Case Numbers: 2201364/2019
2201367/2019
2201370/2019

THE EMPLOYMENT TRIBUNALS

Claimants	(1) Benjamin Churchill (2) Oumar Diallo (3) Zaki Nuseibeh
Respondent	Floreat Capital Markets Limited
HELD AT:	London Central
ON:	29 January to 3 February 2020, Chambers 4-5 February 2020
	Employment Judge Tayler

Appearances

For Claimants:	Ijeoma Omambala, Counsel
For Respondent:	P.J. Kirby, Queen's Counsel

JUDGMENT[1]

1. The Claimants were unfairly dismissed.

2. Had they not been unfairly dismissed, their employment would have ended two weeks later than the date of their resignations.

3. The Claimant's basic award should be reduced by 50%.

[1] Corrected to rectify typographical error

REASONS

Introduction

1. By Claim Forms submitted to the Employment Tribunal on 12 April 2019 the Claimants brought complaints of unfair dismissal.

Issues

2. The issues for determination were agreed, as set out in the Annex

Evidence

3. The Claimants gave evidence.

4. The Respondent called Mutaz Otaibi, Director

5. I was provided with an agreed bundle of documents. References to page numbers in this Judgement are to the page number in the agreed bundle of documents.

Findings of fact

6. The Floreat Group of Companies is a privately owned international financial group controlled by Mr Mutaz Otaibi, his brother Hussam Otaibi and James Wilcox. Its head office is at 33 Grosvenor Street, Mayfair.

7. The Claimants worked together for a number of years at Deutsche Bank on the fund derivates desk. They had a particular specialism in structuring products related to commercial aviation. The Claimants then worked for a business they set up, called Terium.

8. As a result of the financial crisis some hedge funds own distressed or illiquid assets. The Claimants considered that they had the skills that would allow them to “unwind” such assets.

9. The Claimants were introduced to Mr Hussam Otaibi. Discussions took place about a business, in the nature of a joint venture, to seek to exploit the opportunity they thought such illiquid assets might offer. In broad outline, the plan was that the Floreat Group, through one or more of its companies, would provide initial finance. As the business grew it would become self-financing with the profits thereafter being shared between the Claimants and the Floreat Group. The Claimants did not invest capital but brought their experience to the new business.

10. The Respondent, Floreat Capital Markets Limited, was incorporated on 15 July 2013 as a private company limited by shares. The Company's issued share capital is £6, divided into 6 ordinary shares of £1 each, all of which are fully paid up or credited as fully paid.

11. On incorporation, 3 shares were allotted to Floreat (UK) Limited (now Floreat Merchant Banking Limited). One share was allotted to each of the Claimants.

12. There are 2 directors of the Respondent. Mr Diallo was appointed as one of the directors. Mr Hussam Otaibi was the other director when the Respondent was incorporated. Mr Hussam Otaibi resigned on 1 September 2014 and Mr Mutaz Otaibi was appointed on the same day in his place. That day Floreat (UK) Limited/ Floreat Merchant Banking Limited transferred its three shares in the Respondent to Floreat Holdings Limited, another company in the Floreat Group.

13. This structure was designed to reflect the join venture nature of the business. However, there was likely to be deadlock should the Floreat Group fall out with the Claimants; as each has 3 shares, and 1 director.

14. The Claimants commenced employment with the Respondent on 22 July 2013. They signed contracts of employment on 15 August 2013. The material terms were the same for each of the Claimants. The Claimants were described as Partners. The contracts of employment contained the following terms in respect of salary and expenses:

> **6 SALARY**
>
> 6.1 The Employee shall be paid a salary of £100,000.00 per annum ("the Basic Salary"), which shall accrue from day to day and be payable monthly in arrears on or about the last working day of each month directly into the Employee's nominated bank account.
>
> **7 EXPENSES**
>
> 7.1 The Company shall reimburse the Employee for all reasonable business expenses wholly, properly and necessarily incurred by the Employee in the course of the Appointment (including mileage at the Company's agreed rate), subject to production of receipts or other appropriate evidence of the expense incurred.
>
> 7.2 The Employee shall abide by the Company's policies on expenses as communicated to him from time to time.

15. The contracts of employment contained the following terms in respect of confidential information, including a definition in Interpretation section:

> **Confidential Information:** Information (whether or not recorded in documentary form, or stored on any magnetic or optical disk or memory) relating to the business, products, affairs and finances of the Company or any Group Company for the time being confidential to the Company or any Group Company and trade secrets including, without limitation, technical data and know-how relating to the business of the Company or any Group Company or any of their business contacts, including in particular (by way of illustration only and without limitation) client, customer, contact or supplier lists or databases, product designs or information, plans and models, market opportunities, strategy or marketing documents, software code, developers concepts, designs, transactions and affairs of the Company or any Group Company or its clients.
>
> **13 CONFIDENTIAL INFORMATION**
>
> 13.1 The Employee acknowledges that in the course of the Appointment he will have access to Confidential Information. The Employee has therefore agreed to accept the restrictions in this clause 13.
>
> 13.2 The Employee shall not (except in the proper course of his duties), either during the Appointment or at any time after its termination (howsoever arising), use or disclose to any person, company or other organisation whatsoever (and shall use his best endeavours to prevent the publication or disclosure of) any Confidential Information. This restriction does not apply to:
>
> 13.2.1 any use or disclosure authorised by the Board or required by law; or
>
> 13.2.2 any information which is already in, or comes into, the public domain other than through the Employee's unauthorised disclosure; or
>
> 13.2.3 prevent the Employee from making a protected disclosure within the meaning of section 43A of the Employment Rights Act 1996.

16. The notice period, and provisions for dismissal without notice, were made as follows:

> 2.2 The Appointment shall be deemed to have commenced on the Commencement Date and shall continue, subject to the remaining terms of this Agreement until either party gives to the other not less than two months' notice in writing.
>
> 15.1 Notwithstanding the provisions of clause 2.2, the Company may terminate the Appointment with immediate effect without notice and with no liability to make any further payment to the Employee (other than in respect of amounts accrued due at the date of termination) if the Employee:
>
> 15.1.1 is guilty of any gross misconduct affecting the business of the Company; or
>
> 15.1.2 commits any serious or repeated breach or non-observance of any of the provisions of this Agreement or refuses or neglects to comply with any reasonable and lawful directions of the Board; or
>
> 15.1.3 is, in the reasonable opinion of the Board, grossly negligent in the performance of his duties; or
>
> 15.1.8 is guilty of any fraud or dishonesty or acts in any manner which in the reasonable opinion of the Board brings or is likely to bring the Employee or the Company into disrepute or is materially adverse to the interests of the Company.

