RESERVED JUDGMENT **Case Nos: 2400550/2020**
2500551/2020
2406031/2020
2406032/2020

EMPLOYMENT TRIBUNALS

Claimants: Mr Brian Mellor
Mrs Susan Mellor

Respondent: Lunar Automotive Limited

Heard at: Manchester **On:** 28 June to 2 July 2021 and 12 August and 6 September 2021 (in chambers)

Before: Employment Judge Slater

Representation
Claimants: Ms J Duane, counsel
Respondent: Mr A Karia, counsel (on 28 June 2021)
Mr D Bloom, lay representative (30 June to 2 July 2021)

JUDGMENT

1. The first claimant's complaints of unauthorised deductions from wages in relation to unpaid salary and holiday pay are not well founded.

2. The first claimant's complaint of breach of contract in relation to failure to give notice of termination (wrongful dismissal) is not well founded.

3. The first claimant's complaint of breach of contract in relation to holiday pay is not well founded.

4. The first claimant's complaint of breach of contract in relation to unpaid expenses is well founded.

5. The first claimant's complaint of constructive unfair dismissal is well founded.

6. The respondent's employer's contract claim against the first claimant is not well founded.

7. The second claimant was not an employee of the respondent and her complaints against the respondent are dismissed.

8. The employer's contract claim against the second claimant is dismissed.

9. The remedy hearing in relation to those complaints of the first claimant which were successful will be held on 19 November 2021. Case management orders relating to preparation for that hearing are contained in a separate document.

REASONS

Claims and issues

1. The claimants claim constructive unfair dismissal, wrongful dismissal, unlawful deductions from wages and holiday pay. The respondent brings an employer's contract claim against each claimant in relation to an alleged overpayment of wages.

2. The issues were agreed to be as follows:

Constructive unfair dismissal

2.1. Was the second claimant an employee of the respondent at the material time?

2.2. Did the claimants resign because of an act or omission by the respondent?

2.3. If so, did the respondent's conduct amount to a fundamental breach of contract? The claimants rely on:

2.3.1. a breach of trust and confidence (including, failure to provide an outcome to, or to address the grievances and, in the case of the first claimant only, inept handling of the disciplinary procedure);

2.3.2. an implied contractual breach due to the respondent's failure to pay the first claimant during his suspension.

2.4. In relation to whether there is a breach of the implied duty of trust and confidence, the tribunal will need to consider whether the respondent, without reasonable or proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties.

2.5. Did the respondent's failure to provide the first claimant with an outcome to the disciplinary by 8 January 2020 and the respondent's failure to invite the second claimant to a grievance hearing amount to the "last straw" which contributed (however slightly) to the respondent's breach? – *Omilaju v Waltham Forest London Borough Council [2005] IRLR 35*.

2.6. Did the claimants affirm any breach of contract?

2.7. If there was a dismissal, was the dismissal for a potentially fair reason?

2.8. Did the respondent act fairly having regard to section 98(4) Employment Rights Act 1996?

Wrongful dismissal/breach of contract

2.9. Was the second claimant an employee of the respondent at the material time?

2.10. Were the claimants constructively dismissed (issues as in 2.2 to 2.6)?

2.11. If the claimants were constructively dismissed, were the claimants entitled to:

2.11.1. first claimant: 12 months' notice in accordance with his contract of employment; and

2.11.2. second claimant: one week for every year served (five weeks' notice).

2.12. Is the first claimant contractually entitled to compensation for unpaid expenses?

Unlawful deduction from wages

2.13. Was the second claimant an employee and/or worker of the respondent at the material time?

2.14. Did the claimants receive all wages due on termination of their employment?

2.15. Did the respondent make unlawful deductions from the wages of the claimants within the meaning of section 23(1) Employment Rights Act 1996?

2.16. If so, did the respondent have any form of authorisation to make such deductions?

2.17. If the deductions were unlawful, what amount is payable to the claimants and would compensation for further financial loss apply (s.24 ERA 1996)?

Section 38 Employment Act 2002

2.18. If the second claimant succeeds in another claim:

2.18.1. was the second claimant an employee of the respondent at the material time?

2.18.2. When these proceedings were begun, was the respondent in breach of its duty to give the second claimant a written statement of employment particulars?

Holiday pay

2.19. Was the second claimant an employee and/or worker of the respondent at the material time?

2.20. How many days' holiday are the claimants entitled to under the Working Time Regulations 1998 and/or contract of employment? The claimants assert they are entitled to 30 days holiday plus bank holidays (pro rata for the second claimant).

2.21. How many days' holiday did the claimants take in the leave year 1 January 2019 to 31 December 2019? The claimants assert the only annual leave taken was from 2 to 12 November 2019, however no payment was ever received for this annual leave.

2.22. Are the claimants entitled to pay in lieu of holiday that had accrued but not been taken at the time of termination of the contract with the respondent?

2.23. In the alternative, do the claimants have a contractual right to be paid in lieu of holiday that had accrued but not been taken at the time of termination of the contract with respondent?

Employer's contract claim

2.24. Was the second claimant employed by the respondent?

2.25. Were the claimants overpaid wages or any other payments in breach of the employment contract, such that the respondent is entitled to reimbursement of the same?

Ms Duane informed me that the first claimant is no longer pursuing a claim in relation to the phone card.

Application for strike out of responses and postponement of the hearing

3. On the first day of the hearing, I heard the claimants' application to strike out the responses on the basis of failure to comply with case management orders. I also heard the respondent's application to postpone the hearing. For reasons which I gave orally, I refused both applications and directed that I would begin hearing evidence on 30 June 2021, making case management orders. Although written reasons have not been requested in relation to these case management decisions,

to assist any higher court, should my decision be the subject of an appeal, I set out here the conclusions I reached and explained to the parties at the time.

4. The respondent committed a serious breach of the case management orders in relation to production of the bundle and witness statements. I do not consider the financial issues and the lien the respondent's former representatives are exercising over the case files to absolve the respondent of responsibility for the breach. The respondent had around 7 weeks from when their solicitors came off the record and, on their own account, time before this when they knew their solicitors were not going to act unless paid, until the start of this hearing. There is no requirement to be legally represented at a final hearing. Many parties would wish to be legally represented when they could afford to do so, but this does not absolve them of responsibility for dealing with litigation to which they are a party. The respondent, as a litigant in person, could have asked the claimants, soon after 7 May 2021, to provide them with copies of documents which would have enabled them to prepare witness statements and a bundle. They could have asked the claimants' representatives whether they would take over responsibility for the bundle. They apparently did nothing until faced with an application for an unless order.

5. The circumstances exist where I could exercise my power to strike out the response. However, this is a draconian penalty. There are clearly serious issues to be tried in this case. Striking out the response could give the claimants a windfall. I consider a fair trial still to be possible. In these circumstances, I do not consider it appropriate to strike out the responses.

6. Neither party was keen, for differing reasons, on the "third way" I proposed i.e. that the hearing could proceed in a fair way, starting late, and perhaps giving the respondent a further opportunity to provide witness statements. I conclude, however, that this is the route most consistent with furthering the overriding objective.

7. I conclude, for the reasons given in relation to the strike out application, that the respondent has brought this situation on their own head. If a fair hearing can proceed in the remainder of this 5 day listing, I consider it should do. The claimants will suffer, at the least, the prejudice of having the case ongoing for a very considerable further period if it is postponed. At the worst, the respondent may have little or nothing in the way of assets by the time the case comes to trial to satisfy any award, if the claimants are successful, and any award of costs (the claimants are fearful of this, whilst the respondent asserts that its financial position will improve in a few months). The Tribunal is currently listing 5 day cases in the early part of 2023. There are very few possibilities for an earlier date, even if the case were listed for a 3 or 4 day hearing (which would not allow the Tribunal time to make a decision).

8. I conclude that a fair hearing would be possible starting on Wednesday this week, which is likely to allow for the hearing of evidence and possibly submissions. Even if the case cannot be completed to this stage, it is likely to be concluded considerably earlier, by going part heard, than if the whole hearing is postponed.

