Case No: 2301792/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS sitting alone**

BETWEEN:

Mr A Basson

Claimant

and

PayProp Holdings Limited

Respondent

ON: **7-11 March 2022**

Appearances:
For the Claimant: **Mr C Rajgopaul, Counsel**
For the Respondent: **Miss A Mayhew, Counsel**

LIABILITY JUDGMENT

1. The claimant was unfairly dismissed.

2. If required, a remedy hearing will be held on **28 October 2022**. Findings as to appropriate reductions to compensation and directions for the remedy hearing are given below.

REASONS

1. In this matter the claimant complains that he was unfairly dismissed. The issues arising from the claim to be determined at this hearing were agreed between the parties to be whether the respondent had shown a potentially fair reason for dismissing the claimant (the respondent relies upon conduct and/or capability with regard to his performance) and if the claimant was dismissed fairly in all the circumstances. It was further agreed that the

Tribunal would at this hearing make findings of fact relating to whether the claimant would have been dismissed in any event if a fair procedure had been followed. Further, whether there should be any reductions in compensation payable to the claimant because:

a. he caused or contributed to his dismissal by his own blameworthy conduct; and/or
b. the respondent discovered such conduct by the claimant after the dismissal.

Evidence

2. For the respondent I heard from:
   a. Mr J van Eeden, Chief Executive Officer;
   b. Mr E Malan, Chief Business Officer;
   c. Mr H Vogelberg, Chief Financial Officer; and
   d. Dr J Loots, Chief Legal Officer;

   all of Humanstate Group.

3. I also heard from the claimant and on his behalf from:
   a. Mr J Farinha, Chief Executive Officer of Property24; and
   b. Mr R Voogd, Head of M&A at OLX.

4. I had an agreed bundle of documents and both Counsel presented written submissions, supplemented orally, on the conclusion of the evidence.

Relevant Law

5. By section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by his or her employer.

6. In this case the claimant's dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2). If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

7. In a case where the respondent relies upon conduct the Tribunal must consider whether the respondent acted reasonably in treating the claimant's conduct as sufficient reason for dismissing him.

8. In that exercise, the Tribunal is guided by the principles set out in British Home Stores Ltd v Burchell [1978] IRLR 379, affirmed by the Court of Appeal in Post Office v Foley [2000] ICR 1283. Accordingly the Tribunal will consider whether the respondent by the standards of a reasonable employer:
   a. genuinely believed the claimant was guilty of misconduct;
   b. had reasonable grounds on which to sustain that belief; and

c. at the stage at which it formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in the circumstances of the case.

9. Any evidence that emerges during the course of any internal appeal against dismissal will be relevant in that exercise but otherwise material not before the employer at the relevant time is irrelevant.

10. Further, the Tribunal must assess - again by the standards of a reasonable employer - whether the respondent's decision to dismiss was within the band of reasonable responses to the claimant's conduct which a reasonable employer could adopt (Iceland Frozen Foods v Jones [1983] ICR 17 and Graham v S of S for Work & Pensions [2012] IRLR 759, CA). The band of reasonable responses test also applies to whether the respondent's investigation was reasonable (Sainsbury's Supermarkets v Hitt [2003] IRLR 23).

11. When considering the procedure used by the respondent, the Tribunal's task is to consider the fairness of the whole of the disciplinary process. Any deficiencies in the process will be considered as part of the determination of whether the overall process was fair (OCS Group Ltd v Taylor [2006] ICR 1602). The Tribunal will also take account of the ACAS Code of Practice on Disciplinary and Grievance procedures.

12. In coming to these decisions, the Tribunal must not substitute its own view for that of the respondent but to consider the respondent's decision and whether it acted reasonably by the standards of a reasonable employer.

13. If the Tribunal finds that a dismissal was unfair, it is open to it to reduce any compensatory award to reflect that the employee may have still been dismissed had the employer acted fairly (known as a Polkey reduction following Polkey v AE Dayton Services Limited [1988] ICR 142). In assessing such a reduction regard is had to the principles set out in Software 2000 Ltd v Andrews (2007 IRLR 574). In reaching its conclusion, the Tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so. Furthermore, the enquiry is directed at what the particular employer would have done, not what a hypothetical fair employer would have done (Hill v Governing Body of Great Tey Primary School 2013 ICR 691, EAT.)

14. Further it is open to the Tribunal to reduce compensation if it is just and equitable to do so having regard to any blameworthy conduct of the claimant that contributed to the dismissal to any extent. This reduction can apply to both the basic and compensatory awards (section 122(2) and section 123(6) of the 1996 Act.) This is an issue for the Tribunal to decide on the balance of probabilities from the evidence it has heard and is separate to the consideration of whether the dismissal was unfair.

