EMPLOYMENT TRIBUNALS

Claimant: **Mr R G Harper**

Respondent: **Ground Control Limited**

Heard at: **East London Hearing Centre (CVP)**

On: **19, 20 and 21 May 2021**

Before: **Employment Judge Jones**

Representation

Claimant: Mr A Griffiths (counsel)
Respondent: Mr Humphreys (counsel) with Ms Keyms (solicitor)

JUDGMENT

1. **The claimant was unfairly dismissed. The complaint of unfair dismissal succeeds.**

2. **The claimant was wrongfully dismissed. His complaint of breach of contract succeeds.**

3. **There is an implied term in the contract made between the parties on 23 November 2019 that the respondent will not rely on the clawback clause in the event that it unfairly dismisses the claimant and breaches his contract of employment.**

4. **The respondent's counterclaim fails.**

5. **The claimant is entitled to a remedy. This will be determined at a remedy hearing. The Tribunal will notify the parties of the date fixed for the remedy hearing.**

REASONS

1. This is the claimant's complaint of unfair dismissal and wrongful dismissal; and the respondent's counterclaim.

Evidence

2. The Tribunal heard from claimant in evidence. On the respondent's behalf, the Tribunal heard from Andrew Hollyer, strategic sales and development manager, who suspended the claimant and conducted the investigation; Alistair Wallace, construction director, who conducted the disciplinary hearing and dismissed the claimant; and Marcus Watson, executive director, who conducted the claimant's appeal against dismissal. The tribunal had witness statements from all the witnesses who gave evidence.

3. The Tribunal make the following findings of fact from the evidence. The tribunal has restricted itself to making findings of fact necessary to determine the issues in the case.

4. The Tribunal apologises to the parties for the delay in the promulgation of this judgment and reasons. This was due to the complexity of some of the issues in the case and the pressure of work on the judge.

Findings of fact

5. The claimant was employed as a business development manager from 9 September 2015. The claimant was initially employed by Survey Roofing Group and was transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 to the respondent on 1 April 2019.

6. The respondent is a commercial landscaping company providing grounds maintenance, arboriculture, vegetation management, gritting and snow clearance, landscape design and construction, fencing, rodent and pest control management and roofing services to a wide-ranging of small to blue-chip companies such as Tesco, Morrisons and Network Rail. The respondent's head office is in Billericay, Essex with approximately hundred and fifty members of staff based there with a further thirty-five staff based at regional offices around the country. The respondent is organised into business areas such as landscape construction, grounds maintenance and design and ecology.

7. In 2015 Survey Roofing Group (SRG), a much smaller company, operating within the roofing sector, was purchased by various buyers, including some of the respondent's shareholders.

8. As a senior business development manager, the claimant was in charge of developing new roofing business for the company and leading the sales and marketing teams. When the claimant started at the respondent, his terms and conditions included a salary incentive scheme where the bonus payment was based on his performance in the previous financial year, September to August and which would usually be paid to him within two months of the end of that financial year.

9. The claimant's contract stated that he was entitled to commission. The total remuneration package included commission which would be payable on an annual basis in arrears was based on targets set annually. It also stated that he would cease to be entitled to any commission on the termination of employment. The letter of appointment dated 24 July 2015 set out details of a salary incentive scheme which would entitle the claimant to 2.5% commission on all order values from clients and 10% of achieving actual final profit on all major works.

10. On 5 October 2017, the respondent wrote to the claimant to notify him of the commission he could expect to receive for the financial year 2016/17. The letter stated that in recognition of the claimant's success and in line with his commission plan, he was entitled to a gross commission payment of £41,472 which would be paid net in his October salary, after deductions.

11. By letter dated 16 October 2017, the respondent informed the claimant that the business had faced a number of challenges in 2017, *'including the uncovering of previous financial irregularities which meant that our financial performance for the financial year ending 31 August 2017 was significantly less (than) desired'*. The respondent's remuneration committee (referred to as REMCO) decided that despite the significant financial issues which they are covered, they wanted also to reflect the company's confidence in everyone's resilience and their belief that the business would turn around. They decided to do this by awarding salary increases. After conducting a review of its financial performance for the year ending 31 August 2017 and its annual pay review, it decided to award the claimant an indexation increase to his wage which would take his basic salary to £71,190. This change was effective from 1 September 2017.

12. The revised terms and conditions sent with that letter stated that commission would be based on achievement of turnover and margin targets set on an annual basis. Any commission payments due would be paid in arrears. The company reserved the right to amend, vary or withdraw the commission scheme at any time. The claimant was also eligible to participate in the company Leadership Incentive Scheme, the details of which were to be provided to him separately.

13. Details of the first iteration of the Leadership Incentive Scheme (LIS) were also sent out in a separate letter on 16 October 2017. The letter stated that the claimant had a significant leadership role within the business which was expected to grow as the business continued to stabilise and thrive. It also stated that the respondent wanted to ensure that the claimant benefited from his hard work and success, so the offer was of an additional Leadership Incentive Scheme with the following benefits: 3% of all profits generated by the business between 1 September 2017 and 31 August 2018, uncapped.

14. It stated that in order to trigger the LIS, the business must achieve a minimum of £500,000 operating profit in that financial year and achieve a satisfactory cash conversion with 75% of the operating profit traded being in converted into cash. 50% of the LIS would be payable in October 2018 and, the remainder would be payable in April 2019. The letter stated that whilst the Leadership Incentive Scheme may change from time to time, it would continue in the following years as the respondent wanted to ensure that the claimant always continued to be suitably incentivised.

15. Dr Watson's evidence was that the LIS was conceived as a way to incentivise the claimant and 3 other employees who were not all in sales but were all employees whom the directors determined could have a significant impact on the company's profitability. They wanted these employees to stay with the company through the difficult period.

16. The respondent set out the following conditions for the claimant to be entitled to the LIS: that the claimant was responsible for any taxes owed to HMRC as a result of the Scheme, that he kept it confidential from other managers and colleagues, that he continued to be an employee and had not served the respondent with notice before 31 October 2018 for the first 50% of the LIS payment, and 30 April 2019, for the remaining 50%; that he entered into a new contract of employment which will include a new confidentiality agreement and a new non-competition clause; that he continued to pay a full part in the leadership and direction of the company and that he was a role model and champion for the company values, vision and strategy. The letter stated that the Scheme was additional to any commission structures, that it was optional and the claimant did not need to take it up. The LIS also contained a death-in-service benefit and an extended notice period of 3 months. The claimant confirmed his agreement by signing and returning a copy of the letter and the new terms and conditions of employment to the respondent by 20 October 2017. The first payment would have been due in October 2018.

17. The letter was signed by Dr Marcus Watson who at the time was managing Director of the respondent. Dr Watson described the claimant as a diligent, good performer who contributed well to the company. For 2017/2018, the claimant's target was £4 million which he exceeded as he achieved a turnover of approximately £6 million. However, although he personally had done well, SRG had not seen an increase in its profits.

18. Dr Watson's evidence was that the claimant was enthusiastic about the Scheme and that he was responsible for convincing other senior members of staff at SRG to sign up to it.

19. The company did not hit the targets set out in the 16 October 2017 letter. It is agreed between the parties that SRG did not perform well in the financial year 2017/2018. As a result, the LIS did not pay out. However, the claimant was paid his commission payments for winning new contracts and customers within that financial year.

20. It is likely that at or around the beginning of 2018 there were some discussions within SRG about the need to restructure the business. The claimant may well have been aware that discussions were happening but it is extremely unlikely that he was included in them as he was not a director.

21. The Board discussed relocating the office and investing in new premises as some ways of reducing costs as well as investing in IT and reducing staff numbers.

22. Mr Hollyer's evidence was that it was likely that Mr Bradbury would have included the claimant in discussions about the direction of the business but the Tribunal did not hear from Mr Bradbury and Mr Hollyer had not attended any of their discussions. Dr Watson's evidence was that Mr Miller told him that the

claimant had been aware of the change in strategic direction for the business. However, he was unable to say when that occurred or what was said.

23. Dr Watson believed that the claimant, as part of SRGs senior leadership team would have had access to critical information such as company strategy, competitive dynamics including threats and risks, profitability and other commercially sensitive information. I find that as the respondent's most successful salesperson it is likely that the claimant was aware of as much of the respondent's commercially sensitive information as he would have needed in order to be able to do his job, including tender/quote for and win contracts.

24. In his time in the business, the claimant had been successful at winning big contracts for SRG. The claimant held a significant role and was a profit generating member of staff. At the same time, the respondent profits were significantly reduced at the end of the financial year 2017/2018 which led to the directors' concerns for the business.

25. In September 2018, the claimant began to ask about his bonus. The respondent wrote to the claimant on 16 October to inform him of a revised *'additional'* LIS. Under that scheme the claimant would be afforded 3% of all profits generated by the business between 1 September 2017 and 31 August 2018. In order to trigger the LIS the business must achieve a minimum of £500,000 operating profit in the period and achieve a satisfactory cash conversion with 75% of the operating profit traded being converted into cash.

26. The letter then stated as follows:

> *"in your position as a senior member of the leadership team, you will have access to commercially sensitive and strategically significant information and, as such, this Leadership Incentive Scheme is subject to the following:*
>
> *You entering into a new contract of employment which will include a new confidentiality agreement and a new non-compete agreement and, the claimant's notice period being extended to 3 months.*
> *You been an employee of the company (and you not having provided notice to the company) on 31 October 2018 for the first 50% of the LIS payment and on 30 April 2019 for the remaining 50%*
> *you playing a full part in the leadership and direction of the company you being 100% aligned to the interest of Survey Roofing Group and Ground Control;*
> *you being a role model and champion for our values, vision and strategy;*
> *you been a champion of our Health, Safety and Well Being culture and not paying lip service to;*
> *you being responsible for any taxes owed to HMRC as per all employment payments made to you; and lastly*
> *this Leadership Incentive Scheme being kept confidential by you as it is an amazing benefit which we are regrettably unable to offer to all employees and managers."*

27. After conducting an investigation into which part of the business was causing losses, the respondent concluded that it would be better for the business to move away from the major projects that it had been doing, which it considered

were riskier and had lower profit margins; and to move towards maintenance projects which it believed would generate consistent income over a long period of time and therefore, in the long run, be more profitable. This was the incentive behind offering the claimant the position of Business Development Director. However, it is unlikely that the claimant was told all of the above.

28. It is likely that there were some discussions with the claimant towards the end of 2018 about his role in helping the company's turnover and those are reflected in the emails at pages 115 to 126 of the bundle. The claimant was aware that he was being asked to find and develop a new business development team at SRG while meeting his personal sales target of £4 million and distributing his clients between the new team.

29. On or around 20 November, the claimant met with Mr Miller, Mr Bradbury and Mr Hollyer to continue discussions about his place in the business. The letter on page 115 provides a note of their discussion. The claimant was to develop and have day-to-day oversight of the sales team while their appraisals would be conducted by Mr Miller and Mr Hollyer. He agreed to find 2 – 3 key people who could be part of this team. There were options discussed for the claimant's financial remuneration which included commission and what was referred to in the notes as an *'ex-gratia payment'* of £30,000 to be paid in two tranches; the first £20,000 in November 2018 and the second payment of £10,000 to be paid in April 2019. The proposal was that the payments would be subject to clawback *'on the basis of continued employment until 31 October 2019 and confidentiality'*. The note stated that this was the outcome from the REMCO meeting.