9. I have sympathy with the claimants' submissions that allowing the respondent to have more time to prepare witness statements will give them another bite at the cherry and give them the advantage of preparing their witness statements after seeing those of the claimants. However, I do not consider the advantage of having the claimants' witness statements first to be a great advantage; it is common for orders for providing witness statements not to be simultaneous and no doubt skilled cross examination by the claimants' representative can highlight to the Tribunal any areas where the witness statements may have been tailored by access to the claimants' witness statements. The possible ambiguity in the Tribunal's orders of 24 June, leads me to conclude that fairness is best served by the respondents having an opportunity to provide witness evidence in addition to that of Mr Alexander Marks, if they wish to do so. This opportunity is strictly time limited as I set out in the orders which follow. I conclude that, now the respondent has access to the documents in the bundle prepared by the claimants, it is possible for them to prepare witness statements dealing with the relevant issues of fact in the time available.

10. The order relating to documents in the letter of 24 June was unambiguous. The respondent's counsel has not questioned the claimants' statement that the bundle prepared by them includes all the documents disclosed by the respondent and they have shown me the list of documents provided by the respondent whilst still represented. This assists me in concluding that additional documents, such as the notes of a disciplinary hearing of Lee Roberts, are not of sufficient relevance to the issues I need to decide, to require additional documents to be added to the bundle prepared.

11. I consider that fairness requires that we do not start hearing evidence until Wednesday 30 June at 10 a.m. to allow time for the respondent to prepare and serve their witness statements and for the claimants to consider, with their representatives, the statements provided. This will also allow time for whoever is to present the case for the respondent to prepare to cross examine the claimant's witnesses. It is entirely a matter for the respondent whether a director represents the respondent or whether a legal or lay representative, such as Mr Bloom, is to represent the respondent.

Evidence

12. I heard evidence from both claimants and from Paul Williams of MHA Moore and Smalley and from Lee Roberts, for the claimants, and from Nicholas Marks, the shareholder of the respondent, and from Richard Kelly, a senior manager in Mr Marks' group of companies, on behalf of the respondent. There were written witness statements for all the witnesses.

13. There was an electronic bundle of documents of around 450 pages. Further documents were appended to Mr Marks' witness statement and the second claimant disclosed some emails at a late stage in the hearing.

Summary

14. The claimants are husband and wife and directors of Lunar Holdings Ltd (LHL). The first claimant holds a majority of the shares in LHL. LHL holds a majority of the shares in Lunar Caravans Ltd (LCL). The first claimant was Managing Director of LCL. There is a dispute as to whether the second claimant was employed by LCL. LCL went into administration on 16 July 2019. The respondent acquired the business of LCL from the administrators on 14 August 2019. The parties agree there was a transfer of the business to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply. The parties agree that the first claimant's employment transferred to the respondent. The respondent asserts that the second claimant was not employed by LCL prior to the transfer so did not transfer to the employment of the respondent.

15. Both claimants received payments of wages from the respondent in August 2019. They did not receive any payments of wages after 21 August 2019.

16. The respondent occupied the business premises under licences from LCL and LHL. Disciplinary proceedings were taken by the respondent against the first claimant after he locked the gates of the premises after hours on 30 September 2019, preventing employees from attending for work for some days. The first claimant asserts he was acting in his capacity as a shareholder of LHL since the respondent had not paid the licence fee on time.

17. Both claimants say that they were not paid wages due to them. Both claimants presented grievances. There was no outcome to the disciplinary proceedings or the grievances prior to the claimants' resignations. The respondent refused to deal with the second claimant's resignation on the basis that she was not an employee. The second claimant resigned on 27 November 2019. The first claimant resigned on 15 January 2020.

Facts

18. The first claimant began to work for LCL as Managing Director on 4 December 2000. LCL was then owned by a European manufacturing group based in the Netherlands. The business of LCL was the manufacture of caravans. The first claimant had a written contract dated 17 November 2000 which gave him an entitlement to 12 months' notice and 30 days' holiday per annum. Clause 6 of the contract provides that the company shall pay the first claimant "a suitable salary for the level of authority and responsibility at the agreed rate per annum (or at such other rates as the group shall from time to time decide as merited)." It provides that the salary shall be reviewed by the company at 12 monthly intervals. Clause 8 provides that the first claimant shall be provided with a fully expensed Range Rover car, or equivalent. The contract does not clearly specify the holiday year. However, the first claimant asserts that the holiday year was 1 January to 31 December and the reference to accrual during the calendar year in clause 9(b) is consistent with this assertion, so I proceed on the basis that the relevant holiday year for the first claimant was 1 January to 31 December. No other written contract has been produced for the first claimant.

19. The LCL employee handbook, dated January 2017, included a provision about

overpayments, stating that the total of an overpayment would normally be deducted from the next wage/salary payment. The section "deductions", reserved the right to deduct from pay any sums owed to the company, including overpayments.

20. In 2007, the first claimant led a management buyout. He became a statutory director of LCL on 15 January 2007. LHL held all the shares in LCL. Ken Lawrence was a shareholder in LHL until July 2018. He was also a director of LCL until 2 July 2018. After Mr Lawrence's resignation as a director, the remaining directors of LCL were the first claimant, Darryl Mellor (the claimant's son), and Lee Roberts, the Financial Director, who was also the company secretary.

21. The second claimant asserts that she began employment with LCL in 2014 in a part-time capacity as PA to the first claimant as his other PA, Carol Hayley, worked three days per week and he needed additional support. Carol Hayley also provided support to the other directors. The second claimant had no written contract of employment. I accept that she did some work from 1 April 2014 to assist the first claimant, principally making telephone calls about appointments, making travel and accommodation arrangements and preparing expense claims. Sometimes the first claimant would leave a list of telephone calls to be made to sort out his diary. Sometimes she attended events with her husband. I find there were no duties expressly agreed and no obligations expressly agreed as to hours that the second claimant would work. The second claimant mostly worked on Mondays and Fridays, when Carol Hayley did not work. However, she would also help the first claimant on other evenings if he needed to produce something e.g. she would type emails on his laptop in his name. In her own words, she helped where she could. There was no discussion about what holiday the second claimant was entitled to. The second claimant received the same amount of pay whatever work she did each month.

22. Ken Lawrence, a director of LCL and a shareholder of LHL until July 2018, was aware that the second claimant undertook various PA tasks working from home for the first claimant. LCL's HR manager was not aware that the second claimant was an employee of LCL and there was no personnel file for her. The second claimant did not have an LCL email address. The second respondent provided late disclosure, during the course of the hearing, of two emails she had send to Carol Hayley, using a personal Hotmail address. One, sent on 5 February 2019, asked Carol to enter some dates in the first claimant's diary. Another, sent 14 February 2017, asked Carol to book the first claimant away on certain dates and to send him home with copying paper and print cartridges.

23. Carol Hayley left LCL in March 2019. I accept the first claimant's evidence that, in the period March to June 2019, the second claimant assisted him in gathering together information needed to try to sell the business.

24. In the tax year ending 5 April 2017, the first claimant received salary payments paid through PAYE, varying from £7,611 to £8068 per month and the second claimant received salary payments through PAYE, varying from £866 to £918 per month. From the beginning of the tax year starting 5 April 2018, the first claimant

started to receive a lower salary of £681 per month and the second claimant received a salary also of £681 per month. It appears this was on the basis of tax advice and the claimants received dividends from LHL to compensate for the lower salaries. The claimants continued to receive salary payments at this level until July 2019.

25. It appeared to me, from the inability of the first claimant to answer questions about the way payments to him were made and points relating to the accounts of LCL and LHL, continually referring to acting on advice, that the first claimant had little understanding of these matters.

26. Dividends of £153,677 were paid by LHL in the financial year ending 31 August 2018. No dividends were paid by LHL in the financial year ending 31 August 2019.

27. On 20 June 2019, LCL made a payment to the first claimant of £681 gross salary. The first claimant said in his witness statement that this was an error and he should have received a higher payment. However, during the hearing, he accepted that the amount paid for that month was correct.