15. In order to justify a specific reduction, the Tribunal has to find:
    a. culpable or blameworthy conduct of the claimant in connection with the unfair dismissal;

b. that that conduct caused or contributed to the unfair dismissal to some extent;
c. that it is just and equitable to make the reduction.
(Nelson v BBC (no 2) 1979 IRLR 346)

16. As to the amount of any reduction, case law suggests that there are four appropriate categories:
    a. where the employee was wholly to blame – 100%;
    b. where the employee was largely responsible – 75%;
    c. where both parties were equally to blame – 50%;
    d. where the employee is to a much lesser degree to blame – 25% (Hollier v Plysu 1983 IRLR 260).

17. There is a difference in the statutory wording on how to apply the reduction to the basic and compensatory awards but it is accepted that it is very likely (though not inevitable) that the reduction on the compensatory award will applied in the same or similar way to the basic. (Steen v ASP Packaging Ltd 2014 ICR 56)

18. Finally, it also possible to reduce compensation payable to the claimant if is just and equitable to do so because of any pre-dismissal blameworthy conduct by him discovered by the respondent post-dismissal (Devis v Atkins [1977] ICR 662).

Findings of Fact

19. Both parties have argued that witnesses for the other lacked credibility - particularly Mr van Eeden and the claimant. In my view no witness set out to be dishonest nor to mislead me. However there were stark differences in recollection - sometimes about very significant matters - hampered by a particular lack of contemporaneous written evidence which of course is usually the most reliable indicator of accuracy.

20. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

21. <u>Relevant corporate structures/relationships</u>

22. The respondent is part of the international Humanstate Group ('the Group') whose principal business is to assist estate agents to receive, reconcile and deploy rental payments. Mr F Stroebel is the chairman of the Group. The structure of and shareholdings within the Group are complex. It is not necessary to set them all out in detail. The following are the relevant relationships prior to and during the claimant's employment with the respondent.

23. Humanstate Limited (registered in the Cayman Islands) is the ultimate holding company for all of the Group companies other than those incorporated and operating in South Africa and is the sole owner (100%) of the respondent (references in this Judgment to Board meetings are of the

Humanstate Board). In turn the respondent is the holding company and the 100% shareholder of the Group's operating companies in the United Kingdom, Canada and (indirectly) the USA.

24. Humanstate Limited's principal (but not majority) shareholder (42.55% shareholding) is Oldenburg 1662 Limited ('Oldenburg'). Oldenburg (a Cayman Islands company) is the family investment vehicle of Johannes and Jaco van Eeden, who are brothers and the founders of the overall business. Johannes van Eeden represents the interests of Oldenburg on the Board of Humanstate Limited. In this Judgment references to Mr van Eeden are to Johannes van Eeden. Any references to Jaco van Eeden are made clear.

25. In South Africa, the position was slightly different. The locally registered holding company PayProp (Pty) Limited (PayProp SA) controlled the local South African operating companies indirectly through its 100% ownership of a local services company, which in turn owned the local operating subsidiaries.

26. An entirely separate South African business is Property24 (P24), the trading name of an online property platform which helps homebuyers and renters to find properties. It's UK equivalent would be Right Move or similar. P24 was owned by the South African company Korbitech which was in turn part of the very large South African business Naspers. P24 sat within the OLX division of Naspers.

27. The claimant and Mr van Eeden have known each other since 2012 at which time the claimant was employed by and a shareholder in Korbitech.

28. In July 2013 Korbitech bought a majority stake in PayProp SA. On 1 March 2014 the claimant was appointed a non-executive director in the respondent.

29. In 2015 the claimant was awarded share appreciation rights (SARS) in P24.

30. The Group bought back PayProp SA from Naspers at the end of February 2016. The claimant helped Mr van Eeden with that process from late 2015 onwards and it was largely on the back of that that Mr van Eeden approached the claimant to take up a role with the respondent. This coincided with his role at Korbitech coming to an end when an exit agreement was negotiated.

31. Part of that exit agreement was a consultancy agreement between the claimant and OLX entered into on 1 April 2016 - a vehicle allowing the claimant to retain the benefit of his SARS in P24 even though his employment had ended. Mr Voogd negotiated the agreement on behalf of OLX.

32. The purpose of that agreement was set out in its recitals as follows:

> 'OLX wishes to be provided with, and Consultant is able to provide, specialist advice in connection with the projects and businesses being conducted by the Vertical segment of

Naspers Classifieds (a division of Naspers) and OLX B.V. and the Property24 companies in particular, and their affiliated companies.'

and in the body of the agreement stated that:

'the Consultant shall perform the services independently and in such a way to promote the best interests of OLX and its affiliated companies…'

but also expressly recognised that the:

'…Consultant will in all probability be in full time employment elsewhere during the term of this agreement, and that his duties there will always take precedence over the services provided hereunder.'

