EMPLOYMENT TRIBUNALS

Claimant: Mr K Roberts

Respondent: Nextgenaccess Limited

Heard at: London Central (remotely by CVP)
On: 26 and 27 July 2021

Before: Employment Judge Heath

Representation
Claimant: Edward Kemp (counsel)
Respondent: Patricia Leonard

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is well-founded.

2. Had the respondent not followed an unfair procedure in dismissing the claimant there was an 80% chance that it would have dismissed him had it followed a fair procedure.

3. The conduct of the claimant was such that it is just and equitable to reduce his basic award by 75%.

4. The claimant's dismissal was caused or contributed to the extent that it is just and equitable to reduce his compensatory award by 75%.

5. The respondent unreasonably failed to comply with the ACAS code of practice on disciplinary and grievance procedures and his award is to be uplifted by 20%.

REASONS

Introduction

1. By a claim form presented on 10 November 2020, the claimant claims unfair dismissal from the respondent company, which he had co-founded in 2013. The respondent contends that the claimant was dismissed for a reason relating to conduct or some other substantial reason ("SOSR") namely the irretrievable breakdown in working relations, and that if his dismissal is found to be unfair, that compensation should be reduced pursuant to the principles in ***Polkey*** and for contributory fault.

Issues

2. The issues in the case were agreed as follows:-

   a. What was the reason for the claimant's dismissal, and was such reason a potentially fair one under section 98(2) Employment Rights Acts 1996 ("ERA")? The respondent asserts the reasons as being misconduct and SOSR (the irretrievable breakdown in working relations).

   b. Did the respondent act reasonably or unreasonably in treating the above reason as sufficient reason for dismissing the claimant? In particular:-

      i. Did the respondent have a genuine belief in the claimant's misconduct?

      ii. Was such a belief based on reasonable grounds?

      iii. Following a reasonable investigation?

      iv. And following a reasonable procedure?

      v. Was dismissal within the range of reasonable responses open to a reasonable employer?

   c. If a fair procedure was not followed, what was the chance that the Claimant would have been dismissed in any event had a fair procedure been followed, such that any award of compensation should be reduced (***Polkey v AE Dayton Services Limited*** **[1987] ICR 142**)? If so, by how much should any award of compensation be reduced?

   d. Did the claimant cause or contribute to his own dismissal, and if so to what extent?

   e. Did the respondent unreasonably fail to comply with the ACAS Code, and if so, what percentage of uplift should be applied?

Procedure

3. This matter was listed for a two-day hearing to determine both liability and remedy. I was provided with a 523-page bundle, and witness statements from the claimant and Mr Mark Weller, the Managing Director of the respondent, both of whom gave evidence. Because of some changes to the bundle, the page numbering of the hard copy of the bundle did not correspond to the PDF numbering which meant that in the course of the hearing and in submissions I was often referred to two different sets of page numbers. I took time at the beginning of the hearing to read the witness statements and the evidence referred to in them, and then heard from Mr Weller on the afternoon of the first day of the hearing.

4. At the beginning of the second day of the hearing I indicated to the parties that it was looking likely that I would have to reserve my decision, and that we would have to do reconvene for a remedy hearing if the claimant was successful in his claim. I then heard from the claimant. At 2 PM, and with the claimant still under cross-examination, any hope that I could give an oral decision that day had totally disappeared, and the likelihood of getting to submissions was slim. I invited the party's views on how to deal with remedy, if that became necessary. Mr Kemp suggested that I adjourn to another day with a full day time estimate for oral submissions and an oral judgement followed by a remedy hearing. Miss Leonard urged me to direct the exchange of written submissions, with a date for a remedy hearing listed for half a day. She indicated that it was highly likely that if the claimant succeeded in his claim the parties would agree remedy. For reasons given in a brief oral decision, I directed that the parties exchange written submissions and replies to submissions, and adjourned the matter for remedy with time estimate half day on a date to be notified. I considered (by a very narrow margin) that this approach was more conducive to avoiding delay in reducing costs, and put neither party on an unequal footing with the other.

5. I set out directions in this regard in a Case Management Order sent to the parties on 28 July 2021.

6. Evidence concluded at 5:30 PM on the second day and I reserved my decision.

Facts

7. The claimant has worked in the telecoms sector for over 20 years and has considerable experience in large scale fibre networks.

8. In September 2013, the claimant, together with a Mr Gedney, co-founded the respondent company (which I will also refer to as NGA), a UK-based telecoms company specialising in high-speed connectivity and wholesale and bespoke fibre networks, and which installs infrastructure for fibre cable networks. The claimant and Mr Gedney invested over £650,000 of their own funds and initially each held a 50% shareholding. The claimant was the Technical Director, and Mr Gedney was CEO. Both were statutory directors. In 2014 a Mr Quin acquired a 3% shareholding in NGA which enabled their company to buy 55 Large telecoms street cabinets across the UK, with a view to supplying broadband based services. In 2015 Mr Gedney resigned as a director and no longer had any active role in the running of the company.

9. In 2017 NGA expanded its management team by recruiting four individuals on a part-time contract basis. It also sought further investment from other telecoms companies.

10. In July 2017, the UK government launched the National Digital Infrastructure Fund ("NDIF"), a scheme to invest in essential digital infrastructure in the UK. The government provided £400 million which was managed by two private sector fund managers approved by the UK government. One of these was Amber Fund Management Ltd ("Amber"), an international infrastructure specialist which provided asset management and investment advisory services in respect of assets across the globe.

11. In October 2017 Amber made a proposal to invest in NGA. One of the terms of this proposal, was that Amber had to match any funding provided by the government. This proposal followed a meeting between NGA and Amber Investment Committee, which included Mr Naqib, Investor Director, Mr Blaney, Founder and de facto Chair, and Mr Gregory, Director. NGA presented a business plan which included a summary of potential projects and opportunities, and which outlined the investment needed to achieve these aims. An exclusivity agreement was signed with Amber on 19 October 2017. An extensive due diligence process followed.

12. In November 2017, Amber introduced Mr Weller to NGA. Mr Weller has worked in the telecommunications industry since 1990, and has been involved in the building up, management and buying and selling of numerous telecoms companies. The claimant agreed that Mr Weller should join NGA as Managing Director in December 2017, and a contract was signed on 19 February 2018. Additionally, in January 2018, Mr Carter joined NGA on a consultancy basis as a Project/Operations Manager.

13. On 17 May 2018, Heads of Terms were signed between NDIF, Amber, NGA, the claimant as Founder and senior managers, and the Sellers (Mr Gedney and Mr Quin). Investment agreements were signed on 25 October 2018 whereby a new company, NGA Holdco, acquired NGA from the sellers for a purchase price of £4 million. The sellers, including the claimant, received £1.6 million and had £2 million in deferred consideration shares. The claimant was to have a shareholding in the company of 21% which made him the largest individual shareholder in the company. Mr Weller became Managing Director and an Executive Director on a permanent basis under a contract of employment. The claimant was Technical Director employed under a service agreement dated 21 September 2018 and had a place on the NGA Board as "Founder". Under the terms of the investment agreements Amber would have the right to appoint and remove two directors, as well as an observer, to the Board.

14. The business plan, supporting the investment in NGA, forecasted sales of around £3.7 million. The claimant would have been either responsible, or heavily involved, in producing these forecasts. Additionally, the investment agreements set out that Amber would make available to NGA a convertible loan facility of £7 million to fund capital expenditure, with a further £10 million available on request at Amber's discretion. The terms upon which loans could be drawn down were subject to covenants relating to financial performance of NGA.

15. At a Board meeting on 30 November 2018, it was agreed that the claimant would be made responsible for health and safety, and that health and safety and the risk register would be standing items at each Board meeting.

16. In December 2018 Mr Falconer and Mr Marshall were appointed to the Board, with Mr Marshall as Non-Executive Chairman. Mr Alexander later joined, in March 2019, as Finance Director. Mr Weller had known Mr Marshall for around 20 years and recommended him to Amber, and Mr Alexander had worked with Mr Marshall before. All were very experienced in the industry.

17. On 11 January 2019 Mr Weller emailed the claimant raising concerns which had arisen in a budget meeting the previous day. Mr Weller was concerned that Mr McCauley, the Sales Director, and Mr Carter, the Operations Manager, were "out of the loop" in a number of respects which Mr Weller set out in four bulleted points. A theme running among these points related to a concern that the claimant had not shared information with fellow workers. The claimant replied later that day suggesting that Mr Weller may wish to pick up the phone to discuss "*not really a very helpful mail (mostly bollocks as they have the info in 100 day plan, business plans, board papers and Jeff's numbers), but I need you and Simon to manage your bits that includes managing the people which isn't really being done at the moment. We also need to be clear on roles and responsibilities across the whole organisation and also communicate this out*". Mr Weller replied later that day setting out that he felt under pressure for numerous reasons including having "*an Investor who's going to be an ongoing nightmare to manage*". The claimant responded the following day with a lengthy email in which he told Mr Weller that he needed to manage people effectively, including the board and the investor directors on it, and that this was not happening. He sets out a number of other issues, such as roles and responsibilities, where he felt clarity was needed.

18. On 13 March 2019 Mr McCauley resigned as Sales Director. In his resignation letter he said "*When I joined, I was expecting us to have started the build projects straightaway, and I think this is now having an impact on our ability to sell and demonstrate capability. When everyone else seems to be building around us, we can only talk about what we can do*".

19. On 14 May 2019 the claimant took on the role of Sales Director, and this was announced to the Board. Around this time the claimant was concerned that Amber was both micromanaging NGA and also failing to permit NGA to draw down funds from the loan facility to fund strategic projects which he felt were key to winning sales. In his witness statement he described this as "*not in keeping with the spirit of the Investment Transaction*".