17. There was also a schedule setting out the Claimants' duties and responsibilities:

FIRST SCHEDULE

DUTIES AND RESPONSIBILITIES

The Employee shall be a Partner. The Employee's duties are set out below. The following list of duties is not exhaustive, however, and the Employee shall undertake such additional duties as may from time to time be assigned to him by the Board (providing that such duties, in the reasonable opinion of the Board, are commensurate with the Employee's position and seniority):-

- Act as gatekeeper of opportunities to Floreat Principal Investing, evaluate deals, design efficient capita structure and execute it.
- Arrange and structure financing requirements for Floreat Group and external clients.
- Advise clients on balance sheet restructuring.
- Advise on liquidity solutions for illiquid assets holders

18. The salary provisions were amended, and revenue targets set, by letters dated 8 October 2013.

19. On 1 February 2014 Floreat Holdings Limited entered into a £1 million non-interest-bearing loan facility agreement with the Respondent that was due to be repaid in full by 31 December 2018. Over time considerably more that £1 million in debt was built up.

20. In addition to their involvement in the Respondent, the Claimants had shareholdings in two offshore companies, Floreat Advisors Limited and IR Relations Limited, through which they received substantial earnings.

21. Mr Mutaz Otaibi was keen to enter a shareholder agreement with the Claimants. Mr Churchill sent a response to a shareholder questionnaire on 18 September 2014, but little further progress was made.

22. On 20 August 2015 Floreat Investment Management Limited entered into an Investment Advisory Agreement with the Respondent. This was to be one of the Respondent's significant sources of income.

23. In Summer 2016 the Floreat Group moved from Hanover Square to a townhouse at 33 Grosvenor Street. This substantially increased the accommodation available to the Floreat Group. The Respondent did not get significantly more space, or access to meeting rooms, but their costs increased substantially.

24. The Respondent was mainly funded from loans from companies in the Floreat Group. The Claimants did not establish the client base of hedge funds holding illiquid assets that had been hoped for. The majority of their work was directly, or indirectly, for Floreat Group companies.

25. The Claimant's developed an aviation asset backed produce called Floreat Aviation Notes I ("FAN 1").

26. By 2018 Mr Mutaz Otaibi and his brother had decided that they no longer wanted any of the Floreat Group companies to have shared equity. Mr Mutaz Otaibi decided that he wanted to set up a new joint venture with the Claimants that would operate outside of the Floreat Group, although a Floreat Group company would be a partner in the joint venture.

27. The Claimant had breakfast meeting at the Connaught Hotel at the beginning of the week to discuss their pans for the week ahead. They charged the cost as an expense. Initially Mr Mutaz Otaibi signed oft the Claimants' expenses but latterly he only signed off the expenses of Mr Diallo his co-director of the business who, in turn, signed off the expenses of the other Claimants.

28. In June 2018 there was an audit of expenses. For a period the Claimants' charge cards were suspended but they were reactivated after the audit. The Claimant's continued to incur expenses including breakfast meetings at the Connaught. Mr Mutaz Otaibi continued to sign off Mr Diallo's expenses without challenge.

29. By June 2018 Mr Mutaz Otaibi was becoming frustrated by what he saw as excessive delay in determining the future relationship between the Floreat Group and the Claimants. He sent an email to Mr Diallo on 18 June 2018 stating:

> We have always been very candid, transparent, and straightforward about the way that we intend to run our Group including Floreat Capital Market. I do appreciate that our position on some of these matters might be a none-starter for you, Ben, and Zaki which we would like to resolve in the next two weeks. if not, we would need to work together to find an amicable way out for both of us from the existing arrangement no later than the end of July 2018. Therefore, I would appreciate that you take this note very seriously and discuss it with Ben and Zaki.
>
> In general, Hussam, James and I decided about a year ago that we would like to own all our group businesses in the UK 100% for various reasons. We are always happy to share economics with our teams and potential partners but not to share voting rights not whatsoever in our UK structures. Also, we don't intend to have any special arrangement for any team/business that operates under the group umbrella in the UK. i.e. operating out of Floreat House.
>
> We would like our teems to have autonomy when it comes to the implementation of the agreed investment strategy and the day-to-day operation of their respective business as per the Group's overall policies and procedures.
>
> The issues of potential contention in our views are:
> - Your equity shares in Floreat Capital Market Limited (FCM) and related matters such as amounts owed by FCM to the Group, amounts owed by you to the FCM, the required working capital for the remaining of 2018 for FCM, and amounts owed by FIML to FMB.
> - Your expectation of MO/HO/JW moving forward. i.e do you see our role mainly as a financial partner to fund the working capital of our JV and to raise equity? Or is it an equal financial contribution from both sides.
> - Agree our JV agreement under a new structure outside The Group umbrella in the UK.
> - Your ability to accept the way we would like to run the Group.
>
> I would appreciate receiving your views by Tuesday so we can meet on Wednesday to discuss and hopefully find a way to agree a way forward.

30. On 20 June 2018 Mr Diallo replied by email suggesting that the Claimants were prepared to discuss all matters. However, they dragged there feet and sought to avoid discussing the matter further with Mr Mutaz Otaibi.

31. On 13 July 2018 Mr Mutaz Otaibi sent a proposed term sheet for a new joint venture to the Claimants which included a summary of the proposal:

> Floreat Partners, directly or indirectly, (MO/HO/JW) and CM Partners (OD/ZN/BC) will establish a new offshore joint venture company (**Aviation JV Co**) which will undertake the business of arranging, structuring the issue of, and effecting the placement of, listed aviation notes and aviation leasing products (the **Business**). Floreat Partners and CM Partners will each establish a SPV to hold their interest in the Aviation JV Co (**Floreat JV Partner**, and **CM JV Partner** in this term sheet).

32. The proposal was unattractive to the Claimants who thought it would offer them little protection and was considerably less in beneficial than the existing arrangements. They sought to string the process out, to delay the change in the arrangements. They did not provide a substantive response until 21 September 2018, raising various queries about the proposal.

