EMPLOYMENT TRIBUNALS

BETWEEN

Mr P Boulton **(Claimant)**	**and**	**1. XDP Ltd** **2. XDP International Ltd** **(Respondents)**

Held at: **Birmingham**

On: **12-16 October 2020 (in person, save for the claimant's counsel who appeared via CVP);**
22 October 2020 (in chambers);
judgment given orally (by CVP) on 27 October 2020

Before: **Employment Judge T Coghlin QC, Mr G Murray, Miss R Addison**

Representation:

Claimant: **Mr Rhys Johns, counsel**

Respondent: **Mrs Michele Peckham, solicitor**

REASONS

Introduction

1. The tribunal gave judgment on 27 October 2020, dismissing his claims of age discrimination and wrongful dismissal and his complaint of unfair dismissal, and announced its reasons orally. A request for written reasons was then made via email, but through administrative oversight there was a significant delay before that request was passed on to Employment Judge Coghlin. The tribunal

apologises to the parties for this delay. It has subsequently taken some time for the transcript of the oral judgment to be transcribed.

The claim

2. The claimant complains of constructive unfair and wrongful dismissal and direct age discrimination.

3. His claim was submitted on 26 June 2019 following an early conciliation period which ran from 29 April to 29 May 2019.

4. The claimant's age discrimination claim is put on the basis that he was over 55 at the time of the discrimination which is alleged, in early 2019. He compares his treatment to actual or hypothetical comparators aged under 55. The actual comparators relied on are Mr Tresadern, who we are told is about 1 or 2 years younger than the claimant, and Miss Isabella Wayte, who is a director of the respondent company and the daughter of Mr Louis John, the respondent's managing director and principal shareholder. Miss Wayte is some 18 years younger than the claimant.

5. The issues were identified by Employment Judge Flood at the Preliminary Hearing on 14 November 2019 and they were clarified further before us at the hearing.

6. By an application made by his solicitors in writing on 22 September 2020 the claimant applied to amend his claim. In that letter his solicitors explained:

> "It has become clear in reviewing the transcript evidence that the Claimant's position that he was paid £75k per annum is borne out by that evidence. Our client has previously compiled his case on the basis that he was individually paid PAYE of £10k per annum. This is correct. However, the additional £65k per annum was to be paid through our client's company Boltway Investigations Ltd. This was tax efficient for both parties. Our client has paid all tax that he owes upon that income."

7. The additional wording which the claimant sought to introduce by this application was as follows:

> "The Claimant arranged with Louis John that the Claimant would benefit from an income of £75k per annum. In addition to the £10k per annum to be paid

under an employment contract he would also be paid £65k per annum via his company Boltway Investigations Ltd. This was to ensure that tax was kept to a minimum for the Respondent which would not then pay Employer's NI or Income Tax. The Claimant would then account for his income tax when he took the money from the business of which he was the sole beneficiary and shareholder. The Claimant was entitled to a gross sum of £75k per annum for the work he carried out in employment, and there was no distinction between work he performed under an employment contract and work he performed for the £65k."

8. That application was considered on the first morning of the hearing. It was allowed by consent, on the basis that the respondent was given permission to amend its grounds for resistance in response. By that amended pleading the respondent asserted that if the arrangement was as described in the claimant's amended case, the employment contract was tainted by illegality.

9. After those applications and other matters of housekeeping had been dealt with the first day of hearing for us was a reading day.

10. The claimant's evidence was completed on the afternoon of the second day at that point the tribunal had invited the parties to reflect on how they wished to proceed given the issue of illegality which had been raised and in relation to the which the claimant had given his evidence.

11. On the third morning the claimant indicated through his counsel that he wished to withdraw his amended application on which basis it was said the illegality of the argument would fall away. But the tribunal indicated that the amendment had already been granted and that a further application would be required if the claimant wish to undo it. Given that the issue of illegality had been raised by the respondent, the claimant had given relevant evidence, and the tribunal was now alive to the issue, the issue might not simply fall away if the claimant's pleading was again amended. The claimant through his counsel replied that that being so, he did not wish to re-amend his claim.

12. The parties were represented before us by Mr Rhys Johns of counsel for the claimant and Miss Michele Peckham, solicitor, for the respondent.

13. The tribunal heard witness evidence from the claimant and from a number of witnesses called by him: Ms Angela Warrilow, Mr David Owen, Mr Lee Brenan

and Mr Robert Capewell. The only witness called by the respondent was Mr Louis John.

14. Tribunal had bundles running to around 1,500 pages but we were only taken to a limited number of them. Among the documents were a number of transcripts of covert recordings, some of which had been made by the claimant and others by his witness Mr Capewell. These recordings were all made without the consent of others who were involved in the discussions in question, although Mr John at least suspected that he was being covertly recorded in discussions with the claimant.

15. No objection was taken by the respondent to the admissibility of the recordings made by the claimant. The respondent did, however, object to the admission into evidence of transcripts of certain recordings made by Mr Capewell in 2019. For reasons that we gave orally at the time we decided to allow those recordings to be admitted into evidence. In essence we considered that the transcripts contained what appeared to be relevant evidence and the potential relevance of that evidence outweighed the public interest in not condoning the making of such secret recordings and the invasion of privacy which their creation entailed.

16. No issue was taken as to the accuracy of the transcripts of the recordings.

17. The tribunal wishes to express its gratitude to both representatives for the way in which the case was conducted. The hearing took place in person save that the claimant's counsel Mr Lloyds attended by video remotely.

The Issues

18. The issues as initially identified by Judge Flood and kind of developed by us were as follows:

    (1) Was it an implied term of the claimant's contract of employment that the contract between the respondent and Boltway would not be terminated during the currency of the claimant's employment by the respondent?

(2) Did the respondent act in repudiatory breach of the claimant's contract of employment by:

a. the email from Mr John dated 20 September 2018 informing the claimant (inter alia) that his last day as Operations Director would be by 28 September 2018, whether or not that was motivated by desire to be bound by the benefit agreements?

b. terminating the Boltway contract in late September or early October 2018 and ceasing to make payments thereunder? And/or

c. Mr John rejecting all proposals for a new working relationship, in particular by reneging on an agreement the respondent would engage Boltway to provide services at the rate of £35,000 per annum?

(3) Did items (2)(a) to (2)(c) individually or cumulatively amount to conduct which was calculated or likely to destroy or seriously damage the relationship trust and confidence which should exist between employer and employee, and if so was there reasonable and proper cause for that conduct on the part of the respondent?

(4) Did item 2(b) above represent a breach of the implied term set out at (1) above? If so was that breach repudiatory?

(5) Did the claimant affirm the contract of employment and thereby lose the right to complain of constructive dismissal?

(6) If so was there a "last straw" which alone or taken together with the earlier alleged matters amounted to a repudiatory breach of contract? The claimant relies on the matters set out at (2)(c) above and also on Mr John's comment in the email 24 January 2019 that he intended "leaving the running of the business to a younger team".

(7) Did the claimant resign in response to such repudiatory breach?

(8) If the claimant was constructively dismissed, was that dismissal fair? The respondent relies on some other substantial reason for dismissal namely a restructuring.

(9) Was the contract of employment tainted by illegality and if so how does this affect his claim for unfair or wrongful dismissal? It is not suggested that his age discrimination complaint would be affected by any alleged illegality.

(10) If the claimant was constructively dismissed it is common ground that that dismissal was wrongful because the was given notice of dismissal and was not paid notice pay.