20. On 24 May 2019 the claimant met Mr Naqib for a discussion about regulatory matters, but his evidence was that discussion turned to Mr Weller's performance, and that at one point Mr Naqib asked "*Why shouldn't I sack Mark [Weller]?*" The claimant's evidence is that he offered the view that Mr Weller should not be sacked provided he started properly managing the team and the projects. I find that there was a conversation

between the two men and that Mr Weller's ability to manage the SMT was in all likelihood brought into question during this conversation. However, I accept Mr Weller's evidence that Mr Naqib did not bring any of this to his attention. In the light of the emails which were to ensue on 3 October 2019, in which Mr Naqib referred to the claimant's commitment to re-build confidence, it would be surprising if any conversation in May 2019 did not also cover the claimant's responsibility for being part of a functioning senior management team ("SMT").

21. By 1 August 2019 the respondent's financial position had become dire. Mr Weller emailed the claimant on that day to say that he had spoken to Mr Naqib, Investor Director and one of Amber's members on the NGA Board, who had told him that NGA would not be getting authority for any more spending. He commented "*we have lost the trust of the investors*" and said that Mr Marshall had been asked by Mr Naqib to speak to the Investment Board to give his view on the viability of the business. Mr Weller also mentioned the fact that he had to reassure Mr Naqib that he was committed to the business, as Mr Naqib had told Mr Marshall that he thought Mr Weller had "disengaged". Mr Weller concluded his email "*We are beyond the stage of reworking our strategy, they aren't interested it's now about when they turn the tap off vrs orders we can land in the next 6-8 weeks*". A key difficulty was that, under Mr MacCauley's and the claimant's tenure as Sales Director, there had not been any significant sales.

22. On 2 October 2019 Mr Weller emailed Mr Alexander, the Finance Director, setting out some actions that had followed from a meeting with Mr Marshall. Mr Weller referred to a "*perceived problem with Kenny [Roberts, the Claimant] and I'm under scrutiny to manage him properly Khalid [Naqib] doesn't think I'm "engaged" enough*". He also referred to Mr Marshall's perception that he was not "*pulling the management team together effectively*". Mr Weller felt he had a good handle on "*Opps and Finance but need to get better control of sales and Kenny".* He said that the claimant had been "*feeding back into Khalid ref me and my lack of managing him which is interesting and partially true. I will take Kenny aside for a "heart-to-heart" next week and see where we get to*".

23. Around this time a Mr Peck had been acting as Head of Commercial on a consultancy basis. Mr Peck was a capable and popular worker, and the claimant believed he should be offered direct employment. But the financial position of the respondent did not allow for this, as it was struggling to pay the salaries of those currently employed. The claimant discussed this with both Mr Weller and Mr Alexander and was told that Mr Peck could not be recruited to a permanent position.

24. On 3 October 2019 the claimant emailed Mr Naqib, Mr Marshall, Mr Alexander and Mr Weller proposing a job description for Mr Peck as Head of Commercial. Mr Naqib replied that he was confused as he had thought the board had previously discussed recruitment to a different role. Mr Weller emailed the claimant alone asking why he had not discussed the matter with Mr Alexander or himself before sending to Mr Naqib, and saying that it demonstrated how they were a disorganised SMT which was not to be trusted. Mr Alexander emailed Mr Weller, shortly afterwards, to say that this had not been discussed with him. Mr Alexander then emailed

Mr Weller and Mr Marshall again to say that he was not aware of this and said that this did not mean that the claimant had responsibility for bringing business cases to the Board. He said that he could not sign off potential investments that have not been modelled. Mr Weller emailed Mr Marshall and Mr Alexander to say that this was "*Yet again Kenny firing from the hip. Neither James or I have discussed this with Kenny and I'm not surprised at Khalid's response, yet more evidence of the disorganised SMT. The majority of the SMT is organised, focused and informed, Kenny is not and I will deal with him*". Mr Marshall responded, agreeing, and telling Mr Weller "*You have to have a serious chat with Kenny. I will get involved if needed*". Mr Weller replied to the claimant's original email and those who had been copied into it pointing out to Mr Naqib that "*this has not been discussed or agreed internally and as confirmed at the Board Meeting the only new role approved was for the Planner*".

25. Mr Naqib responded to all of the recipients. He addressed the claimant reminding him that he had committed to try and rebuild confidence when he had met the investment committee, which meant that the SMT was joined up and operating with due procedure. It was pointed out that members of the SMT were not to act unilaterally, and that it did not make sense for the claimant to be making the proposal about Mr Peck without SMT agreement and the support of the CEO and CFO, and within the strategy, budget and plans. It was pointed out that it was the CEO's role to make such proposals. He considered the proposal withdrawn and suggested that the SMT should discuss the matter and come to a joint decision. He suggested to Mr Weller that the SMT should intensify the amount and regularity of communication so that there were no gaps at the top of the organisation. He suggested regular meetings to ensure the SMT worked together, and that where there was disagreement that it could, exceptionally, be raised to the chair.

26. Mr Marshall responded to this email firmly endorsing Mr Naqib's comments and urging the SMT to work together as a team. Mr Naqib forwarded Mr Marshall's email to the claimant alone saying that he could not imagine that Mr Marshall's and his own response would come as a surprise and that order and common direction was needed rather than unilateral behaviour or surprises. He said he was available to discuss the matter. The claimant responded to Mr Naqib saying that this was not a surprise at it had been referred to in a CEO report and that a re-forecast for FTE headcount had been made. He went on "*So from my perspective this is following process as set out in the governance documentation for discussion with the remuneration board. If this wasn't the case Mark [Weller] and James [Alexander] needed to be clear, which would be via SMT meetings or communication which isn't happening*". Mr Naqib responded quoting directly from the CEO report and pointing out that it did not support the claimant's contention. He pointed out the re-forecasts were never presented to the Board or approved by it, and, even if it had been, any proposal to the remuneration committee needed the CFO's approval and come from the CEO. He said "*I appreciate this may seem frustrating if you don't feel you are getting the engagement from Mark and James that you feel you should, but you need to play your part as well. Acting unilaterally is not an option and only adds to the dysfunction. I have made the point now to Mark, as has Steve [Marshall], that he needs to seriously lift the level of comms and coordination on the SMT and manage the*

business accordingly. If this doesn't happen, I would like to know about it. Whatever others are doing, as the Founder of this business, you should set the example and be cooperative, collaborative and communicative".

27. Later in the day there was an SMT meeting in which the issues raised in the emails of that day were discussed. The SMT expressed frustration with the claimant "*trying to run a business within a business" interfering with Operations, and not putting a particular business case through Finance*".

28. On 7 October 2021 Mr Weller sent out notes and actions from the last SMT meeting to the SMT. The claimant replied saying that what was missing from the minutes was that he had highlighted three or four times that there needed to be scheduled SMT for three hours a week followed by a further one hour call on Friday with agreed actions and deliverables. He pointed out that there were two matters in there which were not correct. Mr Weller responded agreeing that communication is an issue at SMT, but pointed out that he spent 1.5 hours a week with Mr Carter and Mr Alexander face-to-face and on the phone discussing matters. He went on that the "*issue is the time I another SMT spend with you, this will be covered in the weekly SMT meetings*". Mr Weller forwarded this email to Mr Marshall saying that the claimant *"won't give up without putting up a fight and I will "manage" him as best as I can".*

29. The claimant forwarded his own email of 7 October 2019 to Mr Naqib and Mr Marshall making numbered points. He observed that Mr Weller hardly ever managed him directly, was involving himself in a product which he had no expertise or knowledge on which distracted him from running the business, that Mr Weller was on a drive to undermine him and the efforts of the business development team, that he was making promises to customers outside processes and governance and was taking unilateral decisions without consulting the SMT (by dispensing with a PR consultant on a retainer). He went on that "*the elephant in the room*" was the Operations team's systems, processes and contracts with third party contractors. He apologised for this sounding like "*telling tales outside of school*" but pointed out his commitment to be cooperative, collaborative and communicative.

30. On 10 October 2019 Mr Alexander attempted to arrange lunch with Mr Naqib, Mr Weller and Mr Carter as Mr Naqib understood that "*things are still not working with Kenny and I am prepared to do whatever I can to fix this*". At this point in time the whole of the SMT was finding it difficult to work with the claimant. This lunch meeting took place on 17 October 2019, and I find that members of the SMT bluntly put it that they could no longer work with the claimant and that they were prepared to leave the business. Mr Gregory of Amber, who was in this meeting, later confirmed that the SMT members articulated that they found it "*almost impossible to work with Kenny*".

31. On 18 October Mr Gregory and Mr Naqib met with the claimant. The claimant discussed his approach to securing new business, but the discussion turned to the need for the claimant to work effectively and collaboratively with the rest of the SMT. Amber focused on the need for the claimant to recognise Mr Weller's position and to allow Mr Carter to

deliver his operational role without interference from the claimant. The claimant recalls that he was told to "*wind your neck in*" and was told by Mr Gregory that he was not indispensible. I find that a message was delivered to him in these terms. Mr Weller later texted Mr Naqib to find how the meeting with the claimant went, and Mr Naqib replied "*a firm message delivered that he needs to stick to his role, accept your prerogative to manage the business and not interfere with Jeff or James. We set out the clear consequences if things don't change, and that he is not indispensable. Mike wants to hear out the issues on Tuesday with all sides round the table*".

32. I find that the claimant was warned in clear terms by the investors who were on the board of NGA that he needed to stick to his role and recognise Mr Weller's authority and not to interfere, especially with Mr Carter and Mr Alexander. I find that the claimant was warned by Amber, effectively, that if did not follow this warning his job was at risk. However, I do not find, if such is asserted, that this could in any way constitute a "formal warning", not least as it came from employees of Amber (albeit NGA Board members), rather than his managers at NGA. It was, nonetheless, a strong indication to the claimant to change his behaviour which was causing problems within the respondent organisation.

