Case No: 1403979/18

EMPLOYMENT TRIBUNALS

Claimant: Mr J Samuels

Respondent: Claritum Ltd

Heard at: **Bristol** **On:** **22, 23 & 24 November 2021**

Before: **EJ Christensen**

Representation
Claimant: Ms Millin of Counsel
Respondent: Mr Roberts of Counsel

RESERVED JUDGMENT ON REMEDY

1. 1 The claimant has confirmed that he does not wish to be reinstated or reengaged as his primary remedy, accordingly there is no order made in this regard.
2. The claimant is entitled to a basic award in the sum of £11,684.
3. It is not just and equitable to reduce the basic award because of any conduct of the claimant before his dismissal.
4. The claimant is entitled to a compensatory award. That includes a figure representing his net lost wages arising in the 12 month period following his dismissal on 19 July 2018 and taking into account the income derived from his new business and from employment at KFMI. I am unable to calculate the amount. See reasons below. The parties have agreed to cooperate in calculating this figure.
5. The compensatory award includes
   a. £2,000 in relation to expenses incurred in starting a new business
   b. any pension loss. I am unable to calculate the amount as above.
   c. £500 loss of statutory rights
6. The claimant has taken reasonable steps to mitigate his loss.
7. There is no reduction to compensation by reference to S123(1).
8. There is no reduction to by reference to the principles in Polkey.
9. The ACAS Code of Practice on Disciplinary Procedures applied and the respondent unreasonably failed to comply with it. It is just and equitable to increase the award by 25%.

10. The ACAS Code of Practice on Grievance Procedures applied. The claimant did not comply with it. I am satisfied that that was reasonable in all the circumstances. It is not just and equitable to decrease the award.
11. The claimant did not cause or contribute to his dismissal by blameworthy conduct.
12. The respondent was in breach of its duty to give the claimant a written statement of employment particulars when these proceedings began. It is just and equitable to award 4 weeks pay. The claimant is therefore awarded a figure of £4,032 (4 x £1008).

REASONS

Remedy

1. In a judgment dated 23 February 2021 I determined that the claimant had been unfairly dismissed. A hearing took place over 4 days from 18-21 January 2021. It is understood that my liability judgement has been appealed by the respondent and that the outcome of that appeal is pending. Both parties are content for me to determine matters of remedy at this hearing.

2. This remedy hearing was listed by me at a Case Management Preliminary Hearing on 23 April 2021. The issues for determination were first identified in my Order arising from that CMPH and then refined at a second CMPH that took place on 29 June 2021.

3. At 13.4.4 of my Order of 29 June 2021 it is identified that an issue is - *Is there a chance that the claimant would have been fairly dismissed anyway for some reason by reference to misconduct identified after dismissal?* It has been clarified that this is being argued by the respondent in relation to (a) by reference to personal expenses and (b) the claimant's salary split with his wife. This is an issue arising under S123(1).

Procedural matters arising and case management

4. Some fresh documents were admitted to the bundle during the hearing on the application of both parties.

5. The claimant sought leave at the beginning of the first day to call a new witness. The claimant provided no entirely satisfactory reason for such a late application. It was however explained that as Ms Millin is acting on a direct access basis, she had not been able to make the application for Mr Samuels until the morning of the first day of the hearing.

6. The witness was Ms Angell, the respondent's bookkeeper who had also given evidence at the liability hearing. The respondent confirmed that they had been served with a copy of her witness statement, was in a position to question her and accepted that at least parts of her evidence may be relevant to the issues before me. The respondent objected to her being called as a witness. I gave permission for Ms Angell to be called as a witness as I was satisfied that she may be able to give evidence that was

relevant to the issues before me and I could discern no prejudice to the respondent.

7. The respondent confirmed that it no longer sought to argue for a just and equitable reduction under S123(1) by reference to a loan of £1000.

8. The respondent confirmed that it no longer sought to rely upon the contents of a report from a forensic accountant dated June 2021. The respondent does not seek to rely upon those parts of Professor Hillum's statement that make reference to that report.

9. It was agreed that in the event that I reserved my remedy judgment that it would not be possible for me to address the claimant's costs application at this hearing. This is because of without prejudice issues arising. A separate costs hearing will be listed.

Claimant's Schedule of Loss

10. It was understood at the outset of the hearing that the claimant was seeking to rely upon A94 as his Schedule of Loss to set out the compensation that he is seeking. There is also a different set of figures in the claimant's witness statement. During the currency of the hearing it became apparent that that the claimant's position was unclear and that A94 did not represent an accurate or up to date picture.

11. On the morning of the third day, and after evidence had closed and before submissions, the claimant's representative presented the tribunal with a further updated schedule of loss in which the net pay per week sum was different to A94. After discussion it was clarified that the new net pay sum was a reflection of an agreed alteration that had been made to the gross pay per week sum that had been discussed during the currency of evidence. The new gross pay sum was £1475.92. The new net pay sum was agreed to be £1008 (even though when the schedule on presented to me in the morning it had a figure of £1086.71).

