claimant resigned in response to (or partly in response to) the respondent's non-payment of the claimant's May 2018 salary. I have found that this was a repudiatory breach of the claimant's contract of employment.

119. I conclude that he also resigned in response to the course of conduct by the respondent which included the non-payment of his salary, the emails of 23, 25, 26 July 2018 and the way the respondent dealt with the complaint about 22 May 2018. I have found these to have cumulatively amounted to a fundamental breach of the claimant's contract of employment.

120. In his letter the claimant also mentions his dismissal as a director. The claimant also relied on changes to the nature of his employment which were made at and after the meeting on 6 July 2018 as a repudiatory breach of contract. I have not found these to be part of the course of conduct which undermined the trust and confidence between the claimant and the respondent. This is because they relate primarily to the claimant's position as a director rather than as an employee. The existence of another factor in the claimant's decision to resign does not however affect my conclusion that the claimant was constructively dismissed.

121. I have therefore concluded that the claimant was constructively dismissed by the respondent on 30 July 2018.

Unfair dismissal

122. Having found that the claimant was constructively dismissed, I need to consider whether the dismissal was unfair. This requires consideration of

whether the respondent had a potentially fair reason for dismissal and whether the dismissal was fair in all the circumstances of the case.

123. The respondent said that the dismissal was for some other substantial reason, namely his removal as a director. This cannot be the reason for the conduct I have found to be (or be part of) the repudiatory breaches of contract, namely the non-payment of the claimant's May 2018 salary, the failure properly to investigate his complaint about the 22 May 2018 incident, Mr Frost's emails of 23, 25 and 26 July 2018 and the failure by Mr Commins to reply to the claimant's email of 27 July 2018. There is no reason why the claimant's removal as a director would have led to any of these matters. Further, the claimant's removal as a director was not the reason for his dismissal as an employee, because the claimant's role as an employee continued after his removal as a director.

124. I have considered whether the dismissal could have been for conduct or capability reasons. However, I have not found any misconduct on the part of the claimant, and I have accepted the claimant's evidence that the criticism of his work performance contained in Mr Frost's emails was unfounded.

125. I conclude therefore that there was no potentially fair reason for the claimant's dismissal.

126. In any event, even if there was a potentially fair reason for dismissal, I conclude in the light of my findings of fact that the dismissal was not fair in all the circumstances of the case. In particular, I take into account the failure to follow any sort of procedure, the breaches of the Acas code, and the matters I have concluded are repudiatory breaches, including the failure to provide any explanations to the claimant as to the reasons for withholding pay, and the language and tone of the emails from Mr Frost, particularly the email of 26 July 2018.

127. For these reasons, I conclude that the claimant was unfairly dismissed.

Unfair dismissal remedy

128. I next consider what compensation should be awarded for unfair dismissal. (The claimant is not seeking reinstatement or reengagement.)

129. I have found that, if the claimant had not been dismissed, he would have remained employed by the respondent for a period of at least 17 weeks.

130. I have not found any misconduct on the part of the claimant, or any conduct amounting to contributory fault in respect of which a reduction of the basic and/or compensatory awards would be warranted.

131. I have found that the claimant has reasonably mitigated his loss. He worked in a fairly specialist area but was able to obtain new employment at the same or higher rate of pay within a relatively short period of 17 weeks.

132. The claimant had 5 years' service with the respondent. He was 26 at the termination date. His weekly pay was £576.92 gross and £426.23 net.

133. The claimant is entitled to a basic award of 4.5 x a week's pay. At the time of the effective date of termination, a week's pay was capped at £508. This gives a total basic award of £2,286.

134. The claimant commenced new employment on 26 November 2018. He suffered loss of salary for the period from 30 July 2018 to 25 November 2018, a period of 17 weeks. His total net losses are 17 x £426.23 = £7,245.91. I also award £300 in respect of loss of statutory rights. This gives a total compensatory award of £7,545.91 (before consideration of section 207A).

Wrongful dismissal (breach of contract)

135. The claimant left his employment on 30 July 2018 without notice. The failure to give notice amounts to a breach of contract (wrongful dismissal).

136. The claimant did not have a written contract of employment with an express notice period. I have found that there was no oral agreement for 12 months' notice. A reasonable notice period would however be implied into the claimant's contract.