33. The parties disagree as to whether OLX competes with the respondent. The claimant says it does not and the respondent says that it does as it 'played in our field/vertical'. ('Vertical' being a reference to a specific business sector.)

34. The claimant also says that he provided no services to OLX under the agreement as it was purely a vehicle as described above. Mr Voogd's evidence supported the claimant in this regard. However, when OLX purported to terminate the agreement in April 2019 the claimant successfully sought a reversal of that termination and in an email to Mr Farinha on 16 April 2019 he said:

'I'm back and able to continue to give you information fresh from the mouth of various horses and donkeys.'

and on 1 May 2019 to a Mr Firth of OLX he said:

'…the relationship with OLX and Property24 is very close to my heart and I cherish it.'

He also accepted in his evidence that he met Mr Farinha a few times a year to share information and market news. There was also evidence of him sharing and seeking information with Mr Farinha by email although nothing confidential about the respondent. Mr van Eeden was aware of the continuing relationship, in general terms, between the claimant and Mr Farinha.

35. <u>The claimant's employment with the respondent</u>

36. The claimant was employed by the respondent as its Chief Executive commencing 1 April 2016, principally based in its office in Sevenoaks (as were Mr Jaco van Eeden and Mr Malan). His terms included a starting salary of £160,000 pa plus a share option scheme. That initial scheme was replaced in 2019 by a second scheme.

37. His written terms of employment included at clause 7:

'7 OTHER INTERESTS

7.1 In accordance with clause 3.5 [a 'well and faithful service/whole attention' type clause] and subject to clause 7.4, you agree to devote the whole of your time and attention to the performance of your duties for the Company.

7.2 In particular and subject to clause 7.3, during your employment you will not whether alone or jointly with or on behalf of any other person, firm or company and whether as principal, partner, manager, employee, contractor, director, consultant, investor or otherwise (except as a representative or nominee of the Company otherwise with prior consent in writing of the Group Chairman) be engaged, concerned or interested in any other business or undertaking which:

7.2.1 is wholly or partly in competition with any business carried out by the Company:

7.2.2 requires or might reasonably be thought by the Company to require you to make use of or disclose any Confidential Information to further your interests in that person:

7.2.3 impairs or might reasonably be thought by the Company to impair your ability to act at all times in the best interests of the Company and/or any Associated Company; or

7.2.4 as regards any goods or services is a supplier to the Company.

7.3 Subject to clause 7.4 while you are employed by the Company you shall not without the prior written consent of the Group Chairman:

7.3.1 be engaged or interested either directly or directly in any executive or other management capacity in any trade, business or occupation whatsoever other than the Business of the Company or an Associated Company provided that you shall not be prohibited from holding whether directly or indirectly up to 5% (five percent) of the shares or stock of any class of any Company listed on a Recognised Exchange: or

7.3.2 take any preparatory steps to become engaged or interested in any capacity whatsoever in any business or venture which is in or is intended to enter into competition with any of the Businesses.

7.4 Subject to clause 7.2 and notwithstanding clause 7.3 the Company consents to you holding an interest in the companies listed in Schedule 1 only. In the event that your interest in such companies is reasonably thought by the Company to put you in breach of clause 7.2 the Company will take appropriate steps to address such breach and may remove their consent for you to hold an interest in such entity, in its absolute discretion.

7.5 Any additional interest which you obtain or wish to obtain, whether direct or indirect, in a company or other entity, which is not listed in Schedule 1, must be compliant with clauses 7.2 and 7.3.'

38. The claimant duly completed Schedule 1 (headed: 'Interests (direct and indirect) in active, operating companies (excluding any listed shares)') and disclosed, inter alia, that he was a discretionary beneficiary of a Trust that owned just over 5% of shares of P24 but said:

'Naspers have indicated that they are in the process of making the trust an offer to acquire these shares'

He did not disclose his consultancy agreement with OLX having given careful thought as to what he would and would not disclose and concluded that it did not fall within the terms of clause 7.

39. The claimant sold his P24 shares in July 2016. As well as completing schedule 1 he had told both Mr van Eeden and Mr Malan that he was in the process of selling them and consequently told Mr Malan that the sale had completed. Mr Masson in due course told Mr van Eeden.

40. The parties disagreed about whether P24 was a competitor of the respondent. Whatever definition is used of 'competitor' it is clear that the two companies operated in the same sector and, depending upon the commercial direction taken by them, could easily find themselves in competition - or indeed in partnership - whether generally or on a particular project. The claimant's shares in P24 certainly fell within the scope of clause 7.2.1-3 of his contract which presumably is why he disclosed them. As with his OLX consultancy agreement, he considered but did not believe that he was required to disclose his SARS.

41. The claimant's contract of employment also included a term regarding disciplinary and dismissal rules as follows:

> '21.1 You are not subject to the Company's disciplinary rules and procedures and the Board may raise any such issues with you in a manner which it deems appropriate.
>
> 21.2 If you are dissatisfied with any disciplinary decision to dismiss you, you should refer such dissatisfaction in writing to the Group Chairman, who will proceed in accordance with the appeal procedure set out in the appropriate Company procedure.'

