Case Number 2500296 /20(V)

EMPLOYMENT TRIBUNALS

Claimant
Mr Peter Stienlet

Respondent
PPCE Holdings Ltd

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NEWCASTLE (by CVP) ON 8-11 March (deliberations 15 March) 2021
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For Claimant Ms Claire Millns of Counsel
For Respondent Ms Sarah Brewis of Counsel

JUDGMENT

The claim of unfair dismissal is well founded. I award compensation of £ 97731.50 being a basic award of £11287.50 and a compensatory award of £ 86444. The Recoupment Regulations do not apply.

REASONS (bold print is my emphasis italics are quotations and numbers in brackets pages in the bundle)

1. Introduction and Issues

1.1. The claimant, born 14 March 1969, was employed by the respondent and predecessor companies from 1 January 2003 until was dismissed without notice on 2 November 2019.

1.2. On 17 September 2019 the respondent wrote giving him contractual 6 months' notice of termination and placing him on garden leave. On 31 October 2019 it wrote dismissing him summarily. It alleged he had procured Patrick Parsons Limited (PPL), its subsidiary, to guarantee a personal loan on property at Waterloo House, Thornton Street, Newcastle in breach of his fiduciary duties as a director entitling it to terminate summarily. The claimant denies any wrongdoing asserting the respondent was fully aware at that time the guarantee was given. He contends this dismissal was contrived to avoid the ongoing notice pay.

1.3. Employment Judge (EJ) Arullendran noted at a Preliminary Hearing (PH) the claimant reserved the right to bring a breach of contract claim in the Courts. The respondent reserved the right to bring civil claims against him arising from alleged breaches of director's duties and initially requested these proceedings be stayed and case management orders suspended until the conclusion of civil proceedings to prevent issues of res judicata. She ordered by 5 June (a) the claimant to write to the Employment Tribunal (ET) and the respondent saying, inter alia, whether he had issued court proceedings and, if not, when such proceedings were likely to be issued (b) the respondent to write to the ET and the claimant and stating whether it had issued court proceedings and, if not, when such proceedings were likely to be issued. She suspended case management orders dated 24 February 2020 until a further PH.

1.4. The claimant's solicitors, Collingwood Legal, wrote saying the claimant had not issued court proceedings and did not intend to, but would proceed with his unfair dismissal claim in the ET only. However, he reserved the right to pursue a court claim should the respondent bring such proceedings against him. In addition the respondent's solicitors had written in May 2020 making further allegations in respect of an alleged breach of an Investment Agreement. However, no proceedings had been lodged.

1.5. The respondent's solicitors, Muckles, wrote confirming no civil proceedings had been issued but although there was that possibility, it now seemed unlikely there was any potential for res judicata to arise. At a PH on 15 June 2020 I noted Halstead-v-Paymentshield Group Holdings, Chorion plc-v-Lane and Mindimaxnox LLP-v-Gover so, with both parties' agreement, arranged for the case to be listed for trial.

1.6 Although I must decide the fairness of the dismissal on 2 November, the dismissal on 17 September is highly relevant, especially to remedy.

1.7. The issues are:
1.7.1. What were the facts known to, or beliefs held by the employer which constituted the reason, or if more than one the principal reason, for each dismissal?
1.7.2. Were they potentially fair reasons?
1.7.3. Having regard to that reason, did the employer act reasonably in all the circumstances of the case:
(a) in having reasonable grounds after a reasonable investigation for its genuine beliefs
(b) in following a fair procedure
(c) in treating that reason as sufficient to warrant dismissal?
1.7.4. If the employer acted unfairly procedurally, what are the chances the employment would nevertheless have ended by resignation or fair dismissal if a fair procedure had been followed?
1.7.5. If dismissal was unfair, had the employee caused or contributed to the dismissal by culpable and blameworthy conduct?

2 Findings of Fact

2.1. I heard Ms Gail Bamforth, Mr Neil John Charles Hobbs, and Mr Richard Stephen Laker for the respondent. I heard the claimant, Peter Vincent Stienlet. I had an agreed document bundle.

2.2. The Patrick Parsons group of companies (the Group) provide engineering and design services to clients. The claimant used to be employed by PPL. He and Mr Mark Turner acquired it by management buyout and became directors on 28 November 2007.

2.3. The claimant is a Chartered Civil Engineer with an Honours degree in Civil Engineering. For 32 years he has worked in the engineering sector and held a senior management position in the respondent (or its predecessors) for almost 13 years. Mr Turner is also an Engineer. They grew PPL from a regional business with 8 staff in one office in Newcastle, to a company with, at its peak, 250 staff across 8 sites in the UK and abroad. Over time other directors were appointed, including Grant Richardson, Nick Beckwith, Doug Tidswell and Conor Murphy. PPL's reputation stemmed from the staff's expertise, work and dedication. It also purchased 7 other businesses. The claimant is passionate about the ethos of PPL having been, and needing to continue to be, giving clients personal service to distinguish it from larger companies in the same field which he describes as having a "corporate" image.

2.4. By 2016/17 at latest PPL had cashflow difficulties. Investment was secured in 2017 from LDC (Managers) Limited (LDC), a private equity investment company. The accountancy firm BDO Binder Hamlin performed extensive "due diligence", costing about £600000, and lasting many weeks. The entire issued share capital of PPL was acquired by a company which changed its name to Patrick Parsons Holdings Limited from 2 August 2018 and to PPCE Holdings Limited from 30 January 2020. The claimant received no cash for his shares in PPL but equity in the respondent and became its employee under a service agreement dated 30 August 2017. Mr. Robert Bodnar-Horvath was appointed non-executive director and Chairman, Mr Ben Snow, Investment Director from LDC was appointed to the board to represent LDC's interests. The claimant became Chief Executive Officer (CEO) also appointed to the board. The Board also included Finance Director Ms.Leanne Hannan.

2.5. Waterloo House, a commercial property in Newcastle, was, up until October 2018, the Newcastle office of PPL. The claimant and Mr Turner personally took out a loan to purchase it House in about August 2009 and PPL moved there. They were the only directors/shareholders and there is no evidence or allegation the rent PPL paid was excessive. In March 2017 there was a requirement for a cash injection into PPL so they agreed to re-mortgage Waterloo House and use some of the proceeds for PPL's benefit. Lloyds Bank (Lloyds) required a formal lease was put in place. It was signed by Doug Tidswell (Director and shareholder) on behalf of PPL. A guarantee in respect of the loan was also required by Lloyds which insisted PPL have independent legal advice. The claimant and Grant Richardson, who had no personal interest in the arrangement, met with Sintons Solicitors. A Board meeting took place, quorate by their attendance. The minutes and appropriate resolutions (679-688) stating giving a guarantee conferred a commercial benefit on PPL and declaring the claimant's personal interest in Waterloo House were signed by Grant Richardson. I find the claimant took all proper steps, as a director, to ensure the matter was properly handled. All documentation relating to those matters would have been held by the finance department in PPL. The claimant's Executive Assistant at the time may also have held some documents or had knowledge of their whereabouts but he did not personally store originals or copies in the workplace or at home. The remortgage raised about £140000, of which £55000 was used by the claimant's solicitors on the first day to pay PPL debts and the claimant says more was later used for PPL's benefit. I asked the claimant how this was shown in PPL's accounts. He replied he did not know, "*that was for the accountants to deal with*". The accounts to November 2017 also show the claimant gave personal guarantees for some of PPL's debts.

2.6. When the investment was made by LDC in August 2017, there were significant sums on the balance sheet of PPL for work in progress (WIP) as an asset. In Spring 2018, a new Chief Finance Officer (CFO), Stuart Marshall, identified a significant proportion of the WIP was irrecoverable and some write offs had been postponed. There were debts owed from prior acquisitions yet to be discharged.

2.7. Ms Bamforth, originally an accountant, had worked in senior management for 20 years. In her last role she was in discussions with LDC and stayed in touch with contacts there who introduced her to Mr Bodnar-Horvath in January. She met Mr Snow and Mr Robin (Rob) Powell, a director of LDC, in about February who explained the concerns about overstated WIP which Mr Marshall had identified. The minutes of board meetings in March 2019 confirm the legacy WIP issues, acquisition debts and cash flow issues (413-419). The other concern they expressed was the claimant's style of management eg looking for new acquisitions, having high level discussions with clients and bringing in new business opportunities, while relying on the discipline heads to manage income and internal processes. They considered the Group needed a director responsible for internal processes, governance and best practice.

2.8. Ms Bamforth met the claimant and the team in Newcastle on 7 March 2019. She was to produce a report and transformational plan. She reviewed the Group initially as a consultant. Her review indicated minimal governance structures in place across the Group to control bids and pricing or any effective time recording processes to monitor costs and profitability. For example, the board pack for the board meeting on 2 October 2017 has multiple sections that were incomplete such as key performance indicators, cashflow and gross margins.

2.9. Mr Marshall had resigned and was working his notice period. Mr Laker was contacted by Mr Snow who was aware he was available to start work. He met with Mr Snow and Mr Powell on 2 April 2019 in Newcastle. They explained refinancing was urgently needed but Allied Irish Bank (GB) (AIB) was the only financier willing to invest and would only do so if LDC also made a further substantial investment. Mr Laker wanted to meet the senior management team. He met Steve Payne, Chief Restructuring Officer and, later that day Ms Bamforth. Later in the week, he met with the claimant. This was a friendly and positive meeting. Afterwards, Mr Laker spoke to Mr Powell and agreed to join on 16 April 2019 as a consultant, effectively interim CFO, until the refinancing process reached its conclusion.