(11) Direct age discrimination:

a. Did the respondent subject the claimant to the following conduct?

i. Mr John's comment in the email of 29 January 2019 that he intended "leaving the running of the business to a younger team";

ii. Mr John's rejection of proposals for a new working relationship (and again we take this to be reference at to his rejection of the proposal the claimant being engaged via Boltway at a rate of £35,000 per annum);

iii. it is also said that the constructive unfair dismissal is itself an act of age discrimination.

b. If so did the respondent thereby treat the claimant less favourably that it treated or would have treated a person aged under 55 in materially similar circumstances? The actual comparators relied on are, firstly, Mr Tresadern who as noted above is 1 or 2 years younger than the claimant, however that comparison to Mr Tresadern was not pursed either in cross examination or submissions, and Miss Wayte, who as noted

above is some 18 years younger than the claimant. Alternatively, the claimant relies on a hypothetical comparator who was aged under 55.

c. If so was the claimant's age (which is to say over 55) a material reason for that less favourable treatment?

d. If so has the respondent showed the treatment of the claimant was proportionate means of achieving a legitimate aim namely putting in place measures for succession planning for the senior leadership team?

e. Does the tribunal have jurisdiction to consider the claim having regard to the applicable time limits?

The Facts

The parties and the relevant companies

19. The first respondent, XDP Limited, is a parcel and freight network company which at the relevant times employed by 175 staff in addition to a number of owners/drivers who were engaged as contractors rather than as employees.

20. The second respondent, XDP International Limited, is another company in the same group as the first respondent and was the entity that paid the claimant's salary. It is common ground that the claimant was employed by the first respondent and at the start of the hearing it was agreed that the second respondent be dismissed from the proceedings. In this judgment references to the "respondent" are to XDP Limited.

21. At the time of the events with which we are concerned the MD and sole shareholder of the respondent was Mr Louis John.

22. The claimant worked for the respondent through one of his own limited companies as a franchisee since 1999 running the respondent's Stoke depot. At around this time the respondent operated on a franchise model but over the years increasingly ran depots directly itself.

23. The claimant at the relevant times ran a number of limited companies. One in particular features in this case, Boltway Investigations Ltd ("Boltway"). Boltway provided security services to the respondent in the course of 2014. Its role was to drive down theft through measures such as the use of tracking devices on parcels and vehicles, surveillance and carrying out DBS vetting of contractors.

The agreement in late 2014 / early 2015

24. In December 2014 a discussion took place at the Stoke depot between Mr John and the claimant. Mr John indicated that he did not want to continue to work at the pace that he had been and that he wanted to prepare the business for sale. They discussed a possible floatation or sale of the business in about 4 or 5 years' time, and a possible sale value of £50 million was discussed. Mr John proposed that the claimant should work as Operations Director. There was a discussion about how the claimant should be paid in which Mr John asked the claimant whether he was currently on the payroll and he went on

> "Yeah if we put you on a tuppenny hapenny payroll until we actually know what your salary is like the minimum is – you can then bill it through Boltway and we can have an agreement in place that what we are going to do is when we are going to have an exit strategy or that's the plan or if we sell the business we want you to get your percent of that and happy to put that in writing, I think we would be a fairly good team. Because David is sick to death of the police so put him on the security role."

25. The reference to David was to David Jagger, Mr John's son-in-law. The claimant said of him "yeah he's good". Mr John said

> "and push all that over to him and let you bill me Boltway still for your salary but put you on the payroll."

26. The claimant's recording device was positioned on his desk, and the end of the conversation, when he and Mr John moved away from the desk, was not caught by the recording.

27. During this discussion and over the course of subsequent telephone calls the overall arrangement to the parties was agreed by the claimant and Mr John:

a. The claimant would be employed by the respondent as Operations Director on a part-time basis, 20 hours per week, for a salary of £10,000. This sum was chosen because it represented the personal tax-free allowance at that time. In addition the claimant would be entitled to 2.5% of the profits if any made by the respondent company.

b. The respondent would pay Boltway an annual fee of £65,000 plus VAT which was paid by way of 12 monthly payments against invoices in the sum of £5,416 each. That annual fee of £65,000 per year increased slightly by agreement a couple of years later.

c. The claimant and Mr John would enter into a benefit agreement whereby the claimant would become entitled to 10% of the proceeds of sale of the business in the event that it was sold.

28. On 2 January 2015 the claimant emailed Bella Wayte, who is a director of the respondent, and, as we have said, Mr John's daughter. The email was entitled "payment arrangements". Attached to that email were 12 pre-prepared monthly invoices for the period January to December 2015 on behalf of Boltway in respect of "Security Services" in the sum of £5,416 each, that amount being one twelfth of the annual £65,000 fee which had been agreed, rounded down to the nearest pound. In the email the claimant asked that the payments be made to Boltway's bank account and "the remaining £10k that is running through the payroll can be split into 12 payments." Those payments were to be paid directly to the claimant. The claimant said that he would raise additional invoices for the 2.5% "when we get back into profit". He also said that he would arrange for his solicitors to draft up the agreement for the 10% the next week (this was referred to subsequently as the "benefit agreement").

29. At the start of each successive year thereafter the claimant again provided the respondent with 12 forward dated invoices for Boltway, in each case specifying "Security Services".

30. A written employment contract was drawn up on 5 January 2015 which was the claimants' first day of employment with the respondent. That provided for a job title of Operations Director; working hours of 20 hours per week; a salary of £10,00 per annum, and 2.5% of the profits payable twice yearly in January and

July. We should say at this stage the likelihood of significant profit payments being made to the claimant in the near future was at that point low. The business was making no profit at the time the agreement was entered, as the email of page 50 reflects, and as things turned out there were only a couple of profit payments made to the claimant over the 4 years of his employment, in the order of a couple thousand pounds or so on each occasion. The contract provided that it was terminable on 3 months' notice on each side. The contract also contained the usual kinds of provision found in an employment contract in relation to place of work, holiday, sickness absence, pension and so on. We shall come on to in a moment to the question of whether that written employment contract represented the true and complete agreement between the parties.

31. The benefit agreement was drafted by the claimant's solicitors. It was signed on 5 February 2015 (page 107). The parties to the agreement were Mr John and the claimant. The benefit agreement provided by clause 4 that the claimant would receive 10% of the value of the company on the occurrence of certain specified events. Notably the sale of the majority of the shareholding in the company, and the expiry of 7 years (pages 112 and 113). The benefit agreement provided by clause 6 that it would terminate if the claimant ceased to be employed save that an "invalid or unfair" dismissal would not terminate the agreement.

32. No written agreement was drawn up between respondent and Boltway, and there was no written scope of work or any other documentation indicating what was expected by each party to that particular arrangement of the other. There had been no previous written agreement between the respondent at Boltway in respect of work carried out by Boltway prior to 2015, but that had been at a time when work being done by Boltway was *ad hoc* as opposed to the regular arrangement which was now presented as being in place.

<u>What work was the claimant actually doing?</u>

33. The claimant worked hard for the respondent, and for long hours of up to 70 hours per week.

34. The claimant's role of operations director included sorting out problems with depots, representing the respondent in legal disputes with contractors, and managing a team of regional directors and operations managers around the country.

35. Mr John's evidence was that the work which Boltway was doing was about the vetting contractors by carrying out a DBS checks, establishing the *bona fides* of contractors who were operating through limited companies, reducing losses through theft by means such of the use of tracking devices, and conducting investigations. The claimant denied that from January 2015 he did any such work and said this was all the responsibility of Mr Jagger. He said that he loaned his equipment to Mr Jagger in order to allow Mr Jagger to carry out surveillance tracking, investigations and the like. The claimant said he provided Mr Jagger with very occasional advice and assistance but that this was limited and infrequent, amounting to no more than a few times a year for a few hours each time.

36. The only area where there seems to be any overlap in the evidence of the claimant and Mr John in this respect is that it is common ground that that the claimant did some work in liaising with contractors. The claimant said he would interview contractors, agree terms with them, assess their suitability in the sense of checking whether they had enough vehicles, enough staff, enough experience and so on, but not in the sense of vetting them by way of DBS checks or suchlike. The claimant said he did nothing to do with security and nothing to do with the vetting of contractors; rather the work he did with contactors was part and parcel of, and indistinguishable from, his operations director work. It was the claimants' evidence that the respondent wanted the claimant to do the operations director role only and for Mr Jagger to do the security and that is exactly happened in practice.

