EMPLOYMENT TRIBUNALS

Claimants: 1. Mr D Lindley
2. Mrs A Lindley

Respondents: 1. SED Conveyors Limited
2. RTI UK Services Limited

Heard at: Cardiff (by CVP) **On:** 25, 26, 28 & 29 April 2022 and 3 & 6 May 2022

Before: Employment Judge S Jenkins
Mrs L Bishop
Mr P Bradney

REPRESENTATION:

Claimants: Ms G Holden (Counsel)
Respondents: Mr C Canning (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimants' claims against the Second Respondent all fail and are dismissed.

2. The First Claimant's claim of unfair dismissal, pursuant to section 94 of the Employment Rights Act 1996 ("ERA"), succeeds, but no compensation is ordered to be paid in respect of that unfair dismissal by virtue of the application of the "Polkey" principle and/or the First Claimant's contributory conduct.

3. The First Claimant's claims of; unfair dismissal pursuant to sections 103A and/or 104 ERA, detrimental treatment pursuant to section 47B ERA, unauthorised deductions from wages/breach of contract, and wrongful dismissal all fail and are dismissed.

4. The First Respondent is ordered to pay the First Claimant an amount equal to two weeks' pay, pursuant to section 38(2) of the Employment Act 2002.

5. The Second Claimant's claim of unfair dismissal, pursuant to section 94 of the Employment Rights Act 1996 ("ERA"), succeeds, but no compensation is ordered to be paid in respect of that unfair dismissal by virtue of the application of the "Polkey" principle and/or the Second Claimant's contributory conduct.

6. The Second Claimant's claim of unauthorised deductions from wages/breach of contract succeeds in relation to her annual bonus from 2019.

7. The Second Claimant's claims of; unfair dismissal pursuant to sections 103A and/or 104 ERA, detrimental treatment pursuant to section 47B ERA, direct marriage discrimination, and wrongful dismissal all fail and are dismissed.

8. The First Respondent is ordered to pay the Second Claimant an amount equal to two weeks' pay, pursuant to sections 38(2) and/or (3) of the Employment Act 2002.

9. In light of the Tribunal's judgment, it is anticipated that the parties will be able to compute the sums to be paid by the First Respondent to the Claimants, but if that proves not to be possible, the Claimants are ordered to notify the Tribunal that a remedy hearing needs to be listed.

REASONS

Background

1. The hearing was to deal with the claims of both Claimants. They are married and both worked for the First Respondent. They were dismissed separately but in relation to matters arising out of similar circumstances. Their two claims were issued separately but had been directed to be considered together. We refer to them by their names in this judgment, unless we refer to them collectively, when we refer to them as "Claimants". Whilst our conclusion was that the Claimants were employed by the First Respondent only, we have used the term "Respondents" throughout this judgment for ease of reference, unless there is a need to distinguish between the two Respondents.

Claims

2. Mr Lindley brought claims of unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 ("ERA") and also by reference to sections 103A and 104 ERA, the assertion being that the reason for dismissal, or if more than one the principal reason, was either that he had made protected disclosures or that he had alleged that his employer had infringed a right of his which was a relevant statutory right. Mr Lindley also brought a claim of detriment on the ground of having made protected disclosures, in respect of unauthorised deduction from wages/breach of contract, wrongful dismissal, and a failure to provide a written statement of particulars of employment.

3. Mrs Lindley brought the same claims, but also brought a claim of direct marriage discrimination pursuant to section 13 of the Equality Act 2010 ("EqA").

The Hearing

4. The hearing was listed to take place over six days; 25, 26, 27, 28 and 29 April 2022 and 3 May 2022. It had been timetabled at a preliminary hearing such that four hours on the first day would be taken up with the Tribunal reading witness statements and documents, evidence would then be considered until the afternoon of the fifth day and would be followed by closing submissions on that day. The final day would then be taken up with the Tribunal's deliberations and the delivery of judgment, if possible.

5. In the event, due to preliminary matters which were raised by both parties at the outset of the hearing, we did not start considering evidence until 11.00am on the second day. As a consequence of that, we indicated to the parties that we would not be likely to be in a position to hear their closing submissions by the end of the fifth day, and would instead hear them at the start of the sixth day.

6. A further complication arose however due to the illness of one of the representatives on the third day which meant that we could not sit. Helpfully, we and the two representatives were able to sit on Friday 6 May 2022 and, having completed the evidence by the end of 3 May 2022, we reconvened on 6 May 2022 to hear the parties' submissions. There was then insufficient time for us to deliver our judgment, which was therefore reserved.

7. We heard evidence, in the form of written witness statements and answers to oral questions, from both Claimants and from two former Respondent employees, Mr Mike Perryman and Mr Mark Jones. We were due to hear from two other former employees of the Respondent, Mr Daniel Phelps and Mr Mike Pride. In the event, neither attended the hearing. We had read their witness statements and the statement of the former was of limited relevance in any event. Parts of the statement of the latter were contentious and therefore we could not realistically place any weight on it in the absence of the Respondent being able to cross examine the witness.

8. On behalf of the Respondent we heard evidence, again in the form of written witness statements and answers to oral questions, from Mrs Elaine Young, Director; Ms Romany Heaney, Company Secretary; Mr Terry Young, General Manager of the Second Respondent; and Mr Mark Hacker, Procurement Director.

9. We considered the documents in the hearing bundle to which our attention was drawn, and we considered the parties' representatives' written and oral submissions.

Preliminary Issues

10. On 21 April 2022, i.e. two working days before the commencement of the hearing, the Respondents made an application to postpone the final hearing arising from an assertion that the witness statements of the Claimants,

statements having been exchanged on Tuesday 19 April 2022, contained very serious allegations which had not been part of the Claimants' pleaded cases and of which the Respondents had no notice.

11. On 22 April 2022 the Tribunal also received a communication from the Claimants' representative relating to an application to add additional documents to the bundle, objecting to the Respondent's application to postpone, and also objecting to the inclusion by the Respondents of transcripts of telephone calls which had been recorded covertly.

12. In the event, Mr Canning on behalf of the Respondents, indicated at the commencement of the hearing that the postponement application was not being pursued, on the basis that the Respondents had had an opportunity to prepare rebuttal evidence and, provided that they were given the remainder of the day, they would be in a position to provide that evidence to the Claimants later in the day.

13. The Tribunal convened with the Judge sitting alone to deal with these preliminary issues. The Judge decided that, as the Respondents' witnesses could not reasonably have anticipated the evidence of some of the Claimants' witnesses, and the matters were not in the Claimants' pleaded cases, it was appropriate to give the Respondents the opportunity to produce rebuttal evidence in the form of additional documents and/or witness statements. It was directed that those be produced by 3.00pm that afternoon.

14. The Tribunal convened at the start of the second day to consider the Claimants' application to adduce additional documents and the Respondents' application to adduce the transcripts of covertly recorded conversations. We granted both applications, giving oral reasons for them during the hearing, which we do not repeat. We noted broadly, however, that our focus was on the relevance of the material and the lack of any material prejudice to the opposing party by its inclusion. We concluded that the material was relevant or at least, in relation to some of the Claimants' material, was not clearly irrelevant.

15. The Claimants also requested that some redacted documents in the bundle be provided in their unredacted format, which the Respondent agreed it would do and which were produced.

16. The parties made other applications during the course of the hearing to adduce further documents, which we again granted on the basis that they were potentially relevant and that the other party would not suffer material prejudice as a result. In the event the bundle, which started out at just over 1,000 pages in size, ended up at approximately 1,500 pages.

Issues

17. The issues, which had been agreed at an earlier preliminary hearing on 9 September 2021 before Employment Judge Howden-Evans, and set out in appendices attached to the summary of that hearing, are set out in appendices at the end of this Judgment.

Law

18. The principal legal principles relating to the issues could be summarised as follows.

Protected Disclosures

19. Section 43B(1) ERA provides that a "qualifying disclosure" means:

> "*any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following …*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*"

20. In order for qualifying disclosures to be protected they must be made in one of the prescribed ways, the principal one being to the worker's employer. In this case, whilst the Respondents disputed that any protected disclosures had been made, there was no dispute that if what was said to have been the disclosures had been made then they had been made to the employer.

21. The Employment Appeal Tribunal ("EAT"), in **Cavendish Munro Professional Risks Management Limited v Geduld [2010] ICR 325**, noted that, in order to be a qualifying disclosure it must convey facts, as opposed to just make allegations. The EAT posited the hypothetical example, in the context of a hospital ward, of an employee saying, "The wards have not been cleaned for the past two weeks" or "Yesterday, sharps were left lying around" which would convey information. In contrast, an employee who stated, "You are not complying with health and safety requirements" would merely be making an allegation.

22. The Court of Appeal, in **Kilraine v London Borough of Wandsworth [2018] ICR 1850**, subsequently confirmed that the concept of a disclosure was capable of covering statements which might also be categorised as allegations, such that the two were not mutually exclusive categories of communication. The Court of Appeal made clear that the key point to take away from the **Geduld** case was that a statement which is general and devoid of specific factual content cannot be said to be a disclosure of information tending to show a relevant failure.

23. The Court went on to stress that the word "information" in section 43B(1) has to be read with the qualifying phrase "tends to show"; in other words the worker must reasonably believe that the information tends to show that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement to be a qualifying disclosure it must have sufficient factual content to be capable of tending to show one of the matters listed in section 43B(1)(a)-(f), the emphasis in this case being on subsection (b).

24. The tendency to show one of the relevant failures must also be reasonably believed by the claimant. It was made clear by Underhill LJ in **Chesterton**

Global Limited v Nurmohamed [2018] ICR 731 that that has both a subjective and an objective element. If the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief.

25. To be a protected disclosure the disclosure must also, in the reasonable belief of the worker, be made in the public interest. The EAT, in **Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4**, noted that that requires a claimant to establish first that they did, as a matter of fact, believe at the time of making any disclosure that it was in the public interest; and second, that that belief was reasonable in the particular circumstances.

26. The **Chesterton** case also considered what was covered by the words "public interest". In that case, Underhill LJ endorsed, as a "useful tool", the claimant's four-fold classification of relevant factors which might be relevant in assessing whether a claimant has a reasonable belief that what they are disclosing is in the public interest. They were:

    (a) The numbers in the group whose interests the disclosure served;

    (b) The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the affect is marginal or indirect;

    (c) The nature of the wrongdoing disclosure – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

    (d) The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest.

27. Underhill LJ also noted that it was clear that the question of whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. He noted the legislative history of the provision which corrected, in 2013, the previous position where a worker could be said to have made a protected disclosure even where the interest involved was purely personal in character. He went on to say that he was not prepared to rule out the possibility that the disclosure of a breach of a worker's contract may be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. He noted however that he would certainly expect employment tribunals to be cautious about reaching such a conclusion because the broad intent behind the amendment of section 43B(1) in 2013 was that workers making disclosures in the context of private workplace disputes should

not attract the enhanced statutory protection accorded to whistle-blowers, even where more than one worker was involved.

28. If we were satisfied that protected disclosures had been made, we would then need to consider whether the reason or principal reason for the dismissals were the protected disclosures. Section 103A provides that:

> "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*"

29. There must therefore have been a causal connection between any protected disclosures and the decisions to dismiss.

Statutory Right

30. Section 104 ERA provides similar protection for employees dismissed by reason of having asserted a statutory right as section 103A provides for those who are dismissed for having made protected disclosures. It provides as follows:

> "*(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –*
>
> *…*
>
> *(b) alleged that the employer had infringed a right of his which is a relevant statutory right.*
>
> *(2) It is immaterial for the purposes of subsection (1) –*
>
> *(a) whether or not the employee has the right, or*
>
> *(b) whether or not the right has been infringed;*
>
> *but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.*"

31. Subsection (4) then goes on to confirm what are relevant statutory rights and they include:

> "*(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal.*"

32. In this case the statutory right which the Claimants were contending had been infringed was the right set out at section 13 ERA, the right not to suffer unauthorised deductions from wages.

33. Again, in order for there to have been an unfair dismissal by reason of an assertion of a statutory right, there needs to have been a causal connection between the assertion and the decision to dismiss.

Detriment

34. Section 47B provides that:

> "*(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*"

35. In this case the Respondents accepted that, if proved, the detriments alleged at issue 6 in the cases of both Claimants would qualify as detriments in law. That involved two considerations; was the worker subjected to the detriment, and if so was that because they had made a protected disclosure?

36. As with a dismissal claim under section 103A, there must be a causal connection between any disclosure and the claimed detriment. However, the Court of Appeal, in **Fecitt & others v NHS Manchester [2012] ICR 372**, noted that the test is not the same as that in section 103A, where the disclosure must have been the reason, or at least the principal reason, for the dismissal. The court in that case confirmed that section 47B will be infringed if the protected disclosure materially, i.e. in the sense of more than trivially, influences the employer's treatment of the whistle-blower.

Unfair Dismissal

37. The first aspect for us to consider in respect of the "ordinary" unfair dismissal claim, pursuant to section 94 ERA, was the reason for dismissal and whether it was a reason which was potentially fair pursuant to sections 98(1) and (2) ERA. In that regard, if we had concluded that the dismissals were by reason of having made protected disclosures or having asserted statutory rights, then the dismissals would have been automatically unfair. If however we did not consider that the reasons for the dismissals were either protected disclosures or assertions of statutory rights, then we would need to consider the reason advanced by the Respondents. In these cases, the Respondents contended that the reason for dismissal was the Claimants' conduct, which is a potentially fair reason.

38. If we were satisfied that the reason for dismissal was misconduct, we would then need to go on to consider whether dismissals for that reason were fair in all the circumstances. The principles to be applied by Tribunals in considering dismissals on the ground of conduct have been in place for over 40 years and were set out in the touchstone EAT cases of **British Home Stores v Burchell [1978] IRLR 379** and **Iceland Frozen Foods v Jones [1982] IRLR 439**. The guidance provided by those cases was elided together by the EAT in **JJ Food Services Limited v Kefil [2013] IRLR 850** as follows:

> "*8. In approaching what was a dismissal purportedly for misconduct, the Tribunal took the familiar four stage analysis. Thus it asked whether the employer had a genuine belief in the misconduct, secondly whether it had reached that belief on reasonable grounds, thirdly whether that was following a reasonable investigation and, fourthly whether the dismissal*

of the Claimant fell within the range of reasonable responses in the light of that misconduct."

39. The EAT, in the recent case of **Hope v British Medical Association (EA – 2021 – 000187)**, confirmed that the determination of the question of whether an employer acted reasonably or unreasonably in treating an employee's conduct as a sufficient reason for dismissal is to be assessed by application of that four-stage analysis.

40. We also noted that the range of reasonable responses test also applies to the reasonableness of the investigation, as confirmed by the EAT in **Sainsburys Supermarkets Limited v Hitt [2003] IRLR 23**.

41. In assessing whether the dismissals by reason of conduct were fair, we would also need to consider whether the Respondents had followed appropriate procedural steps, both any arising from their own internal procedures and, most importantly, any set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures.

42. If we considered that the dismissals were unfair in these cases, we would need to go on to consider whether any compensation should be reduced, either by reference to the guidance provided in the case of **Polkey v A E Dayton Services Limited [1987] ICR 142** or by virtue of contributory conduct on the part of the Claimants.

43. With regard to the latter, different provisions apply in respect of the basic award and the compensatory award. In relation to the basic award, section 122(2) ERA provides that:

"*Where the tribunal considers that any conduct of the complainant before the dismissal…was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*"

44. In relation to the compensatory award, section 123(6) provides:

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.*"

45. Whilst the two provisions are similar, there is a difference between them, in that any reduction pursuant to section 123(6) must arise from conduct which contributed to the dismissal. A reduction under section 122(2) does not require that degree of causation, only that the conduct occurred prior to dismissal.

