Case No: 1401135/2021
& 1401136/2021

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Bullivant (1) and Mrs A Bullivant (2)**

Respondent: **Firebird Conference Systems Limited**

Heard at: **Bristol (via CVP)** **On: 14, 15 and 16 March 2022**

Before: **Employment Judge Leith**

Representation
Claimant: Mr Matovu (Counsel)
Respondent: Ms Canneti (Counsel)

RESERVED JUDGMENT

1. The First Claimant was an employee of the Respondent from 1 November 2018 to 8 January 2021
2. The Second Claimant was an employee of the Respondent from 1 November 2018 to 8 January 2021
3. The First Claimant's claim of constructive unfair dismissal is well founded and there shall be a hearing to consider remedy
4. The Second Claimant's claim of constructive unfair dismissal is well founded and there shall be a hearing to consider remedy
5. The First Claimant's claim of constructive wrongful dismissal is well founded and there shall be a hearing to consider remedy
6. The Second Claimant's claim of constructive wrongful dismissal is well founded and there shall be a hearing to consider remedy
7. The Parties must, within 7 days of promulgation of this Judgment, send to the Tribunal dates to avoid for a 3 hour remedy hearing.
8. The Claimants must, within 21 days of promulgation of this Judgment, send to the Tribunal and the Respondent updated schedules of loss.
9. The parties must, 7 days before the remedy hearing, send to the Tribunal and each other written submissions on remedy.

REASONS

Claims and issues

1. The claimants claim constructive unfair dismissal, wrongful dismissal and failure to pay holiday pay. The parties had agreed a list of issues in advance of the hearing, which was subject to an amendment application made by the Claimants on 7 March 2022. The application was two-fold:
    a. Both Claimants wish to add to their ET1s (as a motive for resigning): "the Respondent imposed a unilateral variation to the Claimants' contracts, and placed them abusively onto furlough leave, by Dan Carroll's email of 5 November 2020"
    b. The First Claimant wanted to amend box 6.2 of his ET1 Form, to change his claimed working hours from 20 hours to "55-60 hours", and disregard the calculations set out in box 8.2 of his ET1 Form.

2. I allowed the application, for the reason I gave orally at the time.

3. Accordingly, the agreed list of issues was as follows (I have maintained the parties' numbering for ease of reference):

Employment Status

1. Taking into account the three-stage test in *Ready Mixed Concrete Ltd v Minister of Pensions* [1968] 1All ER 433 and other relevant case law, were the Claimants employees for the purposes of s. 230 (1) Employment Rights Act 1996 ('ERA 1996) at material times? The Claimants' case is that they were employees between 1 November 2018 and 8 January 2021 in accordance with an oral agreement reached in September/October 2018, alternatively a contract of employment can be inferred; while the Respondent denies that its relationship with the Claimants rendered them employees or workers within the meaning of s.230 ERA 1996 for the reasons set out in its Response.
2. It is agreed that for the Tribunal to have jurisdiction, the Claimants only need to establish employment status between 8 January 2019 and 8 January 2021.
3. Can the Second Claimant establish a qualifying period of employment within the meaning of s108(1) of the ERA 1996 for the purposes of s94 ERA 1996?

Unfair Dismissal

4. If a contract of employment is determined to have governed the relationship between the parties, when the Claimants gave notice of termination of employment to the Respondent on 8 January 2021, did they do so in circumstances where they were entitled to do so without notice such that they were dismissed for the purposes of s. 95(1)(c) Employment Rights Act 1996? In particular:

    4.1 Did the Respondent commit a repudiatory breach of contract by failing to pay the Claimants their wages due in respect of the months of October, November and December 2020 (the latter payment being due on or about 5 January 2021)?

    4.2 In respect of paragraph 4.1:

    (a) was there a reasonable explanation for the late payment of wages? If so, what is it, and until what date did the relevant circumstances subsist?

    (b) was any omission corrected by the Respondent at the earliest opportunity, and/or was it capable of being corrected prior to the Claimants' resignations on 8 January 2021?

    and, in either case, does this negate a repudiatory breach of contract as alleged at paragraph 4.1?

    4.3 Further or alternatively, did the Respondent impose a unilateral variation to the Claimants' contracts by Dan Carroll's email of 5 November 2020, namely instructing the Claimants onto furlough with attendant pay reduction? The Respondent denies any contractual variation and asserts that its actions were reasonable in the circumstances.

    4.4 Further or alternatively, did the Respondent act without reasonable and proper cause and in a manner that was calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence by reference to the following and the last straw doctrine:

In the case of the First Claimant only:

(a) Failing to appoint him as a statutory director

In the case of both Claimants:

(b) failing to pay the Claimants their wages due in respect of the months of October, November and December 2020 (the latter payment being due on or about 5 January 2021)?

(c) Dan Carroll's email of 22 October 2020 regarding payment of an alleged licence fee and stating/inferring in particular: a) the master bookkeeping spreadsheet rested solely with Mr Carroll and the Claimants' access to it was removed; b) that he had spoken to Barclays and there was suspicion of embezzlement; c) that they had breached an agreement to only make payments of £100 with the other's knowledge and consent, d) they had breached an agreement to keep a running balance of £10,000, d) that they had left insufficient money to pay roll or pay suppliers, e) they had put the Respondent's future in jeopardy, f) he/the Respondent may report the transfer to the police and seek repayment of the money, g) he/the Respondent may be forced to take legal action against them or Ittium.

(d) Blocking both Claimants out of the business (including from the Respondent's CRM system, Sage, and online banking)

(e) Placing the Claimants onto furlough leave on 5 November 2020.

(f) Failing to invite the Claimants to a grievance hearing despite correspondence of 13 November 2020, 30 November 2020 & 16 December 2020

(g) Failing to respond to correspondence from the Claimants' solicitors dated 16 December 2020

(h) Failing to offer the Claimants any or any competent grievance process;

(i) Failing to afford any or any effective redress to the Claimants' grievances.

4.5 Did the Respondent have reasonable and proper cause for its actions relating to each of the purported breaches listed at paragraph 4.4 (none of which are admitted), in circumstances where (the Respondent alleges, but the Claimants do not admit):

(a) the Claimants had used Company funds to settle an invoice for £28,800 raised by Ittium, a company owned by the First Claimant, pursuant to a purported software licensing agreement signed days earlier by the First Claimant on behalf of the Respondent, without its knowledge or authorisation, and in breach of various alleged agreements between the parties, including (as the Respondent alleges) that any payments exceeding £100 should be agreed by the parties, and that the balance in the Respondent's bank account should not be allowed to fall below £10,000;

(b) The First Claimant refused access to the Respondent to another of its bank accounts to which only he had access;

(c) and in so doing, the Claimants had jeopardised the Respondent's ability to pay its staff and suppliers and to keep trading?

4.6 Did the Claimants resign in response to the breach(es)? In particular, applying Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978:

(a) what was the most recent act (or omission) on the part of the Respondent which caused, or triggered, the Claimants' resignations?

(b) Have the Claimants affirmed their contracts by delay since that act?

(c) If not, was the most recent act/omission by itself a repudiatory breach of contract?

(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

(e) Did the Claimants resign in response (or partly in response) to the breach, or alternatively because they wished to sever their relationship with the Respondent and pursue their own interests in competition with the Respondent?

5. Is the Respondent able to show a potentially fair reason for dismissal for the purposes of s. 98 (1) Employment Rights Act 1996, namely gross misconduct based on the allegations set out at 4.5 above
6. If so, and with regard to that reason, were the Claimants' dismissals fair or unfair by reference to the equity and substantial merits of the case, applying s. 98(4) Employment Rights Act 1996?

Wrongful Dismissal

7. In the absence of any express agreement as to how much notice the Respondent would be required to give to the Second Claimant, if it is determined that the Second Claimant worked under a contract of employment:

   (a) what is a reasonable period of notice to imply where the Second Claimant avers 2 months and the Respondent, citing contracts of employment issued by the Respondent to other individuals during the same period, avers 1 week?

   (b) what is the Second Respondent's statutory notice period arising under s. 86 ERA 1996?

(*NB. The First Claimant seeks a declaration of wrongful dismissal, rendering it unnecessary to determine what a reasonable period of notice would have been in his case).*

8. By reference to the same matters in paragraph 4 above:
   8.1 Did the Respondent committed a repudiatory breach of the Claimants' contract?
   8.2 Did the Claimants accept that breach by their resignations of 8 January 2021?

Holiday Pay

9. If either of the Claimants were employees or limb (b) workers for the purposes of Reg 2 Working Time Regulations 1998, and it being agreed that the relevant holiday year was 1 January – 31 December, what were the Claimants' annual holiday entitlements?:

Of the holiday year 1 January 2020 – 31 December 2020:

9.1 What holiday did the Claimants take in the year of 1 January – 31 December 2020;

9.2 If the Claimants took less than their annual entitlement, were they entitled to carry forward any unused holiday (and, if so, how many days) from that holiday year to the subsequent holiday year commencing 1 January 2021:

(a) by reference to the Working Time (Coronavirus) (Amendment) Regulations 2020; and/or

(b) Was either Claimant denied an effective opportunity to take annual leave following 22 October 2020?

Of the holiday year commencing 1 January 2021:

9.3 If entitled to 1 day each, what holiday did the Claimants take in the period of 1 January 2021 – 8 January 2021?

9.4 What is the total number of days' holiday that falls to be compensated under Reg 14 Working Time Regulations 1998?

Remedy

10. In the case of both Claimants, what is the value of a week's pay for the purposes of ss. 220-227 Employment Rights Act 1996, and, accordingly, what is the value of a day's pay for the purposes of the Working Time Regulations 1998?

