EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4102964/2020, 4102984/2020 and 4102985/2020

Hearing held at Aberdeen on 15, 16, 21, 22, 23, 24 February 2022

Employment Judge McFatridge
Tribunal Member J McCaig
Tribunal Member E Farrell

Garry Kennie	**First Claimant** **Represented by** **Mr Allison, Counsel** **Instructed by** **Quantum Claims**
W James Allan	**Second Claimant** **Represented by** **Mr Allison, Counsel** **Instructed by** **Quantum Claims**
Andrew Kay	**Third Claimant** **Represented by** **Mr Allison, Counsel** **Instructed by** **Quantum Claims**
Texo Engineering Limited	**Respondent** **Represented by** **Mr Hay, Advocate** **Instructed by** **Messrs Addleshaw Goddard**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(One) The unanimous judgment of the Tribunal is that the claimants' claims of breach of contract succeed. The respondent shall pay to the first claimant, Garry Kennie, the sum of Twenty Five Thousand Pounds (£25,000). The respondent

shall pay to the second claimant, W James Allan, the sum of Twenty Five Thousand Pounds (£25,000). The respondent shall pay to the third claimant, Andrew Kay, the sum of Twenty Five Thousand Pounds (£25,000).

(Two) The respondent's counterclaim is dismissed following withdrawal in terms of Rule 52 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

1. All three claimants submitted claims to the Tribunal in which they claimed that they had been wrongfully dismissed by the respondent and were due various sums in respect of notice pay which they had not received. The respondent entered a response in which they denied the claims. It was their position that the respondent had summarily dismissed all three claimants for gross misconduct and that each of the three claimants had been guilty of a repudiatory breach of contract which they had accepted by dismissing them without notice on 17 March 2020. The respondent also submitted a counterclaim against each claimant on the basis that each claimant had been aware that the other two were working for MRDS in breach of contract and that had not complied with their fiduciary duty to tell the respondent this and that as a result the respondent had incurred costs. It is as well to record here that whilst it was put to the claimants in cross examination during the hearing that they had been aware that their colleagues were working for MRDS (and denied in each case) no further evidence was led in respect of the counterclaim and during submissions the respondent's representative confirmed it was not being insisted upon. On being pressed as to what he meant he confirmed that the counterclaim was withdrawn. It is therefore dismissed. The case was subject to a degree of case management and the parties produced a Statement of Agreed Facts in advance of the hearing which confirmed that it was common ground that at the time of dismissal without notice of the three claimants on 17 March each had already either resigned or been dismissed with six months' notice.

2. At the hearing the respondent went first since both parties accepted that the burden was on the respondent to show that the claimants had committed a repudiatory breach of their contract of employment which would justify summary dismissal. Evidence was led on behalf of the respondent from Christopher Hayden Smith, the Managing Director of Texo Group, the group of companies of which the respondent formed part; Richard Colin Lamb, a Divisional Director for Texo Workspace Solutions, part of the Texo Group; Deborah Bruce, a former Business Development Officer for Texo Group; Deborah McFarlane, a former Recruitment Director with Texo Recruitment, another company within the group; John Black, a former Commercial Director with Texo Group; Rebecca Foy, a former Administrator with MRDS Limited; and Brian Sinclair, Managing Director of Monitoring Systems Limited, a company which had business dealings with both respondent and MRDS Limited. It should be recorded that Ms Bruce, Ms McFarlane, Ms Foy and Mr Sinclair all attended under compulsion of witness orders. More is said in relation to these orders below. During the course of examination in chief of Ms Foy and Mr Sinclair I granted permission to the respondent's counsel to ask leading questions and effectively cross examine them even although these were witnesses who had been cited by the respondent. More is said in relation to their evidence and the sequence of events in relation to the grant of the witness orders below. All three claimants gave evidence on their own behalf. Mr Ian McGilvray, Managing Director of MRDS Limited also gave evidence on behalf of the claimants. With the consent of the respondent Mr McGilvray's evidence was interposed between the evidence of Mr Kennie and the evidence of Mr Allan. I should record that the respondent's agent made an application that Mr Allan and Mr Kay be absent from the room whilst Mr Kennie was giving evidence and that Mr Kay be absent when Mr Allan was giving evidence. This application was not granted. Again, more is said about that below.

3. Both parties lodged a joint set of productions which incorporated therein a supplementary set of productions which had a different page numbering. During the course of the hearing a second and third inventory of productions was lodged with the agreement of both parties. The productions are referred to below by page number for the main set, by

page number prefixed by 'S' for the first supplementary set, by page number prefixed by 'SS' for the second supplementary set of productions and by page number preceded by 'SSS' for the third additional inventory. The parties also produced a helpful cast list setting out the various personnel involved which was of assistance to the Tribunal. On the basis of the evidence, the jointly agreed facts and the productions the Tribunal found the following facts relevant to the case to be proved or agreed.

Findings in fact

4. All three of the claimants have extensive experience of working in the oil industry in Aberdeen. In 2018 all three were working for separate companies within the Aberdeen oil industry and all three were acquainted with a Rob Dalziel. They were each approached by Mr Dalziel who advised that he was in the course of setting up a new company or group of companies to provide services to the oil industry in Aberdeen. He advised that he had an investor who would be prepared to back such a venture. This investor already had certain interests in the Aberdeen oil industry. Mr Kennie was first introduced to Texo first of all through a contact with a John Woods who was Chief Operations Officer of Texo DSI. Mr Woods spoke to Mr Kennie re the possibility of Texo expanding into an engineering and service company. Mr Kennie's expertise was in looking after the technical side. Mr Kennie is a Structural Engineer. The company would be operating in the provision of offshore engineering services which was the area of expertise of all three claimants. Over a period there were discussions between Mr Dalziel and the various claimants regarding the possibility of the claimants leaving their current roles and coming to work for the new venture. This culminated in a meeting which took place at the Malmaison Hotel in around May/June 2018 which was attended by all three of the claimants and others as well as Mr Dalziel and Mr Hayden Smith who was the investor who would be putting up the funds.

5. Mr Hayden Smith and his family had been the owners of a successful scaffolding firm which they had sold in or about 2014 and he had substantial funds to invest. He had set up a drone/surveying company in 2016 (Texo DSI). During the course of the discussions between the parties Mr Kay advised Mr Smith that whilst it would be possible to carry

out the suggested plan the overwhelming likelihood would be that the proposed new company would be loss-making in the first year or so and that substantial cash investment would be required to fund the company until it became profitable and self-funding. During the course of discussions all three claimants were told that they would be part owners of the proposed engineering company and that there would be a group structure which would deal with HR, accounting and other matters. Various figures were bandied about and the claimants' final understanding was that they would each receive shares accounting for approximately 10 per cent of the value of the company with the remaining 70 per cent being held by the Group Holding Company which in turn would be owned by Mr Smith and Mr Dalziel.