37. We accept the claimant's evidence on how this worked in practice. We found him a more convincing witness on this, and indeed generally, than Mr John. The claimant's account was supported by a number of factors:

    a. It was consistent with the intention expressed by Mr John that the initial meeting in September 2014 where Mr John spoke only to the claimant undertaking the Operations Director role and made it clear that the

intention was Mr Jagger would take over security and that the claimant would "push all that over to him;"

b. It was Mr Owen's evidence, which we accepted, that it was Mr Jagger and not the claimant who was in charge of security;

c. There was no documentary evidence of Boltway actually doing any vetting or other security work, which we would expect there to have been had it happened;

d. In a discussion on 24 September 2018 which the claimant secretly recorded, Mr John described work which the claimant might now do, in circumstances where he was indicating that the claimant would no longer in substance be operations director. He said: "You can go back to doing some security work", the clear indication being that the claimant had not being doing any such work in the period when he had been operations director.

e. Mr John's evidence was contradictory and unsatisfactory about when the operations director work was actually being done by the claimant. In his statement he spoke of this taking place on one and a half specified days each week. But in oral evidence he said it required about 30 to 60 minutes of telephone calls each morning.

38. Overall we accept the claimant's evidence that his role as operational director was in fact a full time role and was not limited to the 20 hours as stated in his contract.

<u>The agreement between the parties</u>

39. The above findings lead onto a wider question of whether the agreement involving a part-time employed role on £10,000 per annum, with a separate agreement between the respondent and Boltway sitting alongside it, reflected the true intentions and the real agreement of the parties.

40. We are satisfied that the written contract did not represent the true or complete agreement between the parties. It was never intended by the parties that any

services would be provided by Boltway. The parties' true intentions and true agreement were in our judgment accurately reflected in the wording of the amendment put forward on behalf of the claimant in his solicitor's letter of the 22 September 2020 (with emphasis added):

"the claimant was entitled to a gross sum of £75k per annum for the work he **carried out in employment**, and there was no distinction between work he performed under an employment contract and work he performed for the £65k".

41. This was a correct statement of the position and it was fully supported by the evidence which the claimant gave and which we accepted.

42. Based on the transcript from December 2014 and the evidence that we heard overall, we are satisfied the offer of work made to the claimant and true agreement between the respondent and the claimant was for him to work on a full-time basis as operations director and that the full remuneration of £75,000 was in consideration of this work and this work only.

43. It was understood and agreed by the parties that the claimant's operations director work would be under a contract of employment and that has been common ground between the parties throughout these proceedings.

44. We are satisfied that from the very outset in December 2014 it was proposed and agreed that the majority of the pay *for that same work* would be "billed through Boltway" with the minority of the pay being paid through the payroll described by Mr John as a "tuppenny halfpenny payroll."

45. We have rejected Mr John's evidence the claimant in practice did the security-type work alleged and we are satisfied that the parties had never intended for the claimant or Boltway would carry out such work after December 2014.

46. Mr John accepted in oral evidence, and we find, that the figure of £10,000 was selected in order to keep the payment salary below the personal tax allowance threshold in the relevant tax year. This thinking is again seen in when in September 2018 Mr John mistakenly referred to the claimant's payroll salary which at that time remained in fact at £10,000 as being "£11,800 or whatever". This was a reference to the personal allowance then in force namely £11,850.

47. At the meeting in 2014 Mr John spoke only of the claimant undertaking the operations director role and the only mention of Boltway was that it would be used as a vehicle through which part of the claimant's salary as operations director would be paid. There was no mention of any intention for Boltway to have an expanded role.

48. As we have noted above there is no documentary evidence by way of emails or otherwise of Boltway in practice doing any of the tasks which it is alleged by Mr John that it did, such as undertaking vetting and surveillance, during the relevant period. Mr Johns' evidence was this work was not done well by Boltway, leading him to wish to cease the arrangement late in 2018, but again there was no documentary evidence to support this, or to suggest that any issues were being raised in this regard. Moreover when considering the intention of the parties the time the contract was entered into it is striking that there was no written commercial agreement either entered into or even discussed between the respondent and Boltway or any scope of work or lists of tasks to be done or agreed service levels or suchlike.

49. The only written evidence of any ostensible agreement between the respondent and Boltway was the invoices submitted in advance by the claimant at the start of each year on behalf of Boltway totalling £65,000 for the year, increasing slightly after a couple of years, for monthly "security services."

50. In oral evidence the claimant said that it was "fictitious" for Mr John to say that the £65,000 was for security services. In the same vein in an email to Mr John on 17 December 2018 the claimant referred to his stated salary of £10,000 which was put through the pay role as being "fictitious" and said that his "actual" salary was £75,000 (page 634). Consistently with those assertions, the claimant made frequent references in his secretly recorded conversations with Mr John to the reality of his salary of operations director being £75,000 per year (see for example page 604). We accept the claimant's evidence in this regard. The true agreement between the parties was that the claimant would be employed full-time as operations director by the respondent in return for remuneration of £75,000. It was never the parties' intention that he would carry out security services and he did not do so in practice in the years that followed other than an occasional infrequent and *ad hoc* way to assist Mr Jagger. Boltway only entered the equation as a means of reducing in tax on the fictitious

footing that the claimant was carrying out security services. He was not, and it was not intended that he would. He was merely (to use the language of the original December 2014 discussion) billing for the operations director work through Boltway.

51. What was the purpose of this arrangement between the parties? The claimant's evidence was that it was for tax efficiency on the part of both parties. His solicitors said in their letter of 22 September 2020 on his behalf that the arrangement was "tax efficient for both parties". Without for the moment engaging with the benign implication of the word "efficiency", the tribunal accepts the central premise of this assertion, namely that the arrangement was put in place for the purpose of reducing the tax and or National Insurance contributions which each party would pay. For the respondent's part, it would mean that it would pay less by way of employer's national insurance contributions. For the claimant's part, he would ultimately receive the bulk of the salary by dividends through his solely-owned company Boltway, which would attract tax at the lower level than earnings through PAYE as an employee from the respondent. We recognise that if this arrangement was lawful both parties have paid all taxes (VAT and NI) that were due in respect of it. The question is whether it was indeed lawful or whether it was an unlawful device to misrepresent the position to HMRC.

52. The claimant's evidence was that he obtained advice from an accountant before entering into this arrangement, who said that it was lawful. However, we have seen no evidence of that and of course the advice given would depend on precisely what the accountant was told about the nature and reality of the agreement. On 8 December 2018 the claimant emailed Mr John saying (with emphasis added):

> "I have sought advice on the arrangement and you will find that when HMRC become aware, they will gross up what has been paid to me without deductions and XDP will be liable to pay <u>what should have been deducted at source</u> this is in the region of £100k".

53. The claimant told us this new advice came from another individual who worked in an accountancy firm, who was not the advisor to whom he had spoken at the end of 2014 or early 2015.

Mr Brennan

54. In 2015 the claimant asked Lee Brennan, an individual who is employed by P&D Distributions Ltd, another company owned or largely owned by the claimant, to take charge of the respondent's newly formed compliance and resolution department, which he did until June 2018. This department was an area of responsibility which fell squarely within the claimant's remit as operations dDirector of the respondent. Mr Brennan was paid £12,000 per annum in all for this work: £6,000 came from the respondent and £6,000 from P&D Distributions Ltd. This use of an individual paid in part by through a third-party company owned by the claimant (which perhaps reflects the degree to which the claimant was committed to the success of the respondent's business) is a curious aspect of the claimant's employment of the respondent. But it is not suggested by either party that it was inconsistent with his role as operations director having been under a contract of employment and importantly it says nothing at all about his role (if any) working through Boltway.