2.10. All companies in the Group were members of a single VAT group jointly and severally liable for the VAT. It failed to make its payments and the Group received a letter from HMRC threatening a winding up petition. There was insufficient cash to make net payroll payments in March or April 2019, so LDC provided emergency funds to keep the business trading.

2.11. Mr Laker was immediately involved in helping to complete the refinancing. On his first morning, he was in a meeting with Mr Marshall, Mr Powell and Mr Payne to go through the banking documents for it. There was work being undertaken on cashflow planning, reconciling figures and answering questions for LDC's investment committee. Mr Marshall would lead on the banking side and Mr Laker would lead on the LDC side, making sure its investment committee had the information it needed. Mr Marshall was also dealing with HMRC and Mr Laker sat in on calls with HMRC on 17 and 23 April 2019. Mr Marshall viewed Mr Laker as his successor, so effectively started doing a handover. The refinancing was due to complete on 29 April 2019, but did not, which meant the Group had insufficient funds to pay April salaries. The claimant, as CEO, had to send an email to all staff about this (396).

2.12. A financing facility had been in place but was withdrawn. AIB would only invest if LDC also invested a further £2 million. LDC requested the claimant change his role from CEO to Chief Commercial Officer (CCO). LDC recognised the claimant had strong client relationships and could add value to the business, but had grave concerns about him continuing to lead it in view of the serious difficulties which had happened on his watch. Mr Bodnar-Horvath telephoned Ms Bamforth in mid-April asking whether she would be willing to become CEO. She said she needed to think about it. On the same day she spoke to the claimant about the change in roles. He asked if this had been her plan all along. She said it had not. She says the claimant "agreed" to the change and reduce his gross salary from £200,000 per annum to £190,000 with effect from 1 June 2019, £180,000 from 1 July 2019 and align it with other members of the senior management team from 1 September 2019. On 30 April 2019, AIB made a substantial investment as did LDC.

2.13. The claimant accepts the business was in a challenging position in early 2019 and says he was fully committed to the refinance process. He found it stressful and challenging, not helped by Mr Powell who on 30 April in an aggressive tone repeatedly using the F*** word in a demeaning way directed abuse at the claimant. He ranted and would not listen to any reasoned response. The claimant continued to attempt to work constructively despite Mr

Powell's conduct and build bridges with him even sending a thank you email on 4 May 2019 pointing to positive news (794).

2.14. On the date the refinance was completed the claimant was given a letter varying his service agreement (368-369) with no advance warning. He had no choice but to accept a revised job title and financial package. He was given the impression the whole refinancing arrangement was dependent upon him accepting this, as were payment of staff salaries for the month. The only prior indication he had was when he noticed "CCO" beside his name in the schedule of shares he was issued in the days leading up to the investment. He asked Mr Powell who told him, using abusive language, it stood for Chief Commercial Officer and that Mr Powell had not, and would never, back the claimant for the position of CEO. The claimant left immediately to speak with the company's lawyers, Muckle LLP and called the Chairman en route who said he was not aware of the decision. The two partners he spoke to at Muckle LLP were surprised paperwork they had prepared to effect this change had not been shared with him. The letter changed his title to CCO "*or such other title as we agree*" and talked about a transition between 30 April and September 2019. Had the claimant resigned at this point, it is easy to see how he could have shown he was constructively dismissed, though possibly for a fair reason. He did not. He accepted his new role, albeit unhappily.

2.15. As CCO, the claimant was to lead on business development, managing current and future client relationships and identifying opportunities to build the pipeline of future billable work for the Group. He had a specific goal for 2019 of delivering an average of £1.3m revenue per month (390). Ms Bamforth thought this would play to his strengths. Following a discussion with him she confirmed the tasks he should carry out tasks by email on 11 May 2019 (401-402). He was also to implement effective processes for bid committees to check profitability and sign off projects . Ms Bamforth was appointed as CEO from 20 May 2019.Stuart Marshall left and Mr Laker became CFO on 20 May 2019, joined the board on 24 May 2019 and was appointed as director of other companies in the Group shortly afterwards.

2.16. Mr Laker started to experience some difficulties with the claimant. Governance was poor and internal systems not working effectively. In his view, two main steps were urgent
(a) Commercial finance governance in respect of bids ensuring they had been properly costed to make a profit. Bids were being submitted based upon expected fee levels, with little or no focus on the costs to actually deliver projects, meaning work was being won that would generate revenue but no profit, even making a loss. Therefore, they introduced a bid approval committee to scrutinise bids to ensure they would make a profit if it won the work.
(b) Non-commercial finance governance in respect of creditors. The Group had significantly overdue amounts about £1,000,000 owed to trade creditors. The Newcastle office, where he was nominally based, was open plan and he sat with the finance team whose telephones were ringing several times per day with irate creditors chasing for payment, in some cases threatening court proceedings and bailiffs. Mr Laker devised a plan.

2.17. He and the finance team went through a list of creditors identifying invoices more than 60 days old. In the construction industry, 60 days are typical payment terms. The claimant was aware he was working on this but, on several occasions, requested quicker payment of invoices from Sadler Brown Limited. Paying creditors ahead of 60 days undermined the plan.

2.18. On the first occasion this had happened, about 15 May 2019, Mr Laker emailed the claimant suggesting they discuss this when he was back on the office (403). He did not receive a response. The claimant did the same again- an invoice dated 25 April 2019 was paid on 31 May 2019, and one dated 28 May 2019, was paid on 26 June 2019. The claimant told

members of the finance team to make payment and as he had a significant stature in the Newcastle office, Mr Laker says it would have been someone very brave to refuse to make the payment and tell him he needed to speak to Mr Laker. Mr Laker became aware, **he does not say when**, the claimant had a financial interest in Sadler Brown from a confirmation statement filed at Companies House on **2 September 2019** showing he was a shareholder. Sadler Brown are an Architectural practice. In 2018, PPL had a longstanding major client, Redrow in London, which asked if it could handle engineering and architecture as a "one stop shop". Because the claimant was in a position to exercise some control over Sadler Brown if there was a problem, it was engaged as a subcontractor. PPL charged an uplift on the Sadler Brown fee which would be pure profit. Conor Murphy (PPL Director at the time) led the deal and the claimant was not involved in the negotiations. The claimant's involvement with Sadler Brown was permitted under the investment agreement (83) and everyone then at PPL was aware of it.

2.19. Sadler Brown experienced some financial difficulty that could have affected the Redrow project and, therefore, PPL's relationship with Redrow (one of its top clients). I fully accept the claimant had good commercial reason to pay these invoices on time to avoid that. Redrow paid PPL sums which included Sadler Brown's fees and if Redrow found out PPL was retaining that money rather than passing in on, it would create a very poor impression. On this dispute of fact, I prefer the claimant's evidence he explained this to Mr Laker, not by email, but when he and Mr Laker were passing in the office. The respondent seeks to portray the claimant as (i) acting as if he were still CEO, not obliged to justify decisions to anyone (ii) looking after himself as a shareholder in Sadler Brown at the expense of PPL, which would be a conflict of interests and possible breach of fiduciary duty. **There is some truth in the former but none in the latter**. It may be significant Mr Laker found out about the claimant's shareholding sometime after September 2019, though the claimant had been a shareholder for much longer.

2.20. The claimant repeatedly asked for bid proposals to be approved by the bid approval committee at the last minute. Mr Laker accepts any business sometimes needs to be commercially agile to win new work, but regularly felt "*railroaded*". At best, the claimant was disorganised. At worst, he was trying to get bids off signed off that were risky by giving Mr Laker less time to scrutinise the figures. Given Mr Laker was relatively new in the business, he felt he needed to put a marker down so this did not become the norm so sent an email to the claimant querying how long he had known about the bid. Ms Bamforth sent an email too but there was no "*substantive*" response. I find this means there was no email response.

2.21. Mr Laker developed concerns about the claimant's "*financial acumen*". When asked about profit margin expected, he would say things like "*we will make a 35% margin*". However, Mr Laker would then ask him to talk him through the profit margin based on the figures, and he made sweeping statements such as "*that's what we usually make*". Costs, such as his own time and expenses, were not factored in on a number of projects. For example, he had been regularly travelling to a job in Dublin and conceded his time, travel and accommodation costs had not been billed separately but treated as an "overhead". This was as it had always happened, but it is anathema to any accountant. My finding is the claimant knows how to cost an engineering project. On this "White Water" project he says he is a world expert, which I accept. However, I also find, he is lax about monitoring costs like air fares and hotel bills which then eat into profit. As a company grows to the size PPL did, it is vital someone does.

2.22. Ms Bamforth met with the claimant on 22 May 2019 and asked him to prepare a business development strategy and a commercial transformation plan. She asked him about the closure of the Glasgow office, one measure identified to save cost, and which he had been tasked with leading. He conceded he had not started this and said, if that headcount was

taken out, some revenue could not be delivered. The recovery plan advanced by him and Mr Marshall centred on reduction of cost but revenue staying the same. The additional investment had been secured relying on that plan. I accept the claimant had good reason to delay closure of Glasgow but again was oblivious of the need to justify his decision to anyone, including Ms Bamforth, LDC **or the Bank**.