12. There was no figure entered for bonus/commission; the Schedule at A94 had set out a figure for loss of bonus/commission of £222000. Ms Millin told me orally that on instructions that figure had changed to £10000.

13. There was a new line in which the claimant sought an additional £26081.04 for loss of notice period. There is no claim for breach of contract before me.

14. There was a new line in which the claimant was seeking to recover expenses in setting up his new business in the sum of £8676.97. I have been provided with no evidence to support this figure. The Schedule at A4 had a line for expenses which stated NIL. From this I understand that the claimant wishes to seek recovery of such expenses as part of his compensatory award.

15. The period of loss had been increased from the 131 weeks stated at A94 (agreed to represent the period from dismissal and until the liability hearing) to 174 weeks (agreed to represent the period from dismissal and until the date of this remedy hearing). However there is no information provided in relation to what sums the claimant had earned in the period

January 2021 to November 2021 that would need to be offset. The claimant's schedule of loss at A94 gives information on sums obtained through mitigation only up to January 2021 (131 weeks). The claimant seeks to recover loss from his dismissal in July 2018 and for the entire 174 week period to the date of this hearing. The respondent's position on this is that such a calculation is not needed as the claimant had fully mitigated his loss either by October 2018 or if not by April 2019.

16. I indicated to the claimant that this was incredibly unhelpful and very far from being satisfactory. Ms Millin could provide no explanation for this other than her view that this was likely to be a feature of the fact that she appeared for the claimant on a direct access basis.

17. To progress matters it was therefore agreed that my remedy judgment would address matters of principle only in relation to each issue before me where I was without figures to enable me to calculate the correct figure. It is anticipated that the parties will be able to agree the matters of arithmetic once my judgment is promulgated.

18. I confirmed to the parties that in terms of the overriding objective and proportionality, I expected the parties to cooperate in this endeavour to avoid the need for any further judicial intervention. I indicated my view that further judicial assistance may not be proportionate in all the circumstances (including that both parties are represented) after a 3 day remedy hearing at which these matters should have been clear.

Evidence

19. I heard evidence from the claimant and Ms Angell who was the respondent's bookkeeper at the relevant time. For the respondent I heard evidence from Professor Hillum. Professor Hillum is now a Director of the respondent.

Credibility

20. There was a differing account as between Ms Angell and Professor Hillum regarding what Mr Horrigan, the respondent's Finance Director, had told each of them regarding the claimant's trip to Malaysia in May 2016.
21. At that time, May 2016, Professor Hillum had no involvement in the respondent company. At that time Ms Angell was the respondent's book keeper.
22. Ms Angell gave evidence regarding conversations that she had at the time in May 2016, with Mr Horrigan regarding how to process the expense of the claimant's flights to Malaysia. I found Ms Angell to be an entirely straightforward and honest witness. I believed what she told me, as I did when she gave evidence on liability in January 2021. She was measured and careful in her evidence and took time to answer questions put to her with accuracy and without seeking to favour either the claimant or the respondent.
23. In relation to Professor Hillum he gave evidence when asked some supplemental questions that Mr Horrigan did not start work for the respondent until September 2016. However he retreated from that position with little resistance when cross examined, accepted that Mr Horrigan may have done work for the respondent prior to that date and apologized if he had got the date wrong.

24. The respondent submitted that Professor Hillum had heeded the lessons from my liability judgment and had taken care in his evidence at this hearing to ensure that he was diligent in answering questions as clearly as he could. This, however, is an example of Professor Hillum doing the opposite and is consistent with my findings in my liability judgment. At paragraph 261 this is stated "*from his evidence Professor Hillum appears to be someone who is prone to overstating, exaggerating or mispresenting situations without any proper basis*"

25. I have therefore taken care to consider matters of credibility in relation to the evidence of Professor Hillum as I remain satisfied that he is a witness who is prone to asserting matters as fact but without any proper basis.

26. Professor Hillum gave evidence that since hearing Ms Angell give her evidence on the morning of Day 2, he had spoken with Mr Horrigan during the lunch break. Mr Horrigan works for the respondent as its Finance Director. Professor Hillum's evidence was that Mr Horrigan had told him in that phone call that he had no recollection of a conversation in 2016 about the flights and only became aware of them when he was asked to do an investigation into expenses in December 2018 and after the claimant had been dismissed.

27. Notwithstanding that I am satisfied that care needs to be taken in relation to the reliability of Professor Hillum's evidence, I accept that Professor Hillum had such a conversation with Mr Horrigan during the course of this hearing and I believed him regarding what Mr Horrigan had told him. The details that Ms Angell gave in her evidence about her understanding of the Malaysia flights were new details not previously known to the respondent until she answered questions in cross examination on the subject of these flights. It is therefore entirely understandable and inherently plausible that the respondent wished to address this point and make enquires of Mr Horrigan to enable Professor Hillum to address this in evidence. I agreed that supplemental questions could be asked to enable Professor to give evidence of his conversation with Mr Horrigan.