6. Each of the claimants were in highly paid jobs with other companies. Having indicated to Mr Dalziel that they would be interested they said that they really required to have something in writing before they were prepared to hand in their notice. There was a discussion regarding salary. The discussions were open in the sense that each of three claimants were advised what the other would be being paid. Eventually it was agreed that Mr Allan and Mr Kennie would be paid £132,000 gross per annum plus a car allowance and pension contributions of 7 per cent per annum. The car allowance was to be worth £8000. Mr Kay who was taking a substantial cut in salary in order to join the respondent stated he needed a little bit more and it was agreed that his salary would be £137,000 plus car allowance of £8000 and pension contributions of 7 per cent per annum. In order to provide the claimants with the assurances which they wanted before handing in their notice Mr Dalziel arranged for an email to be sent to each party setting out the proposed arrangement in the form of bullet-points. These emails were not lodged. The emails set out the salary, the car allowance, the pension contributions and also that the claimants would be entitled to six months' notice of termination of employment. They also set out the shareholding arrangements in outline and the titles of each claimant. Mr Kay was to be Managing Director. Mr Kennie was to be Director of Engineering. Mr Allan's title was to be Technical Director but this was later changed to Operations Director. Although all three held the title of Director it was unclear to the three claimants whether they would in

fact be statutory directors in the sense of being a Director of the company registered with Companies House. The three claimants were familiar with the practice in the Aberdeen oil industry where managers of a certain level may be referred to as Directors without it necessarily following that they are registered as statutory directors with Company House. The general understanding was that they may well be called upon to be statutory directors at some point.

7. All three of the claimants agreed to what was suggested. The general aim was to build a successful company carrying out offshore engineering work and build it up from nothing to a situation within five years where the company could be sold for a substantial amount thereby giving the claimants the potential to earn a capital sum from the sale of their shareholding.

8. The three claimants commenced work during the latter part of 2018. Their precise start dates varied depending on the notice arrangements which they had with their previous employer. Mr Kennie commenced employment on 18 June 2018. Mr Allan commenced employment on 1 October 2018 and Mr Kay commenced employment on 8 October 2018. Initially none of the three claimants were appointed as statutory directors of the company at Companies House. No steps were taken to issue shares in respect of the 10 per cent shareholding promised. None of the three claimants was given any statement of terms and conditions of employment within the timescale envisaged by section 1 of the Employment Rights Act 1996.

9. The respondent Texo Engineering Limited was part of the Texo Group. There were a number of other companies in the Texo Group providing other types of services. There was a company providing temporary accommodation, one providing access, one providing drones and surveying, one providing port services and one providing recruitment services. Generally speaking the group provided services to the oil, gas and renewables sector in the North Sea. Their aim was to provide construction and engineering work capabilities to the oil, gas and renewables sector for the entire lifecycle and installations from start to finish. There were around eight separate companies.

10. In or about 2018, shortly after Texo Engineering started Mr Chris Smith who is the son of Hayden Smith came to Aberdeen to have a look at the investment in Texo Group and meet the various individuals involved. At the time Mr Smith was coming to the end of a five-year earn-out period which had committed him to working in the scaffolding business the family had previously owned following its sale. Mr Smith was interested in one of the company's activities namely drones and surveying which was operated by a company called Texo DSI. Texo DSI had been incorporated in 2016 and provided surveying and mapping services to various industries including the oil and gas industry. Mr Christopher Smith did not become involved in the operations of the respondent company Texo Engineering Limited at that time.

11. Following its incorporation in June 2018 the respondent company was successful in obtaining various contracts for engineering work. Much of the work was obtained from companies with whom the three claimants had previously worked and had good relations with. One of the contracts which the company had was with a company called MRDS Limited. MRDS Limited had been set up by Mark Robertson and was also known as "Mark Robertson Drilling Services". Mr Robertson of that company was well known to all three claimants. Texo obtained work as a sub-contractor to MRDS Limited on a contract which MRDS Limited had with a company called CNR. The project was for the construction and installation of a piece of equipment called an "iron roughneck". A number of other companies were involved in this project including Oiltech Group who were an IP design company, MRDS who were the fabricators of the iron roughneck dealing with metal and hydraulics, a company called Monitor Systems owned by Brian Sinclair which dealt with design and manufacture of the automation and control unit, the respondent who were installation contractors on the platform and a company called KCA who were the drilling contractor and operator of the iron roughneck unit. CNR were the operators of the Ninian Central Platform on which the iron roughneck was to be installed by the respondent and were the end user and principal contractor. The billing arrangement was that MRDS would bill CNR. Texo would bill MRDS. Texo were essentially sub-contractors to MRDS.

12. Mr Allan worked closely on this project. Mr Kay was not involved with this specific project and had little day-to-day knowledge of it. Mr Kennie did not work directly on the iron roughneck project with MRDS. He was aware in general terms the company was working with MRDS. He was also aware that MRDS were working with another group company called Texo Rope Access. He understood the work was winding down and it was getting to the stage of the invoicing and final documentation being produced. He was also aware of a couple of other jobs where Texo supplied MRDS with system integration. He first had been introduced to MRDS by Mr Dalziel prior to coming to work for the respondent. Mr Kennie was aware that Mr Dalziel wished to work closely with MRDS since Mr Dalziel wished Texo Engineering to become involved in rig maintenance and Texo Engineering had gaps in their capability which could be filled by MRDS. The companies had taken a joint stand together at a trade show known as ADIPEC 2018 in Abu Dhabi. Mr Kennie had attended on behalf of the company. Ian McGilvray and Rebecca Foy of MRDS had attended on behalf of MRDS. Mr Kennie had worked together with them on the stand for around a week. The aim of the joint presence was to obtain work from customers where MRDS and Texo Engineering Limited could complement each other and together provide a full service which neither were able to provide individually. Mr Kennie had also attended the Monaco Grand Prix in 2019 on behalf of Texo together with Texo Accommodation Director Richard Lamb. Mark Robertson and Ian McGilvray of MRDS had also attended. Originally, someone else from Texo was due to go on the trip however they could not go so Mr Kennie had been asked because of his well-known interest in Grand Prix racing. In addition to this Mr Kennie's usual practice throughout his career had been to try to keep close relations with customers and sub-contractors and he would regularly go visit them. He would regularly visit MRDS amongst others. He was also aware that MRDS and the respondent shared premises in Dundee in that MRDS had put up a sign on Texo's premises in Dundee so as to let potential customers know that they could work together.