137. As an employee with five years' service, the claimant had a statutory entitlement to a minimum of five weeks' notice. Based on the reference in the shareholders' agreement signed on 18 November 2015 to service agreements terminable on not more than 3 months' notice, I conclude that a 3 month notice period would have been a reasonable notice period in the claimant's case, and would have been implied in his contract of employment.

138. The claimant is therefore entitled to 3 months' pay in lieu of notice in respect of the respondent's failure to give notice. However, the notice period overlaps with the period for which the claimant has been awarded loss of salary as part of the compensatory award above. There is therefore no award in respect of the wrongful dismissal complaint, to avoid double recovery for this period.

Unlawful deductions from wages/breach of contract

139. There was no dispute that the claimant was not paid his salary for May 2018 and July 2018.

140. Section 13 of the Employment Rights Act permits deductions from salary in some circumstances as set out in section 13(1)(a) and (b). I have considered whether any of these apply.

141. The respondent has not said that it was required or authorised to make deductions from the claimant's pay by virtue of any statutory provision.

142. Section 13(1)(a) relates to deductions required or authorised by virtue of a 'relevant provision' of the worker's contract. Relevant provision is defined in section 13(2) as a provision in a written contract, or one or more terms in a contract which need not be written but where the existence and effect of the term has been notified to the worker in writing.

143. I have found that the claimant had no written contract of employment with the respondent, and that there was no written or oral agreement allowing set-off of pay in one month against pay in later months. There was therefore no 'relevant provision' for the purposes of section 13(1)(a). There was also no written agreement or consent to the deduction by the claimant within the meaning of section 13(1)(b).

144. I have found that the payments made to the claimant which were in excess of his monthly gross pay of £2,500 were not overpayments. Section 14(1)(a) does therefore not apply here, and the respondent was not permitted to make deductions from the claimant's salary in May and July 2018 to recover payments made in previous months.

145. I conclude therefore that the respondent made unauthorised deductions from the claimant's wages in that it failed to pay him his salary for May 2018 and July 2018.

146. The claimant is entitled to £2,500 (before tax) for each of May 2018 and July 2018 ie £5,000.

<u>Failure to follow Acas Code</u>

147. I have found that the respondent failed to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures in a number of respects when addressing the claimant's complaint about the incident on 22 May 2018. The respondent failed to:

147.1. have a meeting with the claimant (a breach of paragraph 33 of the code);
147.2. communicate the decision to the claimant in writing (a breach of paragraph 40 of the code); and

147.3. afford the claimant a right of appeal (a breach of paragraphs 40 and 42 of the code).

148. I find that the respondent's failure to follow the Acas Code in these respects was unreasonable. The breaches of the code were all in relation to aspects of the code which permit the engagement of the employee with the process. The failures to include these required steps in the claimant's case meant that he had only minimal knowledge of and involvement in the investigation of and response to his complaint.

149. I have also found that the respondent failed to acknowledge the claimant's complaints about his unpaid salary, or treat them as a grievance. The respondent did not arrange a meeting after receiving the claimant's emails of 19 and 26 July 2018. I find that this was a breach of the requirement in paragraph 33 of the Acas Code: failing to respond to the claimant for 10 days prior to the termination of his employment amounted to a failure to arrange a meeting 'without unreasonable delay'. This failure was unreasonable because the claimant's complaint was about the failure to pay him for May 2018, a matter which goes to the heart of the employment relationship.

150. In the event, the claimant's employment terminated shortly after he made his complaints about pay. While there may be circumstances in which it would be unreasonable for an employer to fail to follow the Acas Code after the employee's employment has ended, I do not consider in the circumstances of this case that the failure by the respondent to take further steps to investigate the claimant's pay complaint under the Acas Code after the claimant's employment ended was unreasonable. On 27 August 2018, fairly shortly after his employment terminated, the claimant notified Acas for early conciliation and he then commenced his employment tribunal claim on 26 October 2018. In the circumstances of this case, it would be reasonable to regard the claimant's internal complaints as having been superseded.

151. Lastly on the issue of grievances, I have found that the claimant's email to Mr Commins on 27 July 2018 also contained a grievance about Mr Frost's behaviour. However, the claimant's employment terminated very shortly afterwards. For the reasons set out above, I conclude that the respondent's failure to take any steps in relation to this grievance was not unreasonable.

