EMPLOYMENT TRIBUNALS

Claimant: Mr D Morris

Respondent: Cryoaction Limited

Heard: by video **On:** 1, 2, 3, 4, 7, 8, 9 & 10 (in chambers) February 2022

Before: Employment Judge S Jenkins

Representation
Claimant: Mr S Brochwicz-Lewinski (Counsel)
Respondent: Mr J Searle (Counsel)

RESERVED JUDGMENT

1. The Claimant's claim of wrongful dismissal succeeds; he was not guilty of gross misconduct, and was entitled to have received three months' notice of the termination of his employment.

2. The Claimant's claim of unfair dismissal succeeds, but any compensatory award should be reduced to reflect the conclusion that his employment would have ended fairly, in any event, by the end of a further period of six months.

3. All the Claimant's other claims fail and are dismissed.

REASONS

Background

1. The hearing was to deal with the Claimant's claims of; wrongful dismissal, unfair dismissal, breach of contract, unauthorised deductions from wages, failure to pay holiday pay, failure to provide a statement of particulars of employment, failure to provide itemised payslips, breach of contract, and failure to pay the national minimum wage.

2. I heard evidence, via written witness statements and orally, from Ian Saunders, Director; Shaun Turton, Operations Director; Dorota Kucypera, former Chief Operating Officer; Paulina Klink, former Technical Development Manager; Christina Saunders, Director; and Bruce Frew,

independent barrister; on behalf of the Respondent, and from the Claimant, Agnieszka Piotrowska, former Product Director; Ian Watson, Director of Cryolabs Limited; and Robert Reid, Manager of Cryolabs Limited; on behalf of the Claimant, although the order in which I heard from those witnesses was adjusted to reflect their availability.

3. I also considered the written statement of Mr Mark Evans, director of Thames Cryogenics Limited, Mr Evans being unavailable to give evidence orally during the hearing. In the event, Mr Evans' evidence was relatively peripheral to the issues I needed to consider. His statement was largely consistent with the evidence he gave to the Respondent during the internal processes, and I saw no reason therefore to doubt its veracity.

4. I considered the documents in the hearing bundle spanning some 2775 pages to which my attention was drawn, which was relatively few. I viewed several videos, taken in January and February 2020, at the location at which the events which gave rise to the dismissal of the Claimant occurred. I also considered the parties' representatives' written and oral closing submissions.

Issues and law

5. A list of issues had been agreed between the parties at an earlier preliminary hearing held on 6 May 2021 before Employment Judge Howden-Evans. They were as follows.

The Claimant brings claims of:

1. *Wrongful dismissal;*
2. *Unfair dismissal;*
3. *Unlawful deduction from wages (s.13 ERA 1996)*
4. *Failure to provide itemised pay slips*
5. *Failure to pay holiday pay*
6. *Breach of contract (in respect of notice pay and "other payments");*
7. *Failure to provide a statement of particulars of employment*
8. *Failure to pay National Minimum Wage (s.28 NMW Act 1998)*

1. <u>Wrongful dismissal</u>

1.1 Was the Claimant entitled to notice pay?

1.2 Was the Claimant dismissed for gross misconduct and summarily dismissed permitting the Respondent to dismiss without notice pay?

2. <u>Unfair dismissal</u>

2.1 Did the Respondent dismiss the Claimant for a fair reason within s.98(1) and (2) ERA 1996?

2.2 Was the principal reason for the dismissal due to the Claimant's conduct?

2.3 *Did the Respondent act reasonably in treating that reason as a sufficient reason for dismissal taking into account the Respondent's size and administrative resources?*

2.4 *Was the dismissal procedurally and substantively fair?*

2.5 *Did the Respondent have a genuine belief of the Claimant's misconduct at the time of the Claimant's dismissal?*

2.6 *Did the Respondent's decision to dismiss the Claimant for gross misconduct fall within the band of reasonable responses?*

2.7 *Did the Respondent carry out a fair investigation and disciplinary procedure prior to coming to the decision to dismiss the claimant?*

2.8 *Did the Respondent follow the ACAS Code of Practice on Disciplinary and Grievances (ACAS Code)?*

3. Unlawful deductions from wages

3.1 *What deductions does the Claimant argue have been deducted from his wages?*

3.2 *Is the Claimant entitled to any accrued and outstanding holiday pay?*

3.3 *Are there any outstanding payments owed to the Claimant? If so, what are they?*

3.4 *Was the Claimant paid correctly for the hours worked each week?*

4. Failure to provide itemised pay slips

4.1 *Has the Respondent provided itemised pay slips to the Claimant?*

5. Failure to provide a statement of particulars of employment

5.1 *Did the Respondent provide the Claimant with an employment contract on 12 August 2020?*

5.2 *Did the Respondent provide Claimant with a statement of particulars of employment during his employment with the Respondent?*

6. Failure to pay National Minimum Wage (s.28 NMW Act 1998)

6.1 *Did the Respondent pay the Claimant the National Minimum Wage?*

6.2 *How many hours per week was the Claimant employed to work?*

6.3 *Was the Claimant paid his correct salary for the hours that he worked?*

7. <u>Breach of Contract:</u>

7.1 Did the Respondent make a fundamental breach of contract by failing to pay notice pay to the Claimant or any other outstanding contractual payments? If so, what were the payments the Respondent has failed to pay to the Claimant?

7.2 Is the Claimant entitled to any further payments?

8. <u>Remedy:</u>

8.1 If the Claimant succeeds in the aforementioned claims, what sums, if any, should be awarded to the Claimant by way of compensation?

8.2 The Claimant is required to provide mitigation evidence in support of his claim for compensation for loss of earnings.

8.3 If the Claimant succeeds with his claims, should there be any uplift for a failure to comply with the ACAS Code?

6. The primary factual focus of the issues in relation to the wrongful and unfair dismissal claims was on the Claimant's actions at a client's premises, Cryolabs Limited ("Cryolabs") on 31 January 2020, which was said by the Respondent to have amounted to gross misconduct justifying summary dismissal.

7. The factual focus in terms of the breach of contract and unauthorised deductions from wages claims was on the status of payments made to the Claimant. He, along with Mr Saunders, as directors, received his remuneration in the form of regular monthly dividends and, latterly, in the form of payments of salary up to the national insurance lower earnings limit, which were, in fact, not paid to the two individuals but were allocated to them within director's loan accounts.

8. The Claimant contended that the payment of dividends could not be taken into account in terms of the assessment of whether the Claimant received the national minimum wage, such that there had been under-payments. The Claimant contended that, in relation to the last two years of the Claimant's employment, those under-payments fell to be considered under the unauthorised deductions from wages provisions of the Employment Rights Act 1996 ("ERA"); and, in relation to other periods, fell to be considered as a breach of contract, subject to the overall cap on the amount of compensation able to be awarded by an employment tribunal in relation to breach of contract claims.

9. The Claimant also contended that the allocation of the lower earnings level payments to a director's loan account also amounted to unauthorised deductions from wages and/or to breaches of contract in the same way.

10. With regard to the claim in respect of failure to provide itemised payslips,

the Claimant ultimately accepted that, by reference to the particular provisions of section 12 ERA, no financial remedy was available, even if there had been a failure.

11. With regard to the claim of a failure to provide a statement of particulars of employment, it was common ground between the parties that the Claimant was not provided with such a statement during the course of his employment. However, the Respondent contended that it did provide the Claimant with such a document on 12 August 2020. The terms of section 38 of the Employment Act 2002 cater for additional compensation, following a successful claim, where such a statement had not been issued "*when the proceedings were begun*". In this case, the proceedings were begun on 14 September 2020, and therefore the issue for me to address was whether the document provided by the Respondent on 12 August 2020 amounted to a compliant statement of particulars of employment.

12. The main legal principles were encapsulated within the list of issues. I was however conscious of the following additional principles.

13. With regard to the question of the reason for dismissal, I was conscious that the burden of establishing that the dismissal was for a potentially fair reason, i.e. in this case, conduct, fell on the Respondent.

14. I was conscious that the burden of proof in relation to assessing the fairness of any dismissal by reason of conduct, if I was indeed satisfied that the dismissal was for that reason, was neutral. I would need to assess matters from the perspective of section 98(4) ERA by considering whether the dismissal was fair or unfair, taking into account all the circumstances, and determining the question in accordance with equity and the substantial merits of the case.

15. In that regard, the list of issues did not completely encompass the test to be applied in the context of conduct dismissals, which was set out many years ago, in the case of the British Home Stores v Burchell [1978] IRLR 379. Issue 2.5 noted that an issue for me to consider was whether the Respondent had a genuine belief of the Claimant's misconduct, but the Burchell test made clear that consideration also had to be given to whether that belief was based on reasonable grounds, which were, in turn, based on a sufficient investigation.

16. I also noted that the range of reasonable responses test, noted at issue 2.6 as applying in relation to the dismissal decision, as identified many years ago in Iceland Frozen Foods v Jones [1983] ICR 17, also fell to be applied in relation to the reasonableness of the investigations undertaken by the Respondent, as was confirmed in Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23.

17. My overall approach in relation to the assessment of fairness was not to consider whether the Respondent's actions were correct, but was to assess whether the actions taken were open to a reasonable employer acting reasonably in the circumstances.

18. With regard to wrongful dismissal, my approach was quite different in that I had to be satisfied, on an objective basis, on the balance of probability, that the Claimant had been guilty of gross misconduct, i.e. conduct so serious

as to amount to a repudiatory breach of the contract of employment which entitled the Respondent to terminate the contract summarily. I had to be satisfied, on the balance of probability, that there had been an actual repudiation of the contract by the Claimant, and that did not involve any consideration of the reasonableness of the Respondent's belief or approach.

Findings

19. My findings, on the balance of probability where there was any dispute, are set out below. In many areas, clearly opposing evidence was provided by the parties, notably by Mr and Mrs Saunders on the Respondent's side and by the Claimant on his own side. In my view, all witnesses attempted to give evidence which was their honest recollection of what happened. However, in the case of those three witnesses, I felt that their evidence, whilst not necessarily untruthful, was influenced by the particular perspectives they brought to bear on the events, which meant that I found it difficult to totally rely on their evidence in isolation. I therefore looked for corroboration of that evidence from other sources, whether other witnesses or documents. I also took into account the inherent probabilities of the particular circumstances under consideration.

20. The Respondent is a company which provides cryotherapy equipment, principally cryotherapy chambers, to sports teams, spa and wellness facilities, gyms and specialist cryotherapy clinics. Initially it sold and distributed chambers manufactured by a Polish company, Creator Sp.z.o.o. In 2018 however, it set up its own Polish subsidiary, Cryoaction Sp.z.o.o, which manufactured the cryotherapy units sold by the Respondent. Subsequently, another UK subsidiary, Cryoserve Ltd, was set up to focus on servicing and maintenance work.

