Case No: 3311713/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Peter Richards	v	M-Solv Limited

Heard at: Cambridge (by CVP)

On: 22, 23, 24 and 25 March 2022
28 and 29 March 2022

Before: Employment Judge Tynan

Appearances:
For the Claimant: Ms G Churchhouse, Counsel
For the Respondent: Mr M Humphreys, Counsel

JUDGMENT having been sent to the parties on 11 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is a claim presented to the Employment Tribunals on 14 September 2020 following Acas Early Conciliation between 31 July and 27 August 2020. The Claimant claims that he was unfairly dismissed; he pursues what, for convenience, may be referred to as an 'ordinary' unfair dismissal complaint pursuant to Section 98 of the Employment Rights Act 1996, and also a complaint of automatic unfair dismissal pursuant to Section 99 of the 1996 Act.

2. The Claimant gave evidence to the Tribunal and, on his behalf, I heard evidence from two of his former colleagues, Mr Campbell Mackie and Mr Alan Oliver, both of whom were employed as Engineers and had a close working relationship with the Claimant. For the Respondent, I heard evidence from: Dr Philip Rumsby, its Chief Executive since its inception and also a shareholder in the company; David Brunt, who was employed as Manufacturing BU Director at the date of the Claimant's dismissal; Ms Amanda Avis, who was employed by the Respondent as Resourcing and HR Manager from 30 March 2020 until 29 September 2021 and provided HR advice in relation to the Claimant and more generally; Janet Donovan, its Chief Finance Officer; and Dr Adam Brunton, who was appointed to the

role of Tools Business Unit Director in 2020 over the Claimant. Dr Brunton attended Tribunal at my request to give evidence in circumstances where it was suggested that he had been led to believe that the role would be his prior to the appointment process.

3. The Claimant was employed by the Respondent, latterly as Director of Engineering, from 3 September 2007 until 2 July 2020 when he was dismissed on grounds of alleged redundancy. The Claimant disputes that this was the real reason why he was dismissed. He contends that he was dismissed because he exercised, or sought to exercise, his right to parental leave and / or paternity leave and / or to take time off to care for a dependent, namely his daughter.

4. Given his length of continuous service, the Claimant does not have the burden of proof as to the reason why he was dismissed. Instead, it is for the Respondent to establish the reason for his dismissal. If that reason falls within Section 98 of the Employment Rights Act 1996 it is then for the Tribunal, applying a neutral burden, to determine whether or not the dismissal was fair in all the circumstances. If the reason for dismissal falls within Section 99 of the 1996 Act, the dismissal is automatically unfair regardless of how it was handled by the Respondent.

The Claimant's request for Dr Rumsby to be recalled

5. Late on the fourth day of the Hearing, having identified with Counsel on the first morning of the Hearing that the witnesses' evidence would need to be concluded by the end of the fourth day, Ms Churchhouse sought for Dr Rumsby to be recalled. The potential for him to be recalled arose earlier that day in the course of the Claimant's evidence. I declined to accede to the request and Ms Churchhouse immediately requested that I provide written reasons for my decision as part of my written reasons for the substantive judgment, thereby suggesting that the Respondent at least potentially already had in mind that it may wish to pursue matters further. As expressed, it was a pointed intervention and a little unhelpful in circumstances where the Tribunal had yet to hear the parties' submissions, make findings or come to any judgement. I have worked to the assumption that it was a hastily, slightly ineloquently, expressed request, made in the pressure of the moment.

6. The request to recall Dr Rumsby arose in the following context. The Claimant began giving his evidence just after 3pm on the third day of the Hearing. He was questioned about the stated financial rationale for a restructure that resulted in various redundancies, before then being asked about what consultation there had been with the Senior Leadership team about the company's proposed revised strategy, including two proposed new roles, namely R&D Business Unit Director and Tools Business Unit Director. Amongst other things, Dr Rumsby was taken to page 314 of the Hearing Bundle, namely an email from Dr Rumsby timed at 15:10 on 17 April 2020 attaching draft job descriptions and inviting comments on these from the seven Senior Leaders by Monday 20 April 2020. Further questions of Dr Rumsby on this issue focused on whether and, if so, to what extent Dr Rumsby had taken on board the Claimant's feedback on the job descriptions, in particular the Claimant's primary concern that the

draft job description for the Tools Business Unit Director role had indicated that a PhD or Masters would be a key qualification for the successful candidate, a qualification he lacked.

7. On day four of the Hearing, Mr Humphreys' questioning moved on to the issue of voluntary redundancy and the particularly contentious issue of the redundancy scoring process. I believe sometime after 11am the Claimant asked the Tribunal if he could raise a point and said there was a document he wished to refer to. The document in question was at page 313 of the Bundle. It was an email exchange between Dr Mickey Crozier and Dr Rumsby, culminating in an email timed at 08:10 on 17 April 2020, that the Claimant felt evidenced that they had been discussing the R&D Business Unit Director role and, further, that Dr Crozier may have had advance sight of the job descriptions for one or both Director level roles.

8. Evidence on this issue had not been included in the Claimant's witness statement and Ms Churchhouse had not sought to introduce it by way of evidence in chief, notwithstanding I had allowed an extended break following the conclusion of the Respondent's evidence to enable her to consider whether there were any particular issues that may need to be addressed in chief. Nonetheless, I allowed the Claimant to give evidence on the matter even though it did not directly arise out of the matter he was then being questioned on. Ms Churchhouse wished to go further by recalling Dr Rumsby to be questioned about the email. Mr Humphreys objected and I upheld his objections. The email was not a document that had been introduced late in the proceedings or in the course of the Hearing itself, rather it was within the agreed Hearing Bundle and there was every reasonable opportunity therefore for the document to be addressed in the Claimant's witness statement, or failing that in evidence in chief and / or during cross examination of Dr Rumsby.

9. In terms of the overriding objective and achieving fairness and justice between the parties, I considered that the balance in this regard lay in allowing the Claimant to effectively give evidence in chief on the matter in the course of cross examination, but not in allowing the Respondent a second bite of the cherry in terms cross examining Dr Rumsby, particularly at 4.30pm or thereabouts at the end of the parties' evidence on the fourth day of the Hearing in circumstances where I had been bringing keen pressure to bear on Mr Humphreys to trim his cross examination of the Claimant to ensure that both liability and, as appropriate, remedy could be dealt with within the time allocated to the case.

10. I am satisfied that each side was afforded a fair, reasonable and proportionate opportunity to put its case and to test the case of its opponent. I believe it was just and proportionate to draw a line in circumstances where, as it was, during Dr Rumsby's cross examination, Ms Churchhouse had revisited certain issues that she had previously moved on from. The Claimant cannot reasonably complain that he was denied the opportunity to put his case or to test the Respondent's case on this issue in circumstances where Ms Churchhouse was able to cross examine Dr Rumsby for a full day. Ms Churchhouse suggested some injustice or lack of evenhandedness insofar as I had secured Dr Brunton's attendance at Tribunal. Whilst I consider the two issues to be unrelated, in

any event, of the two parties, I consider the Claimant was the principal beneficiary of my decision in relation to Dr Brunton since it afforded Ms Churchhouse the opportunity to cross examine him on a central plank of the Claimant's case; namely whether the outcome of a competitive interview process was predetermined and why he had written an email in the terms he did on 27 April 2020. Ms Churchhouse's professed sense of grievance on behalf of the Claimant was misplaced. Mr Humphreys who might have had greater cause to be disappointed with my decision in relation to Dr Brunton, assisted the Tribunal and Ms Churchhouse by ensuring a statement was prepared overnight for Dr Brunton which further equipped Ms Churchhouse for the task of cross examination.

Disclosure

11. I shall deal briefly with certain disclosure issues raised by Ms Churchhouse. In her skeleton argument, Ms Churchhouse suggested there may be grounds to strike out the Response for disclosure failings on the part of the Respondent, a submission that was not developed further in her oral submissions. However, she submitted, in the alternative, that adverse inferences should be drawn against the Respondent.

12. I was not apprised of the history of the disclosure process in the proceedings and there is no Solicitors' correspondence on the subject in the Hearing Bundle. I was not told that there had been any applications for disclsoure. Of the five documents referred to in paragraphs 1 and 2 of Ms Churchhouse's skeleton which are cited in support of adverse inferences being drawn in the matter:

    a. I have re-read the Claimant's witness statement and can find no reference to the Claimant or his colleague, Mr Milne having had job descriptions for their respective roles as Director of Engineering and Director of Systems Engineering;
    b. I question the relevance of the Respondent's disciplinary policy given, as I shall return to, Ms Donovan's findings in the Disciplinary Investigation were based on undisputed admissions made by the Claimant when they met on 16 June 2020. In any event there is no evidence before me that a copy of the disciplinary policy was requested by the Claimant's Solicitors or that the Respondent failed to make it available for inclusion in the Hearing Bundle;
    c. It is suggested that Ms Avis' advice was not disclosed. However, there was clear evidence of HR advice within the Hearing Bundle - for example, at pages 307, 309, 311 and so on. Dr Rumsby was evidently mistaken on this issue when he conceded during cross examination that there was no such advice in the Bundle and any misunderstanding in this regard was cleared up by Ms Avis when she gave evidence. As I shall return to she was a reliable witness;
    d. As regards the Claimant's appraisals, his witness statement is essentially silent about these, other than he says he went to the Respondent's offices on or around 27 April 2020 to secure copies. His account of that visit focuses upon certain emails discovered by him but otherwise fails to indicate whether he ever located the appraisals at the time, or indeed whether he had any copies of his own at home or otherwise in his possession. I accept Dr Rumsby's

evidence that he has been unable to find the appraisals in spite of an extensive search. There is no proper basis for me to conclude, as was suggested to Dr Rumsby, that they were deliberately destroyed by him to hinder the Claimant in these proceedings.