28. The first claimant asked Mr Roberts in July 2019 to increase his salary payments back to the level he had received before, due to tax planning advice, it was reduced. There was no board meeting to agree that the claimant should receive a higher salary. Mr Roberts acted on what he considered to be an instruction from his boss, the owner of the business. I find that the first claimant gave the instruction to Mr Roberts and Mr Roberts processed the July 2019 payroll before LCL went into administration, although the payment was made shortly after the company went into administration.

29. LCL went into administration on 16 July 2019.

30. The respondent asserts that LCL was insolvent, or close to insolvency, as early as October 2018, relying on an expert's report obtained for the purposes of litigation about the alleged breach by the respondent of a trademark licence agreement and related matters. It is not necessary for me to decide whether this was the case. However, given that LCL went into administration on 16 July 2019, it appears more likely than not that, by the time the first claimant asked Mr Roberts to increase his salary payments, LCL was very close to insolvency. The directors of LCL would, therefore, by this time, be required to consider the interests of creditors and not only shareholders when making decisions.

31. On 19 July 2019, the first claimant received a payment from LCL. The gross salary was stated to be £7611.24 and the net payment £3322.99.

32. Lee Roberts sent the first claimant an email on 29 July 2019 explaining how he processed payroll in July. He forwarded this email to the administrator. Mr Roberts referred in the email to discussions earlier in the month, believing the first claimant had requested to go back onto the monthly payroll at the rates of pay he and the second claimant got paid prior to the tax advice the first claimant had received in early 2017.

33. On 19 July 2019, the second claimant received a payment of £866.14 gross from LCL. I heard no evidence of any decision making process leading to an increase in her pay but it appears, from the email from Mr Roberts dated 29 July 2019, that the increase was as a result of a request made by the first claimant that her salary, as well as his, should return to the level it was at before the reduction following tax advice. The July payment was in line with payments made to the second claimant prior to the reduction in salaries in the tax year beginning 5 April 2018.

34. Around the end of July or early August 2019, the first claimant told Mr Roberts that he thought he had been underpaid in July 2019 by £6,125. Mr Roberts started processing the payroll for August on 12 August. He instructed the payroll company to make an additional payment to the first claimant, believing the first claimant was entitled to this. He did not seek authority from the administrators to do this, which Mr Roberts accepted, on reflection, he should have done.

35. The respondent company was incorporated on 1 August 2019. Nicholas Marks was the sole director of the company from incorporation until his resignation on 4 August 2020. Kevin Coffey became a director on 4 August 2020 and remains a director. Alexander Marks, the son of Nicholas Marks, was appointed a director on 9 March 2021 and remained a director at the time of this hearing, although I note from Companies House records that he resigned as a director on 6 August 2021.

36. On 14 August 2019, the respondent acquired the business from the administrators. The sale and purchase agreement acknowledged that employees would transfer to the employment of the respondent by operation of TUPE. Schedule 1 to the agreement listed the employees. These included both claimants. The respondent has suggested that they did not realise that "Ms Susan Norma Mellor" was the wife of the first claimant because of the use of "Ms". All female employees were listed with the title "Ms".

37. There were a number of licences to occupy premises agreed between LCL and the respondent and also between LHL and the respondent. Although there was some confusion in the evidence about which licence was relevant to the locking of the premises at the end of September 2019, ultimately, it appeared that the relevant licence was one between LHL and the respondent to occupy land and buildings at Shirley Road, Lostock Hall, Preston in relation to which the licence fee was payable on the ninth of each month in advance.

38. Following the acquisition of the business, the first claimant's role was unclear. It does not appear that any agreement was reached as to the claimant's role post acquisition but it is common ground that the claimant was no longer Managing Director of the business. It appears that the first claimant attended for work but had little in the way of duties. He dealt with one matter to do with business rates, but he was unable to tell the tribunal about any other work he did for the respondent.

39. The second claimant never attended the business premises after the transfer (as she had not before) or took any active steps to make herself known to Mr Marks

or Mr Coffey or to seek any instructions as to her duties. Since any work that she did was to assist the first claimant and he was doing negligible duties for the respondent, I find that the second claimant did no work for the respondent after the business transfer, other than compiling the expense claim which appears at page 230 of the bundle.

40. On 20 or 21 August 2019, payments were made by the respondent under PAYE to both claimants. The first claimant's payslip showed gross salary of £7611.26 plus additional payments for grossed up salary and grossed up tax and employee National Insurance paid by the employer, making a net total payment of £9447.99. The second claimant's gross payment was £866.14. According to her payslip, she was paid £415.41 net. The second claimant subsequently asserted in her resignation letter that she had been paid £415.15 and that this was significantly less than her contractual entitlement but did not state what she believed that entitlement to be. In her witness statement, the second claimant wrote that she believed the payment was an underpayment based on her gross monthly salary being £866.

41. The first claimant informed the Tribunal in his oral evidence that he had been mistaken in thinking that £6125 was due to him and that the payment in August, referred to as "grossed up salary" on the August payslip, was made in error.

42. Neither claimant received any salary payments from the respondent after 21 August 2019. No payslips were issued to the claimants after 21 August 2019, indicating that deductions were being made for overpayments.

43. Nicholas Marks was asked to provide funds for the overall August payroll and was surprised by the amount, which was considerably higher than he had anticipated, but nevertheless provided the funds and payments were made to staff, including the two claimants. He subsequently asked Mr Roberts about the payment and discovered that the amount was higher than anticipated, due to the payments to the first claimant. Nicholas Marks was very angry about this. The information available to the respondent prior to the acquisition, in the "data room" included payroll information for LCL as at June 2019, when the first claimant's salary was £681 per month. The data room had been set up by a company instructed by LCL to assist them in finding a buyer for the business, prior to the administration. The information about the claimants' salaries in the data room had not been changed from the information relating to June 2019.

44. Nicholas Marks instructed Mr Roberts in September 2019 to remove both claimants from the payroll. The respondent did not notify the claimants that their salary payments were being stopped.

45. On 26 September 2019, the first claimant raised a formal grievance with the respondent about not having received a salary payment on 20 September 2019 and about unpaid expenses which he said totalled over £800.

46. The first claimant had provided Kevin Coffey with a copy of the December 2000 employment contract on 24 September 2019.

47. On 26 September 2019, the second claimant also raised a formal grievance with the respondent about failure to pay salary on 20 September or to make pension contributions.

48. The respondent did not pay the licence fee due to LHL for the premises on 9 September 2019. Nicholas Marks says he did not pay this because he considered the first claimant had, in effect, stolen his money by "hiking" his salary just before the administration and doing what Mr Marks considered to be helping himself to cash just before administration and taking as much of Mr Marks' money post acquisition as he thought he could get away with. Mr Marks viewed not paying the first occupation licence fee as a way of commercially setting that off against payments he considered should not have been made to the first claimant.

49. By a letter dated 26 September 2019 to the respondent, LHL's solicitors sought to terminate the licence on the grounds of non-payment of the licence fee. The notice required payment in full by noon on Monday 30 September 2019. Mr Marks was out of the country at the time the letter was sent.

50. On 30 September 2019, the first claimant locked the gates of the premises after hours. The following day, employees were not able to attend for work because of this.

51. On 1 October 2019, Nicholas Marks sent an email to the first claimant informing him that disciplinary proceedings would be taken and that he was suspended. He wrote:

> "Your actions and behaviour culminating in you unlawfully placing a lick [sic] and chain around our entrance gate preventing our business from operating is a cause of action against you for gross misconduct, tortious interference and damages."

52. The licence fee was paid late, on 1 October 2019. An agreement was reached and the respondent was allowed to reoccupy the premises from 14 October 2019. The respondent's solicitors' letter of 8 October 2019 includes an allegation that the first claimant was not entitled to the monies which had been paid to him and that it had been made clear to Daryl Mellor (a director of LCL and son of the claimants) that the respondent intended to treat the payment to the first claimant as discharge of the rent. The letter asserts that Daryl Mellor undertook to communicate this message to LHL.