46. The Court of Appeal in **Nelson v BBC (No. 2) [1979] IRLR 346**, set out three factors which must be present for the compensatory award to be reduced. These were:

(i) that the Claimant's conduct must be culpable or blameworthy;

(ii) that it must actually have caused or contributed to the dismissal; and

(iii) that the reduction must be just and equitable.

47. The EAT in **Steen v ASP Packaging Limited [2014] ICR 56** outlined a very similar approach in relation to the basic award.

48. With regard to any **Polkey** deduction, that arises from a consideration of whether, notwithstanding a conclusion that a dismissal was unfair, a fair dismissal would nevertheless have occurred, and, if so, when it would have occurred. It is not necessary for an employment tribunal to reach an absolute conclusion on that, and it is able to form a view on the prospect of that happening and then apply a percentage reduction to the compensatory award to reflect the likelihood of that happening.

49. We would therefore need to consider whether, notwithstanding that we had found any unfair dismissal, that dismissals would nevertheless have occurred, and occurred fairly at some point, and if so, when that would have taken place, or how likely it would have been.

50. We further noted the guidance of the Court of Appeal, in **Rao v Civil Aviation Authority [1994] 495**, that it is permissible to make both a **Polkey** deduction and a contributory conduct deduction, but that in assessing the latter the Tribunal should bear in mind the former.

51. We also noted the guidance outlined by the EAT, in **D v Suffolk County Council (EAT 0180/18)**, that the two potential deductions should be assessed in turn, i.e. **Polkey** followed by contributory conduct, and then that the Tribunal should stand back and look at the matter as a whole to avoid double counting and to ensure that the final result was overall just and equitable.

<u>Unauthorised deductions from Wages (Breach of Contract)</u>

52. Section 13(1) ERA notes that:

"*An employer shall not make a deduction from wages of a worker employed by him unless –*

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract; or

(b) *the worker has previously signified in writing his agreement or consent to the making of the deduction.*"

53. Section 27(1) ERA then defines "wages" as:

"*…in relation to a worker…any sums payable to the worker in connection with his employment, including –*

(a) *any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise.*"

54. Section 27(2) ERA then defines some excluded payments, and these include at (c):

> "*any payment by way of a pension, allowance or gratuity in connection with the worker's retirement or as compensation for loss of office.*"

55. The EAT, in **Somerset County Council v Chambers (UKEAT 0417/12)** confirmed that payments to a pension provided on behalf of a worker are not caught by section 27(1).

56. In that regard, Ms Holden on behalf of the Claimants accepted in her closing submissions that the asserted deductions at 12.1 and 12.2 of the List of Issues relating to Mr Lindley, and sections 13.1, 13.2 and 13.3 of the List of Issues relating to Mrs Lindley, could not be pursued as unauthorised deductions from wages claims.

57. The employment tribunals' breach of contract jurisdiction is provided by the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. That provides, at article 3, that:

> "*Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum…if -*
>
> *(a) the claim is one to which section 3(2) of the Employment Tribunals Act 1996 applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;*
>
> *(b) the claim is not one to which article 5 applies; and*
>
> (c) *the claim arises or is outstanding on the termination of the employee's employment.*"

58. In order therefore to consider the Claimants' claims in respect of this issue, we would need to assess whether any sums had been payable to the Claimants in connection with their employment which had not been paid, and/or whether any such sums had been contractually due to the Claimants and had not been paid.

Wrongful Dismissal

59. As both Claimants were summarily dismissed, i.e. without notice, we would need to consider whether, on balance of probability, they had committed acts of gross misconduct i.e. conduct which was so serious as to amount to a repudiatory breach of the contract entitling the Respondents to summarily terminate it.

Failure to provide a written statement of particulars of employment

60. Section 38 of the Employment Act 2002 applies in relation to proceedings to which the section is stated to apply (which the proceedings brought by the Claimants in this case did), where the employment tribunal finds in favour of the worker in respect of such a claim, and when the proceedings were begun the

employer was in breach of its duty under section 1(1) of the Employment Rights Act 1996, to give a written statement of initial employment particulars. In those circumstances, the tribunal must, unless there are exceptional circumstances which would make an award or increase unjust or inequitable, award, or increase any award already made, by the minimum amount of two weeks' pay and may, if it considers it just and equitable in all the circumstances, increase the amount by the higher amount of four weeks' pay instead.

Direct Marriage Discrimination

61. Section 13 EqA provides that:

> "*A person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourable than A treats or would treat others.*"

62. In this case, the protected characteristic relied upon by the second Claimant was that of marriage. Section 8 EqA notes that:

> "*A person has the protected characteristic of marriage…if the person is married.*"

63. In this case, it was not disputed that Mrs Lindley was married, and was married to Mr Lindley.

64. Direct discrimination involves less favourable treatment, in comparison to others, the comparator potentially being a living person or a hypothetical person. Section 23(1) EqA provides that, on a comparison of cases for the purposes of section 13, "*there must be no material difference between the circumstances relating to each case*". The comparison we were therefore undertaking was between Mrs Lindley and someone who was in exactly the same circumstances as her and undertaking the same work as her, and who was in a long-term relationship with Mr Lindley, but who was not actually married to him.

Findings

65. Before stating our findings, we make the overarching comment that making findings in this case was not a straightforward matter. The parties, particularly Mr and Mrs Lindley on the Claimants' side, and Mrs Young on the Respondents' side, were very much at odds over factual matters, to the extent that, as far as they were concerned, if their particular version of events was to be accepted it effectively meant that the other side's witnesses were lying. There were also references on the part of the Claimants to the Respondents fabricating documents.

66. An example of the disparity between the evidence on the two sides, in relation to one of the first findings we set out below, and which related to a relatively peripheral matter, only having relevance for the amount of Mr Lindley's basic award if his unfair dismissal claim succeeded, was that the parties were totally at odds as to when Mr Lindley's employment started. He contended that his

employment with the Second Respondent started in 2004, and that he then transferred to the First Respondent in 2011 with his continuity of service being preserved. The Respondents, by contrast, contended that the Claimant first undertook some work for the Second Respondent in 2010, before commencing employment with the First Respondent in 2011, with there being a gap between the two appointments.

67. The stark contrast between much of the evidence provided by the two sides, meant that we had to consider whether it was more likely than not that things had happened in the way asserted. In other words, we had to be satisfied that there was a 51% chance that things had happened in the way described. However, in doing that, if our view was as fine as that, it meant that, equally, there was a 49% chance that the events had not taken place in the way described.

68. We therefore looked for support for our conclusions from the documentary evidence in the bundle, being mindful of the contention by the Claimants that certain documents had been fabricated or at least had not been sent to them. We also looked for support for our conclusions from the consistency, or lack of consistency, of the evidence put before us with the way matters had been put by the parties at the relevant times and in the claim forms and the responses. We also looked to the overall plausibility of the cases advanced with reference to the events that we could be clear had in fact happened.

69. On those bases, our findings relevant to the issues in this case were as follows.

70. Both Respondents are engaged in the installation and maintenance of conveyor belts, although it also appeared that some fabrication and general engineering work is undertaken by them. Whilst no direct evidence was put before us, our understanding was that the Second Respondent was owned by Steve Young and Elaine Young, who had initially set it up. It was our understanding that Mr Young focused on operational matters, with Mrs Young being involved in sales and marketing. At all material times Ms Heaney dealt with financial matters, including payroll.

71. The Second Respondent is based in Berkshire and, over the years, set up connected entities in North England and in Wales. We saw and heard no evidence about the operation in North England other than that it was based in Doncaster. In Wales however, a separate company, the First Respondent, was set up in 2011. It operates from premises in Port Talbot. Although connected to the Second Respondent, the First Respondent had three shareholders, each with a third share; Mr Young, Mrs Young and Mr Lindley. All three were also directors of the company.

72. The connection between the two companies went as far as the First Respondent trading under the name RTI Western, with RTI and SED being used fairly interchangeably. There were also, from time to time, financial connections between the companies, with the Second Respondent occasionally providing funds to the First Respondent when it was short of cash, which extended occasionally to the Second Respondent paying the wages of the First Respondent's employees.

73. Mr Lindley contended that he started to work for the Second Respondent in 2004, having been engaged with a view to setting up a business partnership in South Wales under a new company. Mrs Young's evidence, however, was that the first Claimant was only engaged by the Second Respondent for around three to four months in 2010, prior to the First Respondent being set up in 2011. Both sides were in agreement that, when the First Respondent was set up in Port Talbot in 2011, it was managed by Mr Lindley from then until late 2019.

74. Little evidence of the work undertaken by Mr Lindley for the Second Respondent was provided to us beyond the assertions of Mr Lindley and Mrs Young in their witness statements. However, we noted that Mrs Young's evidence, that Mr Lindley had been dismissed from his previous employment prior to undertaking work for the First Respondent in 2011, did find support in an email from the proprietor of the business Mrs Young said had dismissed Mr Lindley. That email confirmed, without referencing the date, that Mr Lindley had indeed been dismissed. We also noted, in correspondence adduced by the Claimant during the course of the hearing, which included communications to Mr Lindley from HMRC, that their records of his employment history consistently recorded a start date of 7 November 2011. On balance therefore, we considered that the Claimant's employment with the First Respondent started in 2011 with there being no connected continuous service.

75. Mrs Lindley commenced work at the First Respondent in 2013, undertaking administrative work. She contended that her role was Office Manager, which was denied by the Respondents, who took the view that if there had been such an appointment it had been made by Mr Lindley without the knowledge or approval of Mr and Mrs Young. We noted that no contracts of employment were ever issued to Mr and Mrs Lindley, or it seemed to any other of the First Respondent's employees. In the case of Mr Lindley, that was explained on the basis that he was a director, but there was no explanation for the lack of the provision of a contract to Mrs Lindley. In our view, the lack of a written contract meant that it was likely that the parties had never particularly bent their minds to Mrs Lindley's specific job title. It appeared to us that Mrs Lindley's duties were broadly those of someone undertaking an Office Manager type role, although we did not consider that anything material turned on her specific job title.

76. In terms of payments to Mr Lindley for his services, he contended that it had been agreed that he should receive £1,500 per week on a net, i.e. after tax, basis. Mr and Mrs Young received the same. Mr Lindley contended that this was entirely salary, whereas the Respondents contended that the bulk of remuneration was taken by way of dividends, amounting to £1,000 per week, with a sum slightly in excess of £500 per week being paid by way of salary, from which tax was deducted to leave a net £500 payment.

77. Mr Lindley contended that dividends were in fact not paid weekly, noting that there were occasional entries in his bank statements showing particular sums, e.g. £5,000, payable by way of dividends. However, we noted that the tax information disclosed by Mr Lindley during the course of the hearing, which

went back as far as April 2015, showed regular payments of taxable income declared in respect of Mr Lindley by the First Respondent, leading to net sums of £500 per week. For example, in 2015 the weekly sum was £559, with £59 per week being paid by way of income tax. In 2017, the taxable income declared was only £221.15 per week, with no tax being deducted, but in subsequent years the sums again showed a picture of Mr Lindley receiving a net £500 per week, with him receiving £567.80, subject to £67.80 per week tax, in April 2018, and £564.80, subject to £64.80, tax in April 2019. On balance, our view was that, in common with many director/shareholders of small companies, the practice adopted was to take the largest part of remuneration by way of dividend, with the salaries declared being sufficient to use up applicable personal allowances and exempt bands. We considered that the occasional lump sum payments received by the Claimant reflected additional dividends declared and paid from time to time.

78. From 2011 onwards, Mr Lindley took charge of the Port Talbot office and the work undertaken from it, supported by Mrs Lindley in respect of administrative matters from 2013 onwards. Mr and Mrs Young did not play any material role in the management of the Port Talbot operation at any time. Ms Heaney however provided financial support to the First Respondent from her base at the Second Respondent's Head Office.

79. Ms Heaney only worked part-time for the Respondent Group, undertaking a second job alongside her duties for the Respondents. She effectively however operated as bookkeeper for the Respondents. That involved taking charge of payroll, which was worked out in relation to the employees working in Port Talbot from figures in relation to hours worked provided by Mr and Mrs Lindley. Ms Heaney's work also encompassed managing the First Respondent's debtors, in relation to which a factoring company was used.

80. Mr and Mrs Lindley's two sons also worked in the Port Talbot operation, one son, Craig, being involved on the management side alongside his father.

81. For a number of years following the setting up of the Port Talbot operation in 2011, matters appeared to run without incident. In her evidence, Mrs Young confirmed that she had had concerns about how the business was being run for some time, referring in her witness statement to concerns in 2018, but under cross-examination to concerns having existed since 2014. That appeared to relate to a period of time when Mr Lindley was undertaking work overseas, unconnected to his work for the First Respondent, and where the Youngs were unaware of his absence.

82. Mrs Young also noted that concerns had arisen, certainly by 2018, regarding what were referred to as "cash payments". What that meant was not just payments for services made in cash which, subject to appropriate invoicing and accounting, would be perfectly legitimate, but referred to illegitimate transactions, where the ability to hide receipts of cash as opposed to receipts from card payments or, in previous years, cheques, existed. The concern was that work was being undertaken as part of the First Respondent's business but

was then kept "off the books", with the cash payment being retained by the employee undertaking the work, which included Mr Lindley.

83. Concerns also arose on the part of Mrs Young, and we presumed by extension Mr Young, around the treatment of staff by both Mr and Mrs Lindley, with complaints having been made to them about what was said to have been bullying by them and about harsh dismissal decisions taken by them.

84. Despite those stated concerns, no formal action was taken by Mr and Mrs Young in relation to either Mr or Mrs Lindley until the events of September 2019. Both parties however referred to a meeting between Mr and Mrs Young and Mr Lindley in June 2018 at which various matters were discussed.

85. Mr Lindley described that meeting as involving him raising a number of issues regarding failures to provide him with the company's accounts and to provide payslips to employees, which are discussed in more detail below. Mrs Young referred to a letter in the bundle which she stated that she had sent to Mr Lindley in June 2018 which referenced things very much from her perspective.

86. Mr Lindley contended that that letter had never been sent to him, but it did seem to reference matters which had arisen at the time, e.g. working overseas without informing Mr and Mrs Young. We also noted, in relation to the delivery of Mrs Young's evidence by her, and without wishing to be disrespectful to her, that she did not seem to be someone who was particularly computer literate. We doubted therefore whether she would have had the technological sophistication to have retrospectively produced a document such as this. We were therefore satisfied that it had been produced in June or July 2018.

87. The document did refer to "cash jobs" being done without the Youngs being informed, and that casual employees were always on the wages list and yet it was felt that there were no casuals working in the business other than on the odd occasion. The letter also referred to the way in which staff were being treated by Mr Lindley, with staff being required to work long hours.

88. Due to her concerns, in 2018 Mrs Young took the step of arranging for calls made from Mr Lindley's work phone to be recorded. She did not directly alert Mr Lindley to this, but both Mr and Mrs Lindley in their evidence indicated that they had understood that calls were being recorded. As we have noted, however, no action was taken in relation to the concerns about Mr Lindley until September 2019.

89. Mr Lindley contended that he had, for many years, sought financial information about the First Respondent's business from Mr and Mrs Young and from Ms Heaney, including the company's accounts, but had not received it. Whilst the documentary evidence in the bundle did not suggest that Mr Lindley had made such requests over many years, it was clear that he had sought such information for some time. Within the bundle were text messages from May 2017 chasing up receipt of the accounts and there were further emails and text messages in 2018.