30. In his response on 23 November, the claimant indicated that he wished to stay on the LIS - referred to in this letter as the Management Incentive Scheme (MIS) - and that he wished to accept the ex-gratia payment with its caveats on clawback and confidentiality. The claimant's evidence was that he was dyslexic and that usually, whenever he agreed anything it was firstly in person and then in writing. This was agreed prior to the first payment being made in the claimant's November wage. The Tribunal had a copy of the claimant's payslip showing a payment of £20,000 made to him on 30 November 2018.

31. The terms of the agreement were confirmed in a letter dated 4 December which confirmed the claimant's promotion to the post of Business Development Director. The claimant was to report to Mr Hollyer, with a business reporting line to Derek Miller. The Business Development Managers who made up the claimant's team, would also report to Mr Hollyer and Mr Miller but the claimant was expected to provide them with mentoring and coaching and to drive the team sales in accordance with the targets agreed, to assist in their future success and the overall success of SRG.

32. The letter stated that the respondent and its sister companies had broken even at the midyear point and that even though no payments were due under the LIS, the respondent wanted to recognise the claimant's contribution in turning around the performance and stability at Survey Roofing. They had decided to award him a total ex-gratia payment of £30,000. This was the same £30,000 he had agreed to in November, some of which had already been paid. The respondent reserved the right to clawback the entire payment if the claimant failed to keep the existence of the payment confidential or in the event that the claimant's

employment ceased or he resigned within twelve months of receipt. The claimant would be expected to repay the ex-gratia payment in its entirety, within thirty days of leaving the company.

33. In Annex A to the respondent's letter, also dated 4 December, SRG informed the claimant about the LIS for the financial year 2018/2019. The claimant would now be offered 6% of all profits generated by the business from 1 September 2018 to 31 August 2019, uncapped. In order to trigger this LIS, the company would need to achieve a minimum of £450,000 operating profit in the period. The letter set out similar conditions to the 16 October letter cited above. The respondent promised to continue a form of the LIS each year thereafter in order to ensure that the claimant continued to be suitably incentivised. One condition that was different was as follows:

> *"you being an employee of the company with no live disciplinary action (and you not having provided notice to the company) on 31 October 2018 for the first Leadership Incentive Payment and you been an employee of the company was no live disciplinary action (and you not having provided notice to the company) on 30 April 2019 for the second Leadership Incentive Scheme payment;"*

34. The document confirmed that the LIS replaced any commission structure and that it was optional. The claimant had to indicate his agreement to this LIS and he did so when he sent an email to the respondent's people director on 14 December 2018 in which he confirmed that he accepted the new role, the bonus payment offered by Remco with attached conditions, and the LIS for the current trading year 2018 - 2019.

35. The claimant was not told about/knew nothing of the Kaizen program which the respondent started sometime in 2019. It is likely that the first time he heard about it was in the hearing and in Mr Watson's witness statement. Mr Watson's evidence was that the respondent established the Kaizen project to right-size the staffing in SRG, move to smaller, more professional premises and to invest in modern IT and further health and safety training. He confirmed that the Kaizen project resulted in the removal of roles but contended that those were in under-utilised delivery teams and overhead staff, which he believed had been a disproportionate amount in comparison to SRG's workload.

36. On 27 March 2019, at a 'Town Hall' meeting, Mr Miller announced a plan to transfer SRG's business development activity to the respondent. The claimant was not at that meeting as he was in London on business. The Tribunal was not provided with minutes of that meeting but the claimant was told that during this meeting Mr Miller and Mr Hollyer told the attendees that the respondent wanted to move away from large roofing projects and focus instead on smaller long-term maintenance contracts. There had been no prior consultation about this and the sales team were surprised by the announcement.

37. When the claimant returned to work, he was met with angry colleagues who told him that as he was a director, he ought to have known about all of this. Shortly after the transfer, the claimant found out that the business development team which he was to head up, was not expected to continue to focus on major contracts or particularly on roofing any more but instead, they were expected to focus on

what he referred to as *'reactives'* or recurring maintenance projects and planned works. The claimant was shocked and upset about the changes to his area of work and considered that this was going to be detrimental to SRG's business. Although the claimant had discussions with Mr Hollyer, Mr Miller and Mr Bradbury in November 2018, as demonstrated by the emails referred to above, those discussions do not appear to have included this change in direction in the sales team – away from majors to reactives.

38. On 1 April 2019, SRG outsourced its business development activity to the respondent. The claimant transferred over to the respondent by operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and began reporting to Andrew Hollyer, the respondent's Group Sales and Marketing Director for sales and to Derek Miller for other aspects of his role. It is likely that the decision to transfer that part of the business was made sometime in November 2018. Mr Miller was the most senior director at SRG.

39. By letter dated 26 April 2019 the claimant was formally informed about the TUPE transfer. The letter informed him of some of the changes that would follow. It stated that the role would remain unchanged however, whilst he would remain a specialist in the sale of roofing services, he would also be required to sell the full range of Ground Control services and any training to support him in doing so, would be offered. The respondent stated that it was going to revise the current incentive plan.

40. Although after a settling in period the claimant made that transition; he was concerned that his old team were disillusioned and that their morale was at an all-time low.

41. The claimant received the second part of the ex-gratia payment with his May salary from the respondent.

42. Mr Watson told the Tribunal that the respondent saw the claimant as instrumental in helping to turn the company around and out of '*the mess we were in'*. I find that in saying so Mr Watson was referring to sales and also to the claimant's ability to assist in improving morale in the business by talking to people and creating a strong team.

43. There was a dispute between the parties as to whether the claimant had been asked to speak to members of his team to find out what their issues of concern were and write a report on it for the directors or whether he volunteered to do so without being asked. On balance I find it likely that the claimant was asked to reach out to the team as he referred to this at the top of the written report which appears at page 137 of the tribunal bundle. Also, Mr Hollyer confirmed in evidence that the claimant informed him that he wanted to raise some of the matters that concerned those who used to work closely with him. Mr Hollyer confirmed that he asked him to '*get it in writing'*. It is likely that there was disquiet among the team and that the respondent was aware of that. I find it likely that the claimant thought that he was doing what he was asked to do by the company when he spoke to members of his old team about how they were feeling about the work that they were expected to do, following the transfer.

44. Sometime in April/May 2019 the claimant spoke individually to his old team in person and noted down their actual/perceived issues with what had happened with the business. The claimant then prepared a written report which he presented to Mr Hollyer.

45. The report appeared on pages 137 – 140 of the hearing bundle. In it, the claimant reported that the team made various complaints to him, some of which he agreed with and raised those on behalf of '*us/we'* such as the lack of consultation/information leading up to the TUPE transfer and the perception that the respondent's statement about Survey Roofing's transformation was inaccurate. He reported that the team contested the respondent's statement that major contracts were not the most lucrative and complained about many other matters such as the lack of information for the sales team, a lack of leadership/direction in the roofing division, low morale, supply chain issues and lack of site monitoring.

46. In the report, the claimant complained about over £1,000,000 in sales that had been lost by what was perceived as a combination of disorganisation/poor response/obstruction from the respondent. At the end of the report the claimant wrote this disclaimer *'this has been collated by liaising with all of my old team, and each has added his viewpoint and perception to this situation. They have wanted to support this process as all felt so passionately about what has and is still happening to the original company they joined and were happy to represent and promote'*. He thanked the respondent for giving the team the opportunity to air their concerns which he stated had directly affected their morale and performance. The claimant hoped that the report would be regarded in a positive and constructive light and that positive steps would be taken to repair the situation. He stated that the report had been sent with the express desire and hope that it would lead to positive changes.

47. Although not referred to by name, the claimant confirmed that the issues raised in this report were critical of the work done by three of the respondent's employees, Derek Miller, Sally Ann Tywdell and Marcus Watson although he did not agree that they had been singled out.

48. The claimant sent the report to Andrew Hollyer as he considered that Mr Hollyer has asked him to prepare it, because they had spoken about it previously and Mr Hollyer was responsible for the team. Mr Hollyer asked if he could show the report to the group managing director, Marcus Watson. The claimant agreed to this as he thought that was going to be used to start a constructive discussion about resolving the issues raised. Mr Hollyer was adamant in the hearing that he had not passed the contents of the report to Ms Twydell or spoken to her about it.

49. In his witness statement, Mr Watson acknowledged that there was likely to be a dip in morale within SRG at the beginning of 2019. He put that down to concerns about the financial robustness of the business, the restructuring of staff and the relocation of the office.

50. However, it is likely that at the time, the respondent did not receive the report in the spirit that the claimant created it. Mr Watson felt that the issues raised were already being addressed and that the report was negative to the business. He also believed that the views shared in the report were the claimant's views. In evidence he said that he had known the claimant for years, that he was brash and

overconfident and *'said it as he saw it'* and that this report was an example of that. Mr Watson's view was that the whole episode with SRG had been uncomfortable for the respondent and this was yet another aspect of what he described as an '*unhappy time'*. He did not see it as a positive act by the claimant or his team or an opportunity to resolve matters with them. I find it likely that just as the claimant had persuaded senior members of staff to sign up to the LIS in 2017, the respondent was hoping that the claimant would assist them in reassuring members of staff about the future but instead, he produced this report. It is likely that this report severely damaged any positivity that Mr Watson had towards the claimant prior to receiving it.

51. On 21 June 2019, Sally-Ann Twydell, Head of Client Services emailed Derek Miller and Tanya Meah, Head of HR to report the contents of the conversation that she said she had with the claimant around three weeks earlier. She asked that her report should remain confidential and that her name should not be used but that she was making this report as she was concerned that other conversations could be happening around the business. She stated that the claimant had used the following wording "*I know someone who is putting together a national roofing company to rival ourselves, they would be interested in someone like you, I can recommend you if you like."* She stated that the conversation stopped there as she had indicated that she was not interested. She also stated that she had been extremely worried and concerned about how the claimant would react to her personally, which was why she had not come forward earlier.

52. Ms Twydell sent a follow-up email to Mr Miller and Ms Meah, on the same day in which she stated that the conversation with the claimant took place on 16 May, around 1:30 PM at the respondent's offices.

53. Later that day, Ms Meah had a conversation with Ms Twydell about her email. Ms Meah made notes of that conversation directly into an email that she sent to herself later that evening. In the email Ms Twydell is noted as having said that the claimant had asked her whether she was happy and told her that he knew someone starting up a roofing business to compete with the respondent but she had put a stop to the conversation. She stated that the claimant had been causing a lot of problems in the business and had not been cooperating with *'us'*. She stated that the claimant had been *'shirty'* with her recently, getting angry and had been *'a pain'*. She stated that she made it clear to the claimant that the conversation was not appropriate and that she would never compromise core values. She felt that the claimant was trying to stop the success of the business and that she was not having any more of it.

54. On the same day, 21 June, Mr Miller forwarded Ms Twydell's emails to Dr Watson. On receipt of the email, he asked Ryan Wingrave, fleet manager, to check the vehicle trackers to find out whether the claimant and Ms Twydell had been at the respondent premises on 16 May, at the same time. Mr Wingrave confirmed that they had and sent screenshots of the tracker results to Mr Watson. Once he had that information, Mr Watson responded to Ms Meah and Mr Miller and said: *'this is hugely disappointing and completely unacceptable (treasonous), if true'*. He attached copies of vehicle trackers for both the claimant and Ms Twydell which he believed corroborated the alleged meeting time, date and location.