Section 99 of the Employment Rights Act 1996

13. The List of Issues identifies that the complaint under s.99 is pursued in combination with Regulation 13 of the Maternity and Parental Leave Regulations 1999. However, a degree of confusion was caused by the fact that the case had been pleaded with reference to both paternity leave and parental leave, and that these terms had been used somewhat interchangeably. Whilst I am of the view that the Claimant intends to pursue his complaint primarily by reference to the fact that he had taken paternity leave in 2019 and time off for a dependent in 2020, nothing ultimately turns on which form of 'family leave' was involved. Having considered Regulation 29 of the Paternity and Adoption Leave Regulations 2002, what has to be decided in each case is whether the paternity leave, parental leave or unpaid leave for dependents, as the case may be, was the reason or the principal reason why the employee was dismissed and / or selected for redundancy.

Findings of Fact

Background

14. The Claimant and Dr Rumsby worked together for over 20 years. They were initially colleagues at Exitech Ltd, a company owned by Dr Rumsby. After Dr Rumsby left the company he approached the Claimant in 2007 to join him in a new business venture, namely at the Respondent. The Claimant joined the company as a statutory Director and investor. His 5% shareholding was held in trust for him by Dr Rumsby.

15. By the time of the events the Tribunal is concerned with, the Claimant was employed in the role of Director of Engineering. The company's growth and evolution over the preceding years is indicated in a series of organograms starting at page 114 of the Hearing Bundle. These evidence that in October 2008 the Claimant had line management responsibility for Systems, Mechanical Design, Electrical Design, Software, Project Engineer and Commissioning. These continued to be his areas of responsibility until the second half of 2010 when Mr Milne either alone or in conjunction with others assumed responsibility for Software and Commissioning. Mr Milne's role or area of the business was more clearly identified at this time as being Technology, albeit a year later his role was identified as R&D Resources Manager, albeit with aspects of technology clearly still within his remit. The pace of change continued and by the beginning of 2013 there were two Technology Groups, albeit Software Design sat within the Claimant's area of responsibility. The position from the second half of 2014 is less clear. Software no longer appears as a function within the organograms. The Claimant's documented areas of responsibility at that point in time were Design & Engineering, Control Systems and System Development.

16. In spite of his breadth of experience, particularly in the first few years of the Respondent's existence as a start up company, the Claimant remains at heart a Mechanical Engineer; that is where his undoubted expertise lies. By his own admission his strengths do not lie in business development, nor in my judgement do they lie in financial management.

17. The organograms also confirm that responsibility for HR issues has, since at least 2011, been identified as within the remit of the Finance and Admin function. HR has certainly been within Ms Donovan's remit throughout her time with the Respondent; she joined the company in May 2018.

<u>The Respondent's trading and financial position</u>

18. Dr Rumsby provides a potted history in the background section of his witness statement. He was not questioned about this, including his evidence at paragraph 10 of his statement that the Respondent's parent company, CN Innovations Ltd ("CNI") has invested approximately £9.1 million in cash into the company, and, that the Respondent has been dependent upon this significant investment and support in order to continue as a going concern.

19. The Claimant acknowledged, as he was bound to, the scale of the Respondent's accumulated losses, namely in excess of £5.6 million as at 31 December 2019, and that the audit of accounts recorded material uncertainty related to going concern. The Respondent's parent company addressed these losses by the provision of written undertakings to provide financial support. The trading losses are summarised at paragraph 27 of Dr Rumsby's witness statement. By 31 December 2020, the end of the year in which the Respondent restructured and reduced its headcount by upwards of 40%, the accumulated losses for the company were approximately £9.5 million.

20. By 13 April 2020, when the Respondent was embarking upon a significant restructuring exercise and, as Dr Rumsby shared with the Senior Leadership team including the Claimant (page 315 onwards), the projection following that restructure was for the Respondent to achieve an end of year loss of £55,000, the company returning to profitability in the final quarter only after two initial quarters of heavy losses i.e. in the region of £0.5 million per quarter. The Tools part of the business was expected to experience a significant fall in revenue, albeit with a significantly improved profit margin. Individual profit and loss accounts for the restructured business projected significant losses within Tools in the first half of 2020, before a marked return to profitability in Q4. Losses were projected to continue throughout the year in R&D, with Manufacturing remaining profitable throughout the year.

21. Whether and, if so, to what extent the financial performance of the Tools part of the Respondent's business, or indeed its wider business, was attributable to the Claimant, to Dr Rumsby, to others within the business, to decisions and behaviours within the wider group or to the prevailing national and global economic environment, is not my primary focus within these proceedings. It is certainly not the function of Tribunals to step into the shoes of those who are responsible for running businesses or to

second guess their business strategies and decisions. A redundancy situation may exist notwithstanding an otherwise sound business has been run into the ground as a result of mismanagement or in pursuit of an ill advised strategy.

22. In one exchange during cross examination, the Claimant said that Dr Rumsby and Dr Brunt had over-promised to clients over many years, and that they had concluded sales which the Claimant and his colleagues could not deliver to budget or on time. He said that Dr Rumsby had thrown him under a bus to save his own skin. If so, that detracts somewhat from the Claimant's case that the reason or principal reason he was dismissed was for taking family leave.

23. The Claimant disputes Dr Rumsby's assessment at paragraph 30 of his witness statement as to the immediate impact of the Covid pandemic on the Respondent's business in early 2020. If so, this was something that might have been raised by the Claimant during the redundancy consultation process. However, there is no evidence that it was. Be that as it may, the Claimant accepts that on 17 March 2020 British Growth Fund Investment Management Ltd ("BGF") confirmed that it was putting on hold a proposed multi-million pound financial investment in the Respondent in light of the uncertain situation. He further accepts that ongoing funding from CNI at that time was conditional upon a headcount reduction that would enable the Respondent to reduce its operating costs significantly.

24. In the course of his evidence, the Claimant sought to emphasise that there was significant unrealised potential value in the Respondent and accordingly why he felt that the financial information and other circumstances outlined above present an incomplete picture. Putting aside that there is no evidence that he raised this in the consultation process, I consider his evidence in this regard to have been a little naive. Companies are in business to make a profit and indeed can only continue to lawfully trade as long as they can meet their liabilities as and when these fall due. The Respondent was only able to continue trading because its trading position was being underwritten by its parent. In the short term, businesses can rarely grow their way out of trading losses. Instead the generally recognised and long established response to trading losses is for a company to retrench and to reduce its operating costs; frequently, this will involve a reduction in headcount, given that staff costs are invariably a significant element of the company's operating costs and are capable of being reduced within a relatively short timescale, whereas sales and costs associated with buildings and services are much less easily addressed in the short term. In my judgement, it does not really matter what the Respondent's potential was in March 2020 if a significant potential investor was unwilling to commit to invest in the business as a result of uncertainties caused by the Coronavirus pandemic and the parent company's ongoing support was conditional upon implementation of significant cost savings.

<u>Dr Rumsby's attitude towards the Claimant's family circumstances</u>

25. On 24 March 2019, the Claimant's wife gave birth to their daughter.

Although the claim of automatic unfair dismissal is pursued by reference to the fact the Claimant took family leave, in his evidence the Claimant referred to the relationship between himself and Dr Rumsby as having changed once Dr Rumsby learned that he was starting a family ie, before he had taken any statutory leave or sought to exercise his rights in that regard. Dr Rumsby denies the Claimant's allegations that on a number of occasions he questioned the Claimant's commitment to his job. The first such alleged occasion is referred to in paragraph 9 of the Claimant's witness statement. The Claimant alleges that in November 2018 there was heavy snowfall overnight and that his wife, who was then approximately five months pregnant, was unwell. The Claimant asked to work from home. I accept his evidence that although his request was agreed to by Dr Rumsby, the following day Dr Rumsby made comments to the Claimant that called into question his commitment and/or priorities.

26. Dr Rumsby's evidence is revealing in terms of his general attitude and was reinforced by Mr Oliver and Mr Mackie, both of whom described Dr Rumsby as someone who regarded staff personal lives to be secondary to the interests of the business.

27. Whilst Dr Rumsby is undoubtedly an intelligent individual, having heard his evidence I question his emotional intelligence and people skills. He is clearly a workaholic, something I do not think he would disagree with. For example, on Sunday 19 April 2020 Dr Rumsby was at work in the morning and in an email exchange with the Claimant said,

> *"Unusually I have got something on this afternoon".*

Many of Dr Rumsby's emails in the Hearing Bundle are brief and contain few, if any, pleasantries. As I say, his testimony at Tribunal was revealing. Amongst other things, he said,

> *"Anything that means someone is not doing everything required to get the company out of its situation is damaging to the company."*

He went on to refer to the Claimant's projects being late and over budget and that anything that further impacted this was detrimental.

28. Dr Rumsby accepted that it was reasonable for the Claimant to want to be with his pregnant wife in November 2018, but then qualified this on the basis "*as long as the work got done*". He was taken by Ms Churchhouse to emails in the days following the Claimant's daughter's birth, and was asked whether the fact that the Claimant had started a family was something he saw as having the potential to disrupt the business. His candid response was,

> *"Anything that distracted from the business could be a threat to the business."*

29. His responses, or more correctly lack of responses, to a number of emails from the Claimant, is equally revealing. He said at Tribunal that he had great respect for the Claimant and considered him a friend, that he congratulated the Claimant and his wife on the birth of their daughter and

that his wife sent the Claimant a gift on their behalf. Nevertheless, when the Claimant said in an email to Dr Rumsby that his wife was experiencing discomfort following the birth, there was no acknowledgement from Dr Rumsby, instead purely a focus on business issues. I refer in this regard to paragraphs 22 and 23 of Dr Rumsby's witness statement. Whilst I accept Dr Rumsby's evidence that his primary concern was how the Claimant's department had been running whilst he had been away on leave, the fact Dr Rumsby thought it appropriate to comment upon the impact of the Claimant's absence in the period immediately following the birth (of what I understand to have been the Claimant's first child) is again revealing in terms of his attitude.

