EMPLOYMENT TRIBUNALS

Claimant: Mr D Fowler

Respondent: Fowler UK. Com Limited

Heard at: Manchester **On:** 24th – 27th February; 30th, March & 2nd April (in chambers) 2020

Before: Employment Judge Howard

REPRESENTATION:

Claimant: Mr Flood, Counsel
Respondent: Mr MacPhail, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal succeeds.

2. The claimant's claim of unlawful deduction from wages is dismissed upon withdrawal.

3. The respondent's counter claim succeeds.

4. The claimant's claim for wrongful dismissal fails.

5. The claims against the second respondent; Inox Equippe Limited are dismissed upon withdrawal.

6. A hearing to determine remedy will be listed in accordance with directions given at X below.

REASONS

1. I heard evidence from Stephen Murray, formally Project Manager and Peter Mackay formerly Head of Group Human Resources, in support of the respondent's case. In addition, I admitted witness statements from David Pickwell, Operations Manager, Jeremy Pitkin, Laing Willard and Lesley Sewter as the contents of these statements were not contested by the claimant. In support of his claim, I heard from Mr Fowler and his brother; Lee Fowler.

2. At the outset of the hearing I dealt with preliminary matters as follows:-

   (i) The parties had not discussed or agreed the issues to be determined. I directed that Mr MacPhail draft and Mr Flood agree a comprehensive list of issues to be sent to me by email for 9:30 am the following day together with a Chronology;

   (ii) Mr MacPhail explained that Mr Mackay (the 'dismissing officer') was not present and would not be attending until Wednesday. Mr MacKay was no longer employed by the respondent and Mr MacPhail was unable to give me any clear explanation as why he was not in attendance. Mr Flood pointed out the difficulties in taking Mr Mackay's evidence on the third day of a four-day unfair dismissal hearing and I issued a Witness Order for Mr Mackay's attendance on Tuesday morning.

   (iii) Based on the number of witnesses and likely length of cross examination there was a risk that four days would not be sufficient. Mr Flood proposed hiving off the counter claim and remedy issues and determine the unfair dismissal claim only. Mr MacPhail sought to postpone the hearing entirely. I refused both applications considering that, with a robust time-table, the evidence on all issues could be heard in four days, leaving submissions and deliberation to be listed for another occasion. In the event, all the evidence was heard and a date of 30th March 2020 set for me to deliberate, aided by written submissions.

   (iv) Mr MacPhail confirmed that the first respondent; Fowler UK.Com was the correct respondent to the proceedings, as Mr Fowler had not been TUPE transferred to the second respondent. On that basis the claim against the second respondent was dismissed upon withdrawal.

   (v) The parties indicated that both might make applications to admit/exclude documents potentially covered by the principle of legal privilege. Helpfully, the issue was dealt with by agreement between the parties and further documents were added to the bundle by both sides.

   (vi) Mr MacPhail applied to admit new witness statements; Laing Willard, Lance Sewter and Jeremy Pitkin. Mr Flood objected. I allowed the

witness evidence to be admitted, balancing the prejudice which would be caused to the respondent by not being able to address matters raised in Lee and Mr Fowler's witness statements against the hardship caused to him in having to deal with evidence at such a late stage. I noted that witness statements had only been exchanged on Thursday and these new statements were served on Friday and during the weekend. They were clearly of potential relevance to the issues to be determined.

(vii) Additional documents were added to the bundle supplied by both parties. An amendment was made to Mr Mackay's witness statement by agreement to remove paragraph 28.

(viii) Mr Flood agreed to take instructions on the "Geys" point; upon which the claim for unlawful deduction from wages was based between the period 2 November 2018 and 30 November 2018. It was eventually agreed that Mr Flood would take instructions and speak to Mr Fowler once he had been released from giving evidence and he would clarify the position in his written closing submission. Confirmation of its withdrawal was provided in that submission and I have dismissed the claim accordingly.

(ix) It was agreed that I would decide all the issues identified in the agreed list, including as to remedy, so that, if I found for Mr Fowler and/or for the respondent's counter claim, calculating remedy would be straightforward.

The Issues

3. **Unfair dismissal**

Liability

3.1 What was the reason, or principal reason if more than one, for dismissal?
3.2 Was that a potentially fair reason?
3.3 If so, was the dismissal fair for the purposes of s98(4) ERA 1996?

Remedy

3.4 Should a reduction be made to the basic award on the basis of conduct?
3.5 Is C's alleged financial loss in consequence of the dismissal and also attributable to action taken by R?
3.6 Has C complied with the duty to take reasonable steps to mitigate his losses?
3.7 Should a reduction be made on the basis that termination of employment for any reason would, or might, have occurred in an event; applying the 'Polkey' principles?
3.8 Should a reduction be made on the basis of contributory fault?

4. **Unlawful deductions from wages**

4.1 Did C act in repudiatory breach of contract prior to 2/11/18? See below.
4.2 Did the contract terminate on 2/11/18?
4.3 If not, when did the contract terminate? Issues to consider may include:
4.4 Did R act in repudiatory breach by way of any commit all or any of the alleged matters set out at paragraph 41 of the Details of Claim?
4.5 Did R act in repudiatory breach of contract by purporting to summarily dismiss C on 2/11/18?
4.6 Did C accept the alleged breach/es in termination? If so, did he do so by way of the letter of his solicitors dated 30/11/18 or earlier?
4.7 Did he affirm the contract, or waive the breach/es, being any such acceptance?
4.8 If termination was post 2/11/18, was C due wages for any period post 2/11/18?
4.9 Did R make a deduction from those due wages?
4.10 Was the deduction unlawful?