28. Notwithstanding that I believed that Mr Horrigan told Professor Hillum what Professor Hillum told the tribunal he had been told by Mr Horrigan, I also believed the evidence of Ms Angell regarding the content of conversations that she had with Mr Horrigan in May 2016.

The issues

29. <u>Unfair dismissal</u>

    a. The Claimant has been directed to clarify whether he wishes to be reinstated and/or re-engaged.

    b. What basic award is payable to the Claimant, if any?

    c. Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?

d. If there is a compensatory award, how much should it be? The Tribunal will decide:
    i. What financial losses has the dismissal caused the Claimant?
    ii. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job or setting up a new business?
    iii. If not, for what period of loss should the Claimant be compensated?
    iv. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed at the time of dismissal (Polkey) or for some other reason (misconduct identified after dismissal S123(1))? Misconduct arising after dismissal in relation to (a) personal expenses and (b) the claimant's salary split with his wife.
    v. If so, should the Claimant's compensation be reduced? By how much?
    vi. Did the ACAS Code of Practice on Disciplinary Procedures apply?
    vii. If so did the Claimant unreasonably fail to comply with it by failing to appeal after his dismissal?
    viii. If so, did the Respondent unreasonably fail to comply with it by reference to incidents including but not limited to (a) failing to be provided with written notification containing sufficient information about the alleged misconduct (para 9) (b) failing to provide the claimant with the written evidence he requested on 17th July (para 9) & (c) putting fresh charges to the claimant at the disciplinary hearing (para 9)?
    ix. If so is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
    x. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct including (a) by reference to his personal expenses and (b) by reference to his salary split with his wife? If so, would it be just and equitable to reduce his compensatory award? By what proportion?
    xi. Does the statutory cap of fifty-two weeks' pay apply?

e. <u>Schedule 5 Employment Act 2002 cases</u>

f. When these proceedings were begun, was the Respondent in breach of its duty to give the Claimant a written statement of employment particulars or of a change to those particulars?

g. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

h. Would it be just and equitable to award four weeks' pay?

Findings of Fact

30. My findings of fact relate to the issues of mitigation of loss, misconduct identified after dismissal (S123(1) and items relevant to the Schedule of Loss in so far as I am able to make findings based upon the evidence before me. In relation to Polkey, contributory conduct and ACAS adjustments, I rely upon the findings I have already made in my liability judgment.

Mitigation

31. At the time of his dismissal in July 2018 the claimant was earning a gross annual salary from the respondent of £76747.84. His gross weekly pay was £1475.92. His net weekly pay was £1008. The respondent had started an autoenrollment scheme for its employees and paid contributions in accordance with the advised rates of 2% in the tax year 6 April 2018 to 5 April 2019 and 3 % in the tax year commencing on 6 April 2019.

32. Following his dismissal from the respondent, the claimant found that his mental health suffered. The claimant felt suicidal at times and received some counselling and was prescribed medication to assist his mental health. He was deeply shocked at having been dismissed from the company that he had started and built up over the previous 16 years or so. Notwithstanding some procedures that were commenced after his dismissal to remove his shareholding the claimant remains a shareholder in the respondent company at the date of this hearing.
33. I am satisfied that the anguish suffered was compounded by the failures in process that led to the decision to dismiss. However, conscious of his responsibilities to his family he set about finding a way of replacing his lost income.
34. He had the particular challenge that he had not been on the job market for 22 years. He considered finding new employment and appointed a specialist consultant to assist him in this endeavour. His primary aim in looking for new employment was to find a package that replicated what he had lost – a salary at a similar level with a package including a shareholding that would enable a capital value to be realised in due course. However he was pragmatic and understood that he should consider other opportunities too if that enabled him to earn sufficient income to support his family.
35. The claimant attended some job interviews but was not at that stage successful in finding any alternative employed work.
36. The claimant was hindered in his job search to a degree by the existence of restrictive covenants in the various versions of the service agreements that had been produced by the respondent over the years. My liability judgment found that none of them were contractually in force. Notwithstanding this the claimant believed that he may be bound by them as a result of correspondence arising between the claimant and solicitors acting for the respondent. The claimant rejected the possibility of exploring possibilities with existing clients of the respondent because of these concerns.
37. Accordingly, he claimant set up a consultancy business called Predictable Growth Limited in October 2018.

38. In relation to this new venture I am satisfied that the claimant will have incurred some level of expense in that regard. It seems proper to make such a finding given that it is well understood that there are costs associated with for example registering at Companies House and creating a website and on-line presence. The claimant provided a figure of £8676.97 in the Schedule of Loss he presented on the morning of day 3. There is no evidence to support this particular amount of expense. I therefore reject that figure but, to assist the parties in concluding matters of remedy, do reach the conclusion that a round sum figure of £2000 is a proper and proportionate estimate of the costs of setting up his new business.
39. The claimant used his network of connections to start to advise early stage, growth and scale-up technology and service companies. He gave consultancy advice on how to run and grow a profitable technology business. This business became quite profitable in a fairly short period of time. It gave the claimant a source of income but did not replace his desire to be involved in a business venture in which he could build capital growth.
40. In the summer of 2019 the claimant started doing some consultancy for a global FM business called KFMI. The claimant provided consultancy services until December 2019 when he became an employee of KFMI. His role was to assist in achieving a management buy out and he was asked by KFMI's senior team to advise on spinning out or separating the tech business from the parent company. When the claimant became an employee of KFMI it was on the basis of an intent on both sides that the claimant would become a shareholder if the management buy out went through. This would have achieved the claimant's aim of achieving capital growth. As the management buy out was ultimately not successful this avenue was not explored and his employment ended.