21. The Respondent was set up by the Claimant and Mr Saunders as the two directors and as equal 50% shareholders. No shareholder agreement was put in place between them at the time, and nor were any contracts of employment or job descriptions prepared. The focus of the two individuals, at the time and subsequently, was that the Claimant, as Chief Revenue Officer, would focus on sales and business development, while Mr Saunders focused on administration and finance, although he did also undertake some customer-facing work.

22. Both parties invested £1000 in respect of their shareholdings, with Mr Saunders subsequently providing funds to the company by way of loans in order to service its initial and ongoing expenditure.

23. In terms of remuneration, the two directors agreed to receive their remuneration primarily by way of dividends, with both receiving £3000 per month. Whilst there were occasional months where one or both of the individuals were not paid a monthly dividend at that level, payments of that dividend sum were made for virtually all months up to February 2020. Discussions took place between the two parties on at least two occasions regarding the prospect of them taking their remuneration by way of salary, but the Claimant's insistence that he required at least £3000 per month net in order to fund his living expenses meant that no such step was taken.

24. In 2017 the company's accountant suggested that both directors should be

paid a formal amount by way of salary by the company at the national insurance contribution lower earnings limit, in order to claim the "national insurance stamp."

25. The Claimant's evidence was that he and Mr Saunders had agreed that they would each receive £600 per month by way of salary for this purpose. He accepted that he never physically received this money, with his belief being that it was being used to pay his tax and national insurance. Mr Saunders' position however, was that the sum would not be paid to the two individuals but would remain on the company's books, being credited to director's loan accounts.

26. There was some support in the bundle for Mr Saunders' position in the form of annual payslips to Mr Saunders for the tax years ending April 2018, April 2019 and April 2020, showing payments at the level of £6000, £6032 and £6136 respectively. The last two equated exactly to the prevailing lower earnings limit, with the first being slightly above it. It seemed to me therefore that the arrangement, if imperfectly understood by the Claimant, was that there would be an allocation of the sums by way of salary such that the two directors would be able to accrue state benefits, referable to that level of earnings. The accrued sums, approximately £18,000 in the context of the Claimant by the time his employment ended, then stood to the credit of their director's loan accounts.

27. In terms of the units, or chambers, sold by the Respondent, these essentially fell into two categories, which depended on whether the unit was being built within the confines of a building or was being installed externally. If the latter, a chamber pre-built within the Polish manufacturing facility would simply be brought on site and connected up. By contrast, in the former case, the component parts of the chamber would be delivered to the site on a "flat pack" basis for them to be assembled in situ. Such a process took considerably longer, some 5 to 10 days, as opposed to the external installation of a chamber which would be likely to be completed within a day.

28. In relation to flat pack installations, engineers from the Polish manufacturing company, whether Creator before 2018 or the Respondent's subsidiary after 2018, would attend to undertake all the installation work, including the pipework to enable the liquid nitrogen, which enables the chamber to work, to flow. They would also undertake all required electrical installation work. With external units, the pipework to enable the liquid nitrogen to flow from the associated tank to the chamber would be undertaken by a third party, it appeared that the Respondent generally used a company called Thames Cryogenics Limited ("TCL"). Then a liquid nitrogen provider, the Respondent generally used BOC, would attend to fill the liquid nitrogen tank, checking that the equipment had been installed correctly before doing so. Mr Turton, before his recruitment by the Respondent, would often attend, as a BOC employee of long-standing, to undertake that element of the work.

29. In addition to the pipes and associated valves, the system, certainly in later years, involved the use of an "actuator", which operated as a form of safety valve. Liquid nitrogen is dangerous as it expands, and consequently displaces oxygen, leading to the risk of asphyxiation. The actuator operates to ensure that the supply of liquid nitrogen from the tank to the chamber

would automatically cut off in the event of a fault. The actuator needs to be connected to an electrical supply by way of a simple two wire connection. A compressed air supply from a compressor is also required in order for the system to operate.

30. Over the years prior to 2019, the Claimant and, on occasions, Mr Saunders, would undertake some of the technical or "hands-on" work arising in relation to the installation and repair of chambers. This included the replacement of oxygen and temperature sensors, but also, in relation to the Claimant, involved the wiring of the actuator. Other hands-on tasks, such as the repair of leaks or the clearing of debris from valves were also undertaken by the Claimant and Mr Saunders from time to time.

31. The Polish subsidiary company was set up in June 2018 and took on many of the staff previously involved in the manufacture of chambers by Creator. The Polish company was set up on exactly the same lines as the Respondent, with the Claimant and Mr Saunders each holding 50% of the shares in that company, and both being its directors. The business of the Respondent's group overall then changed from being the seller and supplier of cryotherapy units manufactured by a third party to being the manufacturer, seller and supplier of those units.

32. In January 2019, Mr Turton was recruited as the Respondent's Technical Director with primary responsibility and accountability for the technical engineering function across the company. As I have noted, Mr Turton had regularly worked with the Respondent in relation to installations as an employee of BOC, and had certified the installations as being fit to receive supplies of liquid nitrogen via BOC's "authority to fill" process. Mr Turton was recruited to undertake the same sort of role for the Respondent, indeed he was authorised by BOC to complete the authority to fill certification despite working for a third party company.

33. Prior to Mr Turton's recruitment, in late 2018, an incident had arisen with regard to an installation of a chamber within the premises of a client, with which the Claimant had been involved. That had led to a potentially dangerous situation, but also led the customer, via threatened litigation, to return the chamber, and to request and receive a full refund of the purchase price of some £79,000.

34. By March 2019, when the sum agreed to be refunded to the client was required to be paid, discussions took place between the Claimant and Mr Saunders about raising the funds for that purpose. Discussions initially took place about both directors investing a further £25,000, but the Claimant was unable to raise that money. It was ultimately therefore agreed, between Mr Saunders and his wife, Mrs Christina Saunders, that they would collectively invest £50,000. In return for that investment, Mrs Saunders came in as a small shareholder, with the Claimant's shareholding being diluted. The company's accountants were involved in undertaking an informal valuation of the company at the time and, and, in return for the investment, Mrs Saunders became the owner of 4.07% of the company, Mr Saunders became the owner of 50.18%, and the Claimant became the owner of 45.75%.

35. Just prior to that, the Respondent had been in the process of recruiting an additional salesperson to assist the Claimant, but the intended recruit

eventually took up a position elsewhere just before joining. As Mrs Saunders had a background in sales, in addition to her investment, it was agreed that she would undertake the additional sales role, with her focus being on the spa and wellness side of the business, with the Claimant focusing on the sports side.

36. It was also agreed that Mrs Saunders would be appointed to the Respondent's board, and a shareholders agreement was entered into between the three shareholders. That agreement included a provision that if a shareholder was also a director or employee, and had their directorship or employment terminated due to dishonesty, gross misconduct or neglect, fraud or illegal activities, or any other ground for summary dismissal, then they would be deemed to have served a valid seller's notice relating to all of their shares, which would lead to the sale of the shares to the other shareholders at the lower of the fair value or nominal value of those shares.

37. That period from the start of 2019, with the introduction of both Mr Turton and Mrs Saunders to the business, appears to have led to something of a sea change, both in relation to the way in which the Respondent managed the technical aspects of its business, and also in terms of the relationship between the Claimant and Mr Saunders.

38. On the technical side, the recruitment of Mr Turton meant that he would be the principal person who would undertake the technical, or hands-on, work, both in terms of installations and repairs, going forward. That could be seen from the fact that Mr Turton acted as the installation manager, and as the final commissioner of the units, in relation to all bar one of the eight installations from 1 March 2019 onwards. The exception was the installation at Cryolabs Glasgow, on 31 January, which formed the background to the decision to dismiss the Claimant.

39. The position with regard to installations was further summarised in a document entitled, "Installation Protocols", which was produced in June 2019. This covered the actions to be taken by the Respondent's employees in relation to installations, from the sale discussions through to the period after the installation. The document was however focused on the longer "flat pack" type of installation and did not directly cover the "drop in" installation of the sort worked on by the Claimant in Glasgow in January 2020.

40. The installations protocol document did however apply a clear demarcation between those involved on the technical side, with two of the engineering employees in Poland and Mr Turton being said to fall under a technical group; administration, which included Mr Saunders and another Polish employee; and sales, which included the Claimant and Mrs Saunders. By far the majority of the actions to be taken under the protocols were allocated to the technical group, with many specifically allocated to Mr Turton.

41. Mr Saunders, in his evidence, also made much of a meeting held on 19 December 2019, between himself, the Claimant, Mrs Saunders and Mr Turton, as making it clear that there was a complete separation of the technical work undertaken by the Respondent from other work, in particular sales. However, the minutes of the meeting record the discussion as having been far more general, and there was no reference to any restrictions on the work able to be undertaken by the Claimant.

42. Nevertheless, the Claimant accepted in evidence that Mr Turton had been recruited to be the employee with primary responsibility for all technical work, and, indeed, that it was desirable for Mr Turton to do that work. His point, however, was that that was not always practicable, as Mr Turton's work took him around the country, and thus he was not always available to deal with issues raised by customers.

43. Mr Turton, in his evidence, appreciated that, and referred to operating a “needs-based approach”, leading to the Claimant, with some remote assistance and guidance from Mr Turton, still undertaking some hands-on work in 2019.

44. In particular, in October 2019, this involved the Claimant attending at a customer's premises in central London to deal with a potential leak, notwithstanding that Mr Turton was much closer, in Loughton, Essex, at the time, as Mr Turton was tied up with an installation. Various WhatsApp messages within the bundle, within a group entitled, “UK Team”, in which Mr and Mrs Saunders, the Claimant and Mr Turton participated, made it clear that Mr and Mrs Saunders were fully aware of the Claimant's work. The Claimant recorded, "*Anyhow team, chief engineer Davie Boy sorted it out with Shaun holding my hand via Watts App videos !!!*".

45. With regard to the change of the relationship between the Claimant and Mr Saunders, both, in their witness statements, recorded a number of matters about each other, which were of concern to them. The Claimant resented the involvement of Mrs Saunders, both in terms of her status as shareholder and director, and also in relation to her sales role, with the Claimant, on occasions, making it clear that he wanted Mrs Saunders to confine herself to her area of spas and wellness, and not to get involved with any enquiries on the sporting side.