42. On 1 July 2017 the claimant was appointed as Group CEO. The respondent portrayed this as not being a promotion but simply reflecting the situation as it had become on the ground. Whether or not this was regarded internally as a promotion, it is clear that the claimant was well regarded and seen to be performing well otherwise this appointment would not have been made. Furthermore, Mr van Eeden's internal announcement of this appointment was clearly very complimentary:

> 'My second but no less important announcement for the day is Riaan Basson's appointment as our new Group CEO. He will be responsible for the group's day-to-day operations, reporting to me in my role as executive chairman and giving effect to the decisions of a newly formed executive committee comprising myself, Jaco van Eeden, Eduard Malan and Riaan himself.
>
> Riaan's arrival has come at precisely the right moment in our history, as we strive to remain as agile and innovative as ever while doubling down on professional rigour and clearer reporting lines in our management structure, with the minimum of bureaucracy.'

43. On 26 April 2018 Mr van Eeden wrote to the claimant in very favourable terms saying:

> 'The company values your contribution to its business immensely (I believe your current compensation package reflects this)…

You are right in that the company would encourage it's group CEO to acquire a stake in the business (or have "skin in the game"),….'

44. There were other communications between the claimant and Mr van Eeden that indicate their working relationship continued to be a positive one. For example, in May 2018 in an email to the claimant Mr van Eeden said:

'Tried to phone you now. Congratulations on your birthday & best wishes for you & your family this year. It's a privilege to be able to work with you!'

and in January 2019 he said:

'Good to see that you're steering things in the right direction, thanks'

45. In March 2019 the claimant received a significant pay rise. The respondent says this was not related to his performance but simply because a new recruit that reported to him was on a salary that required the claimant to receive an increase. Again regardless of how this regarded internally, it is clear that the claimant was well regarded and was seen to be performing well as if he was not this would not have happened. The overall performance of the claimant during this period also has to be viewed against the context of the parties' agreement that the business was very successful and grew significantly under his leadership.

46. In contrast Mr van Eeden's evidence was that he had a conversation with the claimant in around January 2019 where he told him that if he carried on acting in the way he did (by which he said he meant manipulative behaviour) he would be dismissed. Mr van Eeden said there were other similar conversations throughout 2019.

47. In practice the senior management decisions of the Group were made by its executive committee (ExCo) subject to Mr van Eeden having the majority vote and therefore ultimately determining (subject to certain irrelevant excepted circumstances) what decisions were made.

48. The claimant would typically spend Monday and Tuesday morning of each week meeting with his executive team and then attend the ExCo meeting on Tuesday afternoon. A large proportion, if not the majority, of communications between the various senior managers was conducted in person and orally although the claimant would often circulate notes after the ExCo meetings raising any supplementary issues.

49. The evidence was consistent that ExCo meetings could be robust and challenging. The parties disagreed, however, as to whether this included challenging the claimant about his own unacceptable behaviours. In the absence of any contemporaneous notes to confirm either way, I conclude that the ExCo meetings - even if individual issues may have been dealt with robustly - were not used as a means of performance management of the claimant. Indeed one would not expect them to be so used given that it was a relatively public forum and the claimant could not have been expected to think that they were.

50. In July 2019 following a quarterly review and associated social event, the claimant and Mr van Eeden spoke in the latter's home. Mr van Eeden said that the Group needed to raise cash quickly and they discussed selling PayProp SA to P24 which, given their previous relationship, could be relatively quickly achieved. Mr van Eeden asked the claimant to put out feelers, which he did and an exploratory meeting was set up.

51. At the ExCo meeting on 1 October 2019, the potential sale was discussed. There was a stark difference between the relevant witnesses' descriptions of this meeting. The respondent's official notes of the meeting are extremely brief and simply record:

    'Riaan – gets the impression that there is a real interest from Naspers in acquiring the SA business;

    • Riaan – has a huge incentive in Property24; willing to share all the details – especially if there is a possibility of conflict of interest;

    • Johannes – Riaan could potentially be seen as a buyer of the company, with Naspers' money;

    • Riaan – loyalty lies with Humanstate, not necessarily with Naspers'

52. Dr Loots had also prepared a transcript of the meeting (it having been recorded by Jaco van Eeden) but it was of limited use as it was not agreed between the parties and had been translated by him from Afrikaans to English. Even with those limitations however it is clear that whilst the descriptions given of this meeting by both the claimant and Mr van Eeden were not completely accurate, Mr van Eeden did directly ask the claimant if he still had an interest in P24 and the claimant confirmed that he did and that it was a significant one. In his oral evidence the claimant accepted that this meeting was the first time he had told the respondent regarding his SARS and that if the sale went ahead he would be on both sides of transaction. He said that in that event he would have handled the situation 'carefully and respectfully'.