41. The claimant has provided details of amounts that he earned in dividend and PAYE from Predictable Growth Ltd and the amounts received from KFMI his Schedule of Loss and his statement. These relate to the period from July 2018 (dismissal) to April 2019, tax year 2019/2020 and then from April 2020 to January 2021 (date of liability hearing). Figures are provided in both his statement and his Schedule of Loss at A94; however they do not tally.
42. I note for example that in relation to the tax year 2019/206, the Schedule of Loss at A94 refers to both dividend (gross £20,000) and earned income (gross £26,542). However paragraph 9 of the witness statement refers to the same gross figure for dividend income but makes no mention of any earned income. Another example is that in the tax year 2019/2020 there is earned income and dividends shown which tally with the statement. However the statement refers to additional earned income from KFMI which is not referred to in the Schedule of Loss.
43. Further the claimant has provided no details of his income in the period from January 2021 to November 2021 notwithstanding that his position is that I should calculate loss on an ongoing basis until the date of this hearing.
44. I am unable to make numeric findings on what his earnings and net losses were during the 12 months post dismissal and limit myself to points of principle with the agreement of the parties. It is anticipated that this approach should enable the parties to agree the correct figures following some further disclosure by the claimant.

Bonus/Commission

45. As none of the various Directors Service Agreements that were considered at the Liability hearing had contractual force I am satisfied that there is no proper basis to award the claimant any sum for the loss of bonus/commission. The claimant has sought to argue that he should get a bonus/commission to reflect a significant contract that he concluded shortly before his dismissal. I that reject that possibility and am satisfied that no compensation is due under this head.

<u>Misconduct identified after dismissal S123(1)</u>

Expenses and the Directors Loan Account

46. The respondent presented a schedule at A102 – A106 of the bundle. This presents 47 items of expenditure on the basis that these are all expense irregularities discovered by the respondent after the claimant's dismissal and establish misconduct such that there should be a just and equitable reduction to compensation under S123(1). The dates of the various items of expense all pre date Professor Hillum's involvement in the respondent and date from May 2020 to November 2017.

47. The respondent presented the schedule on the basis that these fall into the following categories of misconduct
48. Items paid for on the respondent's credit card that were allocated to the claimant's directors loan account (DLA) on the basis that they did not represent a business expense. The respondent does not recognise the legitimacy of the use of the DLA in this way and seeks to categorise is as misconduct.
49. Items paid for on the respondent's credit card, that were not allocated to DLA and which the respondent argues were not business expense.
50. Items paid for by the claimant personally and then reclaimed as expenses through the receipt system operated by Ms Angell. The respondent's case is that the items listed were not in fact business expenses.

51. The claimant's evidence in relation to these items is that the system of allocating receipts/invoices to the claimant's DLA was a normal accounting process for the respondent conducted in the full visibility and approval of the bookkeeper, head of finance, the Board and the company's external accountants. This accounts for 23 of the items now relied upon by the respondent.
52. 4 receipts are legitimate business expenses including (i) a stay in a hotel in between meeting with 2 clients (ii) purchase of a laptop for a new employee and (iii) lunch with a key potential client.
53. 3 receipts/invoices are duplicates that have already been dealt with at the liability hearing
54. 11 receipts (for example the Malaysia flights) need further investigation to properly understand matters including what the item related to and who had incurred the expense to ensure that it was correctly categorised for accounting purposes. The claimant gave evidence and I find that his business credit card was the default payment card for general company expense and properly used on occasion by other employees to buy items for the respondent. He also gave evidence and I find that he could not be

certain in relation to some items of expense because he has not had access to his work diary since he was dismissed in 2018.