46. Indeed, a meeting took place between Mr Saunders and the Claimant, on 16 September 2019, to discuss the Claimant's concerns about Mrs Saunders’ position as director, and its impact on him. In an email sent by the Claimant on that day, he noted, "*You and I – over the last few months I feel our relationship has been considerably strained. I feel we need to explore this. I've noticed it, as has other people in the company.*".

47. During this period, the Claimant also had concerns about action taken by Mr Saunders without reference to him, referring to the payment of bonuses to staff in Poland, and the sale of a chamber to a client in the Czech Republic on a far less profitable basis than was normally the case with UK sales.

48. On the other side, Mr Saunders spoke of a number of concerns he had about the Claimant, relating to customer complaints and, in particular, discussions the Claimant had had with a prospective customer in Nigeria, which involved not only a sale into a new market, but of an altered product which would require investment in research and development.

49. A sales meeting took place, on 17 February 2020, between the Claimant and Mr and Mrs Saunders, which led to Mr Saunders sending an email to the company's employees clarifying the approach to be taken with regard to sales, which involved seeking his approval for any amendments to an existing product or to the commitment to spend money in relation to third-party providers at that time.

50. Mr Saunders also created a, “Sales Golden Rules” document, which set out the points included in his email, but in a rather more sarcastic tone, and which included a final paragraph, noting that any breach would be regarded as gross misconduct. Mr Saunders, in his oral evidence, confirmed that he had prepared that document in something of a fit of pique.

51. By that stage however, the events in Glasgow on 31 January 2020 had taken place and were soon to take centre stage.

52. In relation to that, the Claimant had negotiated the sale of a new chamber to an existing client, Cryolabs. A chamber had previously been sold to the customer at its site in Poole, and an issue had arisen regarding the manoeuvrability of the unit into the client's premises, which had required the Respondent to do more work than had been anticipated. This sale was for a chamber to be installed at Cryolabs’ premises in Glasgow. Although situated within an existing building, it was a “drop in” chamber, as there was a sufficiently large entrance to move it into the building. It was manufactured and tested in Poland.

53. The Claimant arranged for the delivery of the unit from Poland on 10 January 2020. Mr Turton was in Poland at the time, and therefore the Claimant attended at the site to supervise the unloading of the unit. Messages were exchanged between Mr Saunders and the Claimant on 8 January 2020, with Mr Saunders asking the Claimant to ensure that signed agreements were received from the customer prior to the installation of the unit; my perception was that that related to the issues that had arisen in relation to the installation of the unit in Poole. From the messages however, it appeared that Mr Saunders was fully aware that the delivery was being undertaken on 10 January and that the Claimant would be there at the time.

54. Mr Saunders’ concern about the events on 10 January, which did not lead to disciplinary action, was that the Claimant had gone beyond the contracted agreement with the customer, which was to deliver the chamber to the outside of the premises, with the customer being left to manoeuvre it inside the building. Concerns were raised by Mr Saunders that the Claimant had gone beyond that, by assisting, as part of a large team of people, in the movement of the chamber from the outside of the building to the inside.

55. The Claimant contended that he had made it clear to the customer that the Respondent had done all that had been required of it in delivering the chamber to the site, and that any subsequent assistance he had provided had been "as a human being". In my view, that was something of a mistaken assumption by the Claimant, as I anticipate that had the chamber been damaged due to his negligence, then the customer would have been very likely to have looked to the Respondent to make good any such damage. However, as I have noted, the Claimant's actions on 10 January did not give rise to any of the disciplinary proceedings that followed.

56. Following the delivery of the units, TCL attended to deal with the installation of the pipes and valves in order for liquid nitrogen from a tank situated just outside the customer's premises to flow into the internally site chamber. That was done on or around 24 January 2020.

57. Subsequent to that, the final “commissioning”, or putting into operation, of

the chamber had to be undertaken before it could be used by the customer. That involved the wiring up of the actuator, and the testing of the system, encompassing both the supply of liquid nitrogen from the external tank and the operation of the chamber itself.

58. In relation to that, the Claimant messaged Mr Turton on 17 January 2020, asking him to look at his diary and to give him a few dates when he could go to Glasgow, about which he could then inform the client. The Claimant suggested that the 21st, 22nd or 28th would be best for him, although I observed that the first two dates would not have been suitable as the work undertaken by TCL did not take place until 24 January. The Claimant than further messaged Mr Turton, on 22 January 2020, noting that his diary was filling up and that he could only get to Scotland on certain days on the following week. He concluded his message by saying, "*Are you sure that you do not need to be there?*". At that stage, it was understood that Mr Turton would be moving house towards the end of January.

59. Ultimately, the commissioning of the unit in Glasgow was dependent on BOC filling the external tank with liquid nitrogen, and that was arranged for Friday 31 January. As Mr Turton was not available to attend, the Claimant did so. Mr Turton was aware that the Claimant was going to attend, and also that his work would involve connecting the actuator as, on 29 January 2020, the Claimant said in a message to Mr Turton, "*Seems Glasgow's actuator cable is not fixed, so I will do it on Friday.*". The Claimant went on to say, clearly in jocular fashion, "*Tools required for the job being a pipe cleaner, sticky back plastic, inside of a toilet roll and used washing up liquid bottle.*".

60. Mr Turton's evidence was that, as a more junior member of the company, he was not in a position to challenge the appropriateness of the Claimant undertaking that work. I noted however that, by this stage, Mr Turton had been confirmed to be the Respondent's Principal Health and Safety Officer within its Health and Safety policy, with day-to-day responsibility for health and safety matters. I also noted that Mr Turton did not seem to be a person who would be slow to point out when things were wrong, and indeed that, in a Cryoserve Limited board meeting held in February 2020, he did indeed take the Claimant to task about various matters. Mr Turton was a director of Cryoserve, although not a shareholder, and therefore potentially had more cause to raise issues with regard to that company's business. However, in my view, had Mr Turton had material concerns about the safety implications of the Claimant undertaking the commissioning work in Glasgow, including the connection of the actuator, he would have said so.

61. The Claimant became aware on 30 January 2020 that the liquid nitrogen was being delivered on 31 January 2020. He was also aware that the client wished to commence operation of the chamber on Monday 3 February 2020, the earliest date that Mr Turton had indicated he was available.

62. The Claimant also informed Ms Klink in Poland, on 29 January 2020, that he was due to be at Cryolabs Glasgow on the afternoon of Friday 31 January, as he asked her if she wished to log on to the system when he was there in order to test it. He did not, however, make clear to Ms Klink what it was he was going to be doing at Cryolabs Glasgow.

63. On 30 January, the Claimant sent Mr Turton a message with a photograph

of the actuator which had been sent by the customer in Glasgow, asking if the connection for the actuator cable looked to Mr Turton that it had the right parts. Mr Turton replied saying that he was not sure, but that he thought the wire would go in from the bottom.

64. The Claimant also messaged Mr Turton, on 31 January, asking him to call due to what he perceived to have been a problem with the compressor. In a message the Claimant then confirmed that the compressor was not working, so he had "*over ridden the system by the red button*".

65. That reference to a "*red button*" was to a red lever at the side of the actuator valve. That either operated in an "on" mode, with the lever placed horizontally in a 9 o'clock position, which would then operate to close the valve if any need arose, or it would be in a "bypass" mode, in a 12 o'clock position, which would mean that the valve would not close to prevent the flow of liquid nitrogen if a fault arose.

66. Mr Turton in his evidence at the hearing confirmed that in his call with the Claimant he had suggested to the Claimant that he move the actuator valve slightly in order to check whether the gas was flowing as something of a "trick of the trade".

67. The Claimant's concerns over the compressor were misplaced. He had felt that, as he could not hear the compressor operating, that it was not working. However, it only worked, in terms of making a noise, when there was a need for it to top up the supply of compressed air. If there was a sufficient supply it would not make a noise until there was a need to replenish it. Nevertheless, in two messages the Claimant indicated to Mr Turton that he had moved the red switch to the vertical position which opened up the valve. He did not specify that that was done temporarily, or that he returned the lever to its horizontal position.

68. Also on 31 January, the Claimant sent several messages and emails to Ms Klink in Poland, and had several calls with her about issues that had arisen in relation to the chamber in Glasgow. These exchanges confirmed that the Claimant was less than familiar with the chamber, which, as a "CryoDuo", although broadly similar to the previously manufactured "CrySolo", was the first of its type to be manufactured and installed, and was not a chamber that the Claimant had previously seen, let alone worked on.

69. The Claimant sent Ms Klink a photograph of the grey cable and asked her what the cable was for and where the cable for the actuator was. He also sent her a message entitled, "*What do I do?*", with a picture of the system's computer screen.

70. The Claimant also contacted Mr Evans, noting in a message that he did not know how to take the cap off the new actuator, and again raising a query over whether the compressor was working or not. He again mentioned that he had had to override the actuator by turning the red switch. Mr Evans provided information to the Claimant about the operation of the compressor, and indicated to him how to access the wiring connections. As with the messages to Mr Turton, the Claimant, whilst indicating that he had turned the red lever, did not give any indication as to whether it had been returned to its normal position.

71. Despite the need for assistance, the Claimant did connect the chamber and tested it, and it operated well on the afternoon of 31 January. He then undertook training of the Cryolabs lab staff, including Mr Reid, on the operation of the chamber. Mr Reid took a video of that training. Whilst it was disputed during the course of the disciplinary hearing, it was confirmed before me that the video, and still photographs taken from it, confirmed that the red actuator lever was in the correct, horizontal, position when the training was undertaken. Mr Reid also confirmed in his evidence, as he ultimately did to the Claimant when asked questions prior to the disciplinary appeal hearing, that he had, on subsequent days, regularly observed the "valve" or "nipple" turning on the actuator. All parties confirmed that that indicated that the valve was operating normally, i.e. with the red switch in the on or 9 o'clock position, as, if it was not, the valve/nipple would not change its position.

72. The Claimant returned to the site on the following day, but nothing material happened on that date. On 17 February 2020 however, the Respondent was alerted by BOC that its operator, who had attended at the Glasgow site to refill the liquid nitrogen tank, had noticed a discharge of gas from a pipe within the chamber room. The Claimant was sent pictures of the issue by Mr Reid, and he in turn forwarded them on to Mr Turton, who instructed the Claimant to tell Mr Reid to shut the system down. The Claimant also sent Mr Turton a message with a photograph he had been sent by Mr Reid showing the red lever in the 12 o'clock, or bypass position and this, together with the accompanying message, proved to be a crucial piece of evidence as far as the Respondent was concerned.