The Claimant's work in 2015 and onwards

55. The claimant was appointed as statutory director of the respondent company on 11 August 2015. By September 2017 the claimant had taken advice and learned that there were tax advantages for setting up an EMI (Enterprise Management Incentive) scheme as a vehicle for implementing the agreement under which he would require the 10% stake in the business which had until then being provided for by the benefit agreement.

56. A meeting was held on 5 September 2017 between the claimant, Mr John and the respondent's accountant Mr Holden. Once again the claimant secretly recorded this meeting. An EMI agreement was subsequently entered into on 21 December 2017.

57. Having read the notes of the meeting on 5 September 2017 we are satisfied that the obvious intention of the parties was that the EMI was to replace the benefit agreement which had previously been in place. The benefit agreement and then the EMI were each intended to implement the same basic agreement that the claimant would gain a 10% stake in the business. The claimant's position is that the benefit agreement remained in force even after the EMI was

entered into, and that it continues to exist alongside the EMI and it remains in force to this day, but we cannot see how that can be, given that both agreements had different terms including trigger provisions, exclusions and termination events, relating to precisely the same underlying benefit, namely the 10% stake in the business. The EMI agreement necessarily entailed the implied revocation of the benefit agreement: it was intended to supersede and to replace it. Indeed, reflecting this, at the time the EMI was entered into Mr John asked the claimant to return to him his copy of the benefit agreement, which he did, and in an email on 22 August 2018 the claimant observed the agreement to acquire 10% stake was "payable via the EMI vehicle."

58. A key difference between the terms of the EMI and of the benefit agreement was that the EMI agreement provided that it would come to an end by the termination of the claimant's employment (p146 at para 6.6) and that no claim for loss could be maintained by the claimant flowing from the termination of his employment "*however termination of … employment … is caused*" (p149 at para 11.1). On the face of it therefore the EMI agreement may have made a significant change as compared with the benefit agreement in that the claimant's share option rights might be lost in the event of an unfair dismissal. Another difference is that the EMI agreement did not entitle the claimant to receive the 10% stake on the expiry of a particular period, whereas as we have said the benefit agreement provided for payment upon the expiry of seven years.

59. Before the EMI agreement was put into place Mr John provided a written personal guarantee by email addressed to the claimant and Miss Wayte on 15 December 2017 (page 140): "I will ensure personally or through one of the XDP companies that your share will equate 10% of the total value of XDP Ltd." Mr John explained in evidence this meant that even if he gifted his shareholding of the majority to his daughters and there was a subsequent sale of the business the claimant would not be prejudiced.

<u>Events from August 2018 onwards</u>

60. On 16 August 2018 a meeting took place at the Cock Public House in Wishaw attended by the claimant, Mr John, Miss Wayte and Mr Tresardern who is another director the respondent. A board meeting had taken place earlier that

day. At the meeting at the pub there was a discussion to the effect that the business was not as profitable as it needed to be and that the previously-anticipated timescale for the sale of the business was not now being met. At the outset of the claimant's employment it had been the shared hope of the claimant and Mr John that the business would be ready for sale in about 3 to 5 years. Now, 3½ years on from that, Miss Wayte and Mr John explained that they thought it would take another 5 or even 10 years before the business could be sold. Mr John asked the claimant if he would be around for another 5 years if that is what it took.

61. The claimant followed up on this discussion by email on 22 August 2018 saying that he was prepared to stay on despite the decision to delay the sale but he sought a higher rate of numeration and amendment to the terms of EMI agreement.

62. Moving forward in the chronology for a moment, on 12 July 2019, Mr John had a telephone discussion with Mr Robert Capewell for reasons which it is not necessary to detail here. Mr Capewell was interested to understand the falling-out which by that stage had taken place between the claimant and Mr John, and wanted to try to work out an agreement between them. Mr John's evidence at the tribunal was that he too was keen at this point to achieve an amical agreement with the claimant. During this discussion Mr John and Mr Capewell discussed the conversation which had taken place at Cock Public House on 16 August 2018. Mr John told Mr Capewell he and Miss Wayte tried to get the claimant to resign.

63. Mr John also told Mr Capewelll that his reason for wanting the claimant to resign was that he "wasn't cutting the mustard", that the service he was providing was of poor quality, and that due to the claimant's involvement, the business was not making money. In his evidence Mr John told the tribunal that he had never wanted the claimant to resign and that he had been lying when he told Mr Capewell that he had tried to get the claimant to resign. He explained that in this meeting with Mr Capewell he was cross after having had a meeting with the claimant on 5 February 2019, to which we will return below, in which the claimant had been threatening towards Mr John. This was an allegation which Mr John made in graphic terms in his oral evidence but which he had not even hinted at in his witness statement. Mr John told the tribunal that when he

said this to Mr Capewell he was trying to make inflammatory remarks which he knew Mr Capewell would pass back to the claimant. We found this information unconvincing. Its credibility was not assisted by its tension with Mr John's evidence that at this point he was keen to reach an amicable settlement with the claimant. We conclude that when Mr John told Mr Capewell he had tried to get the claimant to resign at the meeting at the Cock pub he was telling the truth.

64. A board meeting was held on 30 August 2018 of which there was a discussion about the performance of the business and about the way forward. Management accounts were distributed and discussed. The figures were disappointing, contributed to by a large increase in fees paid to some contractors and by way of legal fees. In correspondence over the ensuing few days the claimant said that some of the data produced at this meeting was inaccurate and that it painted a misleading negative picture of the performance. These are the disputes that ultimately not necessary for us to resolve and the claimant did not dispute in his oral evidence there were significant operational problems with two depots in particular East Harling and Stockbridge.

65. On 12 September 2018 a strategy meeting took place involving the claimant, Miss Wayte and Mr Tresadern to discuss the next 5 years of development for the respondent company. The conclusions reached were that the current formula did not work for delivery partners and that a structural reorganisation would be required to provide additional revenue for them to avoid going broke at disrupting the service. Additional resources were required at regional centres and there was a need for more Regional Managers.

66. In the week commencing 17 September 2018 the claimant was on holiday in France. Mr John spend a number of days that week working at the East Harling depot. He told Mr Owen, the Regional Manager who was based there, that he had "come to do the claimant's job". There were backlogs at the depot and although performance had started to improve prior to Mr John's arrival, things continued to improve with Mr John's involvement and efforts.

67. On the 20 September 2018 Mr John emailed the claimant in the following terms:

"I have spent most of this week in East Harling and plan to be back Tuesday And Wednesday of next week. David [Owen] is no longer required after Saturday at East Harling, next week. I will send him to Polesworth to work out of there. Tim [Hoare] wlll be In East Harling next Wednesday and Thursday to do some training. From Monday it will be all regular drivers on drop rates. I also have a back up a guy called Roy Wainwright who wants to take an area.

My next plan Is to get down to Stockbridge for the week and sort the routes and the rates per drop and the driver phones.

Which brings me to the conclusion why do I need an Operations Director.

You have put In an immense effort at XDP over the last 3 years Particularly at the Hub where most people would have given up you just kept going and going.

You have also brought some great ideas which I sincerely thank you for.

You also believed as I did that we would be out after 3 years but because of the lack of profit we are unable to consider a sale currently.

You and Bella have the same share agreement which will not change.

What will happen is you will remain on the payroll as our security adviser and go back to what you did so successfully with the item tracking and catching the bad guys.

This is a very important role that has been neglected recently.

This can be billed per Job through the Boltway company as we did in the past.

Of course if you don't wish to do this that is fine.

I would expect you to complete any of the legal cases you are working on.

I am in the hub on Monday seeing some NG people and I am happy to meet up to discuss any points with you. The rest of the week I am out at depots.

However your last day as Ops Director will be Friday 28th September.
You can choose to resign or the shareholders (me) can remove you."