55. I made findings in my liability judgement on the system operated by Ms Angell in relation to the approval and payment of the receipts that the claimant handed her on a monthly basis. I found that there was a book keeping and accounting system in place that had a number of checks and balances to ensure proper governance of the system for reclaiming expenses and for the posting of matters to the directors DLA. I find that the claimant followed that system at all times when reclaiming his expenses.
56. I am satisfied that on occasions mistakes were made and this meant that sometimes items were wrongly categorised by Ms Angell as either personal or business receipts. The claimant accepts this in paragraph 16 of his witness statement on the basis that he believes that, on the basis of the information provided by the respondent, over an 8 year period, expenses to the value of £446.03 may have been wrongly categorised as a business expense

57. At this hearing Ms Angell gave further evidence regarding the operation of the DLA. Part of the misconduct discovered after dismissal argued for by the respondent relates to items that were posted to the DLA. I find that the DLA was part and parcel of the normal accounting systems that had been in place for many years for both Directors and was in place throughout the period covered by the items under investigation by the respondent. It was understood by Ms Angell, the directors, the respondent's finance director and external auditors as being part of its normal accounting procedures. See paragraph 145 liability judgment.
58. She posted items from credit card statements and elsewhere to both directors' loan accountants if she could not tell on the face of it whether the payment related to personal or business expense. She gave evidence and I find that in particular in 2011 the respondent was in a bad financial way. It struggled to pay the directors salaries and that Mr Barker (the claimant's co director at the time who remains employed by the respondent) on occasion in that year told her that he would have to use the company credit card to put fuel into his car. When this happened she posted the expense to his DLA on the basis that it would be addressed in the reconciliation to ensure that the respondent was not out of pocket.
59. Ms Angell reconciled the DLA in advance of the preparation of the Management Accounts. She did this through a variety of methods which varied in accordance with particular circumstances. Sometimes this created a time lag in performing the reconciliation. The system for DLA (as with the system receipts/expenses generally) was designed to ensure that neither the respondent nor the directors were out of pocket. The system was not perfect but it was clearly understood by the claimant, his co director, the finance director and was never challenged or questioned by the respondent's external auditors. No concerns were ever raised regarding its operation prior to the arrival of Professor Hillum.

60. Ms Angell and the claimant gave evidence and I find that the respondent's credit card was used other members of staff. They would on occasion use the respondent's credit card to buy items such as a piece of software or a subscription or hardware. It was used on occasions to buy Apple or other tech devices for new members of staff. According to the entry on the

credit card statement Ms Angell might post the item to one of the directors loan accounts pending further discussion with the directors. The entry could be and was reversed if she was satisfied, after discussion, that it was a business expense.

61. Professor Hillum confirmed in his evidence that in relation to the respondent's category 3 (Items paid for by the claimant personally and then reclaimed as expenses through the receipt system operated by Ms Angell but were not in fact business expenses), the respondent's determination that these were not in fact business expenses included
62. The fact that the expense took place on Sunday – the respondent's position being that they do not believe the claimant ever worked on Sundays.
63. That the claimant's diary entries do not support the expense.
64. That in relation to one of them (item 3 - £21 lunch at the Kings Arms) – not only is it considered not to be a business expense on the basis that there was no entry in his diary but also that it was not possible to buy lunch in a pub for two people for such a small amount.

65. I do not make detailed findings in relation to each of the 47 items of expense as I am without evidence to enable me to do so for each of them and do not consider this remedy hearing to be an appropriate forum in which to forensically analyse each of the new 47 items. I do however address them in my conclusions by reference to more general principles based upon the evidence before me.

Malaysia flights

66. I make some particular findings in relation to the largest item of expense that the respondent advances as an example of an improper expense discovered after dismissal. This is included in the respondent's category of a personal expense that was improperly charged to the respondent as a business expense (in this case by directly charging the cost of the flights to the respondent's bank account). The respondent's case is that that amounts to misconduct and is relevant to the issue of a potential reduction in compensation in accordance with S123(1).
67. This is item 39 on the respondent's schedule and relates to flights in May 2016 to Malaysia for the claimant and his wife. The expense is significant in the sense that it has a much higher value than the other items - £2038. The claimant, Ms Angell and Professor Hillum gave oral evidence in this hearing in relation to this particular item of expense.
68. The claimant's position on this expense is that it comes into the category of requiring further investigation to understand the basis upon which it was properly categorised as a business expense.
69. From the evidence before me I make the following findings of fact. In 2016, the claimant arranged to meet one of the respondent's key clients following the client's promotion and relocation from Singapore to Kuala Lumpur. The client had been promoted within Cannon and was interested in extending the relationship with the respondent across the whole of SE Asia. The claimant was keen to explore this business opportunity with the client on behalf of the respondent.
70. The claimant decided to annexe a family holiday to his business trip to Kuala Lumpur. Prior to booking flights, he spoke with the Finance Director Mr Horrigan to ask how to address the question of the mix of business and personal expenses. Mr Horrigan and the claimant agreed that that

claimant would not claim any business expenses in relation to his business trip to Kula Lumpur for the meetings with the client for hotel, meals, taxis, travel etc. In return it was agreed that the respondent would meet the cost of the claimant's wife's flight as his full and final business expense claim.

71. After speaking with Mr Horrigan, the claimant booked flights for himself, his wife and children. He paid on a personal card for the cost of his children's flights. He charged the cost of his and his wife's flights directly to the respondent's bank account. He did not submit any further business expenses.
72. When Ms Angell came to process the entries for the flights she spoke to Mr Horrigan to understand how to process the expense of the flights for the claimant and his wife. Mr Horrigan confirmed to her that they should be processed as a business expense on the basis set out above. Ms Angell never doubted that the claimant was attending Kuala Lumpur for a business meeting and also understood that he was staying on for a family holiday. She was concerned to ensure that she processed the expenses accurately. After speaking with Mr Horrigan, she processed them as indicated.