11. As to the unfair dismissal claims (where both Claimants seek a Basic Award but only the Second Claimant seeks a Compensatory Award):

11.1 Did the Claimants engage in conduct which renders it just and equitable to reduce the amount of their Basic Awards pursuant to

s. 122(2) Employment Rights Act 1996, and if so, to what extent? The Respondent relies upon:

(a) In the case of the First Claimant, the matters set out at 4.5 above and unreasonable conduct which damaged the relationship between the parties and included: undermining instructions given by the Respondent to an employee and/or decisions made in relation to clients, bombarding the Respondent with emails despite his entreaties to desist doing so and contacting team members at weekends, again despite requests not to do so.

(b) In the case of the Second Claimant:

(i) enabling or failing to prevent the First Claimant from making the payment to Ittium, a company owned by him (as referenced at 4.5 above), without seeking approval from the Respondent for the payment of such sum in the knowledge that this would severely deplete the bank account;

(ii) failing to provide the Respondent with access to another of its bank accounts to enable payment to suppliers and staff and any creditors (including the Claimants themselves).

11.2 What level of Compensatory Award, if any, is it just and equitable to award to the Second Claimant pursuant to s. 123 Employment Rights Act 1996?

11.3 Should the Tribunal reduce the Second Claimant's Compensatory Award (and if so, to what extent):

(a) By reference to contributory conduct: see 11.1(b) above.

(b) On the ground that that the Respondent could have dismissed the Second Claimant fairly in any event (Polkey v AE Dayton Services Ltd [1987] UKHL 8) in that:

(i) she had been notified of allegations of gross misconduct at the time of her resignation and but for her resignation, the Respondent would have instigated disciplinary procedures that would likely have resulted in her dismissal; and/or

(ii) for SOSR, namely that despite the First Claimant's resignation, she would likely continue to provide support to his business ventures which would have represented a conflict and been contrary to the Respondent's best interests.

12. Is it just and equitable to adjust the Second Claimant's award of notice pay and/or the Second Claimant's Compensatory Award pursuant to s. 207A Trade Union and Labour Relations (Consolidation) Act 1992? If so, by what amount(s)?
13. It being admitted by the Respondent that the Claimants were not provided with written statements of particulars of employment or statements of changes at any time, and that an award under s. 38 Employment Act 2020 falls to be consider in the case of both Claimants:
    (a) Are there exceptional circumstances which would make awards of two or four weeks' pay to either or both Claimants unjust or inequitable?
    (b) Otherwise, is it just and equitable in all the circumstances to award four weeks' pay to either or both Claimants, rather than two weeks?

4. At the start of her closing submissions, Ms Canneti sought to amend the Respondent's case to add an allegation that if and to the extent that there were contracts of employment between the Respondent and the Claimants, those contracts were either void by reason of illegality or unenforceable on the basis that they were tainted by illegality. This was said to be on the basis that the contracts were entered into as a tax avoidance measure, and/or on the basis that the furlough scheme had been abused. Those allegations had not been directly put to either the First Claimant or the Second Claimant. I did not allow the amendment, for the reasons I gave orally at the time.

Procedure, documents and evidence heard

5. I heard evidence from Mr Bullivant and Mrs Bullivant, the Claimants. On behalf of the Respondent I heard evidence from Mr Daniel Carroll, Director, Mr Kim Wilson, one of the co-founders of the Respondent, and Mr Andy Smart, who is a director in the firm murraYoung, the Respondent's accountants.

6. On the first day of the hearing, Mr Carroll joined from his home in Hungary. I drew the attention of the parties to the case of *Agbabiaka* [2021] UKUT 286, and indicated that subject to any submissions they wished to make on the point, my preliminary view was that I would not be able to hear evidence

from Hungary unless the Foreign and Commonwealth Development Office had confirmed that the Hungarian Government had no objection. I gave the parties some time to consider how they wanted to approach the issue. Mr Carroll chose to travel to the United Kingdom for the second and third days of the hearing. We finished at 4.15 pm on the first day to enable him to do so.

7. The hearing was listed for three days. Some time was lost on the first morning of the hearing due to technical difficulties. The parties had agreed a timetable, which allowed for the Claimants' evidence on the afternoon of day 1 and the morning of day 2, the Respondent's evidence on the afternoon of day 2 and the morning of day 3, and submissions on the afternoon of day 3. In light of that, I indicated (with the agreement of both Counsel) that my decision would have to be reserved, and that I would deal with liability and Polkey/contributory fault only.

8. Because of the various issues that arose on the first morning of the hearing, we were not able to start hearing evidence until 2.30pm on the first day. I indicated that we would start at 9.30am on day 2 to make up the lost time. Due to further technical issues, we were not able to start until shortly before 10am. I therefore indicated that Ms Canneti could have a further 45 minutes after lunch on day 2 to conclude her cross-examination of the Claimants.

9. The Respondents case consequently did not start until 3pm on day 2. We started at 9.30am on day 3 to make up for the lost time.

10. I had before me a bundle of 799 pages. The Tribunal had previously made an order limiting the size of the bundle to 500 pages. The witness statements tendered on behalf of Mr and Mrs Bullivant significantly exceeded the 3,000-word limit set by the Tribunal. Having heard from both representatives, I exercised my discretion to permit the bundle and witness statements.

11. On the second day of the hearing, Ms Canneti indicated during the course of cross-examining the First Claimant that a further document had come to light from the Respondents. I indicated that the documents should be disclosed to the Claimants after the First Claimant had finished giving evidence, so that Mr Matovu could take instructions on it. That took place during the lunch interval. Mr Matovu objected to the document being adduced in evidence. The document in question was an email said to have been sent by Mr Bullivant to Mr Wilson in 2017. Having heard from both Ms Canneti and Mr Matovu, I exercised my discretion to admit the document. I gave both counsel the opportunity to ask for the First Claimant to be recalled so that he could answer questions about the document; neither availed themselves of that opportunity.

Factual findings

12. The Respondent is a company which provides online software to help conference organisers collect and peer-review papers, presentations and abstracts.

13. The First Claimant co-founded the Respondent, along with Mr Carroll and Mr Wilson. He continues to hold 50% of the shares in the Respondent. The Second Claimant is the First Claimant's wife.

14. The First Claimant, Mr Carroll and Mr Wilson previously worked for a company called Oxford Abstracts, which provided a broadly similar service to that provided by the Respondent. Mr Wilson left Oxford Abstracts in 2013. In early 2016 Mr Wilson spoke to Mr Carroll about the possibility of setting up a business to create and market an abstract management system. The First Claimant was brought onboard to develop the software. Mr Carroll and Mr Wilson were to focus on sales and marketing.

15. The Respondent was incorporated on 11 February 2016. Mr Carroll, Mr Wilson and the First Respondent were all equal shareholders. Their original shared intention was that they would all be directors. However, the First Claimant was subject to a restrictive covenant which prevented him from being a director of the Respondent for a period of time. Therefore, Mr Carroll and Mr Wilson were registered as directors at Companies House.

16. It was agreed that none of the three co-founders would take payment for the time and effort they had put into the Respondent in the early days. It was further agreed that they would be remunerated equally, although the work undertaken by the First Claimant was front-loaded, in that the software needed to be developed before the product could be marketed.

<u>The departure of Mr Wilson</u>

17. In June 2016 there was a dispute between the First Claimant and Mr Wilson. This culminated in Mr Wilson leaving the Respondent. He sold his share in the business to the First Claimant and Mr Carroll, and resigned as a director.

18. Mr Wilson subsequently brought a claim against the Respondent. That claim was settled. The settlement payment of £1,170 was made by the First Claimant from his personal bank account. That was confirmed in an email dated 4 April 2017 from the First Claimant to Mr Wilson. In that email the First Claimant indicated that he was making the payment because there was a technical issue with the Respondent's bank account, and that he would reclaim the money on expenses from the Respondent. The First Claimant's evidence was that he could not recall whether or not he had done so. Given the passage of time, and the suggestion in the email that he would not be left out of pocket as he would recover the sum from the Respondent, I find that to be unsurprising.

The position thereafter

19. The position after the departure of Mr Wilson was that the First Claimant and Mr Carroll each owned 50% of the shares in the Respondent, and Mr Carroll was the only director registered at Companies House.

20. The First Claimant was registered as a person with significant control ("PSC") at Companies House. The register of persons with significant control showed that with effect from 25 July 2016, the nature of his control was described as "Ownership of shares – More than 25% but not more than 50%". I find that the fact that the First Claimant was registered as a PSC does not, on its own, tell me any more than that he owned 50% of the shares in the Respondent.

21. The First Claimant and Mr Carroll met regularly to discuss strategy and objectives. The meetings were described as monthly meetings, although they did not take place every month.

22. Neither the First Claimant nor Mr Carroll were on the Respondent's payroll. Mr Carroll invoiced the Respondent for the work he did via his own company, Oaklandsse Limited. The First Claimant invoiced the Respondent for work he did via his company, Ittium Limited ("Ittium"). The First Claimant had owned and run Ittium since 2004. He used it as a vehicle to provide various services including software development, computer and software support and installation.

Ownership of the intellectual property

23. The First Claimant wrote the underlying software for the Respondent's product while working for Ittium, using an Ittium computer. The First Respondent's evidence was that he did so in order that the intellectual property ("IP") in the software would be owned by Ittium. His evidence was that he agreed with Mr Carroll that the Respondent would purchase the IP from Ittium at some point in the future, and that in the interim the Respondent could use the software for free.

24. This was supported by an email from Mr Carroll to Mr Wilson dated 23 July 2016, regarding the valuation of Mr Wilson's shares in the Respondent, in which Mr Carroll said the following:

> "Firdbird does not own any of the IP that was created from 27 June 2016. Firebird will have to negotiate the use of any IP created after that date. The IP that Firebird does own is useless on its own so its value is negligible."

25. Mr Carroll's evidence was that the only IP owned by Ittium was that created between 27 June 2016 and 23 July 2016. He was unable to explain why the

situation would have changed on 23 July 2016. The only significance of the date was that it was the date of his email to Mr Wilson.