73. In the message, the Claimant stated, "*Hi, this is how the switch is now and the guy who operates it has not changed it at all, and this was how I left it. Whether BOC has touched it and out it back I do not know but as far as I recall Shaun, this is the position Mark told me to do it meaning g the system was working well when I tested it and left site*". As I have noted, the lever being in that vertical position was in bypass mode, such that the valve would not close down in the event of a fault, and that liquid nitrogen would continue to flow through the system.

74. As far as safety was concerned, the actuator lever was only one part of the safety process. Between the actuator and the chamber was a further set of solenoid valves which would also close in the event of a fault to prevent the flow of liquid nitrogen. It subsequently transpired however, that one of the solenoid valves was blocked with some debris, which meant that it did not fit tightly, and therefore did not totally prevent the flow of liquid nitrogen. The fact that the actuator lever was in the vertical bypass position, therefore, could potentially have had serious consequences.

75. Following their return from a business trip to France, Mr and Mrs Saunders, on 26 February 2020, discussed the issue that had arisen in Glasgow. They concluded that the incident was a serious one which needed to be investigated from a disciplinary perspective, and that the Claimant should be suspended in order that that could be carried out. They also considered it appropriate to remove the Claimant's access to the company systems, and indeed to the company's offices, by changing the locks.

76. The Claimant was away on leave during this period, from Monday 2 March to Wednesday 11 March, and the locks were changed on 4 March.

77. No dividend was paid to the Claimant at the end of February, although there was no discussion between the Claimant and Mr Saunders about that. The Claimant did however, message Mr Saunders on the morning of 2 March 2020. In that he stated that he assumed that no dividend had been paid and requested a full breakdown of incoming and outgoing costs. Mr Saunders replied soon after, noting that the Claimant's assumption was correct, and that due to a lack of sales revenue and ongoing costs for the business the company was not profitable and therefore dividends could not be declared.

78. A payment was made to Mr Saunders by the company at the end of February in the sum of £3000, which he contended was a partial reimbursement of expenses, and that expenses of some £9000 had been outstanding at the time. Again, such payment was not made following any discussion with the Claimant, and was paid at the same time as salaries of other employees were paid, and I presumed at the time when dividends would have been due to have been paid.

79. Ultimately, I did not consider that Mr Saunders' explanation for this payment reflected the reality of the situation. Any concern over distributable profits would not have applied to the reimbursement of expenses. The company had £45,000 in its bank account on the particular day, and if Mr Saunders had been particularly concerned about the viability of the company, I anticipated that he would have taken steps to ensure that any money properly repayable to him as a reimbursement of expenses would have been paid at the time, to avoid him becoming personally out of pocket. I considered therefore that Mr Saunders did maintain the regular payment to himself at the end of February, and did not make the relevant payment to the Claimant at that time. The indications from the documents in the bundle however, were that no further dividends were paid to either shareholder at any time thereafter.

80. On 5 March 2020, the Claimant discovered that he had been removed from group chats on WhatsApp, and could not access his Cryoaction emails. He tried to contact Mr Saunders about that, but could not do so, and then spoke to Ms Kucypera. She had been informed of the decision to suspend the Claimant by Mr Saunders the day before, and had indeed been sent an email on that day with a draft suspension letter and a document entitled "Report on behaviour and actions". Whilst the suspension letter made reference to the issues of 31 January 2020 in Glasgow, the other document set out a summary of issues of concern regarding the Claimant's behaviour and conduct, both relating to the company's customers and internally. It did not include any reference to the Glasgow incident. Ms Kucypera told the Claimant that she was aware that he had been suspended due to an incident at Cryolabs Glasgow.

81. The suspension letter, dated 5 March 2020, was then sent to the Claimant's personal email address on that day, but was not seen by him until the following day. He also collected a copy of the letter from the post office. The letter confirmed that the Claimant had been suspended until further notice, pending an investigation into an allegation of gross misconduct.

82. Five numbered points were then listed in relation to the events of 31 January 2020 and these remained the allegations which the Claimant faced

throughout the disciplinary process and for which he was dismissed. They were as follows:

"*1. Attempted to install CryoAction cryotherapy equipment, even though you are not a qualified engineer or deemed competent to do so, contrary to agreed company rules/processes and health and safety guidance without the support of a company qualified engineer.*

2. In so doing, while attempting to connect a compressor to the automated ball valve safety shut off system, on finding the compressor was not operating correctly you bypassed the safety system in order to test the system was operating correctly.

3. Then remedied the issue with the compressor through the telephone support of the manufacturer subsequently failing to remove the bypass. Subsequently and unconnected, a pipe supplying liquid nitrogen to the apparatus, fractured inside the client's premises. The safety system within the apparatus detected the leak as the oxygen levels inside the area affected had fallen dangerously less than agreed safety levels. As a result, the system sounded an audible alarm, also displaying a visual alarm on the control panel. Ordinarily, the alarm would have triggered an automatic shut down of the liquid nitrogen supply. However, as the shut off system had been bypassed by you, the supply continue unabated.

4. Had this situation occurred overnight or at a weekend, there was a real possibility that the continued supply would have led to a reduction in oxygen levels within the client building, creating an oxygen-deprived environment that could have resulted in a serious risk to life for anyone entering the building.

5. By your deliberate actions, which breached agreed company rules and process, contravened health and safety guidance, you not only placed others at serious risk to life but acted in a way that placed the company and its directors at significant risk of prosecution, fines and in the case of directors of imprisonment. Your deliberate actions could have not only resulted in fatalities but could have also had serious consequences for the company in damaging its reputation beyond repair."

83. The Claimant, quite swiftly, on 8 March 2020, wrote to Mr Saunders requesting that his director's loan be paid back to him in full as a matter of urgency. Mr Saunders replied that, due to the company's current financial situation, they were not in a position to make full payment of the director's loan at that time. I understand that no repayment of the director's loan has yet taken place,

84. The Claimant contended that he was not aware that the £600 per month paid as salary for national insurance contributions purposes, had been paid into a director's loan account. However, in an email to the Claimant's accountant in 2019 he made reference to "*getting a Paye payment to a directors loan account*", which indicated that he had been aware of it.

85. Between themselves, Mr and Mrs Saunders decided that Mr Saunders would investigate the allegations, and that any subsequent disciplinary hearing would then be dealt with by Mrs Saunders. It does not appear that any consideration was given at that stage to the holding of an appeal,

although ultimately, an external barrister, Mr Frew, was brought in to deal with that aspect of the proceedings.

86. Mr Saunders sent an email to the Claimant on 12 March 2020, inviting the Claimant to an investigation meeting on 19 March. In response, the Claimant sent Mr Saunders an email, on 13 March 2020, pointing out that he felt that it was inappropriate that Mr Saunders, or indeed any member of the Respondent or any of its affiliated companies, should be part of the investigation. He noted that there would be significant repercussions for him if the decision was made to dismiss him, in the form of the loss of his employment, directorship and shareholding, and therefore, that Mr Saunders individually, or the Respondent as a whole were not in a position to provide an unprejudiced investigation. He requested that an independent body, agreed by both parties, be brought in to perform that role. That was not agreed to, and ultimately the Claimant attended the meeting with Mr Saunders, although it was rearranged to take place on 20 March 2020.

87. In addition to meeting the Claimant, Mr Saunders also interviewed Mr Turton, Ms Kucypera, Ms Klink, Mr Reid, and the BOC driver who had identified the leak in February 2020. Saunders also obtained written statements from all of those bar the BOC engineer, and he also obtained a written statement from Mr Evans.

88. The statements were prepared by all the individuals personally, but the Claimant subsequently queried whether Mr Saunders had been involved in their delivery. All confirmed that he had not, and that they had been prepared following Mr Saunders preparing a list of points to be covered. Those points were however general ones, and I did not consider that there was any unfairness in the adoption of that approach by Mr Saunders.

89. When Mr Reid replied to Mr Saunders' request he noted that he had asked the Claimant if he could record the training for future reference, and indicated to Mr Saunders that he could send the video to him, if required. Mr Saunders did not take him up on that offer, although Mr Reid did subsequently provide the training video to Mr Saunders.

90. The Claimant also provided questions to Mr Saunders which he wished to be asked of the various individuals. Of note in relation to the questions to be asked of Mr Turton was the following question, "*Did you ever relay to me in discussions prior to my departure to CryoLabs Glasgow that "it's only 2 cables", "you've done it before," and "I'm on the phone if ever you need me"?*" In response, Mr Turton noted, "*During a discussion I did comment on it was two wires that are low voltage for the signal from the chamber to the actuator. I am also aware prior to my employment you had completed this before, i.e. Southampton, after the cable from the unit was not long enough after the TCL install. I regularly reply to all Cryoaction staff both UK and Poland I am on the phone should I be able to help.*".

91. The Claimant also sought to raise questions with Mr Watson, but Mr Saunders indicated that he would not raise further questions of Mr Watson or Mr Reid, bearing in mind the commercial relationship with them and their company. He confirmed that he had felt comfortable asking Mr Reid some initial questions on the basis that they would be likely to be viewed as part of an internal investigation as to what had gone wrong, whereas any further questions would make clear that an investigation into the Claimant

specifically was underway.

92. Mr Saunders completed an investigation report, noting the investigations undertaken. He summarised the witness evidence in relation to each allegation and concluded that there was a case to answer and that a formal disciplinary hearing should be arranged.

93. On 16 April 2020, Mrs Saunders wrote to the Claimant by email, noting that a recommendation for formal action had been made, and she attached an invitation to a disciplinary hearing on 23 April 2020. The investigation report and all its appendices were attached to that email. The letter commenced by saying, "*I am writing to tell you that Cryoaction Limited is considering dismissing you*", before moving on to repeat the five numbered allegations. The letter confirmed that the disciplinary hearing would be held remotely due to the Covid-19 restrictions, and reminded the Claimant of his entitlement to be accompanied by a work colleague or trade union representative.

94. The Claimant replied to Mrs Saunders by email on 21 April 2020, noting that he and his lawyers were compiling a letter as a result of the investigation report, and that there were a number of actions which needed to be addressed prior to the disciplinary hearing. Mrs Saunders replied, confirming that there was nothing to warrant a delay to the meeting arranged for 23 April. In further exchanges the Claimant questioned Mrs Saunders' experience of carrying out such a role.

95. On the morning of the hearing, Mrs Saunders emailed the Claimant to note that she intended that Mr Saunders would also to be in attendance at the meeting so that she and the Claimant could ask him to elaborate on the report and answer any questions raised. The Claimant objected to that, but the meeting went ahead as scheduled

96. The hearing, which ultimately took place in two parts, was recorded. During the hearing the Claimant raised a number of questions which he wanted to be raised of other individuals. This included a request to view the video taken by Mr Reid. As the meeting had not covered all the allegations in full, it was agreed that it would be reconvened on 30 April 2020.