Wives' salaries and referral to HMRC

73. I have made findings in my liability judgment regarding the systems in place and the knowledge of Mr McKenzie relating to the split of directors' salaries with their wives.
74. The respondent now raises new issues relevant to wives' salaries on the basis that these were not known of at the time of dismissal. These relate to the respondent's contention that it was not known at the time of dismissal that the directors' wives did not perform any work for the respondent company in response of that portion of their husband's salary assigned to them and further that the claimant was seeking to fraudulently increase child benefit payments by means of the salary split. The respondent's position is that these are not minor issues and leave the respondent open to investigation by HMRC and the imposition of tax charges and fines. The respondent relies upon pages 416A-C and pages 432P7Q in the liability bundle in relation to these contentions.

75. In this regard I make no findings in relation to what work, if any, the wives of the claimant and his co-director Mr Barker did for the respondent company in recognition of having part of their husband's salary assigned to them. I note the findings at paragraph 65 of my liability judgment. I had no evidence before me at this hearing to make any further findings. To the extent that that is relevant to the matters that Professor Hillum has now referred to HMRC it is a matter for HMRC to determine how they may wish to address that matter.

76. In relation to the issue of the child benefit I find that in September - November 2012 the claimant, Ms Angell and the then Head of Finance at the respondent, Mr Bailey, had an email exchange regarding the impact of new child benefit rules that impacted if either parent earned more than £50000. The claimant sought the advice of Mr Bailey regarding the respective salaries split between himself and his wife once the changes come in.

77. I am satisfied from p482E of the liability bundle and from Professor Hillum's oral evidence that the respondent considered referring the claimant to HMRC in July 2018 at the time they dismissed him. Professor Hillum gave evidence that he and Mr McKenzie brainstormed this at the time but decided not to refer this matter to HMRC.

78. Professor Hillum referred the claimant to the police after his dismissal in relation to potential fraud arising in his expense claims. This caused my liability hearing to ensure that it did not address matters of contributory conduct as it appeared that police investigations were still live at that stage. See the CMO of Judge Cadney 22 June 2020. It is now confirmed that the police investigations resulted in no further action and are no longer live. Accordingly I now address matters of contributory conduct in this judgment.

79. Professor Hillum gave evidence at this hearing and I find that in July 2021 the respondent referred the matter of the wives salaries to HMRC for investigation and that the matter has been assigned a case worker. I am unable to make any findings regarding what prompted Professor Hillum to make the referral to HMRC at that time.

Written Statement of Terms and Conditions

80. The respondent failed to provide the claimant with a Written Statement of his Terms and Conditions in accordance with S1 ERA. I am satisfied that failure is significant in the sense that that it created uncertainty regarding what the claimant's scale or rate of remuneration or the method of calculating remuneration. This was a key element in the investigation carried out by Professor Hillum – see liability judgment.

<u>Submissions</u>

Respondent

81. The respondent provided a written skeleton argument and made oral submissions. The written skeleton addresses the issue of the personal expenses/DLA. It sets out that the claimant had fully mitigated his loss by 12 December 2018. Oral submissions were that the claimant had fully mitigated his loss by 12 October 2018 or if not by April 2019.
82. The respondent submits that any compensation should be reduced by 100% on the basis that the claimant would have been dismissed in any event, has contributed to his dismissal and that it would not be just and equitable to award him compensation.
83. The respondent submitted orally that the issue of the wives' salaries permeated Polkey, contributory conduct and a just and equitable reduction to compensation. The respondent submits that even had the respondent not embarked upon the procedure that they did to dismiss the claimant that they would eventually have fairly dismissed him in any event.
84. In relation to ACAS adjustments under S124A the respondent submits that it was in a very difficult position as an SME (small or medium sized enterprise), that it had no internal HR, was in financial difficulties and that Professor Hillum was new to the business. The respondent submits that any uplift by reference to the respondent's failures to adhere to the ACAS code should be limited to 5-1-%.
85. In relation to the claimant's failure to appeal his dismissal the respondent submits that any compensation should be reduced by 10%.

Claimant

86. The claimant made oral submissions. These were made on the basis of general principles rather than specific figures. I was referred to the principles in Wheelan-v-Richardson 1998 IRLR 114 and Wilding-v-BT in relation to the principles applicable in assessing compensation.
87. The claimant submits that it is relevant that the claimant was mentally anguished at the time of his dismissal but notwithstanding this within 3 months of his dismissal he had started work through a new company he set up and that it is relevant he also searched for employed work in the alternative.
88. In relation to S207A ACAS adjustments the claimant submits that the uplift to compensation regarding the respondent's breaches in the disciplinary process should be 25%. The claimant submits that it is relevant that the respondent had HR advice from Ms Ball throughout the process.
89. The claimant submits that it is relevant that the respondent has sought to take the moral high ground by reference to its referral to HMRC; however the claimant says it is relevant that the contemporaneous emails between Professor Hillum and Mr McKenzie at the time of dismissal indicate instead that they were willing to use the referral to HMRC as a bargaining tool at that time with the claimant.