55. Ms Meah telephoned Mr Hollyer and asked him to conduct an investigation into Ms Twydell's allegation. He was also told that it was likely that the claimant had approached another person in the business and asked them if they were interested in going to work for another company and that he should include that in his investigation. On 21 June 2019, Mr Hollyer spoke to Ms Meah on the telephone. In conducting the investigation, Mr Hollyer chose not to meet with Ms Twydell as he considered that he could rely on the notes taken by Ms Meah of her conversation with Ms Twydell. He felt that that part of the investigation was closed and that his job was to look at the other details around the allegation. He decided that the next steps of the investigation would be to meet the claimant and the other individuals that the respondent believed were involved. Before he met the claimant, Mr Hollyer was given a copy of Ms Twydell's email and the vehicle tracker printout from Mr Wingrave.

56. Mr Hollyer decided that the allegation against the claimant was potentially very serious and that he needed to be able to investigate it without the claimant being at work. He believed Ms Twydell's statement that she was extremely worried and concerned about how the claimant would react to her personally and he also thought it possible that the claimant might be having similar conversations with other employees from Survey Roofing Group. It was for those reasons that he decided to suspend the claimant while he conducted the investigation. He prepared a letter of suspension with the assistance of HR and brought the letter with him when he went to meet the claimant at the hotel.

57. On 24 June, the claimant was asked to meet Mr Hollyer at a local hotel. He was not told the purpose of the meeting or that it was related to his conduct. At the meeting, the claimant was told that he was under suspension and that he had to hand over his laptop and mobile phone so that an investigation could be conducted. The claimant was shocked. He did not have his own mobile phone so when he was asked to hand over the company phone, he picked it up with the intention of removing personal information from it but was stopped from doing so. The respondent offered to send him a temporary phone later that day. The claimant was given a copy of the suspension letter and directed to read copies that had been sent to his company and SRG's email inboxes. By the time he tried to access those, he had been locked out of both of them. Instead, they read the copy that Mr Hollyer brought with him, while Mr Hollyer explained its contents. The claimant asked Mr Hollyer many questions to try to understand what was happening. Mr Hollyer refused to discuss the allegation and told the claimant that he would have an opportunity to discuss it at the meeting on 26 June. Mr Hollyer reported on the meeting to Ms Meah and told her that when he was informed that he was suspended, the claimant stated that he felt that the business wanted him out. He was also recorded as saying that he could only guess that it is linked to another business.

58. The letter did not provide any more details but simply stated that the respondent had become aware of some matters of great concern that it needed to formally investigate and that this was a reason for the claimant's suspension. The allegations were that the claimant had committed acts amounting to a serious breach of trust and confidence. The claimant was informed that those details would be shared with him at the investigation meeting. He was informed that the respondent needed his laptop and mobile phone to review his activity on them and that his IT passwords would be changed from that day so that he would not be able

to have access during the investigation. The respondent did not find anything on the claimant's laptop or mobile phone that was of concern or that related to Ms Twydell's allegation.

59. The letter informed the claimant that the respondent took such allegations seriously and that they were potential acts of gross misconduct which could result in the claimant's summary dismissal.

60. At the investigation meeting on 26 June, Mr Hollyer was accompanied by someone from HR. In the meeting the claimant described the investigation as a witchhunt and completely refuted the suggestion that he had said to anyone that he knew someone with a rival roofing company who would be interested to hear from them. The claimant strongly denied Mr Hollyer's suggestion that he might have done this. At the start of the meeting the claimant referred to other colleagues who had been made redundant since the TUPE transfer and stated *'several colleagues have been thrown to the wall, is it my turn?'* and *'it's a witchhunt; several people have gone through this'.*

61. The claimant confirmed that he had had no further communication with staff or external customers in the way alleged. They went through the names of all individuals who had left the business and the claimant denied being in contact with any of them. He stated that he was uncomfortable. When asked, the claimant was able to describe the respondent's business strategy. During the discussion the claimant was recorded as having said *'I'm finding this all ludicrous; when I find out who this is I will be stepping outside with them. I'm just trying to do my job; excellent at my job. I have no idea of a company that can do this'* and *'it's a witchhunt, I've seen this happen to people who are now gone.'*

62. When asked if he could think about anyone in the business who could be linked to these allegations, the claimant referred to Mr Miller who he considered had dismantled SRG and who had screamed at him. He stated that he had a good relationship with everyone and was proud to represent SRG. Later in the conversation he stated that he had been less than complimentary about Ms Twydell which meant that she would be likely to be less supportive of him. The claimant swore on his son's life that he had never promoted another company and that he had no recollection of making the statement.

63. At no time during the investigation meeting did Mr Hollyer inform the claimant that the allegation comes from Ms Twydell. Mr Hollyer decided not to tell them claimant who made the allegation against him as he did not think it was appropriate. He also did not tell him the date or the place at which it was alleged that the conversation took place.

64. It is likely that the claimant was really annoyed and upset about the allegation against him, about being suspended and having to attend the investigation meeting. At the end of investigation meeting he would have had an understanding of the allegation but not how it had come about or when it was alleged that he made an approach to a colleague about working somewhere else. Mr Hollyer closed the meeting by telling him that he would now undertake individual interviews. The claimant informed him that he had not slept for at least two nights, that he had never been in this situation before and was taking it badly and that the

pressures of work were affecting his home life. The claimant denied having done anything wrong.

65. The claimant begged the respondent for access to the mobile phone. He stated that he had over seven hundred contacts on the phone, some of whom he had before coming to work for the respondent. He also had personal stuff on the phone including details of a holiday that he booked the week before.

66. Mr Hollyer referred to the statement he recalled the claimant making two days earlier, when he was suspended that he can only assume that this was *'to do with company you mentioned to somebody'*. The claimant said he could not recall the statement but that whatever was said was taken out of context. He recalled that he asked whether he should start looking at recruitment and *'am I the next one'* but confirmed that he was being flippant when he did so. The claimant was advised not to communicate with anyone during the investigation and that he continued to be suspended on full pay. When asked what evidence the respondent had, Mr Hollyer stated that the respondent had a written statement but because the claimant had said that he would have harsh words with the person if he knew who it was; the respondent had decided not to share it with him. He also did not inform the claimant of when or where the statement was supposed to have been made.

67. It is unlikely that Mr Hollyer knew, before interviewing the claimant, about any friction between the claimant and Ms Twydell. However, once the claimant told him he did not interview her as part of his investigation. He decided that he did not need to interview her to gain clarity or to check what her understanding was of her relationship with the claimant or her recollection of what he was alleged to have said or why she wanted to remain anonymous.

68. On 28 June, during correspondence with HR about accessing information on the mobile phone, the claimant stated that on reflection, he wanted to retract his outburst in the meeting of *'stepping outside with the man'* who had made the allegation against him. He blamed the outburst on having had little or no sleep for most of the week and feeling unwell. He acknowledged that his reaction had been inappropriate and he apologised fully for any upset caused. He stated that that this was purely a reaction to a completely false allegation.

69. On 3 July 2019, Mr Hollyer conducted his investigation meetings. He conducted fourteen interviews with members of the respondent's staff. The meetings were conducted by telephone and Mr Hollyer was accompanied by someone from HR. He used a template for the questions that he asked each member of staff. He did not mention the claimant's name to the interviewees. He asked each person whether they had been personally approached by someone within the business and asked if they would be interested in joining another roofing company that had the intention or desire to become a larger national roofing company to rival the respondent. Once he completed the interviews, Mr Hollyer prepared a report and attached some of the typed interviews to it and sent it to HR. The interviews were anonymised, so that Ms Twydell was referred to as person A, with the interviewees continuing the letters of the alphabet. Ms Twydell's information was put in the form of an anonymised statement.

70. The investigation report and copies of all the statements produced from the interviews were in the hearing bundle. As Mr Hollyer stated in his witness statement, no one came forward with any substantial information relevant to the allegation against the claimant.

71. However, from those interviews, Mr Hollyer concluded that person B backed up Ms Twydell's allegation. Person B confirmed that he had been approached by the claimant, sometime ago and asked whether he would be interested in joining another roofing company that had the intention or desire to become a larger company to rival the respondent. He said it was some time before the date of the interview and that it was only mentioned to him on one occasion. He said that he did not know whether it was a serious offer but that the claimant had mentioned the name Karslake Roofing Company to him. When he tried to find further information about that company, he could not find anything. He stated that the claimant had approached him by telephone and that because it was the claimant, he took it with a pinch of salt. He had not taken it seriously.

72. Person C referred to a number of people who were unhappy at the respondent at that moment and who could therefore be tempted to leave but stated that they had not been personally approached by anyone. Person C referred to rumours and speculation. They stated that the claimant had been saying *'bits and pieces'* and they suggested other people that should be interviewed. The remaining 12 people stated that they had not been approached by the claimant but that there had been conversations going on within the business. They had no further information on the matter.

73. Mr Hollyer did not re-interview the claimant to give him the opportunity to comment on the statements he had taken. Mr Hollyer described three of the persons interviewed as being 'hesitant' - in his email of 10 July, to HR, he referred to the interviews with AB, DT and LO as those where he considered that the interviewee *'possibly knows more'*. The Tribunal did not find anything in LO, DT or AB's statements that could be considered hesitancy or evidence that they were holding something back. Mr Hollyer did not challenge them about their answers as he would likely have done if he thought that they were doing so. He stated that these were the individuals closest to the claimant. This would also have been a reason to challenge their answers if it was thought that they were holding information back because of their loyalty to the claimant.

74. By the time these interviews were conducted, the claimant was on suspension. His colleagues may not have known the reason for his suspension but it is likely that they connected the investigation to the claimant as demonstrated by the responses given by SU. When asked whether he had heard anything at all concerning this matter, his response was that he had not but as the claimant was unavailable *'you put two and two together'*.

75. Of the 14 interviews conducted by Mr Hollyer, the Tribunal finds that two of the individuals interviewed referred to other approaches that had been made to them that did not involve the claimant, ten individuals confirmed that they had not been approached by anyone, one as described above referred to the claimant making an approach which he had not taken seriously and the last referred to a rumour that the claimant had been saying '*bits and pieces*'.

76. Mr Hollyer also relied on the claimant's outburst at the investigation meeting that if he knew who the man was that had made the allegation, he would take him outside. He concluded that this meant that the claimant had spoken to others and that was why he had not allowed the claimant to retract that statement.

77. In his report, Mr Hollyer set out his conclusions. He stated as follows:

> *'ROH is clearly not happy within his post or with the direction of the business and is being somewhat destructive and trying to stop the business realigning strategy and marketplace. This was backed up by comments made during the interview stage.*
>
> *As a senior leader of the business ROH appears to have under delivered on 3 of our 6 core values. 1." We innovate and embrace change" 2. "We value each other" 3. We act with integrity and honour our commitments".'*

78. On 22 July, the respondent wrote to the claimant to invite him to a disciplinary hearing to be conducted on 25 July 2019. The claimant was informed that the disciplinary allegation was that he had spoken to certain individuals to obtain their interest about been put in touch with a national roofing company to rival Survey Roofing Group (SRG), which the respondent believed amounted to a serious breach of trust and confidence.

79. The invitation letter came from Alistair Wallace, the construction director. He indicated that he would be chairing the hearing and accompanied by an HR specialist. The claimant was advised of his right to be accompanied by a work colleague or a trade union representative. He was also told that if he failed to attend the hearing without proper notice or good reason, the hearing may be held in his absence and the decision made on the information available. The respondent's disciplinary policy was included with the letter. It is likely that the claimant also had copies of the anonymised witness statements from Mr Hollyer's investigation, from persons B and C. He also had a copy of an email from Mr Hollyer to Ms Meah, dated 24 June, in which he described what happened when he suspended the claimant, the investigation notes from Mr Hollyer's interview with the claimant and an undated and unsigned witness statement from person A on SRG's company headed paper.