2.23. Ms Bamforth says it had "*come to light*" the claimant personally owned a property, Royal Court in Newcastle, which he rented to the Group to store archiving and for car parking. In cross examination she said Mr Laker, also based in Newcastle whereas Ms Bamforth is not, told her the rent was four to five times higher than market rate. The claimant disagrees saying rates for car parking in the city centre are high. He denies his ownership "came to light". It was a longstanding agreement for car parking for staff, common knowledge and had always been declared. Ms Bamforth did not know that due to her recent appointment. Ms Bamforth told him he would have to declare a conflict of interest at the upcoming board meeting on 24 May 2019 and the arrangement would have to stop. He said the property had been sold and the arrangement discontinued. He told Ms Bamforth he had nothing further "of that nature" to disclose. I accept there was nothing wrong in what he did. Ms Bamforth says she could have suggested disciplinary action in respect of this but as she had only just become CEO and was aware there had been no governance processes in place, gave the claimant an opportunity to "come clean" and draw a line in the sand so they could move forward positively and do what needed to turn things around in the business. This is important. **Not every transaction between a company and a director is wrong in law or ethically. It depends on openness and advantage to both parties. If a director rents property to a company at fair rent, that is lawful. If the company at the time the agreement is entered into is effectively controlled by that director in his capacity as a shareholder, he has no-one to be open with but himself**. **When other parties acquire an interest in the company, I accept that director cannot carry on as before but I wholly reject the respondent's accusation he was "feathering his own nest" at PPL's expense.**

2.24. At the board meeting on 24 May 2019 there was a discussion about Waterloo House. Mr Turner, with whom the claimant and the respondent had fallen out, had demanded rent on the basis the lease had not been properly surrendered when the respondent vacated. At board meetings, directors are asked whether there are any "conflicts of interest". Neither the claimant nor Mr Turner ever disclosed any (406- 410) but "conflicts of interest" do not arise when both are controlling shareholders and know what each other are doing. A transaction of a company decided upon by all shareholders has effect as if it were a resolution of the company in general meeting (Re Duomatic). That was no longer the case, but the claimant acted, as he always had, honestly, but not feeling obliged to inform everyone of everything done in the past which had been recorded fully at the time.

2.25. Mr Laker thought the claimant seemed unwilling or unable to undertake his new role. He was genuinely surprised, based on his previous experiences, the claimant was not "*exited from the business*" in May. The claimant's good customer and staff relations is the likely explanation for the claimant being asked to stay. Mr Laker's view is that of an accountant, i.e. PPL reached a parlous financial position "on the claimant's watch" so he should not be there any longer. I asked Mr Laker if he had ever encountered a company run by people who could do what the company did well, but were weak on "governance". He replied he had not . I was surprised as it is commonplace and I have seen it in engineering, construction and law firms. I gave an example of a well known chef who can cook brilliantly, but whose expanded business failed. Mr Laker still did not see the point. He Ms Bamforth, Mr Snow and Mr Powell could not do

what the claimant does in engineering but that does not mean he or they are valueless to an engineering company. **It needs the best of all of them working together**.

2.26. As part of the refinancing, a financial plan (Bank Plan) had been prepared mainly by the claimant and Mr Marshall and approved by LDC's investment committee. Mr Laker was tasked with reconciling the 13-week cashflow forecast with the Bank Plan, providing that analysis to LDC, and preparing management accounts, as none had been produced for February, March or April 2019 due to the refinancing, which along with dealing with HMRC had taken up all of Mr Marshall's time. To Mr Laker **demonstrably** keeping to the Bank Plan was vital **.**

2.27. The Group had grown by way of acquisitions, but the Bank Plan did not contemplate any going forward at least until evidence was seen the Plan was being delivered. Mr Laker says in early June 2019, the claimant was meeting with Hill Cannon to discuss the possibility of a joint venture, or so the respondent thought. Ms Bamforth did not want to stifle him and was comfortable with him exploring opportunities for new work, but she knew the Group could not enter into a joint venture with Hill Cannon, which seemed to be the claimant's preferred approach. She asked the claimant to involve Mr Laker in any discussions with Hill Cannon to ensure nothing was agreed contrary to the Bank Plan. Mr Laker thought the claimant's primary focus was on a joint venture instead of driving "organic" growth, which was critical. I am now satisfied that was not his focus and he was trying to get new work through **collaboration** with Hill Cannon, but it **reasonably** appeared otherwise to Ms Bamforth and Mr Laker.

2.28. By 4 June 2019 Ms Bamforth had not received anything from the claimant in relation to her initial thoughts on business development and client retention strategy. She emailed to chase him for a draft and set up some time to catch up on it ahead of the next board meeting (429-430). They met on 5 June 2019 and she sent a follow up email on 6 June 2019 clarifying what she expected to see in the strategy document (431- 432).

2.29. Neil Hobbs started on 10 June 2019 as Transformation Director, and joined the board on 1 September 2019. He had worked with Ms Bamforth in a previous business. She knew he had particular experience in business transformation. She had telephoned him on 8 May 2019 and asked if he would be interested in joining. She explained the Group was struggling, there was a real lack of governance so systems and structures needed to be implemented. The claimant met Mr Hobbs in London, had a friendly conversation and after meeting him, said he would be a good fit for the business and so he was offered the role. The claimant still speaks well of Mr Hobbs whose background is not accountancy but banking and business transformation. Ms Bamforth had produced a transformational plan (496-497) and Mr Hobbs brief was to ensure it was implemented. All the different parts of the business needed to input more detail into the plan get it moving. Whilst in some businesses one can tackle each part of a plan in turn, in a seriously distressed business urgent action is needed across the whole business quickly. In evidence the claimant said he saw why Ms Bamforth, and Mr Hobbs became "frustrated" with his ways which were very different to their own.

2.30. Being aware of the importance of knowing where senior managers are, Ms Bamforth introduced a "Senior Leadership Team Weekly Whereabouts" tracker issued to the whole business once a week. The claimant often was not where he said he was and sometimes could not be located. She does not say, and I do not find, he was shirking, but he seemed to her and to me still to be "going his own way" as he always had. Ms Bamforth met with him again on 10 June 2019, told him what she would expect a business development strategy document to look like and asked for a draft by 21 June 2019. She also chased for his part of the transformation plan, as his was the only part not yet produced.

2.31. She met with him again on 11 June 2019, as he said he wanted more clarity around his role and was unhappy with the title CCO. He expressed concerns about the **perception** of his role saying clients did not understand what it was. He said he wanted to be Group Managing Director. Ms Bamforth explained that was not possible given the terms of the investment and it would cause confusion to the staff and clients. He says they talked about his business development strategy in detail. My finding based on his own evidence, is his priority was presenting to clients a less "corporate" image than larger competitors. He said on Day 2 " *this was our unique selling point and they were throwing it out of the window*". I accept he was not motivated by pride or self interest. Equally, he seemed oblivious to the fact that as the business "grew" from its local small roots to a large one based globally, his " personal touch" was no substitute for tighter controls on finance and keeping the investors happy otherwise it would run into the same financial difficulties it had before.

2.32. On 17 June 2019 the senior leadership team (SLT) met off-site to discuss how they were going to move forward and, in particular, work together effectively. Ms Bamforth had arranged this meeting at a neutral location as it became evident to her there was no a cohesive SLT and a lack of clarity about the direction of the business. The aim for the day was to share concerns, discuss where there were business opportunities and for all attendees to come away with clear and aligned objectives. In advance of the meeting, the attendees were sent a full agenda for the day. Most of the attendees prepared and delivered presentations but the claimant had done little or no preparation. He seemed withdrawn and did not engage at the level expected for a manager in his senior position. Ms Bamforth spoke privately to Mr Bodnar-Horvath, after the session as she was concerned about the claimant's level of engagement.

2.33. On 19 June 2019 Ms Bamforth met with the claimant to discuss a" *business development kick off meeting*" she had asked him to arrange and an "action plan" setting objectives for his team. She told him of a contact she had for delivering a new client relationship management system to better support the business and its development activities. The claimant had sent her an email the day before (440) confirming he was making progress on the transformation plan and bid activity. She says little materialised in practice as the documents he produced were incomplete, basic, lacked insight and detail or were produced by others without his input.

2.34. The claimant denies he failed to produce what had been assigned to him on 22 May 2019 or had to be "chased". A draft was emailed to Ms Bamforth on 20 June 2019 (441), a day ahead of her request and her decision to produce her own plan was not because he had not done so. She says it fell far short of what she needed and I find she had good reason to view it as inadequate. This is an important illustration of the differences between her and the claimant. He says he did give what she asked for but not necessarily in the format she wanted. As he put it "*Would I prepare a 15 page Excel spreadsheet ? No I wouldn't*". He did not appreciate some such documents are a way of CEO's demonstrating to outsiders, including investors and Banks, what is being done to ensure poor financial performance will not recur. In my view, this was not a clash of personalities but of styles of management. His was far less paper orientated and more "laid back" than she wanted, **and needed him to be**.

2.35. The "kick off" meeting was on 24 June 2019. The claimant sent the agenda on the day of the meeting, giving attendees no time to prepare (443). The documents he had prepared were weak and heavily reliant on documents prepared for him (469 -481). Finally, there were no clear action points. The notes from the meeting were not circulated by him until 9 July 2019, and he asked the attendees for comments by the end of the week (468). Ms Bamforth says he was supposed to review "pipeline work" with key staff weekly basis, but he simply was not.