90. In relation to Polkey the claimant submits that there is no chance that the claimant would have been dismissed had a fair process been used. The claimant submits that after Professor Hillum arrived in the respondent company he made up his own rules and changed things from the point of his arrival. The claimant submits that it is relevant that Professor Hillum was seeking to apply those new rules to historic matters of expenses and accounting procedures in place before his arrival.
91. The claimant also submits that the respondent has sought to have a second bite at the cherry at this remedy hearing by raising 47 new expense matters which the respondent reasonably either could have known about at the time of dismissal or in fact did know about at the time of dismissal.

92. In relation to contributory conduct the claimant submits that there is no pre-dismissal conduct that contributes to his dismissal, accordingly there should be no deduction under S123(6).

93. In relation to S123(1) the claimant submits that all expenses were administered under the system in place at the time. In relation to wives salaries the claimant submits that the practice was put in place on advice and further that the evidence establishes that Mr McKenzie knew of the practice. Accordingly there should be no reduction under this head.

94. In relation to mitigation of loss the claimant submits that the claimant may have suffered loss up to the date of this hearing.

Order of deductions/adjustments for the compensatory award

95. It is agreed that the correct order for deductions/adjustments is
96. S123(1) adjustments
97. Polkey

98. ACAS reduction or uplift – S124A
99. Contributory conduct S123(6)

Conclusions

Basic Award

100. It is agreed that the claimant is entitled to a basic award of **£11,684**. It is not just and equitable to reduce the basic award because of any conduct of the claimant before dismissal.

Mitigation of Loss/Compensatory Award

101. In my judgment the claimant took reasonable steps to minimise the loss suffered as a consequence of his unfair dismissal. The claimant suffered mental anguish after his dismissal, not only as a consequence of the inadequate procedure that was adopted to dismiss him by Professor Hillum but also because his dismissal removed him from the company that he had been responsible for creating and running over many years. Notwithstanding this, he very soon appointed a specialist employment consultant, attended job interviews and ultimately was set up his own business through the medium of a limited company providing consultancy services to start ups. This quickly became profitable. He was also successful in being employed by an international FM company.
102. Although I am unable to calculate the loss that the claimant suffered with any precision it is my judgment from the information I do have, that 12 months after his dismissal he had recouped the income levels that he had previously earned from the respondent. By that stage the claimant had regained the same level of income and had also entered an arrangement with KFMI that put him in the position of achieving his aim of having the possibility of being given a shareholding that might eventually have some capital value. Ultimately that ambition was not reached as the MBO did not proceed but I do not consider that any continuing loss after that is a consequence of the dismissal. I reach my conclusions on the claimant's continuing loss based upon the schedule in the claimant's witness statement. By July 2019 the claimant was earning salary from KFMI, dividend and salary income from Predictable Growth Ltd.
103. The claimant is therefore entitled to be compensated for a period of 12 months following his dismissal. It is agreed that the parties will cooperate in agreeing what losses the claimant has suffered in this period. I have issued further directions to assist in this exercise.

S123(1) – just and equitable

104. In my judgment it is not just and equitable to reduce the claimant's compensation by reference to any matters discovered by the respondent after his dismissal. There were 47 items raised by the respondent in this hearing as matters of misconduct. I am satisfied that there is no basis upon which it would be proper for me to conclude that some form of misconduct has been established by the respondent such that I may conclude that the claimant should not be fully compensated for his losses. In considering those 47 items I have taken note of the fact that
105. I have not been satisfied that there was any impropriety in the use of the claimant's DLA such that posting items to the DLA amounts to misconduct. I am instead satisfied that the use of the DLA was a long standing and fully understood and audited practice of the respondent at the time of the relevant events.

106. In relation to the items that the respondent describes as personal expenses improperly claimed as a business expense I note that in relation to, for instance the most expensive item, Malaysia flights, my findings indicate that claimant has provided an explanation for this expense. That satisfies me that there was nothing that appears to properly be categorised as misconduct in relation to that expense. In relation to others the respondent seeks to rely upon for instance that the claimant's diary did not contain entries to support the expense being a business expense, that the event took place on a Sunday or even that the amount was too small to properly represent a pub lunch with a client. In my judgment such assertions, on their face, do not appear to form a properly informed basis to reach a conclusion that this amounts to misconduct. I note that the claimant's position is that the items are proper business expenses incurred by him but that he is hampered in addressing each of them as he is without his diary. The claimant's position is that some (e.g. the Malaysia flights) need further investigation to fully understand the nature of the expense and its proper accounting treatment. The claimant accepts that there may have been mistakes made in the system in relation to some of them. None of that satisfies me that it is proper for me to conclude that this is misconduct that causes it to be just and equitable for me to now reduce the claimant's compensation.