13. So far as the running of the company was concerned Mr Allan and Mr Kennie had substantial autonomy. They reported to Mr Kay. He also had substantial autonomy although as things progressed he became

frustrated that although he was meant to be Managing Director he had little control of certain aspects of the running of the company. Mr Kay reported to Mr Dalziel who was Managing Director of Texo Group Limited.

14. As noted above the claimants did not receive any statement of terms and conditions of employment. All three claimants understood that at some point they would be receiving a contract of employment and that this would detail the arrangements regarding shares etc. On or about 18 December 2018 Mr Kennie received an email from Aileen Uwins who at that time dealt with HR matters for Texo Group. The email was lodged (page 181). It stated:-

> "Please find attached for review your employment agreement with Texo Engineering Limited.
> If there are any areas that you wish to discuss or any changes/amendments that are needed please let me know. I have aligned your holidays as discussed and this takes it to 28 plus 8 statutory."

The document was password protected and the first thing Mr Kennie had to do was obtain the password. He then opened the document. For the avoidance of doubt the Tribunal were satisfied that the document attached to this email was not in fact produced at the Tribunal. The document lodged at page 149-180 of the bundle is similar to but not identical to the document which was sent to Mr Kennie at that time. Mr Kennie read through the document and discussed it with Mr Allan and Mr Kay. At that time Mr Allan and Mr Kay were in the habit of having a weekly meeting at which they would discuss what was going on within the company. The issue of their contract came up at several of these weekly meetings. Mr Kennie had a number of concerns about the document which he had been sent. Mr Kennie had worked at various highly paid posts in the oil industry in the past and had never previously received a document called a Service Agreement. He also thought that this document was much more legalistic and complicated than he was used to. He did not understand all the terms. He was also concerned that the document referred to a Shareholder's Agreement and that his shareholding would be regulated

by the Articles of Association but no Shareholder's Agreement or Articles of Association had ever been produced to him.

15. Mr Allan, like Mr Kennie did not receive a statement of terms and conditions of employment on commencement. When he started it was difficult for him to get any time with Aileen Uwins who dealt with HR for the company as she only worked two days per week and didn't have an office. Like Mr Kennie he received a draft Service Agreement from Ms Uwins in or about December 2018. The document was similar to but not identical to the Service Agreement lodged at pages 119-148. No copy of the actual draft contract which was sent to Mr Allan in December 2018 was before the Tribunal. Mr Allan had the same concerns about the Service Agreement as Mr Kennie. He wished to take advice on it. He was not prepared to progress the Service Contract in isolation since he wanted to see the Shareholder's Agreement and the Articles of Association as these points were very important to him. He agreed at his meetings with Mr Kennie that, since their concerns were the same, Mr Kennie would in his words 'ping off' an email to Aileen Uwins setting out their joint concerns. This was the email at page 184 from Mr Kennie to Ms Uwins. Mr Allan was not copied in to this but was aware of the terms of it at the time. He understood from contact with Aileen Uwins that she was aware of his concerns. He did not receive any further communications from her before she left in or about Easter 2019.

16. Like Mr Kennie and Mr Allan, Mr Kay did not receive any written statement of terms and conditions of employment on joining the company. In or about January 2019 he received an email from Aileen Uwins with which was enclosed a draft Service Contract. The document which is lodged at pages 4-33 was not the document which was enclosed. Mr Kay did not see this document prior to seeing it in the bundle prepared for the hearing. The document which was sent to Mr Kay was a document of 31 pages with draft written across it. He received it on 16 January 2019. He spoke to Aileen in order to obtain the password so he could read the document. He felt there were a number of things in the document that did not make sense. He went back to speak to Ms Uwins and mentioned his concerns. Ms Uwins advised him that the document he had been sent was a

document which had been drafted for the purpose of having him comment on it. Mr Kay had a total of four meetings with Aileen Uwins regarding the document. He also discussed his Service Agreement with the other two Directors at their weekly meetings. Mr Kay also took independent advice from a solicitor. Mr Kay advised Ms Uwins that he would not be signing the Service Agreement or agreeing to anything until all of the documentation was available including the Shareholders Agreement and the Articles of Association. Mr Kay also spoke to Rob Dalziel about it. He complained about the non-compete clauses. He told Mr Dalziel that he needed specialist legal advice. Mr Dalziel said that in due course the Directors would be given funds to pay for independent legal advice in order to get the terms of the agreement described to them better. Mr Kay's position was that he would not enter into any agreement without the Shareholder's Agreement being present. This was important to him. He understood that he had made his position very clear to both Aileen Uwins and Rob Dalziel.

17. Aileen Uwins left the company in or about April 2019. The position at December 2019 was that a draft Service Agreement had been sent to each of the three directors. Each of the three directors had either directly or indirectly in the case of Mr Allan made it clear that they were not prepared to agree to this or sign it. They made it clear that they were not prepared to do so without having the Shareholder's Agreement and Articles of Association to conclude at the same time.

18. In December 2019 Mr Kay was attending a meeting with Mr Dalziel and others in the boardroom at Texo House. The meeting was discussing proposals for the respondent open a new office in Invergordon. Mr Hayden Smith came in to the meeting and asked everyone to leave apart from Mr Dalziel. Mr Kay had not been aware that Mr Hayden Smith was due to be in Aberdeen and he had not expected to see him at the meeting. Mr Kay left the room. Shortly thereafter he was advised that Mr Rab Dalziel had been dismissed. Mr Kay spoke by telephone to Mr Kennie who at that time was on company business abroad visiting the Las Palmas boatyard in Gran Canaria. He advised him what had

happened. Neither of them knew what the reason was for Mr Dalziel's dismissal.

19. Shortly after he made this call Mr Kay was called up to the boardroom and he was advised by Mr Hayden Smith that he was also being dismissed. Mr Kay was extremely upset and he did not know what was going on. He had never been dismissed before. Mr Smith was unclear as to what the process would be. He went back to his office. He spoke to Samantha Csorba who by this time was Group HR Director. Samantha Csorba said that there was no restrictions as to what he could do in relation to applying for other work. Mr Kay returned to work the following day and started tidying up and putting things in boxes. He was expecting to see some form of letter confirming his position but nothing came. Eventually Ms Csorba told him that he should simply go home.