5. Breach of contract (wrongful dismissal)

Liability
5.1 When did termination of contract occur? See above.
5.2 Did C act in repudiatory breach of contract prior to the date of termination of the contract? R relies on (in summary form):
12.2.1 C's alleged conduct/failures in respect of the bad debt issue.
12.2.2 C's alleged conduct/failures in respect of the "Five Lakes" issue (including taking cash which belonged to R, failing to inform R (or his line manager) of the same, failing to have R declare its income in that regard in any, or any appropriate, way (such as to HMRC) and failing to declare to the HMRC the income thereby received by himself).
12.2.3 C's alleged conduct/failures in respect of the issue of car insurance (including naming Leah Fowler as a driver on the company car insurance despite not working for R, failing to inform that the insured SEAT car, in respect of which she was named, was in fact owned by Jerry Fowler (17 years old at the time), naming Will Fowler and/or Jerry Fowler on the company car insurance who should not have been and failing to inform R or his Line Manager of any of the same).
12.2.4 C's alleged conduct/failures in connection with supplying his son Will Fowler with a company car.

Remedy
5.3 Has C complied with the duty to take reasonable steps to mitigate his losses?
5.4 If C had been issued with due contractual notice, what pay would he have received during the notice period?
5.5 Should a reduction be made on the basis that termination of employment would, or may, have occurred during the notice period in an event?

6. Counterclaim

6.1 Did C act in breach of contract as alleged?
6.2 Did C act as alleged at para 28 of the Amended Response?
6.3 Was that conduct in breach of contract as alleged?
6.4 Did R suffer losses as alleged?
6.5 What damages are due?

Findings of Fact relevant to the issues

7. Mr Fowler built up his business over a period of ten years selling, installing and servicing washing machines and dryers to commercial premises. By 2015 the business was turning over approximately 2.2 million and employed 20 staff.

8. In early 2015 Mr Fowler was approached by Photo Me International Plc, proposing to buy his company. Photo Me own and operate photograph booths and were interested in moving into the commercial laundry market. Mr Fowler explained that the Chief Operating Officer of Photo Me; Eric Mergui told him that Photo Me planned to invest in the company with a view to trying to increase turnover to £35 million over a five-year period, that Mr Fowler would be retained as Managing Director but would be supported by Stephen Murray for business and financial knowhow. Mr Mackay said that he would take on the company fleet operations to get a better price. Neither of these things happened. Mr Murray was transferred to a different project within the group and did not met Mr Fowler until the appeal hearing and Mr Mackay did not assist with the fleet.

9. Mr Fowler was paid £1.8 million for the entire shareholding of the company with an additional £400,000 to be paid in two instalments over a two year earn out period, contingent on Mr Fowler meeting agreed targets. Mr Fowler signed a contract of employment dated 1 October 2015. Although the contract specified Mr Murray as his line manager, this didn't happen and Mr Mergui was Mr Fowler's direct line manager. As a director of the company Mr Fowler accepted that he was bound by the statutory provisions of the Company Act 2006, Ss 171-175, the express contractual obligations of fidelity and fiduciary duty and the implied term that he would serve the company with good faith and fidelity, requiring him to; disclose the wrongdoing of other employees and confess to his own wrongdoing; not to misuse, steal, appropriate or convert the company's property; to account for secret profits received as a result of his employment; to act with reasonable care, skill and diligence and to avoid conflicts of interest.

10. Between 2015 and 2017 Mr Fowler met the 'earn out' targets and received the full payments agreed, the second instalment was due in November 2017 and paid in January 2018.

11. Mr Mergui did not attend the hearing or give evidence. His attendance had been the subject of an application for a Witness Order made to Employment Judge Ryan at a Preliminary Hearing on 29 October 2019. The respondent had stated that Mr Mergui would not be giving evidence and had resisted Mr

Fowler's application for a Witness Order. Judge Ryan refused the Witness Order because, although Mr Mergui's evidence was clearly pertinent and relevant, he resided outside the jurisdiction of the Tribunal and so could not be compelled to attend.

12. Mr Fowler described Mr Mergui as behaving in a bullying, abrasive, demanding and challenging way towards him throughout his employment. This description was supported by a stream of emails from Mr Mergui, contained in the bundle, which were brusque, abrasive, rude and critical of Mr Fowler's performance. Mr Fowler said that they were difficult emails to be on the receiving end of. He said that Mr Mergui was a difficult character to deal with and that you never knew from one day to the next what new demands he would make and targets he would set. Both Mr Murray and Mr Mackay acknowledged that Mr Mergui could be challenging and demanding. They readily accepted that Mr Mergui had overall authority and made decisions within the group and that he did not tolerate dissent. It was clear to me that they were under-playing how forceful and abrasive Mr Mergui could be; as was evident from his written communications and Mr Fowler's account.

13. I accepted Mr Fowler's description of Mr Mergui's behaviour. I was satisfied that he was authoritarian and excessively demanding and capricious in his management of the business and Mr Fowler. I accepted that Mr Mergui was responsible for all significant decisions on the running of the business; its strategy and priorities, financial targets and so on.