33. At around this time, but on a date that is not entirely clear from the evidence, there was an SMT meeting. By way of background Mr Carter, as the Operations Director, had responsibility for NGA's operations on the ground. At some point in late October 2019 a section 72 notice (an indication from a local authority of a potential hazard on the highway) was raised in relation to work carried out by a contractor working on NGA's behalf. The claimant discovered this, but rather than discuss the matter with Mr Carter, he printed photographs relating to the potential hazard and raised them with Mr Carter at the SMT meeting in front of the rest of the team. This caused Mr Carter great upset and embarrassment.

34. On 24 October 2019 the claimant emailed Mr Marshall and Mr Weller proposing that Mr Weller take ownership of health and safety reporting to the Board. Up to this point, while the claimant was responsible for reporting health and safety to the Board he had not raised any issues to it concerning health and safety. He also asked, if there were no objections, whether he could attend a large trade meeting on the day of the Board meeting the following week. He had had a meeting with Mr Weller earlier that day but had not mentioned this. By way of background, one of the issues that the Board meeting would be considering was progress, or lack of it, on a large sales opportunity known as the SSE NGD order.

35. On the morning of 25 October 2019 there was an email exchange between the claimant and Mr Weller. Mr Weller asked the claimant why he had not told him he was not intending to come to the Board meeting and wondered if it was to avoid embarrassment over the SSE NGD order. The claimant replied that the order was on track and he would be happy to come to the meeting to talk about it. He said he had given Mr Weller the health and safety remit so he could work with Mr Carter to resolve the section 72 issue, and had done so "*in the spirit of working together*". Mr Weller responded asking if this was in the spirit of working together why he had not asked to miss the Board meeting or talked about the health and

safety report when they had spoken the previous day. He concluded the email "*You are impossible*". The claimant responded that he did not have the meeting when they met and the health and safety point was common sense.

36. On 25 October 2019 Mr Weller had a telephone conversation with the claimant. Mr Weller was furious at what he perceived to have been an ambush on Mr Carter at the SMT meeting regarding the section 72 notice, not mentioning to Mr Weller that he wished to absent himself from the board meeting when the section 72 notice and the SSE NGD order needed to be discussed and then requesting this from the chairman. The claimant says that Mr Weller called him "*a fucking liar*", which Mr Weller denies. I find that it is more likely than not Mr Weller would have used such language in his anger and frustration. Mr Weller additionally told the claimant that he was resigning. The claimant apologised for his behaviour in this conversation and in subsequent texts (not in the bundle).

37. Mr Weller discussed his concerns with Mr Marshall by email on 25 October 2019. In one email Mr Marshall said, of the claimant's possible non-attendance at the board meeting "*I assumed when Kenny said he had agreed it with you - he had. Having said that, if the conference is a real sales opportunity I would have thought it's better he attends. You could have Kenny call in to cover sales".*

38. On 28 October 2019 Mr Weller was on leave, but emailed the claimant, telling him "*I've had enough of how you behave, you simply can't work with people. To decide you aren't attending the Board Meeting and then tell the chairman without discussing it with me is just another sign of how little respect you have for me and I can't work like this. I've spoken to Steven [Marshall] and he has asked me to fight on which I will do for the rest of the SMT and our staff but I need you to demonstrate that you can work with James, Jeff and I. I want you on the phone for your part of the SMT sales report at the BM*". He proposed a telephone call later that day. Mr Weller also emailed Mr Alexander and explained the difficulties he'd had with the claimant. He said "*I lost my temper with him and told him I was off (I'm not) which actually got an apology out of him and a number of texts promising to behave*". It was put to Mr Weller that he had lied about his intention to resign in order to extract an apology. I do not find this to be the case. I find that Mr Weller was extremely angry and frustrated with the claimant and his threat to resign was a genuine emotional reaction which changed later when he calmed down. I accept his evidence that he genuinely felt, at times, that leaving the business would be easier for him than having to deal with the claimant. This fits in with the evidence from Mr Gregory of Amber that the SMT had made it known earlier in October that it was finding it almost impossible to work with the claimant.

39. On 8 November 2019 the claimant was removed from the system which section 72 notice could be brought to respondent's attention.

40. On 5 December 2019 Mr Weller emailed the claimant and Mr Mackervoy (in the sales team) setting out a list of forecasted sales, and asking which were going to "*land as we can't afford another month of missed forecasts*". He mentioned that there was a "virtual" gun to the company's head. Mr Weller forwarded this email to Mr Marshall and Mr

Alexander on 6 January 2020 demonstrating the pressure that was being put on the claimant and Mr Mackervoy to take a more realistic approach to sales forecasts. Mr Weller was concerned, as he articulated in an email to Mr Marshall and Mr Alexander, that the claimant was unrealistically willing to defend his forecasts and not take Mr Weller's advice. He alluded to the possibility of *"another major SMT fallout and I walk*". Again, this contemporaneous expression of how Mr Weller was feeling at the time supports his account that his earlier threat to the claimant that he was going to resign was genuine.

41. The respondent's financial year is the calendar year, and by January 2020 the respondent was significantly behind in its plan for growth. Actual turnover was £385,036 compared to budgeted turnover of £4,018,116. The respondent had forecasted that it would have around 8 to 10 projects, when in actual fact it only had three. Amber was putting Mr Weller under significant pressure to reduce overheads. From its perspective as an investor Amber was simply putting in money to pay the rent and salaries rather than to grow the business.

42. Mr Weller returned to his frustrations with the claimant's inability to forecast accurately on a monthly basis on 22 January 2020 in an email to Mr Alexander. Mr Weller emailed Mr Marshall on 24 January 2020, again outlining his frustrations with the claimant not producing a clear monthly sale reports and asking Mr Marshall to speak to the claimant to explain what he should be producing. Mr Weller said "*he simply doesn't understand or more likely won't accept that he needs to be answerable to sales win delivery on a monthly basis given his woeful performance over the last 12 months*".

43. In early 2020 Mr Terry took over from Mr Naqib as a replacement Amber Investor Director on the NGD board. On 7 February 2020 Mr Weller emailed Mr Alexander to discuss a meeting he had had that morning with Mr Terry. In this email Mr Weller says of Mr Terry "*He arrived pretty quickly on the Kenny problem, how difficult he is and where we are with him now. Ben [Terry] picked up a passive aggressive attitude from Kenny at the SMT and following a fairly lengthy run through the issues we have had he was able to sum up the "Kenny type" very accurately. I was open in describing Kenny being the biggest obstacle to success for us as a management team on the basis we are close to landing some significant sales this month and next……His parting comment was that unless we can find a project for Kenny [to] work on alone we have a problem that needs to be sorted".*

44. On 12 February 2020 the claimant emailed Mr Terry directly forwarding a positive email from a company that the claimant had worked with on a project. Mr Terry forwarded the email to Mr Weller saying "*Looping you in… Ensuring all on the same page…*". Mr Weller forwarded this email to Mr Alexander observing "*Aw bless, Kenny feeling a little threatened by Jeff's glowing reference from SSE has gone and got his own. Worryingly Ben is poking at a lack of comms across the SMT".* Mr Alexander responded "*Lack of comms between who? We are all talking, inc on MLL. Sometimes I think this is more like plotting in the House of Commons than a start-up! It's just wearing*".

45. On 18 February 2020 the claimant had a meeting with Cross Channel Fibre (CCF), which he was hoping Mr Terry could attend. The claimant mistakenly believed he had informed Mr Terry of this meeting and Mr Terry did not attend. On 24 February 2020 Mr Terry emailed the claimant asking for an update on the project that CCF were involved in. The claimant responded that it was on the agenda for the following day's meeting. Mr Terry responded to say that he could not attend the following day's meeting. These emails had been CCed to Mr Weller and to a Mr Cochrane of Amber. The claimant responded to this email, removing Mr Weller from the reply, and adding Mr Gregory, another Amber director, and Mr Blaney the Chair of Amber and Mr Terry's boss,. The claimant gave a very brief update *"which you would have discussed in more detail if you had attended the meeting last Tuesday with Steve Mackervoy to represent Amber and also further the discussion with their CEO Mike Cunningham (over from Canada) and Fergus (Sales VP) on the HS1 route (£9 Mill TCV) as discussed the previous week (included in sales report). Rather than sitting in the NGA offices discussing a power issue affecting two broadband customers (as below) the risk of which should have been managed last October (as attached) but was disregarded by Jeff and Mark (so I don't have much sympathy for their inconvenience last week). The net result is after the hard work put in to get this key customer confidence in Amber's commitment to invest in the strategic projects is diminished due to a focus on a small operational issue which are BAU things for a telecoms company* ". He went on to say that the sales manager was disappointed at the lack of support and he attached the resignation letter from the previous Sales Director Mr McCauley to highlight the impact of lack of support. He addressed Mr Blaney and Mr Gregory saying that he was hopeful as the seller with Mr Terry coming on board that Amber would step up to its investment, but that this clearly was not the case and "*we are back to the micromanagement focus that has damaged this business as well as a number of the other NDIF investments… From a seller's perspective Amber's commitment to the investment needs to be confirmed*".