80. Mr Wallace was on the respondent's executive committee and so was more senior than the claimant. They had not worked together but had met at inter-company and client events. They had also played golf together. He did not know Ms Twydell well. Before he conducted the disciplinary hearing, he read the documents that had been sent to the claimant. He also had a number of additional documents that had not been given to the claimant. Those were the printout which purported to show that the claimant and Ms Twydell's vehicles had been at the head office car park at the same time on 16 May, Ms Meah's file-note of her conversation with Ms Twydell and her original email, Mr Hollyer's letter suspending the claimant, the investigation report and all the statements that Mr Hollyer took during the investigation. He had a copy of the claimant's contract of employment, the letter setting out the most recent iteration of the LIS and various other documents the claimant had not seen.

81. Mr Wallace confirmed that he did not tell the claimant in the disciplinary hearing that he was at risk of dismissal. This was also not referred to in the invitation letter.

82. They discussed Mr Hollyer's investigation report. The claimant denied that anything stated in the statements from persons A, B or C were true. He stated that they were not factual. He felt that the background to all of this was that Mr Hollyer was aware that he was unhappy with SRG's decision not to consult with him or his colleagues before he was TUPE transferred to the respondent. He described his shock at discovering on 27 March that they were going to be transferred and secondly, that the duties performed by himself and his team were going to be changed so that they were no longer doing majors or roofing any more. He had not been familiar with the products the respondent sold under *'winter maintenance'* and found the whole experience unsettling.

83. The claimant was asked about and described his introduction and orientation into the respondent after the transfer. He stated that the first couple of weeks was his orientation into the business, learning about Ground Control and the way it operated. The claimant told Mr Wallace that although it had been difficult to make the adjustment and he had been unsettled; he felt reassured once he met more people in the company and resolved to set up his team and continue his work. He considered that he had successfully made that transition and had been performing well up to the date of his suspension. The claimant confirmed that he did not know who persons A, B and C were and was therefore unable to challenge what they had said apart from categorically denying that he ever spoken to anyone about another roofing company.

84. Mr Wallace refused to tell the claimant the identity of persons A, B and C. He stated that this was because the claimant had made threats in the previous meeting and the respondent owed a duty of care to those individuals. He had not seen the claimant's report on the mood in the team.

85. The claimant expressed shock at the allegations against him as he had never had such allegations made against him in his entire career. He considered that he had represented the business well. The claimant informed Mr Wallace that he had had to go to the doctor and to seek professional help as this allegation had hit him hard and that he had *'seen red'* at the time but had retracted the statement soon as he calmed down.

86. The claimant confirmed that when he was presented with the allegation by Mr Hollyer he thought that it was his turn to be dismissed as he had watched contract managers leave the business, *'virtually every other week'* for no reason during that period of time. That was why he had referred to the need to go to a recruitment consultant and that it was now his turn to leave. He denied mentioning another business and stated that Mr Hollyer had misunderstood what he said. He stated that he can only have been talking about the respondent as there was no other business. He believed that Mr Hollyer heard it in a different way because of the statement from person A rather than because of anything that he said. He believed that Mr Hollyer misunderstood what he said the at the investigation meeting.

87. The claimant was asked about what he did when he was told that he was being suspended on 24 June, which Mr Hollyer reported in his email to Ms Meah. Mr Wallace considered it suspicious that the claimant had allegedly begun to play with his phone on been told that he was suspended. The claimant explained that he had a number of contacts, photographs and personal stuff on the phone that had not been stored anywhere else, also, he had also just booked a holiday, the details of which were on the phone. He had also been asked for his laptop. The claimant said that he was concerned that he had just spent over £3000 on a holiday and now all of that was going, in one go. He reminded Mr Wallace that when he was asked for the phone, he handed it straight over and did not leave the room with the phone to go to the toilet or to his car first.

88. The claimant referred to other people he knew who had left the business over the past four months. He believed that every single person who had an investigation over the last four months had then left the business even though they had been employed for a long time, whether over ten, eight or five years. It was for this reason that he was concerned at the investigation meeting that this might be the start of his dismissal. He said that it was because of those circumstances that he thought the worst.

89. The claimant pointed out that there were eighteen grammatical errors in the minutes of the investigation meeting which he wanted to go through with Mr Wallace. Mr Wallace indicated that he was not interested in grammatical errors. The claimant agreed that the main points or *'bones'* of the minutes of the investigation meeting were correct. The claimant was asked why, if he considered that he was well respected in the business, in SRG, two people would make these allegations against him. The claimant responded that he considered that the two people were likely to be Mr Miller - who he considered had damaged the contract side of the business and who he had made his views clear to, and Ms Twydell - with whom he had had a disagreement and whose actions he believed had lost the respondent a lucrative contract.

90. During their discussion in the disciplinary hearing the claimant stated that he felt that Mr Miller was getting rid of everyone who was involved in major projects. He also talked about the backlash he faced from the team when he returned to the office on 27 March after the announcements made in the Town Hall meeting which they assumed that he had known about but kept secret from them.

91. He stated that he had continued to smash his targets throughout his employment and continued to perform after the transfer. He had always done what was asked of him. Mr Wallace agreed that the claimant would not have been paid under the LIS if he had not been a good performer. The claimant strongly denied ever speaking to colleagues about going to work for another roofing company. He considered that the respondent may have wanted to get rid of him because he was more expensive than other salesmen and that the individuals who made statements against him may have had grudges against him and that they took the opportunity that the company gave them to get back at him.

92. They discussed the statements obtained in Mr Hollyer's investigation. The claimant agreed that he had been frustrated with the respondent in or around April but contended that if he had wanted to leave, he would simply have done so. He denied that he had spoken to anyone about working for another company as

alleged. He also denied that he would ever have said something in an open format that would be detrimental to the business.

93. The claimant described the SRG strategy as he now understood it, within the respondent and how it dovetailed with the LIS. He acknowledged that it would be more difficult to earn additional income under the incentive scheme but that he was confident that he could do it and had done it.

94. In the hearing Mr Wallace agreed that, without knowing the identity of those who had accused him, it would have been difficult for the claimant to say what motivated them. Mr Wallace considered that he had to keep the names confidential in order to protect his workers because of the claimant's statement in the suspension meeting of '*taking the man outside'*.

95. After the disciplinary hearing Mr Wallace spoke to Mr Miller to ask whether the claimant had been aware of the change in strategy of the sales team upon the transfer to the respondent. Mr Miller confirmed that as far as he was concerned, following the meeting in November, the claimant would have been aware. Mr Wallace did not speak to Mr Hollyer about his investigation or about the matters that the claimant raised. He also did not speak to Ms Twydell to check what the claimant had said about her possible motivation for making her allegation.

96. In his assessment of the evidence, Mr Wallace discounted the evidence of person C. He considered that the claimant had been aggressive in the disciplinary hearing and he did not consider that the claimant might have been expressing frustration on being accused of something and having no information about his accusers to assist him with defending himself against the allegation.

97. Mr Wallace's evidence was that he did not believe the claimant and considered that the statements from persons A and B corroborated each other. His reasons for doing so was because he believed that the claimant had been evasive and aggressive in the disciplinary hearing and because the claimant kept bringing the discussion back to his abilities, the issues surrounding the organisation of SRG, the respondent's change in business strategy and his belief that SRG or the respondent were trying to get rid of him. He decided that the claimant was using those matters to deflect away from the allegation that he had actively tried to entice senior employees to a competitor. He decided that the claimant felt sufficiently disenfranchised by SRG and the respondent to approach persons A and B as alleged.

98. Mr Wallace spoke to the claimant on the telephone and informed him that he would be dismissed. He told the claimant that he had spoken to Mr Miller who had confirmed that he was aware of the change in strategy away from majors and that as the claimant had lied about that it was likely that he had lied about speaking to Ms Twydell. The respondent wrote to the claimant on 6 August to notify him of the outcome of the disciplinary hearing. Mr Wallace stated that he believed, based on findings of the investigation, the disciplinary hearing and his conversation with Mr Miller after the hearing, that the allegations were substantiated. It was his belief that the claimant approached individuals in the company to obtain their interest about being put in touch with a roofing company to rival SRG. He stated that this had been corroborated by two statements.

99. Mr Wallace decided that the claimant should be summarily dismissed for gross misconduct due to an irrevocable breach of trust and confidence. The letter stated that the claimant had fundamentally breached his contract of employment and that any sanction less than summary dismissal would not be proportionate to the claimant's misconduct which was exacerbated by his seniority and his finding that on balance, the claimant's clandestine conduct had been to gain personal advantage (now and or in the immediate future) rather than being in the interest of the company. The claimant's employment was terminated with immediate effect.

100. The letter also asserted the respondent's right to repayment of the bonuses of £20,000 paid in November 2018 and £10,000 paid in May 2019 as per the Remco - winter 2018 letter dated 4 December 2018.

101. The claimant was informed of his right to appeal against his dismissal.

102. On 16 August 2019, the claimant wrote to Mr Watson to appeal against his dismissal. The claimant's grounds for appeal were firstly, that he had denied the allegations against him and that his explanations had been rejected based on anonymous statements which he had been unable to challenge. Secondly, he believed that the decision to dismiss him had been predetermined. He complained that his original team been taken away from him and he had been referred to in April as a *'one trick pony'* by Mr Hollyer and told that all sales personnel would need to be able to sell everything in the respondent's portfolio. Thirdly, his suspension had happened not long after he had produced a report after speaking with the original SRG team and ensuring that it was frank and open, as Mr Hollyer had asked him to and in which several issues were identified as well as a perception that the respondent had poorly directed the SRG business.

103. The claimant stated that he believed that the case against him had been constructed in a way that would allow the respondent not to pay him any notice pay and to clawback the bonus which he had earned. He pointed out that his dismissal occurred approximately twenty-six days before the right to clawback the money expired and that he thought that the decision was a cost saving exercise by the respondent. The claimant also pointed out various procedural errors in the disciplinary procedure. He contended that there were no grounds for concluding that he was guilty of gross misconduct and that the respondent had taken matters into account, such as - his understanding of the change in direction of the business - as evidence that he was untrustworthy when those were not part of the allegations initially made against him or which he had faced at the disciplinary hearing.

104. The claimant’s appeal was heard by Marcus Watson on 24 September 2019. At the start of the hearing Dr Watson informed the claimant that he was not going to conduct a re-hearing. He was going to listen to the basis of the claimant’s appeal. They discussed what he referred to as the claimant’s threat of violence at the suspension meeting, they discussed the claimant’s belief that this had been a sham disciplinary and that the dismissal had been decided upon before the suspension meeting, he disputed the truth of the statements from persons A and B. The claimant stated that he believed that since January 2019, the respondent had invented a ruse to get rid of every major player in SRG and that his turn came 8 days after he submitted the report and weeks before his Remco expired. The claimant denied being threatening or aggressive but was clearly angry and upset about the situation. Mr Watson asked the claimant to prove that he had not said

what he was alleged to have said. It was not clear to the tribunal how the claimant would have been able to prove that he had not said something.