20. During 2019 Hayden Smith's son Christopher Smith had been working on his property business. He had also from January 2019 taken an interest in Texo DSI which was the drone and surveying business in the Texo Group. He became Managing Director of Texo DSI in or about April 2019. He was then appointed Managing Director of the respondent following the departure of Mr Dalziel in December 2019. Christopher Smith's understanding was that his father as principal investor and other investors had become disenchanted with the financial performance of the respondent and this was why Mr Dalziel and Mr Kay had been dismissed. Various other changes to the Texo Group were made at this time including the reduction of group companies from around eight to four going forward.

21. On 19 December Hayden Smith wrote an email to Mr Kay which was lodged (page 193-194). He stated

> "Hopefully your head is clearing after the meeting on Tuesday. Over the next six months you may well take the time to complete your house building programme?
> Please be assured Andy that you will receive everything that is due to you as an employee. Any issues you want to raise please notify Samantha &amp, cc me but in this process Samantha is your first point of contact.

> There obviously is a discussion for you &amp, I to have together on your perceived share value, I obviously see currently negative value on the management account.
> Audited accounts have to be posted beginning of March 2020.
> I would suggest that we wait for these to be published &amp and then look for the EBITDA value hopefully there is a considerable value which would put a big smile on my face & no doubt yours &amp, my bank manager, your thoughts on this of course would be appreciated Andy."

22. This was sent to Mr Kay's email address at Texo.co.uk and his email account with this address had been switched off by the respondent on or about 17 December when he had been dismissed. The email was eventually forwarded to Mr Kay and on 23 December he responded saying that he had just received it. He stated

> "Please can you issue me in writing the reason why I have been fired. It wasn't clear in the meeting on Tuesday and doesn't correspond with the accounting mismanagement that I have faced since joining Texo. I will then revert on the below in due course."

23. Ms Csorba then responded to Mr Kay stating

> "We will issue a termination letter which will also confirm details of your garden leave." (page 193).

24. On or about 16 January 2020 the respondent sent to Mr Kay a letter dated 1 January 2020 headed Termination of Employment. This letter was lodged (page 195-199). It stated under the heading Contractual Notice

> "You are entitled to six months' notice period which will run from the 17th December 2019 to 17th June 2020. You will not be required to attend work during this period."

The garden leave provisions were set out in paragraph 1. Section 1.3 stated

> "During any such period of garden leave the executive

1.3.1. Will continue to receive the salary and other benefits to which he is entitled under this agreement but shall not be entitled to any bonus, commission, profit share or any of the rights or benefits under any share option scheme. The company may at its absolute discretion replace any benefit with a cash equivalent sum.

1.3.2. Shall not without the prior consent of the company be entitled to enter or attend his place of work or any other premises of the company or any associated company.

1.3.3. Shall not contact or deal with (or attempt to contact or deal with) any restricted customer or restricted supplier nor have any contact (other than purely social) with any restricted person or if requested by the company any other business contact of the company or any associated company.

1.3.4. Shall remain an employee of the company bound by the terms of this agreement during this period of garden leave in particular but without limitation shall remain bound by his obligations of loyalty and good faith of exclusive service to the company and of confidentiality.

1.3.5. Shall if required by the company resign with immediate effect from any offices he holds with the company or any associated company.

1.3.6. Shall if required by the company take any unused holidays which has accrued and

1.3.7. Shall (except during any period as taken as holiday in the usual way) ensure that the company knows where he will be and how he can be contacted during each working day and shall comply with any requests to contact a specified employee of the company at specified intervals."

25. There were provisions regarding confidential information. The letter does not give any definition of restricted customer, restricted supplier or restricted person. The letter contained a signing box which appeared to be designed for Mr Kay to sign and return. Mr Kay did not sign and return this. Mr Kay continued to receive his payments of salary from

17 December onwards until 17 March 2017 where he was again dismissed in circumstances which are set out below.

26. Following his taking over as Managing Director of the Texo Group Mr Christopher Smith saw his role as that of steadying the ship. He and Hayden Smith had been concerned to find that none of the directors of the respondent had signed their Service Agreement. Hayden Smith wrote to Mr Kennie on 18 December. (S36) The majority of the email dealt with business matters however within the email Mr Hayden Smith stated

> "I will now take on the shareholders agreements and present them to all shareholders by the end January.
> Can you give me the reason(s) why no director in engineering has signed their service agreements?
> Hopefully after today's meeting plus the Town Hall statement and the departure of Rob the atmosphere and focus on working together as a team will improve and everyone will now focus on bringing success to all of the Texo Group companies. I said today no-one is forced to like a work colleague but we all have to work together to resolve any issues."

27. Mr Kennie responded on 18 December. (S35) He stated

> "Thanks for the email and the response. I enjoyed the discussion today.
> Yes, I agree we all need to work hard together to pay back and capitalise on your hard-earned investments. At the same time I'm not going to endure unprofessional behaviour and incompetence which damages the company's name, integrity, revenues and profit. That is my duty-bound responsibility to you and Chris. If that makes me unpopular with my peers so be it.
> The contracts weren't signed as after they had been reviewed James, Andy and I had a couple of comments. The comments were sent back to Aileen and Rob in January 2019.
> We were awaiting re-issuance of the contract by HR. We are also waiting to review the share agreements as this is reference in the contract.

> This was chased up several times with Rob and Aileen.
> The last time we formally chased them up was in August, pension and sick cover with Dave, contracts with Samantha (to be fair to her these were originally being dealt with by Aileen), she had agreement with Rob. Most recently Rob said the share agreements were close to issue so we would be able to complete the review (with the contract).
> To date the only contract issued to me was back in December 2018. James and I have no objection to sign the agreements but we do need to see everything together."

28. Mr Allan was not consulted prior to Mr Kennie sending this email. Mr Allan's position however was that he would want to see the Share Agreement and Articles of Association before he took advice with a view to signing all of the documents at the same time if they were acceptable.

29. At some point on or about 31 December 2019 the respondent advised Companies House that Mr Allan and Mr Kennie had been appointed as directors of the respondent. Mr Allan and Mr Kennie both received letters from Companies House around mid-January advising them of this appointment. They had not been consulted in advance of this appointment and had not signed anything confirming their consent to act as directors. They did not raise the issue at the time with anyone within the respondent since their understanding all along had been that at some point they would be appointed as directors of the company. This was consonant with the initial intention was that they would be "owners" of part of the company.