30. The Claimant alleges that, on presenting the Claimant with a gift voucher on 8 April 2019 to mark the birth of his daughter, Dr Rumsby commented that he had not contributed to the voucher nor wanted to do so. The allegation is denied by Dr Rumsby. On this specific issue I prefer Dr Rumsby's evidence and accordingly do not uphold the allegation. I accept Dr Rumsby's evidence that the voucher was purchased by the company, rather than through a staff collection, and in those circumstances that there would have been no reason for him to make such a comment.

31. A few weeks later, an email from the Claimant in May 2019 regarding childcare issues went unanswered by Dr Rumsby. At Tribunal, he said it did not require one. I disagree.

32. In June 2019, the Claimant wrote in detail to Dr Rumsby regarding a planned reorganisation at the company that would impact his role and position. His email concluded,

> *"I know you are concerned my starting a family will impact my ability in future to hold my current position…"*

I note that the Claimant identified the issue, as he then perceived it, to be that he was starting a family rather than specifically that he had taken, or proposed to take, family leave. Dr Rumsby did not respond in writing to the Claimant's email. Whilst I find that Dr Rumsby engaged with and spoke to the Claimant about other aspects of the email, I find that he never addressed this issue in discussion with the Claimant other than to continue to express concern that any issues or responsibilities, or even interests, outside work should not get in the way of ongoing efforts to turn around the business.

33. When the Claimant emailed Dr Rumsby at 5.13pm on Friday 2 August 2019, to say that he would be late in on the following Monday as his daughter had her injections, Dr Rumsby responded,

> *"This is very disappointing".* (page 262)

It is not the Respondent's case that this particular time off was pursuant to s.57A of the Employment Rights Act 1996.

34. When the Claimant emailed Dr Rumsby at 3am on 29 January 2020 to let him know that his daughter had been progressively unwell and on the

advice of the family's GP she had been taken her to hospital, albeit she was then back home, there was no expression of concern in Dr Rumsby's response, no acknowledgement by him that this was a worried parent emailing in the middle of the night to explain their predicament yet also acknowledging, indeed apologising for, any inconvenience and proposing a solution for a planned business trip that week. Instead, Dr Rumsby wrote,

> *"Pete,*
> *I can't reschedule, it really needs a designer to see the tool and understand what modifications are required. What about Matt? Phil."* (page 298)

Ms Churchhouse not unreasonably suggested to Dr Rumsby that his response was callous. He had expressed no concern for the child, her mother (the Claimant's wife) or the Claimant himself notwithstanding he was Dr Rumsby's colleague and alleged friend of over 20 years. His only explanation at Tribunal was, *"that's my style"*, but that it did not mean he was uncaring. I disagree. I find it was thoroughly uncaring.

35. When the Claimant returned to work after three days out of the business, Dr Rumsby asked to speak with him in a private room when he asked the Claimant whether he could give his job his full attention given his various responsibilities.

36. Emails on 18 February 2020 and 16 March 2020, from the Claimant to Dr Rumsby about working from home due to childcare and related issues, went unanswered. As did an email on 24 March 2020, the second day of the national lockdown, regarding the Claimant's concern as to bringing infection home given a family history of lung infection. Again, I find Dr Rumsby's attitude to have been uncaring.

<u>The restructure proposals</u>

37. The Claimant alleges that within a few weeks of his daughter's birth in March 2019, Dr Rumsby was seeking to secure his removal and he relies in this regard upon proposals brought forward by Dr Rumsby on or around 31 May 2019, including the proposed recruitment of a Chief Operating Officer. This led to the Claimant's email of 3 June 2019 already referred to in which he questioned whether his family commitments were an issue for Dr Rumsby. If the Claimant is right that Dr Rumsby had resolved by May 2019 to remove him, this might indicate that the Claimant's subsequent three day absence from the business in January 2020 was not therefore a material factor in a decision that had already been taken, though of course it might have reinforced Dr Rumsby's thinking.

38. I think it is relevant to look further back in time for the full context and background. On 3 June 2018, Dr Rumsby emailed the Claimant over the weekend. He was working as usual. He wrote,

> *"… I am really worried about our ability to deliver on projects. Even without any new POs we are in a dark position, we are late on almost all third party projects"*

He went on to say,

> *"All that makes me really worried. We have the opportunity to expand the business in line with our agreed 2020 plan but at the moment I cannot see us getting close. Instead we are in serious danger of overtrading."* (page 103)

39. In the context that the Respondent's trading losses had increased significantly from £125,000 to £2,028,000 between 2017 and 2018 (and would increase further in 2019), it is hardly surprising that CNI, which was funding those losses, should have brought pressure to bear on Dr Rumsby to address them. I accept his evidence that in October 2018 CNI's managing director, Mr Charles Chong travelled to the UK from Hong Kong and expressed concern to Dr Rumsby as to the Respondent's viability and made clear that CNI's ongoing financial support was predicated on him stemming its losses. Dr Rumsby was tasked by Mr Chong with producing a business plan that would address the Respondent's operating costs.

40. On 12 October 2018, Dr Rumsby asked the management team to take a 10% reduction to their remuneration. The majority, including the Claimant, refused. Dr Rumsby himself agreed to a very significant salary reduction.

41. I accept Dr Rumsby's evidence that in the first half of 2019, he came under renewed pressure from Mr Chong to address the company's performance. Mr Chong proposed the appointment of a Chief Operating Officer, something that had been implemented some months earlier in the Respondent's sister company, Winsky. I find these developments had nothing to do with the fact the Claimant had recently become a father, but were driven by CNI and Dr Rumsby's need to demonstrate to CNI that there was some strategic plan of action to address the significant loss making situation the Respondent was in.

42. I do not agree with the Claimant that by May 2019 Dr Rumsby was embarked upon some plan of action to force him out. I note in this regard that under the May 2019 proposed restructure involving the appointment of a COO, whilst the Claimant would no longer be a member of the company's Senior Leadership team or sit on the board, he would not experience any reduction in his pay. In the event, although a COO was recruited, the Claimant and Mr Milne, whom it had also been proposed would be removed from the Senior Leadership team, remained part of it. The Claimant was closely involved in the appointment of Mark Turner as COO. Mr Turner commenced with the Respondent on 3 October 2019 but was let go during his probation period in February or March 2020, as part of a range of measures to reduce the Respondent's operating costs.

43. In June 2019, Dr Rumsby produced an Investor Update for a CNI Board presentation. It identified a need for significant investment in the region of £10 million. It further identified that Winsky had the commercial links and the Respondent the requisite technology to achieve rapid growth in revenues in the field of flexible touch screen technology.

44. By 1 July 2019, the Respondent was pitching to BGF for investment. I

accept Dr Rumsby's explanation as to the reasons why the Claimant and indeed others were not closely involved in those discussions, albeit that they were kept apprised of their progress. Specifically, I accept his evidence that BGF was considering making an investment with reference to new manufacturing process technologies that were within Dr Brunt's area of expertise and that the Claimant would have been unable to contribute significantly, or indeed very much at all, to the ongoing discussions and negotiations.

45. I also accept Dr Rumsby's evidence that notwithstanding the discussions and negotiations with BGF, CNI continued to bring pressure to bear upon Dr Rumsby to address the Respondent's loss making situation.

46. In early 2020, Mr Chong approached Dr Rumsby regarding a restructure of the Respondent's operations. After at least 18 months of discussions, I find that CNI was no longer willing to underwrite the level of trading losses then being incurred by the Respondent. I accept Dr Rumsby's evidence that CNI was demanding immediate action.

47. In terms of the chronology of events, I have referred already to the Claimant's daughter having been briefly hospitalised in January 2020. The Claimant was away from the business for three days and his absence was treated as paid annual leave, though his absence was clearly in order for him to look after a dependent. Several days earlier, a headcount reduction plan had been formalised under a range of potential scenarios. They are at page 296 of the Hearing Bundle. Under the first scenario, headcount was planned to reduce by seven by the end of Q1 2020 and by 20 by the end of Q2 2020. It is a little unclear whether the latter figure was inclusive of the Q1 headcount reduction, but at the very least, under that scenario, total headcount in the company would reduce by about 30%.

48. Dr Rumsby shared this plan with the Claimant on 18 January 2020 on the basis he said the Claimant was best placed to understand the new projects and resources required. He was seeking his views on the most likely realistic scenario. In a case in which the Claimant complains of being excluded by Dr Rumsby, for example from the discussions and negotiations with BGF, it is notable that Dr Rumsby brought the Claimant into his confidence at this point in time. It is clear from Dr Rumsby's 18 January 2020 email at page 292 of the Hearing Bundle that the COO was not apprised of the plan. There is no indication on the face of the email that this formative plan was shared with other members of the the Senior Leadership team other than Ms Donovan as CFO. Dr Rumsby's actions in bringing the Claimant into his confidence and seeking his input are at odds with the Claimant's suggestion that Dr Rumbsy had a long standing, or even a recently formed, intention to remove him.

49. As is well known, the global economy suffered a major shock in February/March 2020 as a result of the Coronavirus pandemic. I find this injected a greater sense of urgency and focus to the situation.