33. On 2 October 2018 Mr Mutaz Otaibi responded to the Claimants' queries, stating that:

> We hope that our response below, will provide you with the clarity that you require, to reach an agreement amongst yourselves. If you are not able to reach agreement with us on these terms or are not able to present alternative acceptable terms to us, then we must quickly draw a line in the sand and go our separate ways.
>
> I think that if we are not able to reach a decision on whether to proceed by the end of this week we will need to convene a shareholders meeting to discuss the basis of our divorce. If we decide to proceed we must get on with it and agree the heads of terms in the following week and in any event by the end of October 2018. We are committed to allocate time and resources required to get an agreement in place.

34. The Claimants responded seeking further clarification. Mr Mutaz Otaibi replied by email on 3 October 2018 stating:

> As discussed last week, you need as a team to decide whether Floreat is the right place for you to continue your journey together or you move on your own. It is as simple as that.
>
> You either accept what is on offer or you would need to provide us with an alternative option along the lines of our proposal this week. We are running out of patience.

35. A revised version of the Termsheet was provided to the Claimants on 26 October 2018.

36. On 11 November 2018 the Claimants shared, in a Bloomberg chat, a response that they were proposing that Mr Mutaz Otaibi would send to Mr Mutaz Otaibi on their behalf.

11/06/2018 10:43:54 OUMAR DIALLO, FLOREAT CAPITAL MARK Says Dear Mutaz,

Please rest assured we are constantly discussing your proposal and are giving it our utmost priority. We have duly noted the hard deadline of year end and believe we should be in a position to revert by November month end.

You must appreciate your proposal is an all-encompassing and complex one which require the three shareholders to agree a common position on all these points prior to communicating it back to you.

With regards to FAN 2, we are surprised by your comment as we understand Zaki has been keeping you close to the trade via a constant dialogue. For the benefit of the other shareholders, we are currently evaluating three portfolio, each one with an aggregate value of approximatively USD 500m and comprising between ten to sixteen aircraft. Two of the portfolio are in pricing stage and the last one is still being refined.

Despite the SHAG discussion being a major distraction, please rest assured we are doing our best to continue progressing FAN 2. We are available to discuss further should you have additional and more specific questions.

Kind regards,
Oumar

37. The reference to FAN 2 was to a new aviation note. The slightly sarcastic tone of the first paragraph, and the following chat exchanges, show that the Claimants were playing for time:

11/06/2018 10:46:15 BEN CHURCHILL, FLOREAT CAPITAL MARK Says fine
11/06/2018 10:46:23 BEN CHURCHILL, FLOREAT CAPITAL MARK Says Will frustate the hell out of him
11/06/2018 10:46:59 BEN CHURCHILL, FLOREAT CAPITAL MARK Says It's so pioqanfully generic
11/06/2018 10:47:04 BEN CHURCHILL, FLOREAT CAPITAL MARK Says painfully
11/06/2018 10:47:07 BEN CHURCHILL, FLOREAT CAPITAL MARK Says Making me lauigh
11/06/2018 10:47:07 ZAKI NUSEIBEH, FLOREAT CAPITAL MARK Says do you want to add a bit more on FAN2?
11/06/2018 10:47:18 BEN CHURCHILL, FLOREAT CAPITAL MARK Says I think less is more

11/06/2018 10:47:25 BEN CHURCHILL, FLOREAT CAPITAL MARK Says He'll mayhbe ask for more
11/06/2018 10:47:27 ZAKI NUSEIBEH, FLOREAT CAPITAL MARK Says just one or two sentences to show we're not completely not answering the question
11/06/2018 10:47:28 BEN CHURCHILL, FLOREAT CAPITAL MARK Says Which willl be telling
11/06/2018 10:47:58 BEN CHURCHILL, FLOREAT CAPITAL MARK Says Mayeb give names of vernors
11/06/2018 10:48:04 BEN CHURCHILL, FLOREAT CAPITAL MARK Says Give it more substance
11/06/2018 10:48:34 ZAKI NUSEIBEH, FLOREAT CAPITAL MARK Says maybe say smthg like " pricing is quite a lengthy process and not only involves the pricing of our tranche but also the senior debt, which involves MUFG speakign to other banks as well"...
11/06/2018 10:49:45 OUMAR DIALLO, FLOREAT CAPITAL MARK Says I wanted to avoid timing which I am sure will be his next question
Also keen to avoid naming if we can get away without

38. It does not appear that the draft email was sent. Mr Mutaz Otaibi was not aware of the chat at the time. However, he was annoyed that the Claimants were not discussing the issue with him, and was determined to have a solution to the issue by the end of the year. He decided to take a hard-line approach. On 23 November 2018 he wrote to the Claimants in the following terms:

Attention: The Directors of Floreat Capital Markets Limited

Dear Sirs

Request to convene board meeting of Floreat Capital Markets Limited and requisition of a general meeting

I write in my capacity as a director of Floreat Capital Markets Limited (the **Company**) and on behalf of Floreat Holding Limited (**FHL**) in its capacity as a shareholder of the Company.

I regret to inform you that, on the basis of (i) the shareholders' failure to progress negotiations with regard to the future structure of FHL's relationship in connection with the business of the Company over the last six months and (ii) the current financial position of the Company, FHL is no longer prepared to continue to provide financial support to the Company without clear agreement now on the way forward and/or the steps to be taken to wind down the business.

In light of this, and given the directors' duties in the context of a potential insolvency of the Company, I hereby request that a meeting of the directors of the Company is convened on Thursday 29 November 2018 at the Company's offices at Floreat House, 33 Grosvenor Street, London W1K 4QU at 10.30a.m. Oumar Diallo and I, as directors of the Company, should be present at such meeting. Given their senior positions in the business, I also consider that it would be appropriate for Ben Churchill and Zaki Nuseibeh to attend. In lieu of a company secretary, Mark Banham will also attend in order to take notes of the meeting.

I propose that the agenda for the meeting should include the following items:

- the financial position and solvency of the Company; (balance sheet at 23 Nov 2018 enclosed)
- the liabilities of the Company (including amounts owed to creditors including Floreat Holding Limited, its subsidiaries, and Floreat Investment Management Limited);
- the assets of the Company (including loans outstanding from the Company to Oumar Diallo);
- options for the orderly ceasing of the business of the Company; and
- whether or not to convene a shareholders' general meeting to wind up the Company.