26. I find that the intention and understanding of both Mr Carroll and the First Claimant was that a significant part (in functional terms) of the IP in the software relied upon by the Respondent was owned by Ittium. I further find that the Respondent's product could not operate without the IP in question. It is not necessary for me to go further than that and reach any conclusion regarding the ownership of the IP, and I do not do so.

27. The First Claimant's evidence was that the software was not complete and ready to take to market until early 2018. Mr Carroll's evidence was that the software had already been taken to the market from September 2016. His evidence was that the Respondent had turned over approximately £111,000 by early 2018. A Strategy Review Document from May 2017 suggested that Firebird had already made a number of sales by that point; it referred to 14 live clients, and revenue generated of £27,700 (excluding VAT). I therefore prefer Mr Carroll's evidence regarding the point at which the Respondent took the product to market.

28. Once the initial software had been written, although a certain degree of programming was still required, the First Claimant took a more active role in selling to new customers and providing support to existing customers.

Payroll

29. With effect from 1 November 2018 the First and Second Claimants, Mr Carroll, and Mr Carroll's wife were all put on the Respondent's payroll. All four were initially paid the sum of £1,000 per month. The payments were generally made on the 5th of the month, and the First and Second Claimants received pay slips.

30. The First Claimant's evidence was that this followed a discussion he had with Mr Carroll where it was agreed that they would both become employees of the First Respondent from 1 November 2018.

31. Mr Carroll's evidence was that the First Claimant suggested that they both go on the Respondent's payroll as it would be more cost effective than continuing to run separate payrolls through their existing companies. By that point, it was common ground that the First Claimant's restrictive covenant had come to an end, so there was no barrier to him going on the Respondent's payroll.

32. The First Claimant's evidence, which I accept, was that he had by that point effectively stopped working under the banner of Ittium. His evidence was that approximately 95% of his working time was spent doing work for the

Respondent, with the remaining 5% being spent largely fulfilling his duties as a statutory director for Ittium.

33. The First Claimant's evidence was that he considered that upon going on the payroll, he would be answerable to Mr Carroll. He referred in his evidence to a number of emails that he said showed him asking Mr Carroll for instruction or direction. He was taken, in the course of cross-examination, to a number of documents which showed Mr Carroll asking the First Claimant for input on decisions. I find that the relationship between the First Claimant and Mr Carroll did not change significantly in when they went onto the Respondent's payroll. Each sought input from the other on a regular basis, and neither was in overall control of the company (save that Mr Carroll had certain statutory responsibilities as a director which the First Claimant did not).

34. The First Claimant and Mr Carroll both shared their intended holiday dates with each other. I find that that was not done in the sense that one required the other's explicit approval; but rather in order to avoid the situation where they were both on holiday at the same time.

35. It was suggested to the First Claimant that on one occasion, when he took a month's holiday, he replaced himself with his brother, John Bullivant. The First Claimant's evidence was that John Bullivant was undertaking some work for the Respondent putting videos together, and that he was not doing the work that the First Claimant would have done. I accept his evidence in that regard. It was not suggested to me that there was any other occasion when the First Claimant sent a substitute to do his work. Mr Carroll's evidence was that he and the First Claimants could cover each other's work to some degree. Given the nature of the enterprise, that is unsurprising.

<u>The Second Claimant's work for the Respondent</u>

36. The Second Claimant had been working part-time as administrator and bookkeeper for Ittium. Her evidence was that that workload began to dwindle in mid-2018. On 11 July 2018 the Second Claimant emailed Mr Carroll offering to provide the Respondent with some bookkeeping support. She indicated that she would be able to start in September (after the school summer holidays).

37. From September 2018, the Second Claimant started to do some work for the Respondent. On 3 October she introduced herself by email to Mr Smart, and asked him a query about a VAT number.

38. The Second Claimant's evidence was that although she had done some work on an unpaid basis, it was agreed that from November 2018 she would be paid for working part time as a bookkeeper. Mr Carroll's evidence on the point evolved somewhat. In his witness statement, he stated that the

Second Claimant was only added to the payroll for tax purposes, and that the work she did for the Respondent was done for free. During the course of cross-examination he accepted that she was in fact paid for undertaking bookkeeping from January 2019 onwards.

39. The Second Claimant's evidence was that during November and December 2018 she had a number of handover meetings with Mr Carroll. On 28 November 2018, Mr Carroll emailed the Second Claimant indicating that he hoped to hand over from the beginning of December, with a transition period.

40. There was, in the bundle, a diary marker for a meeting between Mr Carroll and the Second Claimant titled “Accounting Handover”, on 11 December 2018 at 10am. The entry said “We couldn’t find this meeting in the calendar. It may have been moved or deleted”.

41. Mr Carroll’s evidence was that he did not believe the meeting took place on that date, but that it had been postponed until January 2019. The Second Claimant's evidence was that the meeting did take place on that date, and it was the final handover meeting after which she took responsibility for the Respondent’s bookkeeping.

42. On 11 December 2019 at 11.26am, Mr Carroll emailed Vinny Hughes of the Respondent's accountants. The email was copied to the Second Claimant. In the email, Mr Carroll said “I’ve copied Ashley into this conversation, she will be taking responsibility for Sage [the Respondent’s accounting software] from now on.” In my judgement, that is consistent with the final handover meeting having taken place earlier that morning. I therefore prefer the Second Claimant's evidence regarding the handover meeting.

43. Extracts from the Respondent's accounting software were in evidence. They recorded that the Second Claimant made a number of entries on 27 and 28 November 2018. Thereafter, the next few entries were all made by Mr Carroll. The next entry made by the Second Claimant was not until 15 January 2019. I bear in mind, however, that between 11 December 2018 and 15 January 2019, only two entries were made – both by Mr Carroll, one on 11 December and the other on 17 December.

44. It was common ground that when the Second Claimant took on responsibility for bookkeeping, Mr Carroll had overall responsibility for finance, and that she was therefore answerable to him. The Second Claimant had a Firebird email address, and her profile appeared on the company’s website.

Contracts of employment

45. No written contract was issued to the First or Second Claimants, or indeed to Mr Carroll or his wife.

46. There was in evidence before me the contract between the Respondent and Patrik Szeder. Mr Szeder was employed by the Respondent as a Software Developer. It was common ground that he was an employee, although he was employed on what was described as a zero hours contract. His contract included the following terms:
    a. 28 days holiday per year (inclusive of statutory and public holidays), pro rata in accordance with his agreed hours.
    b. A holiday year running from 1 January to 31 December.
    c. No entitlement to carry forward accrued holiday.
    d. An employer notice period aligned to the statutory minimum.

47. Mr Szeder's contract named the First Claimant as his line manager. The contract was signed by the First Claimant on behalf of the Respondent. His evidence was that he required the approval of Mr Carroll to hire new staff or issue contracts of employment. I accept that he would not have done so without discussing it with Mr Carroll first.

48. The First Claimant's evidence was that he would have expected a notice period of three months, given the nature of his role. Similarly, the Second Claimant's evidence was that she would have expected a notice period of two months.

April 2019

49. The notes of the monthly meeting in April 2019 recorded as an objective for the month a Shareholders Agreement, the First Claimant becoming a Director and an IP transfer (impliedly of the IP believed to be held by Ittium). The owner of the objective was Mr Carroll, and the justification recorded for the objective was to give clarity on the co-founders' position.

50. The same notes recorded, as an objective, "£10K minimum balance on bank". The First Claimant's unchallenged evidence was that this had been discussed as an objective, but was not a clear instruction, and there were frequent occasions when the bank balance dropped below that figure.

51. In April 2019 the Respondent's funds ran low. The First and Second Claimants, and Mr and Mrs Carroll, were not paid in May 2019. From June 2019 it was agreed by the First Claimant and Mr Carroll that they would each be paid at a reduced rate of £500 per month. The Second Claimant did not object to the reduction.

52. With effect from June 2019, the First Claimant took on responsibility for finance. He effectively line-managed the Second Claimant. He provided quarterly profit and loss reports to Mr Carroll.

53. On 8 November 2019, the First Claimant emailed Mr Carroll asking that they discuss roles, responsibilities and expectations for each other.

54. On 5 January 2020, the First Claimant emailed Mr Carroll asking that they add the following items to their next monthly meeting:

> "Roles and responsibilities
> Transfer of IP (I.e. most of the software) from Ittium to Firebird
> Shareholders agreement
> Strategy for increasing profit"

Mr Carroll indicated that he was happy to add those items to the agenda.

55. On 10 January the First Claimant emailed Mr Carroll asking to be made a Director of the Respondent. Mr Carroll responded that he would like to wait until after their next meeting. He suggested in his response that the First Respondent had previously not been keen to be made a Director.

The Budapest meeting

56. The next meeting between Mr Carroll and the First Claimant took place on 12 March 2020, in Budapest. It was common ground that the meeting was fractious. The First Claimant's evidence was that Mr Carroll "hijacked" the meeting and accused him of having a poor communication style and being a bully.

57. Mr Carroll told the First Claimant that he considered he was being dragged into work which did not need his time, and that the First Claimant could make decisions on contracts without seeking Mr Carroll's input every time.

58. Mr Carroll's evidence was that he and the First Claimant agreed a limit of £100 for sundry purchases. His evidence was that the limit was intended to enable each of them to purchase smaller items without having to discuss with each other, and was borne out of an incident where the First Claimant wanted to reward Mr Szeder for his hard work by giving him a £50 gift card. The first Claimant's evidence was that no expenditure limit was ever agreed. Although there was a four page note of the meeting in evidence, it did not mention a £100 spending limit. I find that there was some discussion between the Mr Carroll and the First Claimant regarding making sundry purchasing of up to £100, but that they did not agree an absolute rule that neither of them could spend over £100 without the other's express authorisation. Had such a rule been put in place, I consider that it would have been captured in the notes of the meeting.

59. There was no discussion regarding the First Claimant being made a director. The meeting concluded with the First Claimant telling Mr Carroll that he could no longer work with him.