68. Mr John's written evidence was that this email he had meant only to say that he intended to terminate the claimant's statutory directorship and that the way forward which his email set out had no impact on the claimant's employment. He told us that his concerns with the claimant remaining as a statutory director were that he did not want the claimant to have the ability to commit the respondent to commercial contract, a concern which was rooted in the belief that claimant had committed a serious error of judgement by entering into a contract with an individual to whom we shall refer as MN to provide the respondent with agency staff. Mr John's evidence is that MN had been arrested and that he is currently in the process of being prosecuted for money laundering

and modern slavery. Mr John also told us that another reason for wanting to remove the claimant as a statutory director is that he (Mr John) wanted to step down and he wanted to restructure the business with somebody "trustworthy" to support the family business.

69. We found Mr John's evidence on these points unsatisfactory and we do not accept his explanations.

    a. Contrary to his evidence Mr John's email of 20 September made it crystal clear that the claimant's role of operations director - the role in which he was employed, and in which he had been employed prior to becoming a statutory director, and not just his statutory directorship - was no longer required and that his last day in that role would be 8 days hence. In oral evidence Mr John said both that he was confused as to the difference between an employed role and a statutory directorship and also that his email did indeed refer to the employment role, his explanation now being that when he wrote it he was "venting frustration" because he was "annoyed".

    b. As for MN there is no mention of this being a matter which Mr John was taking into account in his email of 20 September 2018 or indeed in any of the other documentation to which we taken or in the respondent's pleaded case. Further the claimant's oral evidence, on which he was not challenged, and which we have no reason to disbelieve and which we accept, was that MN's arrest had come in 2016 and that Mr John had been content for MN to continue to supply the respondent with the agency staff over the intervening 2 years. The only document to which we were taken which refers to MN was a transcript of another secretly recorded discussion on 9 November 2018 in which Mr John is recorded as telling the claimant "I like MN and have no problem with MN" and "you know MN is a safe pair of hands and a good steady guy and I have got a lot of respect for MN". That of course came after the point at which, on Mr John's evidence, he had terminated the claimants' statutory directorship in large part because of the claimant having brought MN on board.

c. As for the restructuring, Mr John written evidence was that he was "looking at the restricting of the company and getting ready for retirement". As mentioned above he told us that he wanted to restructure the business with somebody trustworthy to support the family business. This proposed structuring was never properly explained to us. The respondent's case, and we accept, that in 2019 the respondent engaged Mr Colin Reynolds as full-time operations director. It not suggested this recruitment followed a change of heart on the part of the respondent between September 2018 and early 2019. So there was and remained a perceived need for an operations director. Beyond the explanation that has been given in relation to the contract with MN, on which as we explain we reject Mr John's evidence, there is no explanation of what was actually meant or intended by this restructure, or how it related to the claimant's continuation in the role of statutory director, or for that matter to his employed role as operations director.

70. The claimant replied to Mr John by email on the evening of 20 September 2018 saying that he was aware that there was an agenda to manage him out of the business and that he had believed when Mr John had visited East Harling that he had done so in order that he could then say to the claimant "If I have to go to depots and sort them out, what is the point of an operations director?", which the claimant said had indeed now come to pass. Mr John replied by saying that there had been no desire to push the claimant out, that there had been an ideal opportunity to do this had he wished to when they met at the Cock Public House but he had not taken that opportunity, and his hand was forced into writing his September 2018 email because the respondent was running out of cash.

71. The claimant and Mr John then met on 24 September 2018. Mr John told the claimant at that meeting that he wished to retain the claimant on the payroll so as not to jeopardise the claimant's share scheme. He said that the claimant could

> "go back to doing some security work or other stuff that you've been doing, leave you on the payroll and call you our security manager because you get paid £11,800 or whatever it is a year. You've got to stay on the payroll because otherwise your share scheme becomes defunct."

72. Mr John said that he was happy also to use the claimant for "other jobs, CCTV, anything else but on an as-you-go pay".

73. The claimant told Mr John that he wanted a new share agreement under which his entitlement to a 10% share of the company would not be conditional on his remaining employed. He explained that if he remained on the payroll he would not have job security. He proposed a deal whereby he would obtain unconditionally a 10% share in the company and 3 days work each week working as a consultant at £50,000 per annum. Mr John said he needed time to consider this.

74. On 26 September 2018 Mr John emailed the claimant pointing out that the EMI scheme had been one which the claimant had himself had requested but he did not object in principle to replacing it. He asked the claimant to draw up a proposed replacement for Mr John's professional advisors to consider. He rejected the idea of the claimant working 3 days a week, and proposed paying him £3,000 per month till the end of the year and thereafter paying him on an *ad hoc* basis at the rate of £300 per day.

75. A series of emails were then exchanged in which the claimant and Mr John sought to negotiate but without reaching agreement. In course of correspondence and discussions around this time Mr John told the claimant that he could retain the title of operations director if he wished but he also remained clear that substance of his role would change entirely as his operations director duties would be removed and he would revert to a security role.

76. On 1 October 2018 the respondent ceased paying Boltway in respect of its monthly invoices (and the parties agree that the respondent effectively terminated the agreement with Boltway at that point). The respondent's pleaded case is that it ceased paying these fees "as a considered fee paid for the commercial services provided were too expensive". In his witness statement at paragraph 76, Mr John advanced a different explanation, namely that after 20 September 2018 "the claimant did not provide any security services via Boltway Investigations Ltd, he did not attend sites, carry out vettings etc. In effect, he unilaterally ceased work on that contract." At

paragraph 104 of his witness statement, Mr John gave a third explanation for stopping the Boltway contract, namely that he was unhappy with Boltway's performance, as well as the fact that costs were going up, and the claimant had not undertaken any services through Boltway since 20 September 2018.

77. The reality, we find, is that there was in fact no differentiation between the claimant's work as operations director and anything paid through Boltway. We do not accept that the claimant ceased providing security services in September 2018 as the respondent alleges; there were never any security services for him to provide. The respondent's decision that the claimant would no longer be operations director meant that he no longer had any work to carry out (subject to him going back to security type work) either through the payroll or through Boltway.

78. Although the respondent ceased paying Boltway on 1 October 2018, the claimant continued to be paid his salary of £10,000 (£833.33 per month) through the respondent's payroll.

79. On 9 October 2018 the respondent issued a notice of a resolution to remove the claimant as a statutory director. As was his right, the claimant made written representations in opposition to this resolution but the resolution was passed on 22 October 2018 and he was removed as a statutory director.

80. The claimant and Mr John met on 12 October 2018. During this discussion Mr John again told the claimant that there was no plan to manage him out, and that the claimant was still employed, and that this was deliberately so in order that his rights under the share agreement would not be jeopardised. The claimant replied that he was not employed *as operations director,* and that he had no job. Mr John did not dispute this, save to say that he was still *employed* and was still on the payroll.

81. The claimant and Mr John met again on 9 November 2018. During this meeting they shook hands on an agreement in principle that the respondent would engage the claimant through Boltway on a consultancy basis for a fee of £35,000 per year doing security work, and that the requirement of continued employment would be removed from the share agreement (though the claimant

subsequently proposed that the vehicle to be used would be an amended benefit agreement rather than an amended EMI agreement).

82. On 4 December 2018 the claimant sent draft terms to Mr John on both points (pages 619, 671 and 686). The draft consultancy agreement (page 671) was backdated to start on 1 October 2018 and made provision for a fee of £3,000 per month, which represented an increase in the proposed annual fee from £35,000 to £36,000. It also introduced a provision for a 5-year minimum term, which was not something that had been discussed or agreed in principle on 9 November 2018.

83. The revised benefit agreement (page 686) provided that the claimant would be entitled to the value of his share in the company either on the sale of the company, or on 4 February 2022 (effectively replicating the 7 year date introduced in the original 2015 benefit agreement), or on Mr John's retirement.

84. On 8 December 2018 Mr John responded, raising certain issues with the proposed draft agreements. On the consultancy agreement, he did not take issue with the £1,000 increase in the proposed annual fee. However he said he was not prepared to backdate it or enter into a 5 year term. He took issue with other provisions including a proposed guarantee that Boltway would be paid within 7 days. He also noted (correctly) that the agreement made provision for termination by Boltway in certain circumstances, but none for termination by the respondent, which he said was "obviously unacceptable."