39. I find that by this time Mr Mutaz Otaibi no longer thought that there was much future in a possible new joint venture with the Claimants. He had decided that it was very likely that he would end the business relationship between the Floreat Group and the Claimants. I consider that he wanted a managed winding down of the Respondent, with the Claimants contributing to pay off some of the outstanding debt. The business would cease, having paid its creditors, without the need for insolvency proceedings. He did not want to risk the possible reputational damage that insolvency might bring to him as a director of the Respondent. However, in order to persuade the Claimants to contribute to paying off the debts of the Respondent, he wanted them to think that insolvency was likely and that they might suffer damage to their reputation if they did not agree to his alternative proposal.

40. Partly to cease making more potentially unrecoverable payments, but also to ramp up the pressure on the Claimants, Mr Mutaz Otaibi decided that Floreat Investment Management Limited would terminate the Investment Advisory Agreement. A letter was sent to that effect on 23 November 2018.

41. Seeing that the writing was an the wall the Claimants decided to send themselves large quantities of the data that they had stored while working for the Respondent. Large amounts of data were stored on the Merrill Datasite. From 25-29 November Mr Churchill copied very large quantities of data from the Merrill Datasite to his provate accounts. For example, on 28 November 2018, Mr Churchill uploaded 429 documents to the Norwegian Air Shuttle data room on the Merrill Datasite. Later that day he downloaded the same 429 documents. Mr Churchill then proceeded, on 29 November 2018, to delete the 429 documents he had previously uploaded/downloaded. The documents are listed from p910. From the titles it is clear that they relate to core aspects of the Respondent's business, including full details of FAN 1 and the potential cleints for such products. At around this time all of the Claimants downloaded significant amounts of documentation. They all accepted in cross examination that the data was, in general terms, "confidential" although they contended that it was not subject to copyright, involved no intellectual property and was in the public domain. Looking at the titles of the documents that the Claimants took from the Respondent it is obvious that they were documents that they thought would be likely to be useful in any future business venture they would be involved in.

42. Mr Mutaz Otaibi met with Mr Nuseibeh on 28 November 2018. Mr Nuseibeh said that the Claimant understood the need for a shareholder agreement, but considered that the terms proposed by Mr Mutaz Otaibi were unacceptable. The fact that Mr Mutaz Otaibi had decided to end the business relationship between the Floreat Group and the Claimants is emphasized by the fact that at the end of the meeting he urged Mr Nuseibeh (and the other two the Claimants on the basis that Mr Nuseibeh would be sharing our discussion with them), "not to make a scene" in the board meeting and to make things "as painless as possible".

43. The board meeting took place on 29 November 2018. The Claimants stated that they would not put money into the Respondent. By the end of the meeting it was clear that the Respondent would cease to trade. I do not accept that a decision had been made that it would enter insolvency, but Mr Mutaz Otaibi led the Claimants to believe that was likely. He wanted to hold the prospect of insolvency over their heads to encourage them to accept his preferred option for a winding down of the Respondent with the Claimants contributing to its debts.

44. On 30 November 2018 the sum of £55,000 was transferred from Floreat Holdings Limited to the Respondent. This was to cover wages for the Respondent's staff. A similar sum was transferred every month to fund wages by addition to the debt owed by the Respondent. I accept that Mr Mutaz Otaibi as a director of Floreat Holdings Limited regularly authorised such payments and did not give much thought to authorising this payment. In authorising the payment he was acting on behalf of Floreat Holdings Limited. After the payment had been made Mr Mutaz Otaibi thought further about the matter and gave an instruction that the salary payments should not be made. In so doing he was acting as a director of the Respondent.

45. On 3 December 2018 Mark Rogers, a Sales Executive employed by the Respondent wrote to Mr Mutaz Otaibi and Mr Diallo complaining about the fact he had not been paid, alleging that the Respondent was in breach of contract. Mr Diallo wrote to Mr Mutaz Otaibi on 3 December 2018 stating:

> Dear Mutaz,
>
> I hope you are well.
>
> Please let me know when we can meet to finalise the conversation about FCM's wind down. Mark and Sophie have both been pushing for answers and I do not want to put us both at personal legal risk.
>
> I am available anytime to discuss.
>
> Kind regards,
> Oumar

46. At that stage Mr Diallo concern seemed to be abut the non-payment of staff members other than the Claimants.

47. Later that day Mr Mutaz Otaibi wrote to Mr Diallo stating:

> Dear Oumar,
>
> As per the board meeting last Thursday, there has been no decision yet to wether we are winding down the company or declaring it insolvent.
>
> We are working with our legal advisors to find an elegant solution to end our relationship with you and your partners.
>
> Moving forward, please don't communicate internally or externally with any party priori to signing off with me first as co-director.
>
> As discussed on Friday, there is no need for Ben and Zaki to attend the office until we agreed a way forward.
>
> I will let you know when we can meet once I have a clear proposal.
>
> In the meantime, it is better that you don't attend the office.
>
> Kind Regards
>
> Mutaz

48. This is consistent with my conclusion that at the end of the meeting on 29 November 2018 it was clear that the Respondent would cease to trade, but not how that would happen. The email also made it clear that Mr Mutaz Otaibi did not wish the Claimants to be involved in the Respondent, other than to discuss how it could cease to trade.

49. Mr Mutaz Otaibi offered opportunities to the other staff members of the Respondent to move to other companies in the Floreat Group.

50. The Claimants by this stage were becoming increasingly concerned that, as the Floreat Group had stated that they would cease to provide financial support to the Respondent, it was now not only balance sheet insolvent but cashflow insolvent, putting them at risk should it continue to trade. Later on 3 December 2018 Mr Diallo sent an email to Mr Mutaz Otaibi stating:

> Dear Mutaz,
>
> I have been waiting for us to sit down the entire day and it is now 5pm.
>
> You and I need to discuss the standing of the company and more especially how we terminate FCM as we have employees that have not been paid for November and are asking questions and seeking clarity. (Please refer to Mark's email and I have sat down with Sophie and she is in the same predicament)
>
> Please let me know when you and I are going to discuss the matter and take the final decision.
>
> I have now managed to seek legal advice on the way forward and you and I as Directors have a very serious responsibility which we need to address.
>
> Until it is resolved and I am cleared of that responsibility please note I cannot not attend the office as per your suggestion.