60. The First Claimant and Mr Carroll met again via Skype on 19 March 2020. They discussed sales strategy, and Mr Carroll's concerns regarding the First Claimant's communication style. There was again no discussion of the First Claimant being made a director of the Respondent.

The 27 March 2020 email

61. On 27 March 2020, the First Claimant sent Mr Carroll a lengthy email regarding the points which had not been discussed at the Budapest meeting. In respect of being made a director, he said this:

> "Director Paperwork/Transfer of IP/Shareholders agreement
> This is something that has been dragging on for a bit now. We've had emails over the last two years about this. We documented last year that you would action this but it still hasn't happened yet. What do you think is holding us up on this? Is there anything I can do to expedite this please?"

Mr Carroll responded saying that he would look into it.

62. In the same email, under the heading "Ashley pay", the First Claimant wrote the following:

> "As I understand it, you and I are paid £1000 per month and the money is distributed equally between DC BC PB and AB for tax purposes.
> This means that Ashley isn't effectively being paid for her bookkeeping and admin work.
> I think it was very good of her to do this for the last several months for free but I think we now need to look at paying her for her time.
> Ashley currently works on Firebird on Mon, Wed, Fri 10:00am to 2pm.
> If we were to pay £10 per hour (reasonable?) then this would equate to a monthly pay of £520 per month (£10 * 3 days per week * 4 hours per day * 52 weeks per year / 12 months per year)
> Ashley currently does the following activities:
> Bookkeeping.
> PB Expenses preparation.
> Sending invoices to customers.
> Updating Bookkeeping spreadsheet.
> Paying USD cheques in to the account.
> Chasing customers for payment.
> Recent Events blog.
> Data mining / Adding new leads to the CRM.
>
> So I think our options are:
> 1. Pay Ashley for her work.
> 2. I find another bookkeeper/admin which may be cheaper.
> 3. We use Murray Young to do bookkeeping but we will then have to do other admin/marketing tasks that AB does currently.

> Do you have any thoughts on all of this? Ideally I'd like a decision before 1st April so we can start the tax year and new payroll correctly."

63. The First Claimant's evidence was that this was a mistake, and that the £500 per month that the Second Claimant had been being paid since June 2019 was remuneration for the work she had been doing. His evidence was that when they had all taken a pay cut in June 2019, they had been faced with the choice of either himself and Mr Carroll continuing to receive £1,000 per month while their wives received nothing (and consequently stopped working for the Respondent), or each of them receiving £500 per month.

64. I find that the First Claimant's email was an attempt to increase his and his wife's overall income from the Respondent. It was not, as he attempted to characterise it in his oral evidence, a mistake. Rather, by implying that the payments made to the Second Claimant had been remuneration for the work he had been doing rather than the work she had been doing, he was attempting to find a mechanism to increase his share of the overall income from the Respondent.

65. Importantly, the Second Claimant's evidence was that she understood that the money she received during that period was payment for the work she was doing for the Respondent. It was not suggested to her in the course of cross examination that she would have undertaken the work had she not been paid for it.

66. The First Claimant's attempt to have the Second Claimant paid separately on an hourly basis was, in any event, ultimately unsuccessful.

67. I find that the payroll arrangements were set, at least in part, with the aim of minimising the parties' exposure to tax. However, notwithstanding the First Claimant's email, I find that the £500 per month that the Second Claimant had been being paid between June 2019 and March 2020 was by way of remuneration for the work she had been doing during that time as the Respondent's bookkeeper.

Furlough

68. Also on 27 March 2020, the First Claimant emailed Mr Smart to enquire about the possibility of paying himself, the Second Claimant and Mr and Mrs Carroll a one-off payment of £6,500 in their March pay. He asked whether that would be tax efficient, and additionally whether it would affect the figures that would be used if they had to be furloughed. The email was copied to Mr Carroll.

69. Mr Smart advised that the payment would work from a tax point of view, and would be used in calculating the figure available for furlough.

70. On 30 March 2020 the First Claimant emailed Mr Carroll regarding furlough. He suggested that Mrs Carroll could be furloughed along with Mr Szeder. He further indicated that furloughing the Second Claimant may be more difficult given her role.

71. Mr Carroll responded in the following terms:

> "Yes, we should furlough PS [Mr Szeder], Bernadett [Mrs Carroll] and Ashley [the Second Claimant] and possibly you too.
> There should be very little admin and payroll to warrant missing out on furloughing Ashley. Whoever is left working can easily do what's required.
> Unfortunately I will have to cut Dibs' [Mr Hazra, a sub-contractor] hours right down – he will have to look after himself as a self employed worker.
> I also think we should pay the full amount (£7000) each to take advantage of the furlough amount (I believe the salaries will be averaged – just like self employment earnings will be averaged). As Andy said, this will help save on corporation tax.
> Let me know if anything is not clear."

72. On 31 March 2020, Mr Carroll emailed the Second Claimant a letter regarding furlough leave. The letter was headed "Employee Furlough Leave". It referred to varying the terms of the Second Claimant's employment with the Respondent, so as to take advantage of the Coronavirus Job Retention Scheme.

73. The letter indicated that the Second Claimant would be placed on furlough from 1 April 2020, and that she would be paid 80% of her average earnings during the previous tax year. The letter asked the Second Claimant to sign the letter to indicate her agreement to the terms. The copy in the bundle was not signed by the Second Claimant, but no point was taken by either side regarding that.

74. A letter in the same terms was also sent to the First Claimant on the same date.

75. The First Claimant objected to the terms of the furlough letter, on the basis that it prevented him taking up other work during furlough, which he wished to be able to do. The First Claimant and Mr Carroll exchanged emails on the subject. In one of the emails, the First Claimant concluded as follows:

> "I think these changes are needed for all employees being furloughed and not just myself."

Mr Carroll did not respond to the implicit suggestion that the First Claimant was an employee. After further emails were exchanged, Mr Carroll agreed to make a change to the letter to address the First Claimant's concern.

76. Mr Carroll's evidence to the Tribunal regarding furlough was somewhat contradictory. When he was taken through the terms of the Furlough scheme, he accepted that only employees could benefit, but his evidence was that he felt that perhaps he shouldn't have taken advantage of the scheme to furlough the Claimants. His evidence regarding the letter sent to the Claimants placing them on furlough was that describing them as "employees" in the letter was the only mechanism to take advantage of the furlough scheme. When he was asked whether he had repaid the furlough monies claimed, his evidence was that it hadn't occurred to him to do so prior being cross-examined on the point, but that he would consider it. Given that the Respondent's case throughout this litigation has been that the Claimants were not employees, Mr Carroll's suggestion that he had not considered the issue until it was pointed out to him in the course of cross-examination was, in my judgment, unrealistic. I bear in mind also that he explicitly recognised that the Claimants were in a different position to Mr Hazra, the sub-contractor.

77. I find that Mr Carroll's evidence on the point was an attempt to fit the Respondent's case to the documentary evidence. I find that the contemporaneous documents provide more reliable evidence of his view regarding the Claimants' status in March/April 2020 – namely, that he considered them to be employees.

Pay date

78. On 5 April 2020 the Second Claimant emailed Mr Carroll to ask when she would receive her March pay. Mr Carroll replied that he was very busy and it should be done in the next day or two.

79. By 9 April 2020, the Second Respondent had still not received her March pay. She emailed Mr Carroll again. In that email she noted that it had been the Respondent's custom to pay either on the 5th or around that date. Some further emails were exchanged on the same day, which concluded with Mr Carroll saying the following:

> "I understand your point about payroll customarily being paid on the 5th of the month but these are very, very different times. In fact, I don't believe anything like this has happened before so I don't think there could possibly be a custom. Your understanding of this would be greatly appreciated."

80. In his evidence before the Tribunal, Mr Carroll accepted that it was the Respondent's custom that payments were made on the 5th of the month. His evidence was that it was a custom, not an obligation, although he accepted that there was an obligation to pay the salary.

81. On 24 April 2020, Mr Carroll indicated in an email to the First Claimant that they should perhaps be looking for an exit strategy for one or both of them. The First Claimant responded that he was happy to look at options for exit,

although he would prefer to find a way for them to work together moving forward.

82. On 21 May 2020, Mr Carroll emailed the First Claimant and Mr Szeder to indicate that either one or both of them would need to come off furlough straight away. He explained that they could be re-furloughed at any time as long as the new furlough period was no less than three weeks. The First Claimant understood this to be an instruction that he was to return from furlough. The Second Claimant remained on furlough.

83. On 23 May 2020, the First Claimant emailed Mr Carroll asking for an update on the position regarding becoming a director. Mr Carroll responded on 28 May to explain that he did not see the need to start making changes until they knew what the exit strategy would be. Mr Carroll and the First Claimant exchanged a number of emails about the possibility of one or both of them exiting from the business.

84. On 30 June 2020 Mr Carroll emailed both Claimants to indicate that they would be on flexible furlough with effect from 1 July. He suggested that the First Claimant would work two weeks per month, and the Second Claimant would work two days per month, but indicated that he was open to discussing alternative work patterns. The First Claimant responded the same day that he did not agree to the flexible furlough. Mr Carroll replied on 3 July 2020, in the following terms:

> "I don't think it matters if you agree or not. We are on flexible furlough regardless.
> Whether you work every day of the month or zero days of the month doesn't bother me and makes no difference to the fact we are taking advantage of the flexible furlough scheme.
> As I said, it is up to you how much time you work and how you manage it. My suggestions were simply that – a suggestion. It would be useful if you could tell me at the end of the month the days you worked so I can pass it on to the accountants."

85. The First Claimant worked reduced hours between July and October, while participating in the flexible furlough scheme. The Second Claimant did no work in July, August and September 2020, and worked one day in September 2020.

86. On 21 September 2020 the First Claimant emailed Mr Carroll. He requested that, as no progress had been made on an exit strategy, he be made a director of the Respondent. He asked that a shareholder agreement be put in place, so that the IP could be transferred from Ittium to the Respondent. He concluded the email by explaining that he intended to continue his employment with the Respondent.