105. The claimant got upset in the appeal hearing as he believed that Mr Watson was deliberately trying to antagonise him so that he would lose his temper during the meeting. Mr Watson denied that he was doing so. However, in the appeal meeting, he was noted as having told the claimant that his voice and body language felt threatening. The claimant was noted as saying that he '*never threw the first punch'*, which, along with the claimant's statements that he felt that he was next in line to be dismissed and that it was his turn, the Tribunal finds was unlikely to be a reference to physical violence but a reference to the fact that he did not start this whole process.

106. After the appeal hearing the claimant emailed Mr Watson to inform him that he thought that he had deliberately tried to aggravate him in the appeal meeting to get a reaction from him. He disputed the credibility of the statements from persons A and B and Mr Wallace's conclusion that he was aware in November 2018, of the change in direction of the business away from majors. He accused Mr Watson of systematically dismantling SRG by creating a poor working environment and that when he did not resign as result of those changes, the respondent decided to make him suffer.

107. Mr Watson passed that email on to Ms Meah to deal with.

108. Mr Watson decided that it was reasonable for Mr Wallace to accept the statements of persons A and B and that the claimant made the invitation to Ms Twydell as alleged. Based on the claimant's obvious anger in the appeal meeting, he agreed that it was right for Mr Wallace to withhold the date, time and name of those who gave the statements to the investigation and that this was consistent with the respondent's duty to protect person A who he believed was fearful for her safety. He reasoned that as the claimant had no new evidence to offer, he would confirm Mr Wallace's decision to dismiss him summarily.

109. In considering his appeal decision, Mr Watson spoke to Mr Wallace. He decided that the claimant's conduct in the appeal hearing, his anger at the charges against him and having lost his job, was evidence of a pattern which confirmed that the decision to withhold Ms Twydell's identity was the right one. He decided that because the claimant had not provided any evidence to confirm that he had not said as alleged, this proved that the allegations were likely to be true.

110. During the tribunal hearing, Mr Watson stated for the first time that he had a conversation with Ms Meah after the appeal hearing in which she confirmed that she did speak to Ms Twydell and confirmed the contents of her statement. This had not been mentioned in his witness statement, the notes of the appeal hearing or in the appeal outcome letter. In the circumstances, I find it unlikely that he did so.

111. The respondent wrote to the claimant on 2 October 2019 to notify him of the outcome of his appeal hearing. Mr Watson referred to each of the headings in the claimant's letter of appeal and set out why the respondent did not accept the claimant's points. Mr Watson stated that he concurred with Mr Wallace's decision that the claimant had committed a serious breach of trust and confidence, in

encouraging certain individuals to move to a rival business particularly knowing the challenges the company was facing. He disputed the claimant's suggestion that the decision to dismiss him had been predetermined and explained the respondent's strategy in changing the focus of the SRG sales/BDM (business development manager) team after the transfer to the respondent. He stated that the respondent had been aware of SRG's financial position when it made the decision to pay the claimant the bonus payments and so it would not have made the decision to dismiss him as a cost cutting exercise to enable the sum to be clawed back. He also stated that as Mr Wallace had little or no involvement with the roofing part of the business, there was no evidence to suggest that he had any reason to predetermine his decision to dismiss the claimant.

112. He disputed that the discussion about whether and not the claimant had been aware of the change in business strategy in November 2018 had any bearing on the Mr Wallace's decision to dismiss the claimant. He stated that he had checked that with Mr Wallace who confirmed that he had not taken into account the claimant's unhappiness with the change of direction of the business but that he considered that unhappiness to have been the motive for the claimant's actions.

113. Mr Watson confirmed that he concurred with that decision and that the claimant's appeal had failed.

114. On 28 October 2019, the respondent's solicitors wrote to the claimant to say that unless he repaid the sum of £30,000 to the respondent within fourteen days, the respondent was going to take legal action against him for recoupment of the 'ex-gratia payment'.

115. In the hearing, the claimant produced an email dated 6 May 2021 from the individual known as person B. The claimant only found out the identity of that person through the process of disclosure in this litigation. He confirmed in the hearing that he did not send the statement prepared by Mr Hollyer to person B but instead invited him to comment on his conversation with Mr Hollyer. In the email, person B suggested that it would not have been unusual to have been speaking to another roofing contractor *'as we all know and communicate people in our industry all the time'*. He stated that he said nothing to Mr Hollyer which would have *'implemented'* the claimant working with another company. It is likely that he meant to say *'suggested'* or *'intimated'* that the claimant was working on behalf of another company while at SRG. He stated that he knew that the claimant was 100% '*for*' SRG and the team. He also stated that his statement to Mr Hollyer was totally misconstrued, either in context or content.

116. The claimant also produced email from person C in which she stated that she could not recall ever having a conversation with Mr Hollyer about the claimant. That would accord with the respondent as Mr Hollyer did not tell those interviewed the claimant's name. She stated that the construction industry was full of gossip, rumours and general chitchat and that you take it all with a pinch of salt. She stated that it was not like her to overhear a conversation and relay it back to Mr Hollyer. She denied that the respondent had her permission to use the statement that Mr Hollyer took and stated that she did not endorse using it in a tribunal.

117. Mr Watson stated that the respondent had found out that following his dismissal, the claimant had approached a couple of its clients to try to entice them

away from the respondent. The claimant started employment on 30 September 2019. The process of attracting new business in that new job was challenging for him, especially as he had lost the contact details for many of the industry contacts he had built up over many years, which had been saved on his work mobile. The claimant had collected many numbers of potential/former clients over the years and would transport those from one mobile phone to the other. It was his evidence that he used LinkedIn and other similar sources to build up a new list of clients. On occasion, he was told by the people that he contacted that they were the respondent's clients and were not interested in doing business with him. Once they told him that they were the respondent's client, he respected their decision to stay with the respondent and did not pursue them further. It is likely that the claimant reached out to some of the respondent's clients in an attempt to rebuild his client base.

Law

Unfair dismissal

118. It was the claimant's case that there had been inadequate investigation into the allegations against him and that this tainted the process that followed so as to make his dismissal unfair. That submission was resisted by the respondent. We discussed the following law in the hearing.

119. Firstly, the tribunal is concerned with the question of determining the reason for the employee's dismissal and whether it is one of the reasons set out in section 98 (2) of the Employment Rights Act 1996. The burden is on the respondent to show the reason for dismissal. The reason for dismissal is the set of facts known by the employer or beliefs held by him which cause him to dismiss the employee. (*Abernathy v Mott Hay & Anderson* [1974] IRLR 213). It would be the reason which motivated the dismissing manager. Even if the employer is mistaken in his beliefs, the employer's subjective belief is sufficient to establish a reason for dismissal.

120. The law on unfair dismissal is set out in section 98 of the Employment Rights Act 1996. We discussed the well-known case of *BHS v Burchell* [1978] IRLR 379 EAT, in which the court set out a three-stage test that employers must follow in reaching a decision that the employee had committed the alleged acts of misconduct and that it was reasonable to dismiss them for it. The employer must show as follows: – (a) he believed the employee was guilty of misconduct; (b) he had in his mind reasonable grounds which could sustain that belief, and (c) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

121. That means that the employer does not need to have conclusive direct proof of the employee's misconduct but only a genuine and reasonable belief of it which has been tested through a reasonable investigation.

122. If the Tribunal concludes from the evidence that those stages have been followed, then it must decide whether, taking into account all relevant circumstances, including the size of the employer's undertaking and the substantial merits of the case, that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. In determining this, the tribunal has to be mindful not to substitute its own views for that of the employer. The onus is on the employer

to establish that there was a fair reason for the employee's dismissal such as misconduct, which is relied on in this case. The tribunal must ask itself whether what occurred fell within the 'range of reasonable responses' of a reasonable employer.

123. In the case of *Iceland Frozen Foods v Jones* [1982] IRLR 439, Mr Justice Browne-Wilkinson summarised the law as follows*: "….in law the correct approach for the tribunal to adopt in answering the questions posed by section 98(4) ERA is as follows: (1) the starting point should always be the words of section 98(4) themselves; (2) in applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether they (members of the tribunal) consider the dismissal to be fair; (3) in judging the reasonableness of the employer's conduct, the tribunal must not substitute its decision as to what was the right course to adopt for that of the employer (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, and another quite reasonably take another; (5) the function of the …tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses a reasonable employer might adopted. If the dismissal falls within the band the dismissal was fair; if the dismissal falls outside the band it is unfair."*

124. In connection with his submissions regarding the quality of the investigation, the claimant referred the tribunal to the case of *Clark v Civil Aviation Authority* [1991] IRLR 412 where in obiter comments the court set out as part of general principles governing disciplinary hearing procedures that, the employee should be informed of the allegation or allegations made against them, given an indication of the evidence whether in statement or other form or by recording of witnesses; allowed either by themselves or through their representative to ask questions, and have the opportunity to call evidence and explain/argue their case.

125. A departure from that kind of process was seen in the case of *Fuller v Lloyds Bank plc* [1991] IRLR 336 in which the EAT held that although contrary to an established procedure the employer did not make the witness statements available to the employee; as the employee was fully aware of the case against him, it could not be said that the procedural defect made the dismissal intrinsically unfair. That case likely turned on its particular facts as the standard set out by the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the Code) contains requirements, that the employer inform the employee of the basis of the problem and give them an opportunity to put their case in response before any decisions are made, as basic elements of fairness (Para 4). Another is that employers should carry out any necessary investigations, to establish the facts of the case.

126. The Code further provides that:

> *"9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be*

appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting'.'

127. At the other end of the scale from *Fuller* is the case of *Weddel v Tepper* [1980] IRLR 96. In that case, the tribunal found that the dismissal was unfair on the grounds that the employer had a responsibility to gather further information to complete their case and that they should have given the employee fair opportunity to defend his previous good name. The employer's appeals were dismissed.

128. Both parties referred the tribunal to the case of *Linfood Cash and Carry Ltd v Thomson* [1989] IRLR 235. That case concerned the respondent's treatment of allegations made to it by an informant who refused to allow his identity to be disclosed. The tribunal's decision that the dismissals were unfair were upheld. The employer had not carried out as much investigation into the matter as was reasonable in all the circumstances. The EAT gave some guidance to employers when dealing with allegations concerning an employee's conduct made by an informant. In such circumstances, a careful balance must be maintained between the desirability of protecting informants who are genuinely in fear and providing a fair hearing of issues for employees who are accused of misconduct. There were 10 points in the guidance which the tribunal will now set out, as this case is relevant to the issues in the instant case. They are as follows: –

"(1) the information given by the informant should be reduced into writing in one or more statements……..

(2) in taking statements, the following seem important: (a) date, time and place of each or any observation or incident. (b) the opportunity and ability to observe clearly and with accuracy. (c) the circumstantial evidence, such as knowledge of a system or arrangement or the reason for the presence of the informer and why certain small details are memorable. (d) whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principal.

(3) further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.

(4) tactful inquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add or detract from the value of the information.

(5) if the informant is prepared to attend a disciplinary hearing no problem will arise but if, as in the present case, the employer is satisfied that the fear is genuine then a decision will need to be made whether not to continue with the disciplinary process.

(6) if it is to continue, it is desirable that at each stage of those procedures the member of management responsible for that hearing should himself

interview the informant and satisfy himself that weight is to be given to the information.

(7) the written statement of the informant, if necessary with omissions to avoid identification, should be made available to the employee and his representatives.

(8) if the employee or his representative raises any particular and relevant issues which should be put to the informant, it may be desirable to adjourn for the chairman to make further enquiries of the informant.

(9) although it is always desirable for notes to be taken during disciplinary procedures, it is particularly important in these cases that full and careful notes should be taken.