51. Mr Mutaz Otaibi replied:

> Dear Oumar,
>
> I have been in discussion with two law firms today to assess our options as Directors.
>
> My aim is to provide you with a solution latest by Wednesday to resolve the situation.
>
> You can attend the office as you see fit.
>
> Regards
> Mutaz

52. On 5 December 2018 a sum of 9,900 was transferred by Floreat Holdings Limited to the Respondent to cover the salaries of the staff other than the Claimants. They were paid that day, but the Claimants were not. Instead Mr Mutaz Otaibi arranged for the original payment of £55,000 to be repaid to Floreat Holdings Limited with the description "RTN PAYMENT ERROR". In so doing he was acting in his capacity as a director of the Respondent. It clearly was his intention that the Claimants would not be paid. I accept that the Claimants were aggrieved that there colleagues had been paid but that they had not.

53. On 6 December 2018 Mr Mutaz Otaibi wrote to the Claimants with his proposal for the winding down of the Respondent. While the email was marked "Without prejudice and subject to contract" the Respondent did not seek to rely on privilege in this hearing. Mr Mutaz Otaibi stated his various roles in the email:

> **Attention: Oumar Diallo, Zaki Nuseibeh, Ben Churchill as shareholders of Floreat Capital Markets Limited (the "Management Shareholders") and employees of Floreat Capital Markets Limited (the "Company")**
>
> 1. I write in my capacity as a director of Floreat Holding Limited (FHL), a 50% shareholder of the Company, to you as shareholders of the Company ("Management Shareholders") and, in the case of Oumar Diallo, as a director of the Company and to all of you in my capacity as a director of the Company to you as employees. Further and additionally, for the reasons given below at paragraph 5 it may be that a liquidator may in due course take the view that each of Zaki Nuseibeh and Ben Churchill fall to be considered as directors when assessing their conduct and the repercussions for them arising on an insolvency of the Company.

54. The letter sought to emphasise the risks faced by the Claimants should the Respondent enter formal insolvency:

> **Proposal**
>
> 4. It is in the interests of all concerned with the Company that a solution is found to the issue of funding and that entering into an insolvency process which would involve the appointment of a liquidator is avoided. Insolvency would have major ramifications for the Company's directors and the reputation of all involved. The appointment of a liquidator would open a full review of the conduct of directors, employees and shareholders during the life of the Company, including consideration of any breach of fiduciary or employment obligations by management such as any staff solicitation or attempts to take the Company's business elsewhere.
>
> 5. Zaki Nuseibeh and Ben Churchill have held themselves out as Founding Partners of the Company. On analysis, a liquidator may in due course take the view that they have been part of the decision making process with real authority in relation to the affairs of the Company; have negotiated with third parties on behalf of the Company (eg with MUFG); and have recruited senior management positions within the Company. As such the liquidator's conclusion may well be that they are considered *de facto* directors of the Company at law, and the statutory and fiduciary duties of directors also apply to them.
>
> 6. The financial position in relation to the Company is as follows (figures are based on 30 November 2018 balance sheet attached – these are to be updated as per the date of agreement):
>
> Total Assets: GBP 158,912
>
> The assets represent a director's loan made to Oumar Diallo (for the benefit of himself, Zaki Nuseibeh and Ben Churchill) together with tax paid in relation to such loan. This amount is repayable by Oumar Diallo and recovery would be sought by a liquidator.
>
> Total Liabilities: GBP 3,048,229
>
> If an insolvent liquidation is to be avoided the Shareholders will have to meet their respective share of this deficit on the basis of their shareholding: accordingly, the Management Shareholders are required to pay 50% of the Total Liabilities: GBP 1,524,146.
>
> Taking into account the loans outstanding, the total amount required to be paid by the Management Shareholders is GBP 1,638,058 ("Funding Amount")

55. The letter put forward a proposal for settlement. The letter emphasied the risks for the Claimants of formal insolvency.

56. On 6 December 2018 Mr Diallo sent a series of email chains attaching the Respondent's data to his personal email account.

57. On 6 December 2018 the Claimants decided to call Mr Mutaz Otaibi bluff and their solicitors wrote to insist that the Respondent enter insolvency proceedings:

> It is absolutely apparent to our clients that there is an impasse in respect of the Company, as it appears you accept. From the figures contained in and enclosed with your letter our clients consider that the Company is insolvent. We also note that our clients have not been paid for the last month. Our clients agree that without agreement on funding and shareholder support of the Company going forward, insolvency is the only option for the Company. In any event, given the current impasse, liquidation is the most appropriate course of action. For the record, Mr Diallo is not prepared to provide a further going concern undertaking in respect of the Company.

58. The Claimants' solicitors noted the lack of payment of the Claimants' salaries but did not specifically assert it was a repudiatory breach of contract.

59. The Claimants went on to issue an ultimatum to Mr Mutaz Otaibi:

> The obvious way forward now is for the Company to be put into liquidation as soon as possible. Our clients have no concerns about liquidation whatsoever. Your vague, unparticularised and unsubstantiated insinuations that: (i) Mr Churchill and Mr Nuseibeh could be considered de facto directors of the Company; (ii) our clients should be concerned that a liquidator will review the affairs of the Company; and (iii) there has been any attempt on the part of our clients to solicit staff or attempt to take the Company's business elsewhere are misplaced. Nor do our clients understand or share your concerns about the "major ramifications" of insolvency for all involved.
>
> Accordingly, our clients are strongly of the view that the Company should take immediate advice from a suitable insolvency practitioner and should place the Company into creditors' voluntary liquidation (Mr Diallo is not prepared to provide a declaration of solvency and from what you have said you should not be prepared to do so) as soon as possible. There is no other realistic alternative if you and Mr Diallo are to comply with your duties as directors.
>
> We invite your confirmation by no later than 14:00 London time on 7 December 2018 that you will sign the necessary director and shareholder resolutions to place the Company into creditors voluntary liquidation.