53. On 5 October 2019, the first claimant wrote to Nicholas Marks and Graham Hall of Croners (whom the respondent was instructing to deal with HR matters). The first claimant wrote that he was concerned that there had been no acknowledgement or response to his grievance letter and that his wife had also not received any response to her grievance of the same date. The first claimant referred to Mr Marks's letter of 1 October 2019. He wrote that the actions he had taken had been made in his capacity as a landlord.

54. On 14 October 2019, the first claimant was informed by Paul Shelley, the IT and Logistics Manager, that he was disconnected from all services at Lunar. Mr Shelley wrote that he was following instructions in doing this.

55. By a letter dated 30 October 2019, Nicholas Marks required the claimant to attend an investigation meeting on 4 November 2019 to be conducted by a "Face2Face" consultant (Croner's HR support business). He wrote that this was to discuss "some concerns we have about your conduct". The letter did not specify further the matters to be discussed.

56. By another letter of the same date, Nicholas Marks acknowledged the first claimant's grievance and wrote that this would be heard on 5 November 2019 by a consultant from Croner. He enclosed a copy of a grievance procedure. This procedure stated that a meeting would usually be held within five days of the employee raising a grievance. It was already more than five days since the grievance dated 26 September 2019.

57. On 30 October 2019, a letter from Nicholas Marks to the second claimant acknowledged receipt of her grievance and invited her to a hearing with a Face2 Face consultant on 5 November 2019.

58. On 31 October 2019, the first claimant wrote to Nicholas Marks, writing that the meetings fell within a period of pre-booked annual leave so he could not attend on those dates. He requested alternative dates as soon as possible after his return from leave on 12 November.

59. By letter dated 7 November 2019, Nicholas Marks wrote to the claimant rearranging the investigation meeting for 13 November 2019.

60. The claimants had, by now, instructed legal representatives. Ms Duane, the claimants' legal representative, wrote on 8 November 2019 to Tracy Thomas, HR administrator of the respondent, asking for confirmation that the second claimant's grievance hearing would be rescheduled and for information about the allegations against the first claimant.

61. Tracy Thomas replied on 11 November 2019. She wrote that these matters would be addressed at the grievance hearing. In relation to the second claimant, she wrote that they had no evidence that the second claimant was ever employed by the company. She asked that they produce evidence demonstrating that the second claimant was an employee of the respondent and then they would consider engaging in discussions with her regarding her points of grievance. Until this point, she wrote, there would be no rescheduled hearing as non-employees are not entitled to this right.

62. Ms Duane replied on 12 November 2019. She referred to the second claimant transferring to the respondent in August 2019 and receiving a partial payment from the respondent during this time. She also referred to the second claimant's tax code, showing her primary employer as LAL, her payslip for August 2019 and the respondent's letter to the second claimant dated 30 October 2019 inviting her to

attend a grievance meeting, which she asserted was due to the second claimant's employee status.

63. The first claimant attended a grievance hearing with Andrew McCabe from Croners on 13 November 2019. The hearing was audio recorded and a transcript of this is included in the consultant's report of 27 November 2019.

64. On the same day, the first claimant also attended an investigation meeting with the same consultant. Again, the meeting was audio recorded and a transcript appears in the consultant's report.

65. On 25 November 2019, the claimant emailed Graham Hall of Croners chasing an outcome to the hearings. Mr Hall replied that he would pass the message on and that the timescale for an outcome was determined by the date they receive the minutes and any requirement to conduct further investigations.

66. On 27 November 2019, the second claimant resigned. Her resignation letter asserted that her employment had transferred to the respondent by operation of TUPE and that she was listed as an employee through the due diligence process. She asserted that she had received a payment of £415.151, on or around 21 August 2019 and this was significantly less than her contractual entitlement. She did not state what she believed to be her contractual entitlement. She wrote that she had raised a formal grievance on or around 26 September 2019. She wrote that salary for September, October and November 2019, pension contributions and holiday pay remained outstanding. She referred to the respondent refusing to deal with her grievance. She wrote:

> "It is therefore my position that the actions of the company constitute a fundamental breach of contract and/or an unlawful deduction of wages and therefore gives rise to a claim of constructive dismissal.
>
> "Taking into consideration the conduct of the company to date, I have been left with no alternative but to resign with immediate effect and seek to pursue a claim of constructive dismissal against the company."

67. Nicholas Marks replied to the second claimant, writing that they did not accept her letter of resignation, as they were not aware that she was in fact an employee. He wrote that, if the second claimant had any evidence that she could provide to substantiate that she was an employee, the type of work she undertook, any witnesses that she could provide or TUPE information, then they would look into the matter further. It does not appear that the second claimant provided any further information in response to this invitation.

68. Andrew McCabe produced his report from the first claimant's grievance hearing on 27 November 2019. He provided this to the respondent but the respondent did not provide this to the claimant prior to his resignation. The report was disclosed by the respondent during tribunal proceedings. In this report, Mr McCabe upheld the grievance that the claimant had not been paid salary since 21 August 2019. He suggested that the respondent may want to investigate the

manner in which payment was made to the first claimant to determine whether it was correctly calculated and paid in accordance with his previous salary payments.

69. Mr McCabe also produced his report in relation to the disciplinary investigation on 27 November 2019. A copy of this was sent to the claimant on 10 December 2019, together with an invitation to attend a disciplinary hearing on 13 December 2019.

70. The investigation report accepted that the first claimant had a legal right to lock the premises and acted in the capacity of a landlord in doing so but expressed the belief that, due to the first claimant's refusal to bring the matter to a close sooner than the 10 day period of closure, the first claimant used his employment status to prolong the matter. Mr McCabe recommended disciplinary proceedings in relation to the matters which were then set out as allegations in the respondent's letter of 10 December 2019.

71. The allegations set out in the respondent's letter of 10 December 2019, received by the first claimant on 12 December 2019, were as follows:

> "(1) You unreasonably prevented staff from entering the company premises by locking the front gate on or around 30th of September 2019.
>
> "(2) Whereas you could have unlocked the premises at any time following 30 September 2019 you unreasonably chose not to do so. As a result of this action staff were unable to undertake their duties in accordance with the contract of employment. In addition, you were aware the company would suffer financial loss. As a result of the above actions the company has lost trust and confidence in you which underlines the employment relationship.
>
> "(3) It is alleged you requested, persuaded, influenced, and/or coerced Mr Roberts into informing the accountant company responsible for making salary payments to pay to you a payment to which you knew you were not entitled.
>
> "(4) It is alleged you requested, persuaded, influenced and/or coerced Mr Roberts into informing the accountant company responsible for making salary payments to Susan Mellor payment to which you knew you were not entitled."

72. The first claimant requested that the meeting be rearranged, due to the short notice, and it was rearranged to 20 December 2019. The first claimant requested that he be accompanied by a third party or a legal representative, rather than a fellow employee, but the request was refused.

73. The first claimant attended the disciplinary hearing with Vicky Hart, a consultant from Face2Face on 20 December 2019. I accept the claimant's evidence that he understood that he would receive the outcome by 8 January 2020. However, I find that this understanding was mistaken. Ms Hart said she would deliver the report by that date, meaning to the respondent. The claimant did not

receive the outcome prior to his resignation. Ms Hart's report was disclosed during these proceedings. A transcript of the hearing is included in the report. It is apparent from that transcript that the first claimant had difficulty in describing what work the second claimant had done for LCL.

74. Vicky Hart spoke to a number of employees in the business as part of the disciplinary process. Transcripts of the interviews are included in the report. None of the employees she spoke to were aware that the second claimant was an employee of LCL and then the respondent. Tracy Thomas, HR administrator, said she had worked for LCL for four years before leaving in February 2019 and then returning to work for the respondent in September 2019. She said she had never met the second claimant and the second claimant did not appear on the organisation chart or on their T & A system, the system under which every employee had a clock number, so they knew who was on site and who was off site. She said the first claimant was on the system, but the second claimant was not. Ms Thomas said she was not aware the second claimant was on the payroll and the second claimant had no personnel file. She said that she only knew if the first claimant was on holiday when his PA told them that and there was never anything from the second claimant.