46. On 26 February is in 20 Mr Weller emailed Mr Marshall to tell him that he'd received a phone call at 7:20 AM from an "*agitated and angry Ben*" about email the claimant had sent. Mr Weller observed "*it sounds very much like Kenny has effectively written his "resignation" letter and I'm waiting for a proper catch up with Ben later. It's going to make Friday's meeting interesting!"* Mr Marshall responded "*[The] guy can't help himself"*. Mr Weller responded in one email chain "*It's bizarre but nothing surprised me with him anymore, let's get him out or off now before we land these big deals which are looking very real now*". In another chain he responded "*it's our chance to remove or move him, I'm assuming that this will have pushed Hugh [Blaney] over the edge. Ben has had an interesting idea to move Kenny into the role of Regulatory PIA expert across the Amber investments as a compromise. I don't care as long as he's out of our hair. I'll send over the slides we put together for the Friday meeting. One of the slides addresses the issue Khalid [Naqib] had with removing Kenny, IT, Regulatory and impact on customers etc. as far as I and the team are concerned Kenny going would be net good for everyone but I need Ben to understand this*". Mr Marshall responded that he agreed but this was a matter for discussion. He said "*You will need to sense the temperature and better if it's their idea - they have shareholder issues to take into*

account". Mr Weller responded "*We have, and will continue to play this low key doing the best we can to manage Kenny waiting for him to shoot himself which he's just done*".

47. On 27 February 2020 Mr Terry emailed the claimant thanking him for meeting face-to-face the previous day. He hoped that communication and collaboration would continue to improve. He mentioned some emails the claimant had sent him and commented that he could not find any mail relating to CCF or an invite to the CCF meeting. He asked the claimant to check his sent items and to forward them to him.

48. At the Board Meeting of 27 February 2020 there was a request for a Loan Note Drawdown. There was a vote and a majority voted for a drawdown request of £750,000. At this point in time, with revenue targets less than 10% of what had been forecast, the respondent was in breach of its warranties in relation to Amber's investment and the drawdown conditions in respect of the convertible loan facility were not met.

49. On 28 February 2020 the claimant wrote to Mr Weller and Mr Alexander alarmed at a proposal to take legal action against a valued customer. He explained that their persistent non-payment was due to an error in a branch sort code in a remittance which the Finance Team should have spotted and resolved. Mr Weller forwarded this email to Mr Alexander, describing it is inappropriate as it "slagged off" the finance team and Mr Weller himself. Mr Weller wrote that the finance team had not put the wrong details on an invoice. He said *"I think this deserves the second written warning, thoughts?*"

50. On 1 March 2020 Mr Weller wrote to Mr Terry CCing Mr Gregory, commenting on a positive meeting with Mr Gregory. He said "*as agreed I will be issuing Kenny with a written warning (following legal advice from your lawyers) relating to the email below on the basis that he was instructed, and agreed, that he would not send any emails direct to Amber and that any such correspondence would come through me*". Mr Terry thanked him for the update and welcomed further discussion.

51. On 2 March 2020 Mr Terry emailed the claimant saying that at their face-to-face meeting on 27 February 2020 the claimant had categorically stated to him that he had sent an email consisting of background and detail of the CCF meeting, and an invite to join the CCF meeting. The claimant had used these alleged emails to justify his disappointment at Mr Terry's non-appearance at the CCF meeting, and his subsequent email of 25 February 2020. Mr Terry raised his concern that the claimant was now changing his story to say that the background email was in fact a conversation which the claimant would have to "*get witness statements from people in the room*" to confirm. Mr Terry further mentioned that the claimant claimed that the meeting invite came from the customer. Mr Terry was certain he had not received an invite from anyone. He went on, "*I am labouring this point as this is another clear example of where, even now, communications are still not clear, straightforward, accurate or factual. We must jointly improve upon this.* ***Please do not contact the customer to collate "evidence"*** *as I agree that "the fallout" will damage the relationship with CCF. I propose that we draw a line under our f2f*

conversation from last week, learn from this situation and move forward together".

52. Mr Terry forwarded his email to Mr Weller later that day saying *"From this point forward I will not be communicating directly with Kenny without copying you into everything*".

53. In early March it was realised that the claimant still retained administration rights into the system (known as Symology) that notifies section 72 incidents from councils. Mr Terry became involved in this process and suggested that the Operations Manager Mr Carter sit down with the claimant to sort the issue out. Mr Carter responded that he did not wish to sit in a room with the claimant and be lectured about something he managed for 15 years "*while he continues to undermine me. Sorry if that's blunt but that's where I stand*". In a further email to Mr Weller and Mr Carter, Mr Terry mentioned that he had asked the claimant why he had not forwarded to Mr Carter photos of faulty equipment he had received the previous week and which he produced at an SMT meeting. The claimant's response was "*I shouldn't have to, Jeff's the Ops Director*". Mr Terry observed that the claimant may have realised that he had overstepped the mark as he sent Mr Terry nine emails concerning a Synology "audit trail".

54. Also in early March 2020 there were further developments in respect of the drawdown request. The majority vote was for a £750,000 drawdown, but subsequently a reduced drawdown of £500,000 was agreed. When draft minutes of the February board meeting were produced, the claimant pressed for revisions to be made to what he saw as an inaccurate record of the meeting.

55. The claimant took further issue with minutes of the following month's board meeting in a series of emails on 30 April 2020. Mr Alexander at one point wrote "*Why don't you agree with Ben on the right version. Feel free to take over the editorship of the March minutes*". Mr Terry later felt the need to make clear that he would never retrospectively add anything to any board minutes which had not been discussed at the meeting. He also was "*strongly of the view that the NGA team should be focused on activities which move the needle for the business and not long debates over minutes every month*".

56. On 29 April 2020 Mr Weller began email correspondence with the claimant on the subject of the SSE NGD project and a customer called Colt. The claimant responded later that day in detail about technical aspects of the SSE NGD project and Colt, made some observations about Mr Carter damaging the relationship with customers and expressed disappointment that the lack of trust Mr Weller appeared to have in him and Mr Mackervoy. Mr Weller replied on 1 May 2020 in some technical depth and concluded his email by pointing out that the company had zero credibility with its investors and was losing the credibility with its chairman as it consistently failed to deliver on its forecasts. He pointed out that the only part of the business that consistently delivered and had credibility was Operations, which Mr Carter was in charge of, and that he could not understand why the claimant was constantly "sniping" at him in a "hugely damaging" way. In his response later that day the claimant denied sniping at Mr Carter. He made observations about how things should be properly

managed and reported on at SMT and board level and that there was proper accountability across the business and that decisions were made by the appropriate people in the appropriate way after proper discussion.

57. On 4 May 2020 Mr Weller emailed Mr Alexander, who had been copied into the above correspondence to describe the claimant's email as "*a masterclass of not answering questions I asked*". Mr Alexander replied the same day saying that he was angry at the claimant's emails and said "*it's like there are 17 souls inside a mini submarine stuck at the bottom of the Marianas trench. 16 of them are desperately putting their shoulders to the wheel in a collective effort to get the submarine heading up 5km to the surface. The other one is constantly trying to grab the controls and drill the submarine further into the floor of the trench…*". Mr Weller replied saying he was planning on talking to Mr Marshall about his *"plan to move Kenny out of sales into a "zombie" role as I've had enough*".

58. Mr Weller did in fact email Mr Marshall later that day pointing out that in the last 15 months, 12 of which the claimant had been in charge of sales, the respondent had achieved revenue of £500,000 against a target of £4.35 million. He pointed out that everyone was aware of overpromising and under-delivering on forecasts and he said that the claimant did not have relationships with the respondent's customers to be able to achieve sales himself. He said "*As far as I'm concerned we need to get him out of the role*". Mr Weller proposed a move back to the Technical Director role and said that he needed to ensure that the claimant is far enough away from Mr Carter as he is still "sniping" when he gets the chance. Mr Marshall responded asking "*Why not redundancy or furlough*?" Mr Weller's response was that that could be worked on after the claimant has moved but the priority was to get sales moving and *"put him in a box where he can't interfere*". Mr Marshall responded that Amber and board approval would be needed before the claimant could be moved and that clarity was needed on what was wanted in the medium to long term. Mr Weller responded that he had scheduled a call with the employment lawyer the following Wednesday for Mr Terry and him to run through the two options and then for there to be a further call with Mr Gregory, Mr Marshall and Mr Terry. He concluded "*I know what we need short term, Kenny away from sales and medium long term Kenny out of the business*".

59. On 5 May 2020 Mr Terry emailed the finance director Mr Alexander about an issue which had arisen between him and the claimant over a re-forecast in relation to financial year 2020. Mr Terry supported Mr Alexander and suggested that the claimant did not understand what Mr Alexander was doing. Mr Alexander responded *"I fear we are dealing with nonrational individual who is picking fights with everyone to mask the fact that we have only landed one £60k TCV contract since 1 January 2020*". He went on to observe that the claimant was fighting with Mr Terry over Board minutes, with Mr Weller, himself and Mr Carter over cabinets, with Mr Carter over fibre maintenance (which, Mr Alexander felt the claimant did nothing about when it was his responsibility) with the auditors over valuations in the accounts, and now once again with Mr Alexander over the re-forecast. Mr Alexander observed the claimant had fought tooth and nail over Sales Pipeline and when projects will be signed, was fighting with Mr Peck over the SSE contract and that there were differences of opinion with the claimant nobody even bothered raising because they knew that it

would set him off. Mr Alexander speculated that from the claimant's perspective the business was his "train set" and the debt facility his "piggy bank". He observed how vast sums of money had been spent with very little to show for it. He observed "*it is all everybody else conspiring against him, as opposed to normal disciplined, rational business management. I'm not sure where this is going to end up, but we can't keep going like this for many more months*". Mr Terry responded "*Excellent insight*".

60. On 11 May 2020 Mr Weller emailed Mr Marshall and Mr Terry formally proposing moving the claimant from the role of Sales Director to manage a project known as the EAD replacement project. Mr Mackervoy was to take charge of sales and step up into the role of Sales Director in three months if he delivered his business plan.

61. On 12 May 2020 the claimant and Mr Weller corresponded by email about proposed SMT meeting agenda items concerning lines of reporting and job descriptions and functional team structures. Mr Weller could not quite understand what the claimant might have been driving at and was candid in his evidence to the tribunal that he did not trust him. He mused to Mr Alexander in an email as to whether the claimant was making a veiled threat or whether Mr Weller himself was just paranoid.