60. Mr Mutaz Otaibi did not respond within the required timeframe. On 10 December 2018 the Claimants resigned by emails written in similar terms. Mr Diallo wrote the longest of the emails in the following terms:

> Dear Mutaz,
>
> I was very surprised at the contents of your letter of 5 December 2018.
>
> It is apparent to us that you have a strategy to kill off Floreat Capital Markets Limited: a strategy which has involved the recent termination of the Investment Advisory Agreement – cutting off a significant source of our income and you are now trying to load onto the Company's balance sheet significant unidentified expenses. Under your strategy you are prepared to trample on my rights as a shareholder and employee and disregard your obligations to me as a fellow director of the Company.
>
> In the circumstances, we invited you by no later than 14.00 on 7 December 2018 to place the Company into creditors voluntary liquidation. I also took the opportunity to point out that I have not been paid for the last month. You failed to respond. I am left with absolutely no confidence that you are going to behave properly and appropriately, that your motives can be trusted or that I will be paid for outstanding salary or salary accruing on a daily basis. Given your actions, I have no option but to resign my employment with Floreat Capital Markets Limited with immediate effect.
>
> I shall remain a director of the Company for the time being because to resign now would not absolve me of my duty to ensure that the Company is placed into liquidation as soon as possible. You wrote to me seeking a meeting today. I made myself available. It is obviously very important that we speak about these matters. You cannot simply ignore the reality of where FCM is now – it needs to be placed into liquidation as soon as possible, as Fieldfisher's letter of 6 December made absolutely clear.

61. Later that day Mark Banham, Head of Legal & Compliance, Floreat Merchant Banking Limited wrote to the Claimants:

> Floreat Capital Markets Limited ("the Company") Fitness & Propriety issue
>
> 1. I write to you in my capacity as the Head of Legal & Compliance of Floreat Merchant Banking Limited ("FMBL").
> 2. FMBL is the principal firm of which the Company is an appointed representative pursuant to an Appointed Representative and Tied Agent Agreement between the Company and FMBL dated 26 February 2015 (a copy of which is attached) and is responsible for the actions of the Company from a regulatory perspective.
> 3. Certain matters have come to our attention regarding your personal conduct which could have a bearing on your fitness and propriety to act in a controlled function role for the Company.
> 4. FMBL has decided it is necessary to conduct an internal and confidential investigation concerning your actions in relation to:
>
> - Misuse of company charge cards
> - Failing to adhere to company policies in relation to expenses
> - Failure to keep adequate records

62. Investigations were commenced into the Claimants after they had resigned, including checking their computer accounts.

63. Subsequently, the Floreat Group has put further funds into the Respondent to prevent compulsory liquidation.

64. The Claimants' outstanding salaries were paid on 20 December 2018.

65. The consequences of the arrangement made in happier, and more optimistic, times, specifically, the 50% split of shareholding and fact that only Mr Mutaz Otaibi and Mr Diallo are directors, leaves the Respondent in limbo, and has resulted other litigation, including in the Companies Court.

The Law

66. Pursuant to Section 94 of the Employment Rights Act 1996 ("ERA"), an employee has the right not to be unfairly dismissed.

67. Dismissal includes, pursuant to Section 95(1)(c) ERA, circumstances in which the employee terminates the contract under which he is employed, with or without notice, in circumstances in which he is entitled to terminate it without notice by reason of the employers conduct. This is generally referred to as constructive dismissal.

68. In **Western Excavating v Sharp** [1979] ICR 221, Lord Denning held that where the employer is guilty of conduct which is a significant breach going to the route of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct: he is constructively dismissed.

69. Where the employee relies on a breach of an express term of the contract the employee must also establish that the breach was fundamental.

70. A failure to pay salary on the due date will generally be a fundamental breach of contract. If an employer deliberately withholds or reduces an employee's pay or diminishes the value of the employee's salary package, that is a fundamental and repudiatory breach of the contract of employment, regardless of the amount involved. It is only where the employer's default relates to an inadvertent failure to pay or a delay in payment that the question of whether the breach of contract is fundamental arrises: **Cantor Fitzgerald International v Callaghan and ors** [1999] ICR 639. Lord Justice Judge held:

> "In my Judgement the question whether non-payment of agreed wages, or interference by an employer with a salary package, is or is not fundamental to the continued existence of a contract of employment, depends on the critical distinction to be drawn between an employer's failure to pay, or delay in paying, agreed remuneration, and his deliberate refusal to do so. Where the failure or delay constitutes a breach of contract, depending on the circumstances, this may represent no more than a temporary fault in the employer's technology, an accounting error or simple mistake, or illness, or accident, or unexpected events (see eg Adams v Charles Zub Associates Ltd [1978] IRLR 551). If so it would be open to the court to conclude that the breach did not go to the root of the contract. On the other hand if the failure or delay in payment were repeated and persistent, perhaps also unexplained, the court might be driven to conclude that the breach or breaches were indeed repudiatory."

71. If there is a fundamental breach of contract, the reason why that breach occurred is irrelevant to determining a claim of constructive dismissal: **Wadham Stringer Commercials (London) Ltd v Brown** [1983] IRLR 46 EAT

72. For example, in an insolvency situation, it may not be possible for salary payments to be made, but that does not prevent the failure to make the payments being in breach of contract.

73. There is an implied term of mutual trust and confidence in all contracts of employment. The term has its origin in the decision of the Employment Appeal Tribunal in **Woods v WM Car Services (Peterborough) Ltd** [1981] IRLR 347, where it was held it that is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated, or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The term has been repeatedly approved in a number of cases in the House of Lords, including **Mamood v BCCI** [1997] ICR 606 where the clause is slightly misquoted with a reference to behaviour "calculated and likely" to destroy or seriously damage the relationship of trust and confidence.

74. The test is not whether the actions of the employer were reasonable. The test is whether their actions when objectively viewed are such that they are designed, or likely, to destroy, or seriously damage, the trust and confidence that the employee is reasonably entitled to have in his employer: see **Waltham Forest v Omilaju** [2005] ICR 481.

75. Whether there has been a breach of the implied term of mutual trust and confidence is a question of fact. The Employment Tribunal must consider whether, objectively, in all the circumstances, the contract breaker has shown an intention to abandon and altogether refuse to perform the contract: **Tullett Prebon Plc v BCG Brokers LP** [2011] IRLR 420, CA).

76. For a breach of the term to be made out the conduct of the employer must be serious. Employers are entitled to expect a reasonable level of robustness in their employees. The conduct must be so serious that it shows that the employer does not intend to continue to be bound by the terms of the contract of employment. Where a breach of the implied term of mutual trust and confidence is made out it is necessarily a fundamental breach going to the route of the contract: see **Moore v Safeway Stores Ltd** [2002] IRLR 9.

77. The implied terms of mutual trust and confidence applies equally to the employee.

78. Where a fundamental breach is made out the employee must still establish that that breach played a material part in the decision to leave, see **Nottinghamshire City Council v Meikle** [2004] IRLR 703, although it need not be the sole, or even principal, reason for the decision to resign.