75. By an email dated 20 December 2019 to Tracey Thomas, the first claimant asked for his outstanding pay and reimbursement of outstanding expenses. He recorded his disappointment at not having received the grievance report.

76. By letter dated 15 January 2020, the first claimant resigned. His resignation letter included a statement that, since 21 August 2019, the respondent had failed to pay him any of his salary and accompanying contractual entitlements. He referred to raising a grievance and to salary for September 2019 through to salary for part of January 2020 remaining outstanding as well as expenses, holiday pay and return of a Sim card personally paid for. He wrote that he had received no outcome to his grievance. He wrote that he was informed during the disciplinary hearing that his ongoing suspension should be on full pay. He wrote that he had been assured that he would receive an outcome to the disciplinary hearing no later than 8 January 2020 but had had no response. He wrote:

> "It is therefore my position that the actions of the company constitute a fundamental breach of contract and/or an unlawful deduction of wages and therefore gives rise to a claim of constructive dismissal. Taking into consideration the conduct of the company to date, I have been left with no alternative but to resign with immediate effect and seek to pursue a claim of constructive dismissal against the company."

77. Tracy Thomas wrote to the first claimant on 24 January 2020 inviting him to withdraw his resignation so they could continue with the disciplinary process. The first claimant did not withdraw his resignation.

78. Ms Hart provided her report to the respondent on 27 January 2020. This recommended dismissal, recommending upholding all the allegations.

79. By a letter dated 3 February 2020, Tracey Thomas wrote to the first claimant asserting that he had been overpaid in August 2019. The calculations in relation to the payment period 14 August 2019 to 15 January 2020 included deducting accrued holiday pay and wages due at the rate of £681 per month from the amount paid to the first claimant in August 2019, to arrive at the gross amount the respondent asserted had been overpaid to the first claimant, £16,915.30. Ms Thomas requested that he reimburse the company this amount. The letter made no reference to expenses. I was not shown any reply from the first claimant to this letter.

80. The first claimant clarified in evidence that his expense claims relate to petrol costs for his car. He was provided with a fully expensed car, including petrol for private use. I accept that the document at page 230 sets out the cost of petrol for the first claimant's vehicle from 30 July 2019 until 13 January 2020: a total of £1833.47.

81. Nicholas Marks said he had no knowledge of the first claimant's expenses and whether they were valid or not. The respondent gave no evidence as to why the first claimant's expense claims were not paid.

82. Although letters in relation to the grievance and disciplinary processes were sent in the name of Nicholas Marks, Mr Marks, in his evidence, distanced himself from the processes, saying he had no direct involvement in them, and referring to Croner's running the processes. I find that the consultants who conducted the various meetings made recommendations but the respondent, acting through Mr Marks and other senior managers, would have been responsible for deciding on the outcome of the grievance and disciplinary processes and providing outcomes to these processes.

83. Neither claimant completed any holiday forms. Carol Hayley would enter any holidays booked by the first claimant into his electronic diary on his laptop in January for the rest of the year. The second claimant's name was put in his diary as well.

84. The second claimant took one week's holiday in the period 1 April 2019 until her resignation, being a week in November 2019.

85. The respondent alleges that the first claimant agreed to sell the respondent the business premises for a particular price and then, subsequently, increased the required price. The property was owned by LHL of which the first claimant was the majority shareholder. Since any agreement to sell property owned by LHL was not something done by the claimant in the capacity of an employee of the respondent, I do not consider it relevant to make any findings of fact relating to this.

Law

86. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. Section 95(1)(c) provides that an

employee is to be regarded as dismissed if "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

87. An employee will be entitled to terminate a contract of employment without notice if the respondent is in fundamental breach of that contract and the employee has not waived the breach or affirmed the contract by their conduct.

88. An implied term of an employment contract is the term of mutual trust and confidence. This is to the effect that an employer will not, without reasonable or proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between the employer and employee. Browne-Wilkinson J in *Woods v WM Car Services (Peterborough) Limited 1981 ICR 666*, said that the tribunal must "look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it."

89. The breach of contract need not be the only, or even the main, reason for resignation. It is enough that it is an effective cause.

90. Section 13(1) ERA provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction. Section 14 ERA sets out excepted deductions, where section 13 will not apply. These include, in section 14(1)(a), "where the purpose of the deduction is the reimbursement of the employer in respect of (a) an overpayment of wages, (b) [not relevant].., made (for any reason) by the employer to the worker". An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

91. An "employee" is defined by section 230(1) ERA as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment" is defined as meaning a contract of service or apprenticeship. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

92. The common law implies into every contract of employment a duty of fidelity on the part of the employee. The IDS Handbook on Contracts of Employment describes this duty as follows: "This duty of good faith and loyalty continues for as long as the employment contract subsists and imposes an obligation on the employee to provide honest, loyal and faithful service during employment. This means, among other things, that an employee must not compete with his or her employer, must not make secret profits from his or her employment, must not make

preparations to compete with the employer during working hours, and must not disclose the employer's trade secrets or confidential information without consent or just cause."

93. "The precise scope and content of the duty of fidelity, and whether it has been breached, is a question of fact which depends on the particular circumstances of the case" — *Imam-Sadeque v Bluebay Asset Management (Services) Ltd 2013 IRLR 344, QBD*.

Submissions

94. Mr Bloom made oral submissions on behalf of the respondent. Ms Duane provided written submissions and made additional oral submissions on behalf of the claimants.

Respondent's submissions

95. The respondent submitted as follows. The first claimant's evidence that the increase to his salary was because dividend and directors' loans were no longer available, was untrue. Dividends had ceased after 31 August 2018 and loans were still repayable on demand. The claimant had made a dishonest statement, trying to justify his salary hike. There is no evidence the administrator agreed to the payment to him. The contract indicates that there is some sort of forum, other than the appointee, to determine his salary. To the extent that the contract is applicable, the employee cannot just change his salary as he thinks fit.

96. LCL was on the verge of insolvency at the time of the salary increase. In circumstances where a company is insolvent or on the verge of insolvency, the obligations of the directors transfer from the shareholders to the creditors. If the Board had met and decided to increase the first claimant's salary, they would risk being sued by the creditors. They were giving money to a director and a connected party.

97. The data room showed the claimant's salary as £681. Nicholas Marks was not advised otherwise and the data was never corrected. The buyer was entitled to rely on the representations. It fell to the first claimant to ensure the accuracy of the information given to the buyers. Nicholas Marks felt deceived. It does not matter if this was intentional or reckless; on either test, this met the tort of deception.

98. The respondent had "reasonable and proper cause" for its actions.

99. The first claimant received, in effect, 2.5 years' worth of salary, irrespective of the payment made to HMRC. The August payment, including the tax, was £20,000 more than anticipated, based on the claimant salary of £681. The respondent was entitled to treat the payment as a set off. The payment should never have been made to the claimant. He was under a duty to put it right. He did not. The respondent was entitled to treat it as a set off. The first claimant's actions in the lock out were without justification.

100. The respondent was not the cause of breakdown in trust and confidence. The respondent was the innocent party. Events leading to the discipline and grievance were driven by the conduct of the first claimant.

101. The first claimant had a duty of fidelity.

102. The first claimant resigned prematurely on 15 January 2020. The report was not due to the company until 8 January.

103. The conduct of the respondent was reasonable and proper in circumstances where the claimant took money to which he was not entitled. He was responsible for deceiving the acquirer.

104. Mr Bloom referred to the following cases in relation to the duty of fidelity and fiduciary duties: *AG v Blake [1998] 2 WLR 805* and *John Reeder v Spie Ltd and*

Paul Anthony Garside [2021] EWHC 1221 QB. Mr Bloom submitted that the cases made it clear that the claimant must not act for his own benefit without the consent of his employer. Mr Bloom also referred to the case of *Secretary of State for Employment v ASLEF No.2 [1972] 2 QB 455* for the proposition that the claimant had a duty not to disrupt his employer's business. Mr Bloom submitted that there could be no more pertinent example of wilfully obstructing an employer than wilfully locking the factory for 14 days.