30. On 20 December Hayden Smith wrote to Mr Allan and Mr Kennie. The email was lodged (page S38). He stated

> "Chris and I wanted to update you on the above subjects. Service contracts are now being dealt with by myself and Samantha and we expect these to be completed early January I clarify 2020 for good measure.
> Shareholders' agreements. I'm also dealing with these and targeting end of January 202 for these to be issued in draft to each

> of you. Texo Group Limited is registered in England therefore we will be taking advice to ensure it complies to Scottish law.
>
> Both Chris and I look forward to the new format and new dawn of the Texo Group divisions working together harmoniously (free from disagreement or dissent) which will justify both our faith in each of you and our ongoing investment in 2020 which we both know is also your intent.
>
> As Chris has stated to you all he has to manage Texo DSI full time therefore his unnecessary involvement has to be avoided. Obviously we are both here to support you at any time but not the small stuff i.e. work together in harmony."

31. On 17 January 2020 Samantha Csorba the Group HR Director wrote to Mr Kennie and stated

> "Having reviewed the information Garry sent over from previous email from Aileen and the copy of the contract I had on file I have now looked at the questions, amended the contract where applicable. Below are the questions raised, answered by Aileen and with comments from myself and Hayden on point 6.1.
>
> I appreciate this may be the first draft you've seen and there may have been other questions raised at the time and are still not answered. If there are any outstanding points can you advise asap as I would like to issue keep moving forward to resolve the outstanding actions."

32. It would appear that draft contracts were attached to this email. These were not lodged. The documents lodged on file bearing to be unsigned service agreements were not the same as the documents which were forwarded by Ms Csorba to the claimants on 17 January 2020. The email goes on to deal with various issues. Mr Kennie responded to the email later the same day stating

> "I'm off sick today/yesterday, norovirus so in quarantine. Will be back in Monday (assuming all is well).
>
> As stated previously the intention is to review the employment service agreement alongside the articles of association and SHA

> (as referred under section 14) do you know when this will be issued? Are there any changes (inclusions/exclusions) between the draft service agreement issued by Aileen 18 December 2018 and the one issued 17 January (by email SC) other than the changes stated below (SC email dated 17 January) here."

33. At some point during January Mr Kennie was advised that he had been appointed Managing Director of the respondent. This was done by Hayden Smith without consultation from him. Mr Kennie made it clear to Hayden Smith and Christopher Smith that he did not wish to be Managing Director as he felt his skill set was in engineering and was happy to remain Engineering Director.

34. During this time there were various discussions between Christopher Smith and Mr Kennie regarding the restructuring of the team.

35. Mr Allan resigned from the company on or about 23 January 2020. He spoke to Christopher Smith and stated that he was wanting to resign. He had a lengthy chat. Mr Allan discussed his issues with Mr Smith. Mr Smith asked him to think about it for a week. Mr Smith did this and during this period he also discussed matters with Mr Kennie. Mr Allan confirmed that he did indeed wish to resign and advise Mr Smith on or about 30 January that his mind was made up. He submitted a formal letter confirming the result of these discussions on 30 January (S39). The letter was lodged. It states

> "As discussed with Chris and Garry on 23 January I am disappointed with the position I am now facing and now find both my remit and ability to deliver any real budget through 2020 a wholly unrealistic challenge.
>
> Due to the untenable work projection and a combination of several mixed personal reasons I need to resign. In the short term I plan to continue with focus on current projects near completion and outstanding invoicing I understand that there is around £600,000 which should be possible to invoice by late February/early March and shall likely dominate a large effort during February.

> I also have a small construction campaign during February and PUWER reviews to support.
>
> I anticipate that my workload will significantly drop through February and should be concluded by mid-March. I have agreed with Chris that I would firm up this timeline.
>
> I am keen to advise that I do not have a new employer nor secured work at present. Chris did mention this week that non-competes would not be an issue – and I am keen to work a mutually agreeable exit plan recognising the six month notice period."

36. Mr Kennie found that he was becoming extremely stressed in his work with the respondent. As at January 2020 he was finding things extremely difficult. He was not in a good place physically or mentally. He felt that he was short-tempered and that there was a great deal of conflict at work. In his extensive experience he had never seen in-fighting or back-biting like it. He felt that this was really nothing to do with Christopher Smith but that much of it was the legacy of the way the group had been run previously by Mr Dalziel.

37. Mr Kennie also decided to resign and did so with effect from 10 February. He sent an email to Mr Chris Smith confirming his position on that date. The email was lodged (page 213). It stated

> "Please accept this letter as official notice of my resignation from the role of Managing Director of Texo Engineering.
>
> I have enjoyed the role and the building of Texo Engineering since June 2018 and I sincerely thank you for the opportunity to do so however due to increasing levels of stress and conflict within the business I find that my physical and mental wellbeing are becoming adversely affected. After lengthy and careful consideration I believe it is best that I leave the role and the company.
>
> Where there is no executed Service Agreement (employment contract) in place between myself and the company I am willing to agree a mutually acceptable notice period and leaving date with consideration to the present ongoing project.
>
> I genuinely wish you and Texo Group a continued success."

38. It was common ground between the parties that Mr Kennie's notice was due to expire on 9 August 2020, Mr Allan's notice was due to expire on 23 July 2020 and Mr Kay's notice was due to expire on 17 June 2020.

39. As at March 2020 one of the matters which Mr Allan had to deal with was the final invoicing for the iron roughneck project with MRDS. The position was that MRDS had given CNR who were their customer a fixed price for the project. The arrangement between Texo and MRDS was that part of the price was based on a lump sum but part of it was based on reimbursables of labour and materials costs. This was fairly standard in the oil industry for work of this type. The work being done by the respondent would require to be carried out on the end user's offshore oil installation. Costs could vary considerably for reasons which were not within the control of the respondent. The effect of this was that the final invoice to be rendered by the respondent to MRDS would likely be higher than the amount which MRDS had allowed for in their contract with CNR. That having been said, it would be possible for MRDS to recover any genuine additional costs from CNR on the basis that there had been variations in the contract. Generally speaking, the justification for variations would require to come from Texo.

40. The upshot of this was that the respondent Texo very much had a vested interest in assisting MRDS to obtain additional variations of contract from their end customer so as to enable MRDS to be paid their full costs and thus enabling MRDS to pay the respondent. Matters were complicated by the fact that, as confirmed by Mr McGilvray MRDS were a relatively small company employing around 25 people mainly workshop fabricators. They were effectively overtrading and did not have a sufficiently large capital base to enable them to pay out their sub-contractors before they had received full payment from the end user.

41. The upshot of this was that one of the jobs which Mr Allan had to do in order to assist in securing payment for the respondent was to assist MRDS in billing the appropriate amount to CNR by providing MRDS with all necessary information regarding additional costs. Mr Allan therefore spent a fair bit of time putting together final invoices and engineering

justifications for the respondent and also providing information which would be of assistance to MRDS in collecting money from their customer.