90. By September 2018, Mr Lindley had engaged the services of solicitors, who wrote to Mr and Mrs Young and Ms Heaney on 20 September 2018 referring to numerous informal requests having been made by Mr Lindley to view various pieces of financial information which had not been forthcoming. The letter referred to Mr Lindley as a director being entitled to have access to certain information in respect of the company under the Companies Act 2006, and that under that Act a company's accountant's records must at all times be open to inspection by its officers. The letter also referred to Mr Lindley as a director having the right to be informed about the company's affairs and to inspect all the company's books and records to enable him to carry out his duties as a director. The letter then sought provision of the company's filed accounts, management accounts, bank statements, profit and loss accounts, details of dividends and an asset list.

91. No response to that letter was provided, or to a similar letter sent by the solicitors on 31 October 2018. The lack of response by February 2019 led the solicitors to indicate that Mr Lindley was proposing to issue a County Court claim for an order that he be allowed to inspect the company's accounts. The letters were sent to Mr Young, Mrs Young and Ms Heaney separately, albeit in identical terms.

92. An application to the County Court was then made, with Judgment being issued on 22 August 2019 following a hearing in the absence of Mr and Mrs Young and Ms Heaney. That Judgment directed that Mr Lindley and/or his professional advisers should have open and unrestricted access to various accounting records of the First Respondent by 2 September 2019. Costs of the Claimant's application, amounting to just under £10,000, were also ordered. Following that, some of the financial material was provided by Ms Heaney, although it was not clear whether complete compliance with the court order had been achieved.

93. The queries in relation to the accounts and financial information were made only by Mr Lindley or on his behalf, it being recognised by Mrs Lindley that she was not a director and therefore had no entitlement to such documents. She however had raised concerns herself about the lack of payslips being provided to the First Respondent's employees, including herself. There was evidence in the bundle of emails being sent by Mrs Lindley to Ms Heaney as far back as 2015, noting that individual employees had not received P60s or payslips. On occasions, these requests were provided with an explanation as to why they were needed for the specific individual, e.g. to complete a self-assessment tax return or to apply for a mortgage. On other occasions requests were generally made for payslips to be provided in respect of all employees. Emails were sent regularly throughout 2017 and 2018.

94. Ms Heaney, for her part, would respond from time to time explaining the pressure of her work and apologising for the delays. She accepted in her evidence that payslips were often provided late, on occasions many weeks late, due to difficulties she had in processing them. Those difficulties were only overcome in September 2019 when a new payroll system was introduced which Ms Heaney had come across in her other job.

95. A particular issue regarding Mrs Lindley arose in March 2018, when she discovered from HMRC that they had no record of her having worked at the First Respondent from September 2017, and that no tax had been paid in respect of her since that date. That subsequently Mrs Lindley to pursue a Tribunal claim before the Watford Tribunal which led to an order being made for the First Respondent to pay the Claimant in respect of tax and national insurance.

96. An issue later arose, during the period when Mrs Lindley was under suspension, when she became aware that pension contributions had not been paid to NEST on her behalf. Ms Heaney confirmed that that had arisen due to cashflow difficulties within the First Respondent's business, which she had ultimately addressed by agreeing a payment plan with NEST in respect of all outstanding pension contributions.

97. In early September 2019, Mrs Young was contacted by members of staff from the Port Talbot operation, raising concerns about their treatment by Mr and Mrs Lindley. Mrs Young invited three of the employees to visit her and her husband at their home in Maidenhead, and three of the employees, Mr Pride, Mr Perryman and Chris James, travelled to the Youngs' home some time in the middle of September. The discussion revolved around the management of staff by Mr and Mrs Lindley, in particular the long hours that employees were being required to work, delays in payment and underpayment, and the way in which staff were spoken to.

98. Following that meeting, Mrs Young arranged a meeting, without the knowledge of Mr and Mrs Lindley, of current and former employees of the First Respondent at a bar in Cardiff on 25 September 2019. Mr and Mrs Young and Ms Heaney attended and there were eight employees, or former employees, of the First Respondent in attendance. The employees and former employees complained principally about the way they were treated by Mr and Mrs Lindley, and also by one of their sons, Craig. The allegations again involved concerns over working hours, but extended to concerns over bullying behaviour. Indications were also made about cash payments being made by customers who would deal only with Mr Lindley, the implication being that the cash payments received by Mr Lindley were retained by him and not put through the company's books.

99. Mr and Mrs Young and Ms Heaney decided that the allegations should be investigated. Statements were obtained from several employees and former employees, those who attended the meeting on 25 September 2019 and others. Again, the thrust of those statements focused on the way Mr and Mrs Lindley managed staff, with specific allegations of bullying treatment. Again however there were also references to individuals having witnessed third parties arrive at the company's premises, liaise only with Mr Lindley, and provide cash for purchases. Mr and Mrs Young and Ms Heaney decided that Mr and Mrs Lindley should be suspended whilst further investigations were undertaken.

100. Mr and Mrs Young attended at the Port Talbot site on 30 September 2019 to effect the suspensions. They attended very early in the morning, having been provided with keys to the yard by one of the employees, and were there when Mr and Mrs Lindley arrived. Craig Lindley had arrived shortly before his parents and had been told that he was being suspended. He communicated that to his parents such that they had some knowledge of what was potentially awaiting them when they arrived.

101. When that happened, what we felt we could only describe as a "slanging match" then developed between Mr and Mrs Young on one hand and Mr and Mrs Lindley on the other. This initially took place in the yard but then moved inside. Rather than calmly inform the Lindleys that they were being suspended, Mr and Mrs Young did so in a very brusque and direct manner, Mr Young informing Mr Lindley that he was being suspended and that he was a "*fiddling bastard*". Ultimately, Mr and Mrs Lindley left the first Respondent's premises that morning under suspension.

102. A letter was sent by Mrs Young to Mr Lindley dated 30 September 2019 noting his suspension in relation to allegations of bullying and intimidating of staff and of theft. Mr Lindley was informed that he was required to attend a disciplinary meeting on 8 October 2019 to be conducted by Mrs Young and Ms Heaney. The letter contained "*one example*" of evidence, with Mrs Young saying that they had several more examples. Mr Lindley contended that he did not receive this letter and it was very difficult for us to take a view one way or another as to whether he did or not. The letter appeared to have been put together with a degree of professional input, and Mrs Young confirmed that she was taking advice from external legal and HR sources from time to time. In our view, it was likely that the letter had been prepared and sent, although of course we could not confirm that it had actually been received by Mr Lindley through the post. Mrs Young did not send a similar letter to Mrs Lindley that day.

103. Mrs Young then sent a further letter to Mr Lindley dated 7 October 2019, this time by recorded delivery, requiring Mr Lindley to attend a disciplinary hearing on 11 October 2019. This time the allegations were set out into five bullet points as follows:

- *bullying, harassment and intimidation of, and inappropriate behaviour towards, the Company's staff;*
- *potential financial irregularities;*
- *potential irregularities regarding shifts worked and the wages received;*
- *theft;*
- *removal of Company and customer data from the Company servers, hard drives and computer systems;*

104. Some copies of relevant documents were enclosed, with further documentation, said to be confidential in nature, to be provided during the disciplinary hearing. Again, this letter appeared to have been put together with a degree of external

advice, and, indeed, the letter noted that an independent HR expert would conduct the hearing. This time, an identical letter was sent to Mrs Lindley on the same day, again by recorded delivery, with the allegations against her being:

- *bullying, harassment and intimidation of, and inappropriate behaviour towards, the Company's staff;*

- *removal of Company and customer data from the Company servers, hard drives and computer systems;*

105. Mrs Lindley subsequently contacted Mrs Young to inform her that she and her husband were on annual leave from 10 October to 24 October 2019 inclusive, and Mrs Young then, on 9 October 2019, rearranged the disciplinary hearing for 28 October 2019.

106. Mr and Mrs Lindley's solicitors then wrote separate, albeit very similar, letters to Mrs Young on 14 October 2019, setting out their objections to their treatment. The letters asserted that the disciplinary processes being applied were nothing more than a sham and obviously engineered to bully the Lindleys out of their employment because of the dispute that Mr Lindley had with the First Respondent. The letter in relation to Mrs Lindley also referred to her treatment being potentially for discriminatory reasons.

107. Both letters stated that they should be taken to be formal grievances on the Lindleys' behalves. The letters raised concerns about the suspension of the Lindleys and the investigation which had been undertaken. They asserted that the action taken was motivated by the legal proceedings commenced by Mr Lindley, the judgment obtained in August 2019 and the threat of enforcement action on 16 September 2019. The letters also raised a concern about the failure to meet with Mr and Mrs Lindley at investigatory meetings as opposed to proceeding straight to a disciplinary hearing. The letters concluded by noting that the disciplinary hearings should be postponed until the grievance processes had been concluded.

108. Solicitors then instructed by the First Respondent then wrote to the Claimants' solicitors on 23 October 2019 noting the agreement to the postponement of the disciplinary hearing in order for the grievances to be heard, and noting that the disciplinary hearings would now be converted to grievance meetings and that the grievances would be conducted by the previously identified HR expert.

109. On 25 October 2019, however, Mrs Lindley emailed Mrs Young, noting that she and her husband were unable to attend the grievance meeting due to stress. Both Mr and Mrs Lindley were then certified as unfit for work through to the middle of December 2019.

110. During this period Mrs Lindley, on behalf of herself and her husband, queried with Mrs Young and Ms Heaney the initial failures to pay sick pay to the two of them, and then queried the amounts being paid. That included an email from Mrs Lindley to Ms Heaney on 8 November 2019 noting the SSP weekly rate

and querying the amounts that had been paid. During this period, only statutory sick pay was paid.

111. Mrs Lindley continued to query the correct sick pay payments following the expiry of the Fit Notes on 18 December and 22 December 2019 respectively. She also, on 1 January 2020, in an email to Ms Heaney, commented that she had noticed that she and her husband had not received their annual bonus for the previous year. The sick pay queries were resolved by payments on 3 January 2020 but no bonuses in respect of 2019 were paid.

112. Mrs Lindley also brought to Ms Heaney's attention, on 13 January 2020, that she had received emails from NEST in relation to the non-payment of pension contributions from September 2019. As we have noted, contributions into NEST on behalf of the First Respondent's employees who were members were not paid at that time due to a lack of funds, but were subsequently paid following the agreement of a payment plan between the First Respondent and NEST.

113. With regard to sick pay entitlement, as we have noted, Mr and Mrs Lindley never received formal contracts of employment or written statements of particulars of employment and therefore no written agreement existed regarding the payment of sick pay. Mr and Mrs Lindley contended that they had always received full pay in respect of sickness absences. The Respondents' position was that, whilst that may have been the case, they were never informed by Mr and Mrs Lindley when they were absent due to sickness and therefore simply continued paying their full salary in the usual way. If therefore, the Lindleys had received full pay in respect of sickness absence that had arisen inadvertently.

114. There was no evidence before us of any particular agreement having been reached orally in respect of sick pay, and nor were there any payslips before us which recorded payments being made to Mr and Mrs Lindley of full pay in relation to periods of sickness absence. We also noted that Mrs Lindley's emails about the sick pay she and her husband had received had engaged with the detail of SSP payments and had not made reference to any entitlement to full pay during that period.

115. We considered that had there been a contractual entitlement to full pay in respect of sickness absence, even if only on the basis of an implication through custom and practice, then Mrs Lindley would have raised that in her communications with Ms Heaney in November and December 2019 and would not have taken issue with the minutiae of the SSP payments. In our view, therefore, Mr and Mrs Lindley had no contractual entitlement to full pay in respect of sickness absences.

116. With regard to bonuses, it was confirmed that in all previous years Christmas bonuses had been paid to all staff. The position of the Respondents was that, in relation to bonuses at Christmas 2019, the company's cash resources were limited and therefore only bonuses, of relatively small amounts, were paid to employees. None of the directors, i.e. Ms and Mrs Young as well as Mr Lindley, received any form of bonus, having historically received somewhat

larger sums than the other employees. Mrs Lindley however did not receive a form of Christmas bonus, and we considered that she would have fallen into the "other employee" category and not into the "director" category. It seemed to us therefore that she should have received a payment in respect of her bonus at the end of 2019 as all other non-director employees did.

117. Although Mr and Mrs Lindley were fit to work by the end of 2019, and consequently were fit to engage in grievance and disciplinary processes, no further contact was made with them in relation to progressing those matters until the end of February 2020. In the meantime, however, investigations had continued to be undertaken, principally by Mrs Young, into the various allegations relating to Mr and Mrs Lindley.

118. Those included further statements from employees and former employees about the way they had been treated by Mr and Mrs Lindley, and also further allegations about payments received in cash which did not go through the company's books. Statements were also received from employees who asserted that claims were made by Mr Lindley for casual employees who did not in fact work. A specific statement was taken from one employee who had been the driver of a company vehicle from which tools had been stolen in September 2019, noting that, whilst only two items had been stolen, an insurance claim made by Mr and Mrs Lindley had been for six items. A statement was also received from a local computer expert who noted that he had been instructed to change the First Respondent's IP address by the addition of another digit, which would have prevented access to the shared network folder.

119. A particular statement noted that cash had been received from one particular customer on several occasions, which had been counted and checked by Mr Lindley, and a statement was received from the owner of that building company confirming that he had paid Mr Lindley cash amounts for steel over the previous three years.

120. A statement was also received from Mr Jones, who confirmed its content during evidence before us, that, in his work as a storeman, goods received from one particular supplier, Phoenix Saxton, always had to be placed in the main office to be checked off by Mrs Lindley who would then notify him to collect stock to be stored away. Mr Jones confirmed that that procedure only appeared to apply to that supplier and not to any other.

121. Another employee confirmed that one of his duties had been to confirm that goods from Phoenix Saxton were checked off but that that then unexpectedly became Mrs Lindley's responsibility, which was not the case with any other supplier.

122. A statement was also received from an individual who had been involved in the sale of a conveyor belt to the First Respondent which had previously been the property of a company which had gone into administration or liquidation. Mr Lindley had contacted Mr and Mrs Young about that and a sum of £12,025 had been transferred to Mr Lindley's account in order to make the purchase.

However, the person who sold it to the First Respondent confirmed in a statement that he had in fact only received £8,000 for the sale.

123. A statement was also received from an employee of Phoenix Saxton noting that he had been instructed by Mr Lindley and by his son to supply goods to the First Respondent, such as a lawnmower, strimmer, ceramic floor tiles, shower head, shower screen and shower tray, but to change the names on the supply lists.

124. An invoice was also discovered from another computer specialist which was dated 25 September 2019, where the services were described as "*relating to advice on how to copy data from shared drive onto USB hard*".

125. A handwritten statement was also obtained from Mr Jones confirming that he had not seen or heard of three individuals in respect of whom Mr Lindley was receiving payment as casual workers. Mr Lindley confirmed before us that the general practice had been that casual workers would be paid cash for their services by him, that cash having been sent to his account for that purpose.