105. Mr Bloom submitted that, as a senior employee, the first claimant was a fiduciary and had fiduciary obligations which could only be dispensed with by informed consent. These duties included confessing wrongdoing. The first claimant had not pleaded informed consent.

106. In relation to the second claimant, the respondent submitted that there was not sufficient certainty as to the terms of her employment for there to be a contract or to infer a contract of employment in the absence of a written contract of employment. The second claimant's purported role was to support her husband. She said she organised diary events but there were none with the respondent. The respondent accepted that the second claimant prepared the expenses claim. This would not take more than an hour to construct and was done over months. The second claimant did no work for the respondent other than preparing an expense claim. She did not offer to do anything.

107. The second claimant claimed the salary hike was by reason of the loss of dividends. The respondent challenged the legitimacy of the pay increase for the same reasons as given in relation to the first claimant.

108. The respondent submitted that this was a contrived and opportunistic claim.

109. The respondent submitted that the first claimant did three things to cause problems for the respondent: (1) the salary hike and taking money without authority; (2) the lockout, not recognising the set off; and (3) the more fundamental cause of damage by the first claimant, the hiked price of the property beyond what was affordable. This led to the respondent having to move premises. The respondent submitted that these three things gave the respondent reasonable and proper cause for their actions.

110. In relation to the employer's contract claim against the second claimant, in answer to the judge's question as to what evidence there was that the second claimant deceived the respondent (this being the basis for the claim set out in the pleadings), Mr Bloom replied that he thought I was right and they would say "nice try".

<u>Claimants' submissions</u>

111. Ms Duane relied on her written submissions. These can be referred to, if necessary, so I do not seek to set these out in detail in these reasons. I record, however, that Ms Duane accepted that there was an error in the written submissions on page 8, paragraph 27(e) in seeking to rely on a failure to pay notice

pay to either claimant as a breach of contract entitling the claimants to resign. Ms Duane also confirmed that, as discussed at the outset of the hearing and recorded in the list of claims and issues, failure to address the claimants' grievances and inept handling of the first claimant's disciplinary matters was relied on as part of the alleged breach of the implied duty of mutual trust and confidence.

112. A summary of the claimants' principal written submissions is as follows.

113. The second claimant was an employee of the respondent: there was no power of substitution; there was sufficient control and mutuality of obligations; other factors pointed to employment status. In the alternative, the second claimant was a worker.

114. The respondent was in repudiatory breach of the claimants' contracts by failing to pay salary; failing to address the claimant's grievances; failing to pay the first claimant during suspension; failing to pay the first claimant's contractual expenses; and in the inept handling of the disciplinary matters in relation to the first claimant. The claimants did not affirm the contracts before resigning. The claimants resigned in responses to the breaches.

115. The claimants were entitled to their notice pay: in the case of the first claimant, 12 months' notice; in the case of the second claimant, 5 weeks' notice (one for each year served).

116. The first claimant was entitled to his contractual expenses: £1833.47 for car expenses.

117. The claimants were entitled to their unpaid salaries and to holiday pay.

118. In relation to the employer's contract claims, Ms Duane submitted that the claimants' salaries were changed due to directors' loans no longer being available and salaries paid at this level in July, pre-acquisition. Due to a genuine misunderstanding by the first claimant, he thought he was entitled to a higher payment, and he had discussions with Mr Roberts which led to the additional payments in August 2019. Although the company handbook allows for recovery of overpayments, the respondent did not advise the claimants that their salaries would be withheld. Ms Duane contended that this was because a predetermined decision had already been taken to dismiss both claimants. The first claimant accepted that £6125 was a payment owing due to a genuine misunderstanding, but the grossed-up tax and national insurance contributions are not payments due against the first claimant. The first claimant asserts that salary of £7,611.26 was properly payable and the respondent was not entitled to the recovery of such monies.

119. Ms Duane made the following additional oral submissions.

120. "Hike" implies egregious or unjust remuneration. The claimant submitted this was not the case. The format in which the claimants were remunerated to change over the years. This was not a "hike" but simply a change of the manner paid. The

claimants relied on custom and practice as the basis for their entitlement to make the changes.

121. There was evidence that the change in salaries was communicated to the administrators. If the change did not make it into the data room, the claimant should not be liable for this. Reliance on this had not been proven.

122. The allegation about hiking the property price was a new allegation. There was not sufficient evidence to substantiate this. The claimants invited the tribunal to dismiss this allegation or not take any inference from the assertion.

123. The premises were closed due to the respondent's election not to pay the licence fee. This was appropriate. The rights as a landlord trump the fiduciary duty.

124. Nicholas Marks conceded that the second claimant was employed by LCL prior to the transfer; she was paid and did work. It was accepted she was an employee. It was difficult and improbable to argue that there was no TUPE transfer. It was erroneous to draw attention to the second claimant not contacting the respondent.

125. In relation to holiday pay, the first claimant relied on the Working Time Regulations for any carryover from 2019. The second claimant relied on the Working Time Regulations only, seeking a pro rata amount.

126. In answer to a question from the judge as to how an employee could unilaterally vary his wages, Ms Duane submitted that there appeared to be a custom and practice of salary changes without board level input. She submitted that there was an implied term which permitted the first claimant to alter his own salary since at least 2016. It was permissible for the first claimant to change his salary in that manner.

Conclusions

<u>The second claimant</u>

127. I deal first with the employment status of the second claimant since, for reasons which follow, this has implications for all the claims brought by the second claimant.

128. Although we identified at the start of the hearing an issue about whether the second claimant was a "worker" if not an employee, on reflection, I have concluded that all the second claimant's claims against the respondent require her to have been an employee of LCL and then, by operation of TUPE, an employee of the respondent. Worker status would give her rights to make complaints of unauthorised deductions from wages against her "employer". However, if she had been a worker vis-à-vis LCL, but not an employee, TUPE would not have operated to transfer her, and her accrued rights, to the "employment" of the respondent. There has been no argument the second claimant became a worker vis-à-vis the respondent or an employee of the respondent by any means other than the

operation of TUPE.

129. I have found that the second claimant did some work for LCL (see paragraph 21). This was of a very limited nature and to assist her husband. Payments to the second claimant bore no relationship to the amount of work she did for LCL and changed according to tax advice to enable both claimants to extract money from the business in the most tax efficient way, until the change made shortly prior to the administration of LCL.

130. There is little evidence to suggest that the second claimant was subject to the element of control of her work in the way which would be expected of an employee. The evidence does not support Ms Duane's submission that the second claimant was provided with daily tasks and that LCL would determine the duties and timescales for each task. Ms Duane's submission refers to the respondent determining this, but I understand the submission relates to the situation pre-transfer, so I consider this in relation to LCL; if the intention was to refer to the situation post transfer, there is no evidence of daily tasks being provided, the only work done post-transfer by the second claimant being the compilation of an expenses claim. Instruction as to tasks could only have come from the first claimant. In the disciplinary hearing with Vicky Hart, he struggled to explain what work the second claimant had done. I accept that he asked for help with certain matters, which could include giving the second claimant a list of telephone calls to make to sort out his diary, and the second claimant liaised with his PA in the office over some matters e.g. diary dates, but this appears more consistent with a family member helping out with the family business, than being contractually obliged to do certain tasks within a certain timescale.

131. Similarly, there is little evidence of the mutuality of obligation which would be expected in an employment relationship. There was no agreement as to hours of work. I accept that the majority of work that was done by the second claimant was, at least until Carol Hayley left, done on Mondays and Fridays since Carol Hayley was not available to assist the first claimant on those days, but the evidence does not support the claimant being required, as a matter of contract, to do particular tasks within a particular timescale.

132. There are other features of the relationship lacking which would be expected if the second claimant had been an employee: the company's HR person was unaware the second claimant was an employee and there was no personnel file for her; the second claimant did not appear on the organisation chart or on their T & A system, the system under which every employee had a clock number; she did not have a company email address; when she went on holiday, she did not complete an application for leave in the same way as other employees were required to do (with the exception of the first claimant, who, as Managing Director pre transfer was in a rather different position).