50. Dr Rumsby's evidence in his witness statement that 16 staff were placed on furlough, that staff hours were reduced, that the COO was released immediately and that the Senior Leadership team took a 20% pay

reduction (in Dr Rumsby's case, on top of his already reduced salary) was not challenged by the Claimant. The pay reductions remained in place until late 2021. Dr Rumsby gave further unchallenged evidence as to additional financial pressures resulting from an outstanding loan to HSBC.

<u>The consultation process</u>

51. On Friday 3 April 2020, Dr Rumsby presented restructuring proposals to the Senior Leadership team under which the company's existing five departments would be reconfigured as three Business Units; namely, Tools, Manufacturing and R&D. This reflected a revised strategy under which Tool design and build resources would be reduced significantly and the Respondent's manufacturing operations, led for several years by Dr Brunt, would grow (page 561). Under the draft proposals there would be a 40% reduction in operating costs and a 37% reduction in staff and contractors, though the reduction in headcount in the Tools related part of the business would be more pronounced.

52. At paragraph 29 of his witness statement, the Claimant states that the planned reorganisation was communicated on 17 April 2020. He is mistaken in this regard. The reorganisation was formally presented to the Senior Leadership team on Friday 3 April 2020. The Claimant's email of 3 April 2020, at page 304 of the Hearing Bundle, evidences that he engaged immediately with the proposals. Curiously, given his complaint in these proceedings as to how the consultation and recruitment process was handled, he proposed that David Milne who headed up Systems Technology (one of the three Tools groups) should be placed in charge of R&D and that Dr Crozier, who headed up Process Technology, the third Tools group, should become a Technical Lead or else redeployed into Sales. It is unclear from his email what he envisaged might become of Dr Brunton who at the time headed up Business Development and Sales. Be that as it may, in his comments on 3 April 2020 the Claimant did not challenge the proposed new structure, or the proposed very significant reduction in headcount in Tools. The tenor of his email is that he assumed he would lead the new Tools Business Unit. He wrote,

> *"We are going to find it hard to find tech leads".*

53. I consider that the Claimant's email of 3 April 2020 was not the email of someone who believed at that time that there was a plan to remove him, or that his position was vulnerable on the back of having taken three days' leave in January 2020, or paternity leave or parental leave in 2019. On the contrary, his comments above suggest that he entered the process confident of his position.

54. As part of the documented follow up actions (page 306), the Senior Leadership were to comment on the proposed structure at page 6 of the strategy presentation (page 565) by 6 April 2020. There are no documents in the Hearing Bundle evidencing any challenges to the overall strategy. I return to the matter of the Claimant's subsequent representations on 19 April 2020.

55. In an email dated 15 April 2020, (page 309), Dr Rumsby referred to the

fact he would be inviting Dr Brunton, the Claimant and Mr Milne to apply for the Tools Business Unit Director role, with applications to be submitted by 24 April 2020 and a decision as to the successful candidate by 1 May 2020. There is no reference in that email to the R&D Business Unit Director role. I find that was not an oversight on Dr Rumsby's part, rather I infer that at that point Dr Rumsby expected Dr Crozier to be appointed to the role, something that is further supported by the email exchange at page 313 of the Hearing Bundle, in which Dr Rumsby evidently shared the draft job description for the R&D Business Unit Director role with Dr Crozier a day before it was shared with the rest of the Senior Leadership, including Mr Milne who would go on to apply for the role.

56. Ms Avis who had joined the Respondent as Resourcing and HR Manager on 30 March 2020, advised as to the implementation of the proposed restructure and provided Dr Rumsby with a detailed bullet point structure for a Senior Leadership team meeting scheduled for 17 April 2020 (page 310). Ms Avis proved a particularly reliable witness. She was highly articulate, and her evidence at Tribunal was consistently detailed, focused and evidence based.

57. The proposed strategy and structure having been communicated by Dr Rumsby on 3 April 2020, Ms Avis' advice (page 311) was that Dr Rumsby should confirm the structure on 17 April before then going on to outline the process for the appointment of the Directors of the R&D and Tools Business Units, including that there would be an opportunity to comment on the draft job descriptions. She identified that Dr Rumsby would also explain to the Senior Leadership team why the role of Director of Manufacturing was not at risk and why Dr Brunt was not being placed in the selection pool and / or expected to re-apply for his job. This addresses Ms Churchhouse's submission that the Respondent did not turn its mind to the composition of the selection pool. I find that it did in fact turn its mind to the issue and that Dr Rumsby explained this to the Senior Leadership team on 17 April 2020.

58. In my view, the meeting structure recommended by Ms Avis in her email to Dr Rumsby of 17 April 2020 was unexceptional. Indeed, it was well, and carefully, thought through.

59. Following the meeting on 17 April 2020, Dr Rumsby circulated the final strategy, structure and budget for 2020 to the Senior Leadership. He confirmed that this was approved by the parent CNI. The Claimant and his colleagues had by then had 14 days in which to consider and comment upon it. As I have already noted, the Claimant raised no immediate objections to it.

60. The original draft job description for the Director of Tools is at pages 340 - 341 of the Hearing Bundle. The Claimant was concerned to note that a PhD Masters in Engineering, Physics or similar was stated to be one of the key skills and qualifications. Later that day, Mr Milne provided comprehensive comments on the job descriptions in an email to Dr Rumsby who in turn responded on Sunday 19 April 2020 describing them as all very relevant, albeit he emphasised to Mr Milne that the Respondent was to become a much smaller organisation.

61. The Claimant likewise sent a detailed email to Dr Rumsby (pages 355 and 356). It was timed at 13:49 on Sunday 19 April 2020. There had earlier been some confusion between them as Dr Rumsby believed they were due to speak at mid-day. In the first half of his email the Claimant set out his thoughts on the company's future structure, overlooking that the Senior Leadership's views had been sought on 3 April 2020 and the structure confirmed on 17 April 2020. The Claimant questioned whether the proposed structure would work and proposed a stand-alone business development function as well as a potential ongoing need for a COO within the organisation. He proposed that the CFO should no longer be part of the Senior Leadership and, again curiously given the complaints he pursues in these proceedings, said,

> *"this would also seem to be appropriate given our CFO is part time"*

The Claimant did not question that there should be a single Tools Business Unit, though as before he identified who should be appointed into the five Leadership roles regardless of the outcome of any appointment process (page 357).

62. Having then set out his comments on the draft job description for the Tools Business Unit Director role, the Claimant went on to question why, as a shareholding Director, he had not been more involved in the reorganisation discussions with CNI. It seems to me the evident answer is that he had an obvious conflict of interest in the matter. He also asked,

> *"Where do you see me fitting within the new organisation with my skills and experience?"*

I find that the Claimant had realised by then, possibly on receipt of the draft job description for the role of Tools Business Unit Director and given also that there was to be a competitive interview process, that he was not assured of appointment to the position. I consider that was his own assessment of the situation rather than because anything had then been said by Dr Rumsby or anyone else to suggest the outcome was predetermined. I conclude that he had identified in his own mind that Dr Brunton may be a strong contender for the Tools Business Unit Director role should he apply for it.

63. Dr Rumsby proposed a meeting on Teams with the Claimant the following afternoon. During that meeting Dr Rumsby confirmed that the strategy and structure could not be changed, having been approved by CNI at the end of the initial consultation period.

64. Revised job descriptions for the two Director roles were produced by Dr Rumsby on 22 April 2020. They were a significant evolution on the drafts previously circulated and I find this reflects that Dr Rumsby had genuinely sought to take on board the comments and concerns that had been expressed. However, the Claimant remained concerned about the continued reference to a PhD or Masters qualification within the Key Skills and Qualifications section. In fact, the matter had evolved in so far as the job description referred to a PhD or Masters "(or equivalent)" (page 370).

In any event, I find that it was not an essential qualification. Instead, the candidates' qualifications were just one of 16 criteria against which the three candidates for the Tools Business Unit Director role were to be assessed.

Meetings with Winsky and related issues

65. On 24 April 2020, the Claimant learned of a Business Strategy meeting on 22 April 2020 that had been attended by representatives from the Respondent and Winsky. Dr Rumsby had asked Dr Brunton and Dr Crozier to attend the meeting. It was attended on Winsky's side by Mr Eric Chong, its Marketing Manager. The Claimant became suspicious about the nature of the meeting and why he had not been invited. I find that he was understandably sensitive around the matter given the ongoing recruitment process and the uncertainty this created for him. However, there was no attempt By Dr Rumsby or others to hide that meeting from the Claimant. He attaches particular weight to an email dated 21 April 2020 at page 358 of the Hearing Bundle, a copy of which as I shall return he secured through improper means.

66. In confirming in the email of 21 April 2020 that Dr Brunton and Dr Crozier would attend the meeting on 22 April 2022, Dr Rumsby added the words 'Tools' and 'R&D' in brackets, respectively, after their names. However, in so doing, I find that he was responding to, or as Mr Humphreys described it, 'mirroring' the agenda put forward by Mr Chong. I find, in and of itself, that this does not evidence that Dr Rumsby had resolved to appoint Dr Brunton to the role of Tools Business Unit Director or necessarily Dr Crozier to the R&D role even if, by the previous week, he clearly had in mind that Dr Crozier would very likely be appointed to the R&D position.

67. Even if the Claimant had not been invited to the meeting with Winsky, there was no attempt to hide from the Claimant or others that the meeting had taken place. On the contrary, on the Claimant's own evidence at paragraph 36 of his witness statement, he was informed by Dr Rumsby that he had invited Dr Brunton and Dr Crozier to attend to speak respectively to Tools and R&D topics. The email of 21 April 2020 merely confirms this.