126. On 29 February 2020 Mrs Young wrote separately to Mr and Mrs Lindley by email, inviting them to investigative meetings on 4 March 2020. In Mr Lindley's case, the allegations to be investigated were stated to be as follows:

"*1. That you were party to a fraudulent insurance claim in August 2019*

2. That you have taken cash payments from customers for Company stock and not paid the cash into the Company bank account

3. That you have claimed pay for individuals who did not work for the Business

4. That you have approved payments for shifts not worked by your son Craig

5. That you have failed in your duty of care to employees by ignoring the Working Time Regulations

6. That you have made fraudulent expense claims

7. Misuse of the Company credit card

8. That you were party to changing the IP address

9. That you have removed Company property from the office

10. That you were working overseas whilst claiming a wage from the Business without informing or seeking permission from the other Directors"

127. In Mrs Lindley's case, the allegations to be considered were:

"*1. That you were party to a fraudulent expense claim in August 2019*

2. *That you have made fraudulent expense claims*

3. *Misuse of the Company credit card*

4. *That you were party to changing the IP address*

5. *That you have removed Company property from the office*

6. *Inappropriate behaviour towards colleagues, including bullying and harassment*

7. *Failure to provide employees with PPE*

8. *Claiming payments for staff who don't exist*

9. *Failure to log work being carried out correctly despite requests to do so.*"

128. The meetings were arranged with a different HR consultant, Elaine Fountain.

129. The Claimants' solicitor wrote to Mrs Young by email on 3 March 2020 in response to her two emails of 29 February. He wrote to object to the meetings and to advise Mrs Young that his clients would not be in attendance. He noted that a grievance had been raised by Mr and Mrs Lindley on 14 October 2019 and that it was inappropriate to restart the disciplinary process whilst the grievance remained outstanding. The email also noted that the meeting had been scheduled at the First Respondent's premises which, given the circumstances surrounding the suspension, was felt to be inappropriate, and instead it was contended that a neutral venue should be sought. A query was also raised around the appointment of a new HR consultant with a question being raised as to the company she worked for in order that it could be verified that she was genuinely independent. The letter concluded by noting that Mr Lindley had not received his full salary over the previous two weeks, receiving £500 instead of his contractual £1,500 entitlement. It was noted that if the correct payments were not made then that should be classed as an additional point of grievance to be investigated.

130. As we have already noted, in our view there had been an agreement in respect of all three directors that, whilst they should receive a net £1,500 per week, that should be made up of £1,000 by way of dividend and a further sum which would net down to £500 by way of wages. That dividend element was stopped in respect of all three directors from February 2020 onwards due to the cash position of the company.

131. Mrs Young responded by a letter dated 10 March 2020, noting that the venue for the meetings would change to a local hotel, but that the arrangements would otherwise remain the same. The letter stated that the first Respondent was not in receipt of a grievance from the Lindleys' solicitor dated 14 October 2019 and asked for confirmation as to when and how it had been submitted. Mrs Young in her evidence before us confirmed that that had been a mistake and the fact of the earlier grievance in October 2019 had been overlooked.

132. The Claimants' solicitor responded by email dated 12 March 2020, noting that the earlier grievance had been provided and that the company's then solicitors had acknowledged it. The email noted that the investigation meeting should not take place until the grievance process, and any appeal, had been completed. The query about Ms Fountain's independence was repeated, and the contention that Mr Lindley's salary was £1,500 and not a net £500 was restated.

133. Ms Fountain then spoke to the Claimants' solicitor, and also communicated with him by email to confirm her background. Emails were exchanged between Ms Fountain and the Claimants' solicitor regarding the payments to Mr Lindley. In Ms Fountain's email it was noted that the proposed meeting would deal with the grievances rather than the disciplinary investigations, but Mr Lindley's solicitor noted that until he was paid the shortfall in his wages for the previous few weeks then Mr and Mrs Lindley would be unwilling to attend any grievance meetings.

134. Ms Fountain sent a formal invite to a grievance hearing to Mr and Mrs Lindley, anticipating that they would meet on 23 March 2020, with the method of holding the meeting needing to be clarified as there was, at the time, uncertainty over the ability to meet in light of the developing COVID-19 pandemic. The Claimants' solicitor replied, noting that Mrs Lindley would be willing to attend but that too short notice had been provided to allow her to arrange her trade union companion to attend with her. It was suggested that Mrs Lindley should obtain the availability of her representative so that a mutually agreeable date could be arranged. We noted that Mrs Lindley, in her evidence before us, confirmed that at no stage had she been a member of a trade union. The Claimants' solicitor restated the fact that Mr Lindley had not been paid his full salary for the previous four weeks and that, until the shortfall was paid, he was unwilling to attend a grievance meeting.

135. Ms Fountain then replied the same day, rearranging the meeting with Mrs Lindley for 27 March 2020. She restated that it was understood that correct payments had been made to Mr Lindley, and that she believed that he should attend the meeting to explain his grievance, noting that should he fail to attend then she would have no alternative other than to make a decision on the evidence available to her.

136. In the event, no meeting took place with either Mr or Mrs Lindley. Instead, Ms Fountain sent questions, via the Claimants' solicitor, for them to answer in writing within a certain time period. Both Mr and Mrs Lindley separately provided answers to Ms Fountain's questions, together with more detailed summaries of their perspectives on the issues of concern that had been raised.

137. We did not hear evidence from Ms Fountain, but could see in the bundle that she either met with, or received answers to written questions from, Mr Young and Mrs Young. It also appears that she was due either to meet with Ms Heaney or to receive answers to written questions from her, as there was a set of questions for Ms Heaney within the bundle, but there were no answers.

138. Ms Fountain provided her decision on the grievances by letters dated 20 April 2020. She partly upheld the grievances, in that she accepted that the conversation over their suspensions should have been held in private. She also acknowledged that Mrs Young had been incorrect to say that a grievance had not been received. She also accepted that Mrs Lindley had received two disciplinary invitations, with different allegations contained within them, which had been confusing. With regard to the other allegations, nearly all were not upheld, with one point being stated to be unable to be decided upon.

139. Ms Fountain noted in both letters that Mr and Mrs Lindley had the right to appeal against her decision, and they did appeal via a letter from their solicitor dated 24 April 2020 covering both of them. The letter noted that the grounds of appeal could broadly be broken down into three key areas; (i) that Ms Fountain simply sided with the accounts given by Mr and Mrs Young and did not provide any critical analysis of the evidence; (ii) that Ms Fountain had failed to deal with the key issue, which was that the disciplinary process was wholly unfair, and that Mr and Mrs Young's actions had demonstrated that they had already decided to dismiss Mr and Mrs Lindley; and (iii) that, despite finding in Mr and Mrs Lindley's favour on some points, Ms Fountain had failed to identify what corrective measures she was going to implement, most notably to ensure that the disciplinary process was fair moving forward.

140. The letter concluded by noting that the appeal process should take place by way of a full re-hearing of the matters not determined in Mr and Mrs Lindley's favour, given what was described as the "*wholly inappropriate manner in which the grievance had been concluded*".

141. It had been indicated to Mr and Mrs Lindley that Mr Hacker would hear the grievance, and the appeal letter asserted that it would not be acceptable for a more junior employee than Mr and Mrs Young to consider the complaints and asserted that it was imperative that an independent HR professional should be appointed.

142. Mr Hacker acknowledged the appeals by email dated 5 May 2020 to Mr and Mrs Lindley, noting that he would be looking into the points of appeal that week. The Claimants' solicitor restated the objections to Mr Hacker acting as appeal officer in an email of 7 May 2020. Mr Hacker did not ultimately accept those protestations and proceeded to deal with the appeals.

143. In relation to Mr Lindley, Mr Hacker wrote to him by email suggesting that the appeal hearing take place on either 7 May 2020 or 11 May 2020. Unfortunately, those emails were sent to an incorrect email address, being sent to davelindleyrti@btconnect.com as opposed to the correct address of davelindleyrti@btinternet.com. Consequently, Mr Lindley did not receive those invitations. In Mr Hacker's view, however, Mr Lindley simply failed to attend the suggested meeting.

144. In Mrs Lindley's case, Mr Hacker's invitation to a grievance appeal hearing was received, and noted that the hearing would take place on 15 May 2020 by telephone. Mrs Lindley replied however saying that she would not attend as the letter was very vague and that it was unclear how it was planned on holding

the meeting given the guidelines in place regarding the COVID-19 pandemic, that there was insufficient time to arrange a representative, that Mr Hacker was not suitably qualified to be able to hear the grievance appeal as he was not a qualified HR professional person, that he was employed by Mr and Mrs Young and was good friends with them both in and out of work, and that a reasonable request had been made for an independent HR consultant to consider the appeal.

145. Mr Hacker replied, noting that it was not essential for HR professionals to hear grievances, as that was usually done by managers within a business and that he had experience of such matters. He also noted that the information Mrs Lindley had about him was factually incorrect. He confirmed that it had been his intention to hold the hearing by telephone, and that he felt that had been made clear in his initial letter. He noted Mrs Lindley's problem arranging a union representative to accompany her, and commented that he was willing to rearrange the meeting.

146. The Claimants' solicitor then replied on Mrs Lindley's behalf, noting that the point about an HR professional was to ensure independence, and that due to Mr Hacker's friendship with Mr and Mrs Young his ability to conduct an impartial process must be in severe doubt. Mrs Lindley's position was said to be clear, which was that if Mr Hacker wished to proceed with the appeal hearing in her absence then that was his decision and he would do so without Mrs Lindley's consent. The solicitor noted that Mrs Lindley would not attend a meeting with Mr Hacker, but would have no objection to attending a meeting if an independent HR professional was appointed.

147. In the circumstances of the communications between Mrs Lindley and her solicitor with Mr Hacker over her unwillingness to attend the hearing, our view was that had Mr Lindley received the letters inviting him to the appeal hearing he would also have refused to attend for the same reasons.

148. In the circumstances, Mr Hacker proceeded to consider the appeals on the basis of the information he had received. That was the correspondence and documentation that had arisen in the grievance process and Ms Fountain's grievance outcome letters. Mr Hacker prepared a note of his conclusions in relation to Mr Lindley's appeal and provided that to Mr Lindley under cover of a letter dated 23 May 2020 in which he summarised his approach and his decision. Whilst some, relatively minor, matters were upheld, the majority were not.

149. Mr Hacker then undertook exactly the same process in respect of Mrs Lindley's appeal, preparing a document with his conclusions on the issues he had considered, and providing that to Mrs Lindley in a letter dated 5 June 2020 in which he summarised the conclusions reached. Whilst some issues were upheld, by far the largest part were not.

150. Following the conclusion of the grievance processes, steps were taken to proceed with the disciplinary allegations relating to Mr Lindley. Mr Hacker wrote to Mr Lindley on 29 May 2020 inviting him to a disciplinary hearing on 4

June 2020. Mr Hacker noted that the disciplinary hearing had been arranged to discuss the following allegations:

"*1. Financial irregularities, specifically,*

a. payments made to Dan Harlin for casual labour

b. payments made to L Evans

c. payments to a John Wait.

2. Theft:

a. Missing funds, specifically, your purchase of Dunlop Conveyor belt in May, 2019 from Mike Jones. You were sent £12,025.00. Statement from Mike Jones confirming price was £9k and the fact that you paid him £8k.

b. Cash payments from Tosh Building Services. Evidence attached. No record of the funds being paid into the bank.

c. Allegations that you instructed Phoenix Saxon (Michael Williams) to supply domestic fixtures, fittings and tools and charge the items as something else to RTI Western.

(3) Insurance fraud, specifically, that you made a false insurance claim following an incident on 16.8.19."

151. Mr Lindley was advised of his right to be accompanied by a workplace colleague or a trade union representative.

152. Various documents were disclosed with the letter, including statements from employees and external parties regarding the allegations, copies of bank transfers, copies of invoices from Phoenix Saxton, and an email and statement relating to the insurance issue.

153. Mr Lindley's solicitor replied on his behalf of 3 June 2020, raising several concerns about the disciplinary process, asserting why it should not go ahead. These included; the fact that Mr Lindley was not offered the opportunity to attend or provide information for consideration at the grievance appeal hearing, the grievance appeal outcome was heavily biased towards the company, the disciplinary meeting should not take place until the grievance appeal hearing had been properly concluded, there was insufficient notice of the disciplinary hearing, the allegations were different to those put to Mr Lindley in October 2019, the investigation had been inadequate, the evidence provided was not explained, Mr Lindley had not been interviewed as part of the investigation, Ms Fountain had been involved in the investigation and should have had no involvement due to her prior involvement in the grievance, and Mr Hacker's appointment as disciplinary officer was entirely inappropriate as he had been involved in conducting the grievance appeal.

154. The letter went on to say that it was felt that Mr Lindley had "*zero chance*" of the hearing being conducted fairly, and a request was again made for an impartial HR consultant to be appointed to perform an appropriate investigation.

155. Mr Lindley had in fact sent an email reply to Mr Hacker on 2 June 2020, noting that he would not attend the disciplinary hearing because he had not been given sufficient time to prepare and arrange a trade union representative. He also raised the point that he had not received any correspondence from Mr Hacker inviting him to a grievance appeal meeting. We observed that Mr Lindley confirmed that he was not at any time a member of a trade union.

156. Mr Hacker replied to Mr Lindley's solicitor on 8 June 2020. He noted that, as a small organisation, the Respondent had limited people and financial resources and that, under the ACAS guidance, as a small organisation there was no issue in him carrying out the disciplinary hearing. He stated that he had full authority to make any decision he saw fit and would carry out the task with due care, attention and professionalism. He noted that there had been numerous attempts to try to arrange the disciplinary hearing and noted that he had now arranged for it to go ahead on 11 June 2020 by video.

157. Mr Lindley's solicitor replied on 10 June 2020, again maintaining that it was inappropriate for the disciplinary hearing to take place and for Mr Hacker to deal with it. It was noted however that Mr Hacker seemed determined to progress the disciplinary hearing regardless of Mr Lindley's representations about it and therefore a document was attached with Mr Lindley's written representations to the allegations. It was noted that that was not done with any acceptance that the disciplinary process should proceed, but was done to "*try and avoid the whitewash of a procedure*" that Mr Hacker was intent on completing. The email concluded by noting that Mr Lindley would be willing to attend a disciplinary process in person if he first had the chance to attend a grievance appeal hearing and the appeal process was conducted afresh by a suitable party. He confirmed however that Mr Lindley was not willing to attend the scheduled meetings as things stood.

158. Mr Hacker considered Mr Lindley's written representations and raised some questions of him, via his solicitor, as a result. Mr Hacker also met with several individuals to ask them questions about the allegations.

159. Mr Hacker then went through Mr Lindley's written responses and noted, after each section, his conclusion referring to the documentation he had considered. He concluded that, on balance, the allegations against Mr Lindley were supported by the evidence and he therefore upheld them. He then wrote to Mr Lindley on 22 June 2020 with his decision. He set out his findings in respect of each of the allegations and sub-allegations and noted that his conclusion was that Mr Lindley should be dismissed, without notice, on the grounds of gross misconduct, that dismissal taking effect on 23 June 2020. He concluded the letter by noting that Mr Lindley had the right to appeal the decision, with any appeal being made to Mr Terry Young, the son of Mr and Mrs Young, and the General Manager of the Second Respondent's Windsor site, within five working days.

160. With regard to Mrs Lindley, Mr Hacker wrote to her on 22 June 2020 inviting her to an investigation meeting on 24 June 2020. That was to be held by telephone or by video. The allegations to be investigated were:

> "*1. That you were party to a fraudulent insurance claim in August 2019*
>
> *2. Misuse of the Company credit card*
>
> *3. That you were party to changing the IP address*"

161. Mrs Lindley's solicitor replied to Mr Hacker on 24 June 2020, advising him that she would not be in attendance at the investigation meeting. That was on the basis that it was not considered that Mr Hacker was a suitable person to conduct the investigation, having conducted the appeal in relation to Mrs Lindley's grievance and the manner in which Mr Hacker had now dismissed Mr Lindley, meaning that Mrs Lindley had no faith in Mr Hacker's ability to conduct a fair investigation. The email also referred to the fact that this was the third time that new allegations had been put to Mrs Lindley which were felt only to have arisen because of the fact that court action had been taken against the company. Reference was also made to there being only a little over one day's notice of the meeting, which was inadequate. The email concluded by noting that if Mr Hacker wished to provide a list of questions then Mrs Lindley was prepared to respond, albeit that that would still be under protest at the fact that Mr Hacker was conducting the investigation.