79. Where the Claimant establishes a constructive dismissal it is still open to the Respondent to establish a potentially fair reason for dismissal. The burden to do so rests on the Respondent.

80. Where the employer establishes a potentially fair reason for dismissal the Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is to be determined in accordance with equity and the substantial merits of the case.

81. Section 122(2) ERA provides for a reduction of the basic award where the Tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it.

82. There are two stages at which the Tribunal has regard to justice and equity in considering the compensatory award. Pursuant to Section 123(1) ERA the Tribunal should award compensation of such an amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal, insofar as the loss is attributable to the action taken by the employer. Section 123(6) ERA provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion that it considers just and equitable having regard to that finding. The equivalent predecessor

provision to Section 123(1) ERA founds what is referred to as a **Polkey** reduction where it is decided that there is a chance that had a fair procedure been adopted the employee would have been dismissed in any event.

83. In considering **Polkey**, contribution and just and equitable compensation the Tribunal has to make its own factual findings about what would have happened had a fair procedure been applied and/or whether the misconduct did in fact take place.

84. Provision is made by Section 207A of the Trade Union & Labour Relations Consolidation Act 1992 for an increase in compensation of up to 25% where an employer has failed to comply with the provisions of applicable code of practice, in this case the ACAS Code on Disciplinary and Grievance Procedures, and where that failure is unreasonable.

Analysis

85. In considering this matter, I have kept very much in mind that, when considering the actions of Mr Mutaz Otaibi, I have to consider the role in which he was acting. In his various roles within the Floreat Group, other than as a director of the Respondent, he was entitled to seek to change the basis on which the Floreat Group would deal with the Claimants in the future, if at all. There was nothing to stop Mr Mutaz Otaibi and his brother deciding that they wished to have control of the equity of companies within the Floreat Group. There was nothing to stop them robustly seeking to purchase the shares from the Claimants. Mr Mutaz Otaibi was entitled to do so in his roles within the Floreat Group, and as a fellow shareholder of the Respondent. There was nothing to prevent him deciding that Floreat Holdings Limited was no longer prepared to provide finance to the Respondent. He was also entitled to determine that Floreat Investment Management Limited would terminate the Investment Advisory Agreement.

86. I can only concern myself with things that Mr Mutaz Otaibi did as a director of the Respondent. In that role, after monies had been transferred to the Respondent, specifically so that salaries could be paid, he took a decision that employees would not be paid. He must necessarily have been acting in his role as a director of the Respondent when he decided that the Claimants would not be paid. The monies were in the Respondent's account. He could only require that the payments were not made as a director of the Respondent.

87. The Claimants rely on a breach of the express term of their contract to pay salary. Each of the Claimants had the following term in their contracts of employment:

> **6 SALARY**
>
> 6.1 The Employee shall be paid a salary of £100,000.00 per annum ("the Basic Salary"), which shall accrue from day to day and be payable monthly in arrears on or about the last working day of each month directly into the Employee's nominated bank account.

88. Mr Kirby conceded that at the time the Claimants resigned the Respondent was in breach of contract through failure to pay salary. It was not argued that by 10 December 2018 it was within the period covered by the wording “on or about the last working day of the month”. The Respondent contended that, while there was an admitted breach of contract it was not, in the unusual circumstances of this case, fundamental.

89. Mr Mutaz Otaibi made the decision that other employees would be paid, but that the Claimants would not, and a repayment would be made to Floreat Holdings Limited. This was a deliberate decision not to pay salary. It was not a question of a short delay, or an inadvertent failure. Not only was it a breach of the Claimant's contracts of employment, as conceded by the Respondent, it was a fundamental breach because of the deliberate decision not to pay.

90. In addition, Mr Mutaz Otaibi sought to put pressure on the Claimants to agree to his terms for a wind down of the Respondent, including them making payments to cover a proportion of the Respondent’s debt. Mr Mutaz Otaibi wished to hold the possibility of insolvency over them to persuade them to agree to his terms. In his roles, other than as a director of the Respondent, Mr Mutaz Otaibi was entitled to seek to improve his negotiating position and put pressure on the Claimants. However, it was made clear by the Claimants’ solicitors that they would not agree to his terms. As the Respondent was now not only balance-sheet insolvent, but cash flow insolvent, steps had to be taken, as a matter of urgency, to deal formally with the insolvency which as far as the Claimant knew was unavoidable because Mr Mutaz Otaibi said there would be no more funding for the business . Mr Mutaz Otaibi failed to respond within the time limit imposed by the Respondent's solicitor, and left the Claimants in a position in which Mr Diallo as a director and, so Mr Mutaz Otaibi would have them believe, the other two Claimants, as potential de facto directors, continued to run an insolvent business. This was a breach of the implied term of mutual trust and confidence. He was refusing to take steps to resolve the insolvency of the Respondent as a director of the Respondent.

91. Accordingly, I find that there wre fundamental breaches of the express term to pay salary and of the implied term of mutual trust and confidence as set out above. I do not find that any of the other breaches of the implied term of mutual trust and confidence asserted in the Claim Form are made out.

92. The Claimants knew that their relationship with the Floreat Group was coming to an end. They were seeking an exit from the business on the best possible terms. However, I accept that they were motivated, in material part, in deciding to resign, by the fact that the Respondent had failed to pay their salaries, particularly after the salaries of other employees had been paid. I also consider that a material part of their decision to resign was the fact that they were being left in a position where the Respondent appeared to be cash flow insolvent, but Mr Mutaz Otaibi as the fellow director of Mr Diallo, was failing to take urgent steps to formalise the insolvency, with the consequence that they would be at risk of having been found to have traded while the company was insolvent.

93. I find that a material part of the Claimants' decision to resign was the breaches of contract brought about by Mr Mutaz Otaibi acting in his role as a director of the Respondent.

94. I appreciate that Mr Mutaz Otaibi felt enraged because the Claimants were dragging their feet and trying to put off the day when the problems of the Respondent would have to be resolved. That does not affect my decision that he, in his role of director of the Respondent, brought about the Respondent's breach of the Claimant's contracts of employment, in response to which, at least in part, they resigned. The reason that Mr Mutaz Otaibi acted as he did is irrelevant to the breach of contract.