68. I regret that as is the case with someone who might search their partner's phone or diary for evidence of their infidelity, a narrative of deception took hold in the Claimant's mind and, as I set out below, he went in search of evidence that would support that narrative.

69. The Claimant additionally relies upon an email sent by Dr Brunton on 27 April 2020 to Eric Chong and others regarding 'busbar metalisation' (page 391). I accept Dr Brunton's evidence that when he wrote that,

> *"It will be great to work with you on this and other subjects. Looking forward to it"*

he was putting his best foot forward. He said at Tribunal, and I accept, that it was not a legal email, rather it was a friendly email between close business associates. I further accept his evidence, as the Claimant

seemed to do in the course of his own cross examination since he specifically relied upon what Dr Brunton had said, that he was ambivalent about staying with the Respondent even though it was during the early weeks of the pandemic. Unlike Ms Churchhouse, I attach no particular significance to the fact that he was then 50 years of age, as indicative that he may not have the confidence to move on.

70. The fact the meeting on 22 April 2020 took place, and that it was attended by Dr Brunton and Dr Crozier, is consistent with the Respondent's established strategy since at least summer 2019 to work in collaboration with Winsky to exploit its touch screen manufacturing technology and the latter's commercial links. I refer in this regard to page 183 of the Hearing Bundle.

71. Dr Rumsby continued to be transparent about the initiative, openly updating the Senior Leadership about it on 1 May 2020, including that Dr Brunton had again attended a meeting.

72. That is not to say that Dr Rumsby embarked upon the recruitment process for the two roles with an entirely open mind. As regards Dr Crozier, I have already confirmed my finding that he did not. Even allowing for the fact that, having worked with the Claimant, Mr Milne and Dr Brunton for many years, Dr Rumsby would inevitably have had a well informed sense of their respective skills, experience and attributes, the available evidence supports that Dr Rumsby subsequently approached the task without bringing to bear the requisite degree of objectivity and open mindedness that was required. As I shall come to in a moment, I have no such concerns in relation to his three colleagues on the recruitment panel.

<u>The recruitment process</u>

73. The Claimant, Dr Brunton and Mr Milne applied for the Tools Business Unit Director role. I accept Dr Brunton's evidence as to why he did not apply for the R&D role, namely that he regarded it as a retrograde step, having moved out of R&D at least a couple of years beforehand. The Claimant himself seems to have recognised this in the organisation chart he put forward on 19 April 2020, which did not envisage Dr Brunton being appointed to the R&D role. Instead, he believed the role should be filled by Mr Milne.

74. Ms Avis continued to advise on the process. The candidates were invited to prepare a presentation. There was some confusion between the Respondent's witnesses as to the extent, if at all, to which the presentation informed the outcome of the recruitment exercise. Dr Rumsby's understanding was that it was simply a means by which the candidates might settle into the interview, though his evidence in that regard is somewhat at odds with the comments he included on the candidate score sheets which indicate that their presentations did inform his thinking and, therefore, his scoring of them.

75. The Claimant felt wrong footed when informed at the start of the interview that he would only be permitted 10 minutes for his presentation. However, this was also true of the other candidates. If the Claimant has cause to

complain that this had not been communicated in advance, it was a complaint that might equally have been made by the others. In my judgement nothing turns on this.

76. Each member of the interview panel - Dr Rumsby, Ms Donovan, Dr Brunt and Ms Avis - was tasked with asking questions of the candidates in relation to specific skills. I find that each candidate was asked the same questions, albeit any follow up questions and discussion inevitably reflected the answers they had provided in response to the initial set questions. The adoption of a set of standard questions was intended to ensure consistency of approach and assessment. There were no defined scoring guidelines. There were 16 stated criteria against which candidates were assessed, including descriptions to accompany the criteria which provided at least some guidance. The criteria were each scored from 1 to 5, with 5 being the best. However, it was effectively ultimately for each of the panel to identify for themselves what each of the scores signified. None of the criteria were weighted more heavily than others, meaning the candidates were assessed by reference to a broad range of skills and criteria. If there were no scoring guidelines, the scores do at least confirm the order in which each of the panel ranked the candidates both overall and as against the 16 individual criteria.

77. I am satisfied that the panel, including Dr Rumsby, approached their task in good faith and that they scored the candidates independently of one another. Dr Rumsby and Dr Brunt were physically present together for the interviews, which took place either by phone or by Teams. Ms Donovan and Ms Avis attended remotely. It was not suggested to Ms Donovan, Ms Avis or to Dr Brunton that Dr Rumsby had influenced their scoring. Ms Avis readily accepted that she was only a few weeks into her role and did not therefore have an independent view of the candidates' respective performance in their current roles. In that sense she proceeded to score them by reference to their performance at interview, as might be the case with unknown external candidates in a recruitment exercise. I find that each of Dr Brunt, Ms Donovan and Ms Avis approached their task with an open mind. Dr Brunt may have been less eloquent than Ms Donovan and Ms Avis in terms of his evidence at Tribunal, but I am satisfied that they each approached their task in a structured, objective and evidence based way.

78. Dr Brunt was able to address any concerns I might otherwise have had as to his description of the Claimant's presentation as having "the flavour of therapy" and a "rambling mess". He satisfied me that these were not intended as pejorative comments, rather giving expression to what he saw as the Claimant's focus on where the Respondent was rather than how he might drive the turnaround that was evidently required.

79. I am not satisfied that the necessary objectivity was brought to bear by Dr Rumsby. In his cross examination of the Claimant and also in his closing submissions, Mr Humphreys sought to suggest there was a mixture of positive and critical feedback in Dr Rumsby's comments. That is a generous observation on his part. Whilst Dr Rumsby did identify the presentation itself as thoughtful, his comments in relation to the Claimant were otherwise overwhelmingly negative, with his only other positive

comment heavily caveated.

80. Dr Brunton's aggregated score in the process was 250, or 185 disregarding Dr Rumsby's scores. The Claimant's aggregated score was 213, or 166 disregarding Dr Rumsby's scores, and Mr Milne's aggregated score was 224, or 168 disregarding Dr Rumsby's scores. With or without Dr Rumsby's input, Dr Brunton was assessed as the strongest candidate by an appreciable margin. Disregarding Dr Rumsby's scores, Dr Brunton scored the same or more highly than the Claimant in 14 out of the 16 selection criteria. The Claimant scored more highly than Dr Brunton in terms of his inter-personal skills and on quality.

The 'misconduct' issue

81. On 4 May 2020, the Claimant and Dr Brunton were emailed about an upgrade to their phones (page 406). When Dr Brunton indicated his preferred device, the Claimant was suspicious given the outcome of the interview process was then unknown to him. However, the outcome had by then been communicated to Dr Brunton as the successful candidate.

82. The following day, 5 May 2020, the Claimant accessed staff HR files stored on the company's server. It is irrelevant that the Claimant enjoyed access to them. I find that he did so for an improper purpose and, as a result, that personal data was processed unlawfully. The Claimant did not say what files he had accessed, though confirmed that he learned he and Mr Milne had been unsuccessful in their application for the two available roles, that Mr Milne was to be offered a new role entitled Chief Engineer, and that the Claimant would be offered a role as Mechanical Design Engineer. This was confirmed to him later that day by Dr Rumsby.

83. In a follow up letter to the Claimant dated 5 May 2020, Dr Rumsby confirmed the outcome of the interview process and referred to feedback having been given when they had met earlier (pages 414 and 415). Dr Rumsby confirmed the existence of a potential role for the Claimant of Mechanical Design Engineer within the new Tools Business Unit on a salary of £50,000, though in my judgement not unreasonably identified that the Claimant may not regard this as a suitable alternative role. That was indeed, and remains, the Claimant's view. I do not regard Dr Rumsby's reference to its suitability to be in any way related to the Claimant's family situation as the Claimant suggests at paragraph 51 of his witness statement. I find that Dr Rumsby did not consider it may not suit the Claimant by reason of his family commitments, rather because he rightly anticipated that the reduction in status and salary meant the Claimant would regard it as unsuitable.

84. In his letter to the Claimant, Dr Rumsby did not mention the role of Chief Engineer that either had then been or was imminently to be offered to Mr Milne at a salary of £75,000. I entirely understand why the Claimant was concerned that he had not been considered for the role, particularly having secured, through his access to Mr Milne's file, a copy of the job description for the role which he felt overlapped significantly with his allegedly redundant role. His evidence at Tribunal was that the Chief Engineer role (subsequently titled Chief Technologist) comprised perhaps 90% of the

duties of his role. I infer because he understood he had acted improperly in accessing Mr Milne's file, the Claimant did not raise the issue with Dr Rumsby. Instead, on 12 May 2020, he had a further call with Dr Rumsby when he confirmed that he was not interested in the Mechanical Design Engineer role. Discussions ensued regarding a potential settlement agreement.

85. A new organisation structure was circulated to the Respondent's staff on 18 May 2020. It naturally prompted colleagues to contact the Claimant as to what this might mean for him. Whilst that left him in an uncomfortable position, he had at that point been unsuccessful in his application for the Tools Business Unit Director role.