87. Mr Carroll responded on 25 September 2020. He indicated that he did not consider it was the right time to sell the company. He again accused the First Claimant of bullying him. In respect of making the First Claimant a Director, he said this:

> "Once again, you are not correct about me coming up with excuses to make you a director. Hopefully the minutes will show I brought up the topic of you becoming a director last year (late last year?) and your answer was: not until Ashley's pay has been sorted out – you fail to mention the barriers you have put up. Once again I am left policing your statements – and negative spin – and I am sick of it. I also imagine, based on previous experience with you, that you have no recollection of these events – that would be typical of you."

88. Although Mr Carroll sought to blame the First Claimant for the fact he was not a director, he did not thereafter take any steps to make him a director.

The Ittium Licence Agreement

89. In early October 2020, the First Claimant appointed his brother, John Bullivant, as Managing Director of Ittium. His evidence was that he left his brother to do whatever he felt was necessary with the company.

90. On 8 October 2020, the First Claimant sent Mr Carroll a lengthy email. Within that email, he explained that he had asked John Bullivant to be the Managing Director of Ittium, and tasked him with ensuring that the company was profitable and got the most out of the IP that it owned. He indicated that Mr Carroll would be hearing from John Bullivant in due course.

91. Mr Carroll responded to that email a week later on 15 October 2020. In his response, he indicated that he did not accept John Bullivant being appointed as Managing Director of Ittium, and did not think it was in the Respondent's best interests. He indicated that he would not liaise with John Bullivant, and that his agreement was with the First Claimant and not with anyone else.

92. Meanwhile, on 9 October 2020, John Bullivant emailed the First Claimant and Mr Carroll. The email simply read "Please find attached documents". Attached to the email was a letter indicating that Ittium intended to start charging the Respondent for continued use of its software. The letter set out the terms of the licence, which were that the Respondent would pay £3,000 plus VAT per month for use of the software, for a term of six months commencing on 1 November 2020, with the fee for the full term being prepaid.

93. The licence agreement was attached to the email, although it was not in evidence before me. Also attached to the email were two invoices – one for the period from 1 November 2020 to 31 January 2021, and the second for

the period from 1 February 2021 to 30 April 2021. Each invoice was for £9,000 plus VAT (£10,800 in total).

94. Mr Carroll's evidence was that the email went to his junk folder. His evidence was that as a result, he did not see the attachments, because attachments to not appear on emails in his junk folder. His evidence was that he didn't ask for the attachments to be resent because he had told the First Claimant that he would not deal with John Bullivant – although the email in which he said that was not sent until 6 days after the email from John Bullivant.

95. Whatever his view of John Bullivant's appointment, it is somewhat surprising that he would ignore correspondence from the Managing Director of the company which he believed owned the software the Respondent required in order to operate. However, I accept his evidence that that was exactly what he did. If he had read the documents, I find that he would have responded.

96. The First Claimant did not ignore the email from John Bullivant. He signed the license agreement on behalf of the Respondent, and paid both invoices, along with an outstanding invoice from Ittium dating from 2019. The 2019 invoice related to work done by the First Claimant before he went on the Respondent's payroll. He had agreed with Mr Carroll that the invoice (and another invoice from Oaklandsse Limited covering the same period) would both be paid when the Respondent was in better financial health. The total sum the First Claimant paid to Ittium from the Respondent's bank account was £28,800.

97. The First Claimant's evidence was that the decision to set the licence fee and invoice the Respondent was entirely that of John Bullivant, and that he considered the payments to be both fair and affordable to the Respondent. I find his evidence in that regard to be entirely disingenuous. I find that he was, at the very least, well aware of what John Bullivant would do, and that it was done with his blessing (whether implicit or explicit). I find also that he deliberately made the payments without discussing them with Mr Carroll first, as he believed that Mr Carroll would not have agreed to them being made.

98. The First Claimant's evidence was that he made the payments himself. The Second Claimant's evidence was that she was not aware of the invoices at the time, and that she had no part in arranging for them to be paid. Bearing in mind that she was on flexible furlough and worked no days in October 2020, I accept her evidence in that regard.

99. After the Ittium invoices had been paid, the balance in the Respondent's Barclays bank account was £2,277.03. There was, however, additionally

money in the Respondent's TransferWise account – over $12,000 USD and almost $5,000 ASD. Mr Carroll did not have access to the TransferWise account, which had been set up by the First Claimant.

100. Upon becoming aware of the transactions, Mr Carroll withdrew £2,250 from the Barclays account (which was very close to the balance in that account). His evidence was that he did so in order to prevent any further sums being taking by the First Claimant. Mr Carroll's evidence, which I accept, was that Barclays then froze the account so that no one could access it.

101. On 22 October 2020, Mr Carroll emailed the First and Second Claimants. In that email he indicated that a payment of £28,800 had been made without his knowledge or consent. He explained that:

- He had discussed the matter with Barclays, who had frozen the account and removed the Claimants' access.
- He considered the payments were a breach of the agreement with the First Claimant that they would not make payments over the value of £100 without the other's knowledge and consent.
- He considered the payment to breach the agreement to keep a running balance of £10,000 in the account at all times.
- There was not enough money left in the account to run payroll or pay suppliers
- He may report the matter to the Police and seek repayment, but was giving the Claimants the opportunity to pay the money back first.

102. The Second Claimant responded to the email the next day. She described herself as being sickened and anxious after recieving Mr Carroll's email. She requested a copy of the Respondent's grievance procedure. On 30 October 2020 she emailed Mr Carroll, again requesting a copy of the Respondent's grievance procedure. On the same day the First Claimant also requested a copy of the Respondent's grievance procedure (which he had previously requested on 13 October 2020). Mr Carroll responded that the request had been passed to the Respondent's solicitors.

<u>The grievance procedure</u>

103. Mr Carroll provided a grievance procedure to the First Claimant on 4 November 2020. The procedure indicated that it only applied to employees. The procedure allowed for an informal discussion as stage one. Stage two was triggered by the submission of a grievance in writing. The procedure provided as follows in terms of what would happen following submission of a written grievance:

> "If the matter cannot be satisfactorily resolved under stage one, or it is inappropriate to do so, you should raise the matter formally by

setting out your grievance in writing and sending a copy to Dan Carroll. This should be done without unreasonable delay. Once Dan Carroll receives a written copy of your grievance, you will be invited to attend a meeting with Dan Carroll to discuss the grievance. If you have not set out in detail the basis for your grievance in your initial letter raising the grievance, you should tell Dan Carroll before the meeting what the basis for the grievance is so that Dan Carroll has a reasonable opportunity to consider he grievance before the meeting and undertake any necessary initial investigations."

104. Mr Carroll's evidence was that the policy was produced by the Respondent's solicitors following the Claimants' request. Mr Carroll's evidence was that he had not noticed that it applied only to employees, and would have changed it had he realised that. I consider his evidence in that regard was, again, an attempt to fit the documents to the Respondent's case. I find that at the relevant time, the reference to the policy only applying to employees did not strike Mr Carroll as problematic because he regarded the Claimants as employees.

105. On 30 October, Machins Solicitors wrote to the First Claimant, indicating that they were instructed by Mr Carroll. The letter was headed "Letter of Claim". Within the letter, it was asserted that the First Claimant had abused his position of trust, and that there had been a fraudulent or dishonest appropriation of the monies paid to Ittium.

106. On 2 November 2020, the First Claimant emailed the Respondent's accountants confirming how many days he and the Second Claimant had worked in October, for the purposes of flexible furlough. The email was copied to Mr Carroll.

107. On 5 November 2020, Mr Carroll replied providing the same information in respect of himself and Mrs Carroll. He indicated that there was no money in the bank account to pay salaries, but asked the accountants to go ahead with the furlough claim, explaining that he would make payment when he could. In the same email, he asked the Claimants to give him access to the TransferWise account so that payments could be made. He instructed them not to make any payments from the account themselves. Finally, he instructed informed both Claimants that they would be put on 100% furlough for November. Both Claimants were prevented from accessing certain of the Respondent's systems, including Sage.

108. The First Claimant responded on 6 November 2020 suggesting that Mr Carroll go on 100% furlough instead, leaving the First Claimant on flexible furlough. He offered to transfer funds from the TransferWise account to the Barclays account to allow the payroll payments to be made, but indicated that he was awaiting legal advice on whether to give Mr Carroll access to the TransferWise account.

109. On 13 November 2020, Gaby Hardwick Solicitors wrote to Machins Solicitors on behalf of the First Claimant. The letter explained that the First Claimant was not willing to allow Mr Carroll access to the TransferWise account, as he was concerned that Mr Carroll would make an immediate payment to himself and not leave sufficient funds to meet the Respondent's expenses. The letter purported to raise a formal grievance on behalf of both Claimants.

110. On 23 November 2020, Machins Solicitors wrote to Gaby Hardwick Solicitors. The letter was described as being sent on behalf of the Respondent (rather than Mr Carroll). The letter indicated that Mr Carroll was prepared to confirm that on being granted access to the TransferWise account he would not transfer any large sums of money to himself without notifying the First Claimant, and would leave one month's payroll in the account at all times. The letter did not deal with the purported grievance.

111. On 30 November 2020, Gaby Hardwick Solicitors responded. The letter explained that dual authorisation could not be set up on the TransferWise account. It proposed that dual authorisation be set up on the Barclays account instead, upon which Mr Carroll would transfer £11,000 into that account. They noted that the grievance remained outstanding.

112. Machins Solicitors emailed Gaby Hardwick Solicitors on 9 December 2020. The email was described as being on behalf of Mr Carroll (rather than the Respondent). It rejected the suggestion that dual authorisation could not be set up on the TransferWise account, but did not address the suggestion that dual authorisation be set up on the Barclays account. In respect of the grievance, the email indicated that Mr Carroll was unclear what the Claimants' grievance was, and asked that it be set out in writing.