53. I find that the claimant cannot be said to have 'volunteered' this information at the meeting as that suggests taking the initiative when giving it. Rather, when he was asked whether he had an interest, he did answer immediately and truthfully.

54. At the outset of a Board meeting on 10 October 2019, the claimant 'in the interest of transparency' declared an involvement in the long-term incentive plan of P24 in his personal capacity until 2023.

55. At an ExCo meeting on 15 October 2019 (a transcript of which was again available but with the same limitations as above) the existence of the claimant's conflict of interest was discussed (which the claimant said he deliberately did not disclose previously as he did not believe it to be a conflict) as was the meaning of his contractual obligations. Broad agreement was reached that he would separately discuss the nature of his SARS interest with Mr van Eeden and that the scheduled meeting with P24

would stand but any sale would require full Board endorsement and appropriate due diligence.

56. On 24 October 2019 the claimant emailed Mr van Eeden with details of his SARS interest in P24 and concluded:

> 'Of course, I will abide by your decision regarding the advisability of my involvement in talks with P24 on behalf of PayProp in light of all of this.
>
> Would be great if we could settle either way so that I can inform JP, should I/we withdraw.'

At an ExCo meeting on 29 October 2019, it was discussed whether to proceed with the proposed sale. It is clear that Mr van Eeden had significant misgivings given the information that he had received from the claimant about his interest. At one point it was said:

> 'JvE – Would like RB to stand back, due to some uncertainty and not feeling comfortable with the situation; please ask Naspers to approach me or the Board directly if they are interested;
>
> RB – understood, will pass on the message'

although the meeting concluded with an agreement that the meeting would not yet be cancelled but could be at the last minute. Mr van Eeden confirmed that he would communicate the final instruction to the claimant.

57. On 31 October 2019 Mr van Eeden emailed the claimant and said:

> 'P24 discussion: I do not support it.'

which in the context of the meeting of 29 October clearly meant that the meeting should not go ahead.

58. In his reply on 1 November 2019 the claimant said:

> 'Please advise when you'll have 10 minutes tomorrow to touch base.
>
> 1. Tom, HoS etc. and 2. message (if any) to P24.'

59. The respondent says that this demonstrates a refusal by the claimant to accept Mr van Eeden's decision not to proceed with the sale to P24 as he was 'desperate' for it to go ahead (because of the potential benefit to him personally) and that he kept trying to steer discussions towards a relationship with P24. The claimant says that is not the case and that in any event buying PayProp SA would have had a negligible impact on the value of P24 and therefore little financial impact on him. Further that he stood to benefit more if PayProp SA remained within the Group as it would contribute to him meeting the necessary threshold to maximise his Group share option plan.

60. I do not have sufficient information before me to accept or otherwise the claimant's argument regarding the value of P24 and/or the financial impact. However, I find that the terms of his email dated 1 November 2019 do not support the respondent's argument. In all the circumstances, asking for a

steer on any message to be given to P24 was not in itself indicative of a refusal to accept the decision particularly in light of the claimant's email dated 24 October 2019.

61. On 29 November 2019 Mr Vogelberg prepared and sent to Mr Malan a paper regarding the accounting treatment of the share-based settlement agreements in place for the Group. These included the claimant's share option plan, a revised version of which had been signed in May 2019 and completed in October 2019. Mr Malan's compelling evidence, which I accept, was that this paper was not shared with Mr van Eeden and he would not have been aware of the detail.

62. The claimant says that the paper showed that the value of his entitlement under the plan could increase to nearly £13M, taking him to more than 7% of the shares in Humanstate thus substantially diluting the stakes of the van Eeden brothers and threatening Mr van Eeden's position in particular. Mr van Eeden's evidence however was that he wanted the claimant to increase his share and would have welcomed the dilution. This was consistent with his 'skin in the game' comment in his email to the claimant on 26 April 2018.

63. <u>The claimant's dismissal</u>

64. On 5 December 2019 the claimant and Mr van Eeden met in Switzerland. Over dinner Mr van Eeden told the claimant that his employment would be terminated. There is a dispute as to what reasons, if any, were given to the claimant and if referral to the Board was mentioned (even if it was, Mr van Eeden was effectively the Board given his voting share). Mr van Eeden agreed that he did use the phrase 'a thousand little cuts' which he said was a reference to a loss of trust. The claimant's evidence that the first time trust was mentioned was when he met Jaco van Eeden for a coffee a few days later. In any event the outcome – that the claimant was losing his job - was clear.