86. On 21 May 2020, the Claimant's Solicitors contacted Ms Avis to inform her that they had been instructed. I have not been made privy to the contents of their letter, which was sent on a 'without prejudice' basis, however the letter included certain documents including the 21 April 2020 emails with Winsky already referred to and the draft of a letter to Mr Milne advising the outcome of the interview process and which offered him the Chief Engineer role. This prompted a disciplinary investigation by the Respondent. The Claimant was suspended on 22 May 2020 to enable an investigation by Ms Donovan who, as already noted, had responsibility for HR matters. She reported the outcome of her investigation to the Claimant on 1 July 2020. In her letter she referred to the Claimant's actions in accessing a colleague's file and Dr Rumsby's desk, taking copies of documents and doctoring some of them, as "nothing short of acts of very serious misconduct" and an abuse of his position and duties of confidentiality and fidelity. Her letter to the Claimant concluded as follows,

> *"… The trust and confidence the Company should have in you as an employee and senior member of the management team has broken down irretrievably.*
>
> *… under normal circumstances, such action would result in disciplinary action. However, in light of the fact the redundancy consultation process you were involved in had been completed before your suspension and that your role in the Company has been confirmed to be redundant … I recommend that no disciplinary action is instigated and rather the redundancy process is finalised without further delay."* (page 460)

87. The following day, 2 July 2020, the Claimant was issued with notice of redundancy. The letter is in a standard form, including a reminder to the Claimant that he could appeal against his redundancy. He was asked to submit any appeal in writing within five working days. He did not avail himself of his rights in this regard.

88. My findings in relation to the 'misconduct' issue are as follows. The Claimant attended the Respondent's offices late on either 26 or 27 April 2020. On his own evidence, he returned home after midnight. He says he went to the office to retrieve his old laptop as a backup and did so in the evening in view of the Covid-19 risk. I reject his explanation and find instead that he went to the Respondent's offices for the sole purpose of

looking for evidence to use against the Respondent and that he resolved to go its offices late at night when he was as confident as he could be that he would not be discovered and that no one would know he had been there. He said he wanted to access his handwritten appraisals to support his application for the Tools Business Unit Director role. I do not accept his evidence in that regard. He might have requested copies of his appraisals from Dr Rumsby or Ms Avis. He said that he attempted to retrieve the spare keys to a cabinet that stored the HR files from an unlocked drawer next to Dr Rumsby's desk. I regret to say that I find his evidence in this regard, repeated at Tribunal, to be so unconvincing as to border on being dishonest. It was misleading for him to describe it as a drawer next to Dr Rumsby's desk; it was Dr Rumsby's private drawer and the Claimant revealed his clear understanding and appreciation in that regard when he confirmed in the course of his evidence at Tribunal that he was occasionally asked by Dr Rumsby, as a long standing senior trusted colleague, to put Dr Rumsby's laptop away in the drawer.

89. The Claimant's efforts to minimise the seriousness of his actions continue at paragraph 42 of his witness statement. On finding a folder marked 'Winsky' in Dr Rumsby's desk, the Claimant looked inside the folder and found a hard copy of the emails dated 21 and 27 April 2020 already referred to. I have already set out my findings in relation to them.

90. The Claimant embarked upon a further search for evidence just over a week later on 5 May 2020.

91. I regard the Claimant's conduct on 26/27 April and 5 May 2020 as wholly unacceptable and his attempts to minimise the seriousness of his actions as particularly egregious. This was exacerbated at Tribunal by the Claimant's belated, 'on the hoof', attempt to suggest that the transcript of the recording of his investigation interview might not be accurate, a suggestion I give short shrift to.

92. As I shall return to, the Claimant's conduct on 27 April and 5 May 2020 struck at the heart of the relationship of trust.

93. The Claimant's assertion that the real purpose of the disciplinary investigation was a desperate bid on the part of the Respondent to find a reason to dismiss him in order to avoid making a redundancy payment to him rather misses the mark given that the Respondent did not in fact dismiss him notwithstanding it considered it had ample grounds to do so. Ms Donovan's failure to recommend that course of action, having been advised in the process by Ms Avis, is a further reason why I have confidence in their bona fides and objectivity in the redundancy selection process.

94. I return in my conclusions below to the criticisms that are made by the Claimant of the investigation process. However, the Claimant accepted during cross examination that he had accessed and taken copies of documents from HR files and the CEO's desk, for his own purposes and that he had doctored one of the documents in order to create uncertainty as to how he had secured a copy of it.

Miscellaneous residual matters

95. There are two final matters in respect of which I consider it is important that I make findings. The first matter concerns the role of Chief Engineer / Chief Technologist, the second a new role of Operating Manager that was offered to another colleague, Ben Milson and about which the Claimant learned during a conversation with Mr Milne on 8 May 2020.

96. The Claimant did not raise the Operating Manager role with Dr Rumsby, notwithstanding he had become aware of it prior to his telephone conversation with Dr Rumsby on 12 May 2020 as part of the ongoing consultation process. Whilst it may have reinforced his sense of unfairness, I find that he did not pursue the matter furtherwith Dr Rumsby because he was fundamentally unwilling to accept the significant reduction in pay and status the role would have entailed, putting aside in this regard whether in fact he had the requisite skills and experience for the role.

97. The Claimant had been resistant to giving up his position within the Senior Leadership team in 2019. Although he had accepted a temporary pay reduction in 2020, from £90,000 to £72,000, I find that he was unwilling to countenance a further permanent reduction in his pay to £60,000 or the reduction in status it would have entailed, even if the position of Operating Manager did not involve the “humiliation”, as he perceived it, of the Mechanical Design Engineer role.

98. The Chief Engineer / Chief Technologist role job description is at pages 574 and 575 of the Hearing Bundle. The ‘Background’ section of the job description identifies the role as having technical responsibility for all aspects of Tool delivery. It does not identify who the role would report to, but that it would work closely with the Tools and R&D Business Unit Directors. It refers to the post holder having an exceptional technical background in laser and inkjet systems and technologies. The Claimant asserts that it contained significant overlap with his role as Director of Engineering. I have difficulty in following that argument given that the majority of the Claimant’s responsibilities as Director of Engineering were subsumed within the Tools Business Unit Director role. However, the further difficulty I face is that the role is addressed in fairly brief terms in paragraph 49 of Dr Rumsby’s witness statement where he states that the Claimant had only peripheral knowledge of many of the necessary skills. I approach Dr Rumsby’s evidence with a degree of caution, mindful of the risk it may be self-serving, but also given his lack of objectivity in relation to the Claimant. Equally, whilst the Claimant was able to take me to those components of his former role where he felt there was overlap, albeit he accepted not in relation to Optics Design and Modelling, in certain respects he fell back upon experience gained during the company’s early years. Whilst I accept that the Claimant has a rounded knowledge as a result of his experience of designing software and laser technologies into the machine tools produced by the Respondent, he is not a software or laser expert.

99. In many respects the stated key skills and qualifications of the Chief Engineer / Chief Technologist role, mirrored those used by the Respondent in the selection process for the Tools Business Unit Director

role. Whilst they were, of course, different roles, assessed against broadly the same criteria, there were just two points separating the Claimant and Mr Milne in terms of the Tools Business Unit Director role, namely 166 as against 168. Whilst I do not attach particular significance to the original job title of Chief Engineer, I can understand why this was of particular concern to the Claimant given his existing role as Director of Engineering. Ms Donovan herself identified this may be the case on 6 May 2020 in an email to Ms Avis and Dr Rumsby. She said,

> *"He doesn't have the technical qualifications but it has been bothering me"*

100. Ms Avis acknowledged that she was ultimately reliant upon Dr Rumsby's assessment to Mr Milne and the Claimant's respective technical strengths and capabilities, though I accept she at least sought to test this with him. Ms Churchhouse quite rightly highlighted during cross examination that the required technical experience, skills and qualifications were identically defined in the job descriptions for the Tools Business Unit Director and Chief Engineer / Chief Technologist roles, giving rise to the obvious question why the Claimant might have been considered for the former if his technical skills ruled him out of contention for the latter.

The Law and Conclusions

101. Section 98(1) of the Employment Rights Act 1996 provides:

> In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show —
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

102. One of the stated reasons falling within Section 98(2) is that the employee was redundant.

103. If a Respondent establishes a potentially fair reason for dismissal, Section 98(4) of the Employment Rights Act 1996 goes on to provide:

> … the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) —
>
> (a) depends 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
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

104. Pursuant to Section 99 of the 1996 Act, an employee who is dismissed

shall be regarded as unfairly dismissed if the reason or principal reason for the dismissal is of a prescribed kind, or the dismissal takes place in prescribed circumstances. The ‘reasons’ and ‘circumstances’ are prescribed by Regulations, including the Maternity & Parental Leave etc Regulations 1999 and Paternity & Adoption Leave Regulations 2002, and confer protection against dismissal for taking or seeking to take paternity leave, parental leave and/or time off under Section 57A of the 1996 Act.

105. The question then is whether the Respondent has established, on the balance of probabilities, that it dismissed the Claimant by reason that he was redundant (and not for a prescribed or some other reason) and that it did not put his role at risk and/or select him for redundancy for a prescribed reason, whether relating to him taking or seeking to exercise his rights to take paternity leave, parental leave or time off for a dependent.

106. I am in no doubt that the Respondent embarked upon a restructure of its business under pressure from CNI and in view of its continuing, indeed increasing, financial losses that were effectively being underwritten by CNI, and that the Covid-19 pandemic and BGF pausing discussions regarding a potentially significant investment into the business meant the restructure assumed greater urgency. I have seen no evidence to suggest that the creation of a single Tools Business Unit in place of the three Tools groups, each led by a Senior Manager, was designed in order to secure the Claimant’s removal from the business. Instead, it reflected the Respondent’s documented strategy that Tools would become a significantly smaller part of its business and that the Respondent would focus its efforts instead on growing its Manufacturing Business Unit.

107. In my judgement, the Claimant’s role as Director of Engineering was genuinely redundant, as were the roles of his two senior Tools colleagues. As to the reasons why the Claimant was selected to be made redundant, it is Dr Rumsby whom the Claimant alleges was motivated or influenced by the fact that he had taken or planned to take family leave in his treatment of, and decisions in relation to, the Claimant. There is nothing in the scoring sheets, including Dr Rumsby’s notes, from which it might be inferred that the panel was influenced by any prescribed reasons in the scores attributed to the Claimant, let alone that any prescribed reasons were the reason or principal reason why the Claimant was not successful in his application for appointment as the Tools Business Unit Director.