42. Mr Allan was also involved in obtaining payment on a further project which the respondent had been carrying out direct for CNR which was for in the region of £350,000-£400,000. In discussions with Mr Smith he advised he was going to sort out these matters before he either went on gardening leave or left with a payment in lieu of notice.

43. Mr Kennie also continued to work with the respondent following his resignation. Around mid-February a new Managing Director for Texo Engineering Limited was brought into the company, Scott Fraser. Mr Kennie sent out a number of emails to customers introducing Mr Fraser as the new Managing Director of the company. An example of the kind of email he sent out is lodged at page 216. Shortly after this Hayden Smith came up to Aberdeen and met with Mr Kennie. He indicated that he was unhappy with Mr Kennie still being in the office while he was working his notice. He told Mr Kennie that either he was in or out. Either he rescinded his notice and carried on working for the company or he was to go immediately. Mr Kennie said that he would go and he was then told he was being put on gardening leave. He was also advised that he would have the choice of being on gardening leave for six months or his contract would end immediately and he would receive pay in lieu of notice of about £40,000 with no non-competes.

44. Mr Kennie's last day at work was around 6 March.

45. With regard to the MRDS contract one of the other sub-contractors, Monitor Systems was also concerned about receiving payment of their final invoices from MRDS Limited. In addition to the issue about not being paid there was a technical issue which required to be resolved regarding the iron roughneck. When it had been installed an issue had arisen regarding a particular piece of equipment applied by Monitor Systems which kept tripping. A workaround had been found which involved changing the cable thickness for certain of the electrical installation which had been installed on the rig by Texo Limited. The precise nature of this technical solution had still to be resolved. On or about 13 March a Teams

video call was arranged between managers at MRDS and managers at Monitor Systems Limited. Monitor Systems Limited is owned by Brian Sinclair. He understood there would be two parts of the call namely one where he would be present which would deal with the issues surrounding non-payment of one of the invoices submitted by MRDS. He then anticipated there would be a technical discussion which would deal with the ongoing technical issues with the installation on the rig.

46. Prior to this meeting one of the engineers at MRDS Limited asked Mr Allan if he could attend the technical part of the meeting in order to deal with any technical issues which arose.

47. The meeting started with Mr McGilvray and another representative of MRDS management on the call with Mr Sinclair and two of his managers. Mr Sinclair had anticipated that Mark Robertson who he knew to have a technical background would be attending on behalf of MRDS for the technical side and was disappointed that he was not there. The meeting initially dealt with the business aspects relating to the unpaid invoice. Mr Allan did not wish to be present during this discussion which had nothing to do with him and absented himself for the first 10 minutes or so of the meeting. After about 10 minutes he then went into the meeting room. He found it was set up with the two individuals already there sitting directly in front of the computer screen. He thought they were probably the only two people who could be seen. Another engineer from MRDS came in at the same time as Mr Allan and both he and Mr Allan then sat down beside the other two and out of direct shot of the computer that was sitting on the desk. Mr Allan was well acquainted with Mr Sinclair and the other engineers present. He popped his head round so it would be visible on the screen and said hello before sitting down to deal with the technical matters which he understood would be discussed next. He had a very brief exchange of pleasantries with Mr Sinclair and then Mr Sinclair left the meeting. Mr Allan did not think anything more of the incident and continued with his duties for the rest of the day.

48. Following his dismissal on 17 December Mr Kay had stayed at home during most of January and avoided social contact. He had a number of calls from people within the oil industry asking him what had happened

regarding his dismissal and he did not engage with any of these. It was not a subject he wished to discuss. Mr Kay had a long-standing friendship with Mr Mark Robertson of MRDS and by February he felt that he could no longer hide away and arranged to visit Mr Robertson in order to have a generalised chat. At some point in early March Mr Kay had a meeting with Mr Robertson in the MRDS building. No-one else was present at this meeting. Their chat covered general gossip about the oil industry although Mr Kay was not prepared to discuss his own situation. Mr Robertson and Mr Kay have a shared interest in various issues including drones and 3D printing. In addition Mr Kay was in the habit of helping people when they had issues with their computers.

49. During the course of his discussion with Mr Robertson each of them discussed their own home workshops. Mr Kay has a full workshop and amongst other things is in engaged in a long-term project of building a new house for himself. Mr Robertson also has an extremely extensive and complete home workshop. Mr Robertson mentioned to Mr Kay that whilst in the USA he had come across special drawer inserts which were designed to be used in a home workshop so that tools could be kept in their proper place. He had been unable to source them in the UK. Mr Kay agreed that he would have a shot at printing something similar using his 3D printer. This was something that Mr Kay offered to do as an obligement with absolutely no thought of payment. It was something that he offered to do personally for Mr Robertson and had nothing whatsoever to do with MRDS.

50. The two also discussed computer software. Mr Robertson told Mr Kay that he had personally purchased a computer system called CRM. He understood this to be some kind of contact management system. He advised that he had purchased this personally. Mr Kay's understanding was that if the system proved to be workable then Mr Robertson would seek to sell it to MRDS. Mr Kay was already aware that Mr Robertson had been trying to sell MRDS for some time. Mr McGilvray had been brought in to the business with a view to making it ready for sale. Mr Robertson said that he was having problems getting the CRM system to provide any meaningful information and was unsure whether it was worth him

spending any more time and effort on it. Mr Kay offered to look at it for him. Again, this was done as a personal obligement to Mr Robertson as an individual. It was not in any way work for MRDS. Mr Kay did not do this with any expectation whatsoever of payment.

51. In order to access the system Mr Kay required a username and password. The username was in the form of an email address. Mr Kay was advised either then or subsequently of the username and password. The username took the form of an email address which had the words MRDS in it. It was not an active email address. No emails could be sent or received from it. It was simply the log-in name for the software. As it happens Mr Kay subsequently did have a look at the software. He noted that one of the fields within the software had been completed i.e. it did not contain any actual information. He also considered that it was fairly useless software and advised Mr Robertson that he should simply abandon it and not waste any more time trying to get it to work.

52. On 16 March Mr Christopher Smith held a small dinner for members of the senior management team of Texo Group and related companies at the Malmaison Hotel in Aberdeen. Shortly before those present were due to sit down for their meal Christopher Smith was called over to the bar by Richard Lamb who was Managing Director of Texo Workspace Solutions (now called Texo Accommodation). Mr Lamb showed Mr Smith a text which had been forwarded to him by David Mair a former Business Development Manager with Texo Group. The text had been sent by Mr Sinclair to Mr Mair. Mr Sinclair and Mr Mair were extremely close friends who had known each other for many years. The text message was not retained by Mr Lamb so its precise contents were not before the Tribunal. The text message said something along the lines of “did Mr Mair realise that James Allan had started working at MRDS”. The message bore to have been forwarded by Mr Mair. There was no indication as to the date when Mr Sinclair had sent the original message to Mr Mair. There was a brief discussion between Mr Lamb and Mr Smith. Mr Black was involved in that discussion. Thereafter, those present sat down for dinner and the matter was not discussed again that evening.