97. On 27 April 2020, the Claimant wrote to Mrs Saunders with a list of additional questions, although most of these were in fact observations on Mr Saunders' conclusions rather than specific questions. The Claimant did however, repeat his desire to put specific questions to Mr Reid. Mrs Saunders decided that they should not be asked, primarily due to the commercial relationship between the Respondent and Cryolabs, but also because she felt that Mr Reid's answers would not, in any event, have been reliable as they may otherwise have demonstrated his own culpability for the issue that had arisen.

98. In advance of the second disciplinary hearing. Mrs Saunders asked Mr Turton to view Mr Reid's video, which the Claimant had contended would show the actuator in the correct position during the training. Mr Turton confirmed to Mrs Saunders that the video was inconclusive. However, during this hearing, Mr Turton explained that he had only been able to view the video on his phone and, as a consequence, had not been able to freeze the video at the appropriate frame. He confirmed that he had been unable

to view the video on his laptop due to his poor internet connection at his home.

99. Mrs Saunders passed on various supplemental questions the Claimant had raised to Mr Turton, Ms Kucypera and Ms Klink.

100. The second disciplinary hearing scheduled for 30 April 2020 was postponed in order to give more time to view the material and, on 1 May 2020, Mrs Saunders invited the Claimant to attend the reconvened disciplinary hearing on 6 May 2020. Mrs Saunders confirmed that Mr Turton, Ms Kucypera and Ms Klink would be available to answer questions during the reconvened hearing in relation to the allegations against the Claimant, but that Mr Watson, Mr Reid and the BOC engineer would not be involved. The Claimant attempted again to get Mrs Saunders to ask specific questions of Mr Reid which were as follows. "*1. When I was performing the training did you along with your colleagues physically observe that the nipple on the actuator changed its position either Its open or closed positions after the console had been operated? 2. After I left site on 1 February, did you continue to observe that the nipple on the actuator changed its position either in its open close positions after the console had been operated? 3. If you had observed at any time that with the nipple on the actuator had not changed its position after the console had been operated at any time what would you have done?*". Mrs Saunders maintained her position with regard to the asking of questions of Mr Reid.

101. The reconvened hearing took place as scheduled on 6 May 2020, and Mr Turton, Ms Kucypera and Ms Klink were in attendance to be asked questions by the Claimant. Following the meeting, Mrs Saunders concluded that all the numbered allegations were proven and that the Claimant had been guilty of gross misconduct with the appropriate sanction being summary dismissal. She confirmed that in a detailed letter to the Claimant dated 14 May 2021.

102. With regard to the first allegation, Mrs Saunders concluded that the Claimant was not a qualified engineer and was not competent to undertake the work at the Glasgow site on 31 January 2020, based on his obvious lack of qualifications and the number of calls, messages and emails he had to send to other individuals on that day. She concluded that the Claimant was aware that Mr Turton had responsibility to oversee the commissioning of all chambers and, therefore, that the Claimant had acted contrary to those processes.

103. With regard to the second allegation, Mrs Saunders noted that the Claimant had admitted that he had bypassed the safety system, although she confirmed that she believed that the Claimant had gone against company policies and rules with the best of intentions as he wanted to provide a high level of customer service to a customer who was anticipated to require further chambers in the future. Mrs Saunders concluded that the actuator valve should only be put into its bypass mode by a qualified engineer and that the fact that the Claimant had done so demonstrated either a lack of awareness or a total disregard for the safety protocols.

104. With regard to the third allegation, Mrs Saunders appeared to place great store on the Claimant's WhatsApp message of 18 February in which, in text accompanying the photograph showing the lever in the vertical, bypass

position, the Claimant had said that that was how he had left the lever, and that that had been the position that Mr Evans had told him to leave it in. The Claimant had been adamant during the disciplinary hearing that he had simply mistyped the position, leaving out the word, “not” on at least two occasions when typing the message, noting that he had done so quickly, and whilst under particular stress due to being in hospital at the time, whilst his son was undergoing an operation. Mrs Saunders noted that Mr Turton had been unable to discern if the actuator lever had been in the correct position during the training video, which was something that all parties subsequently accepted had been the case. She noted that the Claimant had confirmed, in messages on 31 January 2020, that he had placed the actuator into bypass mode but had not sent any similar message saying that he had placed the lever back in the correct position, and that he had noted, in his subsequent WhatsApp message in February, that he had left the lever in the bypass mode. She concluded that, on balance, the Claimant did leave the lever in the bypass mode, either in error or due to his lack of knowledge.

105. With regard to the fourth and fifth allegations, Mrs Saunders concluded that the Claimant's actions had potentially led to serious risk of injury and could have had serious financial consequences for the company. Ultimately therefore, she confirmed that the Claimant should be dismissed with immediate effect, without any period of notice or payment in lieu of notice.

106. The dismissal letter confirmed the Claimant's right of appeal and he did appeal by letter dated 22 May 2020. In this, he addressed what he considered were deficiencies in Mrs Saunders' conclusions in relation to each of the five numbered allegations, and he then specified eighteen grounds of appeal.

107. The Claimant's concerns appeared to fall into the following broad areas.

    1. That Mr and Mrs Saunders should not have been involved in the disciplinary processes due to a conflict of interest arising from the gain that would arise from the acquisition of the Claimant's shares at par value if he were to be dismissed for gross misconduct, and that conflict fed into a variety of deficiencies in the processes they had applied.

    2. That the decision was prejudged.

    3. That the Claimant was not aware of the policies and procedures that were said to have governed his actions.

    4. That other, non-technical, employees had undertaken hands-on work as well as him.

    5. That there had been no reprimand of him, or remedial action taken, after his visit to Glasgow on 31 January 2020 for some three weeks.

    6. That he had, in fact, returned the actuator lever to its normal mode before leaving the site.

108. The Claimant also attached several appendices to his appeal letter. These included a response that the Claimant had received from Mr Reid to the specific questions which the Claimant had asked him directly, which were

that he had observed the nipple on the actuator changing its position during the training, and that he had subsequently checked the operation of the valve on a daily basis whilst operating the chamber.

109. The appeal hearing was arranged for 1 June 2020 and it was confirmed to the Claimant that it would be conducted by Mr Frew, that the hearing would again be undertaken remotely, and would be recorded and transcribed. The Claimant was unable to attend the appeal on that date, and it therefore was rearranged for 8 June 2020.

110. In noting that the meeting needed to be rearranged, the Claimant had questioned the engagement of a barrister to conduct the appeal hearing, and stated that that put him at a significant disadvantage such that he requested that the Respondent should allow similar representation for him and should pay for that representation. In her letter confirming the arrangement of the hearing, Mrs Saunders confirmed that Mr Frew was undertaking his role independently, and that the process was an internal one which did not require representation.

111. The hearing took place on a June 2020 as scheduled and, like the disciplinary hearing, ended up needing to be heard over two days with both hearings lasting some four hours.

112. Following the first hearing, Mr Frew prepared a note of further information that would be required with various questions to be answered by Mr and/or Mrs Saunders. The Claimant also provided some further written points for consideration by Mr Frew.

113. The reconvened hearing took place on 12 June 2020 and, following that, Mr Frew produced his outcome letter dated 23 June 2020.

114. Whilst Mr Frew did not address the Claimant's grounds of appeal point by point, he did confirm that he did not consider that there had been any element of pre-judgement or any ulterior motive, which I took to refer to conflict of interest, on the part of Mr and Mrs Saunders in dealing with matters in the way that they did. He also confirmed that he did not find any material procedural concerns.

115. With regard to the specific allegations which Mrs Saunders had found to amount to gross misconduct, Mr Frew very much focused on the first. He concluded that, whether or not any concerns had arisen following the Claimant's work at Glasgow on 31 January 2020, he had not been a qualified engineer and therefore had not been a competent person to carry out the work, even though he had himself considered himself to be capable. He felt that the Claimant had installed the equipment contrary to agreed company rules and processes and health and safety guidance, and that he had done so deliberately, making a commercial decision to do so. He therefore upheld the allegation and felt that, in his opinion, the Claimant's actions had amounted to gross misconduct, which would justify his dismissal.

116. With regard to the second allegation, Mr Frew concluded that, viewed in isolation, the Claimant’s admitted actions in that regard would not have led to a sanction of summary dismissal.

117. Similarly, with regard to the third allegation, with again the position being that Mr Turton had been unable to confirm that the actuator had been in the correct position when the training was undertaken, Mr Frew again felt, on balance, that the Claimant had left the valve in bypass mode. He again however, concluded that, viewed in isolation, dismissal would not be appropriate for that allegation.

118. With regard to the fourth and fifth allegations, Mr Frew described them as being inextricably linked to the first allegation.

119. He concluded that his greatest concern lay with the first allegation, which led to a finding of gross misconduct, and a conclusion that the summary dismissal was fair and reasonable in all the circumstances.

Conclusions

120. Considering my findings in the context of the applicable law, my conclusions on the issues I had to determine were as follows.

Wrongful Dismissal

121. The key question for me was whether that the Claimant had been guilty of conduct so serious as to amount to a repudiatory breach of the contract. In that regard, throughout the disciplinary process the Claimant was accused of having committed five disciplinary offences (see paragraph 82 above), and he was ultimately dismissed because of the conclusion by Mrs Saunders that those offences had occurred and had amounted to gross misconduct.

122. Of the five separate numbered allegations however, the fourth and fifth were, in my view, better categorised as consequences rather than acts. The first three, broadly; (i) attempting to install equipment even though not qualified or competent, contrary to agreed processes and guidance without the support of a qualified engineer; (ii) bypassing the safety system in order to test that the system was operating correctly; and (iii) failing to remove the bypass having remedied the issue; all involved direct acts or failures to act on the part of the Claimant.

123. The other two, however, broadly; (iv) had the situation occurred overnight or at a weekend there was a real possibility that a reduction in oxygen levels would have arisen, creating a serious risk to life; and (v) by his actions, the Claimant had placed others at serious risk and placed the company and its directors at significant risk of prosecution, and damaged the company's reputation beyond repair; did not describe specific acts or omissions on the part of the Claimant. They were instead consequences of the first three allegations, demonstrating, in the Respondent's view, the seriousness or potential seriousness of them.

124. Both Mrs Saunders, at the disciplinary stage, and Mr Frew, at the appeal stage, addressed all five allegations separately. Mr Frew however, appeared to form a fairly similar view to mine in that he described the fourth and fifth allegations as being “inextricably linked” to the first allegation, describing the fourth as a natural conclusion to the first allegation and the fifth as a common sense consequence of the Claimant's actions set out in

the first allegation.