65. At a Board meeting on 9 December 2019 the claimant's future was discussed. Mr van Eeden provided background and context for the meeting which was minuted as:

> '• Over the course of past three years, and recent months in particular, there has been a breakdown in trust between members of the Executive Committee (ExCo) and RB;
>
> • On a number of occasions, RB did not implement decisions made by the ExCo (of which RB is a member), often not acting in the best interest of the company as perceived by members of the ExCo;
>
> • The Chairman had multiple conversations about this with RB, and informed him that these issues will be presented to the Board'

66. Of the four directors present and following a discussion, only Mr le Roux voted against the proposal to 'disengage' with the claimant. The final vote was 45 to 29 in favour but this reflects that Mr van Eeden had 43 votes and Mr le Roux had 29. The remaining votes were cast by Jaco van Eeden and

Mr Malan (one each). The decision was also made that Mr van Eeden, Jaco van Eeden and Mr Malan would lead the process around the termination.

67. Mr van Eeden called the claimant to inform him of the outcome of the Board meeting and sent an email on the same day giving notice of termination (without a specific reason), that he would be on garden leave for 3 months and discussions would follow regarding the terms of his departure with an intention to engage with him in good faith. The email did not refer to any right of appeal.

68. On 4 February 2020 (nearly two months later) Mr van Eeden wrote to the claimant confirming the termination of his employment on the same day because he could no longer take the business of the company forward as the Board had lost confidence in him. On this occasion the claimant was informed of his right to appeal against the dismissal.

69. The claimant submitted a written appeal against dismissal on 10 February 2020. In summary his grounds for appeal were:
    a. lack of process prior to dismissal;
    b. inconsistent reasons for dismissal;
    c. lack of prior notice of performance concerns; and
    d. incorrect corporate governance.

70. Mr Stroebel replied on 19 February 2020 confirming that he and Mr Vogelberg would conduct the appeal, advising the claimant of his right to representation and that on conclusion a recommendation would be made to the Board.

71. The appeal took place on 10 March 2020. The claimant attended unaccompanied. Dr Loots was the notetaker and Jaco van Eeden attended as a representative of the respondent. The claimant's appeal letter was read out on his behalf and he made additional oral comments. Jaco van Eeden then read out a statement for the respondent together with additional oral comments. He acknowledged that no formal performance complaints had been made or process followed but said there had been several conversations where it was directly communicated to the claimant that the founders were not happy with his management style and that he had been manipulative. He gave examples of other incidents that he said led to a loss of trust in the claimant. It is clear that the appeal meeting was the first time that any performance concerns were formally put to the claimant.

72. Further discussions involving all parties followed including Mr Stroebel asking whether it would be possible, if the appeal was successful, for the claimant to return to work at the respondent. The claimant said that he believed it was but Jaco van Eeden said it was not.

73. Mr Vogelberg's evidence was that during the appeal process he had 'countless' discussions with different members of the ExCo to understand the concerns regarding the claimant's behaviour. He made no notes of those discussions and no further evidence was available regarding them.

The contents of those discussions were not put to the claimant for his comment during the appeal process.

74. Having reviewed all of the information provided the appeal panel concluded that there had been a complete breakdown in trust and confidence in the claimant which was irreparable and it would not be possible for him to continue working at the respondent. They prepared a report for the Board annexing the respective statements of the claimant and respondent, notes of the appeal and the claimant's comments on those notes. The report was not sent to the claimant for comment and contained a number of statements that he does not accept to be accurate or an impartial reflection of his position.

75. The report gave a detailed commentary on each of the following areas:

'The breakdown of trust between the Company and the Appellant;
The management style of the Appellant;
The procedure followed in the termination of employment; and
The ability of the parties to continue working together.'

and concluded that:

a. the claimant committed a serious breach of fiduciary duty and was untruthful in respect of his interest in P24;

b. although no process had been followed prior to termination dismissal was an inevitability whatever procedure had been followed due to the loss of confidence in the claimant;

c. senior management of the respondent had lost trust in the claimant;

and accordingly the appeal should be unsuccessful and the claimant should not be reinstated in his former role.

76. That report was considered by the Board on 9 April 2020. Mr van Eeden was not present but Jaco van Eeden attended as his proxy. The recommendation of the appeal committee was passed by 45 votes to 30. The 45 votes again comprised Mr van Eeden's 43 votes and one each from Jaco van Eeden and Mr Malan.

77. <u>Miscellaneous other matters</u>

78. The respondent relies upon miscellaneous other matters to support their argument that the claimant was underperforming or breached their trust and that was the reason for his dismissal.

79. One was his alleged failure to properly budget and manage the respondent's finances which led to them nearly running out of cash. Mr van Eeden's evidence was that he only realised how serious the situation was at a meeting he had with Mr Vogelberg on 21 November 2019. There was no documentary evidence to support such an argument. Mr van Eeden

accepted in his evidence (despite what his quite specific evidence to the contrary had been in his written statement) that this concern was never put to the claimant and that as Chief Finance Officer Mr Malan was responsible for budgeting.