62. On 1 June 2020 the claimant emailed Mr Weller to tell him he needed to get roles and responsibilities clarified so that everyone was clear about what they were supposed to be doing, and people were not trying to get other people to do their work for them or push the blame onto other people when they have not been managed. Mr Weller asked the claimant to explain exactly how roles and responsibilities were not clear, and the claimant responded that this highlighted that Mr Weller was not clear on who was responsible for key areas. Mr Weller pressed the claimant further, on 2 June 2020, on what exactly the claimant had an issue with. The claimant responded that the issue, in general, was who was "*supposed to be doing what and taking responsibility for their own areas of responsibility*". He believed some members of the SMT were prioritising their own teams and personal agendas rather than the priorities of the company, which meant that some projects were half finished or faltering. Mr Weller asked which projects were faltering and what issues there were with delivery. The claimant suggested Mr Weller review projects and delivery Mr Carter as this would give them an idea. On sales he said the board sales update would speak for itself.

63. The claimant's evidence to the tribunal was that he felt that Mr Carter was chasing him for information that he already knew in order to "score points". He believed that Mr Weller had organised "*a working party to push me out of the organisation*" and that Mr Carter was part of that group. Ms Leonard puts to him that he "*had no trust and confidence in Mr Weller, Mr Alexander and Mr Carter*". His response was that he believed "*they were working on a pointscoring basis possibly to push me out of the business*. *Everything escalated to major disagreement".* Ms Leonard put to the claimant that the employment relationship was *"well and truly fractured*" and that he had lost trust and confidence in the respondent. He denied that he had lost trust and confidence and said that there may have been some way to have found a route forward. It is difficult to square the claimant's belief that a number of the SMT had organised a working party

to remove him from the company with the claimant's saying that he maintains trust and confidence in the company. It is also difficult to be certain what was the claimant's belief at the time and what is an after-the-event rationalisation. However, I do find that at this point in time the relationship, on both sides, was strained almost to breaking point.

64. On 3 June 2020 there was an outage on the respondent's website. The matter was resolved by EIT, the respondent's IT consultants, but some issues arose about the domain. Daniel, the IT consultant dealing with the issue, informed the respondent that the domain was important, as attached to it are records that deal with the direction of emails and website requests to the correct servers. If someone wanted to be malicious those records could be adjusted, and emails or website requests could be redirected. He also mentioned that in January he himself had asked for access to the domain from the claimant to make some changes, but instead of giving him access the claimant asked what the changes were and made those changes himself.

65. On 6 June Mr Weller asked Daniel from EIT who hosted and owned the domain for the website. Later that day Mr Weller emailed Mr Alexander to say that it could not be certain who owned the website, that the claimant had confirmed it was owned by the company during due diligence, and that there was a need to get the claimant to confirm this again. He said that Mr Terry had confirmed that no meetings should go ahead with the claimant until it was understood whether he controlled the domain, and if he did, he would be asked to give the passwords to the IT consultants.

66. On Monday 8 June 2020 Mr Weller emailed the claimant informing him that the IT consultants had confirmed that they did not have the domain UN and password. He pointed out that this it was a significant risk for the business for one person to have sole access to the domain UN and password. He indicated that he was under the impression that the claimant had handed this over to Mr Alexander and the IT consultants at the start of the year. Mr Weller said "*Could you please provide the NGA domain UN and password to both James and to Daniel at EIT asap. EIT have also confirmed that they cannot confirm who owns the NGA domain as the ownership is privacy protected, can you confirm thatnextgenaccess.com is owned by NGA Ltd*".

67. Later that day the claimant replied "*It will be resolved this week*".

68. On 9 June 2020, Mr Alexander contacted the website host provider who confirmed that the domain was registered in the claimant's name.

69. On Wednesday, 10 June 2020 Mr Weller emailed the claimant and asked him to update him on how he was getting on with the change of ownership of the domain. The claimant did not respond.

70. Mr Alexander contacted the website host provider again on 12 June 2020 and they confirmed they had not received a request to change the domain account. He enquired how he could have the domain registered in the respondent's name.

71. Mr Weller emailed the claimant again on Friday 12 June 2020 asking him to confirm that he will have transferred ownership of the NGA domain by the end of the day as he had confirmed earlier in the week.

72. At 5:10 PM on 12 June 2020 the claimant responded to Mr Weller. He said that he had contacted the website hosting company who had advised that there was not a safe way to provide access to a third party or an inexperienced party without risk to the business. He went on to mention security, invoices for the domain and how they had been paid and recommended that an audit would need to be made to confirm that they had been paid. He then mentioned the problems with the website. He then asked whether Mr Weller wanted to run through the roles and responsibilities around these issues. He suggested the following Thursday or Friday.

73. Mr Weller emailed the claimant some 20 minutes later saying that this was very disappointing, but he assumed that the domain was still in the claimant's name and that he was not prepared to transfer it the ownership of NGA Ltd.

74. On 13 June 2020 Mr Weller corresponded with Mr Marshall by email about the issue, explaining that the claimant still owned the domain and was the only person with passwords for the domain, and set out the developments over the past week. Reference was made to a telephone call at 9 AM on 15 June 2020 with Mr Weller, Mr Alexander, Mr Terry, Mr Marshall and a lawyer. Mr Weller also consulted the respondent's General Counsel.

75. On Monday, 15 June 2020 at 10:57 AM Mr Weller emailed the claimant. He set out the claimant's confirmation on 8 June 2020 that the issue of domain ownership and admin password would be resolved last week, and that it had not. He explained that this had been a simple lawful reasonable instruction coming from him as CEO. He referred to the security measures that the claimant had highlighted in his email of 12 June 2020 and explained that the respondent had appropriate measures to address the claimant's concerns, and that the claimant was not responsible for management of the respondents IT, as this was Mr Alexander's role. He set out that it was not for the claimant to make unilateral decisions which went against the company's decisions. He outlined his awareness of security aspects of managing a company's domain and that the password is never held by one person. He set out that this represented a breach of contract relating to the sale of the business. He set out the following as reasonable lawful instructions: -

> *"1. Transfer the domain ownership; and*
>
> *2. Give admin access to James [Alexander]. To be clear, I am not asking you to hand over the "Control Panel credentials" (password) to our "developer team" I have asked you to hand this over to James, who as noted above is responsible for IT.*
>
> *In both instances you must confirm by 2 PM to myself and James (with evidence in support) that this has been done. So there is no confusion, you must take the following steps:*

1. Give James Alexander the account number

2. Give James Alexander the email address that the account is registered to.

3. Give James Alexander the password to login to 1&1 IONOS account.

You must prioritise the above over any other task. Failure to comply may result in further action. I trust this won't be necessary and you will now behave appropriately and as instructed."

76. The claimant emailed Mr Weller at 6:25 PM on 15 June 2020. He attached invoices showing who paid for the domain, and contact records to avoid confusion around ownership. He suggested how login could be done and set out a multifactor authentication process which he outlined. He further proposed, that as a director of the company responsible to the board for IT security he would like to have a formalised handover of responsibility to Mr Alexander as mishandling access was a material risk to the operation of the company.

77. Mr Alexander forwarded the claimant's email to Daniel from EIT and asked how much of it was true. He asked various other questions about multifactor authentication, passwords, best practice around business accounts, password protocol and other matters. Mr Alexander in an email to Mr Weller on 15 June 2020 suggested that the claimant was "*deliberately ignoring the distinction between registrant and ownership to try and retain the password. He is doing everything possible to discourage us from going through with moving the access from him to me*".

78. On 16 June 2020 the domain still had not been transferred to the respondent. Mr Alexander contacted the website hosting company and requested that the domain be transferred to the respondent and for a password to be provided. It was transferred, passwords were provided as well as login details without the numerous security measures the claimant had put forward the previous day and week.

79. On 16 June Mr Weller emailed an invitation to the claimant to attend a disciplinary hearing the following day at 9:30 AM. The invitation stated as follows:-

The reason for the disciplinary meeting is to discuss the recent incident whereby you have failed to transfer the Company domain and password to James Alexander. This failing is in breach of the agreement for the purchase of your shares in the Company by Amber Infrastructure Ltd.

When this situation was discovered last week, you were asked by email dated 8 June 2020 to rectify this, to share the password for the domain and to confirm who owns the domain (nextgenaccess.com). You confirmed in your response of the same day that this would be actioned, however, you failed to do so.

You were given a further opportunity to rectify this matter by email dated 15 June 2020. Once again, you ignored the lawful and

reasonable instruction to action this change and share the necessary information.

Your behaviour amounts to serious insubordination and is in breach of clause 4.1.3 of your Service Agreement dated 25 October 2018 ("Service Agreement") It has also led to a lack of trust and confidence that you are behaving in best interests of the company.

We will discuss the incidents at the hearing, no decision will be made before the hearing, however, if your reply is not considered satisfactory then the formal stages of the disciplinary process will be applied and you may receive a warning or sanction up to Summary dismissal due to the serious nature of the misconduct.

The claimant was told that he would have the right to appeal any action taken as a result of the hearing to Mr Marshall.

80. The claimant responded later the same day explaining that it was unreasonable to schedule a hearing at such short notice. He explained that he wished to be accompanied to any hearing that did take place by the respondent's General Counsel. He suggested convening the meeting on Friday or the following Monday.

81. Also, on 16 June 2020 the claimant made numerous requests for a copy of the draft accounts be sent to him for review. Mr Alexander was reluctant to provide them as they were unfinished.