2.36. On 25 June 2019 Ms Bamforth met with the claimant to discuss the " kick off" meeting, as she had received the above poor feedback from Mr Hobbs. She also heard from several engineers, Alexis Towell, the claimant's Executive Assistant and Holly Richardson, the Marketing Manager, there was no clear direction at the meeting, or any follow up action points. The claimant had also failed to prepare a proposal on the bid approval committee she had asked him to set up to ensure bid governance, and stop the practise of '*winning work at all costs'*, which was causing poor financial performance. She emailed him a list of actions to seek to address these concerns. Her notes are pages 785, her follow up email and email about the bid approval committee are 447- 448 and 453.

2.37. Ms Bamforth says she had many discussions with the claimant about his role and his unhappiness at no longer being the leader of the business. He oscillated between saying he **could not** do the job of CCO and **did not want to**. On or around 3 July 2019, she was coming up to Newcastle and suggested meeting with the claimant off site. They drove to Jesmond for lunch. The claimant seemed really unhappy and emotional and she asked him what he wanted. He asked her to make an offer to LDC to buy the business back. She said LDC was likely to want £10-15 million. He said he would only offer about £2 million in view of the state of the business. Ms Bamforth spoke to Mr Powell at LDC, but the offer was declined.

2.38. On 3 July 2019 the claimant met with Mr Bodnar-Horvath with the intention of resigning because having built the business from scratch he could not stand by and watch the things going on. In particular, the way his change of role had been handled by Mr Powell, the "***lack of respect for the shareholders"*** and his complete loss of control of the business were big issues. Mr Bodnar-Horvath persuaded him not to resign and said he would discuss the situation with the other members of the Board at the meeting the following day. At that meeting, he asked the claimant to present his report then leave so they could discuss his position. He did so. There was no resolution to change the existing plans. In blunt terms, the claimant had to accept he was no longer in charge and do as he was told. At the board meeting on 4 July 2019 the claimant was visibly emotional. I accept he was very stressed.

2.39. Alarm bells were ringing for Mr Hobbs by July 2019. On many occasions he had to support the claimant's direct reports, Alexis Towell and Ms Richardson as the claimant was giving them no direction on what they needed to be doing so they approached Mr Hobbs to ask for guidance. Both were capable, but the claimant's lack of direction was left them bewildered.

2.40. As the claimant still was not delivering what Ms Bamforth was asking of him, she emailed him on 9 July 2019 setting out the key areas on which she needed his support and another email asking for some information she needed urgently (482-485).

2.41. She met him off-site in London on 10 July 2019. He said he found it difficult coming into work. She acknowledges he seemed deeply unhappy and this was affecting the atmosphere and morale in the Newcastle office **as he acknowledged**. He said: "*I wear my heart on my sleeve so it is difficult to hide how I feel*". He asked again for (i) a change of job title to Group Managing Director (ii) increased salary and (iii) a relaxation of the non-competition clauses he would bound by if he were to leave. She was sympathetic towards his feelings but explained the respondent needed him to do the job he was being paid to do. She followed up the meeting with objectives and expectations of the CCO role and was clear she needed him to be fully engaged. She asked him to come back to her as soon as possible. His response at 489 is very terse. I accept it was a very important decision for him and difficult to express in an email. They agreed to speak again the following week and, ahead of that meeting, Ms Bamforth tried to summarise the position in an email of 15 July (491- 492). I find Ms Bamforth was not "creating"

a paper trail, this is how she always works. Many people from accounting and legal backgrounds do, for good reason. Emails can be referred to rather than relying on memory, and what one cannot deal with at the moment can be done a little later. The claimant much prefers to speak, face to face or by telephone. That is genuinely how he works and always has. I am not saying either is right or wrong, but the two do not fit easily together.

2.42. They met again on 17 July 2019. The claimant said he had concerns about putting effort into the business for three to five years with no guarantee he would not then be exited from it. She said he was being paid a significant salary and so was expected to fulfil his role regardless, support her, identify and drive growth. She told him to take paid time off to think about what he wanted. He did and was then on annual leave from 1 to 14 August 2019..

2.43. As the claimant had still not produced the business development strategy Mr Hobbs and Holly Richardson produced one with Ms Bamforth (507-526), as it could not be left any longer, Despite the perilous financial position of the Group, the claimant had approved a promotion with significant salary increases in May 2019, which came to light in early August (558- 560). He explained cogently to me why he had but did not respond by email to Ms Bamforth's email request for an explanation. He says he spoke to her, but she cannot recall him doing so. This is frankly typical of the gulf between them. She reasonably expects a written reply to a written question, he prefers to talk. In the final analysis, she is the CEO and has the right to choose.

2.44. In August 2019 the Group experienced a large unforecast cost from, a White Water project in Sharjah UAE which created a significant issue in the accounts. The project was being run from the Dubai office, which I accept, but that does not excuse head office finance not knowing why the cost was put through in the wrong month. As CCO it was the claimant's job to take steps to prevent a recurrence and I see no evidence he did, or even saw the need to. There were some other issues with revenue and costs not forecasted. Ms Bamforth asked the claimant for details on 20 August 2019. There were some urgent outstanding points so she sent an email after the claimant failed to return her call (582-585 and 588). He replied on 23 August, but his answers were short and unsatisfactory (586- 587).

2.45. At the beginning of August 2019, Mr Hobbs reported to the board they had moved to red RAG status (550- 553). As a result, he, Ms Bamforth and Holly Richardson, prepared "mind maps" and a client retention strategy plan (555-557, 568 and 590). Following this, he tried to engage with the claimant with minimal success (569-581 and 591-604). He received no response to emails of 19 or 26 August 2019 and had to chase the claimant for a call to get any input from him. The claimant circulated an update to the board on 27 August 2019.

2.46. The claimant says he tried to engage with Ms Bamforth about what his new role involved in July 2019. At that point in under three months since the refinance Ms Bamforth and others had send him a stream of emails asking him to respond . As he felt it more appropriate to have a discussion he emailed her on 16 July 2019 to request a call (491). He was then on annual leave 18-26 July and 1-14 August 2019. When he returned from holiday in August she had created a business development strategy and presented this to a meeting of the SLT on the day he returned. He felt **bypassed** by her and says it is unreasonable for the respondent to rely on inaction when Ms Bamforth was encouraging him to take leave. **I find the periods of leave were not the problem, his lack of urgency at other times was. I find no clash of personality between them or between the claimant and Mr Hobbs, in sharp contrast to the relationship the claimant had with Mr Powell. However, the clash of working methods and style was a real problem.**

2.47. Before a Board meeting on 27 August 2019 the claimant was called to a room where Ms Bamforth, Mr Laker and Mr Powell had been in discussions before he arrived. Mr Powell, now Chairman and non executive director after Mr Bodnar-Horvath had stepped down on 31 July 2019, said the Group would be filing a breach of warranty claim against him and all the other directors in post prior to LDC's investment. This came as a great shock. It was two days before the expiry of the warranties under the investment agreement. Mr Powell said the claimant was personally at risk up to £400,000. That could mean he would lose his family home. They asked him to leave the room and called Mr Beckwith and Mr Richardson in to tell them the same thing. After they had finished, he re-joined them for the Board meeting then asked to be excused. **The thought of the company he had built and funded now looking to claim against him was too much to cope with. This lead him to say his "head was not in the right place"** His handwritten notes (607-609) detail this sequence of events, which are not reflected in the Board minutes (743-746) or ET3. A letter of warranty claim (797- 805) was then posted to his home address in an envelope addressed, in Ms Bamforth's handwriting, to "P Stienlet" and was opened by his wife Paula.

2.48. As I said above, Mr Turner had demanded rent on Waterloo House because the lease had not been properly surrendered when the business vacated the premises. The claimant had blamed Mr Turner and stated that he would resolve this issue with him.

2.49. On 28 August 2019 Ms Bamforth met with the claimant to go through their list of actions. In particular, she wanted him to review the business development strategy she, Mr Hobbs and Ms Richardson had produced and prepare a budget for his area of the business to deliver the plan. She said his job title would not be changing, but she wanted to draw a line under things and move forward positively. The claimant was deeply unhappy about the breach of warranty claim. He emailed Ms Bamforth (797-802) raising various concerns on 29 August, including Mr Powell's behaviour (615), recording matters he had spoken of to her in the past but which she had told him not to pursue as a complaint. He met Ms Jo Morton Head of HR, on 5 September 2019 complaining about Mr Powell and asked her to record his concerns (806)

2.50. In early September Ms Bamforth continued to chase the claimant for actions he was responsible for like the business plan and closing off the deed of surrender for Waterloo House (621- 625 and 629- 632). On 10 September 2019 they met off-site in Huddersfield. The claimant again raised queries regarding his salary by email ahead of the meeting (638) which Ms Bamforth had agreed to discuss with Mr Powell. At the meeting, the claimant expressed dissatisfaction with his job title once more and asked if there was any likelihood of an increase in salary, which was due for review that month. Ms Bamforth said she did not expect so and it was likely to reduce to align with other members of the senior management team. To her his focus continued to be on his personal position, including potentially working less hours. He again asked about post-termination restrictions, as I accept, in the context of what he could do if he dropped to a four day week. At no point did he give any thoughts on how he would play his part in moving the business forward. They agreed to consider their respective positions and meet again on 17 September 2019 in Birmingham. When I asked, the claimant agreed he may have come across to Ms Bamforth as lacking commitment and looking for a way out. I accept he was not, but it was entirely reasonable for Ms Bamforth to think the opposite.