113. At some point, the Second Claimant did produce a document setting out in more detail what her grievance was. It was common ground that that document was never sent to the Respondent. The Second Claimant's evidence was that she did not send it to the Respondent because she was never invited to a grievance meeting.

114. On 1 December the First Claimant started other work as a software developer. His evidence was that he still wanted to resolve the dispute at that stage. I bear in mind that the First Claimant was on furlough at the time. His decision to start a new job on 1 December was consistent with his previous request to be allowed to do so while on furlough. I accept his evidence that he was, at that point, still willing to resolve the outstanding dispute with the Respondent.

115. On 16 December Gaby Hardwick Solicitors wrote to Machins Solicitors. They again indicated that dual authorisation could not be set up

on the TransferWise account. They indicated that the grievance had been raised in wiring, and that consequently under the Respondent's grievance procedure a meeting should be organised so that it could be discussed and investigated. They explained that the First Claimant felt that the Respondent had breached the implied duty of mutual trust and confidence, by failing to acknowledge or investigate his grievance, failing to appoint him as a director, failure to pay him on time or at all, failure to consult with him over matters affecting the business, and the nature of the allegations made against him in recent correspondence.

116. The letter concluded by indicating that unless there was a positive and constructive commitment to mediating the outstanding issues, the likely next step was that the First Claimant would resign without further notice. A response was requested by midday on Friday 18 December 2020.

117. No further correspondence was sent by or on behalf of the Respondent to either the Claimants or the solicitors. Mr Carroll's evidence was that on the 4th or 5th of January, he was told by Barclays that the account would be unfrozen within the next couple of days. His evidence was that as soon as the account was unfrozen he would be able to make the outstanding salary payments. However he accepted that he did not update the Claimants about that, either directly or via their solicitors.

118. On 8 January 2021, Gaby Hardwicke wrote to Machins Solicitors on behalf of both Claimants, indicating that they resigned from their employment with the Respondent without further notice.

119. None of the correspondence from Machins Solicitors indicated that the Respondent believed that neither of the Claimants were employees. Nor did it mention that the Barclays account was frozen. The First Claimant's evidence was that his understanding of Mr Carroll's email of 22 October was that he had been frozen out of the Barclays account, and that he did not understand that the account had been frozen. In light of the subsequent correspondence, I accept his evidence in that regard.

120. On 20 January 2021, the Claimants were paid for the period from October 2020 up to their resignation.

121. Mr Carroll's evidence was that the Claimants could have paid themselves at any time from the TransferWise account to which they had access. However it was not suggested to them in contemporaneous correspondence that they could do so. I bear in mind that, when the First Claimant paid the Ittium invoices himself, Mr Carroll threatened to report him to the Police. Given the preceding correspondence, and the degree to which temperatures had been raised, I find Mr Carroll's suggestion that the

Claimants could have paid themselves from the TransferWise account to be entirely unrealistic.

122. There was in evidence before me a draft outcome letter in response to the Claimants' grievances. Mr Carroll's evidence was that it was prepared by his solicitors, on his instructions. It was common ground that it was not sent to the Claimants. Mr Carroll's evidence was that they resigned before it had been finalised.

123. The draft outcome letter started by quoting only part of the section of the letter of 13 November 2020 in which the grievance was raised. In doing so, parts of the Claimants' grievances were overlooked. The letter recited that further details had been requested but not provided, and that it had therefore been deemed that a meeting would not be required. That was a misunderstanding of the Respondent's own grievance policy, which provided that further details did not need to be provided until after a meeting had been arranged.

124. Under the heading "our decision", the draft outcome letter started by stating that it was not clear what allegations had been made against the Claimants by Mr Carroll. It then went on to conclude that Mr Carroll had not, in fact, made any allegations against the Claimants.

125. The draft outcome letter quoted the section of the grievance letter which referred to Mr Carroll's email of 22 October 2020 as being the source of the allegations. In the 22 October email, Mr Carroll had, in terms, accused the First Claimant of breaching various agreements between them, described the First Claimant's actions as "alarming", and indicated that he may report the matter to the police. He had implied, heavily, that the Claimants had embezzled money from the Respondent. Furthermore, the solicitors engaged by Mr Carroll had, no doubt on instructions, accused the First Claimant of abusing his position of trust and fraudulently or dishonestly appropriating monies from the Respondent. Those same solicitors had, on Mr Carroll's evidence, prepared the draft grievance outcome. In light of all of that, I find that the suggestion in the draft outcome letter that Mr Carroll had made no allegations against the Claimants was bizarre and unsustainable.

126. I find that the document could in no sense have constituted a meaningful outcome to the grievance raised by the Claimants. However, as it was not seen by the Claimants before they resigned, it cannot have formed any part of their decision to resign.

127. On 27 May 2021, Mr Carroll approved the Respondent's financial statements for the hearing ended 31 August 2020. The statements recorded that the average number of persons employed by the Respondent was five

during 2020, and six during 2019. Mr Carroll accepted in evidence that those numbers included both Claimants for both years.

Law

Employment and worker status

128. An "employee" is defined by section 230(1) Employment Rights Act 1996 (ERA) as being "an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment." "Contract of employment" is defined as meaning a contract of service or apprenticeship.

129. Whether an individual works under a contract of service is determined according to various tests established by case law. A tribunal must consider relevant factors in considering whether someone is an employee. An irreducible minimum to be an employee will involve control, mutuality of obligation and personal performance, but other relevant factors will also need to be considered.

130. The Court of Appeal in the case of *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld and Howe* [2009] EWCA Civ 280 gave guidance on the position where the claimant is a shareholder. The fact that an individual is a shareholder in a company, even the sole shareholder, is not a barrier to that individual also being an employee of the company. And even in the case of a company with a single shareholder, the company and the individual are not the same person – the company is still capable of exerting control over the individual. Control exercised by an individual as shareholder will not ordinarily be of special relevance in deciding whether or not that individual has a valid contract of employment.

131. The principles were considered more recently by the Employment Appeal Tribunal in the case of *Rainford v Dorset Aquatics Limited* [2021] UKEAT 2020-000123. The EAT set out in paragraphs 16 and 17 various propositions relating to the question of whether a shareholder was also an employee. Of particular relevance, the EAT noted that payment of "salary" with payslips and PAYE/national insurance deductions is a relevant factor which would point towards employment but is by no means decisive in itself; and it may be of little significance if it is organised entirely by a company accountant for tax reasons without any particular awareness of the part of the putative employee and covers only a small part of the total payments to a shareholder/director.

132. A "worker" is defined by section 230(3) ERA as being: "an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a) a contract of employment, or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any

work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

133. I was additionally referred by Ms Canneti to the case of *X v Mid Sussex Citizens Advice Bureau* [2012] UKSC 59, regarding the status of volunteers.

Constructive unfair dismissal

134. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

135. The employee must show that they were dismissed by the respondent under section 95. Section 95(1)(c) provides that an employee is dismissed if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

136. Guidance was given by the Court of Appeal in the case of *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 211:

> "If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed."

137. A constructive dismissal may be founded on the breach of an express term or an implied term. There is implied into all contracts of employment a duty of mutual trust and confidence. That duty was described by the House of Lord in the case of *Malik and Mahmud v BCCI* [1997] ICR 606 as being an obligation that the employer must not:

> "Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

The test is an objective one.

138. The employer does not have to act unreasonably in order to be in repudiatory breach of contract. In the words of Sedley LJ in the case of *Buckland v Bournemouth University* [2010] EWCA Civ 121:

> "It is nevertheless arguable, I would accept, that reasonableness is one of the tools in the employment tribunal's factual analysis kit for

> deciding whether there has been a fundamental breach. There are likely to be cases in which it is useful. But it cannot be a legal requirement. Take the simplest and commonest of fundamental breaches on an employer's part, a failure to pay wages. If the failure is due, as it not infrequently is, to a major customer defaulting on payment, not paying the staff's wages is arguably the most, indeed the only, reasonable response to the situation. But to hold that it is not a fundamental breach would drive a coach and four through the law of contract, of which this aspect of employment law is an integral part."

139. A breach may be made up of a sequence of events which meet the test cumulatively, even if none of those events would have done so individually. In such a case, the employee may rely on a "last straw" which does not in itself have to be so serious as to constitute a repudiatory breach (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978). However, the last straw must not be entirely innocuous or trivial.

140. In order to succeed in a claim of constructive dismissal, the employee must resign in response to the breach. However, the breach need not be the only reason for the resignation (*Wright v North Ayrshire Council* [2014] IRLR 4).

141. If after a breach of contract the employee behaves in a way that shows he or she intends the contract to continue, they will have affirmed the contract. Once the contract has been affirmed, the breach is waived and the employee can no longer rely on it to found a claim of constructive dismissal unless there is a last straw which adds something new and revives the earlier issues.

142. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

143. Misconduct is a potentially fair reason for dismissal under section 98(2).

144. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the

employee; and shall be determined in accordance with equity and the substantial merits of the case.

145. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *Burchell v British Home Stores* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* [1982] IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* [2003] IRLR 23, and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563).

146. Section 108 of the 1996 Act provides that in order to bring a claim of unfair dismissal, an employee must have two years continuous service as at the Effective Date of Termination.

Polkey

147. In the case of *Polkey v AE Dayton Services Ltd* [1987] UKHL 8, the House of Lords set down the principles on which a Tribunal may make an adjustment to a compensatory award on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed.

148. In undertaking the exercise of determining whether such a deduction ought to be made, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand: *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274.

<u>Contributory fault</u>

149. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

150. Section 122(2) provides as follows: "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it

would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly."

151. Section 123(6) then provides that: "Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

Holiday pay

152. The Working Time Regulations 1998 provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the start date of the claimant's employment in the first year and, in subsequent years, on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year. There will be an unauthorised deduction from wages if the employer fails to pay the claimant on termination of employment in lieu of any accrued but untaken leave.