162. Mr Hacker initially replied on 2 July 2020 noting that he was not prepared to accept written answers to questions and that he believed that the matter could and should be resolved by speaking to Mrs Lindley directly. He noted that Mrs Lindley was suspended from duty on full pay, was not unwell, and therefore had no reason not to attend the meeting. He noted that should she again decide not to attend the meeting he would have no choice but to proceed in her absence. As Mrs Lindley did not attend the investigative meeting, Mr Hacker, on 6 July 2020, noted the points that he had wished to discuss with her and noted his concerns about the various matters. He concluded that matters should progress to a disciplinary hearing and a letter was sent to Mrs Lindley on 7 July 2020 inviting her to a disciplinary hearing on 10 July 2020 by telephone. Although the letter came from Terry Young, the General Manager of RTI Windsor, it was confirmed by both Mr Young and Mr Hacker that it had not been prepared by him but had been prepared by Ms Fountain. The letter specified that the disciplinary hearing had been arranged to discuss the allegations which had been stated to be subject to investigation, which were clarified as follows:

> "*1. Irregular and fraudulent charges on the Company Credit Card, specifically, spa days, overnight stays at hotels in Cardiff, charges to John Lewis, full list enclosed with the notes from the investigation meeting*
>
> *2. Potential insurance fraud, specifically following an incident on Friday 16 August 2019.*

3. Change of company IP address."

163. Mrs Lindley was advised that, if proven, the matters could be regarded as gross misconduct and therefore a potential outcome of the disciplinary hearing could be the termination of her employment. She was advised of the right to be accompanied by a work colleague or trade union representative.

164. Terry Young then dealt with Mr Lindley's appeal and Mrs Lindley's disciplinary hearing. That was on the basis that he was best placed to deal with the process as he had not had any prior involvement in the disciplinary matters and indeed had not previously been involved in the First Respondent's business.

165. Mr Lindley had appealed against his dismissal via an email from his solicitor of 29 June 2020. The grounds of appeal were noted to be that:

- The decision to dismiss Mr Lindley had been made in September 2019 and the disciplinary process conducted had been a sham designed to ensure that he was dismissed.
- The real reason for dismissal was the issuing of court proceedings against the company.
- The investigation had been one-sided and had amounted to a witch hunt against Mr Lindley from start to finish.
- Mr Lindley's grievance appeal had not been conducted fairly and had not been completed adequately prior to the decision to proceed with the disciplinary hearing.
- The decision taken by Mr Hacker to dismiss had been unreasonable and not within the range of reasonable responses.
- That Mr Hacker had not been a suitable person to conduct the disciplinary hearing.
- That Elaine Fountain had conducted much of the investigation and it appeared that that had happened when she had been involved in the grievance process.

166. The email noted that, given the asserted fundamental flaws in the process, Mr Lindley required the appeal to be considered as an entire re-hearing rather than a consideration of the reasonableness of Mr Hacker's findings. The email also noted that Mr Young's appointment as appeal officer was entirely inappropriate, Mr Lindley having no faith that, as Mr and Mrs Young's son, he would be able to conduct an impartial process. Again a request was made for an independent HR consultant to conduct the appeal.

167. Mr Young then sent an email to Mr Lindley's solicitor on 13 July 2020 with which was enclosed a letter inviting Mr Lindley to an appeal hearing by video on 16 July 2020. We observed, from Mr Young's oral evidence, that he had little recollection of communications sent under his name in relation to both Mr

Lindley's appeal and Mrs Lindley's disciplinary hearing. Whilst Mr Young himself was less than clear as to how the correspondence had been produced, even to the extent of being unable to recall that he had even seen some of it, Mr Hacker was frank in his confirmation that the correspondence from Mr Young had been prepared by Ms Fountain, and also by himself, on Mr Young's behalf.

168. The Claimants' solicitor wrote to Mr Young by email on 21 July 2020, noting that he had been out of the office the previous week and therefore unable to pass on the meeting invite, and enquiring if Mr Young had proceeded with the appeal hearing or if it had been rescheduled. Mr Young replied on 22 July 2020, noting that he was happy to reschedule it and offered to meet with Mr Lindley on either 27, 28 or 29 July. Mr Lindley's solicitor then replied on 27 July 2020, confirming that Mr Lindley would not be in attendance at the meeting, that his grounds of appeal had been fully documented and were sufficient to allow Mr Young to consider the appeal, and that should he have any questions he should not hesitate to contact him. The email noted that Mr Hindley had no faith in the appeal process for the reasons previously outlined.

169. Mr Young confirmed in his witness statement that, having considered all the evidence available to him, he saw no reason to interfere with the decision of Mr Hacker and therefore upheld the decision to dismiss and rejected the appeal. It did not appear however that Mr Young ever sent a letter or any written communication to Mr Lindley confirming the outcome, which was a requirement of the first Respondent's disciplinary procedure.

170. In his oral evidence, Mr Young was not at all clear about what he had done in relation to the appeal. He was vague about what documents he had considered and what, if indeed any, conclusions he had drawn from them. He also accepted that he had not communicated the outcome to Mr Lindley in writing, noting that he had not done so but would have hoped that someone else would have done.

171. With regard to Mrs Lindley's disciplinary hearing, Mr Young wrote on 7 July 2020 inviting her to a meeting on 10 July. As we have already noted, that letter was not actually prepared by Mr Young but by Ms Fountain and Mr Hacker on his behalf.

172. Mrs Lindley's solicitor replied to that letter on 9 July 2020 noting that she would not be in attendance given that the process had "*been a sham from start to finish*" and that the outcome had already been determined in advance. The observation was made that Mr Young's appointment as disciplinary officer, given that he was Mr and Mrs Young's son and therefore was in no way impartial, meant that he was incapable of providing an objective decision. The solicitor noted nonetheless, in anticipation of a refusal to appoint an objective disciplinary officer, that Mrs Lindley's written representations were provided in an attached document. Further representations were made as to why the disciplinary process should not go ahead.

173. Mrs Lindley made comments in relation to all three allegations which Mr Young noted he had considered. In his written witness statement he also referred to

conducting further enquiries and considering relevant documents. He stated that, on the balance of probabilities, given the evidence that had been collated and which was in front of him, and taking into account any evidence submitted by Mrs Lindley in response to the allegations, he concluded that the allegations were supported by the evidence and therefore that he upheld them.

174. In his oral evidence however, Mr Young was again extremely vague about what documents he had considered and what steps he had taken. He in fact stated that he did not recall seeing Mrs Lindley's written representations. He stated that he remembered the representations she had made but did not remember seeing the written document. He again confirmed that he had not produced his letter confirming his decision, which was sent to Mrs Lindley on 21 July 2020, but did remember seeing it. That letter set out a fairly detailed response to each of the points raised by Mrs Lindley in her written representations together with the rationale for the conclusions reached. As we have noted Mr Hacker, who gave evidence after Mr Young, confirmed that he and Ms Fountain had prepared the communication sent by Mr Young.

175. The letter confirming Mrs Lindley's dismissal without notice for gross misconduct with effect from 21 July 2020 advised her of her right to appeal the decision. She did submit an appeal dated 27 July 2020. via her solicitor, the grounds being similar to those advanced by Mr Lindley in his appeal. The appeal was to be heard by Mr Terry Young's wife, Mrs Chudney Young.

176. Mrs Chudney Young did not attend to give evidence before us and the only documentation regarding Mrs Lindley's appeal in the bundle was a letter dated 20 October 2020 confirming that the appeal was not upheld, with the dismissal decision being confirmed. Mr Terry Young in his statement noted that there had been several unsuccessful attempts to arrange a meeting to hear Mrs Lindley's appeal, with Mrs Lindley indicating that she wanted her appeal to be dealt with on the papers, but we saw no evidence to support that.

177. The appeal outcome letter addressed the points raised in the appeal letter in some detail, with some supporting documentation being provided by way of attachment. Our view on balance was that this document had again been prepared by Ms Fountain and Mr Hacker and that Mrs Chudney Young had played a very limited role in the consideration of the appeal.

178. The only additional matter we need to refer to within our findings related to the transcripts of recordings of telephone conversations that we allowed to be adduced in evidence and which were explored with Mr and Mrs Lindley by Mr Canning in cross examination at some length. No dates of the conversations were provided, although we could place one of the conversations, between Mr Lindley and his son Dan, who remained in work following the suspension on 30 September 2019, as it referred to the suspension and what was happening in the workplace in the immediate aftermath. Others appeared to have taken place whilst Mr and Mrs Lindley were still in work.

179. It was unclear when these transcripts had come to the Respondents' attention. Mrs Young confirmed that she had only become aware of the calls after Mr and Mrs Lindley had been suspended, as she had initially been unable to listen to

them due to a change in their contract. Mr Hacker then referred to the transcripts as part of the documentation he had considered during his role in the disciplinary processes. It was unclear to us, however, whether the recordings had in fact been listened to prior to the disciplinary decisions or after them.

180. The conversations nevertheless, in our view, provided some verification from the Claimants themselves about the allegations they were facing. Notably one tri-partite conversation between Mr and Mrs Lindley and their son, Craig, referred, in jocular fashion, to what Mr and Mrs Lindley would get for their son's birthday. In this conversation Mr Lindley senior noted that he had suggested to Mrs Lindley that they get Craig an 18v drill. Craig replied that he did not really need a new drill, to which his father stated, "*I'm only taking the piss again*". Mrs Lindley then continued the conversation by referring to the discussion that she had had with Mr Lindley senior, noting that she had then said that, "*We could buy it from Phoenix*" i.e. from Phoenix Saxton. Mr Lindley then commented, "*Typical Yorkshireman*", the implication from that being that he would save money by doing so. Craig Lindley then stated, "*Freebie for you guys…*", to which Mrs Lindley replied, "*Aye*".

181. Mr and Mrs Lindley attempted to explain this conversation by referring to it all being a joke, largely for the benefit of Mrs Young, the two of them being aware, or at least perceiving, that the calls were being recorded and that Mrs Young would therefore be able to listen to them. They referred to a different transcript in which the two of them discussed what they were going to say when Mr Lindley telephoned the office and said, "*Hello Elaine, how are you?*". In relation to the conversation about the drill, however, and the involvement of Phoenix Saxton, that point only arose during the course of the investigation and was not something that Mr and Mrs Young were aware of during the course of Mr and Mrs Lindley's employment prior to the suspension. We could not therefore see how any joke being made by Mr and Mrs Lindley for Mrs Young's benefit could have extended to the discussion about buying the drill from Phoenix Saxton.

182. We considered whether the point being made about buying the drill from Phoenix Saxton, with some savings being made for Mr and Mrs Lindley, could simply have referred to an ability, in making such a purchase, to do so at cost price, or possibly without the application of VAT, thus leading to an overall saving for Mr and Mrs Lindley. However, we felt that Craig Lindley's reference to such a transaction being a "*freebie*", and Mrs Lindley's agreement with that, meant that the acquisition of a drill for Craig Lindley from Phoenix Saxton would have been done at no cost. In our view, that supported the Respondents' conclusion regarding the Phoenix Saxton element of the allegations against Mr and Mrs Lindley.

183. Another transcript, which clearly took place after the suspensions, recorded a call between Dan Lindley and a customer. In that transcript, Dan Lindley referred to the price for whatever was being purchased as being lower for cash, with the customer then noting that he had meant to ask Dan Lindley to ask his father what it is he owed him. Dan Lindley replied that he did not really know because everything that his parents had done had "*got deleted or got wiped"*

and that "*they had wiped everything and took everything with them*". When Dan Lindley then referred to the amount as being "*around a few grand*", the customer noted that he thought that it was about "*three*", to which Dan Lindley that he would "*call it three grand then*". He went on to say that as far as they knew it could be five or six grand but they had no recollection of it, to which the customer replied that he did not think it was because he had paid Dan Lindley's father "*quite a lot of times like two grand, one grand*" and that he was "*leaving it all up to him to keep a record of it*". In our view, whilst it was possibly the case that the reference being made to cash payments referred to legitimate ones i.e. those going through the company's books, we found the reference to broad round sums of £1,000, £2,000 etc. suggested that these were illegitimate transactions.

184. Finally, in a transcript of a call between Mr Dave Lindley and his son, Dan, which must have taken place very soon after Mr Lindley's suspension, was the following exchange:

"*Dave: I mean at the end of the day when it boils down to it…I mean Mikey's done a little bit of a cash job, no doubt Chris has done it. I know Josh did it.*

Dan: Everyone's done a fucking cash job and I can fucking prove it. I've been with half the guys on cash jobs. So…

Dave: But like I say, if you can prove that and you can say to me, right I can prove he did this, then I can actually go back and say hang on, you're asking people who've done cash jobs and you're accusing us of doing this but we haven't done owt.

Dan: The only way we can prove something is, all we got is word of mouth haven't we?"

185. Later on in the transcript there was a further exchange as follows:

"*Dave: So like you say, I don't err…I mean at the end of the day, people do look back within the industry…I mean it's like anything, it's like an electrician, you get an electrician and he's on site and somebody turns round and says 'wire that in, £50', he does it, don't he! It will always be there, it will never go away, it will always be that. But as far as embezzlement and things like that, fucking hell they are making out like I've had thousands and thousands and thousands of pounds.*

Dan: As long as you've done nothing wrong.

Dave: Don't get me wrong, Dan. You know yourself there's been the odd cash job gone through.

Dan: Yeah, but what I'm saying is…

Dave: But nothing to the extent, you know fucking thousands of pounds.

Dan: Yeah, aww see what happens.

Dave: But at the end of the day, it doesn't matter if it's £250 or if it's £250,000, it's still the same crime if you know what I mean. I mean if you go rob a bank and take a pound or a million pound it's still the fact you robbed that bank."

186. Again, the references to cash jobs and the seeming acceptance by Mr Lindley that what he was doing was illegitimate, lent support to the conclusions reached by the Respondent about his conduct prior to his suspension.

Conclusions

187. Applying our findings and the legal principles to the issues we had to consider, our conclusions were as follows. We dealt first with Mr Lindley's claims before moving on to Mrs Lindley's claims, and we followed the order of the issues set out in the appendices.

188. We did however first reach our conclusion over the correct Respondent. We noted that he Claimants had only included the Second Respondent in their claims because they were uncertain about the correct identity of their employer. However, other than a few occasions when their salaries were paid by the Second respondent, we saw nothing to suggest that it had any role in the employment of either Claimant. We therefore concluded that the correct Respondent was the First Respondent and that the claims against the Second Respondent should be dismissed.

Mr Lindley

Whistleblowing

1. Did the following acts by the Claimant, averred at paragraph 52 of the particulars of claim, occur and amount to protected disclosures?

189. Ms Holden, in her submissions on behalf of Mr Lindley, noted that some fifteen specific disclosures were said to have been made which fall into the four categories set out under issue 1. We considered each of them in turn, although we do not comment on them individually.

190. With regard to various text messages sent in 2017 and 2018, we did not consider that any of them contained information which amounted to a disclosure on the part of Mr Lindley that he had a reasonable belief that breaches of legal obligation had occurred. In each of them, he either asked to receive company accounts, bank statements, etc., or reminded Ms Heaney that he was anticipating receipt of them. He did not in these messages make any reference to any specific source of entitlement to those documents or, conversely, to any source of obligation on the part of the First Respondent, in the form of Ms Heaney, to provide them.

191. Our view was however different in relation to an email Mr Lindley had sent to Ms Heaney on 7 August 2018. In this, he again noted that Ms Heaney had

been supposed to send him the company books and records. In this email however he went on to say, "*As a director of SED I am not asking for anything I shouldn't be entitled to see*".