14. In 2018, the directors of Inox/Tersus; Mark Kendal and Jeremy Walding, approached Mr Fowler to propose a possible merger. Inox/Tersus sold laundry machines and Mr Fowler thought they would be a good fit to expand the business and he introduced them to Mr Mergui. Unbeknownst to Mr Fowler, meetings took place between Mr Mergui, Mr Kendal and Mr Walding in April 2018 resulting in agreement at a meeting on 23 April 2018 that Photo Me International would acquire Inox/Tersus and merge it with Fowler UK.com, renaming the company 'Revolution'. Agreement on the merger was progressed through email correspondence between Mr Mergui, Mr Kendal and Mr Walding; Mr Fowler was not included and only became aware of the merger when Mr Walding emailed him on 2nd May 2018 to arrange a site visit, forwarding the email chain.

15. A meeting was arranged for the 12 June 2018 with the senior management teams from the three companies to brief them on the merger. Mr Walding led the meeting and presented an organisational chart which identified him as Managing Director or Revolution and Mark Kendal as Operations Director; both with teams reporting to them. Mr Fowler was identified as 'special projects/laundry' with no direct reports. Mr Fowler had not been informed of or consulted about the organisational structure of the merged companies, in advance. He described the meeting as humiliating and one of the worst moments of his life. In his evidence, Mr Mackie insisted that Mr Walding had made it clear that the organisational structure presented was provisional. Mr Fowler could not recall it being described as provisional and pointed out that, in any event, it was a 'fait accomplis'. Thereafter, the reality was that Jeremy Walding assumed day to day management of the business. This was

illustrated by many occurrences; Mr Fowler emailed Mr Mergui asking why he *'had not been informed about Jeremy before today in front of my team?'* Mr Mergui did not challenge his understanding Mr Wilding's new position, simply apologised for not informing Mr Fowler in advance explaining that he had been *'fully occupied'*. In response to a query about his son's pay, Mr Mergui told Mr Fowler that the matter should be referred to Mr Wilding *'who is now the boss of this division'*. The new organisational structure was circulated in a staff memo authorised by Mr Mergui on 21st June 2018 which stated *'It has been decided to merge the three companies and to have a new name, Revolution…Jeremy and Mark have been appointed managers of this group..'* Thereafter Mr Mergui described Mr Wilding as Mr Fowler's *'direct boss'* in email correspondence. Thereafter, as Mr Fowler explained and I accepted, his authority and role was systematically stripped from him; he was side-lined into dealing with a commercial leasing arrangement without any prior notice and notwithstanding that he had no knowledge or expertise of commercial leaseholds; only becoming aware when he was copied into an email of 27th June; his instruction to exchange a particular washing machine for a customer was refused on the grounds that it had to be authorised by Mr Walding.

16. I had no difficulty in accepting Mr Fowler's evidence, supported by documentary evidence, that from June 2018 onwards Jeremy Walding was Managing Director of the merged company; behaved with that authority and was treated as such; that decision had been made by Mr Mergui and was in no sense provisional.

17. Mr Mackay held the disciplinary hearing which resulted in Mr Fowler's dismissal. He is a senior and experienced human resources director with considerable experience of management re-organisations and dealing with a range of disciplinary matters. Given his seniority and experience, I was surprised that his evidence was so vague and unconvincing. During the day that he gave evidence to the Tribunal, he repeatedly responded to questions defensively and often, unhelpfully. He appeared aggrieved that he was being called to account when, in his view, Mr Mergui should be answering some of the questions put. However, Mr Mackay insisted that it was he who had made the decision to dismiss Mr Fowler, impartially and independently of Mr Mergui, rather than upon his instructions, as Mr Fowler believed (and ultimately, I found). Given that, it was reasonable for Mr Flood to challenge Mr Mackay in some detail on the background and basis upon which he reached his decision.

18. Shortly after that meeting, Mr Fowler's heart condition, Atrial Fibulation, became symptomatic and he was off work unwell. On 5th July, Mr Wilding emailed Mr Mergui, raising *'concerns over Dave Fowler's acceptance to the changes within the organisations of the companies..'*. Mr Mergui's response provided a clear indication of his intention to remove Mr Fowler from the business; stating *'Yes I agree with you. It will be difficult for Dave to be part of our team and follow the strategy we want to apply, for this reason we should be very prudent and check and double check his contract – I will try to call him next week and ask him to come to London for a face to face meeting. In your side, you should build your strategy without him.'* Mr Mergui was not present

to explain what he meant, but I was satisfied that the intent was clear; consistent with the treatment of Mr Fowler up to that point; that his employment would soon be terminated one way or another. Mr Mackay and Mr Kendall were copied into this email exchange.

19. Further evidence that the respondent was preparing the way for Mr Fowler's exit from the business was provided by Mr Kendall's email of 18th July; when he raised a query about Mr Fowler's contract; *'it has come to light that in the event of David exiting the business his contract states he can keep his mobile number. Can you confirm if this is the case as this leaves us vulnerable and exposed…'*.

20. Mr Fowler raised his concerns with Mr Mackay. A meeting was held on 8th August with Mr Mackay, Mr Wilding and Mr Fowler; the upshot of which was confirmed in Mr Mackay's email of 15th August. He insisted that no changes had been made to Mr Fowler's position and his role of Managing Director remained open to him. This was plainly disingenuous given the reality of the situation.

21. In the meanwhile, Mr Mergui had called Mr Fowler to several meetings at which he attempted to persuade Mr Fowler to agree a settlement to leave the company. As Mr Fowler accepted, by that stage he had lost such trust and confidence in his employer that he was willing and open to agree terms however Mr Mergui's offers and conditions were unreasonable, changeable and unreliable. Mr Fowler described Mr Mergui shouting at him to sign, unclear as to what he was being asked to agree to; in any event no terms were reached.