80. There is certainly not the evidence before me to support a finding of fact that the claimant was underperforming in this area.

81. The respondent also seeks to rely on the alleged manipulative behaviour of the claimant which Mr van Eeden said he had raised with him many times. The respondent relied upon various allegations, none of which were supported by written or compelling oral evidence, said to demonstrate a manipulative approach (e.g. a proposal in April 2019 by the claimant to sell his voting rights to Mr van Eeden, unfulfilled promises made to his cousin when he joined the Group, disobeying instructions from ExCo regarding a Head of Sales appointment for Canada and failing to provide a full explanation to ExCo on other matters). The claimant denied that many of those allegations were true or had a different explanation of his behaviours that he said was valid. Again I find that there is insufficient evidence for me to find as a fact that the claimant was guilty of manipulative behaviour in his dealings with the respondent or on their behalf. I do find however that these matters were of genuine concern to Mr van Eeden and this corresponds to his reference to a 'thousand little cuts'

82. Furthermore none of these examples were put to the claimant with any specificity when he was dismissed or at his appeal. Much of this detail appears for the first time in the respondent's further particulars provided in the course of this litigation.

Conclusions

83. Reason for dismissal: the respondent relies upon the potentially fair reasons for dismissal of conduct and capability (performance). At the time of the events in question, the respondent referred to them generally as a loss of trust and confidence in the claimant.

84. In respect of conduct they rely specifically on the failure of the claimant to disclose what is alleged to be a conflict of interest in respect of his interest in P24. In respect of poor performance they rely on the allegations of directly disobeying orders, a lack of transparency and breaches of fiduciary duty budgeting issues and manipulative behaviour.

85. The claimant says that the real reason for the dismissal was that Mr van Eeden did not wish him to accrue rights to any greater value of shares than that already accrued. Further, that the reasons given to him for his dismissal at the time, and subsequently, varied.

86. Notwithstanding the timing of the dismissal (six days after Mr Malan's email dated 29 November 2019 regarding the claimant's share options arrangements) I conclude that Mr van Eeden had genuinely lost confidence in the claimant and that was the reason for his dismissal. Further, it seems

inherently unlikely that the respondent would have completed the second share option plan so shortly before the dismissal if that was the real reason.

87. The reason for that loss of confidence was the claimant's continuing interest in P24 that he had not disclosed upon commencing employment but did disclose at the ExCo meeting on 1 October 2019 which he believed to constitute a serious conflict of interest.

88. I find that Mr van Eeden also had concerns about certain aspects of the claimant's style and behaviour but he did not articulate those concerns with any clarity or effectiveness either before or on 5 December 2019. Rather there was a series of informal and undocumented conversations with the claimant and others over an extended period of time in which Mr van Eeden may have thought he was conveying a certain message about style/behaviours but any such message was not received, either at all or sufficiently, by the claimant.

89. Accordingly I find that the reason for the claimant's dismissal was conduct (the failure to disclose his SARS interest in P24) rather than performance.

90. Reasonableness of dismissal

91. That being the case, I apply the usual principles to determine the fairness of a conduct dismissal.

92. Was it a genuine belief on the part of the respondent? Yes. Both Mr van Eeden and the appeal panel had a genuine belief that the claimant had acted in conflict with the interests of his employer by not disclosing his interest in P24 prior to 1 October 2019.

93. Was that belief based on reasonable grounds? Yes. It is arguable whether, according to the terms of his contract of employment, the claimant was required to disclose that interest at recruitment stage. Even if the claimant is right that there was at that stage no conflict to disclose, as chief executive it must have been incumbent upon him to disclose that interest as soon as there was any prospect of the sale to P24 even being discussed regardless of how firm or definite those discussions were. He failed, however, to so disclose his interest until he was asked a direct question on 1 October 2019, the prospect of such a deal having been first floated in July 2019.

94. Was there a reasonable investigation in order to found that belief? To a certain extent little investigation was required. On 1 October 2019 Mr van Eeden asked the claimant whether he had an interest in P24 and he confirmed that he had. The more significant issue was whether having that continuing interest amounted to a conflict. The decision makers all had sufficient of their own knowledge to form a view on that without further investigation.

95. Having come to that decision based on that reasonable belief, dismissal was plainly within the band of reasonable responses. The claimant's

behaviour went to the heart of the relationship of trust that he had, as Chief Executive, with his employer.

96. The dismissal was therefore substantively fair.

97. The procedure followed by the representative in effecting that dismissal was however extremely flawed. I agree with the respondent that given the seniority and position of the claimant the usual sort of ACAS-compliant process was not required (as is recognised by his contract of employment) but even so, some sort of process addressing the fundamental requirements of fairness is required.