2.51. The claimant said in cross examination "…***ultimately the beauty of running a business is the staff and watching them grow and develop and this was one of my prime responsibilities****".* He also said by September " *in my own head things were starting to calm down, as the shock of it had calmed down – the warranty issue did cause some worry. .. I enjoyed working with them in the business and I'm working with them now."* He said he came

back from leave in August feeling *"very positive."* and "*I was working with clients and bringing in business".* I accept he was producing his revenue target. Ms Millns rightly made these points in her submissions to show he was in his eyes "committed and engaged" but to what? He was no longer "running" the business. He was committed, in my judgment, to doing what he had always done best- winning projects and keeping clients and staff happy.

2.52. A common slogan in the business transformation sector is" *if you do what you have always done , you will get what you always got*". The claimant had built a large engineering company from a small one by delivering quality projects and having satisfied clients. Put bluntly, he had also taken PPL to the brink of terminal insolvency. I do not underestimate how hard it is for someone who has built a business to recognise they must now take orders from people who could not do what he had done. Neither do I underestimate how hard it is for someone in Ms Bamforth position to get him to change. Both people came across well to me and the claimant recognises there was no animosity in her approach, in contrast to Mr Powell who had now replaced Mr Bodnar-Horvath, of whom the claimant speaks well, as Chairman. The situation was crying out for someone in a position of neutrality between the two views of the future to try to find middle ground, someone perhaps like Ms Morton.

2.53. Over the next few days, Ms Bamforth says she formed the view the claimant should probably be dismissed. On more than one occasion he had said he was considering resigning. His behaviour was affecting working relationships. They had numerous discussions to try and move forward and she had given him guidance and support, as had Mr Hobbs, Mr Laker and others. She was at a loss as to what more she could do to get him to perform his duties. She did not feel the position could be left unaddressed any longer. She spoke to Mr Powell, Ms Laker and Jane Gilbert Boot, another director, to obtain their views and they agreed. She also kept Jo Morton, the HR Manager, informed and obtained prior consent from LDC to terminate the claimant's employment. A dismissal letter was typed but, had he shown a sudden improvement, I accept she **may** not have used it.

2.54. Mr Laker confirms Ms Bamforth spoke to him and Jane Gilbert Boot explaining her concerns.I accept he claimant was delivering some aspects of the CCO role, but his apparent lack of engagement which was taking its toll on the business and impacting on staff morale, particularly in the Newcastle office. Mr Laker had experienced this first hand. The claimant would turn up late and/or leave early, probably to meet clients, but it was obvious to people working there he was unhappy. By then, the claimant had had four months to settle into the CCO role . Mr Laker thought they had reached a point where there was nothing more the business could do. It did not appear to him the claimant would ever change and start doing his job, regardless of what was done to help him.

2.55. Mr Hobbs had arranged a business development working group kick off session on 17 September 2019 at Birmingham following on from the meeting on 24 June 2019. Staff had travelled from around the country. The claimant was in the Birmingham office from 8am but received an important client call that placed a key project in jeopardy just as the meeting was due to start so asked Mr Hobbs to start it in his absence. He came in part way through. He did not take over the meeting. At times, he disagreed with points Mr Hobbs made, which was awkward in front of colleagues expected to deliver aspects of it. Mr Hobbs reported all this to Ms Bamforth, who was not at the meeting. It cemented her concerns about the claimant .

2.56. Ms Bamforth met with the claimant later that day at 3pm at a Hotel. She said he had, at times, said he could not do the CCO role while, at other times saying he did not want to do it. As a consequence, she was exercising the respondent's right under clause 2.2 of the Service

Agreement (243-263) to terminate his employment on six months' notice due to his poor performance. His employment was to terminate on 17 March 2020. In the interim he was placed on garden leave in accordance with clauses 14.1 and 14.2 of the Service Agreement. She gave him the ready prepared letter (656-657).

2.57. The claimant says he was shocked and surprised to receive a letter. He thought she was going to discuss the enquiries he understood she was going to make of Mr Powell to follow up their meeting on 10 September 2019 (806). The letter included his employment was being terminated because (i) "*your personal position and pride is clearly conflicting with the duties that you continue to owe as a senior employee and director*" (ii) "*the performance of your day to day duties and the contribution you bring to the Company is fundamentally being affected by the ongoing situation*" (iii) "*your performance is not at the required level*"; and(iv) "*the working relationships are substantially affected*". Couched in such vague language, the claimant believes it demonstrates a deliberate attempt to keep open various alternative "reasons", primarily performance issues. The respondent has a procedure for the management of any performance and/or conduct concerns. It did not follow any.

2.58. Ms Bamforth accepts no performance management process had taken place but felt this would be futile. More importantly in her oral evidence she was clear people of the claimant's, and her own, seniority are not managed in the same way as junior staff. In her view, she had given the claimant numerous opportunities but he had failed to deliver anything meaningful, so should have realised his performance was being questioned. Given the Group's perilous financial position and the need for business development to build the pipeline, she could not feasibly leave things any longer. The claimant subsequently emailed her raising a number of queries regarding his dismissal and his shares. (661-662 and 666-670).

2.59. The claimant addresses paragraphs of the ET3 saying the respondent has sought to **fabricate** in retrospect, performance concerns. He says meetings with Ms Bamforth, during which "performance" is alleged to have been discussed, have been taken out of context. He accepts the scope of his new "***reduced***" role was discussed, as well as the progress of tasks he was responsible for but he was never told perceived shortcomings in his performance could result in dismissal. **I accept that.** He adds he never received clarity on his new role. **I do not accept that. In his oral evidence he did not say he did not know what to do**. He describes meetings with Ms Bamforth as "*two senior colleagues seeking to **discuss** and agree a job description, roles and responsibilities during a transitional period"*. He admits he was finding it hard. I accept he was not aware his performance was being scrutinised to the extent it is now clear it was. Had he been, he says he would have been able to respond to avoid being dismissed. **I do not accept that. I reject it was** his "*personal position **and pride***" conflicting with his duties. He genuinely believed some of what he was being asked to do was wrong for the business image and other things were unnecessary paperwork. He did not "buy into" the changes Ms Bamforth was trying to achieve or the urgency of doing so.

2.60. It seems to him the respondent and/or its investors wanted him out of the business and were prepared to dismiss unfairly but give six months' contractual notice. His dismissal was also communicated straight away to staff. He did not wish to leave so asked to appeal the decision but this request was rejected by Ms Bamforth by email of 23 September 2019 (666-667). He thinks his raising valid issues about Mr Powell with Ms Bamforth on 29 August and Ms Morton on 5 September may have influenced the decision to dismiss him. Ms Bamforth denies this. Though the claimant was reluctant to say so, it was clear to me he thought Mr Powell, or LDC, drove this decision to dismiss with no opportunity for the claimant to argue against it . At first, this seemed to me unlikely. What came next made it more likely.

2.61. Following this dismissal he had minimal contact with any one from senior management All communications were from or to Ms Bamforth. When on garden leave he was excluded from the business premises and after a short time, his access to company email accounts and computer systems were disabled. He had been having some difficulties with his personal email account, He was also feeling very emotional about his dismissal which he believed had been orchestrated by Ms Bamforth and did not want to speak to her.

2.62. On Friday 11 October 2019, the respondent received a letter dated 4 October (680)from Lloyds calling upon PPL for immediate payment of its liability under a guarantee of the claimant and Mr Turner's borrowing on Waterloo House. The liability was £336,986.43 and PPL had until 25 October to make proposals for payment.

2.63. Mr Laker's immediate thought was to tell the board. None knew about the guarantee. He checked the disclosure letter to the respondent at the time of the original investment by LDC, and there was no mention of it. Nothing had been disclosed at board meetings. He emailed Lloyds on 11 October 2019, asking for a copy of the guarantee which was posted by Lloyds on 21 October 2019. The guarantee documents appeared to be validly executed. The claimant and/or Mr Turner had defaulted on the mortgage payments. Ms Bamforth says the liability was so significant it threatened the respondent's solvency. She sent an email to the claimant's personal email address on 21 October 2019 asking what he knew about it and for his assistance in tracing the documents (675 -676). She sent another on 24 October 2019 (720 - 721) by which time she had all relevant documents. He failed to respond to either. Mr Laker e-mailed Lloyds on 30 October 2019 asking for a further 21 days to respond to which they agreed (807-809). Ms Bamforth said to Ms Millns using PPL to guarantee a personal loan was **plainly** a breach of his fiduciary duties, amounting to gross misconduct. She accepts the sale of Waterloo House on 17 January 2020 removed the guarantee but says the demand resulted in the respondent deciding to go through a distressed sale process of PPL. No solvent offers were made and PPL went **into administration, not liquidation**, on 4 February 2020.

2.64. Both Ms Bamforth and Mr Laker say the documents from Lloyds **in themselves** make clear this was "*a flagrant breach by the claimant of the Companies Act and his fiduciary duties*" because he had been a director of PPL at the time the guarantee was entered into. Mr Laker asks "*How could it have been in the best interests of PPL for it to guarantee the loan?* "Ms Bamforth says he was **placing his own personal interests above those of PPL**; created a conflict of interest; failed to exercise independent judgment, reasonable care, skill or diligence by entering into the loan guarantee; and, had failed to declare an interest in the transaction.