133. I do not consider the fact that the second claimant did her work from home, rather than from the office, to be a strong factor either for or against employment status. Some employees can work perfectly well from home, as has become particularly apparent during the pandemic. However, there was no evidence that

there was a set up at home which would allow the second claimant to operate as if she were working from the office e.g. a facility for calls made to the office to be transferred to the second claimant so she could take calls when Carol Hayley was not in the office; or access to LCL's computer network from home. The claimant did tasks which she could do from the normal home facilities, mostly making telephone calls.

134. The second claimant was treated as an employee for the purposes of PAYE, but this is not conclusive of employment status. Her inclusion in the list of employees in the sale and purchase agreement is also not conclusive of her employment status; it is probably simply reflective of her inclusion on the PAYE payroll.

135. I conclude that the lack of control over the work done by the second claimant, the lack of mutuality of obligation and the majority of other features of the relationship are more consistent with the second claimant not being an employee of LCL than with being an employee. I conclude that the second claimant was not an employee of LCL prior to the transfer of the business. TUPE did not, therefore, operate to transfer the second claimant to the employment of the respondent.

136. There is, therefore, no basis on which the second claimant can bring any of her claims against the respondent and these complaints are not well founded.

137. If the second claimant was not an employee of the respondent, no valid employer's contract claim can be brought against the second claimant and this employer's contract claim is dismissed.

<u>The first claimant</u>

138. The validity of the pay rise given to the first claimant beginning in July 2018 at his own instruction has implications for most of the first claimant's claims, so I begin with this.

139. I consider that the part of the written contract dated 17 November 2000 dealing with the mechanism for determining the first claimant's salary no longer applied by July 2019. It provided for the salary to be at the level "the group shall from time to time decide". With the management buyout, the reference to the "group" in the written contract no longer had any application.

140. It has not been argued that the first claimant was not an employee of LCL, so I proceed on the basis that he was an employee of LCL following the management buyout.

141. There was no further written contract setting out how the first claimant's pay was to be determined. I have had no evidence as to how the level of pay in place before the tax year beginning 6 April 2018 was arrived at. It appears that the first claimant decided himself, after receiving tax advice, how much salary he would receive, with other income to be received from dividends from 6 April 2018 onwards.

142. There is no implied contractual term that a Managing Director can set their own level of pay. The employing company, by its board of directors, has to make a decision as to what the pay is to be.

143. In practice, when the business was a family business (which it was to a large extent before the retirement of Mr Lawrence and then wholly after the retirement of Mr Lawrence), and whilst the business was not close to insolvency, the formalities of agreeing the first claimant's level of pay were probably of little significance. If the owners of the business (the family members through LHL) had wanted the first claimant to be paid at a certain level, that would have been achieved and any decisions to that effect could be ratified subsequently, if necessary, if they had not been made in a formal manner. However, once LCL was close to insolvency, the directors would have to consider their duties to creditors, and not just to shareholders, when making decisions, including about the pay of the Managing Director.

144. The first claimant decided, without reference to the Board of LCL, that he should be paid at an increased level from July 2019. By the time this decision was made, LCL was close to insolvency. I conclude that the first claimant's unilateral decision, and instruction to the Financial Director, Mr Roberts, did not have the effect of giving the claimant an entitlement to the increased rate of pay. It matters not that the decision was to revert to a rate of pay the first claimant had enjoyed prior to 6 April 2018. The first claimant's contract in relation to salary had been varied with effect from 6 April 2018 in accordance with his own wishes, to reduce his liability to tax. It has not been argued that this was not a valid variation. For the first claimant's pay to be increased back to the pre-April 2018 level, LCL had to make a decision to this effect. There is no evidence that LCL, acting through its board of directors, made such a decision.

145. I conclude, therefore, that the claimant's salary, at the time his employment transferred under TUPE to the respondent, was £681 per month.

146. If I had found that the necessary formalities had been undertaken to increase the first claimant's pay from July 2019, it would have been necessary to invite submissions from the parties on the effect of the case of *Ferguson and others v Astrea Asset Management Limited [2020] UKEAT/0139/19* on the situation. This case was not referred to me during the hearing but has subsequently come to my attention. The case concerned directors who increased their salaries prior to a TUPE transfer. The issues I would have needed to consider would have been: whether the sole or principal reason for the increase was the TUPE transfer and, therefore, the increase was void because of regulation 4(4) of the Transfer of Undertakings (Protection of Employment) Regulations 2006; and/or whether the increase was void under the abuse principle in EU law.

147. Since I have decided that the increase was invalid because the necessary formalities were not undertaken, it is not necessary for me to invite submissions on these issues.

The first claimant's complaints of unauthorised deductions from wages – non-payment of salary

148. The first claimant was not paid after August 2019. The failures to pay him in September 2019 and subsequent months until his employment ended in January 2020 (including his time on suspension) were deductions from wages. These deductions would be unlawful unless they were authorised deductions (as set out in section 13(1)) or excepted deductions as set out in section 14 of the Employment Rights Act 1996 (ERA). There is no right to equitable set off in relation to a complaint of unauthorised deductions from wages.

149. A deduction made for the purpose of the reimbursement of the employer in respect of an overpayment of wages made (for any reason) by the employer to the worker, is an excepted deduction, under section 14 ERA. Given my conclusion that the pay increase was not valid, it follows that the claimant was overpaid in July and August 2018. If the respondent was making the deduction for the purpose of reimbursing the respondent for the overpayment, the first claimant's complaint of unauthorised deduction from wages would not succeed.

150. I have found that the respondent stopped the first claimant's wages because Nicholas Marks was angry when he found that, in August, the first claimant, at the first claimant's own instructions, had been paid considerably more than Mr Marks had understood the claimant's salary to be (see paragraph 43). I conclude that the respondent withheld the wages because Mr Marks considered the first claimant had effectively helped himself to money to which he was not entitled. I conclude that the purpose of the deduction was to reimburse the respondent for the overpayment. I conclude, therefore, that the first claimant's complaints of unauthorised deductions from wages in relation to non-payment of salary are not well founded.

The first claimant's complaint of breach of contract - failure to pay expenses

151. I have found that the claimant was entitled, under his contract dated 17 November 2000, to a fully expensed company car, which included payment for costs of personal use of the car (see paragraph 18). I have seen no evidence that this part of the claimant's contract was ever changed. I accepted that the claimant had incurred petrol costs of £1833.47 in the period 30 July 2019 to 13 January 2020 which were not reimbursed by the respondent (see paragraph 80). I conclude that the respondent was in breach of contract by not reimbursing the claimant for these expenses.

The first claimant's complaint of constructive unfair dismissal

152. As identified in the list of claims and issues, the first claimant relies on the following alleged breaches of contract:

152.1. a breach of trust and confidence (including, failure to provide an outcome to, or to address the grievances and inept handling of the disciplinary procedure); and

152.2. an implied contractual breach due to the respondent's failure to pay the first claimant during his suspension.

153. I deal with the second alleged breach first. Since I have concluded that the first claimant was not paid wages after August 2019, including the period on suspension, for the purpose of the respondent reimbursing itself for overpaid wages, I conclude that failure to pay the first claimant during his suspension was not a breach of contract.

154. In relation to the alleged breach of the implied term of trust and confidence, the first claimant relies on the following acts or omissions of the respondent:

154.1. Failure to pay wages from September 2019 until the claimant's resignation on 15 January 2020.

154.2. Failure to address the claimant's grievance.

154.3. Failure to pay the claimant during his suspension.

154.4. Failure to pay the claimant's contractual expenses.

154.5. Inept handling of the disciplinary proceedings against the claimant.

155. In relation to the failure to pay wages and the failure to pay the claimant during his suspension, I have concluded that the claimant was not paid because the respondent was seeking to reimburse itself for overpayments of wages made to the claimant. I conclude that these matters do not individually constitute a breach of the implied duty of mutual trust and confidence and cannot contribute to such a breach when taken together with other matters.

156. I have concluded that the respondent was in breach of contract by failing to pay the claimant's contractual expenses (private petrol costs of running his company car). This matter could, therefore, contribute to a breach of the implied duty of mutual trust and confidence.