82. On 17 June 2020 at 12:37 PM the claimant's solicitors emailed a letter addressed to Mr Weller, but also sent to Mr Carter. The letter set out warranties in respect of the investment agreement of 25th of October 2018. It alleged that Mr Weller was in breach of a warranty given that he had been involved in pre-litigation discussions in relation to a matter which was alleged to be proceeding in the High Court.

83. The claimant solicitors also emailed the respondent in respect of the disciplinary hearing. They explained that the claimant would not be attending the disciplinary hearing as there was no disciplinary issue, and any allegation was groundless and refuted and based on a false characterisation of the claimant's conduct. They suggested that the claimant did not refuse or fail to transfer passwords or access permissions for the domain but set out in detail how the transfer should be affected and how other individuals needed to act. They put forward that the claimant as a director, major shareholder and technical director responsible for information security raised appropriate concerns about transferring access permissions to a third party. His offers to discuss concerns were not taken up, and as such he was acting within his duties as a director. They suggested that the claimant had concerns about transferring access permissions to Mr Alexander who has no knowledge or background in IT. They further suggested that any concerns could have been discussed at an FLT meeting on 16 June 2020 which was postponed following the claimant's request for draft company accounts. They set out that the respondent had no authority to make the demands that it did of the claimant, and he justifiably considers that those demands were not in the best interests of the company. They suggest the disciplinary allegations

are untenable and "*bear the characteristics of the scenario manufactured for an ulterior purpose*".

84. The disciplinary hearing went ahead chaired by Mr Weller. He made reference to the solicitors' letter which made clear that the claimant would not be attending any disciplinary meeting. He agreed to take the solicitors' letter as written submissions relating to the issues.

85. Mr Weller set out a history of the domain/password incident. He concluded that the claimant was not seeking to be helpful and that he delayed or ignored Mr Weller's emails and reasonable request and provided obtuse replies when he did respond. There was no justification in not providing the information requested within the timelines given why he could not have provided an explanation why he could not have done this sooner. He suggested that the way the claimant had acted demonstrated a lack of respect to Mr Weller in his role of CEO and was "*another example of him displaying a difficult and obstructive approach to myself and other members of the SMT*". He did not accept that he had pressurised the claimant in any way.

86. Mr Weller went on to outline that this incident was reflective of the claimant's deteriorating relationship with other SMT members, for example Mr Carter and Mr Alexander, and that it had been difficult to work with him. He set out the deteriorating relationships whereby Mr Alexander and Mr Carter offered their resignations citing the claimant's conduct and behaviour towards them as their reason. Mr Weller set out his own attempts to engage with the claimant regarding his behaviour. He mentioned the proposal to Mr Naqib for the employment of Mr Peck in October 2019, which led to instruction not to communicate with the board except through himself or Mr Alexander. He set out that the claimant had ignored this instruction and gave the example of the email of the 25 February 2019 to Mr Terry, Mr Blaney and Mr Gregory. Mr Weller mentioned the claimant informing him he could not attend the October 2019 board meeting. He further mentioned how Amber directors had had a meeting with him to discuss their concerns with his behaviour and lack of sales. He suggested that despite concerns being raised with the claimant verbally and in emails, he had ignored them and sought to interfere in areas the business that were not his responsibility, which undermined others in their role. Mr Weller concluded that the claimant could not remain as an employee as he posed a significant risk to the business by his conduct and behaviour which had an impact on others and exposed the business. He explained that the recent incident was the final straw for him and demonstrated the claimant's unwillingness to engage with him. He set out that he did not consider an alternative dismissal given the way the claimant had reacted to previous warnings, where he improved for a while but reverted to previous conduct and behaviour. He set out that the appropriate sanction was dismissal on notice.

87. On 18 June 2020 a dismissal letter was sent by first class post and email by Mr Weller. The letter explains that the claimant's employment was terminated with immediate effect. Mr Weller wrote that the claimant's "*conduct and behaviour over the previous months, despite various warnings, has caused an irretrievable breakdown in the relationship between you and the company. You have demonstrated you are not*

willing to abide by lawful and reasonable instructions; you seek to undermine other members of the SMT, not just me, and you have failed to cooperate with the SMT, as demonstrated with the domain and admin password, which was the final act. Your behaviour as an SMT member is wholly inappropriate and means you must leave the company".

88. Mr Weller set out events leading up to the disciplinary meeting, and then went into the issues. He set out a narrative of the domain/password issue, referred to the deterioration of his behaviour in October 2019 necessitating Amber intervening, suggested he was an obstructive and divisive member of SMT working against the company/SMT rather than with it/us. He wrote that the password/domain issue was the final act in a series of events going back many months outlined within the minutes. He wrote that the claimant's conduct has led to Mr Carter and Mr Alexander threatening to leave the company, and that he could not take the risk any further with the claimant's refusal to adapt and cooperate. He wrote that the claimant posed a real risk to the effective functioning of the company and the SMT. He set out that he did not consider that a lesser sanction was appropriate based on the claimant's failure to respond positively in the past the previous warnings, and that he believed that the claimant was not capable or willing to address concerns.

89. Mr Weller set out a right of appeal to Mr Marshall, and set out the practicalities of the termination arrangements. He set out that the directors have resolved to remove the claimant as director from the company. The claimant did not exercise his right of appeal.

90. Notice of the claimant's removal as director of the respondent was sent to him on 18 June 2020. It was signed by Mr Marshall, Mr Weller, Mr Alexander, Mr Falconer, Mr Hogg, and Mr Terry. A draft of this removal bearing the date of 16 June 2020 appeared in the bundle.

The law

91. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant's dismissal, and that this is a potentially fair reason under section 98(2) ERA 1996. In this context, a reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*" (***Abernethy v Mott, Hay & Anderson*** **[1974] ICR 323**).

92. Potentially fair reasons include a reason relating to conduct (section 98(2)(b)) and "*Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*" (section 98(1)(b) "SOSR").

93. The approach to fairness of dismissal is governed by section 98(4) ERA, which provides: -

> *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
>
> > *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the*

employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

94. Where the reason for the dismissal is said to be misconduct, the approach to fairness is the test in ***British Home Stores v Burchell*** **[1980] ICR 303** set out in the issues at paragraph 2d) above. This approach is suitable to an SOSR dismissal where it is alleged that trust and confidence broke down (***Perkin v St George's Healthcare NHS Trust*** **[2006] ICR 617**).

95. In considering a dismissal that is disciplinary in nature, the tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures.

96. Exceptionally, a dismissal might be considered fair in the absence of any fair procedure (***Gallacher v Abellio Scotrail Ltd*** **UKEATS/0027/19**, an SOSR case, but the principle can apply to a conduct related dismissal). Where the following of a disciplinary procedure would have been pointless or futile, the failure to follow it will not render the dismissal necessarily unfair (***Jefferson (Cmmercial) LLP v Westgate*** **UKEAT/0128/12** and ***Moore v Phoenix Production Development Limited*** **UKEAT/0070/20)**.

97. Under the principal in ***Polkey v AE Dayton Services Ltd*** **[1987] IRLR 503** where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.

98. The burden is on the employer to show what might have happened had a fair procedure been followed, but the tribunal is to take account of all the evidence in making an assessment. Sometimes reconstruction of what might have been is so uncertain or speculative that no sensible prediction can be made (***Software 2000 v Andrews*** **[2007] IRLR 569** and ***King v Eaton (No 2)*** **[1998] IRLR 686**.)

99. Section 123(6) ERA provides that the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable where it finds that the dismissal was to an extent caused or contributed to by any action of the employee. This involves a finding that there was conduct "*deserving of blame*" by the employee ***Sanha v Facilicom Cleaning Services Ltd*** **UKEAT/0250/18**.

Conclusions

Reason(s) for dismissal and whether it/they are potentially fair

100. The claimant in his witness statement sets out that he believed that the respondent dismissed him because he challenged certain members of the SMT about aspects of their roles that he considered they were not effectively doing, and that he challenged Amber in relation to the management of the investment. He further said that the concerns he

raised were valid and reasonable and believes he was the "fall guy" for the failings of others.

101. The respondent's stated reason is perhaps best summarised in the second paragraph of Mr Weller's dismissal letter of 18 June 2020:-

> *Your conduct and behaviour over the previous months, despite various warnings, has caused an irretrievable breakdown in the relationship between you and the Company. You have demonstrated you are not willing to abide by lawful and reasonable instructions; you seek to undermine other members of the SMT, not just me, and you have failed to cooperate with the SMT, as demonstrated with the domain and admin password, which was the final act. Your behaviour as an SMT member is wholly inappropriate and means you must leave the Company.*

102. I find that the beliefs articulated in the dismissal letter by Mr Weller are what caused him to dismiss the claimant (see *Abernethy*). Over the course of the claimant's employment there had been a number of incidents which cumulatively caused the respondent to believe that there had been an irretrievable breakdown in the relationship between them and the claimant. Most of these are referred to in the disciplinary hearing and were operating on Mr Weller's mind when he took the decision to dismiss:

a. On 3 of October 2019 he had gone straight to the board having failed to secure agreement about the recruitment of Mr Peck.

b. On 10 October 2019 the lunch was organised with Amber as Mr Carter and Mr Alexander were prepared to resign rather than work with the claimant.

c. On 18 October 2019 the claimant was given an unequivocal warning from Amber about his conduct.

d. At the end of October 2019 the respondent reasonably believed that the claimant had "ambushed" Mr Carter about a section 72 notice in an attempt to undermine and humiliate him.

e. On 25 October 2019 Mr Weller believed that the claimant was seeking to absent himself from a board meeting when he was under it pressure to explain lack of sales and the section 72 issue.

f. On 28 October 2019 Mr Weller articulated that it was clear that the claimant could not work with him and others in the SMT.

g. On 5 December 2019 Mr Weller refers to another SMT fallout and threats that people would leave.

h. On 7 February 2020 Mr Terry, new in his role, picked up that there were difficulties with the claimant, and he was described as the biggest obstacle to success for the respondent.

i. On 25 February 2020 the claimant made unsubstantiated allegations that Mr Terry had failed to attend a meeting he had

been invited to, criticised Mr Terry and Amber in inappropriate terms CCing the email to Mr Gregory and Mr Blaney, the chair.

j. On 28 February 2020 he "slagged off" the finance team and Mr Weller over the issue of legal proceedings against a customer.

k. On 29 April 2020 Mr Carter set out that he was constantly being undermined by the claimant

l. On 4 May 2020 Mr Alexander described the claimant's lone attempts to sabotage the respondents attempts to fight its way out of difficulty using a submarine metaphor.

m. On 5 May 2020 Mr Alexander described how the claimant was constantly picking fights with most of the members of the senior management team and Amber Board members (an observation Mr Terry endorsed).

n. On 12 May 2020 Mr Weller felt paranoid in his dealings with the claimant, indicating a lack of trust in him.

o. Finally, the respondent believed the claimant failed to cooperate on the issue of the domain and password.