125. With regard to the first three allegations, Mr Frew made clear, in his appeal outcome, that his greatest concern lay with the first allegation, and that he was clear that, viewed in isolation, the second and third allegations would not have given rise to a conclusion of gross misconduct.

126. With regard to the first allegation, it was clear that the Claimant did attempt to install cryotherapy equipment. However, the extent of that "installation" must be noted. The unit had been manufactured in Poland and had been checked there before dispatch. The pipework and valves had subsequently been installed and checked by TCL in situ in Glasgow. All that was then left was the final commissioning of the equipment, in terms of the wiring of the actuator valve, followed by the testing of the system to ensure that it worked. Therefore, the action undertaken by the Claimant in Glasgow on 31 January 2020 was only a small part of the overall installation.

127. Similarly, it is clear that the Claimant was not a qualified engineer and he never made any claim that he was. With regard to deemed competence, the evidence was clear that the Claimant had undertaken a variety of technical, or hands-on, work in respect of the Respondent's customers over the years, and that this had included the wiring of an actuator valve. Mr Saunders had also undertaken a range of hands-on work at customers' premises over the years, and there was photographic evidence in the bundle, albeit in the context of an engineer being present as well, of Miss Kucypera undertaking some minor technical work relating to the replacement of a sensor.

128. Whilst much of the Claimant's work on the technical, hands-on side had taken place prior to the arrival of Mr Turton in January 2019, and whilst the Claimant appeared to accept that Mr Turton's recruitment meant that he would do the technical work whenever possible, the Claimant continued to do some technical or hands-on work. Notably, he assisted in the identification and resolution of a potential leak at a customer's premises in London in October 2019.

129. Mr Evans, in his witness statement, confirmed that the wiring only required two connections to be made, and Mr Turton confirmed that, in a discussion with the Claimant about the Glasgow work, he had commented that it was only a case of connecting up two wires. Mr Turton also confirmed under cross-examination that work the Claimant had undertaken in relation to pipework at a client's premises was more complex than the wiring of the actuator valve. Mr Turton also confirmed under cross-examination, when asked if the Claimant was capable of doing the wiring, that he would say that the work was similar to asking if someone could wire a three-pin plug. It was also clear that the Claimant, whilst needing to get some assistance from Poland and from Mr Evans, did wire up the actuator correctly.

130. Whilst therefore, there was no indication that the Claimant had any form of formal or certified competence, it seemed clear that he was competent to undertake the work, which was very straightforward.

131. The allegation went on to say that the Claimant did that work contrary to agreed company rules/processes and health and safety guidance. In that regard, the Respondent contended that its health and safety policy and its

installation protocols indicated that the Claimant should not have done the work. With regard to those however, as I have noted, the installation protocols focused on large-scale "flat pack" installations and, even in relation to those, gave no indication as to any restriction on the individual undertaking the final commissioning of the units in the form of wiring up an actuator valve and testing the system.

132. The health and safety policy was a very general one, identifying the responsibilities of the company and employees in relation to health and safety risks and issues, which were effectively predicated on there being an identification of the health and safety risk or issue at the time.

133. The installation protocols focused very heavily on Mr Turton as the person primarily in charge. However, Mr Turton confirmed in evidence that he had been aware that the Claimant was going to Glasgow to do the work and that he understood the work that the Claimant would do when he was there. Mr Turton also confirmed that whilst it was intended that he would do all technical work where possible, it was not always possible for him to do everything due to his other commitments. He confirmed that the question of whether he would do work personally, or whether it could be done by a customer or by the Claimant or Mr Saunders, would be assessed on the merits of the particular situation.

134. Mr Turton also confirmed, from his perspective of being the Respondent's principal health and safety officer, that had he had any concern about the safety of the work being undertaken then he would have raised it. He indicated that he did not feel comfortable raising any concerns about the Claimant doing the work in Glasgow because of his position as a subordinate. However, Mr Turton confirmed, albeit in the context of a Cryoserve Limited board meeting where he was also an appointed director, rather than in relation to the Respondent, that he had challenged the Claimant about his general approach to that company. In my view, had Mr Turton had any concern about the safety of the work being undertaken by the Claimant in Glasgow, he would have raised it.

135. Similarly, Ms Klink was fully aware of the work the Claimant was doing, by virtue of the messages and calls that took place between them. Ms Klink also contended that she did not feel comfortable in raising concerns about the Claimant doing the work in Glasgow due to the fact that he was a director of the company. Again however, I did not consider that Ms Klink would have stayed quiet if there had been any risk to health and safety by virtue of the work being undertaken by the Claimant.

136. The final element of the first allegation was that the Claimant had undertaken the work without the support of a company qualified engineer. In terms of undertaking the work without the direct, hands-on support of a qualified engineer, that was correct. The Claimant did however seek the telephone assistance of Mr Turton and also sought support from Mr Evans and Ms Klink and, as I have already noted, Mr Turton, the Respondent's qualified engineer and principal health and safety officer, did not, at any stage, indicate any concern about the Claimant doing the work. Indeed, the Claimant expressly asked Mr Turton as to whether he, i.e. Mr Turton, needed to be at Glasgow, and Mr Turton did not respond.

137. On balance, I did not consider that this that the work undertaken by the

Claimant in Glasgow on 31 January 2020 as outlined in the first allegation amounted to a repudiatory breach of contract.

138. With regard to the second allegation, the Claimant confirmed, in the context of his discussions with Mr Turton and Mr Evans on 31 January 2020, and in all his comments during the internal disciplinary processes, that he had indeed moved the actuator lever to the bypass system in order to test that the system was operating correctly. The Respondent appeared to place great store on the fact that, whilst the Claimant had noted in messages to Mr Turton and Mr Evans that he had moved the actuator lever, he had not indicated in those messages that he had moved the lever back, or that he had moved it temporarily.

139. However, there was evidence, which is dealt with in more detail in relation to the third allegation below, that the Claimant had only moved the actuator lever temporarily. Indeed, Mr Turton, under cross-examination, noted that that he had told the Claimant, in the form of what he described as a "trick of the trade", to move the lever briefly in order to quickly check that gas was travelling through the valve, as a method of confirming that the compressor was working.

140. Bearing in mind that the Respondent's engineer and principal health and safety officer himself suggested that the Claimant should bypass the safety system in order to test the system was operating correctly, I did not consider that this allegation amounted to a repudiatory breach. Indeed, that appeared also to have been accepted by Mr Frew, who confirmed that he would not, in isolation, have treated this allegation as one amounting to gross misconduct.

141. With regard to the third allegation, I did not consider that the evidence supported the conclusion that the Claimant had subsequently failed to remove the bypass, i.e. had failed to return the actuator lever to the correct, automatic position.

142. The Respondent appeared to place great store on, and, in my view, to be rather sidetracked by, the Claimant's message to Mr Turton on 17 February 2020 that the picture of the actuator lever in the vertical, i.e. bypass, position was how he had left it, and was how Mr Evans had told him to leave it.

143. On the face of it, that was a concerning message, in that it suggested that the Claimant had left the valve in the bypass position, such that it was not capable of fulfilling its primary safety purpose. However, the Claimant was adamant during the disciplinary processes that he had returned the lever to the correct position on 31 January 2020.

144. The training video, taken in the afternoon of 31 January, did show that, at that time, the lever was in the correct position, i.e. that the bypass had been removed. Whilst the Respondent had not been in a position to confirm that during the internal disciplinary processes, it had, by the time of this hearing, accepted that that had been the case.

145. There was therefore, evidence showing that the Claimant had, following the completion of the commissioning work, put the actuator lever in the correct position. The Claimant's message of 17 February 2020 suggested that he

had not, or, that if he had, that he had subsequently placed the lever once again in the bypass system. Again, the Claimant denied that he had done that and made repeated representations that Mr Reid would confirm that the lever had been placed in the correct position, and that his observations of the correct moving of the valve or nipple, which could only move if the lever was in the correct position, would confirm that.

146. Mrs Saunders refused to ask those questions of Mr Reid, although the Claimant had himself asked them directly of Mr Reid prior to the appeal hearing. In my view, Mr Reid's answers to those questions, which confirmed that he regularly checked the movement of the valve or nipple whenever the chamber was in operation, demonstrated that the actuator lever could not have been left in the bypass position by the Claimant. Again, therefore, in my view the Claimant's actions in that regard, were not, on balance, made out as giving rise to any misconduct on his part, and could not, therefore, in my view, have given rise to a repudiatory breach of contract.

147. Bearing in mind my comments about the fourth and fifth allegations being consequences of the first three, particularly the first and third, as I did not consider that the first three allegations gave rise to repudiatory breaches of contract, then the fourth and fifth did not, of themselves, similarly, give rise to such a breach. I did therefore conclude that the Claimant was wrongfully dismissed with regard to his notice entitlement.

148. In relation to the amount of that entitlement, as I have noted, the Claimant was not provided with any contract of employment or statement of particulars of employment until after his employment ended. That document indicated that the Claimant would be subject to statutory notice, which would have meant, by the time the Claimant's employment ended, some four weeks' notice. The Claimant by contrast contended that, as a director, reasonable notice of six months would be implied.

149. Assessing matters as best I could, I did not consider that it would be appropriate to imply a notice period of six months. Whilst notice periods of that length can still arise, they are by no means universal, even at senior levels. However, I did consider that it would be reasonable to imply a notice period of three months. It would be unusual for the notice period of a director to be limited to the statutory period, which would have meant that the Claimant himself could have left on giving only one week's notice and that the Claimant would have had very little protection by way of notice, certainly in the early years of his employment. I therefore concluded, on balance, that the Claimant's notice entitlement should be considered to have been three months, and that he was wrongfully dismissed by virtue of being dismissed without being served with that notice.

Unfair dismissal

150. With regard to the unfair dismissal claim, the first issue for me to assess was whether the Claimant had been dismissed for a potentially fair reason, falling within sections 94(1) or (2) of the Employment Rights Act 1996. In this case, the Respondent contended that the dismissal was by reason of the Claimant's conduct. The Claimant's case however, was that there had been an ulterior motive in dismissing the Claimant in order to obtain his shares at a significantly reduced value.