153. A worker is entitled to be paid a week's pay for each week of leave. A week's pay is calculated in accordance with the provisions in sections 221-224 Employment Rights Act 1996, with some modifications. There is no statutory cap on a week's pay for this purpose. Since the payment for leave in this case was due before 6 April 2020 (when there was a change to the relevant provisions) an average of pay over the previous 12 weeks is taken. In accordance with a series of cases including the Court of Appeal's judgment in *British Gas Trading Ltd v Lock and anor* [2017] ICR 1, all elements of a worker's normal remuneration, not just basic wages, must be taken into account when calculating holiday pay for the basic four weeks' leave derived from European law but not for the additional 1.6 weeks leave which is purely domestic in origin.

Breach of contract

154. If there is no expressly agreed period of contractual notice, there is an implied contractual right to reasonable notice of termination. This must not be less than the statutory minimum period of notice set out in section 86 ERA. For someone who has been employed at least one month but less than two years, this is one week's notice. Thereafter, it is one week's notice for each completed year's service, up to a maximum of 12 weeks.

155. An employer is entitled to terminate an employee's employment without notice if the employee is in fundamental breach of contract. This will be the case if the employee commits an act of gross misconduct. If the employee was not in fundamental breach of contract, the contract can only

lawfully be terminated by the giving of notice in accordance with the contract or, if the contract so provides, by a payment in lieu of notice.

156. A claim of breach of contract must be presented within 3 months beginning with the effective date of termination (subject to any extension because of the effect of early conciliation) unless it was not reasonably practicable to do so, in which case it must be submitted within what the Tribunal considers to be a reasonable period thereafter.

Conclusions

157. In assessing the status of the Claimants, I do not have the benefit of written terms to assist me. Instead, my starting point must be the factual findings I have made regarding the reality of the relationship between each Claimant and the Respondent. I remind myself that the Claimants are separate, and must be considered individually.

First Claimant – employment status

158. I start with the issue of control. I remind myself that the question is not whether the First Claimant was controlled by Mr Carroll, or whether Mr Carroll was hierarchically superior to the First Claimant within the Respondent company. Rather, the question is whether the Respondent, a limited company, exercised control over the First Claimant. In considering that question, I set aside the control exercised over the Respondent by the First Claimant in his capacity as a shareholder.

159. Although the First Claimant clearly had a hand in setting the Respondent's strategy, the steps he took to implement that strategy were under the Respondent's control. I bear in mind that Mr Carroll's view, expressed in the Budapest meeting, was that the First Claimant did not act autonomously enough – that is, that he was too quick to seek Mr Carroll's approval before entering into contracts. That is indicative of the First Claimant acting under the company's control. Looking at the relationship as a whole, I conclude that the Respondent exercised control over the First Claimant regarding the work that he did.

160. I conclude also that there was mutuality of obligation between the First Claimant and the Respondent. The First Claimant was required to give his time to the Respondent. He had responsibilities; he could not simply fail to discharge them. The Respondent was in return obliged to pay the First Claimant the sum of £1,000 per month from 1 November 2018. The payments were made on or around the 5th of the month. When in May 2019 the Respondent could not afford to pay the First Claimant, the temporary abatement of his pay was with his agreement. Similarly, when from June 2019 to February 2020 the First Claimant's pay was reduced to £500 per month, that was again with his agreement. The First Claimant agreed to being furloughed in April 2020.

161. I conclude that the First Claimant was required to give personal service. Ms Canneti suggested to me in her closing submissions that the First Claimant had the right of substitution. I bear in mind Mr Carroll's evidence that he and the First Claimant could do each other's job to a certain degree. However, that is not an indicator of a true right to substitution. I have found that the First Claimant never sent a substitute in his place. I conclude that he had no right to do so, and that he was required to perosnally serve the Respodnent.

162. Although it is not determinative, it is relevant that Mr Carroll regarded the First Claimant as an employee, and acted consistently with him being an employee (by enrolling him on the Furlough scheme, sending him a grievance policy which indicated on its face that it applied to employees only, and including him in the number of employees named in the Respondent's annual return). Mr Smart also unhesitatingly described the First Claimant as an employee.

163. The First Claimant was paid by the Respondent through its payroll from 1 November 2018 until his resignation. That was the only payment he received from the Respondent referrable to that period (the 2019 Ittium invoice was for work done pre-November 2018). He received no dividends. It was not a situation, as in *Rainford*, where the payroll arrangement was put in place by accountants for tax purposes without the input of the First Claimant and Mr Carroll; on the contrary, it was very much their decision.

164. Taking all of those factors into account, I conclude that the First Claimant was an employee of the Respondent. His employment commenced on the date he was put on the Respondent's payroll, namely 1 November 2018. He remained employed until his resignation on 8 January 2021.

<u>Employment status – second Claimant</u>

165. As with the First Claimant, I conclude that the Second Claimant was required to give personal service. I bear in mind that Mr Carroll was able to take over the Second Claimant's work while she was furloughed; however, that is not indicative of a right of substitution. It was not suggested to me that there were any other circumstances where she sought to send a substitute on her behalf, and I conclude that she had no right to do so.

166. I conclude also that there was mutuality of obligation between the Second Claimant and the Respondent. The Second Claimant was required to undertake bookkeeping work for the Respondent. The Respondent was in turn obliged to pay the Second Claimant the sum of £1,000 per month from 1 November 2018 (reduced to £500 per month from June 2019 to February 2020). The payments were made on or around the 5th of the month, by established custom. When in April 2020 the payroll run was not

made on the 5th of the month, the Second Claimant chased for payment. The fact that she did so, and the response she received, are in my judgement consistent with there being an obligation on the Respondent.

167. I have carefully considered the First Claimant's email of 27 March 2020. For the reasons I found above, I conclude that it did not prove that the Second Claimant was not being paid for the work that she did. In any event, I bear in mind that the Claimants are separate individuals. The Second Claimant did not concede that the money she was being paid during that period did not reflect her own contribution to the Respondent.

168. Turning to the issue of control, I conclude that the Respondent exercised control over the Second Claimant regarding the work that she did. She answered initially to Mr Carroll, then subsequently to the First Claimant. While the Second Claimant had a certain degree of autonomy, that was not in my judgment inconsistent with her being subject to the overall control of the Respondent. Furthermore, she was integrated into the Respondent's business. She was introduced to the company's accountants, and liaised with them directly. She had a Firebird email address, and her profile appeared on the company's website.

169. Although it is not determinative, it is again relevant that Mr Carroll regarded the Second Claimant as an employee, and acted consistently with her being an employee (by enrolling her on the Furlough scheme, sending her a grievance policy which indicated on its face that it applied to employees only, and including her in the number of employees named in the Respondent's annual return). Mr Smart also described the Second Claimant as an employee.

170. In my judgment, while the tax efficiency to be gained by paying the Second Respondent through the payroll was in the minds of both the First Claimant and Mr Carroll, that fact alone does not override the reality of the relationship. It may well be that had she not undertaken the bookkeeping work, the Claimants would have sought some other way of using her to minimise their overall tax burden. But that was not the case here. The Second Claimant did work for the Respondent, for 12 hours per week. It was not suggested to her that the money she received from the Respondent was so generous as to be irrational, or to suggest that the relationship was a sham; I do not find that that was the case.

171. Taking all of those factors into account, I conclude that the Second Claimant was an employee of the Respondent.

172. I turn next to the question of when that employment commenced. The Respondent's case was that it did not commence until 15 January 2019. I bear in mind, however, that the Second Claimant made her first entries on

Sage on 27 November 2019. She had a handover meeting with Mr Carroll on 11 December 2018. On the same day, Mr Carroll emailed the Respondent's accountants informing them that she would be taking over the bookkeeping. I do not consider that the Second Claimant would have been expected to have familiarised herself with the role and the company in her own time. That is, in my judgment, what she was doing during November and December (while beginning to take on some administrative and bookkeeping work).

173. Therefore, I conclude that the Second Claimant's employment commenced on the date on which she was put on the payroll, namely 1 November 2018. She remained employed until her resignation on 8 January 2021. It follows that the Second Claimant has the necessary qualifying period of employment to bring a claim of unfair dismissal.

Dismissal

174. I turn next to the question of whether the Claimants were dismissed. The list of issues sets out the three terms said to have been breached:

a. The requirement to pay the Claimants their salary on or about the 5th of the month, by failing to pay the Claimants the wages due for the months of October, November and December.
b. The term that the Claimants were on flexible furlough, by imposing a unilateral variation instructing them onto full furlough.
c. The implied duty of mutual trust and confidence, in the manner set out in detail in the list of issues.

I will take each of the terms in turn.

175. I have found as fact that the Claimants were not paid timeously for October, November and December. At the point that they resigned, they had gone unpaid for three months. Taking the issue as it is set out in the List of Issues agreed by the parties, I conclude that the failure to pay the Claimants their salary did constitute a repudiatory breach of contract.

176. Turning then to question 4.2(a) on the agreed list of issues, I bear in mind that the Respondent was unable to make payments from the Barclays account. The Respondent had informed the Claimants of that; albeit that the First Claimant had not understood that to be the case. As a matter of ordinary language, with reference to the list of issues, that was a reasonable explanation for the late payment of wages. That situation persisted until after the point where the Claimants had resigned.

177. In respect of question 4.2 (b), the omission was not capable of being corrected prior to the Claimants' resignations on 8 January 2021. I bear in mind that the Respondent did nothing to update the Claimants about when they could expect their salary between Mr Carroll's email of 5 November 2022 and their resignations on 8 January 2022. Although there were some negotiations over access to the TransferWise account, it was not made

clear to the Claimants in terms that they would not be paid until the Barclays account was unfrozen. They were effectively left in the dark.

178. In my judgement, however, neither of my answers to 4.2 (a) or (b) were capable negating the breach of contract. The pay term is fundamental to the contract between employee and employer. The Respondent was in breach of that term. The Respondent's banking difficulties did not render that breach trivial or inconsequential.