(10) whilst not peculiar to cases where informants have been the cause for the initiation of an investigation, it is important that if evidence from an investigating officer is to be taken at a hearing, it should where possible be prepared in a written form.

Where the credibility of the witnesses at issue, it is an error of law for the tribunal to substitute their own view for that of the employer. The relevant question is whether the employer acting reasonably and fairly in the circumstances could properly accept the facts and opinions which they did. The evidence is that given during the disciplinary procedures and not that given before the Tribunal…….A decision by a Tribunal that the employer could not reasonably have accepted a witness as truthful must be based on logical and substantial grounds……For the Tribunal merely to prefer one witness to another might well not be sufficient since that could be to substitute their own view.'

Wrongful dismissal

129. The claimant was dismissed summarily on 5 August 2019. His complaint is that he was wrongfully dismissed and that he was entitled to contractual notice pay of a total of 3 months' pay.

130. In determining a complaint of wrongful dismissal, the tribunal must decide whether the employer has proved that the gross misconduct actually occurred. It is only in those circumstances that an employer is entitled to dismiss an employee in breach of contract i.e. without giving the requisite contractual notice.

131. The question in a wrongful dismissal claim is whether the dismissal was objectively justified by gross misconduct, not whether the outcome was fair. Questions of fairness are only relevant to the unfair dismissal complaint.

Counterclaim

132. The respondent counterclaimed for the whole of a payment of £30,000 made to the claimant in two instalments, of £20,000 in November 2018 and £10,000 in May 2019. The respondent acknowledged that the tribunal's jurisdiction

is limited in matters of breach of contract as set out in the [Employment Tribunals] Extension of Jurisdiction (E &W) Order 1994, to £25,000 (Article 10).

133. The claimant disputed the respondent's claim for repayment of that sums. The claimant disputed that the first instalment of £20,000 was subject to the agreement. He also defended the claim as follows: he contended that it was a variation to the earlier 2017 scheme and therefore not an exgratia payment at all; that the requirement to repay the amount was an unenforceable penalty clause and lastly, that there was an implied term in the contract that an unfair dismissal cannot amount to a cessation of employment for the purposes of a clawback in these circumstances.

134. Both parties referred the Tribunal to parts of *Chitty on Contracts*. I was referred to parts of Chapter 26 of *Chitty*, which starts as follows: Where the parties to a contract agree that, in the event of a breach, the contract-breaker shall pay to the other a specified sum of money, the sum fixed may be classified by the courts either as a penalty (which is irrecoverable) or as liquidated damages (which are recoverable). The law on this topic has been fundamentally rewritten by the decision of the Supreme Court in the cases (heard together) of *Cavendish Square Holding BV v Makdessi* and *ParkingEye Ltd v Beavis* [2015] UKSC 67.

135. The respondent referred paragraph 26 – 236 which stated that if a contract provides that in a certain event a sum of money paid under the contract is to be repaid to the original payer, the reimbursement cannot be a penalty. It was the respondent's primary submission that the penalty rules did not apply. If they did apply, the respondent submitted that this was reimbursement which cannot be a penalty, which meant that it was therefore enforceable. This was a case of liquidated damages. The clause came into operation on cessation of the employment and not because of a breach of the contract.

136. At paragraph 26 – 190 *Chitty* states

> *"A clause is enforceable if it meets the traditional test that it does not extravagantly exceed a genuine attempt to estimate in advance the loss which the claimant would be likely to suffer from a breach of the obligation in question, but the true test is whether the party to whom the sum is payable had a legitimate interest in ensuring performance by the other party and the sum payable in the event of breach is not extravagant or unconscionable in comparison to that interest."*
>
> And at 26 – 197
>
> *"In Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis a majority stated that whether a clause is a penalty is a question of construction. From this it follows, Lords Neuberger and Sumption said, that the test must be applied as of the date of the agreement, not when it falls to be enforced; a penalty clause is a species of agreement that is by its nature contrary to public policy. It also follows that the application of the test does not involve a discretion, and if the clause is penal it is wholly unenforceable."*

137. The Supreme Court also held that the *'purpose of the law relating to penalty clauses was to prevent a claimant recovering a sum of money in respect of a*

breach of contract committed by the defendant which bore little or no relationship to the loss actually suffered by the claimant as a result of the breach'. Their Lordships described a penalty as essentially a way of punishing the contract-breaker rather than compensating the innocent party. That contrasted with a genuine pre-estimate of loss, which would not be classed as a penalty and likely to be enforceable. In determining whether a contractual provision was penal, the true test was whether it was a secondary obligation which imposed a detriment on the contract-breaker out of all proportion to the innocent party's legitimate interest in the enforcement of the primary obligation.

138. The claimant relied on the case of *AG of Belize v Belize Telecom Ltd* [2009] UKPC 10 in which the following was stated:

> *"[17] the question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.*
>
> *[18] in some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.*
>
> *[19] the proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic …. but also well supported by authority……*
>
> *[21] it follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean…… this question can be reformulated in various ways which a court may find helpful in providing an answer - the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on……. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"*

139. The court also stated that a court dealing with an application should refrain from falling into the danger of detaching phrases such as "*necessary to give business efficacy*" from the basic process of construction of the instrument. The court must be careful not to make so much of a requirement that it risks diverting attention from the objectivity which informs the whole process of construction into speculation about what the actual parties to the contract or authors of the

instrument would have thought about the proposed implication. The imaginary conversation with an officious bystander vividly emphasises the need for the court to be satisfied that the proposed implication spells out what the contract would reasonably be understood to mean. That and the other conditions referred to above (i.e. "*it must be necessary to give business efficacy*" and *"goes without saying"*, etc.) are not a series of independent tests which must each be surmounted but rather a collection of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so.

Applying law to facts

Unfair Dismissal

140. The claimant focused on the reasonableness of the investigation in this case.

141. What was the reason for the claimant's dismissal? It is the respondent's case that the claimant was dismissed because of misconduct. It was the claimant's case that he was dismissed because of the report that he produced and gave to Mr Hollyer and which was passed to Dr Watson.

142. If he was dismissed for gross misconduct, the Tribunal has to decide whether, if Mr Wallace believed that the claimant had committed gross misconduct, his belief was based on a reasonable investigation and whether he had in his mind reasonable grounds that could sustain that belief. Had the respondent carried out as much investigation into the matter as was reasonable in the circumstances, at the time that Mr Wallace formed that belief?

143. It is this Tribunal's judgment that there were many flaws within the investigation.

144. The accusation that the claimant had approached colleagues to entice them away from the respondent came from Ms Twydell in an email to the Head of HR and to Derek Miller, a senior director within SRG. Ms Twydell was herself a senior employee within SRG. She indicated that she did not want the claimant to know that the allegation came from her. She was therefore an anonymous informant. The tribunal considered how the respondent treated that information, in light of the law and the guidance set out in the case of *Linfood Cash and Carry Ltd*, referred to above.

145. The respondent had a statement from Ms Twydell and a note of conversation between her and Ms Meah, the HR director. The investigation manager, the disciplinary hearing manager and the appeal manager all decided that they did not need to speak to Ms Twydell to check her understanding of her conversation with the claimant and to satisfy themselves of the weight to be given to the information she provided. Evidence from an anonymous informant raises two issues; one is whether the informant's identity should be passed onto the employee accused of misconduct to enable them to defend themselves against the allegation and the other is whether the request for anonymity is justified/fair or whether it is being used as a cloak to hide allegations that the informant knows are

untrue. Was her fear genuine? During the investigation and disciplinary process in this case, it is this Tribunal's judgment that the respondent considered the first issue but not the second.

146. It is this tribunal's judgment that by the time he arrived at the suspension meeting, Mr Hollyer had already made the decision to withhold Ms Twydell's identity from the claimant. This was based on her request for anonymity and not on anything that he knew that the claimant had done to warrant that. Ms Twydell stated that she was extremely worried as to how the claimant might react to her personally, if he knew that she had made the allegation against him. It was not clear what this was a reference to. It could have been a reference to the argument or disagreement they had about work and a fear that there would be further argument between them. It could be also be a reference to something more serious or to her not wanting to be challenged on her statement. It does not appear from the documents that Ms Meah asked Ms Twydell for more details on why she did not want her identity to be shared with the claimant and once it was passed to Mr Hollyer for investigation, neither Mr Hollyer, Mr Wallace or Mr Watson spoke to Ms Twydell to find out why she decided that she did not want the claimant to know that it was she made the allegation against him. Mr Hollyer referred to a concern that the claimant might have harsh words with her but did not say on what that concern was based.

147. Even if the respondent initially believed her when she stated that she was fearful of his response, for whatever reason, they did not revisit that issue or question her statement when the claimant stated in the investigation meeting that he had been less than complimentary about her. Mr Hollyer did not speak to her to find out whether that was a motivating factor for her or whether she felt the same.

148. During the disciplinary hearing, the claimant told Mr Wallace that he had had a disagreement with Ms Twydell and her actions caused the respondent to lose a lucrative contract. Mr Wallace did not pay any attention to this point and made no further investigations about it. He did not ask the claimant what he meant by this and did not consider whether this was motivation for Ms Twydell to misunderstand something that the claimant had said or at the other extreme, to fabricate a story to get back at him. In her conversation with Ms Meah, Ms Twydell referred to the claimant having been '*shirty'* with them recently and having been 'a pain'. That was not a suggestion of violence or a threat of violence. In the later email she stated that she was worried about how he would react. At the very least, both the claimant's and Ms Twydell's comments about their relationship would have caused a reasonable employer to question whether she had a motive to make up this allegation against him and whether it was likely that the claimant would have extended a lucrative invitation to someone with whom he did not have a good working relationship. The respondent did not consider any of this.

149. The claimant gave the respondent a motive or at least a line of investigation to follow-up with Ms Twydell which could have called into question her credibility, recollection or motives. This is even more important where she was not going to attend the disciplinary hearing to give the claimant the opportunity to challenge her himself; and the claimant was not told who it was that had given a statement against him or the time and date when it was said that he made the alleged statement, so that he could challenge it. Contrary to the guidance set out in *Linfood* above, the respondent did not investigate whether Ms Twydell had suffered at the

claimant's hands or had any other reason to fabricate her allegation against him, whether from personal grudge or any other reason or principal.

150. In this tribunal's judgment, Mr Hollyer's investigation also failed to give the claimant sufficient information to be able to properly defend himself against the allegation. Mr Hollyer decided that he was not going to tell the claimant who had made the allegation against him well before the claimant stated in the investigation meeting that when he finds out who said it, he would be stepping outside with them. The respondent did not consider whether it was appropriate in circumstances where the claimant was facing possible career ending allegations, to withhold Ms Twydell's details from him. The claimant was also not given the printout showing their cars in the carpark at the same time on 16 May and also not told the day when it was alleged that he made the invitation to her to leave the respondent and work for another company.

151. The tribunal was not told of any previous incident of the claimant being threatening or aggressive at work or with clients or customers during his employment. In the particular circumstances of this case: where the claimant had been called to a meeting to be suspended where there had been no hint of any issue in his employment until that date, he was suspended but not told of the details of the allegation and spent two sleepless nights before coming to the investigation meeting where he's told of the allegation but not told who made it, where or when, but was then asked to explain it; it is not surprising that he was angry and upset and expressed those feelings in the investigation meeting and later, in the disciplinary hearing.