53. On the following day, 17 March, a discussion took place between John Black, Debbie McFarlane and Debbie Bruce who all worked at Texo Engineering Limited. The discussion took place in Debbie McFarlane's office. It was not possible for the Tribunal to ascertain who initiated this discussion or indeed any details whatsoever of what was said. The upshot of the discussion was that a series of three telephone calls were made by each of the three to MRDS. The aim of these calls would appear to have been to establish whether not only James Allan but whether the other two claimants were working at MRDS. The Tribunal accepted that the plan was that each of the three present would telephone MRDS and ask for one of the three claimants. The situation at this point was that Mr Kay had been on gardening leave since around 19 December. Mr Kennie had been on gardening leave since around 6 March and Mr Allan was still working for the respondent and as part of his duties for the respondent was trying to sort out the final matters in relation to the accounts with MRDS which involved him regularly having contact with MRDS.

54. All three calls were answered by Rebecca Foy of MRDS. Ms Foy carried out various tasks for MRDS which included general administration, marketing, sales and procurement and reception. She was doing reception in March 2020 as well as doing procurement. In general terms if she was not available the phone would be answered by whoever was there.

55. Ms Foy knew all three claimants. She had been on the joint stand which MRDS and Texo had taken at the trade fair in Abu Dhabi. She had known Mr Kay for about two years. She had met him at a number of networking events and award nights which had been attended by representatives of Texo as well as MRDS. She also knew Mr Allan who had been at one of the award nights and in Abu Dhabi.

56. Generally speaking if a call came in to MRDS to the general MRDS number it would be answered. The staff at MRDS had a landline telephone on their desk and whoever was on reception such as Ms Foy would put the person through to that number. Most calls were for either the Workshop Manager or for Accounts. There was a list of the desk fixed line telephones next to reception with their numbers which Ms Foy could

use. Ms Foy also had various people's own personal mobile numbers in her own personal telephone. If asked for an email address she would try to find this by looking in her own emails to see if she had an email from that person within the company. She did not have a separate list of email addresses or mobile telephone numbers. None of the three claimants had a fixed telephone number to which calls could be directed at MRDS. Generally speaking, it was not at all unusual for a member of staff of other companies to be at MRDS for meetings or to speak to people in the workshop. Ms Foy's role was more than that of a receptionist. If a call came in and it was to someone who did not work for the company then she would do her best to try and help that person be traced.

57. It is unclear what order the calls were made in. Deborah Bruce phoned and asked for James Allan. Ms Foy said he was not there. She offered Ms Bruce Mr Allan's mobile number which she had in her telephone. Ms Bruce did not take the number from her.

58. Debbie McFarlane phoned and asked for Mr Kay. She said she was "Stacey from CNR". Ms Foy knew that CNR was a large customer of MRDS. She did not know anyone called Stacey. Ms McFarlane asked to speak to Mr Andy Kay. Ms Foy offered her Mr Kay's mobile number. There was a general discussion about covid which was becoming a topic of conversation at the time. Ms McFarlane ended the call by saying she would take sweeties in to the office.

59. Mr Black telephoned and asked to talk to Garry Kennie. Ms Foy told him that he wasn't there. She suggested he phone his mobile. Mr Black asked if he could confirm that the mobile number for Mr Kennie was the same one he had. Ms Foy said she would have to check and then went to look for Mr McGilvray who she thought would probably have Mr Kennie's number. When she came back she found Mr Black had hung up.

60. No contemporaneous notes of these calls was taken by any of the participants.

61. Shortly after these calls Ms Bruce, Ms McFarlane and Mr Black spoke to Mr Christopher Smith. They met in the Texo offices. All three met with Mr Smith at the same time. They told Mr Smith about the telephone calls

which they had made. Mr Smith then made the decision to dismiss all three claimants. Mr Smith instructed Sam Csorba to telephone each of the claimants to advise them that they were dismissed and instructed her to arrange for a formal letter to be sent confirming their immediate summary dismissal without notice.

62. Ms Csorba telephoned Mr Kennie. Mr Kennie was engaged with his angling club in carrying out a clean-up of the riverbank. He missed the initial call and only noticed that there was a missed call on his telephone when he took a break. There was a voicemail which had been left. Mr Kennie listened to the voicemail which advised him that he had been accused of gross misconduct and that he was dismissed without notice. Mr Kennie also had a text which he received from Mr Kay which stated that he and James Allan had received similar messages from the company. Shortly thereafter Mr Kennie received a letter by email from the respondent dated 17 March signed by Mr Smith a copy of which was lodged (pages 230-232). The email was sent at 15:47 in the afternoon. Mr Kennie was also told that he was being removed as a statutory director. Ms Csorba made immediate arrangements to advise Companies House that the claimant was no longer a director of the company and Mr Kennie was removed as a director from 17 March. The email which was sent to Mr Kennie stated (page 231)

> "…. On 17 March 2020 we reasonably held a suspicion that whilst still employed by the company but on a period of approved leave and whilst holding the office of statutory director you were also simultaneously engaged by Mark Robertson Drilling Services Limited (MRDS). MRDS is in dispute with the company. Further, when we telephoned MRDS to speak to you an employee of MRDS confirmed that you worked there but were not available to take the call at the time. We also understand that you have an MRDS email address.
>
> As a statutory director you owed the company fiduciary duties and are obliged to abide by specific statutory duties pursuant to the Companies Act 2006 including in particular your duty to avoid conflicts of interest and not to accept benefits from third parties. As

> a fiduciary you were in a position where you had to act solely in the interests of the company. You have breached this fiduciary duty. You have also failed to abide by the implied terms of your employment (including your duty of fidelity and loyalty and the implied term of mutual trust and confidence) you have failed to serve the company faithfully and not to act against the interests of the company business. During a leave of absence you have failed to devote the whole of your time, attention and skill to the business of the company and to faithfully, competently and diligently perform your duties. Further without reasonable or proper cause you have acted in a manner calculated or likely to damage seriously or destroy the trust and confidence between employer and employee. Your conduct has fallen far short of the level expected of a Senior Executive. The company has accepted your conduct has caused an irrevocable breach and elected to terminate your contract."

The letter went on to ask Mr Kennie to sign a formal undertaking in relation to his future conduct confirming that he would not utilise company confidential information. Mr Kennie did in fact return a signed copy of this undertaking to the company.