2.65. As the claimant failed to respond to Ms Bamforth's emails, she spoke to Mr Powell, Mr Laker and Ms Gilbert Boot about summarily dismissing the claimant and obtained LDC's prior consent to do so. She wrote to him on 31 October 2019 exercising a contractual right to terminate his employment summarily pursuant to clause 13.1.1 of the Service Agreement, in accordance with which, notice was deemed given 48 hours from the date the letter was posted and, accordingly, his employment terminated on 2 November 2019. She asked Mr Laker to calculate the claimant's outstanding entitlements and sums he owed to the business. This was offset against his directors' loan balance and deducted from his final salary. The email setting this out and the letter summarily dismissing him are at 734-5 and 737-8

2.66. Ms Bamforth says the respondent was fully intending to pay the claimant's salary and benefits during his notice period after the first dismissal until the Lloyds guarantee came to light but **on about 26 October** stopped the payment through payroll. As the claimant was summarily dismissed, he became a "bad leaver" in accordance with the articles of association

(288-367) which triggered a mandatory transfer of his shares. Accordingly, Mr Laker wrote to the claimant on 20 December 2019 to effect the mandatory transfer (766-767).

2.67. The claimant did not read Ms Bamforth's email of 21 October upon receipt. When she emailed again on 24 October 2019 forwarding a scanned copy of a letter from Lloyds , he did not feel able at that time to read it. He contacted her when his salary was not paid in the salary run that would have been authorised on about 26 October. He tried to call and text her on the morning of 31 October 2019 but she did not respond. He emailed her at 11.29 am asking for an explanation. He received an email from Ms Bamforth, timed at 13.29pm, attaching a letter of summary dismissal (737-738). His primary concern was how he was going to satisfy his monthly outgoings. He only properly read her emails of 21 and 24 October, upon receipt of her's summarily dismissing him for a breach of fiduciary duty.

2.68. It was Mr Turner who defaulted on his part of the loan payments when he was in dispute with the respondent in the employment tribunal. The claimant is at a loss to understand why the respondent took no steps to follow up Ms Bamforth's emails of 21 or 24 October, by phone or a posted letter. Had he been given a chance to explain, he would have shown he did not act in breach of his fiduciary duty. The summary dismissal letter states: *'Using PPL to guarantee a personal loan is clearly a breach of your fiduciary duties as a statutory director of PPL <u>at that time</u>'*. Disclosure documents received as part of these proceedings show the respondent had the guarantee together with minutes and resolutions passed by PPL when it was given (679-688). A minute of a board meeting of PPL on 16 March 2017 records his personal interest was declared and necessary resolutions made in respect of the guarantee. The minutes were signed and dated by Grant Richardson. Ms Bamforth spoke to Mr Richardson who said he did not realise what he was signing, and seemed really disturbed. Given his reaction and the fact he derived no personal benefit she believed him and decided to take no formal action. Neither Ms Bamforth nor Mr Laker understood the significance of Sintons being involved. Mr Laker . had sought legal advice but advice can only be as good as the instructions. Ms Millns used a strong word, "*absurd*", to describe the conclusions the respondent reached. For reasons I explain more fully in my conclusions , I agree with her.

2.69. All members of senior management were aware of the ownership, lease and impending sale of Waterloo House. as the claimant had updated the Board as shown in minutes 24 May 2019 (406-407) and 4 July 2019 (464). He also explained to Ms Bamforth on 23 August 2019 (587) a significant challenge he was facing with the sale was Mr Turner being in an employment tribunal dispute with the respondent. She says she was not aware there was an accepted offer to purchase of Waterloo House when Lloyds called on the guarantee. I do not accept that, but if she was it is because she did not ask.

2.70. The claimant emailed Ms Bamforth on 18 January 2020 to confirm Waterloo House had been sold and so there was no longer a liability on the guarantee (770). She says this does not exonerate him, saying his ***long term poor management and lack of governance left PPL significantly loss making, reliant on other companies in the Group and it was brought to a terminal position by the receipt of the loan guarantee demand***. Long term poor management and lack of governance are not a breach of fiduciary duty and were part of the reason for terminating with notice in September.

2.71. As for his alleged non-disclosure of the guarantee, the claimant did not personally hold any documents relating to Waterloo House. To the best of his knowledge all were made available to LDC as part of the due diligence process by the finance department. At no time did he knowingly withhold any relevant information. **In March 2017** the Lloyds loan was **secured**

on Waterloo House. **I find Lloyds would only ask for a guarantee from PPL if told the purpose of the loan was to raise funds for PPL's use and keep a roof over its head. If PPL paid a debt to Lloyds which was secured on Waterloo House, PPL would normally acquire the benefit of the security.**

2.72. The summary dismissal saved the respondent his salary plus other elements of his remuneration package eg subscriptions, phone allowance, private medical and life insurance for him and his family for the remainder of his notice period. An allegation of gross misconduct meant he was classed as a 'bad leaver'. The impact would be to increase the value of the remaining shareholders' shareholding. He was the largest shareholder after LDC.

2.73. At paragraph 43 of its defence the respondent alleges any departure from its own process or the ACAS Code was justified. Amongst the reasons given are "*the seriousness of the concerns and the Claimant's failure to engage with the Respondent…*". Given the seriousness the respondent attaches to it and the extremely serious and detrimental impact the allegations could, and have, had for him, no further harm was likely to result while they asked him to explain. He thinks the respondent chose not to do so to serve its own ends.

2.74. I do not accept the Group's decision to put PPL through a distressed sale process was as it says, that it was ***brought to a terminal position by the receipt of the loan guarantee demand***. PPL was not cash generative, it had been supported by other businesses within the Group for a long time which had depleted the Group's cash. When no solvent offers were made for PPL it went into administration on 4 February 2020.

3. Relevant Law

3.1. Section 98 of the Employment Rights Act 1996 (the Act) includes:
"(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 dismissal
(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 ..of the employee for performing work of the kind he was employed by the employer to do
(b) relates to the conduct of the employee."
(3) In subsection (2) (a) –
(a)" capability" , in relation to an employee , means his capability assessed by reference to skill, aptitude ,health or any other physical or mental quality.

3.2. In Abernethy v Mott Hay & Anderson, Lord Justice Cairns said the reason for dismissal in any case is a set of facts known to the employer or may be beliefs held by him which cause him to dismiss the employee. That is what the employer has to show. Sometimes an employer will "mis-label" the facts. In Abernethy it said the employee was redundant, which he was not. The proper label was found to be capability due to the employee's unwillingness to change, a "mental quality". Misconduct and incapability are sometimes hard to differentiate. Sutton and Gates (Luton) Ltd-v-Boxall held a reason related to capability if the claimant is trying his best and failing, but relates to his conduct if he is failing to exercise to the full such talents as he possesses. The respondent must show what it knew and believed.

3.3. In ASLEF-v-Brady it was said:

It does not follow… whenever there is misconduct which could justify dismissal, a tribunal is bound to find that was indeed the operative reason... For example, if the employer makes the misconduct an excuse to dismiss an employee ..then the reason for the dismissal – the operative cause – will not be the misconduct at all, since that is not what brought about the dismissal, even if the misconduct in fact merited dismissal.
Accordingly, once the employee has put in issue with proper evidence a basis for contending the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing the principal reason is a statutory reason.
On the other hand, the fact the employer acted opportunistically in dismissing the employee does not necessarily exclude a finding the dismissal was for a fair reason. There is a difference between a reason for the dismissal and the enthusiasm with which the employer adopts that reason. .

3.4.Section 98(4) of the Act says:
"Where an 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 all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

3.5. An employer does not have to prove, even on a balance of probabilities, the misconduct it believes took place actually did. It simply has to show a genuine belief. The Tribunal must determine, with a neutral burden of proof, whether it had reasonable grounds for that belief and conducted as much investigation in the circumstances as was reasonable British Home Stores-v-Burchell as qualified in Boys & Girls Welfare Society-v-McDonald. It does not have to prove he was incapable only reasonably believed he was. As Lord Denning MR said in Alidair -v-Taylor 1978 ICR 445 '*When a man is dismissed for incapacity or incompetence it is sufficient the employer honestly believes on reasonable grounds he is incapable or incompetent.It is not necessary the employer prove he is in fact incapable or incompetent*.'

3.6. Stephenson LJ gave in Weddel-v-Tepper guidance on the "Burchell Test"
Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a ***fair opportunity of explaining*** *before dismissing him. And they do not have regard to equity or the substantial merits of the case if they* ***jump to conclusions*** *which it would have been reasonable to postpone .. until they had, per Burchell, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee* ***a fair opportunity to explain himself****, their belief is not based on reasonable grounds and they are not acting reasonably*."

3.7. In Polkey-v-AE Dayton Lord Bridge of Harwich said of employers who say the employee could not do his job properly or was guilty of misconduct
But an employer having prima facia grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the

authorities as "procedural" which are necessary in the circumstances of the case to justify that course of action. Thus in the case of incapacity the employer will not normally act reasonably unless he gives the employee ***fair warning*** *and an opportunity to mend his ways and show that he can do the job… in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears* ***whatever the employee wishes to say*** *in his defence or an explanation or mitigation…*
If an employer has failed to take the appropriate procedural steps in any particular case, the one question the tribunal is not permitted to ask in applying the test of reasonableness ..is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction .. this question is simply irrelevant. ***It is quite a different matter if the tribunal is able to conclude the employer himself, at the time of dismissal, acted reasonably in taking the view, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness .. may be satisfied.***

3.8. The so called "rules of natural justice" are explained in Khanum-v-Mid Glamorgan Area Health Authority. There are three basic requirements of a disciplinary enquiry: firstly, the person should **know the nature of the accusation against him**; secondly, he should be given an opportunity to state his case; and thirdly, the decision maker should act in good faith. Slater-v-Leicestershire Health Authority 1989 IRLR 16 confirms the rules of natural justice do not form an independent ground upon which a decision to dismiss may be attacked, although a breach will clearly be an important matter when considering fairness under s.98(4).