98. There was no process followed by the respondent prior to Mr van Eeden telling the claimant on 5 December that his employment was being terminated. Ratification of that decision by the Board was meaningless given Mr van Eeden and the board were effectively synonymous.

99. Thereafter the claimant was offered and exercised the right to appeal. That appeal process itself however was seriously flawed in that the allegations, with sufficient particularity and supporting evidence, were not put to the claimant in a way that he could meaningfully comment on until after the meeting when the report was sent to him (having only been read out to him during the meeting). When he then submitted his comments, they were not taken any further into account. Mr Vogelberg's enquiries – even if they took place – were not recorded and not put to the claimant for comment. Finally, of course, although the appeal panel included the Group Chairman – who would have been a good choice as the most senior person in the Group and someone not previously involved in the underlying events - the decision was not in fact entirely that of the Chairman and Mr Vogelberg. The decision was sent back to the Board for ratification which again, in practice, meant ratification by Mr van Eeden - the original decision maker.

100. Accordingly the process was fundamentally unfair such as to make the claimant's dismissal unfair and the claimant is entitled to consideration of a remedy for that. In accordance with the parties' agreement I have considered whether the claimant would have been dismissed in any event if a fair procedure had been followed and whether there should be any reductions in compensation payable to the claimant on account of his conduct.

101. <u>Adjustments to compensation</u>

102. <u>Would there have been a fair dismissal if a fair process had been followed?</u>

103. In relation to the allegation of misconduct in respect of the failure to disclose his continuing interest in P24, I find that there is a significant chance that the claimant would have been fairly dismissed if a fair process had been followed. The evidence against him was stark and, as already said, it went to the heart of his relationship with his employer. Further, given his very senior role and the necessary trust that such a role requires at Board/ExCo

level, dismissal was more than likely to be to the outcome of a fair process. Personal relationships were clearly very important however to how the respondent was managed and this was not a business run on a purely commercial and unemotional basis. If a fair process was followed there is at least a chance that the claimant may have been able to persuade Mr van Eeden in particular either that there had been no breach or that he should not be dismissed (I note his responses to Mr Stroebel in this respect at the appeal meeting). I assess the chance that the claimant would have been dismissed at 60%.

104. The respondent has submitted that such a fair process would take 2 weeks because it was an urgent matter. I do not agree. On the evidence before me it is clear that the respondent did not always act as swiftly as it could even in pressing circumstances. I note the delay between 1 October and 5 December 2019 and then again to 4 February 2020. No doubt this was at least in part due to the geographical locations of the various parties (they could not just pop next door into an office and call a meeting quickly) as well as usual diary pressures. It also seems likely that for the respondent to follow a fair process would have involved them seeking appropriate legal advice which would add further delay. I find therefore that a fair process – from investigation to dismissal to appeal - would have taken 3 months.

105. <u>The claimant's conduct</u>

106. I find that the claimant was guilty of blameworthy conduct which led to his dismissal (the failure to disclose his SARS interest in P24). On the facts the claimant was entirely the author of his own misfortune in this respect and therefore I find that is just and equitable to make a reduction in respect of contributory conduct of 100%.

107. For completeness I do not find that there should be any contributory fault reduction on the basis of the manipulative behaviour etc allegations. There simply is not enough evidence before me to make such findings of fact.

108. As to whether there should also be a reduction on account of blameworthy conduct by the claimant discovered by the respondent after his dismissal (his failure to disclose his consultancy agreement with OLX), I find that there should not. Although, again, it is arguable whether OLX was a competitor, there was no specific proposed deal involving OLX that brought the claimant's relationship with them into sharper focus (as the possible deal with P24 had brought his SARS into sharper focus). Further, Mr van Eeden was aware of the claimant's continuing relationship with Mr Farina even if he was not aware of the consultancy agreement underpinning that relationship. In all those circumstances, I do not find it just and equitable to make a further reduction.

Remedy Hearing

109. A 3 hour in person remedy hearing will take place on **28 October 2022** commencing at **10am** at London South Employment Tribunal, Montague Ct, 101 London Rd, Croydon, CR0 2RF. It is anticipated however that with the

findings above the parties should be able to reach agreement without the need for a further hearing. If so, they shall please inform the Tribunal as soon as possible. Otherwise, the following directions apply.

110. On or before **16 September 2022** the claimant shall send to the respondent a statement setting out the remedy he seeks and his efforts to mitigate his loss together with copies of any supporting documents and an updated schedule of loss.

111. On or before **30 September 2022** the respondent shall send to the claimant any witness statements and counter schedule of loss upon which they wish to rely in relation to the remedy sought together with copies of any additional documents they say are relevant to the issue.

112. The parties shall seek to agree a bundle of documents for use at the remedy hearing and file one electronic and two hard copies no later than **26 October 2022.**

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Employment Judge K Andrews
Date: 6 June 2022

Sent to the parties on
Date: 15 June 2022