85. As for the share agreement, Mr John did not take issue with the reintroduction of the benefit agreement as opposed to the EMI agreement. He did not object to the removal of the requirement for continued employment. He did however take issue with a few other points: that the agreement was made out in the wrong company name; he was not prepared to agree to payment being triggered on 4 February 2022 or on his retirement (though he did not express any broader objection to payment being triggered by the expiry of *some* period), and he did not agree to another provision in the agreement, for payment following the death of the claimant.

86. Mr John concluded his email by suggesting that the claimant "come back with some alternatives or amendments to the 2 agreements."

87. Correspondence continued. On 8 December 2018 the claimant maintained that what he was proposing was reasonable, and (as we have set out above) made reference to the likelihood of the respondent being required to pay something in the region of £100,000 in respect of taxes that "should have been" deducted at source in respect of his employment, once HMRC found out about it. He also suggested that the respondent might wish to make a one-off payment in full and final settlement of his 10% shareholding and what he described as his unlawful dismissal attempt.

88. On 16 December 2018 Mr John suggested an alternative proposal that the claimant be paid a one off payment of £80,000 "in lieu of your share options and any other matters". (p631) This was rejected by the claimant on 18 December 2018 (page 634) and again on 7 January 2019.

89. Discussions continued in January, with neither side moving further from their positions.

90. On 24 January 2019, Mr John emailed the claimant in the following terms (p667):

> "I am happy to meet up if you want.
>
> However I did offer you security work after our last meeting but did you agree to sign a contract for it. I also made you an offer of £80k for your share option which you declined.
>
> I am happy to continue with your employment and £10k salary. It would be useful if you responded to operational emails with your input.
>
> I accept you were heavily involved at XDP for 2.5 years for which you invoiced us.
>
> Unfortunately the business is not very profitable and I can not see any option in the near future of making the business saleable. Hence my decision to step down this year and leave the running of the business to a younger team. …"

91. The claimant says that this email, with its reference to leaving the running of the business to a younger team, was an act of direct age discrimination against him, and that it evidenced a discriminatory motivation for the respondent's overall approach. However in a brief reply sent 2½ hours later the claimant

gave no indication that he had read the email as amounting to or indicative of age discrimination.

92. It is common ground, and the documents show, that Mr John had for some time shared with the claimant his intention to step down and retire as MD (as indeed he has subsequently done). Mr John was at this stage 65. The claimant was 55. Of the other directors of the business, Miss Wayte was 37 and Mr Tresadern was 53 or 54 (at most two years younger than the claimant). The company secretary, Mrs Townsend, was 70. The other individual whose age is relevant is Colin Reynolds, who was recruited as operations director in March 2019 aged 62.

93. On 5 February 2019 the claimant and Mr John met again. It was a short meeting lasting about 10 minutes. Mr John again reassured the claimant that he was still employed, and that his previously negotiated share agreement remained in place. It was clear however that neither side was going to move from their previous negotiating positions about a future working relationship.

94. Within an hour or so of the end of the meeting, the claimant posted a resignation letter which he had begun drafting before the meeting and which was mis-dated 4 February 2019, perhaps reflecting the day on which he had started drafting it. In that letter the claimant said he was resigning with immediate effect. He said that following the 20 September 2018 email he had had no work to do and was no longer receiving most of the £75,000 salary for his role; that this was part of a wider plan which Mr John had to deprive him of his benefit (ie his proposed shareholding in the company); and that Mr John had shown himself unwilling to reach agreement with regard to a future working relationship. The resignation letter made no allegation of age discrimination.

95. On 6 February 2019 the claimant wrote another letter saying that he considered that he had been constructively dismissed and giving formal notice that for the purposes of the benefit agreement which as we have said that he continues to maintain remain in force) he disputed the validity of the termination of his employment.

The Law

96. The tribunal was referred to a number of authorities and statutory provisions and have taken them into account on the principles in which they contain.

97. In relation to illegality the tribunal was referred to the case of **Hall v Woolston Hall Leisure Ltd** [2000] IRLR 578, **Lightfoot v DJ Sporting Ltd** [1996] IRLR 64; **Enfield Technical Services Ltd v Payne** [2008] ICR 1423; **Colen v Cebrian** [2004] IRLR; **Hyland v Barker** [1985] IRLR 403; **Blue Chip Trading v Helbawi** [2009] IRLR 128; **Patel v Mirza** [2016] UKSC; and **Robinson v Al Qasimi** 2020 IRLR 345.

98. In respect of constructive unfair dismissal the tribunal was referred to Section 95 of the Employments Rights Act 1996 and to the principles set out in **Western Excavating v Sharp** [1978] ICR 221; **Quigley v University St Andrews** UKEAT/0025/05; **W E Cox v Toner** [1981] IRLR 443; **Croft v Consignia** [2002] IRLR 851; **Waltham Forest v Omilaju** [2005] IRLR 35; and **Kaur v Leeds Teaching Hospital NHS Trust** [2018] EWCA Civ 978. We were also referred to a number of authorities on the question of the fairness of a constructive dismissal but in view of our other findings it was not necessary for us to apply those authorities.

99. In relation to direct age discrimination the tribunal has considered Sections 13 (1) and (2), 23 and 136 of the Equality Act 2010 and the guidance in respect of the burden of proof set out in **Igen v Wong** [2005] IRLR 258.

100. In our analysis below we have borne in mind and sought to apply these legislative provisions, and the guidance given in the case-law to which we have been referred.

Analysis and Conclusions

Age discrimination

101. The first allegation of age discrimination focusses on Mr John's reference in his email of January 2019 to "my decision to step down this year and leave the running of the business to a younger team". We see no merit in this allegation.

a. The wording in Mr John's email related to Mr John's own situation. The "younger team" meant a team younger than Mr John; it did not mean a team younger than the claimant or imply that Mr John wished to remove the claimant as being too old. The claimant was some 10 years younger than Mr John.

b. The tribunal notes that Mr Tresadern, who was initially relied on as a comparator by the claimant, and therefore on the claimant's case was presumably part of the "younger team", was only a year or two younger than the claimant.

c. The claimant was replaced as operations director by a person, Mr Reynolds, who is some 7 years older than himself. It has not been suggested, and there is no reason to suspect, that Mr Reynolds was recruited as means of covering up age discrimination (at the time Mr Reynolds was recruited in March 2019 the claimant had not made an allegation of age discrimination, and the respondent had no reasons to suspect, and did not suspect, that such a claim would be brought).

102. Turning to the second alleged act of age discrimination, we see no basis whatsoever to conclude that Mr John's approach to the negotiation of a new working relationship with the claimant was influenced in any way, whether consciously or unconsciously, by considerations of age. No material was brought to our attention from which we could properly conclude that his approach was influenced by age in any way. We accept and find as a fact that he was not.

103. In summary the claimant has not come close to establishing a prima facie case in relation to either of his substantive allegations of age discrimination. It also follows that if he was constructively dismissed, that dismissal cannot have been an act of age discrimination. Accordingly his claim of age discrimination fails.

Illegality

104. We turn next to the question of illegality. The basic structure of the law is set out by Lewis J in **Robinson v al Qasimi** [2020] IRLR 345:

"83. The underlying issue in this case is whether considerations of public policy arising out of the fact that the contract was performed illegally mean that an employment tribunal should refuse to enforce claims for a breach of contract, in the form of a claim for wrongful dismissal, or for a breach of the statutory right not to be unfairly dismissed. Courts have long recognised that, in appropriate circumstances, a court may decline to assist a person to enforce a contract which is being performed illegally: see the judgment of Lord Mansfield CJ in **Holman v Johnson** (1775) 1 Cowp 342.

84. A contract may be prohibited by statute or the parties may have entered into the contract for an illegal purpose. In such cases, the contract may be unenforceable from the outset. In another category of cases, the contract may be lawful when made but it may be performed illegally.