3.9. Even an admission of some misconduct will not mean an employer can dispense with hearing what the employee has to say, as in Whitbread Plc-v-Hall 2001 IRLR 275:
"Where misconduct is admitted by the employee, the requirement of reasonableness in s.98(4) .. relates not only to the outcome in terms of the penalty imposed by the employer but also to the process by which the employer arrived at that decision. Accordingly, the employment tribunal should not simply ask whether dismissal fell within the "band of reasonable responses" but should also apply that test to the procedure used in reaching the decision to dismiss. The requirements of s.98(4) and the expressions of principle by the House of Lords in Polkey v AE Dayton Services indicate a procedural as well as substantive element to the band of reasonable responses open to an employer faced with such misconduct.
.. Although there are some cases of misconduct so heinous that even a large employer well versed in the best employment practices would be justified in taking the view no explanation or mitigation would make any difference, in the present case the misconduct in question was not so heinous as to admit of only one answer. Dismissal had been decided by the applicant's immediate superior who had a bad relationship with him and had gone into the process with her mind made up. In the circumstances, that method of responding was not among those open to an employer of the size and resources of these employers."

3.10. The opportunity to appeal to a different decision maker is highly desirable see West Midlands Co-Operative Society-v-Tipton. The EAT in Afzal-v-East London Pizza Ltd confirmed withholding the right to appeal may of itself render a dismissal unfair.

3.11. In Stuart-v-London City Airport Ltd the Court of Appeal held the employer could not be criticised for not having pursued **further** investigation into the circumstances of the misconduct when it had **reasonably concluded** the employee's explanation of events was untruthful. However, if he is given no chance to explain , no reasonable employer can form such a view

3.12. Ladbroke Racing-v-Arnott held a rule which specifically states certain breaches will result in dismissal cannot meet the requirements of section 98(4) in itself. The statutory test of fairness is superimposed upon rules which carry the penalty of dismissal. If an employer has a rule prohibiting a specific act for which the stated penalty is instant dismissal he does not satisfy the statutory test by imposing that penalty without regard to the facts or circumstances other than the breach itself. If that were a legitimate approach to the law it would follow a contract could be framed to say any act constituted gross misconduct warranting dismissal irrespective of the manner in which the breach occurred. That would amount to an attempt to "contract out" of the law of unfair dismissal as is void by reason of s203 (1)

3.13. McCall-v-Castleton Crafts held there is no magic in written warnings as to an intelligent man verbal ones may suffice. However, explaining the purpose of warnings in capability cases Sir Hugh Griffiths said graphically in Winterhalter Gastronome-v-Webb *" A man may not know he is capable of jumping the five bar gate until he hears the bull behind him"*. Retarded Childrens Aid Society-v-Day held if an employee is "*determined to go his own way*", it **may** be reasonable for the employer to conclude a warning would be futile but he has no be given a fair chance to show otherwise.

3.14. The implied duty of fidelity prevents an employee setting up in competition with his employer or going to work for a rival concern as long as the employment subsists Hivac-v-Park Royal 1946 1 All ER 350 and Thomas Marshall (Exports) Ltd-v-Guinle 1978 IRLR 174, Neither the implied duty of fidelity at common law, nor any doctrine of equity will prevent an employee preparing to leave, especially where his job in under threat. Laughton and Hawley-v-Bapp Industrial Supplies Ltd 1986 IRLR 245. Adamson-v-B & L Cleaning Services Ltd 1995 IRLR 193 and Marshall-v-Industrial Systems and Control Ltd 1992 IRLR 294 show limits to this doctrine when the preparatory steps are more concrete and advanced. Merely keeping open the option of leaving and, saying so, would rarely, if ever, breach the duty.

3.15. The concept of fiduciary duty can be complex. In Nottingham University-v-Fishel 2000 IRLR 471 Elias J said :*The fiduciary duty on a person who undertakes to act solely in the interests of another is not the same as the employee's duty of good faith or loyalty or the mutual duty of trust and confidence, where a party has to take into consideration the interests of another but does not have to act in the other's interests.* In Helmet Integrated Systems Ltd – v-Tunnard 2007 IRLR 126 Moses L.J. said *The distinguishing mark of the obligation of a fiduciary, in the context of employment, is not merely that the employee owes a duty of loyalty but of single-minded or exclusive loyalty. The decision of Elias J in University of Nottingham v Fishel [2000] IRLR 471 provides the clearest analysis of the distinction between the duty of fidelity which every employee owes and a fiduciary duty which requires an employee to act solely in the interest of his employer and not in his own interest, still less the interests of anyone else.* My short explanation is a director "feathering his own nest" when he should be feathering that of the company is a breach. Making decisions which may leave the company in a vulnerable position is not.

3.16. There are two elements to unfair dismissal compensation: the basic award which is an arithmetic calculation based on age and length of service set out in s 122, and the compensatory award explained in s 123 which as far as relevant says:
(1) Subject to the provisions of this section and sections 124 and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(6) Where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant , it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding .

3.17. Subsection 4 is subject to the important qualification first made in Norton Tool Co Ltd -v-Tewson and affirmed in Burlo-v-Langley that sums earned in mitigation during the notice period do not fall to be deducted from loss. A tribunal may take into account the chance of events occurring Where the chance of a future event is very high, or very low, it may well treat the chance as 100% or 0% Timothy James Consulting Ltd-v-Wilton UKEAT/0082/14).

3.18. Software 2000 -v-Andrews 2007 ICR 825 updated for legislative changes , held .
1 The evidence from the employer may be so unreliable the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction, though the mere fact an element of speculation is involved is not a reason for refusing to have regard to the evidence.
2.The employer may show that if fair procedures had been complied with, the dismissal would have occurred when it did in any event. …
3.The Tribunal may decide there was a chance of dismissal … in which case compensation should be reduced.
*4.**The Tribunal may decide the employment would have been continued but only for a limited period.***
5.The Tribunal may decide the employment would have continued indefinitely because the evidence that it might have terminated earlier is so scant it can effectively be ignored.

3.19. Section 123(6) as explained in Nelson-v-BBC empowers a Tribunal to reduce a compensatory award if the claimant's **culpable and blameworthy** conduct caused or contributed to the dismissal. This can be done in addition to a Polkey reduction (Rao-v-Civil Aviation Authority). Section 122(2) empowers a Tribunal to reduce the basic award on account of the conduct of the claimant before the dismissal. In Steen-v-ASP Packaging Ltd the EAT held an employment tribunal must consider four questions (a) what conduct is said to give rise to possible contributory fault(b) was that conduct objectively blameworthy, irrespective of the employer's view on the matter (c) if so, did it cause or contribute to the dismissal (d) If so, to what extent would it be just and equitable to reduce the award ?

3.20. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 as amended (TULRCA) includes
(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.
(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—
(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable,
the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

3.21. Section 124 imposes limits on the amount of a compensatory award under section 123. At the relevant time, it was **the lower of** £86444 or 52 week's pay **without** the £525 cap.

4. Conclusions

4.1. The claimant says the respondent had no fair reason for the dismissal on 17 September 2019 and in any event acted unreasonably. I find the respondent had valid concerns. Ms Bamforth told me, she thought, he was not **trying** his best to fulfil the role of CCO. In my judgment, her main reason at the time was the mere fact he was not doing what was needed, and she did not address, even to herself, why that was. In my view the claimant was, as an engineer, so dedicated to quality projects and giving a service to clients to compete with larger "corporate" companies, he had put insufficient checks in place when the company grew to a size which no one or two men can control . It became the victim of its own "success". In truth by 2016/17, it was unable to pay its debts as and when they fell due, and could have been wound up. Things had to change, so why did he not change?

4.2. LDC invests in "distressed" companies, tries to improve financial performance in a way which increases share value making the company attractive to buyers (probably one of the large "corporate" entities the claimant was committed not to becoming) and then either keeps it or sells it to realise profit on their original investment. Many people, including the claimant, do not view such investors favourably. The reality is that but for LDC, and later AIB, providing money, PPL would have failed in 2017. While the claimant is genuinely concerned about the staff, eg wanting to incentivise them with shares in the company, such incentives are an illusion if the shares, due to liabilities exceeding assets, have no value. LDC would not "water down" its shareholding. It would rather abandon a non profitable part of the Group, and all who depended on it, if that made more profit. There is nothing unlawful or unethical about this. LDC looks to make a profit from "salvage" of a distressed company.