22. Only Mr Fowler and Mr Mergui were present at those meetings, bar one that Mr Mackay also attended. Mr Mackay's recollection was vague and unreliable as to what was said and I accepted Mr Fowler's account as accurate.

23. In this judgment I do not criticise the respondent for seeking to agree terms of mutual termination; the fact that this was taking place simply supports my conclusion that Mr Mergui had decided in June that Mr Fowler's employment would terminate; doing so by agreement was one avenue that Mr Mergui was exploring to achieve that.

24. Mr Fowler replied to Mr Mackay's email, copying in Mr Mergui and Mr Wilding on 16th August 2018. It was a detailed letter in which Mr Fowler laid out the sequence of events and raised his concerns about his treatment. He explained that he was recovering and would be fit to return to work from 26th August; that he would take annual leave from then to 7th September 2018 and would return to his role on 10th September 2018; *'I am prepared to give the group the opportunity to rectify what it has done and consider your proposals for moving forward… I shall return to the business on Monday 10th September 2018. I shall do so as Managing Director of the Fowler business and expect my office to be vacated by Dave Pickwell so that I am able to get on with the job which (according to you) I am still employed to do.'* Mr Fowler's letter also included a Data Subject Access Request.

25. Mr Fowler received no reply to his letter. In evidence, Mr Mackay accepted that the letter should have been treated as a grievance and dealt with accordingly; he was unable to give any clear explanation for why it was not or indeed had been responded to at all.

26. It is clear that Mr Fowler's letter prompted efforts by Mr Mackay to place further pressure on Mr Fowler to agree terms. A meeting was held between them on 10th September at which he was placed on paid leave. There were no minutes taken but Mr Fowler provided an account in his email of 12th September 2018; stating; *'for the record I was not happy to be threatened with alleged acts of wrongdoing dredged up from over two years ago, concerning matters of which you are aware and have always been aware. I am ready and willing to return to work and understand you are instructing me to remain away from the business on paid leave.'* In response, Mr Mergui wrote to Mr Fowler on 14th September; the letter was marked *'Without Prejudice'* (privilege was waived for these proceedings). He laid out a list of 'performance and conduct' issues and encouraged Mr Fowler to consider the *'current options'* available to him. In the meanwhile, Mr Fowler had heard, which I accepted, that his customers had been told that he was no longer with the business. Given all this, Mr Mackay's insistence, at the time and in evidence to me, that there was no settled intention to manage Mr Fowler out of the business and that his role remained open to him was thoroughly disingenuous.

27. Pressure was further added on Mr Fowler during this period by Mr Mergui's behaviour in refusing to approve his expenses for attending the meetings to which he had been summoned in Paris, Cheltenham and Belgium. Subsequently Mr Mackay promised reimbursement of expenses arising from the disciplinary hearing and failed to pay them.

28. Mr Fowler reiterated his willingness to return to work on 1st October. Shortly after, Mr Mackay forwarded his email to Mr Mergui and provided him with advice on the options available to the company; *'Further to the below received from David, I just want to make you aware of the options available to us here and the related risks to the company, as I feel it is my duty to make you fully aware..'*. Mr Mackay identifies 3 options; 2 low risk; and offer of a consultancy agreement and settlement terms or no consultancy and higher settlement sum; one very high risk; dismissal. Mr Mackay recommended option 1 or 2 but stated; *'As always, I absolutely defer to your decision on which option you wish me to follow, as such await your instructions after considering the above'.* Whilst there is nothing improper in Mr Mackay advising Mr Mergui on options and risks, this correspondence provided further support for my conclusion that Mr Mergui was intent on removing Mr Fowler, prompting Mr Mackay to advise him on the associated risks and to confirm that he remained willing to carry out Mr Mergui's instructions.

29. On 16th October, Mr Mergui sought Mr Mackay's advice specifically on the cost and risk of dismissing Mr Fowler. Mr Mackay identified the likely risk and cost of unsuccessfully defending a claim of unfair dismissal, the impact upon Mr Fowler's non-compete clause and he advised that a settlement agreement would be the best option, stating again that he deferred to Mr Mergui's decision on the matter.

30. On 26 October 2018, Mr Murray was sent to scrutinise the Fowler accounts by Mr Mergui. He discovered significant aged debt (i.e. nine months and beyond) to the value of approximately £220,000. This had increased significantly between September 2017 and June 2018; £60,000 of the debt was effectively unrecoverable as the debtor company; BSP, had gone into liquidation.

31. Mr Fowler was unaware of Mr Murray's enquiries and Mr Murray took no steps to meet or discuss the debt reports and these figures with him. The first Mr Fowler became aware of the situation was when he was invited to a disciplinary hearing on 31 October 2018. The allegation put to him was broad and non-specific and he was provided with no documentation supporting it; that he was guilty of *"namely but not limited to neglect of duties as Managing Director not being observant of the company's policy and procedure, incorrect management of the company's accounting resulting in loss of trust and confidence".*

32. The disciplinary hearing was held three days later, on 2 November 2018. Mr Mackay told me that he checked with Mr Fowler at the outset of the hearing whether he was happy to proceed. This does not feature in the minutes, however Mr Fowler explained that whether he had been made that offer or not, he would have wanted to continue to just get the hearing over with, having travelled down from the North to attend and given his expenses were not being paid. Mr Mackay showed Mr Fowler the spreadsheet and reports collated by Mr Murray, telling him that as they were confidential documents, he could not have copies. Mr Fowler was caught unawares and unprepared to properly interpret and understand the sheets that he was being shown and absorb the figures or to give a properly considered explanation. Mr Fowler was given no details as to who the debtors were, save for the company in liquidation; BSP. He was not given a fair opportunity to understand and consider the allegation and the evidence against him.