151. On balance, I was satisfied that the reason for dismissal was the Claimant's conduct. I considered that had the Respondent been focused on removing the Claimant for spurious reasons to obtain his shares at a reduced value, then it would have consistently operated in that manner throughout the process. However, whilst Mr and Mrs Saunders were involved with the investigative and disciplinary stages, the Respondent brought in an entirely independent barrister to deal with the appeal. Mr and Mrs Saunders did not appear to have made any attempt to communicate with Mr Frew, let alone to influence him, as Mr Frew confirmed in his evidence that the first time he spoke to either Mr or Mrs Saunders was at the start of the video appeal hearing, which was being arranged by Mrs Saunders. Whilst the ability of Mr and Mrs Saunders to acquire the Claimant's shares at par value in the event of a gross misconduct dismissal was clearly of some benefit to them, notwithstanding their contentions that the company was effectively of no value, I did not consider that that was the primary or principal reason for dismissing the Claimant. I considered that Mr and Mrs Saunders were motivated by what they felt had been acts of misconduct.

152. Turning to the question of whether dismissal by reason of conduct was fair in all the circumstances, I considered the constituent elements of the Burchell test. For similar reasons to my conclusion that conduct was the reason for dismissal, I concluded that the Respondent had had a genuine belief in the Claimant's guilt of the alleged misconduct, as I noted, with regard to the second allegation, that the Claimant accepted that he had done what was asserted, i.e. bypass the safety system in order to test the system was operating correctly, taking issue only with the assessment of that act, rather than with the act itself.

153. Similarly, with regard to the third allegation, there was evidence, in the form of the Claimant's message to Mr Turton of 17 February 2020, which certainly could have given rise to a concern that an act of misconduct had arisen.

154. I was therefore satisfied that the Respondent in the form of Mrs Saunders as the dismissing officer, had a genuine belief of the Claimant's guilt of the asserted misconduct. I was also satisfied that Mr Frew similarly had that genuine belief, albeit he did not indicate that the misconduct in relation to the second or third allegations would necessarily have reached the dismissal threshold.

155. With regard to whether that genuine belief was based on reasonable grounds, I considered that there were grounds for considering that the Claimant had committed acts of misconduct. With regard to the first allegation, it was clear that the Claimant was not a qualified engineer and had undertaken the work alone without any direct assistance. Whilst I have found, for the purposes of the wrongful dismissal claim, that the Claimant was competent to undertake the limited technical work required, there were potentially grounds for the Respondent to form a different view.

156. Similarly, with regard to the company rules and processes, whilst I did not consider that there was any direct prohibition on the Claimant undertaking the work, particularly in the context where it was known by the Respondent's engineer that he was doing so, there was scope for the Respondent to conclude that the Claimant had potentially operated outside

the normal processes.

157. With regard to the second allegation, as I have noted, the Claimant accepted bypassing the safety system in order to test that the system was operating correctly, and therefore, if the Respondent considered that that was indeed an act of gross misconduct, they had grounds on which to conclude that it had taken place.

158. Finally, with regard to the third allegation, there was evidence, in the form of the Claimant's message to Mr Turton on 17 February 2020, for the Respondent to conclude that the Claimant had potentially left the actuator lever in the bypass position.

159. With regard to the question of whether those grounds were formed from a sufficient investigation however, I was not convinced that they were.

160. With regard to the first and second allegations, there was little additional clarification that could have been provided by any extra investigative processes. Although the Claimant strongly rejected that he had committed acts of misconduct in relation to both allegations, I concluded that the conclusions rested on the information that was before the decision makers

161. I took a different view however, in relation to the third allegation. There, as I have noted, it seemed to me that the Respondent had a disproportionate focus on what appeared to be an admission on the part of the Claimant that he had left the actuator lever in the bypass position. Whilst that was a clearly reasonable interpretation of the Claimant's message to Mr Turton of 17 February 2020 in isolation, that was not how matters rested.

162. The Claimant was adamant that he had left the lever in the correct position, and was equally adamant that the review of the training video, and the raising of specific questions of Mr Reid, would confirm that. With regard to the video, it only became apparent during this hearing that the reason why Mr Turton could not be clear about the position of the lever was because he was viewing the video on his phone and could not freeze the video at the appropriate point. I make no criticism of the Respondent for not realising that that had been the case, and consequently of not being aware that Mr Turton should have viewed the footage on his laptop.

163. However, I considered that a reasonable employer would have raised the further questions of Mr Reid. The Respondent contended that it could not ask further questions of Mr Reid due to the commercial relationship it had with Cryolabs. However, it had asked questions of Mr Reid in the investigative stage of the process, on the basis that there were issues which the Respondent needed to be satisfied about from a broad, customer-service perspective, and not from an internal disciplinary perspective. I saw no reason why the Respondent could not have asked the further questions suggested by the Claimant in a similar manner. It would have been a straightforward process to have asked the questions neutrally, in the context of an overall investigation, whilst maintaining the commercial relationship with the customer.

164. Overall, bearing in mind that the evidence provided by Mr Reid would have had a very important bearing on the third allegation, I considered that the Respondent had not formed its belief of the Claimant's guilt on the basis of

reasonable grounds formed from a sufficient investigation. I was however satisfied, in relation to the first and second allegations that it had.

165. I then moved to consider whether the decision to dismiss the Claimant in respect of the concluded misconduct fell within the band of reasonable responses. In that regard, I took into account my conclusion that the Respondent's conclusion in relation to the first and second allegations satisfied the Burchell test. I also noted that Mr Frew, in the appeal, noted that, whilst he would not have dismissed the Claimant in respect of the second and third allegations in isolation, he was very much of the view that dismissal would be an appropriate response in respect of the first allegation.

166. However, I noted that Mr Frew was unaware of the previous history regarding the Claimant and Mr Saunders. He was not fully appraised of the extent to which the Claimant undertook hands-on technical work, both before Mr Turton's arrival and afterwards. More fundamentally, he was not aware that Mr Saunders had had concerns over the Claimant, in particular concerns over the work the Claimant had been involved with at the particular client in 2018, which had led to the Respondent reimbursing the client for the cost of the unit, a sum just short of £80,000, and which it was felt could have led to a significant risk of harm to individuals.

167. I noted that, at that time, the Claimant and Mr Saunders were equal shareholders and co-directors and therefore the ability for Mr Saunders to take action against the Claimant would have been limited. I considered however, that had Mr Frew, and, at the earlier stage, Mrs Saunders, taken into account the fact that Mr Saunders had accepted what appeared from his evidence to have been viewed as very serious misconduct on the Claimant's part in 2018, he and she would have concluded that it would have been an inappropriate jump, from conduct which did not appear to even be commented upon in 2018 to dismissal, in circumstances which were significantly less harmful (it being accepted that the actual issue that arose in Glasgow in February 2020 was not the fault of the Claimant), in 2020. In my view, a reasonable employer would have taken that position into account and, even if satisfied that misconduct had occurred, would have imposed a lesser sanction.

168. I therefore concluded that the decision to dismiss, even in the context of a Burchell compliant dismissal in respect of the first and second allegations, fell outside the range of reasonable responses.

169. In terms of procedure and the compliance with the ACAS Code of Practice, I was conscious that, whilst the Claimant criticised various steps taken by the Respondent in terms of the investigation and disciplinary processes, notably the initial unwillingness to view the video footage and the ongoing unwillingness to contact Mr Reid, those criticisms did not involve any failures to apply the ACAS Code. Taking the Claimant's assertions at their strongest, they could be viewed as calling into question whether the Respondent had carried out any necessary investigations to establish the facts of the case.

170. The Code however, focuses on the employer taking “appropriate” steps to establish the facts of the case, and, whilst I have formed the view that it was inappropriate for the Respondent not to have raised the further questions of Mr Reid, I did not consider that this took the Respondent's approach outside

the obligations set out within the ACAS Code.

171. The Respondent, in the form of Mrs Saunders, had a reason not to ask those questions, which, although I considered it unreasonable, did not, in my view, amount to a breach of the ACAS code. Even if it had, in view of the fact that the failure appeared to be misguided rather than deliberate, I would not have considered it just and equitable in all the circumstances to increase any award of compensation to the Claimant.

172. With regard to the question of contributory conduct, as I have noted in relation to the wrongful dismissal claim, I did not conclude that there was in fact any misconduct on the Claimant's part in relation to his actions on 31 January 2020. Consequently, I did not consider that the Claimant's actions approached the blameworthy threshold set out in BBC v Nelson (no.2) [1979] IRLR 346. In that case, the Court of Appeal set out three factors which must be present for a compensatory award to be reduced by reason of contributory conduct. These were; that the Claimant's conduct must be culpable or blameworthy, that it must actually have caused or contributed to the dismissal, and that the reduction must be just and equitable. The EAT, in Steen v ASP Packaging Ltd (UKEAT/23/11) outlined a very similar approach in relation to the basic award.

173. Applying that guidance, whilst I noted that the Respondent had considered that the Claimant had committed acts of gross misconduct, I have concluded that that conclusion was unreasonable in the circumstances. I did not consider that the Claimant had been guilty of culpable or blameworthy conduct. In addition, even if the Claimant's conduct could be said to have contributed to his dismissal, I would not have considered it just and equitable to make any reduction to the compensation to be awarded to him, as, even in those circumstances, I considered that a reasonable employer would have imposed a lesser sanction. I therefore did not consider that any contributory conduct deduction should be applied.

174. With regard to the question of whether dismissal would have occurred, and occurred fairly at some point, and if so, when that would take place or how likely it would be, i.e. the Polkey principle, I noted that both Mr Saunders and the Claimant had referenced in their evidence the deteriorating relationship between them in the last year or so of the Claimant's employment, certainly since the admission of Mrs Saunders as a shareholder and director. I also noted Mr Turton's observation in his evidence that the relationship between Mr Saunders and the Claimant had deteriorated.

175. I noted the Claimant's answers to questions under cross examination about the relationship, and the conclusion I reached was that it seemed inevitable to me that the relationship between Mr Saunders and the Claimant had deteriorated to such an extent that the relationship would not have lasted much longer. Both aired criticisms of each other, and Mr Turton's evidence indicated that those criticisms were becoming more deep-seated. The Claimant had also referred to the deterioration of their relationship, and that it was visible to others, in an email prior to the disciplinary investigation.

176. Assessing the situation as best I could, I considered that the Claimant's employment would have lasted no longer than a further six months. I therefore concluded that the compensatory award should be reduced to

reflect that the Claimant's employment would have ended at the end of a six-month period. That dismissal would then have been on notice, on the "some other substantial reason" ground arising from the breakdown of the relationship between the Claimant and Mr Saunders, with Mr Saunders remaining in his role and not the Claimant, in view of the greater combined shareholding of Mr and Mrs Saunders and the fact that they formed a majority of the board of directors.

Unauthorised deductions from wages

177. The Claimant's claim of unauthorised deductions from wages fell into three areas. First, in relation to pay in respect of accrued but untaken holiday; second, in relation to payments which did not satisfy the national minimum wage; and third, in relation to payments made to the Claimant's director's loan account.