4.3. Mr Powell was, to the claimant, the personification of all the claimant found repugnant about LDC's strategy. Mr Laker too held a view that because the financial failure of PPL happened "on the claimant's watch" he should have been "exited" in May 2019. Others saw the claimant's value **if, but only if,** he spent all his time working hard on what he did well, but left it to them to run everything else **their way**. **In short, his future in the Group depended on him doing, without challenge, what he was tasked with, no less and no more.**

4.4. I do not read in Ms Bamforth's emails **clear** instructions but as Underhill P said in Samsung Electronics-v-Monte D'Cruz "*We would be hard put ourselves to assign a clear meaning to some of the terms used … But lawyers must be wary of assuming terms that look to them like mere management–speak have no meaning to their regular users. Most large modern businesses have adopted systems …. which, it must be assumed, they find valuable but whose language would not score highly in an essay competition. Tribunals must not allow a disdain for such terminology to lead them into treating such systems as necessarily worthless*". **The claimant did not say in oral evidence he did not understand what Ms Bamforth and others wanted of him. Rather he formed his own view of what were the greater priorities and the best "style" of delivery. He agreed with me it looked as if he was not committed and said he knew Ms Bamforth was "frustrated" by him.**

4.5. Ms Bamforth genuinely felt the claimant was simply not committed to "engaging "with her or senior managers because he did not agree with their methods or style. He gave the clear impression he might leave, which of course was his right. His statement says "*On 3 July 2019 I met with the Chairman of the Respondent, Mr Robert Bodnar Horvath, with the intention to resign. We discussed the reasons behind this and the fact that* ***having built the business from scratch I could not stand by and watch the things going on***". That is exactly what he was expected to do to keep his job. Employment is a hierarchical relationship and whatever

the claimant had done in the past, he now had to do what the respondent wanted him to, in the way it wanted him to do it. Ms Brewis won her only really arguable point which was that however hard he tried he never would, or could, bring himself to do that. As in Abernethy the proper label for the first dismissal, in my judgment, is **capability** due to unwillingness, more probably inability, to become "subordinate". I do not underestimate how difficult it is for anyone who has built a company to do that. The respondent's view he never would change was the true principal reason for dismissal, a potentially fair one and, last but not least, it had reasonable grounds for its belief even though having heard the claimant, I accept he would have liked to stay. He wanted to stay on his terms, not the respondent's.

4.6. Another slogan often used in the business transformation sector is "***If** the people won't change, you have to change the people*". No-one ever, to borrow Sir Hugh Griffiths phrase, put" the bull behind" the claimant. I fully accept **he thought** he was doing his part to aid the turn around. Unlike the respondent's witnesses, I do not attribute his failure to "commit" and "engage" to "pride" but to his genuine belief their way was wrong for the long term future. However, I have no doubt had he been told bluntly he was not and he had a choice between "buying in" to a subordinate role or being dismissed he would have tried to "buy in" but could not have brought himself to do so.

4.7. I find the dismissal was procedurally very unfair. The proviso identified by Lord Bridge does not help the respondent which did not act ***"****reasonably in taking the view that, in the* ***exceptional circumstances of the particular case****, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with.* On the contrary Ms Bamforth was very open and honest she, and those she consulted, have a "two tier" approach-- junior staff should be dealt with under performance management procedures in place, whereas ones of the claimant's rank need not be because the "Service Agreement" permits them to dismiss without one . That flies in the face of the law I have cited in 3.7-3.13 above. Ms Bamforth had no logical reason for refusing the claimant an appeal. Also, there was no reason not to comply with s 207A TULCRA. The Group had an HR department and should have known better.

4.8. Polkey applies in an unusual way on the facts of this case. Had it not been for the second dismissal. I would have found the first was unfair, made a full basic award but reduced the compensatory award to **six week's pay on top of the notice pay on** the basis that is how long it would have taken to follow a fair procedure at the end of which either resignation by the claimant or a fair dismissal with notice would, in my judgment have occurred. As Ms Brewis suggested the latest date that impasse would have been reached was the end of October. I would not have reduced under s 123(6) because the claimant did not contribute to his dismissal by **culpable and blameworthy** conduct. He tried to change but could not. For unreasonably failing to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures I would have increased by 25% as the respondent had no reason other than its view senior staff can be dismissed with none of the safeguards it contains and no appeal.

4.9. The respondent says it had a potentially fair reason for the summary dismissal namely conduct and a reasonable belief he had committed a serious breach of his fiduciary duties which meant it could not reasonably continue to employ him as CCO or at all. **I wholly reject that**. Ms Bamforth's evidence in cross examination and re-examination was "*the sole reason*" for her coming to view the claimant had committed an act of gross misconduct "…*was due to his breach of fiduciary duty and securing a personal loan on a property that served the business no benefit".* The dismissal letter of 31 October states: "*Using PPL to guarantee a personal loan is clearly a breach of your fiduciary duties as a statutory director of PPL at that*

time. Accordingly, in view of the seriousness of this matter, the Company is exercising its contractual right to terminate your employment summarily and forthwith without prior notice or payment in lieu of notice pursuant to 13.1.1 of your service agreement…"

4.10. There is no logical reason for the bank to have asked for a guarantee from PPL unless it believed PPL would benefit from the remortgage. Everything was done "above board" at a firm of solicitors **advising PPL**, Sintons. For many years, the need for a guarantor to have such advice when a relationship exists between it and the borrower has been a feature of banking law and Lloyds rightly insisted on it. Mr Laker described the clear documents which existed as " boiler-plate" forms signed by only Mr Richardson, who did not know what he was signing. This ignores the law, the facts and the role of Sintons. A main indicator of a breach of fiduciary duty is a director safeguarding his personal wealth at the expense of the company. A contra-indication is a director giving personal guarantees putting his personal wealth at risk and mortgaging personal assets to raise money to shore up the company. That is what I see here.

4.11. Ms Bamforth accepted the **only** investigation was obtaining the documents from Lloyd's bank Those documents do not show any breach of fiduciary duty, they reveal the contrary. Further, as Ms Millns submitted, the guarantee was not entered into during the claimant's employment under his service agreement which did not exist at the time. She added Ms Bamforth and Mr Laker were unable to coherently explain **why** there had been a breach of fiduciary duty.They concluded the re-mortgage was for personal gain not the commercial interest of PPL with no explanation sought as to how or why it had come about. I do not accept there was a breach of fiduciary duty. However, the point I must decide is the Burchell test and the respondent is nowhere close to passing it even with a neutral burden of proof. There was no investigation, he was not given any particulars of the allegations or asked to explain. Had he been, and had the respondent listened with an open mind, it could not reasonably have come to any other conclusion than that he had remortgaged Waterloo House, not for personal benefit, but to "shore up" PPL, not by a director's loan but rather paying sums PPL owed or needed to spend, for long enough for another investor to arrive.

4.12. As for the claimant's failure to "disclose" after August 2017 the existence of the guarantee, his reasonable assumption was the documents in the finance department of PPL would have come to the attention of LDC during due diligence, so he had no cause to tell LDC what they already knew. The fact the guarantee was news to Ms Bamforth and Mr Laker, neither of whom were there at the time, does not change that. Both jumped to the conclusion **any** guarantee by PPL of a liability of directors **must be** a breach of fiduciary duty.

4.13. I accept the claimant was remiss in not reading Ms Bamforth's emails but a letter or phone call to the claimant was all it would have taken to clear the matter up. His pay was stopped prior to dismissal and his phone calls and text messages seeking an explanation were ignored. No employer with a dedicated HR function and resources to take independent legal advice would have treated the fact of the guarantee as a sufficient reason for dismissal.

4.14. Also there was an accepted offer for the purchase of the property that would have released ample funds for the guarantee to be removed. This sale completed and the guarantee was removed. I accept Ms Bamforth's view that of itself would not excuse wrongdoing at the time the guarantee was given, but there is no evidence of wrongdoing. I accept the respondent was initially alarmed at the call from Lloyds. However, in its business, it must have known it could acquire security over Waterloo House if it paid Lloyds and, if it had not the funds to pay, Lloyds would not, as **unsecured** creditors chase PPL. No Bank would try to recover an unsecured debt from a guarantor without first enforcing the security against the

borrower. The claimant spoke to the bank as soon as he realised what was going on and they held off until the sale completed. If Lloyds had, for some strange reason, chased PPL, all the Group would need to do, and subsequently did, was put PPL into administration. I was not initially convinced the claimant was right to say the respondent used this as an excuse to avoid paying him during the notice period, but that is the view I formed. The attempt to paint the picture of the claimant as "feathering his own nest" would explain why Mr Laker went looking at Sadler Brown Ltd's details at Companies House **in September 2019** when he could have done so earlier or simply asked the claimant if he held shares in it.

4.15. The summary dismissal was procedurally and substantively unfair but the loss flowing from it is the difference between what happened and what would have happened had the claimant not been summarily dismissed. He is not obliged to give credit for sums earned in the notice period. I make a Polkey reduction as explained at 4.8 above , at the end of October a fair dismissal with notice or resignation with notice expiring end April 2020 would have occurred. I do not reduce under s 123(6) because the claimant did not contribute to either dismissal by **culpable and blameworthy** conduct. For unreasonably failing to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures I increase by 25%.

4.16. His solicitors in the schedule of loss have made a common error. In calculating the number of complete years the effective date of termination is extended by the statutory minimum notice period so he has 17 years, not 16, for the **last 9 of which he was over 41 years old . The multiplier is 21.5 and the multiplicand is the statutory maximum at the time of a week's pay £ 525 = £ 11287.50**

4.17. It is important adjustments are applied to awards in the correct order Digital Equipment Co Ltd-v-Clements 1998 ICR 258. More adjustments now apply. The loss, based on my Polkey conclusion, is up to end April 2020. He was not paid after the end of September. His basic weekly pay was about £1550. With fringe benefits the weekly loss would rise to about £2000 weeks a fair procedure would have taken **plus** the notice period his loss would exceed £60000. There was, reasonably, no mitigation in October 2019, no duty to mitigate in the notice period and no s123(6) reduction. Uplifted by 25% that becomes £75000. The loss must be grossed up for tax and the very lowest it could be would exceed £95000. The last matter to apply is the statutory cap £86444, which is so far exceeded it is in furtherance of the overriding objective not to delay issuing judgment to hold a remedy hearing to make a more precise calculation which cannot change the outcome .

Employment Judge T.M. Garnon
Judgment authorised by the Employment Judge on 16 March 2021