33. During the disclosure process for this litigation a chain of email and text correspondence emerged demonstrating that Mr Fowler had taken proactive steps to chase BSP for payment and had sent a letter before action, however neither Mr Murray nor Mr Mackay were aware of this. Further, as he conceded in evidence, Mr Mackay had not appreciated that two of the major debtors of the aged debt were Inox and Tersus, now part of the merged company.

34. Mr Fowler explained to Mr Mackay that chasing debt and managing debtors had been the responsibility of the Accounts Manager, Gayle Bailey. Gayle had left the business on 26 October 2018 and Mr Murray had had a brief conversation with her that day. Mr Murray did not take a statement from her, take any notes, or inform Mr Mackay of Gayle's role and responsibilities. Even when Mr Fowler told Mr Mackay at the disciplinary hearing that Gayle managed debt collection, he took no steps to investigate or evaluate the impact of that on the allegations.

35. Mr Murray accepted that Gayle had told him that she was leaving because of the workload. Mr Fowler told me that Gayle had left because she had been

bombarded with demands for information from Mr Mergui to the extent that it had prevented her from carrying out her role adequately of managing debt. In his evidence, Mr Murray accepted that the reason that the debt position had deteriorated so significantly was connected to the numerous financial reports that Gayle was required to provide.

36. At the end of the disciplinary hearing, Mr Mackay dismissed Mr Fowler for gross misconduct, confirming dismissal by letter of 5th November; *'for your lack of management and complete neglect of your duties and responsibilities as a Managing Director leading to a Loss of Trust and Confidence in your capability to carry out your duties as a Managing Director of Fowler UK'*.

37. Mr Fowler appealed on 9 November 2018. Mr Mackie initially refused to allow an appeal because it had been submitted within seven, rather than five days but subsequently agreed to arrange an appeal hearing which was held by Mr Murray.

38. As Mr Murray confirmed in his evidence, he did not provide Mr Fowler with any documentary evidence and he simply confirmed the decision to dismiss. Mr Murray didn't dispute that, after informing Mr Fowler that his dismissal was upheld, he suggested that he seek legal advice.

39. As Mr Mackay and Mr Murray conceded and was evident, Mr Murray and Mr Mackay's actions did not comply with the company's disciplinary policy which provided for an investigatory meeting, notes signed by the employee, a time-line of events and summary of evidence with recommendations which the disciplinary manager should review. As the person who discovered the aged debt, investigated the matter and then heard the appeal; Mr Murray did not comply with the requirement in the policy that the manager conducting the investigation must not be a witness to the allegation. Further, it was apparent when Mr Murray gave his evidence, that he had not approached the appeal in an impartial manner; he was plainly convinced from the moment he saw the aged debt reports that Mr Fowler had been negligent in his management of debt. Nor was there any convincing explanation offered for why Mr Murray had been appointed to conduct the appeal given his prior involvement. There were other members of senior management who could have conducted it; including Mr Mergui.

40. Taking all the documentary evidence together and looking at the situation as a whole; it was entirely apparent that the decision to dismiss Mr Fowler was made by Mr Mergui and carried out by Mr Mackay, on his instructions. Mr Mergui had become increasingly frustrated that settlement terms had not been agreed; when the 'aged debt' issue was discovered, this provided the pre-text to dismiss Mr Fowler. The outcome of that disciplinary hearing was pre-determined and the hearing a sham. The speed at which this was done and the absence of any genuine attempt to properly investigate and to conduct a fair hearing and appeal supports my conclusion.

41. Had Mr Murray or Mr Mackay undertaken a reasonable investigation, they would have taken account the fact that Gayle had day to day responsibility for monitoring and chasing debt; of her description of the overwhelming demands

upon her; the steps taken by Mr Fowler to chase BSP for payment and the fact that Tersus and Inox were significant contributors to the aged debt.

42. Based on the evidence presented to me; I am satisfied that Mr Fowler did not breach any express or implied contractual terms of his contract in relation to his management of debt; specifically, amounting to gross misconduct as alleged by the respondent.

43. After Mr Fowler had been dismissed, but before the appeal hearing, the company received an anonymous 'tip off' letter, making various allegations against Mr Fowler. The first allegation was that, since 2012 he had personally profited from the coin operated staff machines at the Five Lakes Hotel.

44. In 2011 Mr Fowler's company had supplied and installed two coin-operated washing machines and a dryer for the staff laundry at the Five Lakes Hotel complex. The company had also supplied and installed machines to service the hotel's laundry. The contract provided ongoing service of the commercial and the staff machines. When Mr Fowler attended Five Lakes he would empty the staff machines of coins and would use that money for expenses. Mr Fowler explained that the staff machines regularly malfunctioned because staff would jam euro coins into them rather than sterling and it became a nuisance for him to have to attend and fix the problems. He said that, in around 2012, he simply transferred ownership of the staff machines from the business to his brother Lee. Lee is a self-employed washing machine engineer. Mr Fowler said that from then on, Lee would regularly attend and service the staff machines and would take the coins which he would use for his expenses.