192. In our view, notwithstanding that there was no reference to any specific legal entitlement or obligation, the reference to Mr Lindley's perception of entitlement, in an email which reminded Ms Heaney that he had asked for the company's books, provided sufficient factual content to demonstrate that Mr Lindley reasonable believed that he was providing information which tended to show that there had been a breach of legal obligation.

193. The position was, in our view, even more clear in the letters sent to Mr and Mrs Young and Ms Heaney by Mr Lindley's solicitor on his behalf. In his letter of 20 September 2018, the solicitor referred to Mr Lindley having made numerous informal requests to view various pieces of financial information in relation to the company which had not been forthcoming. He went on to note that, as a director, Mr Lindley was entitled to have access to certain information in respect of the company under the Companies Act 2006 and that, under that Act, a company's accounting records must be kept at its registered office or such other place as the directors think fit and must at all times be open to inspection by the company's officers. The letter noted that, as a director still in office, Mr Lindley had the right to be informed about the company's affairs and to inspect all the company's books and records to enable him to carry out his duties as a director.

194. In our view, the references to Mr Lindley's entitlement to inspect the company's books and records under the Companies Act, the fact that several requests to have access to the company's books and records had been made, and that those requests had not been granted, amounted to a disclosure of information which in Mr Lindley's reasonable belief tended to show that there had been a breach of legal obligation.

195. The solicitor's next letters of 31 October 2018, again referred to numerous requests having been made to inspect the financial documentation which had not been provided, and referred specifically to section 388 of the Companies Act 2006 and noted that failure to comply with that section constituted an offence which was punishable by imprisonment and/or a fine. Again, we were satisfied that the content of that letter amounted to a disclosure of information on Mr Lindley's behalf which, in his reasonable belief, tended to show that a breach of legal obligation had taken place. We formed a similar view in relation to the solicitor's subsequent communications in which court action was threatened and ultimately pursued.

196. In order for the disclosures to amount to qualifying disclosures, however, they also had, in the reasonable belief of Mr Lindley, to have been made in the public interest. In that regard, we considered closely the Court of Appeal Judgment in the **Chesterton** case. We noted the Court's guidance that, where the interest in question is personal in character, there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. The four-

fold classification referred to in **Chesterton** was said to be a useful tool in carrying out an analysis of that. Using that four-fold classification, we considered the following:

(a) The numbers in the group whose interests the disclosure served were small, in effect only Mr Lindley. Bearing in mind that the right is only for officers of the company, the only officers were Mr and Mrs Young and Mr Lindley. Mr and Mrs Young were, we presumed, in possession of the documents or had access to them, they certainly were not seeking access to them. They were actively resisting their disclosure, which left only Mr Lindley.

(b) The nature of the interests affected were, we felt, limited to Mr Lindley. Neither he nor his solicitors made any reference to requiring access to the company's books for any purpose other than to satisfy himself about the state of the company's finances. Nor did either of them suggest that there was anything untoward behind the refusal to provide access to the financial records. Had Mr Lindley, for example, indicated that he needed access to the accounts in order to satisfy himself that no impropriety had taken place, then that may have amounted to a disclosure in the public interest, as the interest underpinning the request could have been said to have been to discover and punish criminal activity which would clearly have been in the public interest. However, at their highest, the references to the underlying rationale for the request only went as far as being to enable Mr Lindley to perform his duties or functions as a director.

(c) With regard to the nature of the wrongdoing disclosed, again, we did not see that what was being disclosed amounted to anything which would be of interest to the wider public.

(d) The identity of the alleged wrongdoer was simply the First Respondent and its officers which, by any measure, could not be considered to be a large or prominent wrongdoer in terms of the size of its relevant community. Regardless of the size, however, we did not consider that any failure to provide the financial information to Mr Lindley had any material ramifications for the wider community such as the First Respondent's employees. Certainly, Mr Lindley and his solicitors did not make any reference to any broader, more public, rationale for his requests.

197. On balance, therefore, our conclusion in relation to Issue 2 was that we were not satisfied that Mr Lindley had reasonably believed that his requests for the accounts and other financial documents amounted to a disclosure of a breach of legal obligation in the public interest. In our view it was clear to him that any such legal obligation was personal to him.

198. Consequently, with regard to Issue 3, as we did not find that Mr Lindley had made a protected disclosure, he could not be considered to have been dismissed as a result of having made that protected disclosure.

Statutory Right

4.Did the following acts by the Claimant, averred at paragraph 57 of the Particulars of Claim, occur and amount to asserting a statutory right?

199. In relation to this matter, we first considered Mr Canning's submission that section 104(1) ERA was simply not engaged. He noted that section 104(2) confirmed that it was immaterial for the purposes of subsection (1) whether or not the employee had the right or whether or not the right had been infringed. He went on however to contend that in this case, because the statutory right did not exist at all, it could not be considered to be a relevant statutory right as it was not a right conferred by the ERA for which the remedy for its infringement was by way of a complaint or reference to an Employment Tribunal.

200. Mr Canning noted that the assertions said to have been made related to a failure by the Respondent to pay correct national insurance contributions, income tax and pension contributions. He then noted, quite correctly in our view, which ultimately seemed to be accepted by Ms Holden in her submissions, that any failure by an employer to pay tax, national insurance or pension contributions does not engage Part II of the Employment Rights Act as the definition of "wages" in section 27 refers to sums "payable to the worker". Those payments would not have been paid to the Claimants, and therefore they had no right for which the remedy for infringement was by way of complaint or reference to an Employment Tribunal.

201. With all due respect to Mr Canning, we could not agree with his submission. In our view, the wording of section 104(2) is clear, and it means that where an employee alleges that an employer has infringed a right of theirs which is a relevant statutory right, then it does not matter whether the employee is right in that assertion or not, only that they have made it. We considered that to conclude otherwise would place an unjustifiably onerous burden on an employee to take steps to establish that they did indeed have the particular right before asserting it, which we felt was not what the legislation was intended to do.

202. However, we did note that section 104(1) ERA does require the employee to enforce "his" statutory right. In that regard, we noted that all the assertions made about national insurance, tax and pensions, were made by Mrs Lindley and referred to employees, i.e. non-director employees, more broadly, with occasional reference to individuals, and also referred to her own position. We saw nothing to indicate that Mr Lindley had ever asserted that a statutory right of his had been infringed, nor did we see anything that Mrs Lindley had done which could be said to have extended to her husband. That therefore meant, notwithstanding our views on the interpretation of section 104(2), that section 104(1) was nevertheless not engaged and therefore, with regard to Issue 5, there was no question of the Claimant having been dismissed as a result of having asserted a statutory right.

Detriment

203. With regard to issue 6, as we did not find that Mr Lindley had made a protected disclosure, he could not have been treated to his detriment as a result of having made a protected disclosure as asserted in paragraph 6.

Unfair Dismissal

204. We first considered Issues 7 and 8, and the question of the reason for dismissal and whether the first Respondent had satisfied us that it had dismissed Mr Lindley for a potentially fair reason, that reason being asserted to have been his conduct.

205. We noted that had we considered that Mr Lindley had been dismissed for having made a protected disclosure or for having asserted a statutory right then his unfair dismissal claim would have automatically succeeded and, by definition, the Respondent would not have satisfied us that the reason for dismissal was his conduct. We were conscious however that the fact that we did not find that the dismissal had been by reason of a protected disclosure or having asserted a statutory right, simply because we did not consider that a protected disclosure or assertion of a statutory right had, in fact, been made, did not mean that the reason for Mr Lindley's dismissal had indeed been his conduct. We were conscious that we still needed to look to the Respondents to satisfy us that the reason for dismissal had been conduct.

206. We were of the view that the Respondents, in the form of Mr and Mrs Young, were content that concerns about the way Mr and Mrs Lindley had been managing the First Respondent's business were brought to their attention. In our view, the two of them were annoyed by the requests, and they were no doubt even more annoyed by the award of a not insubstantial amount of costs against them in respect of the County Court application made by Mr Lindley. However, we noted, confirmed from Mr Perryman's evidence, that the employees had contacted Mr and Mrs Young with their complaints about the actions of Mr and Mrs Lindley. It seemed to us that Mr and Mrs Lindley may have been more receptive to those complaints at that time than they had been in the past, as evidenced by the fact that they had not taken action against Mr and Mrs Lindley in respect of matters in prior years when it seemed to us that they would have been entitled to have done so. Nevertheless, having received the information from the employees, we considered that it was that information, and the misconduct suggested within it, which led to the action subsequently taken.

207. We were particularly mindful of the fact that, notwithstanding that Mr and Mrs Young took the initial decision to suspend Mr and Mrs Lindley, and also that Mrs Young was active in the investigation of the allegations against them, she did not take part in consideration of the disciplinary allegations that ensued. Mr Hacker, who took the decision to dismiss Mr Lindley, in our view clearly had in mind the concerns about his conduct. We were therefore satisfied that the reason for the dismissal of Mr Lindley had been his conduct.

208. We then moved on to consider Issue 9, whether the first Respondent had acted fairly in dismissing the Claimant pursuant to section 98(4), considering the **Burchell** test.

209. With regard to the scope of the investigation, we noted, with regard to the allegations about casual workers, that Mr Hacker received documentary evidence from current employees that claims had been made for payments to be made to casual workers. However, in some cases, no-one had seen or heard of the employees and, in another case, where the individual (Mr and Mrs Lindley's son-in-law) was known to employees but was not considered to have attended to work with any regularity.

210. With regard to the Phoenix Saxton allegations, Mr Hacker received statements obtained from employees who confirmed that they were told to pass deliveries from that company first to Mrs Lindley for her to check, a step which was not required in relation to any other supplier. A statement was also obtained from an employee of Phoenix Saxton, confirming that items which did not appear to relate to any services provided by the First Respondent had been supplied, and that invoices had been adjusted to avoid referring to them.

211. With regard to cash payments, a statement was obtained from a customer who confirmed that he had been asked to pay for products in cash, and statements were also obtained from employees that cash payments were directed to Mr Lindley.

212. Finally, with regard to the allegation about the insurance claim, a statement was obtained from the driver of the vehicle who indicated that fewer items had actually been stolen than had been included in the insurance claim.

213. We noted that Mr Lindley had not been spoken to during the investigation process, and that it would be usual for an employer to hold an investigative meeting with an employee before proceeding to the disciplinary hearing. However, we noted that that is not an absolute requirement, and that the ACAS Code, when dealing with investigations notes that, "*In some cases, this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary* hearing".

214. We were mindful that our approach in relation to assessing the reasonableness of the investigation was to consider it from the perspective of the range of reasonable responses. In our view, the steps taken to investigate the allegations, principally by Mrs Young in the early part of 2020 and by Mr Hacker in the course of his consideration of the disciplinary allegations, even taking into account that Mr Lindley was not spoken to, fell within that range.

215. We then considered whether that investigation had given reasonable grounds for the belief of misconduct on the part of Mr Lindley. In that regard, we noted Mr Hacker's explanations for his conclusions in his letter confirming his dismissal, and we considered that the investigation had clearly given reasonable grounds to consider that misconduct had taken place.

216. Finally with regard to the **Burchell** test, we considered whether those grounds had then led to a genuine belief of Mr Lindley's guilt of the offences with which he was charged. In this regard, we were mindful of the submission on behalf of Mr Lindley that Mr Hacker was influenced by the Youngs, both in terms of being more junior to them in the corporate structure and of being a friend of theirs. Ultimately, we did not agree that there was any material friendship between Mr Hacker and Mr and Mrs Young, although we did note that he was an employee of theirs, albeit probably the most senior, apart from Mr and Mrs Young themselves.

217. In our view however, Mr Hacker approached matters professionally and independently. Notwithstanding that Mr Lindley did not attend the disciplinary hearing, Mr Hacker provided a detailed analysis of the points raised by Mr Lindley in his defence, and provided clear conclusions as to why he decided that the disciplinary offences had been committed. We did not see anything which suggested to us that Mr Hacker had been motivated by any ulterior motive or that he had had anything other than a genuine belief in Mr Lindley's guilt.

218. We then considered whether the decision to dismiss Mr Lindley was within the range of reasonable responses. We noted that the allegations were serious and related to financial wrongdoing. In the circumstances, we were satisfied that the decision to dismissal fell comfortably within that range.

219. We also considered whether the dismissal was fair from a procedural perspective. We noted the various concerns raised by Mr Lindley's solicitor about the perceived lack of fairness of the process. We also noted, however, that the Respondents are small employers, with a very small management team. Whilst it would probably have been better for an external adviser to have been engaged to undertake the investigation, leaving Mr or Mrs Young to deal with the disciplinary hearing, we considered that had that happened, in view of the clear strength of view expressed by Mr and Mrs Young when suspending Mr Lindley on 30 September 2019, criticism could quite properly have been made. In the circumstances, we did not consider that engaging Ms Fountain to consider the grievance processes, and in practice to advise on the application of the disciplinary processes, meant that matters were unfair from a procedural perspective.

220. We also noted that, in contrast with Mrs Lindley, the case against Mr Lindley had proceeded straight to a disciplinary hearing, without an investigative meeting. We noted however that, whilst it is common for a separate investigative meeting to take place before matters are referred on to a disciplinary hearing, that is not an absolute requirement. We were mindful of our view of the Respondents as small organisations, with a limited managerial group, and felt that the lack of an investigative process had no materially adverse effect on the fairness of the dismissal.

221. We were however concerned about the appeal from a procedural perspective. Whilst we noted the recent Court of Appeal decision in **Gwynedd Council v Barratt [2021] EWCA Civ 1322**, albeit relating to a redundancy dismissal, that

a dismissal is not necessarily unfair because of a failure to provide for an appeal, we nevertheless noted that the Respondents sought to allow an appeal but carried it out very ineffectively.

222. We noted the concern raised on behalf of Mr Lindley about the ability of Mr Terry Young to reach an independent decision, bearing in mind that it was his parents who had set the ball rolling with regard to the disciplinary process. We did note however, that, in the absence of another manager, then Mr Terry Young may have been the only possible candidate. Indeed, that was Mr Young's own view of matters when giving evidence.

223. We noted that Mr Lindley's solicitor strenuously maintained during the conduct of the processes that an external HR adviser should have been brought in to deal with matters. However, we did not consider that that would be a requirement of an employer in terms of fairness. It is not at all uncommon for an employer to engage external assistance for the investigative stage. However, it is much less common, in our experience, for an external party to be brought in to make substantive decisions regarding dismissals. This was, after all, a business primarily owned by Mr and Mrs Young and we considered that they were justified in taking the decision that disciplinary decisions would be dealt with internally.

224. Had the appeal been undertaken diligently and independently then we would have been satisfied that it had not been unfair for Mr Terry Young to make the appeal decision, in the same way that we considered that it had not been unfair for Mr Hacker, an employee, to undertake the dismissal decision.

225. However, we saw no evidence that Mr Terry Young had given any thought to what he needed to do to consider the appeal. He did not appear at all familiar with the material produced as part of the appeal and confirmed that he had not drafted the appeal letter. Whilst it is not uncommon for external advisers to be involved in the drafting of communications, it is incumbent on the person on whose behalf they are being drafted to ensure that they are accurate and reflect their own judgment. In this case, Mr Terry Young's inability even to recall that he had seen his dismissal letter meant that he had not fulfilled the duties required of him.

226. Mindful that an appeal is an important part of a disciplinary process, we therefore considered that the dismissal was unfair due to that procedural failing.

227. We then went on to consider issues 10 and 11, i.e. the questions of contributory conduct and **Polkey**. In the event, following the guidance of the Court of Appeal in the **Rao** case, we considered them in reverse order.