178. The Claimant appreciated that there is now a limit on the period capable of being covered by an award arising from unauthorised deductions from wages, to the period of two years ending with the date of presentation of the complaint, by virtue of section 23(4A) ERA. To the extent that any payments to the Claimant fell within the period prior to that, i.e. 14 September 2018, the Claimant contended that such excess fell to be considered as a claim of breach of contract, subject to the overall cap on the compensation capable of being awarded by a tribunal in respect of breach of contract claims of £25,000.

179. With regard to the claim in respect of pay for accrued but untaken holiday, there was a complete paucity of evidence before me, beyond the Claimant's assertion that he had 5.5 days' holiday entitlement outstanding when his employment ended, and the Respondent's assertion that the Claimant had taken all holiday due to him at the time his employment ended.

180. There was no clear evidence before me as to the holiday year applied by the Respondent, the only evidence of any sort being the content of the statement of particulars of employment provided to the Claimant by the Respondent after his employment had ended. That document referred to the holiday year being the calendar year and, on balance, I accepted that that applied. I considered it unlikely that the Respondent would have included a reference which was not that which prevailed generally, and also noted that many employers use the calendar year as the holiday year.

181. That statement of particulars also referred to the Claimant being entitled to 5.6 weeks' holiday per year, which coincided with the Claimant's entitlement under the Working Time Regulations 1998.

182. I noted that the document had been drafted on the basis that the Claimant was employed for only one day per week. I considered that was only an artificial assessment, in order to treat the payment of sums up to the lower earnings limit as wages, and did not reflect the reality of the situation, which, in my view, was that the Claimant worked full-time for the Respondent. Therefore, 5.6 weeks amounted in the Claimant's case to 28 days annually.

183. The Claimant was employed for some 4.5 months during the 2020 holiday year, and that therefore led to him being entitled to 10.5 days up to the point

his employment ended. The Claimant contended that he had taken 5 days, leaving 5.5 days accrued but untaken and for which payment was required. I noted however that the evidence in respect of the disciplinary investigation indicated that the Claimant had been absent on leave from 2 to 11 March inclusive, which amounted to 8 working days. I also noted that the period of January to May would have included four bank holidays; New Year's Day, Good Friday, Easter Monday and May Day. In the circumstances, and bearing in mind that the Working Time Regulations entitlement includes public holidays and the statement of particulars document repeated that, I considered that the Claimant had taken all holiday entitlement due to him during the 2020 holiday year and therefore nothing further felt to be paid.

184. With regard to the Claimant's national minimum wage ("NMW") entitlement, the Claimant's case was predicated on the fact that he had received comfortably the largest part of his remuneration by way of dividend and not by way of salary. The Claimant contended that, notwithstanding his agreement to receive remuneration by way of dividend, as it was not paid by way of wages or salary, those payments could not count for the purposes of the National Minimum Wage Act and Regulations.

185. The National Minimum Wage Act 1998 provides that a person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage. The Claimant clearly qualified for the national minimum wage.

186. The National Minimum Wage Regulations 2015 then deal with the assessment of the wage paid to an individual worker. Regulation 7 provides that a worker is to be treated as remunerated by the employer in a pay reference period at the hourly rate determined by the calculation - R/H, where R is the remuneration in the period, and H is the hours of work in the period.

187. Remuneration is then defined in regulation 8, which provides that the "*remuneration in the pay reference period is the payments from the employer to the worker, as respects the pay reference period*". I noted that the Regulations do not make any reference to wages or salary, but refer to "*payments*". There was nothing in the wording of the Regulations, nor is there anything I could see in any applicable case law, which limits the payments to be taken into account for NMW purposes to wages or salary. Regulation 10 contains a list of payments that do not count towards the conclusion of NMW, but there is no reference to dividends within that regulation.

188. Whilst I readily accepted that dividends are generally referable to an individual's shareholder status rather than his or her status as an employee, I considered that the circumstances of the Claimant and Mr Saunders in this case were such that they were structuring their remuneration from the company arising from their efforts and services, and not by reference to their shareholdings, in a particular way so as to optimise the tax and national insurance position. That meant that the majority of their remuneration was received by way of dividends, and that they also received, albeit indirectly, by allocation of sums to director's loan accounts, an additional sum of salary up to the lower earnings limit.

189. In my view, in the particular circumstances of the agreed position between the original two directors and shareholders in this case, all sums received by the Claimant in respect of his services to the Respondent should be counted towards the calculation of NMW. In the case of the Claimant that involved payments totalling approximately £42,000 per annum in the years in question.

190. I noted that the Claimant contended that he worked for some 70 hours per week, whereas the Respondent contended that the Claimant worked normal office hours; in fact, on occasions, somewhat less than that. In terms of the evidence I heard, which was not in any sense directed towards the question of the Claimant's NMW entitlement, it seemed to me that the Claimant did broadly work normal office hours. He did travel and some of that travel would no doubt have led to occasional weeks involving more than 35 or 40 hours per week, but overall I considered it likely that the Claimant usually worked for that sort of amount of time.

191. However, even if the Claimant was correct and his working hours were 70 each week, the payments he received in the form of dividends and the lower earnings level payments to the director's loan account were still comfortably above the NMW on an hourly basis.

192. My conclusion therefore was that the Claimant had been paid at least the minimum wage in relation to all his hours worked, and therefore there had been no unauthorised deduction from wages in respect of that, nor had there been any breach of contract.

193. With regard to the Claimant's contention that the allocation of the lower earnings level payments to his director's loan account involved unauthorised deductions from wages, I noted that the section 13(1) ERA provides that a deduction shall not be made from the wages of a worker unless required or authorised to be made by virtue of a statutory provision or relevant provision of the worker's contract, or where the worker has previously signified in writing his agreement or consent to the making of the deduction.

194. In this case there was no relevant statutory provision, and bearing in mind that the document which potentially purported to be a contract was not issued until after the employment had ended, there was no relevant provision of the Claimant's contract. However, I noted that there were email exchanges with regard to the decision to allocate payments up to the lower earnings limit to his director's loan account. I therefore considered that he had signified in writing his consent to the making of the deduction.

195. In any event, I did not consider that there had been a deduction, as the Claimant accepted that the lower earnings level payments should be allocated to a director's loan account and the money currently stands to the credit of that account for payment to him. The Respondent does not appear to dispute that the sum is due, only saying that it is not possible to pay the sum due in the current financial circumstances. In my view, that does not involve any form of deduction by the employer, in that the credit to the Claimant is available for him to claim, and potentially pursue by way of a debt action if required.

196. I also noted that, almost immediately upon being suspended, the Claimant

requested that his director's loan account be repaid, referencing the balance in that account as being approximately £18,000. That reflected the lower earnings limit payments allocated to that account over the previous three years, and it seemed to me that the Claimant had accepted that those allocations would be made to his director's loan account from the tax year 2017/18 onwards. It did not seem to me therefore, that there was any question of there having been any deductions for the purposes of Part II ERA.

197. I also noted that the informal valuation undertaken by the Respondent's accountants in March 2019, noted that net profits for the preceding years would need to be adjusted to reflect a commercial salary for the directors, and that the net profits for the year ended 31 August 2018 already included a deduction of £6000 by way of salary for each director. That commercial salary was based on the average dividends declared, and was £36,000 for both Mr Saunders and the Claimant. It seemed to me therefore that the Claimant was actively involved in, and agreed to, the decision that most remuneration from the Respondent would be received by way of monthly dividend, and that a sum, returned to HMRC as salary, equal to or just in excess of the lower earnings limit each year would be allocated to the director's loan accounts.

Failure to provide itemised pay statements

198. Whilst there were itemised payslips within the bundle, which were, on the face or them, issued annually in April 2018, 2019, and 2020, the Claimant contended that he had not received them during the course of his employment.

199. The obligation under section 8 ERA is that a worker "*has the right to be given by his employer, at or before the time at which any payment of wages or salaries made to him, a written itemised pay statement*". That statement is to contain the gross amount of the wages or salary, the amounts of any variable and fixed deductions, and the net amount of wages or salary payable.

200. Section 12(3) ERA then provides that, on an application from a worker that an itemised pay statement has not been given or does not comply with what is required, then the tribunal is to make a declaration to that effect. Where any unnotified deductions were made during the period of thirteen weeks immediately preceding the date of the application for the reference, the tribunal may order the employer to pay the worker a sum not exceeding the aggregate of the unnotified deductions so made.

201. In this case, the Claimant's representative accepted that there were no unnotified deductions, and therefore, whether or not the itemised pay statements had been provided, there was no financial consequence. However, bearing in mind my conclusion that the Claimant was involved in, and agreed to, the allocation of salary up to the lower earnings limit to his director's loan account, and also that the lower earnings limit payments were included in the Claimant's tax returns for the years ended April 2018 and 2019 (the return for the year ended April 2020 was not before me), I considered that the itemised pay statements had indeed been received by the Claimant at the end of, or shortly after, the relevant tax years. His claim in respect of itemised pay statements therefore failed.

Failure to provide a statement of particulars of employment

202. Sections 38(2) and (3) of the Employment Act 2002 provide that if, in the case of proceedings to which the section applies, the tribunal finds in favour of the claimant and either makes no award to him in respect of that claim, or makes an award in respect of that claim, and "*when the proceedings were begun*" the employer was in breach of his duty to the worker under section 1(1) or 4(1) ERA, then the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead. The "minimum amount" is two weeks' pay, and the "higher amount" is four weeks' pay.

203. As I have emphasised, the requirement is not that the employer must have been in breach of the duty to provide the statement of particulars of employment at the time envisaged, which, at the time that the Claimant was employed, was within eight weeks of the commencement of employment, but requires the employer to remain in breach of that duty "when the proceedings were begun." In this case, the proceedings were begun on 14 September 2020 and the Respondent provided the written statement of particulars on 12 August 2020.

204. Whilst I have no doubt that the Respondent provided those particulars in order to avoid the application of the provisions of section 38 of the 2002 Act, bearing in mind that the Claimant had commenced early conciliation with ACAS by that time, there was, in my view, nevertheless, no breach at the time the proceedings were begun, as the content of the letter provided to the Claimant on 12 August 2020 contained all the information required to be provided by section 1 ERA. In the circumstances, no award fell to be ordered pursuant to section 38 of the 2002 Act.

Next steps

205. In relation to the Claimant's successful claims, a one-day remedy hearing will be listed to consider the compensation to be awarded, unless the parties are able to reach agreement themselves.

Employment Judge S Jenkins

Date: 3 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 7 March 2022

FOR EMPLOYMENT TRIBUNALS Mr N Roche