45. Both brothers accepted that on occasion thereafter Mr Fowler would still empty the coins but Lee insisted that this was done only to cover for him when he was ill or away. Lee said that he had serviced the staff machines exclusively from around 2012 onwards and had put a sign on the machines with his own mobile number and contact details. He gave a confused and unconvincing explanation for why he did not account for those earnings. He said that upon his accountant's advice he would use them for expenses and keep receipts, but he did not think he needed to declare the sums earnt themselves.

46. However, the brothers' account was plainly not correct. In fact, since 2012, the company's engineers had regularly attended and repaired the staff machines. The bundle contained repair notes from 2012 to May 2017, which was consistent with an ongoing service agreement. Mr Fowler's explanation that call handlers would allocate engineers to service the staff machines in error was not convincing given the frequency with which visits took place over an extended period. Mr Fowler's evidence was undermined by the uncontested evidence of the respondent's Service Desk Manager from 2007 – 2014, Mr Mike Souter; he confirmed that he had never been instructed not to send engineers to fix the staff machines at 5 Lakes and the uncontested evidence of one of the engineers, Laing Willard. Mr Willard confirmed that he regularly repaired the staff machines from April 2014, always making Mr Fowler aware. Mr Willard also recalled emptying the coins on one occasion

and leaving them in the cash box and Mr Fowler sending another engineer, Mr Pitkin to collect them. Mr Pitkin confirmed this in his uncontested statement. In short, there was overwhelming evidence that the company's engineers continued to service the staff machines, in accordance with the company's contractual obligations, with Mr Fowler's full knowledge, from 2012 to late 2017. Throughout this period, Mr Fowler continued to collect the coins and retain the income.

47. Mr Willard's uncontested evidence was that it was only in around late 2017/early 2018 that Lee's contact details were placed on the machines; this is consistent with the documentary evidence of earlier service visits being carried out by company engineers. It appears that from that point, Lee attended and serviced the machines and that he benefited from the arrangement by taking the coins on those occasions. There were still occasions thereafter when Mr Fowler would collect the coins; when pressed as to why, he was unable to give a clear explanation.

48. There was no evidence whatsoever of a transfer of ownership of the staff machines from the business to Lee whether in 2012 or 2017-18. It follows that when Photo Me International bought the business and all its assets; that included the coin operated staff machines at Five Lakes. Mr Fowler accepted that, if ownership of the machines had not been transferred to Lee, they would have passed to the new owners with the sale of the business in 2015 and would have continued to be owned by the respondent. Mr Fowler did not account to the business for the income derived in coins from them. From 2017-2018 there was clearly a flexible and informal arrangement between the brothers as to collection of the coins and the income derived was not passed onto the respondent or declared.

49. I was satisfied that Mr Fowler's conduct in respect of the staff machines at 5 Lakes amounted to a clear repudiatory breach of contract; he received an undeclared income from the machines which belonged to the respondent from 2012 onwards; he did not inform the respondent of the income he was deriving; he did not declare the money as income to the company and failed to pay tax on it and he took no steps to remedy that failing. Plainly that conduct was in fundamental breach of the implied duty of good faith and fidelity and his fiduciary obligations as a director of the respondent.

50. It is difficult to quantify the sums involved. The respondent's witnesses had no knowledge of the sums generated by the machines; Mr Fowler's recollection was vague. In his witness statement, Lee Fowler estimated the amount he collected as between £200 and £280.00 per month with less money in the summer. In cross examination he estimated the amount as around £2,000.00 - £2,500.00 per year. Lee was the person who regularly collected the coins from late 2017. I accepted his recollection of those amounts as genuine. In its counterclaim, the respondent provided an estimate of the machines generating £200-£300 every 2-4 weeks, however there was no evidential basis for this assessment. Doing the best that I can from the evidence provided, I assess the annual income generated from the machines from installation in 2011 to Mr Fowler's dismissal in 2018 at the midway point of Lee's estimate; £2,250.00 per annum.

51. The respondent relied upon two further matters that came to light following Mr Fowler's dismissal; the first was that he had provided a company vehicle, a Ford Transit, for his son which was not required for his son's role working on the service desk and office based. I accepted Mr Fowler's explanation that his son had been a field based service engineer and had used a company Ford Transit van. Following an accident, his son moved to office based work and continued to drive to and from work in the van but it was used as a pool vehicle during the day and continued to be of benefit to the company. The Ford Transit at issue was simply a replacement for the old Ford Transit van when it became un-roadworthy.

52. The second was that, in December 2017, Mr Fowler arranged for his daughter, Leah, to be added on the company's insurance to drive a vehicle. Mr Fowler had personally paid the relevant excess for Leah and Gayle had made the arrangements. Mr Fowler explained that he hadn't thought there was anything wrong with this and he certainly wasn't being dishonest. Gayle knew that Leah was a student and not an employee and would have provide those details to the insurance company. He assumed that if there was a problem with adding Leah to the insurance, Gayle would have told him. I accepted that it was a reasonable expectation of Mr Fowler, that Gayle would have provided accurate details to the insurers and informed him of any issues that gave rise to.

53. In respect of the Ford Transit and Leah's insurance, I find that neither amount to blameworthy or culpable behaviour nor a breach of any express or implied contractual term of Mr Fowler's contract of employment or his fiduciary obligations as a director of the company.

The Law

Unfair Dismissal

54. S98 ERA 1996 provides as follows;

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it—
(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
……
(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case."