228. In that regard, bearing in mind our conclusion about the fairness of the dismissal at the disciplinary hearing stage, and that Ms Fountain had put together an appeal outcome letter which, in our view, cogently responded to the grounds of appeal, we considered that had the Respondents operated a fair appeal process then it would, in our view, have led to the dismissal decision being upheld. We were therefore satisfied that there should be a 100% deduction from the Claimant's compensatory award to reflect that.

229. Had we not considered matters in that way we would nevertheless have considered that the Claimant's compensatory award should be reduced by 100% on the ground of the Claimant's conduct. In our view, applying the **Nelson** guidelines, the Claimant's conduct was culpable or blameworthy, it caused the dismissal, and the reduction would have been just and equitable.

230. We were mindful that **Polkey** only applies to the compensatory award and therefore considered, in relation to the basic award, and applying the same considerations, that it would be appropriate to reduce the basic award by 100% on the ground of Mr Lindley's conduct.

Unlawful deduction of Wages/Breach of Contract

12. Did the Respondents make the following deductions from the Claimant's salary as specified in paragraph 61 of the particulars of claim?

231. We note that Ms Holden in her submissions accepted that the first two of the six asserted deductions could not be pursued, as concerns that national insurance and tax had not been paid did not engage Part II of the Employment Rights Act, and nor did they involve breaches of contract for which damages to the Claimant could be awarded.

232. With regard to company sick pay, our findings were that Mr Lindley had no contractual entitlement to company sick pay during his absence between October and December 2019, and therefore we did not consider that any unauthorised deduction from wages or breach of contract arose in that regard.

233. With regard to the earnings not paid by the Respondents during Mr Lindley's period of suspension, we were conscious that this referred to the £1,000 each week that Mr Lindley did not receive during the period from the middle of February 2020 up to his dismissal. In that regard, however, we noted that the practice of declaring only a limited amount of payments to Mr Lindley by way of salary, a sum which netted down to £500 per week, had been in place for many years and is, or certainly was, a not uncommon approach to the payment of remuneration in small limited companies where directors receive dividends and salaries. We also noted that Mr and Mrs Young also did not receive this £1,000 element of their remuneration packages during this period.

234. Overall, therefore, we concluded that Mr Lindley had no contractual entitlement to the sum of £1,000 a week not paid from February 2020 onwards, and therefore there had been no unauthorised deduction from wages or breach of contract in the decision not to pay him those sums.

235. With regard to the annual bonus, we noted that there was no documentation regarding any commitment to pay bonuses, but that such bonuses had been paid over the course of Mr Lindley's employment. We also noted that other employees i.e. the non- director employees, apart from Mrs Lindley, had received their bonuses, although these appeared to be at a much lower level than the bonuses that had been paid to Mr Lindley, and indeed to Mr and Mrs Young, in previous years.

236. In the absence of any express bonus entitlement, we considered that, at its highest, any bonus entitlement was discretionary and that there was, at most, an understanding that consideration would be given to the payment of a bonus. We noted then that the decision taken, due to the company's cash situation, was that only the relatively limited sums would be paid to the non-director employees by way of bonuses and that none of the directors, Mr Lindley, Mr Young and Mrs Young, received bonuses at Christmas 2019. In the circumstances, we again did not consider that the non-payment of any bonus to Mr Lindley at the end of 2019 involved an unauthorised deduction from wages or a breach of contract.

237. Finally, with regard to holiday pay, we saw and heard no evidence about holiday entitlement, or the amounts taken. The only piece of evidence before us was a document within the bundle which suggested that a payment in respect of holiday had been made to Mr Lindley on the termination of his employment. Mr Lindley did not, beyond a general assertion that he felt he had not been paid in respect of his holiday entitlement, provide any evidence to support his claim. In the circumstances we did not consider that there had been any unauthorised deduction from wages in this respect or any breach of contract.

Wrongful Dismissal

238. We noted that our approach here involved the application of a different test to that applied in respect of the unfair dismissal claim. We were not here assessing the reasonableness of the Respondents' decision, but we had to consider whether, on balance of probability, Mr Lindley had committed the acts of gross misconduct referred to. Our conclusion was that he had.

239. We noted the evidence produced by the Respondents in respect of the allegations against Mr Lindley, and felt that it was compelling, certainly in relation to the items obtained from Phoenix Saxton and the cash payments received. We noted the comments made by Mr Lindley in the transcribed telephone recordings which we felt indicated an acceptance by him that he had been in the habit of misconducting himself. In our view, Mr Lindley had committed acts of gross misconduct which amounted to repudiatory breaches and the Respondents had been justified in not paying notice to him.

Failure to provide a written statement of particulars of employment

240. As a matter of fact, the Respondents accepted that no statement of written particulars of employment had been provided to Mr Lindley at any time. Mrs Young's only comment was that she felt that, as a director, there was no obligation to provide Mr Lindley with one.

241. We also noted that our conclusion in respect of Mr Lindley's unfair dismissal claim was that it succeeded, albeit that as our concerns only related to the fairness of the appeal stage, by virtue of the application of **Polkey** and/or contributory conduct, no compensation should be awarded to him. However, section 38(2) of the Employment Act 2002 still applies in circumstances where an employment tribunal finds in favour of an employee but makes no award in

respect of the claim to which the proceedings relate. That sub-section was therefore engaged, and we were therefore obliged to make an award of the minimum amount of two weeks' pay to the Claimant unless we considered that there were exceptional circumstances which would make such an award unjust or inequitable.

242. In the circumstances, we did not consider that there was anything which made an award unjust or inequitable. Notwithstanding Mrs Young's perspective on Mr Lindley's entitlement to a written statement of particulars of employment, section 1 of the Employment Rights Act 1996 clearly applied to him, and there appeared to have been no attempt ever to have provided him with such a document.

243. We considered whether it would be just and equitable in all the circumstances to award the higher amount of four weeks' pay. In that regard, we noted that Mr Lindley did not appear to have ever questioned the absence of a statement of employment particulars. We also noted that the Respondent, as we have indicated, is a small employer and did not seem to be at all well-resourced in terms of HR advice. In the circumstances, we considered that it would not be just and equitable to award the higher amount and therefore confined our award to the minimum amount of two weeks' pay.

Mrs Lindley

Whistleblowing

1. Did the following acts by the Claimant, averred at paragraph 52 of the particulars of claim, occur and amounted to protected disclosures?

244. As with Mr Lindley, we first considered whether Mrs Lindley had made protected disclosures in the ways asserted. In this regard, we noted that three of the four areas of disclosure were said to be the correspondence from Mr and Mrs Lindley's solicitors, the County Court application and the County Court Order. In the event, however, Ms Holden confirmed that those related only to Mr Lindley and were not disclosures made by or on behalf of Mrs Lindley, bearing in mind that she was not a director of the First Respondent and therefore had no ability to access its books and records. Our focus therefore was on the remaining group of disclosures which were said to be set out within emails sent to the Respondent over a number of years. Those disclosures all regarded the provision of payslips and Ms Holden in her submissions referred to thirty-one examples of that.

245. We considered each of them, and all were emails, almost all to Ms Heaney, relating to the non-provision of payslips. The only exceptions were text messages, which were ones sent by Mr Lindley about access to the accounts, and a reference to a meeting of 12 June 2018, of which there was no evidence that Mrs Lindley even attended.

246. We looked at all the emails asserted to amount to disclosures; all chased the production of payslips or P60s, sometimes relating to individual employees who

had not received them, and at other times referring to the position more broadly.

247. In respect of some of the emails, the reason behind requesting the payslips was given e.g. one employee was stated to be going for a mortgage appointment, and another was said to require payslips to do his self-assessment tax return. However, in none of them did Mrs Lindley go beyond requesting the payslips and providing the reason for them. She did not, in any of them, specify any source of legal entitlement to the payslips or any concern that any particular wrongdoing was arising as a result of any failure to provide them. In our view, none of the emails contained any assertion that there was, let alone that Mrs Lindley reasonably believed that there was, any such wrongdoing. In our view, therefore, none of the asserted communications could be said to have amounted to qualifying disclosures.

248. We considered nevertheless whether the disclosures, if we had considered they had been made, had been reasonably believed to have been made in the public interest and, in contrast to Mr Lindley's disclosures, we considered that they had. Mrs Lindley, whilst part of the group who would have been expected to have received payslips, was not raising matters for herself and there were some twenty-five employees involved. However, as we did not consider that there had been disclosures of information which Mrs Lindley reasonably believed tended to show a breach of legal obligation, her claim of dismissal by reason of having made protected disclosures failed.

Statutory Right

4.Did the following acts by the Claimant, averred at paragraph 57 of the Particulars of Claim, occur and amount to asserting a statutory right?

249. The statutory right asserted by Mrs Lindley was the same as that said to have been asserted by Mr Lindley. We have noted our position in respect of Mr Canning's contention that section 104(1) of the ERA could not be engaged due to the fact that Mrs Lindley did not have in fact have the right she asserted, bearing in mind that the definition of "wages" does not encompass payments to third parties in respect of matters such as national insurance, income and tax and pension contributions. We were therefore satisfied that, notwithstanding that Mrs Lindley did not in fact have that right, that section 104(2) applied.

250. In Mrs Lindley's circumstances, that meant that she had asserted a statutory right that she felt had been infringed, as she did include herself in some of her requests for payslips to be produced. We therefore had to consider Issue number 5, which was whether the Claimant had been dismissed as a result of having asserted a statutory right.

251. In that regard, we noted that Ms Heaney, to whom the vast majority of requests for payslips had been made, played no part in the disciplinary process or decision making. We also noted that, at no time, did Mrs Lindley make any particular criticism of the failure to provide the payslips, notwithstanding that she chased them over a period comfortably in excess of three years. We were further not satisfied that Mr Hacker, who carried out the disciplinary

investigation in relation to Mrs Lindley, and Mr Terry Young, who took the decision to dismiss her, were more than tangentially aware of any issue that had been raised regarding the failure to provide payslips.

252. In the circumstances, we did not consider that the decision to dismiss was influenced to any extent, let alone any material extent, by the continued requests by Mrs Lindley for payslips to be produced. We did not therefore consider that the reason or principal reason for the dismissal of Mrs Lindley had been her assertion of any statutory right.

Detriment

253. With regard to Issue 6, as we concluded that Mrs Lindley had not made a protected disclosure, her claims in respect of having been treated to her detriment as a result of having made protected disclosures fell away.

Unfair Dismissal

254. As with Mr Lindley, we first considered Issues 7 and 8. Again, notwithstanding that we did not consider that dismissal had been by reason of having made a protected disclosure or having asserted a statutory right, we still nevertheless needed to look to the Respondents to satisfy us that they had dismissed Mrs Lindley for a potentially fair reason, again in her case that reason was contended to have been her conduct.

255. In that regard, for broadly the same reasons as led to our conclusion in relation to the reason for Mr Lindley's dismissal, we were satisfied that the reason for dismissal had been Mrs Lindley's conduct. We noted that concerns, initially about Mrs Lindley's bullying behaviour, had been brought to Mr and Mrs Young's attention by employees. We noted then that, during the course of the investigation, concerns about Mrs Lindley's conduct regarding credit card purchases, the insurance claim and the change to the IP address, were identified and pursued.

256. We also noted again that, whilst Mr and Mrs Young were the progenitors of the disciplinary process, in terms of suspending Mrs Lindley and indicating that a disciplinary investigation should be commenced, they played no part in the decision making and nor did Ms Heaney, who was the person who was the recipient of nearly all Mrs Lindley's requests for payslips to be provided.

257. We also noted Mr Hacker's conclusions in respect of the conduct allegations against Mrs Lindley, which were endorsed by Mr Terry Young, albeit with not a particularly detailed consideration. We were nevertheless satisfied that the reason for the dismissal of Mrs Lindley had been concerns over her conduct.

258. We then moved to consider the fairness of that dismissal for that reason, applying the **Burchell** test.

259. First with regard to the sufficiency of the investigation, we noted the steps taken by Mr Hacker to investigate the allegations, and that they ultimately were narrowed down to the three which were fully investigated and which formed the

basis of the disciplinary allegations against Mrs Lindley. We also noted that the investigation, notwithstanding that no meeting took place with Mrs Lindley, encompassed consideration of her version of events. In the circumstances, we were satisfied that a sufficient investigation had been undertaken, certainly an investigation which fell within the range of reasonable responses.

260. We then moved to the question of whether that investigation gave reasonable grounds for the conclusion that Mrs Lindley had committed acts of gross misconduct. We noted Mr Hacker's conclusions in relation to the various allegations against Mrs Lindley, having taken into account her representations.

261. With regard to the use of the credit card for inappropriate purchases, whilst we noted that Mrs Lindley's responses explained some of the purchases, we nevertheless considered that there were grounds for Mr Hacker, and subsequently Mr Terry Young, to conclude that certain inappropriate expenditure had taken place, notably purchases from John Lewis for goods which appeared personal in nature and which did not appear at the Respondent's premises, and certain hotel stays over more than one night.

262. Similarly to Mr Lindley's case, we concluded that there were grounds to conclude that Mrs Lindley had knowingly sought to advance an insurance claim for goods which had not in fact been stolen.

263. Finally, with regard to the change to the IP address, there was a statement from the external IT consultant which clearly stated that he had been directed to change the IP address and which confirmed the ramifications of that. We were therefore satisfied that the investigation had given rise to sufficient grounds for the conclusion that Mrs Lindley had committed acts of misconduct.

264. We then moved to consider whether there had then been a genuine belief of Mrs Lindley's guilt of those offences. In this regard, our focus was on Mr Terry Young who was the disciplinary decision maker. We noted that Mr Young had not prepared the letter confirming his decision and that he had very little, if indeed any, recollection of even having seen it. As we noted in our findings, Mr Young had an extremely vague recollection of the material he had considered in reaching his decision to dismiss or of the conclusions he had drawn from them. It appeared to us that Mr Young had not really engaged with the process and had relied on Mr Hacker and, in particular, Ms Fountain, to guide him through that process.

265. Whilst it is not uncommon for a disciplinary decision maker to rely on assistance from an external HR consultant or solicitor in the drafting of decisions and outcome letters, the decision, in order to be fair, nevertheless does need to be that of the decision maker. In this case there appeared to be a complete abdication of responsibility by Mr Terry Young in relation to the decision he had to take. He appeared to have taken what those advising him prepared for him without giving any particular thought as to whether he was of the same view. In our view, Mr Young did not really bend his mind to the question of whether Mrs Lindley had committed the disciplinary offences alleged, and therefore there can be no question of him having had a genuine belief in that guilt. Consequently, the decision to dismiss was unfair.

266. We then moved to consider issues 10 and 11, whether, notwithstanding that the dismissal of Mrs Lindley was unfair, her award of compensation should be reduced by reference either to contributory conduct or **Polkey**. Again, we approached that from the perspective of considering **Polkey** first before considering contributory conduct.

267. With regard to **Polkey**, we noted what we considered to be a cogent explanation for the dismissal decision put forward in the dismissal letter. Notwithstanding that that was prepared primarily by Ms Fountain and not by Mr Young himself, we considered that, had a fair process been undertaken in respect of the disciplinary hearing, then it would have led to the conclusion that the allegations had been made out. In those circumstances, bearing in mind the seriousness of the allegations and the fact that they related to financial misconduct, we would have had no hesitation in concluding that the decision to dismiss would have been within the range of reasonable responses and would therefore have been fair.

268. Notwithstanding our concerns about the almost complete lack of process with regard to any appeal, whilst that would also have led to a conclusion that the dismissal was unfair, we did not see that there was anything extra that Mrs Lindley could have brought to bear in an appeal which would have led to a different outcome. We were therefore satisfied that Mrs Lindley's dismissal would have taken place fairly had appropriate processes been followed and therefore that it was appropriate to reduce her compensatory award by 100%.