103. Mr Kemp challenged the respondent's reason for dismissal on the basis of 1) the respondent not having a reasonable belief in any misconduct as the claimant had provided Mr Weller with all the information he had requested in respect of the domain issue; and 2) there being no objective evidence at the time of dismissal (as opposed to historic evidence) that the claimant's relationship with others had irretrievably broken down.

104. I do not accept these challenges. Taking the second one first, the evidence demonstrates a succession of events involving undermining colleagues, not following instructions and acting in a way perceived by the rest of the SMT and the investor as contrary to the interests of the respondent. As recently as 4 May 2020 Mr Weller was in discussion with Mr Marshall about the claimant "*sniping on Jeff*" and putting him "*in a box where he can't interfere*". On the same day Mr Alexander made his "submarine" comment to Mr Weller about how the claimant was constantly trying to sabotage the respondent. On 6 May 2020 Mr Alexander set out in detail to Mr Weller and Mr Terry how the claimant was "*picking fights with everyone*" and viewed everyone else is conspiring against him and suggests "*we can't keep going like this for many more months*". These comments were not made with the expectation of their being used in evidence in a tribunal to show the reason for dismissal, but, I find, were genuinely reflective of the contemporaneous beliefs of the respondent's senior management team and investor. The evidence had also shown brief periods of improvement when the claimant was taken to task followed by relapses into his former patterns of behaviour. There was abundant recent evidence upon which the respondent could reasonably believe that the relationship between it and the claimant had irretrievably broken down.

105. In respect of the domain issue, the "behind the scenes" correspondence between Mr Weller, Mr Alexander and the IT consultant

makes it clear that the respondent genuinely believed that the claimant was deliberately setting out not to comply with the respondent's requests of him in relation to the domain issue.

106. I therefore find that the reason for dismissal was as set out in the extract of the dismissal letter set out above. The reason is potentially fair in that it amounts to a reason related to conduct, and/or SOSR, irretrievable breakdown in relationship.

Did the respondent genuinely believe in the claimant's misconduct or in an irreparable breakdown in relationship and was such belief held on reasonable grounds?

107. Some of the ground covered in the previous section of this decision is relevant here.

108. The requests made of the claimant on 8 June 2020 where he was to provide the domain UN and password to Mr Alexander and the IT consultants "asap", and to confirm that the web domain was owned by the respondent. He said that he would sort this by the end of the week, but on 12 June 2020 the claimant's response did not engage helpfully with those questions. Instead, he mentioned that there was not a safe way to provide third party or an inexperienced party (presumably a comment about Mr Alexander's expertise or experience in IT) and he asked if Mr Weller wished to discuss roles and responsibilities about this issue (a criticism he often made of Mr Weller).

109. Mr Weller essentially told the claimant on 15 June 2020 that the safety concerns were a matter for the respondent and not for the claimant unilaterally to decide. He set out instructions in clear numbered points, to be complied with by 2 PM. In particular he was asked to transfer domain ownership and give admin access to Mr Alexander. He was asked to give Mr Alexander the account number, the email address that the account is registered to and the password to login to the 1&1 IONOS account. Almost four and a half hours after that deadline the claimant responded he did not provide proof of change of ownership or provide the username or password as requested by Mr Weller.

110. In respect of the domain issue, which was the subject matter of the invitation to the disciplinary hearing, the behind-the-scenes correspondence (see above) suggests that the respondent genuinely believed that the claimant was deliberately setting out not to comply with reasonable requests of him.

111. In the circumstances I find that the respondent genuinely believed in the claimant's misconduct in respect of the domain issue. Such belief was held on reasonable grounds. The respondent had made requests of the claimant and his responses demonstrated that he had failed to comply with them.

112. In respect of matters which were relied on in support of breakdown of relationship Mr Kemp submitted that innocent matters were deliberately exaggerated or reasonable explanations for sending them were provided, namely the fact that the claimant had significant "skin in the game" and the

significant personal stake in ensuring the respondent was well run and managed.

113. The person dismissing the claimant was Mr Weller the managing director/CEO. He had witnessed or been otherwise involved in all of the matters listed above as supporting the breakdown in the relationship between the claimant and the respondent. This may be relevant to other aspects of the fairness of the dismissal, but I find that Mr Weller was well placed to make a judgment on the nature of the relationship between the claimant and the respondent at the time of dismissal. I do not consider that matters have been exaggerated out of innocent or innocuous incidents. The sheer number of incidents, and the documentary evidence of the impact that the claimant's conduct had on Mr Weller, Mr Carter, Mr Alexander, Mr Terry and Mr Naqib is compelling.

114. There is no doubt that the claimant, as founder of the company and largest individual shareholder had a considerable interest in the company being well run. What has emerged from the evidence is a stark difference in perspective between the claimant on the one hand and virtually everyone else involved in the running of the respondent on the other. He felt that drawing down loans from Amber was a vital precondition to growing the business and achieving sales. Amber, however, had invested on the basis of sales forecasts and projected revenue which would allow further money to be advanced as sales increased. What he, no doubt, viewed as legitimate concern from a person with a substantial vested interest, was poorly received by virtually everyone involved in the running of NGD.

115. However, much of what transpired cannot simply be put down to a difference in perspective. For example, the correspondence around the possible recruitment of Mr Peck shows the SMT and Mr Naqib being genuinely concerned at the claimant unilaterally bypassing the SMT. The investor organised a lunch when members of the SMT were threatening to resign because they could not work with the claimant. Mr Carter expressed in emails that he was being undermined by the claimant, and Mr Weller was furious at the way, in his view, the claimant had ambushed Mr Carter at SMT meeting. The claimant's upbraiding of Mr Terry shortly after he joined the Board, CC'd to Mr Terry's boss and another senior Amber colleague, was unwarranted, and, as accepted by the claimant in evidence, poorly judged. Emails between SMT members, written by people probably not expecting their correspondence to be scrutinised by a future tribunal, show Mr Carter, Mr Alexander, Mr Marshall, Mr Terry and Mr Weller setting out the difficulties they are having with working with the claimant. Mr Alexander graphically illustrated (the submarine comment) his view of the claimant as being the sole saboteur of the respondent's interests in the way he was conducting himself.

116. The domain issue was described as the final straw by Mr Weller during the disciplinary meeting which illustrated a lack of respect for Mr Weller as CEO. The dismissal letter makes clear that Mr Weller viewed the issue as one which potentially place the company at significant risk. He concluded that the claimant had become an "*obstructive and divisive member of SMT and based on the facts, in my view you are working against the Company/SMT rather that with it/us*".

117. I do not find that the respondent, or Mr Weller in particular, was exaggerating concerns. I do not find that Mr Weller or his senior colleagues turned the claimant into the "fall guy" to deflect from their own failings. They had significant difficulty in working with the claimant because of the way they perceived that he conducted himself. In the circumstances, I find that the respondent held a genuine belief that the relationship had broken down, and there was ample evidence on which to sustain that belief reasonably.

Fair investigation

118. The ACAS Code of Practice sets out the keys to handling disciplinary issues in the workplace fairly. The Code recognises by its use of language ("in some cases", "where practicable", "it would normally be appropriate" "wherever possible") that it is not setting out rigid tramlines for how every disciplinary case should be run. The first step is for the employer to establish the facts of the case, if necessary by having someone not involved in decision-making investigate the case. The second stage is to give the employee sufficient notice of the disciplinary issue that he or she is facing and its potential consequences. Any written evidence relied on should be provided at this stage. Next, a meeting to discuss the problem should be held without unreasonable delay, and the employee should be given the opportunity to be accompanied should they wish. After the meeting it is for the employer to decide on appropriate action and then to provide an opportunity to appeal to an impartial person not previously involved with the case.

119. Mr Kemp submits in his Written Closing Submissions that there were multiple elements of unfairness within the disciplinary process. He submits

a. there was no investigation,

b. no evidence was obtained from a number of individuals about whether they could continue to work with the claimant or around the issue of breakdown of trust,

c. the incidents relied on to establish breakdown in relationships were "*extremely historic*" and that the claimant was not given an opportunity to put forward his version of events,

d. the whole process was effectively one where one individual was "*judge, jury and executioner*",

e. no impartial appeal was offered,

f. the decision to dismiss was predetermined,

g. the decision to dismiss was unreasonably hasty,

h. the claimant had a clean disciplinary record with no previous warnings and no thought was given to alternatives to dismissal such as redeployment or mediation.

120. As with other elements of my consideration of fairness, I am not to substitute my own opinion but to assess whether the respondent's conduct

fell within the range of reasonable responses open to a reasonable employer.