55. I was guided by the EAT judgment in **British Homes Stores v Burchell 1978 IRLR 379 EAT**, being mindful that the employer must show that he had a genuine belief in the employee's guilt, held on reasonable grounds, after reasonable investigation. I was also guided by the Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt 2003 IRLR 23 CA** that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

56. In accordance with the Employment Appeal Tribunal's guidance in **Iceland Frozen Foods Ltd v Jones 1982 IRLR 439**, I was mindful, in reaching my conclusions, not to substitute my own view of what the appropriate sanction should have been for that of the respondent's, but that I should consider whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case.

57. I am aware that of the importance of adopting a fair procedure to the fairness of a dismissal, as emphasised by the House of Lords in **W Devis and Sons Ltd v Atkins 1977 ICR 662, HL** and subsequently endorsed by the House of Lords in **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**.

58. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613.**

59. I was reminded of the EAT judgment in **Sunshine Hotel v Goddard UKEAT/0154/16**, that there is no absolute requirement to have an investigation hearing.

60. On the reason for dismissal Mr McPhail referred me to an EAT judgment; **Associated Society of Locomotive Engineers and Firemen (ASLEF) v Mr S Brady**; *'We would agree in principle there is indeed a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason…An employer may have a good reason for dismissing whilst welcoming the opportunity to dismiss which that reason affords.'*

'Polkey' principles

61. It has been established since **Polkey v A E Dayton Services Limited [1988] ICR 142** that in considering whether an employee would still have been dismissed even if a fair procedure had been followed, there is no need for an all or nothing decision. If the Tribunal thinks there is doubt whether or not the employee would have been dismissed, this element can be reflected by

reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment. Although this inherently involves a degree of speculation, Tribunals should not shy away from that exercise. A similar exercise was also required by what was then section 98A(2) (part of the now repealed statutory dispute resolution procedures), and the guidance given by the Employment Appeal Tribunal in paragraph 54 of **Software 2000 Limited v Andrews [2007] IRLR 568** remains of assistance, although the burden expressly placed on the employer by section 98A(2) is not to be found in section 123(1):

"(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role.

(6) The s.98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a Tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the

employment may have come to an end when it did, or alternatively would not have continued indefinitely.

(7) Having considered the evidence, the Tribunal may determine

(a) That if fair procedures had been complied with, the employer has satisfied it - the onus being firmly on the employer - that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the O'Donoghue case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored."

62. Mr Flood referred me to **Trico-Folberth Ltd v Devonshire 1989 IRLR 396** for the proposition that it is not enough for the Respondent to demonstrate that it could have dismissed the Claimant for any or all the conduct matters alleged, but that it would have done so.

Contributory Fault

63. A reduction because of contributory fault by the employee can apply both to the basic award and to the compensatory award by virtue of differently worded provisions in sections 122 and 123 respectively:

"Section 122 (2) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly….

Section 123 (6) 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 as it considers just and equitable having regard to that finding."

64. As to what conduct may fall within these provisions, assistance may be derived from the decision of the Court of Appeal in **Nelson v BBC (No 2) [1980] ICR 110** to the effect that the statutory wording means that some

reduction is only just and equitable if the conduct of the claimant was culpable or blameworthy. The Court went on to say (*per* Brandon LJ at page 121F):

> *"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody minded. It may also include action which, though not meriting any of those more pejorative terms, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved."*

Wrongful Dismissal

65. I was referred to **Boston Deep Sea Fishing and Ice Co v Ansell 1888 39 ChD 339 CA for** the well-established proposition that*; 'if an employer finds out after the employee has been dismissed that the employee was guilty of a fundamental breach of contract which would have justified summary dismissal, the employer can rely on this to rebut a claim of wrongful dismissal.'* Together with the more recent case of **Williams v Leeds United Football Club 2015 IRLR 383 QBD**, that '*since the question of whether an employee is in repudiatory breach is a matter of fact, the employer's motivation for wanting to summarily dismiss is effectively irrelevant'*.

Counter claim

66. S3 Employment Tribunals Act 1996 and the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994/1623 confers jurisdiction on the Tribunal to determine an employer's claim for breach of contract; provided, in essence; the employer's contract claim must arise or be outstanding on the termination of the employee's employment and must relate to (1) damages for breach of the contract of employment or other contract connected with employment; (2) a sum due under such a contract or (3) the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract (Article 4 & S3(2).

Conclusions

Unfair Dismissal

67. I found that the respondent had decided to terminate Mr Fowler's employment and used the aged debt issue as the pretext. Mr Fowler's conduct in that regard was not the genuine reason for his dismissal which had been predetermined. Accordingly, the respondent did not establish the potentially fair reason relied upon for dismissal; conduct, falling within S98(1) ERA 1996.

68. Even if the respondent had established that conduct was the reason for dismissal, the decision to dismiss fell outside the range of reasonable

responses open to this employer in the circumstances; applying S98(4) ERA 1996.

69. Applying the 'Burchell' principles; the respondent did not undertake a reasonable investigation into the allegation of misconduct; Mr Murray's investigation was restricted to consideration of the aged debt spread sheets; he did not adequately explore Gayle's role, gather relevant information from her and report that to Mr Mackay; he did not speak to Mr Fowler and he made insufficient enquiries as to the source of the aged debts and any steps taken by Gayle or Mr Fowler to chase/address those debts. Even when informed by Mr Fowler of Gayle's role, Mr Mackay took no steps to investigate further. The fact that neither Mr Murray or Mr Mackay were aware of Inox/Tersus's contribution to the aged debt or the efforts to secure payment from BSP illustrates the inadequacy of the investigation undertaken.