152. I have next considered section 207A of TULRCA. The claimant's grievances about the 22 May 2018 incident and the failure to pay him in May 2018 are matters to which I have found the Acas Code applies. The claimant's complaint of constructive unfair dismissal concerns those grievances as they were part of a course of conduct which I have found

amounted to a breach of the implied term of trust and confidence. Section 207A(2)(a) is therefore met.

153. I have found that the respondent has failed to comply with the Acas code in a number of respects and that (as set out above) some of those failures were unreasonable. Section 207A(2)(b) and (c) are also met.

154. I have therefore considered whether it is just and equitable to increase the claimant's compensatory award.

155. I have taken into account that there were significant failings in relation to the 22 May 2018 grievance, and a failure to acknowledge the pay grievance. The respondent failed to provide the claimant with an appropriate procedure. The claimant submits that an appropriate increase would be to increase the compensatory award by 25%.

156. Set against that, I have taken into account the fact that the respondent did take some steps under the Acas Code in response to the complaint about the 22 May 2018 incident, and the fact that, in respect of the pay complaint, I have found that only the respondent's failure to follow the first stage of the procedure was unreasonable.

157. Weighing up these factors, I have concluded that it would be just and equitable to increase the compensatory award by 15%. This gives an increase of £1,131.89, making a total compensatory award after increase of £8,677.80.

Unpaid holiday

158. I have found that the claimant had one day's untaken holiday at the date of termination of his employment. His entitlement under Regulation 13 of the Working Time Regulations 1998 was to 20 days per year. His holiday year ran from 1 July to 30 June. He accrued 2 days annual leave during the period 1 July to 30 July 2018 (30/365 x 20, rounded up).

159. The claimant is entitled to pay in lieu of one day's untaken holiday for the holiday year which started on 1 July 2018.

160. The claimant is awarded one day's pay which is £115.38 (£576.92/5).

Written statement of particulars of employment

161. Section 38 of the Employment Act 2002 applies to proceedings for unfair dismissal. I have made an award to the claimant in respect of his complaint of unfair dismissal.

162. I have found that the respondent was in breach of its duty to provide the claimant with a written statement of employment particulars under section 1 of the Employment Rights Act 1996.

163. Section 38(3) therefore applies.

164. I make an award of two weeks' pay under section 38(3). I have considered whether it is just and equitable to make an award of four weeks' pay, I have concluded that it is not, because the initial failure to provide a written statement of employment particulars arose prior to the acquisition by the respondent.

165. The award under section 38(3) is subject to the statutory cap on a week's pay. The claimant is awarded £1,016 (2 x £508).

THE RESPONDENT'S CONTRACT CLAIM

166. I have found that the claimant was authorised to make the payment of £10,000 from the respondent's bank account to the respondent's Barclaycard as he was a director of the respondent at the time. This payment was made to clear the balance of the respondent's card which had reached £10,877.87. The card was used to pay company suppliers and expenses. There was no evidence that the balance on the card was built up as a result of any improper expenditure or misconduct on the part of the claimant.

167. The respondent's complaint of breach of contract in respect of this payment fails and is dismissed.

168. In relation to the MBA fees, the agreement between the claimant and the respondent which provided for repayment of the fees by the claimant expressly said that the claimant would not have to repay any fees if the reason for his leaving the respondent was because he had terminated his employment in response to a fundamental breach by his employer.

169. I have found that the claimant terminated his employment in response to a fundamental breach by the respondent, namely the failure to pay his pay and a breach of the implied term of trust and confidence.

170. In these circumstances the claimant's MBA fees are not repayable to the respondent, and this complaint of breach of contract also fails and is dismissed.

171. Finally, the respondent seeks repayment of the claimant's salary for May 2018 and July 2018 as a debt arising from overpayments of previous salary. I have found that the payments to the claimant in excess of £2,500

per month in the months before May and July 2018 were not overpayments. This complaint therefore fails and is dismissed.

Summary of award to claimant

Basic award	£2,286.00	
(Compensatory award before increase	£7,545.91)	
(Increase under s207A TULRCA	£1,131.89)	
Compensatory award after increase	£8,677,80	
Total unfair dismissal award		£10,963.80
Unauthorised deduction from wages		£5,000.00
Unpaid holiday		£115.38
Failure to provide written statement of particulars		£1,016.00
Total award to claimant		£17,095.18

_____

Employment Judge Hawksworth
Dated: 25 September 2019

Judgment and Reasons

Sent to the parties on: 4 October 2019

.....
For the Tribunal Office