108. I am in agreement with Ms Churchhouse, even taking into account that the two sat opposite one another and accordingly would have spoken directly on numerous matters, that Dr Rumsby’s responses as well as his failures to respond to the Claimant’s emails, as set out in my findings above, is particularly troubling. But whatever his previously expressed “frustrations”, if that is not too mild a term, with the Claimant’s commitments outside work, I do not consider that these were actively operating in Dr Rumsby’s mind at the time of the restructure. In this regard, I note that he had acted upon the Claimant’s concerns in 2019 regarding the proposed COO role by keeping the Claimant on the Board and within the Senior Leadership team. He also seemingly took the Claimant into his confidence regarding the 2020 restructure ahead of the COO and the Claimant’s other

colleagues on the Senior Leadership team. In my judgement until the Coronavirus pandemic and the BGF discussions stalled, Dr Rumsby continued to envisage an ongoing Senior Leadership level role for the Claimant.

109. In any event, following the candidate interviews on 28 and 30 April 2020 and 1 May 2020, the Claimant remained at risk because the four members of the panel had assessed Dr Brunton to be the strongest candidate for the role of Tools Business Unit Director. The Claimant's assertion that he was selected for a prescribed reason runs into the immediate difficulty that his case in this regard is pursued solely with reference to Dr Rumsby's views, motives and biases. He has never alleged that Dr Brunt, Ms Donovan or Ms Avis acted for a prescribed reason, even if he submits in the alternative that they acted unfairly in the matter. Regardless of the scores allocated to him by Dr Rumsby, he would still not have been selected for appointment to the Tools Business Unit Director role on the strength of the others' scores; scores which he does not assert were tainted by the same discriminatory motives or biases that he asserts were operating in the mind of Dr Rumsby. In any event, and for the reasons set out above, in my judgement such considerations were not operating in Dr Rumsby's mind at the time of the recruitment exercise.

110. That still leaves the possibility that the Claimant was excluded from consideration for the Chief Engineer / Chief Technologist and Operating Manager roles for a prescribed reason. However, the available contemporaneous documents evidence that Ms Avis and Ms Donovan were in agreement that the Chief Engineer / Chief Technologist role should be offered to Mr Milne. Whilst I recognise that they were more reliant in this regard upon Dr Rumsby's assessment as to the Claimant's technical skills, which was seemingly the decisive factor, nevertheless I am satisfied that Dr Rumsby genuinely believed Mr Milne to have the stronger and broader technical expertise, even if Dr Rumsby did not approach the issue with an entirely open mind or think to test his views through a competitive interview process.

111. In my judgement, the Respondent has discharged the burden of proof upon it. I am satisfied that the reason, the principal reason, why the Claimant was dismissed was because his role was redundant not because he took or sought to exercise his family leave rights.

112. I turn then to the question of whether it was a fair dismissal. Although this involves a broad enquiry, having regard to the test in section 98(4) of the 1996 Act, for convenience I have approached the issue having specific regard to the six matters identified in paragraph 10 of Ms Churchhouse's written submissions:

122.1 The Tribunal is not directly concerned with whether Mr Milne was treated fairly in this matter, particularly in terms of his application for the R&D Business Unit Director role. Having not heard evidence about the parallel recruitment process, I am not in a position to conclusively determine that Dr Crozier's appointment was predetermined. However, on the evidence available to me it does look that way. What is clear is that Dr Rumsby was not even

handed in terms of how he dealt with the two candidates for the role. Understandably, that gives rise to suspicion on the Claimant's part. I have considered whether the same lack of even handedness operated in relation to Dr Brunton. However, I refer to my findings already on this issue. Whilst the outcome in relation to the Tools Business Unit Director role may not have been pre-determined, in the sense of Dr Brunton believing he was assured of the role, Dr Rumsby certainly did not approach his task with the required degree of objectivity and a sufficiently open mind. However, I do not agree with Ms Churchhouse that Dr Brunt ought reasonably to have been placed in the selection pool. During the redundancy consultation process, no representations were made by the Claimant, or others, to that effect. In my judgement the Respondent's decision to exclude Dr Brunt from the selection pool sat firmly within the band of reasonable responses. The Manufacturing Unit was unaffected by the restructure, indeed it was intended that it would grow under the Respondent's new business strategy. There was no reduced need for work of the kind being done by Dr Brunt. In any event, had Dr Brunt been placed in the selection, in my judgement he would inevitably have been selected to head up the Manufacturing Unit given his undoubted skills and long experience, underpinned as the Claimant acknowledged, by his unique knowledge and understanding of ISO manufacturing standards.

122.3 I do not consider that the Respondent acted unreasonably in failing to invite volunteers for redundancy. Firstly, these were strategic senior level appointments critical to the future success of the business, with responsibility to deliver the turnaround that was urgently required. In any event, as Mr Humphreys says, the fact that all four individuals at risk applied for the two Director roles evidences that ultimately there was no appetite on any of their parts to leave the business, even if Dr Brunton was somewhat ambivalent regarding his future with the business.

122.4 The Employment Tribunals recognise that competitive recruitment exercises, such as the one operated by the Respondent, are a permissible way to select for redundancy and that recruitment involves some element of subjective assessment. I take on board Mr Humphreys' submission that the pleaded case and List of Issues in the case are focused on Dr Rumsby's approach to the task. In any event, I am satisfied that the other three members of the interview panel brought an appropriate degree of focus, purpose, integrity and objectivity to their task and that they acted throughout in good faith. Be that as it may, the fairness of the interview process was tainted by Dr Rumsby's relative lack of objectivity and failure to keep a sufficiently open mind as to the outcome of the process. Whilst I take on board Ms Churchhouse's submission that there were no defined KPIs, the criteria against which the candidates were scored were defined. The scoring process was already in use for recruitment generally. Each member of the panel scored the candidates relative to the others, they made notes to explain their overall assessment, and there was a process of

moderation at the conclusion of the interviews, even if in the event the respective scores were not altered following that moderation.

122.5 Whilst I do not accept that the Chief Engineer / Chief Technologist role largely mirrored the Director of Engineering role, the responsibilities of which were subsumed within the Tools Business Unit Director role and / or which ceased to exist given the significant reduction in size in the Tools business, I entirely agree with Ms Churchhouse that the Chief Engineer / Chief Technologist role was potentially suitable alternative employment and for which the Claimant ought reasonably to have been considered as part of an open, transparent and objective recruitment exercise. I am inclined to the same view in relation to the Operations Manager role, even if this has arisen at a very late stage in the proceedings such that there is effectively no disclosure or evidence from the Respondent on the matter. I balance the fact that it is only addressed in a very short paragraph in the Claimant's witness statement with the fact that it was a relatively easy matter for the Respondent to address and I also remind myself that the burden of proof does not operate under s.98(4) of the Employment Rights Act 1996. Moreover, the Operations Manager role attracted a salary of £60,000 which was higher than the salary for the role that was offered to the Claimant. In the circumstances, it is difficult to understand why it was not put forward to the Claimant even if the Respondent assumed, reasonably or otherwise, that it would be of no interest to the Claimant.

113. For the reasons identified above, I conclude that the Respondent acted outside the band of reasonable responses in how it handled the Claimant's redundancy and accordingly that he was unfairly dismissed.

114. Pursuant to s.123(1) of the Employment Rights Act 1996, where a Tribunal upholds a complaint of unfair dismissal, it may award such compensation as it considers just and equitable in the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal. In accordance with the well established principles in <u>Polkey v AE Dayton Services Limited</u> [1988] A.C. 344, the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the likelihood that the employee's employment would still have terminated in any event. Ms Churchhouse rightly reminded the Tribunal that the burden of proving that an employee would have been dismissed in any event rests with the employer. Nevertheless, Tribunals are required to actively consider whether a <u>Polkey</u> reduction is appropriate. In <u>Software 2000 Limited and Andrews & Ors</u> [2007] UKEAT 0533_06, the EAT reviewed the authorities at that time in relation to <u>Polkey</u> and confirmed that Tribunals must have regard to all relevant evidence, including any evidence from the employee and the fact that a degree of speculation is involved is not a reason not to have regard to the available evidence, unless the evidence is so inherently unreliable that no sensible prediction can be made. It is not an 'all or nothing' exercise.

115. The more recent decision of the EAT in <u>Contract Bottling v Cave</u> [2015] is illustrative of how a purely statistical chance of dismissal by reason of

redundancy was adjusted to reflect the employee's particular circumstances.

116. This case is a case in which it is not in my judgement too speculative an exercise to determine what would or could have happened. However, I must do so having careful regard to the entirety of the available documentation and evidence in the case, and mindful also that having treated the Claimant unfairly in the matter the Respondent now has a vested interest in asserting that it was inevitable he would have left its employment.

117. Applying Polkey principles in practice requires an evidenced based approach drawing upon common sense and experience, and in the final analysis ensuring that any final decision is just and equitable. My conclusions in this regard are as follows. Firstly, even had Dr Rumsby approached the selection exercise with a more open mind and applied himself more objectively to the task in hand, I am certain that Dr Brunton would still have been appointed to the position of Tools Business Unit Director. He was comfortably the strongest of the three candidates and even putting aside the entirety of Dr Rumsby's scores, he was scored by the other panel members more highly than the Claimant and Mr Milne. Having reviewed the 16 categories against which the candidates were assessed, the other three panel members scored Dr Brunton more highly than the Claimant in ten categories. They received the same score in just four categories and as noted already, the Claimant scored more highly than Dr Brunton in terms of interpersonal skills and quality.