107. In relation to the credit card receipts it is relevant that I have found that the respondent's credit card was used by other employees and that it remains unclear who incurred the particular expense and also whether it can be determined that the item purchased was for the business.

108. In relation to the issues of the wives' salaries, I have made no findings regarding what work, if any, the wives of Mr Samuels and Mr Barker did for the respondent for the reasons set out. In relation to the issue of Child Benefit/Wives Salaries my findings are limited to recording the exchange in 2012 between the claimant, Ms Angell and Mr Bailey (then Head of Finance) relating to an enquiry from the claimant. There is nothing in that exchange that tends to establish misconduct such that I am satisfied that it would be just and equitable to reduce compensation.

109. It is my judgment that overall considerations of fairness remain paramount and there is no proper basis for me to conclude that it is just and equitable to make any reduction to compensation on the basis of the 47 items now raised by the respondent and the wives' salaries.

Polkey

110. It is my judgment based upon my findings in my liability judgment, that there is no chance that a fair process would still have resulted in the claimant's dismissal. Once Professor Hillum started the process of reviewing the bags containing the expenses he closed his mind to the possibility that there were things he did not properly understand and did not acquire an understanding of the expenses and accounting systems operated by Ms Angell. He appeared highly suspicious of her. He has provided no explanation for this. He had no level of curiosity in his investigation of a rationale explanation for the contents of the receipt bags and seemed intent instead simply on quickly moving to establish the claimant's guilt. That his mind was closed is demonstrated, for example, by the fact that he refused to consider information that the claimant sought to present to him at the Disciplinary Hearing to establish no impropriety or

misconduct [paragraph 174 liability hearing] relating to each of the items under consideration.

ACAS Code adjustments – S124A ERA & S207A TULCRA
Disciplinary Process

111. The particular parts of the ACAS Code of Practice are set out in the issues at the start of this judgment. Of itself I do not consider the failure by the respondent to have provided the claimant with written notification containing the specific charges against to be a particularly significant breach of the ACAS Code. This is because I am satisfied that the claimant knew enough to understand the charges against him and this is established by the fact that he prepared a schedule setting out his position in relation to the various items and took that to the Disciplinary Hearing. However it is relevant that this is coupled with the failure to provide the claimant with any of the information that he had requested before the Disciplinary Hearing and then putting fresh charges to the claimant during the currency of the hearing and without enabling the claimant to address those charges. It is also relevant that the respondent had the assistance of an HR advisor in the process. When considered in their totality this indicates an utterly flagrant and egregious disregard of the principles of fair process set out in the Code. On that basis I consider it proper to uplift the claimant's compensation by a factor of 25% to reflect such a serious breach. Even taking the respondent's relatively small size into account I do not consider these breaches to be reasonable in any sense and in accordance with S207A(2) TULCRA I consider it just and equitable in all the circumstances to uplift by the maximum of 25%.

Appeal Process

112. The claimant did not appeal the decision to dismiss him. His dismissal letter told him that he had a right of appeal. He responded to that as set out in paragraph 184-186 of my liability judgment.

113. In accordance with S207A(3) TULCRA I am satisfied that the claimant's failure to appeal his dismissal was reasonable in all the circumstances. The manner in which he was dismissed by Professor Hillum, and the utter failure to observe basic principles of fairness, reasonably caused him to have no trust in the respondent in relation to the running of a fair appeal process. I therefore do not consider it just and equitable in all the circumstances to make any reduction to compensation to reflect his failure to appeal.

Contributory Conduct

114. On the basis of the findings in my liability judgment I am satisfied that there is nothing in the claimant's conduct prior to his dismissal that is culpable and blameworthy in that it caused or contributed to his dismissal.

115. Prior to February 2018 the claimant had been running the respondent's business as a Director and Shareholder to the best of his ability in conjunction with Mr Barker and Mr McKenzie. He did this along well established lines and with standard checks and balances in place for a business of this size. The systems were not perfect and could have run different ways. That is established by Professor Hillum starting to work for the respondent and the different practices he introduced. For instance, he introduced a system for the authorisation of directors' expenses that had not previously existed.

116. Prior to Professor Hillum's arrival the claimant had been claiming expenses in accordance with long standing and well understood practices operated by the respondent's book keeper, overseen by the Head of Finance and audited by its accountants. He and Mr Barker had split their salary with their wife on the advice of accountants and in the knowledge of Mr McKenzie. My liability judgment [paragraph 65] finds that Mr McKenzie not only knew of this practice but that he suggested in 2009 that the directors create further tax efficiencies with the wives by reference to entrepreneurs tax relief.
117. Professor Hillum introduced some changes to those systems after his arrival in February but the events under investigation that caused Professor Hillum to dismiss the claimant all took place in the years prior to February 2018 and by reference to the systems then in place.

Employment Judge Christensen
Date: 6 December 2021

Reserved Judgment & reasons sent to parties: 7 December 2021

FOR EMPLOYMENT TRIBUNALS