152. He made two statements which the respondent relies on as support for their decision not to share Ms Twydell's involvement with him. Firstly, at the investigation meeting the claimant spoke about stepping outside with the person who made the allegation, once he finds out who it is. Later, in the email he referred to stepping outside with the '*man'*. In this Tribunal's judgment, those were ambiguous statements and were not necessarily threats of violence. One can be taken outside for a stern discussion. Even the claimant's apology, once he had calmed down and realised what he said was taken by Mr Watson as proof that it had been a threat of violence, which further upset him. In this Tribunal's judgment the respondent interpreted those ambiguous statements against the claimant. The respondent also concluded that Ms Twydell's fear/concern was genuine, without any further probing. The respondent did not take into consideration the circumstances in which the claimant's statements had been made in assessing whether they were sufficient to warrant withholding important information from the claimant in the investigation and disciplinary process. In this Tribunal's judgment the decision to do so hampered the claimant's ability to fully defend himself against the serious allegation made by Ms Twydell.

153. Mr Hollyer took fourteen statements from members of staff as part of his investigation. Three statements were sent to the claimant – those taken from persons A, B and C. He did not see the rest until sometime later, after the disciplinary hearing. The claimant should have been sent all the information that had been sent to Mr Wallace so that he could properly defend himself against the allegation. The fact that twelve witnesses did not corroborate Ms Twydell's allegation was a relevant part of the investigation that the claimant needed to have,

in preparing his defence. He was only shown the statements that supported the case against him and not those that detracted from it.

154. Some of those statements referred to individuals being approached by other members of staff to work elsewhere. The Tribunal was not told whether any of those were the subject of further investigation. This occurred during an unsettled period within the respondent, during which there were likely to be lots of conversations about other possible places to work. Where all the other possible conversations followed up? The claimant had only been given some of the documents prepared in the investigation. The witness statements were all unsigned. There does not appear to have been any investigation into Karslake Roofing and if it was known that it did not exist, it was not clear what effect that had on the investigation or Mr Wallace's conclusions. The statements from persons A and B were vague and imprecise.

155. In this tribunal's judgment, Mr Hollyer made statements within the investigation report that were highly critical of the claimant and were only loosely connected to the allegation made by Ms Twydell. In my judgment those statements relate more to the report the claimant prepared for Mr Hollyer and Mr Watson rather than to the allegation that Mr Hollyer was investigating. He stated that the claimant was clearly not happy within his post or with the direction of the business and that he was being destructive to the business and trying to stop it from realigning strategy and marketplace. Also, that the claimant had under delivered on three of the respondent's six core values. In this Tribunal's judgment, those statements were Mr Hollyer's response to the claimant's preparation of the report which had been submitted shortly before his suspension, rather than to the allegation made by Ms Twydell. Ms Twydell expressed similar concerns in one of her emails – that the claimant was trying to stop the success of the business and that she was not having it. In this Tribunal's judgment, it is highly likely that in conducting this investigation, Mr Hollyer focused on the evidence that confirmed what he initially thought, which was that the claimant had done as alleged and that the claimant was not committed to the business, which he felt was demonstrated by the report. He statements about the claimant's commitment to the business relate to the claimant's report more than to Ms Twydell's allegation. There was no reference to Ms Twydell's allegation in the report's conclusion. These statements about the claimant's attitude to the business would have been of concern to any director, including Mr Wallace, even though he had not worked directly with the claimant and had not seen the report the claimant prepared for Mr Hollyer.

156. Any statements the claimant made during this process were interpreted against him. He made one statement that when he found out who had made the allegation, he would step outside with them. When he apologised in the email, he stated that he wanted to retract the statement about going '*outside with the man'*. The respondent focused on the second statement and took it to mean that he had spoken to other people apart from Ms Twydell rather than the more obvious meaning – that the claimant had assumed that the allegation against him had been made by a man. His statement in the suspension meeting that he could only guess that the allegation against him was linked to another business was later misquoted as '*the company you mentioned to somebody'*, which was closer to the allegation against him but not what had been recorded in the email that Mr Hollyer sent to Ms Meah.

157. A lot of time was spent in the investigation meeting and in the disciplinary hearing discussing the claimant's understanding of the new strategy for the business development team, the claimant embedding into the team and his awareness or support for the new strategy. The respondent's case was that this was only discussed in the disciplinary hearing because the claimant was deflecting from the allegations. It is this Tribunal's judgment that these matters were discussed because the respondent was concerned about what the directors saw as the claimant's lack of commitment to the business, his destructive behavior towards it and what Mr Hollyer referred to in the investigation report as his *'trying to stop it from realigning strategy and marketplace'.*

158. The fact that Mr Wallace's only enquiry after the disciplinary hearing was to confirm with Mr Miller the claimant's understanding of the change in strategy in the sales/business development section shows how important this matter was to the directors, including Mr Wallace. An important issue for the respondent was that the claimant was not seen as supportive of the business and was instead, conducting himself in a '*destructive'* way, as Mr Hollyer described. It is this Tribunal's judgment, this was as much a reference to him not being on board with the move away from majors as well as a reference to the production of the report; in addition to the alleged invitation to Ms Twydell, which the respondent had not properly investigated and had insufficient evidence to believe had actually happened.

159. Mr Hollyer did not attend the disciplinary hearing and Mr Wallace only spoke to him to discount person C's statement. Neither Mr Hollyer nor Mr Wallace spoke to Ms Twydell.

160. In the circumstances, it is this Tribunal's judgment that the respondent had not conducted a reasonable investigation into the allegation made by Ms Twydell. The claimant had not been given a reasonable opportunity to defend himself against Ms Twydell's allegation. The claimant gave the respondent information which could have called into question the veracity of the account given by Ms Twydell which it ignored, while at the same time it did not give the claimant sufficient information to enable him to challenge the allegation made against him. The investigation report sent to Mr Wallace had been written to show the claimant as a threat to the business or someone who was acting contrary to the company's best interests.

161. The guidance in the case of *Linford* is instructive as it was a case with facts similar to the instant case. This Tribunal is aware that the statements in that case were guidance and not law. This tribunal has been careful not to substitute its view for that of the respondent. It is this Tribunal's conclusion that considering the seriousness of the allegation against this claimant, the possible consequences for him; the circumstances of this respondent and resources available to it; the respondent failed to conduct a reasonable investigation.

162. In the disciplinary hearing, when the claimant expressed his frustration at having a serious allegation made against him but not having the information to be able to fully respond to it, Mr Wallace considered that he was being aggressive and evasive. It was not clear how the respondent expected the claimant to be able to prove that he had not said something. Mr Wallace also did not consider it necessary for him to speak to Ms Twydell. He simply accepted that she had a real

and genuine fear of the claimant, that her statement was accurate and that she had no reason to fabricate an allegation against the claimant. It was not reasonable for him to come to those conclusions based solely on her email to Ms Meah and Ms Meah's note of their conversation. He had not satisfied himself of these aspects. It is likely that Mr Hollyer's statements that the claimant was not happy within his post or with the direction of the business and was being destructive of the business, weighed heavily on Mr Wallace's mind. It is this Tribunal's judgment that those statements referred mainly to the contents of the claimant's report. The conclusion in the dismissal letter that the claimant's conduct had been to gain personal advantage was not a matter that had been covered in the investigation or referred to in Ms Twydell's original accusation and it was not clear what that was being referred to.

163. In the circumstances, it is this Tribunal's judgment that Mr Wallace did not have a genuine belief at the end of the disciplinary hearing that the claimant had extended the alleged invitation to Ms Twydell and to person B, in an attempt to entice them away from the respondent.

164. It is this Tribunal's judgment that an employer acting reasonably and fairly in these circumstances could not properly have accepted the statements and opinions which the respondent did at the end of the disciplinary hearing.

165. In this tribunal's judgment the respondent had not conducted a reasonable investigation and Mr Wallace did not have a genuine belief that the claimant had committed gross misconduct as he did not have the evidence on which to base such a belief. The respondent had not fully investigated the allegation and the motives of the person who made the anonymous allegation. Also, the claimant had not had an opportunity to fully challenge the evidence.

166. At the end of the disciplinary hearing Mr Wallace came to the conclusion that although the business considered that it had heavily invested in the claimant, he was not committed to it and was instead, behaving in a destructive way towards it and was actively *'trying to stop it from realigning strategy and marketplace'* by the production of a report that made serious accusations against directors. It is this Tribunal's judgment that this was the main reason for the claimant's dismissal.

167. This was not a fair reason for the claimant's dismissal.

168. Was this remedied at the appeal stage? The Tribunal note that when Mr Watson was first told of the allegation, even before the investigation, after he was provided with evidence that the claimant's vehicle had been in the car park at the same time as Ms Twydell; Mr Watson referred to the claimant having acted in a '*treasonous'* way. That demonstrated the strength of feeling that Mr Watson had towards the claimant. He felt that the claimant had been disloyal to the respondent and it is my judgment that that did not relate solely to the allegation made by Ms Twydell.

169. Mr Watson had strong feelings about the report that the claimant had put together. He believed that it contained the claimant's views. He considered that the claimant had been heavily remunerated and he expected loyalty in return. It is likely that he also expected the claimant to work to reassure members of the team

about the future of the business rather than simply reporting back how everyone was feeling.

170. In this Tribunal's judgment, Mr Watson considered that when he prepared and submitted that report, the claimant had not been the asset to the business that the respondent needed and that instead, he had been disloyal or behaved in a '*treasonous'* way. It is my judgment that this was why in the appeal hearing, the concern Ms Twydell expressed that the claimant might have harsh words with her as justification for withholding her details, morphed into a concern that he might be violent – because he stated in that meeting that he had '*not thrown the first punch'*.

171. Dr Watson repeatedly asked the claimant in the appeal meeting whether he had any evidence to counteract the statements made by persons A and B. It was not clear apart from denying that he had made the statements, what proof he was expected to provide. Apart from persons A and B, the only other participant to those alleged conversations was the claimant. It was not clear to the Tribunal what else he could have done apart from deny that he had made the statement as alleged. If he had the details of who had made the allegation, he could have pointed to something that might have motivated those persons to make false allegations against him, which he had already attempted to do without knowing who it was. Without any more information than he had before the disciplinary hearing, he was could do no more than continue to repeat that he had not made the statement as alleged.

172. In this Tribunal's judgment, the appeal did not remedy the flaws of the investigation and the disciplinary process. It is firstly, the Tribunal's judgment that the respondent did not believe that the claimant had committed gross misconduct at the time of the decision to dismiss him. Secondly, it is also this Tribunal's judgment that the respondent did not conduct a reasonable investigation into Ms Twydell's allegation and could not have had a reasonable belief that the claimant had made the invitation as alleged by Ms Twydell. The allegation was a convenient way to dismiss an employee who the directors considered had shown that he was not committed to the company, was instead acting against the best interests of the company, being destructive and actively trying to stop it from realigning strategy and marketplace. In the circumstances, it is this Tribunal's judgment that the claimant's dismissal was unfair and outside on the band of reasonable responses.

173. The complaint of unfair dismissal succeeds.

Wrongful Dismissal

174. The Tribunal considers that it is not possible to say whether the claimant tried to entice Ms Twydell and other colleagues away from the business to a competitor. The claimant did not go to a competitor after his dismissal. He was unemployed for a short time.

175. The respondent had not considered the information that he gave them during the investigation and disciplinary hearings that Ms Twydell was not someone he got on with and that she was one of two people who would have had a reason to make up this allegation against him because of issues that they had had between them at work. The respondent never investigated that. It was never put to her and she was never asked about it.