118. In his closing submissions, Mr Humphreys made the valid point that Ms Donovan was not challenged in terms of her evidence in paragraph 15 of her witness statement, namely that the Claimant had identified his own lack of sales experience, achieving sales being one of the key documented responsibilities in the new role and, further, that technical development, over and above standard devised models, and leadership were not core skills he possessed. Those comments by him support the scores that he was given by the panel relative to Dr Brunton under the categories of Technical Expertise for the role, Commercial Experience and Leadership.

119. When, on 19 April 2020, the Claimant proposed a restructure under which there would continue to be a Business Development and Sales function led by Dr Brunton and on the same day asked Dr Rumsby where he saw the Claimant fitting in the organisation given his skills and experience, I conclude that he was effectively giving voice to his own recognition, at that time, that Dr Brunton would be a strong candidate for the Tools Business Unit Director role should he put himself forward for it. The timing is relevant since this was before Dr Brunton and Dr Crozier had joined the meeting with Winsky on 22 April 2020 and before the Claimant had discovered the 21 and 27 April emails.

120. The evidence in relation to the Chief Engineer / Chief Technologist role is less conclusive, particularly having regard to the Respondent's burden of proof in the matter. Dr Rumsby was emphatic that Mr Milne was the obvious candidate for the role, but beyond the relatively limited comments

at paragraph 49 of his witness statement, his evidence at Tribunal during cross examination rested to a large degree in assertion. Mr Humphreys recognised the difficulty of the Respondent's position when he observed in closing that it could be a difficult issue to engage with if one is not a technical specialist. However, the fact is that Dr Rumsby failed to bring essential clarity to the issue. One of the principal difficulties with the Respondent's position is that the Claimant was invited to apply for the role of Tools Business Unit Director yet was excluded from the Chief Engineer / Chief Technologist role notwithstanding that the technical responsibilities were identically defined in the job descriptions for each position. In purely statistical terms, the Claimant would have had a fifty percent chance of appointment to the Chief Engineer / Chief Technologist role if he had been up against Mr Milne in a competitive interview process. Excluding Dr Rumsby's scoring, there was almost nothing to separate the Claimant from Mr Milne in terms of the Tools Business Unit Director role against a range of criteria that was used generally by the Respondent in its recruitment process. Those scores, of course, related to a different role, but just two points separated the Claimant and Mr Milne if one excludes Dr Rumsby's scores.

121. I have regard to the fact that Mr Milne scored more highly than the Claimant in terms of technical expertise in relation to the Tools Business Unit Director role, albeit just one mark separated them in this regard. Ms Donovan, who I consider had less direct insight into the Claimant's technical skills, scored the Claimant lower than Mr Milne. Dr Brunt, who I consider had a much better understanding of the Claimant's technical capabilities, scored him and Mr Milne equally. Of course, as I have noted already, the Claimant himself identified to the panel that technical development was not one of his core skills. If Mr Milne had the edge, and the Respondent has ultimately satisfied me that he did, then in the further context that an exceptional technical background had been identified as essential and that Mr Milne's job function throughout his employment with the Respondent had been focused on technology, whilst it was not such in my judgement as to make Mr Milne the certain choice to be appointed in a competitive interview process, I conclude that there was only a 40% chance of the Claimant being appointed to the role.

122. As regards the Operations Manager role, I have regard to the fact that this only arose as an issue in the Claimant's witness statement rather than in the pleadings or the agreed List of Issues and, as such, that it was not addressed in the Respondent's witness statements. It also explains why the Operations Manager job description was not included in the Hearing Bundle. In my judgement, the question of whether or not the Claimant had the requisite skills and experience for the role, whether he would or might have secured the position in a competitive interview situation and whether the role would or might have become redundant at a later date, does not arise since, for the reasons set out in my findings above, I am certain that the Claimant would have ruled it out immediately on grounds of the reduction in status and salary. I refer, as I already have done, to his sense of humiliation at being offered a Mechanical Design Engineer role at an salary of £60,000 and refer also to paragraph 22 of his witness statement.

123. I turn finally to the issue of the Claimant's misconduct. I do not consider

that Ms Churchhouse makes a good point when she submits, or implies, that Ms Donovan's reference to the Claimant's conduct as amounting to very serious misconduct means that she did not necessarily view it as gross misconduct. I am in no doubt whatever that Ms Donovan considered that the Claimant was guilty of gross misconduct and that she believed there were grounds to dismiss him summarily. In my judgement she took the pragmatic view that the redundancy process should simply run its course. In so doing, the Claimant received both his notice pay and statutory redundancy pay which would otherwise have been forfeited had the Respondent exercised its right to terminate him summarily as I consider it would have been entitled to do.

124. I refer briefly to the Judgment of the High Court in Brandeaux Advisers (UK) Ltd v Chadwick [2010] EWHC 2370 (QB). In the course of their closing submissions Ms Churchhouse and Mr Humphreys each made reference to paragraph 32 of Mrs Justice Thirlwall DBE's Judgment, specifically that the regard should be had to the context in which any misconduct takes place. The given example in Brandeaux was an employee who swears in response to a superior also swearing. I note the following observations in the Judgment,

> *"I am doubtful if the possibility of litigation with an employer could ever justify an employee in transferring or copying specific confidential documents for his own retention which might be relevant to such a dispute."*

125. The documents accessed by the Claimant, particularly the documents in his colleagues' HR files, were undeniably confidential information. In this case the mere fact that the Respondent had commenced a redundancy consultation process, proactively engaged with its Senior Leadership team as to the proposed strategy, structure and budget, and circulated job descriptions for comment, cannot justify the Claimant's actions in going to its premises late at night and looking through Dr Rumsby's personal private drawer or the Claimant's subsequent actions on 5 May 2020 in accessing colleagues' HR files.

126. I do not agree with Ms Churchhouse's submission that there were significant mitigating circumstances. The Claimant was indeed a long serving employee, but he was also a senior employee with fiduciary responsibilities as a statutory Director.

127. Ms Donovan's decision not to rely upon the Claimant's gross misconduct at the time has disadvantaged the Respondent in these proceedings, since the Claimant's misconduct does not fall to be considered under s.123(6) of the Employment Rights Act 1996, as it did not cause or contribute to his dismissal by reason of redundancy. The principal question I have to determine is whether his misconduct would or might have come to light in any event had the Respondent not acted unfairly in the matter. When the Claimant went to the Respondent's offices on 27 April 2020, it was because he wanted to secure evidence that may be of assistance to him. I am satisfied that he would have behaved exactly as he did regardless of how the restructure was handled by the Respondent. He was suspicious of the Respondent from the outset,

whether or not he had good reason to be. He felt vulnerable and wanted to position himself for exit should it come to that. I conclude that, come what may, he would have embarked upon a covert search of his colleagues' HR files.

128. However, I attribute just a 15% chance to the possibility that the Claimant's actions might have come to light had he been appointed to the Chief Engineer / Chief Technologist role.

129. Mr Humphreys makes the point that the Claimant believed his actions did not amount to wrongdoing and indeed that was the Claimant's evidence at Tribunal. However, his actions in doctoring one of the emails he found in Dr Rumsby's drawer evidences to me that he understood his search of Dr Rumsby's drawer was improper and that he sought to cover his tracks in terms of how he might have come to be in possession of the emails, even if he had a different view of his actions in accessing his colleagues' HR files. In my judgement it is relevant that he disclosed to the Respondent, through his Solicitors, that he was in possession of materials only once it was clear that he would be leaving the Respondent's employment and with a view to levering an improved financial settlement. He did not instruct his Solicitors to write to the Respondent at the point that he learned that he had been unsuccessful in his application for the Tools Business Unit Director role. I allow for the possibility that he might have sought to appeal the decision not to appoint him to that role whilst otherwise pursuing the Chief Engineer / Chief Technologist role and that within the context of any such appeal he might have revealed that he was aware of the 21 and 27 April 2020 emails. Further, I cannot rule out the possibility that the Respondent might simply have chanced upon his actions; I note in this regard that Ms Avis had in mind to review who had access to the company's HR files as one of her early tasks on joining the Respondent, but that she had been distracted from this task by the immediate need to focus on the restructure.

130. Mr Humphreys is right that the Claimant had the misconceived view that his established access to HR files meant he could look through them for his own personal ends. Whilst I do not consider that the evidence in this regard is so inherently unreliable that I cannot make any sensible prediction, for the reasons set out, I assess the chance of dismissal for gross misconduct at just 15%. In my judgement his misconduct might have come to light within one month of Dr Brunton being confirmed as the Tools Business Unit Director and the Claimant being informed on 5 May 2020 that he remained at risk of redundancy. In the circumstances, I identify 2 August 2020 as the most likely date by which any chance of dismissal would have been realised. In other words, in my judgement, had concerns arisen regarding the Claimant's conduct by 5 June 2020, the Respondent would have embarked upon exactly the same investigation process which would have taken exactly the same length of time and therefore come to a conclusion one month after its conclusions of 2 July 2020. The relevant date therefore in terms of my Polkey finding is that had the Claimant been appointed to the Chief Engineer / Chief Technologist role, he had an additional 15% chance of being dismissed from the Respondent's employment by 2 August 2020.

131. It should be clear from my findings that I am critical of the Claimant's conduct on 27 April 2020 and 5 May 2020. Subject to Counsel's further submissions in this regard at the Remedy Hearing, I shall give consideration then as to how that conduct might be reflected in the amount of any basic award pursuant to s.122(2) of the 1996 Act.

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Employment Judge Tynan

Date: 17 May 2022

Judgment sent to the parties on

17 May 2022

For the Tribunal office