157. In relation to the grievance, the first claimant submitted his grievance (about unpaid salary and expenses) on 26 September 2019. This was not acknowledged until 30 October 2019, when the first claimant was given a date of 5 November 2019 for a grievance hearing. The hearing took place on 13 November 2019, having been postponed due to the first claimant's holiday. The consultant provided a report to the respondent on 27 November 2019, but the respondent did not provide the report or an outcome to the grievance to the first claimant before his resignation.

158. I conclude that the delay in dealing with the claimant's grievance and failure to provide him with an outcome could contribute to a breach of the implied duty of mutual trust and confidence.

159. In relation to the handling of the disciplinary proceedings against the claimant, the claimant avers that the respondent rushed into making formal allegations, when evidently further enquiries were required before putting the allegations to the first claimant. I do not consider this point to be well made. An investigation meeting was held on 13 November 2019. Formal allegations were made, and the claimant invited to a disciplinary hearing, only following the consultant's report to the respondent after this meeting. The part of the disciplinary hearing referred to in paragraph 40 of the claimant's submissions refers to disciplinary action being taken not, as the submissions appear to be suggesting, that these various steps be taken before disciplinary allegations are made and a disciplinary hearing held. The disciplinary hearing is part of the process of allowing the employee to present his or her side of the case. Although disciplinary proceedings were undertaken, the respondent had not reached the stage of taking disciplinary action by the time the claimant resigned. I conclude that there is nothing in the handling of the disciplinary proceedings prior to the disciplinary hearing which can contribute to a breach of the implied duty of mutual trust and confidence.

160. The first claimant misunderstood what Vicky Hart said about when the claimant would be told of a decision; 8 January 2020 referred to when she intended to have her report with the respondent, not when the claimant would receive an outcome. In fact, she did not get her report to the respondent until after the claimant's resignation. The disciplinary hearing was on 20 December 2020. Given the time of year, an outcome was likely to take longer than might otherwise be the case. I do not consider that, by 15 January 2020, when the claimant resigned, the delay in providing an outcome was such that the delay could contribute to a breach of the implied duty of mutual trust and confidence.

161. Of the matters relied on by the claimant, I have concluded that the following matters could contribute to a breach of the implied duty of mutual trust and confidence: the failure to pay the claimant's expenses and the delay in dealing with the claimant's grievance and failure to provide him with an outcome.

162. There will not be a breach of the implied term if the respondent's actions were taken for reasonable and proper cause. The respondent gave no evidence as to why the first claimant's expense claims were not paid. In these circumstances, I am unable to conclude that the respondent had reasonable and proper cause for not paying the claimant's expenses. Mr Marks distanced himself from the grievance process in his evidence and the respondent's evidence provides no basis for concluding that the respondent had reasonable and proper cause for the delay in dealing with the claimant's grievance and failure to provide him with an outcome.

163. I conclude that these two matters are sufficiently serious, taken together, to constitute a repudiatory breach of the implied duty of mutual trust and confidence.

164. The next question is whether the breach caused the first claimant to resign. From the claimant's resignation letter, I conclude that the matters which I have concluded constituted a breach of the implied term contributed to the first claimant's decision to resign. There were other matters which also caused the

claimant to resign, which I have found not to form part of the breach, including the handling of the disciplinary matter. However, it is enough if the breach is an effective cause of the resignation. I conclude that the breach is, in this case, an effective cause of the first claimant's resignation.

165. I conclude that the claimant did not affirm the contract following the breach; he was continuing to claim he was entitled to be paid his expenses and to complain about not being given an outcome to his grievance, up to his resignation.

166. I conclude that the first claimant was constructively dismissed.

167. I conclude that the respondent has not shown a potentially fair reason for the constructive dismissal and, therefore, conclude that the complaint of constructive unfair dismissal is well founded.

The first claimant's complaint of wrongful dismissal

168. For the same reasons as outlined in my decision on the complaint of constructive unfair dismissal, I conclude that the claimant was constructively dismissed. I conclude that the respondent was in breach of contract by not giving the first claimant 12 months' notice of dismissal.

The first claimant's complaint of failure to pay holiday pay

169. The first claimant claimed unauthorised deductions from wages or breach of contract in failing to pay the claimant for holiday taken between 2 and 12 November 2019. If the respondent had been paying the claimant salary for November 2019, this would have included payment for the holiday. The claimant was not being paid during this period because the respondent was seeking to reimburse itself for overpayments of wages made to the first claimant. This is an excepted deduction for the purposes of the unauthorised deduction from wages claim and sums which can be set off in relation to the breach of contract claim. I conclude that this complaint is not well founded.

170. The first claimant also claims unauthorised deductions from wages or breach of contract in respect of accrued but untaken wages. The first claimant relies on a holiday year of the calendar year, in accordance with his contract. The first claimant has not put forward any basis on the facts and law on which he would be entitled to carry forward unused holiday from a previous leave year. The claim can, therefore, only be made in respect of leave accrued in the period 1 to 15 January 2020.

171. No payment of holiday pay was made to the first claimant on termination of employment because of overpayments of wages which had been made to the claimant. This is clear from the letter of Ms Thomas dated 3 February 2020 (see paragraph 79). This is an excepted deduction for the purposes of the unauthorised deduction from wages claim and sums which can be set off in relation to the breach of contract claim. I conclude that this complaint is not well founded.

The employer's contract claims

172. The contract claim against the second claimant fails as the Tribunal has no jurisdiction to deal with it, given my conclusion that the second claimant was not an employee. Even if she had been, Mr Bloom effectively accepted, in submissions, that there was no evidence to support the alleged breach of contract by the second claimant.

173. The issue in relation to the first claimant was set out in the list of claims and issues as follows: were the claimants overpaid wages or any other payments in breach of the employment contract, such that the respondent is entitled to reimbursement of the same? The list did not identify the contract term relied upon.

174. The contract claim against the first claimant is set out in the pleadings, at paragraph (64) as: "it is advanced that the 1st Claimant deceived Mr Roberts into authorising a payment of £20,371 .68 on or around the 21st August 2019".

175. From the respondent's submissions, it appears that the contract term relied upon is the duty of fidelity. Although it was not entirely clear from submissions, it appears also that the respondent may have been seeking to rely on the lockout and hiking the price of the property, in addition to authorising the August payment, as constituting the breach of contract by the first claimant. If this was the intention of the respondent, I conclude that the respondent is not entitled to rely on the lockout and hiking the price of the property as these matters were not relied on in the respondent's pleaded case. In any event, the first claimant was acting in capacities other than that of an employee in relation to these matters.

176. The basis of the contract claim appears, therefore, to be an alleged breach of the duty of fidelity by the first claimant by deceiving Mr Roberts into authorising the August payment (part of which the claimant now accepts that he was not entitled to).

177. I conclude that an employee would be in breach of the duty of fidelity if it deceived its employer into making payments to them to which they were not entitled. I have not been referred to any authorities as to what would be required to find deceit. However, based on a normal interpretation of that word, I conclude that it would require the employee to be concealing or misrepresenting the truth. The employee would have to be aware that he was not entitled, or, at the very least, might not be entitled, to the payments which he was causing his employer to make but representing to his employer that he was entitled to such payments.

178. The burden is on the respondent to satisfy the Tribunal that the first claimant deceived the respondent into making payments in August 2020 to which he was not entitled. The inability of the first claimant to answer various finance related questions suggested to me that the first claimant had a limited understanding of financial and corporate matters. It appeared to me entirely possible that he had a mistaken belief that he was entitled to unilaterally increase his pay in July and that he could have made a mistake about whether he had been made the full payment to which he considered he was entitled as a result of this change, leading to the

instruction he gave in August for additional payments. I conclude that the respondent has not discharged the burden of satisfying me that the first claimant acted deceitfully, rather than mistakenly. I conclude, therefore, that the employer's contract claim against the first claimant is not well founded.

Employment Judge Slater
Date: 7 September 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
15 November 2021

FOR THE TRIBUNAL OFFICE