70. Mr Mackay did not form a genuine and reasonable belief that Mr Fowler had been grossly negligent in his management of debt; the outcome was pre-determined and Mr Mackay did not address his mind adequately or at all to whether Mr Fowler had in fact committed the misconduct alleged.

71. The respondent did not adopt a fair and reasonable disciplinary procedure or comply with their own Disciplinary Policy. Mr Fowler was given no reasonable opportunity to consider the evidence and allegations against him. Mr Murray had not discussed the details of the aged debt, which customers it related to and why, with him. The relevant spread sheets were simply shown to him at the disciplinary hearing and he was not allowed copies; that was not sufficient to enable him to properly reflect and provide a considered response. Rather than pause to make further enquiries and allow Mr Fowler to reflect, Mr Mackay simply rushed to deliver his pre-determined decision of dismissal.

72. The conduct of the appeal in no way remedied any of these defects, rather compounded them. Mr Murray did not conduct a genuine review or reconsideration of the evidence, he simply rubber-stamped the decision that had been made.

73. Accordingly, Mr Fowler's dismissal was unfair and his claim succeeds.

Contributory Conduct

74. As the aged debt issue was not the genuine reason for dismissal and I found that Mr Fowler's management of debt, specifically as alleged by the respondent, was not culpable or blameworthy to any extent, I do not make any deduction from the basic or any compensatory award to reflect contributory fault in that regard. However, Mr Fowler's conduct in respect of 5 Lakes was culpable, although it did not contribute to his dismissal. Applying S122(2), it would be just and equitable to reflect that conduct by a reduction in the basic award of 20%.

75. With regard to 'Polkey' and applying the 'Software 2000' principles; I have no doubt that once the 5 Lakes issue had come to light, the respondent would have commenced an investigation and gathered the evidence that was

produced to me at this hearing. Mr Fowler's conduct in that regard could fairly be considered a fundamental breach of the express and implied terms identified and warranting dismissal for gross misconduct. I am satisfied that the respondent would certainly have instigated disciplinary proceedings and that the outcome would have been dismissal. It would have taken the respondent some time to conduct reasonable investigations upon which to base a genuine and reasonable belief. Taking into consideration the severity of the allegations and potential consequences for Mr Fowler, I find that it would have taken the respondent 16 weeks to undertake a substantively and procedurally fair disciplinary process; including a thorough investigation; providing Mr Fowler with the evidence gathered and affording him sufficient time to consider and respond; conducting a disciplinary hearing; making any further necessary enquiries, communicating the outcome and conducting an appeal. I am satisfied that during that period, Mr Fowler would have been suspended from work on full pay; as he in fact was.

76. Mr Fowler had indicated that he was fit to return to work. In evidence he explained that at some point thereafter, his health deteriorated and he became unfit. He did not specify a particular date for this; however, given that my finding that he would have been suspended from work on full pay; I do not accept Mr MacPhail's submission that the compensatory award should be reduced to reflect the fact that he had exhausted his sick pay entitlement.

77. Compliance with the ACAS Code: Although an uplift was sought in the claim form for a failure to comply with the Code, it did not feature in the agreed list of issues and no submissions were made, identifying any specific breach. In these circumstances I make no uplift to the award.

Wrongful Dismissal

78. As I have found, Mr Fowler's conduct in respect of 5 Lakes amounted to a fundamental breach of contract, persisting from 2012 up to Mr Fowler's dismissal and entitling the respondent to bring the contract to an end by summary dismissal.

79. Accordingly, Mr Fowler's claim of wrongful dismissal, being unpaid notice of termination of employment fails and is dismissed.

Counter claim

80. Through his conduct in receiving income from the staff machines at 5 Lakes which was properly and contractually due to the respondent, failing to inform the respondent of this income or account for and declare it; Mr Fowler was in breach of his contractual obligations to the respondent as specified in my findings. That breach was ongoing from 2012 to his dismissal and gave rise to losses on the part of the respondent in the amount of the annual income derived from those machines by Mr Fowler and/or Lee.

81. I have decided that the annual loss of income to the respondent was £2,250.00 per annum, up to the date of Mr Fowler's dismissal. In his submission, Mr Flood points out that to reach an accurate assessment of the

damages due to the respondent arising from this contractual breach, the cost to the respondent of attending and collecting the coins must be calculated and offset against the lost income. I agree. Mr Flood has proposed a method of calculation; however, this is a matter for determination at a remedy hearing as I have heard no evidence on the point.

82. Accordingly, the respondent's counter claim for damages arising from breach of contract succeeds; the amount to be determined.

Directions

83. Having made my findings on remedy, I anticipate that the parties can agree precise sums for both successful claims. However, if, despite the parties' best endeavours, that proves not to be possible; the following directions apply:

84. Within 3 weeks of this judgment being promulgated, the claimant shall send to the respondent a revised schedule of loss for the claim of unfair dismissal and suggested calculation of loss for the counter-claim.

85. Within 6 weeks of this judgment being promulgated, the respondent shall send to the claimant a counter-schedule in respect of both claims; together with any additional supporting evidence for the damages claimed.

86. If the parties can agree the sums to be awarded, they shall write to the Tribunal for my attention within 8 weeks, asking me to issue judgment on remedy in agreed terms. If not, they shall propose directions for a hearing to determine remedy, appropriate to the circumstances at that time (this judgment is promulgated during the Covid-19 outbreak). I will then issue directions for that hearing.

Employment Judge Howard
2nd April 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
3 April 2020

FOR THE TRIBUNAL OFFICE