85. In the employment context, the latter cases have generally involved situations where an employee was being paid in a way which involved a failure to pay tax or national insurance contributions lawfully due, or to avoid restrictions on the employment of immigrants. The traditional analysis of that category of cases (as distinct from cases where statute expressly or impliedly prohibits a contract or where the parties intend from the outset to perform an illegal act) is given by the Court of Appeal in **Hall v Woolston Hall Leisure Ltd** [2000] IRLR 578, [2001] ICR 99. There the employee was dismissed because she was pregnant. She brought a claim for discrimination on grounds of sex. For the five months prior to the dismissal, however, the employer had been failing to pay the amounts of tax due. The employee was aware of the discrepancy and queried it but was told that was the way things were done. Before considering whether the claimant could enforce her rights under the Sex Discrimination Act 1975, breach of which amounted to a statutory tort, Peter Gibson LJ considered the position in relation to the enforcement of contractual rights. He observed that acquiescence by an employee in the employer's illegality would not generally prevent an employee from enforcing contractual rights. Rather, there needed to be, as a minimum, knowledge and active participation in the illegality. As Peter Gibson LJ said at para [38] of his judgment:

'In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the performance illegal the employee actively participates in the illegal performance. It is a question of fact in each case whether there has been a sufficient degree of participation by the employee. And as ***Coral Leisure Group*** *[1981] IRLR 204 shows, even if the employee has in the course of his employment done illegal acts he may nevertheless be able subsequently to rely on his contract of employment to enforce his statutory rights.'*

86. Turning to the decision of the Supreme Court in **Patel v Mirza**, that case involved a claim for restitution. The claimant had paid a large sum of money to the defendant pursuant to an agreement that the defendant would use it to purchase shares based on inside information about the affairs of the company. That agreement contravened a statutory prohibition on insider dealing. The defendant did not in fact acquire the relevant information and did not make the share purchases. The claimant brought a claim for restitution of the money paid. The defendant resisted the claim on the basis that the contract was an

illegal contract. The case did not therefore involve a claim to enforce a contract, still less, a contract of employment. The Supreme Court determined that, as a general rule, where a person satisfied the requirements for a claim in unjust enrichment, he should not be prevented from recovering money by reason of the fact that the money was paid for carrying out an illegal activity. Lord Toulson, with whom Lady Hale, Lord Kerr, Lord Wilson and Lord Hodge agreed, observed that it was right that a court considering the application of the doctrine have regard to the policy factors involved and to the nature and circumstances of the illegality (see para [109]). In assessing that –

'120. … it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether the purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts…'

As Lord Toulson observed at para [102] of his judgment:

'That trio of necessary considerations can be found in the case law.'

87. The Court of Appeal has subsequently considered the application of the observations of the Supreme Court in **Patel v Mirza** in the specific context of a contract of employment in **Okedina v Chikale** [2019] EWCA Civ 1393, [2019] IRLR 905. In that case, the claimant claimed for wrongful dismissal and breaches of various statutory rights arising out of the contract of employment including, amongst others, unfair dismissal and unlawful deductions from wages. The claimant was subject to immigration control. Statutory provisions prohibited the employment of such persons in specified circumstances (including the circumstances in that case). The Court of Appeal considered whether the statute rendered the contract unlawful. It also considered whether the contract was unlawful by reason of the way in which it was performed. The respondent had brought the claimant to the United Kingdom to work and applied for a visa for her. In the course of doing so, the respondent gave false information to the immigration authorities to obtain a six-month visa. The respondent then made an application in the claimant's name for an extension of the visa, having forged the claimant's signature, on the false basis that the claimant was a member of the respondent's family. That application was refused (and an appeal against the refusal was dismissed by the First-tier Tribunal). The claimant continued to work in the United Kingdom after the expiry of the visa. The claimant relied upon the respondent to sort out the visa and was not involved in the provision of false information and did not know of, or participate in, the appeal. The employment tribunal found that the claimant had not knowingly engaged in any illegal performance of her contract and was not barred from enforcing the contract. The respondent appealed contending that the employment tribunal had not carried out the analysis of the relevant factors contemplated by the majority of the Supreme Court in **Patel v Mirza**. Underhill LJ with whom the other members of the Court of Appeal agreed, dismissed the appeal. He said that:

*'In his judgment in **Patel v Mirza** Lord Toulson was attempting to identity the broad principles underlying the illegality rule. His judgment does not require a reconsideration of how the rule has been applied in the previous case-law except where such an application is inconsistent with those principles. In the case of a contract of employment which has been illegally performed, there is*

*nothing in **Patel v Mirza** inconsistent with the well-established approach in **Hall** as regards "third category" cases. As Mr Reade puts it, **Hall** is how **Patel v Mirza** plays out in that particular type of case. Accordingly, the ET was quite right to treat its findings about the claimant's "knowledge plus participation" as conclusive and the EAT was right to endorse that approach'*."

105. In **Enfield Technical Services v Payne** [2008] ICR 1423, the Court of Appeal held, to cite the headnote:

"that a genuine claim to self-employment, unaccompanied by false representations as to the work being done or the basis on which payment was being made, did not necessarily amount to unlawful performance of a contract of employment; that any tax advantage for workers claiming to have self-employed status did not, of itself, render a contract subsequently found to have been a contract of employment unlawfully performed; and that a contract tainted with illegality due to misrepresentation was distinguishable from a mis-characterisation of the employment relationship as being one of self-employment, unaccompanied by false representations."

106. Here, the parties agree that the claimant was, as operations director, an employee. Both parties believed this from the outset, and both continued to assert this through these proceedings. Yet the parties agreed an arrangement whereby part of the claimant's pay for that employed role would be diverted via Boltway even though both parties were aware this was in fact part of his salary as an employee. There was in truth, as we have found, no distinction at all between any one part of his employed earnings and any other part. The sole and shared intention of the parties of putting this arrangement in place was to pay less tax. This was not something imposed on the claimant against his will or case of an employer with markedly greater bargaining power imposing upon him. The claimant was a willing and uncomplaining participant.

107. The claimant was an experienced businessman who operated his own companies and was capable of looking after his own interests.

108. We found that the claimant took active steps to misrepresent and to conceal the true fact of the relationship in two ways.

a. Firstly, it seems inevitable that acting through Boltway he made or allowed representations to be made to HMRC which were not correct and which were contrary to his belief that all of his pay was his salary

as operations director, namely representing that Boltway was doing work by way of "security services".

b. Secondly, the claimant created a fictitious paper trail in form of invoices which he had drafted at the very outset of the relationship and which he continued to draft each year in respect of each monthly payment which was made to Boltway. He must have anticipated that if HMRC chose to look into the arrangements of either the respondent or Boltway or both, these invoices would be the documentary record which HMRC would see and which it would be intended that HMRC would rely upon.

109. All tax was paid by both parties only on the assumption that the arrangements between the parties were legitimate and lawful. We consider that it was unlawful. It was an illegitimate attempt to ensure that tax properly payable on employed earnings would not be paid.

110. In accordance with the discussion in **Robinson v al Qasimi** [2020] IRLR 345 at [91]-[99], the tribunal considered whether any part of the agreement could be separated from any other parts.

a. We consider that up until end of September 2018 there is no proper basis to split that which was lawful from that which was unlawful. The entire arrangement was unlawful. The arrangement procured that no PAYE tax would be payable on any part of the of the claimant's employment earnings given that his salary with the respondent was set at £10,000 being the tax-free personal allowance and given that was unlikely that much if anything by way of profits would be paid in the near future. In relation to this period we see no basis for separating what might otherwise be regarded as legal from that which is illegal: both elements ran alongside each other and were inexplicably entwined with each other.

b. However after the end of September 2018, the tribunal considers that the position is different. At that point the illegality affecting the arrangement simply fell away and all that was left was a contract through which no employed earnings were being routed illegitimately via Boltway.