179. Notwithstanding my conclusion regarding the pay term, I will consider the other terms which the Claimants say were breached.

180. The Claimants were already on Furlough prior to 5 November 2020, albeit that they were on flexible furlough rather than full furlough. The move to flexible furlough had taken place over the objections of the First Claimant. Importantly, it had not been the subject of a written variation, unlike the original move to furlough in March 2020. Insofar as the nature of the Claimants' furlough changed with effect from 5 November 2020, I conclude that it did not constitute a variation of the Claimants' contracts of employment, and consequently neither did it constitute a repudiatory breach of their contracts.

181. Finally, turning to the implied duty of mutual trust and confidence, and with respect to the acts relied upon by the Claimants:

a. The Respondent did fail to appoint the First Claimant as a statutory director, despite a number of requests from the First Claimant to Mr Carroll. Although Mr Carroll sought to suggest that the First Claimant had been resistant to being appointed as a director, the contemporaneous emails showed the First Claimant asking to be made a director a number of times, over a period of months. It was in the control of Mr Carroll, on behalf of the Respondent.
b. I have already found that the failure to pay the Claimants their wages for October, November and December 2020 was a repudiatory breach of an express term. It follows that it was also capable of contributing to a breach of the implied duty of mutual trust and confidence.
c. Mr Carroll's email of 22 October 2020 was, in my judgement, capable of contributing to a breach of the duty of mutual trust and confidence. Being told, by a representative of their employer, that they are at risk of being reported to the Police or be the subject of legal action would inevitably have a chilling effect for an employee. It was all the more so in respect of the Second Claimant, given that she had not been involved in paying the Ittium invoices. In that regard, I bear in mind the obiter comments of Elias LJ in the case of *Crawford v Suffolk Mental Health Partnership Trust* [2012] EWCA Civ 138

> Being under the cloud of possible criminal proceedings is a very heavy burden for an employee to face. Employers should not subject employees to that burden without the most careful consideration and a genuine and reasonable belief that the case, if established, might justify the epithet "criminal" being applied to the employee's conduct.

Although there was no evidence before me that any referral was actually made to the Police, Mr Carroll threatened to do so.

d. In respect of the suggestion that the Claimants were blocked out of the business, they were on furlough leave with effect from 5 November 2020, so would not have needed access to spreadsheets, systems or online banking. Insofar as the First Claimant may have felt he had a legitimate need to access any part of the business during that period, it could only have been in his capacity as shareholder not as employee. Revoking the Claimants' access to systems therefore cannot, in my judgement, have contributed to a breach of the implied duty of mutual trust and confidence.
e. For substantially the same reasons I have set out above, placing the Claimants on full furlough was, in my judgement, not capable of breaching the implied duty of mutual trust and confidence.
f. Taking the final four points together, the Respondent's grievance policy was clear. Once a grievance had been intimated, it was required to invite the Claimants to a grievance hearing. It was not conditional on the grievance being further particularised – rather, the particularisation only needed to be provided before the hearing took place. The Claimants were not invited to a grievance hearing. Mr Carroll provided very little detail of the investigation he was said to have carried out. His position in that regard was inconsistent – he cannot have investigated a grievance if he had, as the Respondents lawyers had indicated in correspondence, no idea what the grievance was about. The failure to deal in any meaningful way with the Claimants' grievances was capable of contributing to a repudiatory breach of contract.

182. Turning then to the question of whether the Respondent had a reasonable and proper cause for its actions [LoI paragraph 4.5]:

a. The First Claimant signed the licensing agreement between the Respondent and Ittium. I conclude that he did reasonably believe he had the authority to enter into a contract of that value, in light of Mr Carroll's request at the Budapest meeting that he stop running contracts past Mr Carroll. It would have been odd if he could enter into contracts but not make payments required under them, so I conclude that he did have the authority to make payments of the value made to Ittium. The £100 limit related to small items of sundry expense rather than contracts for the core functioning of the business. In respect of the point about the balance in the Respondent's bank account, that is not in my judgement relevant, given that the aggregate balance across the Respondent's various bank accounts remained comfortably over £10,000 even after the

payment was made. However, I conclude that it must have been obvious to the First Claimant that it was inappropriate for him to sign the licencing agreement and make the payment to Ittium, in circumstances where:

i. He owned Ittium and would profit from the arrangement at the expense of the Respondent;
ii. The arrangement was a significant departure from the previous position, where the Respondent had been allowed to use the IP for free; and
iii. In the context of the Respondent's overall financial position, it was a very large sum of money (by way of comparison, it was equivalent to over two years pay).

b. The First Claimant refused to allow the Respondent access to another of its bank accounts. If, in his capacity as shareholder, he had concerns about the way that the director of the company was conducting himself, he could have used his power as a shareholder. Refusing to allow Mr Carroll to access the Respondent's bank account was, in my judgement, wholly unreasonable, given that Mr Carroll was the Respondent's sole director. All of the correspondence regarding the TransferWise account was between the First Claimants solicitors and the solicitors who variously described themselves as acting for either the Respondent or Mr Carroll. The Second Claimant was not asked for access to the TransferWise account, and I do not impute the First Claimant's failure to provide access onto her.

183. Taking the foregoing points together, the effect of the First Claimant's actions was to jeopardise the Respondent's ability to pay its staff and suppliers and keep trading. They did not, however, give the Respondent reasonable and proper cause for the acts which I have identified above as contributing to the breach of the implied term. They post-dated the failure to appoint the First Claimant as a director. They did not justify failing to pay the First Claimant, nor did they justify ignoring his grievance. Taken at its highest, the first point goes some way towards excusing Mr Carroll's email of 22 October; it does not, however, give him reasonable and proper cause to accuse an employee of criminality without proper investigation.

184. For the same reasons, and in light of my finding that the Second Claimant was not involved in paying the Ittium invoice or in the correspondence regarding the TransferWise account, it follows that the Respondent did not have a reasonable and proper cause for the same acts in respect of the Second Claimant.

185. I turn next to the question of the Claimants' resignation [LoI 4.6]

186. The most recent act or omission was the failure to pay the Claimant's pay for December 2020, which was due on or around 5 January 2021, and the failure to respond to the letter of 18 December 2020. The failure to pay occurred some 3 days before the Claimants resigned; the failure to respond to the 18 December letter around two weeks before that. The Claimants had not affirmed their contracts since that act.

187. The failure to pay was, as I have found above, in itself a repudiatory breach of contract.

188. Furthermore, both the failure to pay and the failure to engage with the letter of 18 December 2020 formed part of a course of conduct which, viewed cumulatively, amounted to a repudiatory breach of the implied duty of mutual trust and confidence.

189. In my judgement both of the Claimants resigned in response to that breach. I bear in mind that the First Claimant had secured other employment with effect from early December 2020. However, as I found above, if matters with the Respondent could have been resolved he would have continued working for the Respondent.

190. I therefore conclude that both Claimants were constructively dismissed by the Respondent.

191. In respect of the First Claimant, his actions in signing the licence agreement with Ittium then paying the invoices did, in my judgement, constitute gross misconduct. That is a potentially fair reason for dismissal.

192. At the point that the First Claimant resigned, while Mr Carroll clearly had a firm belief that both Claimants had committed misconduct, that belief could not be said to be founded on a reasonable investigation. No process had been followed; the Claimants had not been given the opportunity to state their case. It follows that the First Claimant's dismissal was unfair.

193. I have not found any misconduct by the Second Claimant. It follows therefore that the Second Claimant's dismissal was also unfair.

Polkey

194. I remind myself that when considering Polkey, I must decide what this employer would have done; not what a hypothetical employer would have done. There was simply no evidence before me from which I could

conclude that the Respondent would have dismissed either Claimant had they not resigned. Nearly three months elapsed between the payments being made and the Claimants resigning. Although the parties were exchanging correspondence via their lawyers, no steps were taken to commence a disciplinary process in respect of either Claimant. I therefore do not find that the First Claimant would have been dismissed in any event.

195. I reach the same conclusion in respect of the Second Claimant, further bolstered by my finding that she had not committed any misconduct. Furthermore, I do not consider that she would or could have been fairly dismissed simply by virtue of the fact that the First Claimant had resigned. She was, prior to furlough, fulfilling an important role for the Respondent. While a *Polkey* deduction inevitably involves a degree of speculation, it is in my judgment fanciful to suggest that her husband's departure would have led her to be fairly dismissed from the Respondent's employment.

Contributory fault

196. I have already found that the First Claimant committed gross misconduct in signing the licence agreement with Ittium, and paying the Ittium invoices. He had a significant conflict of interest, which he must have realised. His conduct in doing so was, in my judgment, entirely culpable.

197. The breach of the pay term occurred after the First Claimant's culpable conduct. So did the acts which cumulatively breached of the implied term of mutual trust and confidence, save for the failure to make him a director. In my judgement, that point on its own would not have constituted a breach of the implied duty of mutual trust and confidence.

198. Looking at the situation in the round, and bearing in mind the seriousness of the First Claimant's conduct, I conclude that it is just and equitable to reduce his basic award and compensatory award by 100%.

199. I have found that the Second Claimant was not involved in signing the licence agreement with Ittium, paying the Ittium invoices, or withholding access to the TransferWise account. It was not suggested to me that she was guilty of any other culpable conduct. Therefore, I find that it is not just and equitable to make any reduction to the compensation payable to the Second Claimant.

Wrongful dismissal

200. For the same reasons as set out above, I find that both Claimants were wrongfully dismissed, in that they resigned in response to the repudiatory breaches by the Respondent of their contracts of employment.

Failure to provide written particulars

201. Neither Claimant was provided written particulars.

Holiday pay

202. It was agreed by both Counsel that quantification of any holiday entitlement should be dealt with as a remedy issue.

Employment Judge Leith
Date: 7 April 2022

Reserved Judgment & reasons sent to parties: 21 April 2022

FOR THE TRIBUNAL OFFICE