95. Accordingly, the Claimants were dismissed. The Respondent did not put forward in its pleading or in closing submissions any potentially fair reason for the dismissal of the Claimant. Although the fairness of the dismissal was one of the agreed issues, in the absence of a potentially fair reason for dismissal, the dismissal must necessarily have been unfair.

96. I next consider what would have happened absent the dismissal of the Claimants. It was clear that the relationship between Mr Mutaz Otaibi, on behalf of the Floreat Group, and the Claimants, was at an end. They no longer wished to do business together. Absent the conduct that led to their resignations, I consider that there then would have been a further meeting, or meetings, in which steps were taken to urgently find a solution that would result in either the winding down of the Respondent or in its insolvency. I accept that Mr Mutaz Otaibi was determined that this should be concluded by the end of the year.

97. I also consider that, in the light of the breakdown in relations with the Claimants, investigations would have been undertaken, including investigating the activity on the Claimant's computer accounts. This would have discovered that they had downloaded very substantial amounts of the Respondent's data. The Claimants accepted that the information was confidential in broad terms and that they should not have taken it, but contended that it was the type of information that was available in the public domain. While having looked at the titles of the documents, I very much doubt that all of the information was in the public domain, that was not a matter upon which they were specifically challenged. The definition of confidential information used in their contracts of employment included an exclusion where information was in the public domain. This was so that the definition covered removal of the type of information that could give rise to an injunction in reliance on the restrictive covenants in their contracts. Irrespective of whether the information removed fell within the contractual definition of confidential information, I consider that it is clear that the Claimants, while employed by the Respondent, took substantial amounts of information from the Respondent, knowing full well that they were not permitted to do so. They did so because they thought that the information would prove useful in a future business venture. They were using their time and efforts while employed by the Respondents to do this. It was, if not in breach of an express term of their contract, a breach of the implied term of mutual trust and confidence on their part to remove such information while working for the

Respondent. I reject their evidence that they did not really think what they were doing. They knew what they were doing and that it was wrong, and contrary to their duties as senior employees of the Respondent.

98. I conclude that by the end of two weeks from the dates on which the Claimants were dismissed, their contracts would either have ended by mutual agreement[2] (without notice payment bearing in mind the discovery that they had taken data from the Respondent), with the Claimants agreeing to destroy all information that they had taken in a manner that was verifiable by the Respondent or they would have been fairly dismissed for gross misconduct for taking the Respondent's data. Accordingly, the compensatory award is limited to the period of two weeks from the date on which the Claimants resigned.

99. I consider that the Claimants were guilty of blameworthy conduct that occurred before their dismissal and renders it just and equitable to reduce the basic award. I accept that their actions were, in part, because of the hard-line approach that had been taken by Mr Mutaz Otaibi and their feeling that he was bringing about the insolvency of the Respondent which led the Claimants to wish to protect their positions. Nevertheless, downloading such large amounts of information was wholly improper conduct. I conclude that all of the Claimants were involved in the decision to download the information in a concerted manner. I consider that their basic awards should be reduced by 50% for contributory conduct.

100. Having regard to the short period of the loss to be compensated for by the compensatory award, I do not consider it is just and equitable to further reduced the compensatory award for contributory conduct.

101. I do not accept that there was other wrongful conduct on the part of the Claimants as alleged by the Respondent. I consider that their expenses were not significantly out of the ordinary for a business of this nature. They went through the appropriate approval process. I do not consider that the Claimant had got past the preliminary consideration of a potential new business venture that might compete with the Respondent. I do not accept that the when the Claimants were tasked with selling FAN 1 notes they were in breach of their duties by not informing others that GAM Investments might be selling some FAN 1 notes at under face value. I do not accept that the Claimants were required to put further funds into the Respondent. It was the funding decision of the Floreat Group that brought about the risk of insolvency. I do not consider that the Claimant were wrongfully seeking to bring about the insolvency of the Respondent.

[2] I make no decision in this case as to how the outstanding debt of the Respondent would have been dealt with.

102. Although the possibility of an ACAS uplift was raised in the list of issues. When it was agreed that liability would be determined first, together the specific remedy issues of contribution and/or **Polkey** reduction, we did not include ACAS uplift as one of the matters to be determined. Accordingly, if it is a matter that is pursued by the Claimants, it will be considered as part of the determination of remedy.

Employment Judge Tayler

7 February 2020

Corrected Judgment and Reasons sent to the parties on:

08/02/2020

…….....
For the Tribunal Office

Annex

1. Did the acts set out at Paragraph 9 of each of the Claimants' grounds of claim either separately or together constitute a repudiatory breach or repudiatory breaches; specifically:

    a. Did the Respondent's failure to pay each of the Claimant's salary on or around the last working day of November 2018 amount to a repudiatory breach of each of the Claimant's contracts of employment;

    b. Did the Respondent's failure to pay each of the Claimant's salary on or around the last working day of November 2018 show an intention to abandon and refuse to perform clause 6.1, an essential term, in each of the Claimant's contracts of employment;

    c. Did any of the acts set out in Paragraph 9 of each of the Claimants' grounds of claim, on its own, amount to a breach of the implied term of mutual trust and confidence that the Respondent owed to each of the Claimants;

    d. Did any or all of the acts set out in Paragraph 9 of each of the Claimants' grounds of claim cumulatively amount to a breach of the implied term of mutual trust and confidence that the Respondent owed to each of the Claimants;

    e. Did any or all of the acts set out in Paragraph 9 of each of the Claimants' grounds of claim show an intention by the Respondent to abandon and

refuse to perform an essential contractual term between each of the Claimant's and the Respondent?

2. Did each of the Claimants resign in response (or partly in response) to a repudiatory breach?

3. If so, did each of the Claimants resignations amount to a dismissal having regard to section 95(1)(c) ERA 1996?

4. If so, was such constructive dismissal unfair, having regard to section 98(4) ERA 1996?

5. If so, what compensation is each of the Claimants entitled to taking into account

    a. Whether the Claimants would have been fairly dismissed by reason of conduct or redundancy or some other substantial reason in any event?
    b. Whether there should be a Polkey reduction.

6. Did the Claimants raise grievances covered by the ACAS Code of Practice on Disciplinary and Grievance Procedures ?
7. If so did the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures as regards to the manner in which each of the Claimants grievances were not addressed/handled?

8. If so, should each of the Claimants be awarded an uplift on any award of compensation; and if so, what percentage uplift should be applied (up to 25%)?