269. For similar reasons, had we needed to consider the assessment of the compensatory award by reference to contributory conduct, we would have concluded that there should be a 100% deduction, and we considered that there should be a 100% deduction from the basic award by virtue of Mrs Lindley's contributory conduct. We considered that her conduct in relation to the allegations she faced was blameworthy, did cause her dismissal, and that a reduction of that magnitude would be just and equitable in the circumstances.

<u>Direct Marriage Discrimination</u>

270. Our conclusion in relation to this claim was that the claim was advanced on a misconceived basis. We felt that there were elements of the treatment of Mrs Lindley which arose from her relationship with her husband, notably the decision to suspend her, which appeared to have been driven by a concern that Mr Lindley had been "fiddling", at a time when there was no understanding of any financial misconduct by Mrs Lindley. However, we nevertheless felt that her claim of marriage discrimination did not survive a detailed consideration of the terms of section 13 EqA, in the context of the application of section 23 of that Act.

271. Section 13 requires that there must be less favourable treatment of a claimant because of their protected characteristic in comparison to the way others would be treated, with section 23 noting that there must be no material difference between the claimant and the comparator. In this case, that meant that the circumstances of any hypothetical comparator must be the same as Mrs Lindley's, other than the fact that she was married, and the hypothetical

comparator was not. That meant that the hypothetical comparator would have enjoyed exactly the same relationship with Mr Lindley in terms of being his life partner over the same period of time. Mrs Lindley herself, under cross-examination, noted that if she had been in a relationship with Mr Lindley of the same length and nature, but had not in fact been married, she would still have been treated in the way that she was, by virtue her close connection with him.

272. In our view, that was a tacit acceptance of the fact that Mrs Lindley's claim of direct marriage discrimination could not be made out. It could not be said that any less favourable treatment she received arose because of her marriage to Mr Lindley.

Unlawful deduction of Wages/Breach of Contract

273. With regard to the deductions specified at issue 13, we noted that Mrs Lindley accepted that items 1, 2 and 3 had been resolved, notwithstanding that they were not matters which could fall within the scope of an unauthorised deduction from wages claim.

274. We were not clear as to whether issue 13.4 was meant to be included as a claim on behalf of Mrs Lindley or was included in error, as it was a claim also brought by Mr Lindley, but in his case was clearly related to the £1,000 per week which he did not receive from February onwards. Mrs Lindley had no entitlement to that type of payment. She did make reference to issues regarding pay following her return from sick leave in December 2019, but confirmed that those payments had been properly paid in early January 2020. We did not therefore consider that there had been any unauthorised deduction from wages or breach of contract in that regard.

275. Our conclusions in relation to Mrs Lindley's claim in respect of sick pay for the months of October to December 2019 and in respect of holiday pay were the same as those in relation to Mr Lindley for the same reasons.

276. With regard to bonus, as we noted in our findings, all non-director employees other than Mrs Lindley were paid a Christmas bonus in 2019. That was on the basis that Mr and Mrs Young, notwithstanding the company's cash position, felt that those employees should be rewarded in the relatively limited amounts involved, whereas the director employees, who would typically have received much larger amounts, should not receive anything.

277. We noted that the Respondents did not contend that the rationale for not paying the bonus to Mr Lindley was the fact that he was suspended and under investigation. In the circumstances, that led us to the conclusion that, notwithstanding our view that any entitlement to bonus was discretionary, there had been a failure properly to exercise that discretion in Mrs Lindley's case in that, had the reason for not paying Mr Lindley's bonus been considered, it would have been concluded that it did not apply to Mrs Lindley and therefore that she would have received a bonus.

278. Whilst the Respondents may have gone on to consider the exercise of discretion, taking into account matters such as the fact that Mrs Lindley was

under suspension at the time, they did not undertake that analysis. We therefore concluded that Mrs Lindley had had an entitlement to a bonus at Christmas 2019, which had not been paid, and therefore that there had been an unauthorised deduction from wages or breach of contract in that regard.

279. We saw no evidence of the specific sums paid to the other employees at Christmas 2019, or of the sum that Mrs Lindley had received in previous years, and we therefore could not give judgment on the sum involved. That matter will need to be considered at a further hearing on evidence, unless the parties are able to agree it.

Wrongful Dismissal

280. As we explained with regard to Mr Lindley, we needed in this case to apply a different test to that applied in respect of Mrs Lindley's unfair dismissal claim and needed to consider whether she had committed acts of gross misconduct.

281. Again, as with Mr Lindley, we noted the clear grounds set out in Mr Hacker's investigation outcome which were echoed in the dismissal letter of Mr Young, notwithstanding that it was drafted by Ms Fountain. We found the rationale applied by Mr Hacker in concluding that there was a disciplinary case to answer compelling, and we considered that the evidence produced in support of his conclusions satisfied us, on the balance of probability, that Mrs Lindley had committed acts of gross misconduct. The nature of those acts, relating to financial misconduct, then went to the root of the contract which we considered justified the summary dismissal.

Failure to provide a written statement of particulars of employment

282. As with the case of Mr Lindley, we noted that no written statement of particulars of employment had ever been provided to Mrs Lindley. We have also considered that her claims of unfair dismissal succeeded albeit, as was the case with Mr Lindley, we did not consider that any compensation should be awarded as a result of that. In Mrs Lindley's case, we also considered that her claim in respect of bonus succeeded which, whether assessed under Part II of the Employment Rights Act or under the Extension of Jurisdiction Order, was a claim in respect of which section 38 of the Employment Act 2002 applied. In this case therefore, both sub-sections (2) and (3) applied, in that when the proceedings were begun the employer had been in breach of its duty to provide the required statement, and we had decided claims in favour of the employee, in respect of one of which we had made no award, but in respect of another we had made an award.

283. Again therefore it fell to us to award or increase the award by the minimum amount of two weeks' pay, unless we felt there were exceptional circumstances which would make such an award or increase unjust or inequitable. For the same reasons as we applied in relation to Mr Lindley, we did not consider that there was anything which justified a conclusion not to make an award. We then moved to consider whether an award of the higher amount should be made and again, for the same reasons as outlined in relation to Mr Lindley's claim, considered that we should not.

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Employment Judge S Jenkins
Date: 26 May 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON 26 May 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

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APPENDIX 1

List of Issues in relation to Mr Lindley's Claims

Automatic Unfair Dismissal

Whistleblowing

284. Did the following acts by the Claimant, averred at paragraph 52 of the Particulars of Claim, occur and amount to protected disclosures?

1.1. Disclosure of his concerns set out within emails to the Respondent over a number of years;

1.2. Disclosure of his concerns which were reasserted within correspondence from Berry Smith dated 20th September 2018 and 28th February 2019;

1.3. Disclosure of his concerns which were reasserted within a county court application made on or around 28th June 2019;

1.4. Disclosure of his concerns which were reasserted in an order subsequently issued by the County Court on 22nd August 2019.

285. If so, were the disclosures qualifying disclosures and were they made in the public interest?

286. If the Claimant is found to have made a protected disclosure was the Claimant dismissed as a result of making that disclosure?

Statutory Right

287. Did the following acts by the Claimant, averred at paragraph 57 of the Particulars of Claim, occur and amount to asserting a statutory right?

a. The Claimant and Mrs Lindley asserting for several years by email, text message and verbally that unlawful deductions from wages had been made between 2013 and 2018 when the Respondents had failed to make the correct national insurance contributions and pay income tax.

b. The Claimant and Mrs Lindley asserting by email, text message and verbally that unlawful deductions from wages had been made from September 2019 where the Respondents had failed to make the correct pension contributions.

c. Mrs Lindley submitting Employment Tribunal proceedings 3320092/2019 in relation to the Respondents' failure to correctly

deduct tax and national insurance and the failure to pay correct pension contributions.

288. If the Claimant is found to have asserted a statutory right was he dismissed as a result?

Detriment

289. If the Claimant is found to have made a protected disclosure as per paragraph 1 above, but the Respondents are not found to have dismissed the Claimant as a result, was the Claimant subjected to the detriments stipulated at paragraph 56 of the Particulars of Claim, as follows?

d. The Respondent failed to follow a fair disciplinary process.

e. The Respondent failed to adequately consider his grievance.

f. The Respondents refused to pay the Claimant company sick pay;

g. The Respondents failed to make timely payment of wages while the Claimant was suspended as well as incorrectly asserting that the Claimant was only entitled to £500 per week the remaining £1,000 made up of dividends.

Unfair Dismissal

290. Did the Respondents have a fair reason to dismiss the Claimant in accordance with section 98(1) and 98(2) of the Employment Rights Act 1996?

291. If the answer to paragraph 7 above is yes, was the reason related to his conduct?

292. Did the Respondents follow a fair procedure in dismissing the Claimant from his employment pursuant to section 98(4) of the Employment Rights Act 1996?

h. Did the Respondents pre-determine the Claimant's guilt prior to commencing the disciplinary process?

i. Did the Respondents follow the Acas Code of Practice on Disciplinary and Grievance Procedures?

j. Did the Respondents form a genuine and honestly held belief that the Claimant was guilty of gross misconduct?

k. Did the Respondents carry out a reasonable investigation into the alleged gross misconduct?

l. Was the dismissal within the range of reasonable responses?

293. If the Tribunal finds that the Claimant's dismissal was unfair, did the Claimant's conduct cause or substantially contribute to his dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?

294. Would the Claimant have been dismissed in any event such that any awards of compensation should be reduced in accordance with Polkey v AE Dayton Services Limited [1987] ICR 142?

Unlawful Deduction of Wages/ Breach of Contract

295. Did the Respondents make the following deductions from the Claimant's salary as specified in Paragraph 61 of the Particulars of Claim:

m. Unpaid National Insurance;

n. Unpaid tax;

o. Company sick pay during the Claimant's sickness absence between October and December 2019;

p. Earnings not paid by the Respondents during the Claimant's period of suspension;

q. Loss of annual bonus; and

r. Payment in respect of accrued but unused holiday pay as at the date of termination.

296. Were the deductions specified in Paragraph 12 above unlawful?

297. Alternatively, have the Respondents breached the Claimant's contract of employment by failing to provide the payments specified in paragraph 12 above?

Wrongful Dismissal

298. Did the Respondents fail to make a payment in respect of the Claimant's 12 week notice period and is the Claimant entitled to such payment?

Failure to provide a written statement of particulars of employment

299. Did the Claimant receive a statement of his written particulars of employment within 2 months of commencing employment with the Respondents, or at all?

300. If the Claimant was issued with a statement of written particulars within the first 2 months of his employment commencing, did that statement contain

all of the information required by section 1 of the Employment Rights Act 1996?

APPENDIX 2

List of Issues in relation to Mrs Lindley's Claims

Automatic Unfair Dismissal

Whistleblowing

10. Did the following acts by the Claimant, averred at paragraph 52 of the Particulars of Claim, occur and amount to protected disclosures?

1.5. Disclosure of her concerns set out within emails to the Respondent over a number of years;

1.6. Disclosure of her concerns which were reasserted within correspondence from Berry Smith dated 20th September 2018 and 28th February 2019;

1.7. Disclosure of her concerns which were reasserted within a county court application made on or around 28th June 2019;

1.8. Disclosure of her concerns which were reasserted in an order subsequently issued by the County Court on 22nd August 2019.

11. If so, were the disclosures qualifying disclosures and were they made in the public interest?

12. If the Claimant is found to have made a protected disclosure was the Claimant dismissed as a result of making that disclosure?

Statutory Right

13. Did the following acts by the Claimant, averred at paragraph 57 of the Particulars of Claim, occur and amount to asserting a statutory right?

a. The Claimant asserting for several years by email, text message and verbally that unlawful deductions from wages had been made between 2013 and 2018 when the Respondents had failed to make the correct national insurance contributions and pay income tax.

b. The Claimant asserting by email, text message and verbally that unlawful deductions from wages had been made from September 2019 where the Respondents had failed to make the correct pension contributions.

c. *The Claimant submitting Employment Tribunal proceedings 3320092/2019 in relation to the Respondents' failure to correctly deduct tax and national insurance and the failure to pay correct pension contributions.*

14. *If the Claimant is found to have asserted a statutory right was she dismissed as a result?*

Detriment

15. *If the Claimant is found to have made a protected disclosure as per paragraph 1 above, but the Respondents are not found to have dismissed the Claimant as a result, was the Claimant subjected to the detriments stipulated at paragraph 56 of the Particulars of Claim, as follows?*

    a. *The Respondent failed to follow a fair disciplinary process.*

    b. *The Respondent failed to adequately consider her grievance.*

    c. *The Respondents refused to pay the Claimant company sick pay;*

    d. *The Respondents failed to make timely payment of wages while the Claimant was suspended as well as incorrectly asserting that the Claimant was only entitled to £500 per week the remaining £1,000 made up of dividends.*

Unfair Dismissal

16. *Did the Respondents have a fair reason to dismiss the Claimant in accordance with section 98(1) and 98(2) of the Employment Rights Act 1996?*

17. *If the answer to paragraph 7 above is yes, was the reason related to her conduct?*

18. *Did the Respondents follow a fair procedure in dismissing the Claimant from his employment pursuant to section 98(4) of the Employment Rights Act 1996?*

    a. *Did the Respondents pre-determine the Claimant's guilt prior to commencing the disciplinary process?*

    b. *Did the Respondents follow the Acas Code of Practice on Disciplinary and Grievance Procedures?*

    c. *Did the Respondents form a genuine and honestly held belief that the Claimant was guilty of gross misconduct?*

    d. *Did the Respondents carry out a reasonable investigation into the alleged gross misconduct?*

    e. *Was the dismissal within the range of reasonable responses?*

19. *If the Tribunal finds that the Claimant's dismissal was unfair, did the Claimant's conduct cause or substantially contribute to her dismissal? If so, by what proportion would it be just and equitable to reduce the compensatory award?*

20. *Would the Claimant have been dismissed in any event such that any awards of compensation should be reduced in accordance with Polkey v AE Dayton Services Limited [1987] ICR 142?*

Direct Marriage Discrimination

21. *With regard to the Particulars of Claim at paragraph 62, and the Respondents subjecting the Claimant to disciplinary proceedings and ultimately dismissing her:*

    a. *Who is the correct comparator; and*

    b. *With regard to that comparator, did the Respondents actions amount to less favourable treatment because of the Claimant's marriage to Mr Lindley?*

Unlawful Deduction of Wages/ Breach of Contract

22. *Did the Respondents make the following deductions from the Claimant's salary as specified in Paragraph 64 of the Particulars of Claim:*

    a. *Unpaid pension contributions not included within claim 3320092/2019;*
    b. *Unpaid National Insurance;*
    c. *Unpaid tax not included within claim 3320092/2019;*
    d. *Earnings not paid by the Respondents during the Claimant's period of suspension;*
    e. *Company sick pay during the Claimant's sickness absence between October and December 2019;*
    f. *Loss of annual bonus; and*
    g. *Payment in respect of accrued but unused holiday pay as at the date of termination.*

23. *Were the deductions specified in Paragraph 13 above unlawful?*

24. *Alternatively, have the Respondents breached the Claimant's contract of employment by failing to provide the payments specified in paragraph 13 above?*

Wrongful Dismissal

25. *Did the Respondents fail to make a payment in respect of the Claimant's 7 week notice period and is the Claimant entitled to such payment?*

Failure to provide a written statement of particulars of employment

26. *Did the Claimant receive a statement of her written particulars of employment within 2 months of commencing employment with the Respondents, or at all?*

27. *If the Claimant was issued with a statement of written particulars within the first 2 months of her employment commencing, did that statement contain all of the information required by section 1 of the Employment Rights Act 1996?*