121. Had the decision to dismiss been based solely on the domain issue then I would have considered that this might have been one of those cases where an investigatory stage of the process may well not have been needed. However, while the invitation to the disciplinary hearing was confined to the domain issue, the actual decision to dismiss was, as set out above, based on both this and issues of breakdown of relationship. While I do not consider that the breakdown of relationship issues were "extremely historic", I do consider that an investigation by someone who was not a decision-maker would have been appropriate where allegations ranged over several months.

122. I do not accept that unfairness was created by not taking evidence from colleagues about whether they could continue to work with the claimant. The evidence that none of the senior management team could work with the claimant is extensive. As recently as 5 May 2020 Mr Alexander had made the observation that the claimant was effectively fighting battles with everyone and Mr Terry praised that insight. On 29 April 2020 Mr Carter made it clear he felt undermined by the claimant. And Mr Weller's evidence of his serious difficulties working with the claimant is extensive and recent.

123. The fact that the reasons for dismissal included reasons not set out in the invitation raises another unfair aspect of the investigation. The claimant was not told the whole of the case he had to answer.

124. I will take the "judge, jury and executioner" point together with the appeal officer and pre-determination points. I have some sympathy for the claimant's contention that Mr Weller was judge, jury and executioner. It might even be said that "witness" might be added to the mix. It is right, however, the claimant operated at Board level in a small company which was then in severe financial difficulties. The only conceivable way of avoiding these difficulties would have been by buying in external investigator/decision-makers.

125. It is also right to say that Mr Marshall had been involved in a number of email discussions where negative views have been expressed about the claimant, and had even offered some himself, and had questioned whether the claimant should be furloughed or made redundant. Again, given the seniority of the claimant the only way to have avoided any possibility of bias would have been to have bought in an external appeal officer.

126. From the claimant's perspective the disciplinary process would undoubtedly have looked predetermined and a foregone conclusion. Disclosure of documents during the litigation process which he had not seen before would have fortified such a view. In some senses this is inevitable in a case like this where there is a breakdown in the working relationship between a senior manager and the rest of the SMT. The respondent's case is that the claimant acted in a manner that cumulatively destroyed the working relationship. It is therefore unsurprising that the bundle was littered with negative comments from his colleagues and

thoughts of how to get rid of him. There comes a point in cases where a working relationship is at, or tends towards breaking point when it probably is the case that an employer embarks on a disciplinary process with a mindset that it is likely to dismiss. These are difficult cases when it comes to assessing fairness. The evidence the claimant will genuinely view as supporting his belief that his dismissal was predetermined is very much supportive also of the respondent's case that it viewed the claimant's actions as destroying the working relationship.

127. On balance, and again it is finely balanced, and looking at matters in the round, I consider that these three elements together constituted an unfairness in the conduct related disciplinary process. That is to say, it was outside the range of reasonable responses to have effectively had Mr Weller and Mr Marshall determining disciplinary issues in which they had a stake and a viewpoint, and most of which had not been raised in the invitation to the disciplinary hearing. While I do not consider the outcome was predetermined it would have appeared that way, and not unreasonably so, to the claimant. Notwithstanding the size and financial state of the respondent a fair employer acting reasonably would have sought to put some distance between Mr Weller and Mr Marshall and the conduct of the disciplinary process.

128. This is not one of those rare cases, in my judgment, where the respondent can argue that procedure can be dispensed with, or that failure to follow it made no difference as it would have been futile (***Gallagher, Jefferson*** and ***Moore***). Here the respondent chose to go down a disciplinary route, and having done so they should have done so fairly. I would not be having regard to equity and the substantial merits of the case were I to decide that it was open to the respondent to choose to engage a procedure, to run that procedure unfairly, and then, effectively, to row back and say that following that procedure was a futile exercise in any event.

129. In the circumstances I find that the respondent did not follow a fair procedure in dismissing the claimant.

Dismissal within range of reasonable responses

130. I remind myself again that it is not my function to substitute my own opinion, but to assess whether the decision to dismiss for the reasons I have found fell within the band of reasonable responses. I have found and concluded that the claimant conducted himself in a way that undermined and alienated his colleagues over a substantial period of time. Also that he failed to follow reasonable instructions of the CEO and other Board members and, in respect of the domain issue, failed to follow reasonable instructions on an issue that the respondent reasonably regarded as serious and urgent. In the circumstances I find that dismissal fell within the reasonable range of responses.

Conclusion on unfair dismissal

131. In the circumstances I find that the claimant was unfairly dismissed in circumstances where the procedure adopted to affect his dismissal was unfair.

Polkey

132. Mr Kemp, for the claimant, submits that this is not a case where it would be appropriate to make any ***Polkey*** deduction as it would not be far too speculative an exercise to reconstruct a hypothetical situation following a fair disciplinary process. He says that it would have been open to the respondent to have called Mr Marshall, Mr Alexander and Mr Carter to give evidence about the state of relationships as at the date of dismissal and whether they had irretrievably broken down.

133. The first step for me is to recreate a hypothetical fair procedure. Such would have involved an independent investigator, decision-maker and appeal officer. It also would have involved the claimant being made aware of all disciplinary matters which the respondent would be considering, that is to say the matters which the respondent alleged contributed to the breakdown of the employment relationship. This would have given the claimant the opportunity to meet these allegations. This may have involved either calling members of the SMT to give evidence at a disciplinary hearing, or at the very least providing to the claimant in advance of the hypothetical disciplinary hearing the sort of detail which Mr Weller did in fact cover during the actual disciplinary hearing.

134. This approach obviously does raise uncertainties. I do not consider, however, that it sets me embarking on "*a sea of uncertainties*" (***Eaton***). One uncertainty, for example, is whether the claimant would have attended such a meeting. I will assume for the purposes of this exercise that he would have done so.

135. The uncertainties which Mr Kemp points to in his written submissions revolve around the state of relationships just before and at the time of dismissal and whether or not they had irretrievably broken down. While Mr Kemp was right to say that members of the SMT were not called to give evidence before me, I am in a position to make a reasonable assessment as to what their view was. As I indicated earlier, Mr Alexander had been particularly trenchant in early May about his views about the claimant and the effect he was having on the respondent company (the "submarine" comment and the observations about the fights the claimant was picking which Mr Terry found insightful). Mr Carter complained about the claimant constantly undermining him in late April. Less certain is what Mr Marshall might have said, though the claimant viewing him as a biased appeal officer might suggest, to put it neutrally, that his evidence might be negative.

136. Additionally, the hypothetical fair procedure would have considered the domain issue, and the claimant would have been able to have challenged any evidence put forward by the respondent and to have put forward his account.

137. In running his unfair dismissal claim the claimant has largely run an extended version of any defence that he would run during a hypothetically fair disciplinary process. Looking at the evidence as a whole I find that there is a very strong chance that a hypothetically fair process would have concluded that the claimant's conduct and behaviour over the previous months caused an irretrievable breakdown in the relationship between him and the company. It is highly likely to have found that the claimant had demonstrated he was not willing to abide by reasonable instructions, that

he undermined other members of the SMT and that he failed to cooperate with the SMT on the issue of the domain and admin password. I find that this high likelihood falls short of a certainty. I cannot rule out the possibility that during a hypothetically fair process some evidence might have emerged that gave a glimmer of hope that the relationship might be resuscitated. I consider it unlikely, not least as the claimant went into the *actual* process sending letters that Mr Weller reasonably considered were calculated to discredit him. Perhaps this might not have happened, however, had the claimant had more confidence in the fairness of the disciplinary process. Setting a percentage to a likelihood is not easy in circumstances such as this, but, doing the best I can, I find that a hypothetically fair disciplinary process was 80% likely to result in the claimant's fair dismissal.

Contributory fault

138. Mr Kemp resists any finding of contributory fault on the basis that there was no blameworthy conduct by the claimant which caused or contributed to his dismissal. He says that the proximate cause of the dismissal was a "false disciplinary charge" raised against the claimant in relation to the domain issue, and that historic incidents had been exaggerated and are understandable given the claimant's unique position as a single large shareholder with a significant personal stake in the future of the company.

139. My above findings and conclusions are that this was not a false disciplinary charge. I have found that the claimant was given instructions in relation to matters which the respondent reasonably viewed as serious and urgent and he did not comply with them. He raised security concerns about the transfer of the domain UN and passwords which proved not to be a concern to the domain hosting company. He was culpable in not complying with the requests reasonably made. While the way he conducted himself with his colleagues is, to an extent, understandable given his perspective on Amber's investment strategy and his position as a founder of the company, I have found as a fact that he acted in a way that undermined his colleagues and his CEO, antagonised the investor and contributed to the breakdown of the employment relationship. The claimant's position makes his actions understandable but does not exculpate him.

140. I find that the claimant was mainly to blame for his dismissal and his compensation should be reduced by 75%. This percentage applies both to basic award, under section 122 ERA in that it is conduct such that it would be just and equitable to reduce the amount of the basic award, and to the compensatory award under section 123 ERA in that the claimant caused or contributed to his dismissal.

ACAS Uplift

141. While the parties have not specifically addressed in their written submissions the issue of an uplift under section 3 of the Employment Act 2008, it was in the agreed list of issues, and they have made their submissions on procedural fairness.

142. I have found above that the respondent failed to follow key steps in the ACAS Code of Practice such that the claimant's dismissal was unfair. The breaches involved not having a fair investigation process, not informing the claimant of the whole case that he was to face and not having suitably independent personnel involved in the decision-making. These are significant defects.

143. On the other hand, it might be argued that this was a small employer in financial straits. That said, it is clear from the evidence that the respondent sought legal advice prior to the dismissal.

144. I consider that failure to follow these procedures was unreasonable. I consider that an uplift of 20% is appropriate in the circumstances.

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Employment Judge **Heath**

18 October 2021_____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

19/10/2021.....

FOR EMPLOYMENT TRIBUNALS