176. I did not accept Mr Watson's evidence that he had spoken to Ms Meah about Ms Twydell's statement at the time he conducted the appeal. It is likely that he said it while giving evidence because he realised during the hearing that this would have been the appropriate and reasonable thing to do but it was not what he did at the time.

177. The claimant did not get on with Ms Twydell. He thought that she had hurt the business and that was why they were not on good terms. It is likely that Ms Twydell would have had a different explanation as to why they did not get on but she was never asked about that. Neither the respondent nor the Tribunal had the benefit of hearing her explanation for her concerns about the claimant or why she says that they did not get on.

178. They were both at head office on 16 May but that was not unusual as that was their place of work. The claimant mentioned 'the business' and later referred to taking a 'man' outside when he finds out who it is who made the allegation against him. Without further evidence, it is this Tribunal's judgment that these facts are insufficient and could not lead to a conclusion that the claimant approached Ms Twydell and asked her if she would be interested in going to work for another company which was thinking of setting up in competition to the respondent.

179. In addition, the respondent did not conduct an investigation into whether the claimant was actually being destructive to the business. He had a different view from the directors on what aspect of sales was the most lucrative for the business, but it was not submitted that holding a different opinion was by itself destructive. Although he held that different opinion, it was agreed that the claimant continued to do his job. In the report he produced he set out his motives for doing so which appeared to be to assist the respondent and to encourage open and constructive dialogue between sales and the directors to resolve the issues thrown up by the TUPE transfer and the change in direction. It is this Tribunal's judgment that the respondent considered the claimant's actions in talking to the old sales team and writing and submitting this report as destructive, undermining and contrary to what they expected of him but it was not submitted that it was misconduct or gross misconduct.

180. It is this Tribunal's judgment that the claimant was wrongfully dismissed and is entitled to his notice pay.

Counterclaim

181. It is this Tribunal's judgment that the claimant was paid the sum of £20,000 by SRG in November 2018 and a further £10,000 by the respondent in May 2019. The claimant was part of a group of staff who transferred to the respondent on 1 April 2019 under the TUPE Regulations which meant that on that day all of SRG's rights, powers, duties and liabilities in connection with the claimant's employment transferred to the respondent.

182. Why did the respondent pay the claimant those sums of money? The first iteration of the LIS set out in the letter of 16 October 2017 was to cover the period September 2017 - August 2018. The purpose was to incentivise the claimant to ensure that he benefited from his hard work. The respondent wanted to keep the claimant and three other colleagues in the business which is why they were

included in the scheme. This version was additional to any commission earned. However, the scheme did not pay out because SRG did not perform to those levels.

183. In September 2018, in response to the claimant's queries about his bonus, the respondent revised the scheme for the same period (2017 to 2018).

184. In November 2018 separate discussions began between the parties about the claimant's role in the business. It is likely, that those discussions on the part of SRG, were in anticipation of the TUPE transfer to the respondent. As part of those discussions, the claimant agreed to be paid commission and the ex-gratia payment of £30,000 in two tranches. In an email response to Mr Bradbury and others dated 23 November, the claimant agreed that he accepted the payments with the term that they would be subject to clawback on the basis of continued employment until 30 October 2019 and confidentiality. This was before the first payment was made on 30 November.

185. It is this tribunal's judgment that these conditions were repeated and clearly set out in the letter of 4 December 2018. It is also this tribunal's judgment that the purpose of the payment was to recognise the claimant's contributions in turning around the performance and stability of SRG. It is referred to as an ex-gratia payment. It was not referred to as a bonus or commission payment calculated on his sales or the revenue that he brought into the business.

186. The next iteration of the LIS replaced any commission structure. In the respondent's letter that was conflated with the ex-gratia payment. On 14 December the claimant again accepted the latest version of the LIS, the same ex-gratia payment and its attached conditions.

187. It is therefore this tribunal's judgment that the ex-gratia payment was not made under the LIS. It was a separate payment. The claimant was never paid anything under the LIS. The purpose of the payment of £30,000 was to recognise the claimant's contribution to the business, to retain him in the business and possibly as a bonus or equivalent payment to recognise his hard work in helping to turn SRG around. It also reflected the directors' hope that he would continue to do so.

Was it a penalty clause?

188. Having considered the law set out above in *Chitty* and in the cases referred to, it is this Tribunal's judgment that the clause came into operation on cessation of the claimant's employment and not because he had breached his contract with the respondent. The Tribunal applied what is set out in *Chitty* as the true test of such a clause i.e. whether the party to whom the sum is payable had a legitimate interest in ensuring performance by the other party and the sum payable in the event of the breach is not extravagant or unconscionable in comparison to that interest. The claimant had a bonus payment of just over £41,000 in October 2017. That leads the Tribunal to conclude that an ex-gratia payment of £30,000 in lieu of a bonus and to reflect his contribution to the business would not be an extravagant or unconscionable payment. The respondent had a legitimate interest in keeping the claimant within the business, performing his duties and assisting to turn SRG around.

189. The claimant submitted that the trigger for the repayment clause would be his breach of contract because, if he had done misconduct, which led to his fair dismissal, the clause would be entitled the respondent to clawback the payment, which means that it was a penalty clause.

190. At the time that the parties made the agreement, neither party considered the likelihood or possibility of the claimant being dismissed, whether fairly or otherwise. It is likely that it was an attempt by the respondent to keep the claimant in the business for at least four months after the transfer, until the end of August 2019. The respondent had a legitimate interest in keeping the claimant in employment. At the time that the agreement was made it was considered good for the business to keep him in employment. The payment was therefore a deterrent to the claimant leaving the respondent's employment. It was not a deterrent to him breaching the employment contract.

191. In this Tribunal's judgment, this clause was not a variation to the 2017 LIS scheme. It stood outside the scheme and separate from it. It was also not a penalty clause. Under the clause, the claimant had to repay the amount to the respondent on the end of his employment. It arises from the cessation of the claimant's employment. In the letter of 16 October, the respondent stated that it would need to be repaid if the claimant gave notice to the company. In the revised version set out in the letter o 4 December, it stated that it would be clawed back if the claimant's employment ceases or he tendered his resignation within 12 months of the payment. Also, that the claimant understood that the respondent reserved the right to clawback the entire payment within 30 days of the claimant leaving the company.

192. In this Tribunal's judgment, the respondent indicated its intention to pursue repayment of the ex-gratia payment long before it knew that the claimant intended to bring proceedings in the employment tribunal. It was raised in the dismissal and appeal outcome letters, which were the earliest points at which it could have been raised.

193. It is this Tribunal's judgment that it was not a penalty clause.

Should the Tribunal imply a term into the contract?

194. The claimant submitted that the Tribunal should imply a term into the claimant's contract that an unfair dismissal cannot amount to a cessation of employment for the purposes of clawback. The claimant submitted that it could not be solely within the employer's gift to unlawfully terminate the contract and then demand repayment of money which the claimant had rightfully earned. Where the claimant had been unfairly dismissed, these would be circumstances of the respondent's own construction and the respondent would be benefitting from its own wrongdoing. The claimant submitted that in order to give total business efficacy to the contract, there must be a term implied into the contract that the respondent cannot rely on its unfair dismissal of the claimant to terminate the contract and then demand repayment of the bonus on that termination.

195. The principles set out in the case of *AG of Belize* applied to this part of the analysis. What happens when the instrument does not expressly provide what is to happen when an unexpected event occurs? The agreement made between the parties did not address what happened if the claimant was dismissed, fairly or

otherwise. The court in *AG of Belize* stated that the most usual inference in such a case is that nothing is to happen and the loss lies where it falls. Paragraph 18 of the judgment refers to some cases where that would not be the case and the reasonable addressee would understand the instrument to mean something else.

196. In those cases, the reasonable addressee would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs, if necessary, to spell out what the instrument means.

197. Would implying a term as the claimant to suggests spell out in express words what the instrument, read against the relevant background must be reasonably understood to mean or would it distort the meaning or go further than the parties meant at the time?

198. In considering the claimant's submission, the Tribunal was concerned that it needed to be satisfied that the proposed implication spells out what the contract would reasonably be understood to mean by the parties at the time that it was made rather than what the Tribunal or the claimant thinks from this perspective that he would like it to have meant.

199. It is clear to this Tribunal that the claimant would not have agreed to this term in the contract if he thought that the respondent would have tried to enforce it upon his dismissal. It is also clear that the respondent entered into the contract with the intent of securing the claimant's presence in the business at least until the end of August 2019. At the time that they entered into the agreement in November/December 2018, the claimant was seen as an asset to the business and the respondent's main concern was to stop him leaving and going to another company. At the time, it had no intention of dismissing him. The payment was to stop him leaving, to incentivise him and to reward him for his hard work to date.

200. That is confirmed by the letters dated 16 October and 4 December referred to above at paragraph 191 in which both refer to the claimant's resignation. That was what the respondent was seeking to prevent.

201. It is this Tribunal's judgment that if anyone had asked either party in November/December 2018 – would you expect this clause to apply if the claimant was unfairly dismissed? They would both have said that they would not expect it to do so. The respondent submitted that the clause should apply even if the respondent has wrongfully and unfairly dismissed the claimant and that there was no need to imply such a term into the contract because the existing contractual rules can accommodate it.

202. However, the claimant's dismissal was in breach of contract as he was wrongfully dismissed. If he had been dismissed fairly given his entitlement to notice of dismissal, he would still have been employed at 31 August being the date on which the period for any re-payment of the bonus ended.

203. In this Tribunal's judgment, it is appropriate to imply into the contract a clause that the respondent will not rely on the clawback clause in the event that it unfairly dismissed the claimant. This term would give the contract business efficacy. In this Tribunal's judgment, both parties would have said *'of course not, it goes without saying'* if someone had asked them in November 2018, if they would expect the respondent to be able to clawback the ex-gratia payment having unfairly dismissed the claimant and breached his contract.

204. It is this Tribunal's judgment that the clause was not a penalty clause and would be enforceable but, given the circumstances, it is appropriate to imply a term into the contract that the respondent cannot enforce it on this particular termination. That is because the respondent terminated the claimant's employment in breach of contract and in breach of the claimant's statutory right not to be unfairly dismissed. Such an implied term would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean (*AG of Belize, para 21*).

Judgment

205. It is this Tribunal's judgment that the claimant was unfairly dismissed. It is also this Tribunal's judgment that the claimant was wrongfully dismissed.

206. It is this Tribunal's judgment that there should be implied into the contract between the parties made on 23 November 2019 an implied term that the respondent will not rely on the clawback clause in the event that it unfairly dismissed the claimant and breached his contract.

207. The respondent counterclaim fails.

208. The claimant is entitled to a remedy.

209. The parties have submitted a schedule and counter schedule of loss which were in the bundle. However, both parties indicated that if the claimant was successful, they would wish to make submissions on the claim for an ACAS uplift and on contributory fault. The Tribunal is now giving both parties the opportunity to make those submissions in writing before a decision is made on the remedy due to the claimant.

210. Both parties are to confirm the contents of the schedule of loss and counter schedule in writing to the Tribunal by 15 November. Both parties are also to indicate whether they are content for this matter to be dealt with on the papers or their preference is for a remedy hearing.

211. The Tribunal will set a date for a remedy hearing and notify the parties. The parties can exchange their written submissions on remedy 14 days before the

hearing and they can then comment on each other's submissions, either in writing or in person at the remedy hearing.

Employment Judge Jones
Date: 2 November 2021