111. The effect of the illegality up until the end of September 2018 is that the claimant has less than 5 months' continuous service pursuant to a lawful contract of employment at the time of his resignation. Accordingly he is not entitled to complain of unfair dismissal.

112. Another effect of this illegality is that in seeking to establish a cumulative breach of the implied term of trust and confidence, the claimant is not entitled to rely on conduct which occurred before 1 October 2018 as that would be for him to rely on breach of the unlawful contract.

Constructive Dismissal

113. The question remains whether the claimant was constructively dismissed. That is relevant to his claim of wrongful dismissal for which there is no qualifying period of service, and also to the case of unfair dismissal if we are wrong on the question of illegality.

114. We consider it is helpful to start by considering the alleged "last straws" relied on by the claimant. There are two elements. Firstly, there is the alleged discriminatory comment made by Mr John in his email in January 2019. We have found that this was not discriminatory. We also see nothing remotely objectionable about it. It is not something which, taken together with other conduct, is capable of amounting to a repudiatory breach of contract. So that element falls away as not capable of amounting to a last straw.

115. Secondly the claimant relies as a last straw on Mr John's failure to agree a new working relationship and in particular his alleged reneging of the agreement on which hands had been shook in principle for the claimant to be engaged via Boltway at the rate of £35,000 per annum for consultancy services.

116. The tribunal accepts that, depending on the facts of the case, the implied duty of trust and confidence can be engaged where there is a failure to offer new contractual terms. This was established by the case of **Transco plc v O'Brien** [2002] IRLR 444. However it is notable that the facts in **Transco plc v O'Brien** were extreme: every permanent employee in the employer's

workforce was offered new contractual terms except for the claimant. Here the failure to agree new terms was not characterised by a singling out of the claimant or anything of the sort.

117. What there was, was a negotiation. The claimant and Mr John had shaken hands on terms in principle on 9 November 2018. It was the claimant who then sought to introduce significant new terms including the 5-year minimum term on the consultancy agreement coupled with one-sided early termination provisions. It seems to us entirely objectionable that Mr John should not have agreed to those terms. Mr John had shown willingness to negotiate but ultimately it was the claimant who did not move towards him and in any event, we see no basis on which we could properly conclude that Mr John's approach was unreasonable in any way. His objections to the new proposed benefit agreement need to be seen in the context that the key new terms to which he objected, though in some cases reflecting terms that had been in place under the first benefit agreement, were more favourable to the claimant than what he was entitled to under the existing EMI which had superseded that benefit agreement: an example being the provision that payment would be made in any event in February 2022. It is also notable that Mr John was prepared to agree to the claimant's key demand, which was an important improvement on the terms of both the first benefit agreement and then the EMI agreement, namely the removal of the continued employment requirement in order to preserve the benefit. Furthermore Mr John offered as an alternative a one-off payment of £80,000 in settlement of the claimant's entitlement under the share agreement. All through this, Mr John made clear that the respondent would continue to employ the claimant in order to protect his shareholding. We cannot conclude that Mr John's approach to these negotiations was either unreasonable or objectionable in any way. Furthermore after the 4 December 2018 communication the claimant did not make any substantial movement towards the position being taken by Mr John.

118. For these reasons we cannot say there is anything objectionable about the respondent's approach to these negotiations, whether taken by themselves or when seen in the context of and taken together with any of the respondent's earlier actions in the period before 1 October 2018. Even assuming there had in September 2018 been a plan to manage the claimant out there was nothing in Mr John's approach to negotiations in the period from 1 October 2018

onwards to suggest that, objectively viewed, his approach was indeed now to advance such a plan.

119. We therefore find that there was no "last straw" capable of supporting a constructive dismissal after the start of October 2018.

120. We do find that the claimant did resign at least partly in the response to the respondent's conduct before the end of September 2018. However the constructive dismissal claim cannot succeed in our judgement for each of three reasons.

121. Firstly, he cannot rely on breaches of what, as we have explained above, was an illegal contract at the relevant time.

122. Secondly, if we are wrong on the question of illegality, the tribunal finds that the claimant was directly dismissed on 20 September 2018 and that there was no subsequent breach of contract by the respondent.

a. The 20 September 2018 email meant that the claimant's job was being taken away from him. With it went all of his duties, most of his monthly remuneration, and his job title (albeit that Mr John later said that the claimant could have the title of operations director, though not the role or the pay). His contract as a full-time operations director was wholly withdrawn and was replaced with an entirely new contract. This in law amounts to a direct dismissal: **Hogg v Dover College** [1990] ICR 39.

b. That direct dismissal is not a dismissal about which the claimant had complained in these proceedings and he would be out of time to bring such a claim.

c. There was no subsequent breach of contract, as to which we refer to our findings on the question of last straw above. So there is no question of a constructive dismissal from the claimant new contract under which he continued in the respondent's employment after 1 October 2018.

123. Thirdly if we are wrong about there being a direct dismissal by operations of the **Hogg v Dover College** principle, we find that the claimant

affirmed the contract before resigning. In reaching this conclusion we take account of a number of factors.

a. In an employment context an employee is entitled to a reasonable time to make up his or her mind before deciding to take the important step of resigning and claiming constructive dismissal and we take full account of that given that giving up his employment was a big step for the claimant to take given the importance of his potential shareholding to him.

b. But after the 20 September he remained in employment for some 4½ months before eventually resigning on 5 February 2019 which is a considerable length of time in which to remain employed and to continue to assert and receive the benefits of an ongoing employment relationship.

c. The claimant was aware of all of the necessary facts in order to bring a complaint of constructive dismissal.

d. He was an experienced and intelligent man.

e. He had available to him at the time, and said he was taking, legal advice.

f. He was throughout the period after 20 September 2018 continually threatening to take legal action.

g. He was not doing any work during this period but that is because he was not being required to.

h. He was being paid and continued to be paid regularly and to receive the £833.33 per month to which he now was entitled (he would also have been entitled to obtain any profits share that may have been generated).

i. The claimant made a deliberate decision to remain in employment. That was not an unreasonable decision: he wanted to protect his rights under

the share agreement. However it was a deliberate decision to remain in employment and he continued over a prolonged period to receive the benefits of that continued employment.

j. The claimant was negotiating, but those negotiations, after initially making some progress, stalled by December 2018 after hands were shaken on a new deal in November. It was clear by mid-December 2018 that no further progress was likely and the claimant's approach to negotiations thereafter were not constructive. But we would have reached the same finding on affirmation even without that factor of the claimant's lack of engagement by seeking to meet Mr John half-way from December 2018 onwards.

124. Taking all these matters into account we conclude that the claimant affirmed the contract of employment with the effect that he lost the right to complain of constructive dismissal.

125. We would add that, had we not made the findings which we have made about illegality and the **Hogg v Dover College** dismissal, we would have concluded that the respondent did act in repudiatory breach of contract by Mr John's email of 20 September 2018. The claimant was employed as a full-time operations director on a total remuneration of slightly more than £75,000 a year with a three-month notice period. He was told that he would no longer be operations director; it was made clear then and shortly afterwards that his total remuneration would be cut £10,000 and if he did not resign he would be dismissed, and all of this without a recognisable process. All of this was in the context we find of a plan which had been in existence until that point at least to manage him out, as he suspected and as in fact was the case. There was no reasonable or proper cause for the respondent's actions in this regard. It was not suggested by either party that the implied term of trust and confidence had no part to play in relation to this matter which relates to the termination of employment, or that there was no breach of that term on the basis that the respondent's conduct fell within the **Johnson v Unisys** "exclusion zone" so we do not consider that point further.

126. On the basis of our findings it is also not necessary for us to approach the matter from the perspective of asking the questions posed by issues (1)

and (4) in the list of issues set out above which we consider to be rather artificial in the context of our findings made about the contract between the parties.

127. For these reasons the claimant's claims fail and they are dismissed.

Employment Judge Coghlin
11 February 2021