63. Mr Allan was working from home on the 17th having been asked to vacate his office at the Texo premises on 15 March. At that time the government was urging people to work from home where possible because of the Covid pandemic. Mr Allan received a very short phone call from Ms Csorba to advise that he would be receiving an email of dismissal and that he had to immediately acknowledge it. There was no reference to MRDS or the reason for dismissal. As it happens, very shortly before this Mr Allan had completed an email to Christopher Smith which he had composed simply in order to bring Mr Smith up to date with what he had been doing. This was the kind of email he would send in the normal course of business. This email was lodged in a supplementary bundle (SS1). It is timed at 15:06 on 17 March. He confirmed that prior to leaving the office to work from home he had fully allocated the hours on 10.2.60 (roughneck work scope) which he described as the only anomaly that he had already advised needed attention. He stated that he had also presented the man

hour distribution and answered the query on 10.5.99 which would allow the final invoice for the roughneck project to be issued. He also stated that he had visited MRDS the previous week to finalise the technical paperwork being provided and that this had now been scanned in the system to Kevin Blair of MRDS. He finished the email stating

> "I remain committed to supporting the technical and commercial closure to these activities as discussed several times but believe I can achieve remotely."

64. Mr Allan also received an email from Ms Csorba. This was in identical terms to the email sent to Mr Kennie despite the fact that unlike Mr Kennie Mr Allan was not on a period of approved leave. The email and letter to Mr Kennie was lodged at page 223-226. Like Mr Kennie, Mr Allan was presented with a letter of undertaking to sign. He did not do so having taken legal advice.

65. On 17 March Mr Kay was in his own workshop building a staircase. He was wearing a full-face breathing unit and earplugs and missed the call from Ms Csorba. When he stopped work there was a voice message from Rebecca Foy advising him that someone called Stacey from CNR had been looking for Mr Allan and would it be possible for him to pass on the message to Mr Allan if he saw him. Mr Kay was confused at this since he knew many people at CNR but did not know anyone called Stacey. Ms Foy had left a telephone number which she said was the number for "Stacey" from CNR. Mr Kay rang this number but it rang out. Mr Kay worked on. After lunch he received a call from Sam Csorba stating that he was being dismissed. Mr Kay was surprised at this and asked why. Ms Csorba told him it was in the letter. Mr Kay asked Ms Csorba if she would tell him and was Ms Csorba said that she would not. Mr Kay made a remark to the effect that he did not believe that the respondent could dismiss him twice.

66. Subsequently Mr Kay received a letter by email. Mr Kay's letter was lodged at pages 227-229. It is in identical terms to the letters sent to Mr Kennie and Mr Allan. Like the two other letters Mr Kay was asked to sign an undertaking. Having taken legal advice he did not do so.

67. The claimants sought legal advice and initiated ACAS Early Conciliation on 24 March.

68. On or about 7 April 2020 Samantha Csorba sent an email to John Black, Deborah McFarlane and Deborah Bruce. The email was lodged (S51). It states

> "Could you write me a statement re Monday 16th March pretty sure it was the 16th as all were dismissed on 17th covering your phone call to MRDS and who you spoke to and what was said during the conversation."

Deborah Bruce responded in an email at S50. It states

> "I called early morning of the 16th March. I spoke with the receptionist and asked for James Allan. The receptionist said he wasn't in yet and doesn't normally come in until after 10am. Did I want his mobile number."

Ms McFarlane sent an email (S49) which stated

> "It was the morning of the 16th March.
> I called MRDS and asked to speak to Andy Kay and the receptionist replied he doesn't come in every day and is normally later in the morning. Can I give you his mobile number.
> She asked who was calling and I said Stacey from CNR – she said she'd received a few calls that day. She offered me his email address and said I could get him on that. I asked if James Allan was there and she said he only came in now and again but if I left my number she would get one of them to call.
> We chatted about corona and she said she was still working and the office was still open."

Mr Black sent an email (S49). He stated

> "I can't recall the day but it was the same morning that Debs made the call. I asked the receptionist to talk to Garry Kennie and she said he is not here at the moment but would I like his mobile number or she could pass me through to Andy Kay. I asked if she could

confirm Garry's mobile number to ensure it was the same number I had and when she put me on hold I hung up."

69. As part of the preparations for this hearing the claimants provided statements to their legal representative Paul Lefevre confirming their relationship with MRDS. Mr Allan's statement was lodged (page 93). Mr Kay's statement was lodged (page 94-95). Mr Kennie's stated was lodged (page 96). The Tribunal were satisfied that these statements accurately set out each individual claimant's interactions with MRDS in the period up to 17 March.

70. As part of the preparations for this case the respondent carried out a search of each claimant's directorships at Register House. These were lodged (page 269-271). They confirmed that at no time did any of the claimants hold any statutory post with MRDS.

71. As part of the preparations for this hearing each of the three claimants sought confirmation from MRDS of any relationship which they had. In each case the response of MRDS was to the effect that the claimant had never worked for MRDS Limited nor received remuneration from MRDS Limited. The three statements were printed on MRDS paper and signed by Mark Robertson and lodged (pages 256-258).

72. As part of the preparation for these proceedings the claimants obtained copies of their tax records. Mr Kay's was lodged (pages 57-59), Mr Allan's was lodged (pages 60-61) and Mr Kennie's (pages 61-63). The only income from employment shown was that which they received from Texo Group Limited.

73. In or about December 2020 Mr Smith met with Mr Sinclair to discuss the case. This followed a number of requests which Mr Smith had made. Mr Sinclair was unwilling to become involved but was attending the respondent's premises on another matter and agreed to meet with Mr Smith. There were two conversations in total. During the course of one of them Mr Sinclair indicated that whilst he did not believe he had said anything he may well have said to Mr Mair that Mr Allan was working for MRDS. He could not recall exactly, if he had this was said in a jocular, ironic manner to someone with who he had had a long and close friendship

and he said it was not intended to be taken as a statement of fact. He stated that he had been on a conference call as indicated above and that Mr Allan had appeared onscreen for a very short time and that they had exchanged pleasantries. Following this meeting Mr Sinclair produced an email which he sent to Mr Smith confirming his recollection of matters. This was lodged (S52-54). He made it clear to Mr Smith that he was not at all willing to come to a tribunal and give evidence on the point. He eventually gave evidence to the tribunal under compulsion of a witness order.

74. The Tribunal was satisfied on the evidence that none of the claimant's had any knowledge to the effect that any of the other claimant's was working for MRDS whilst still employed by the respondent. The tribunal's view was that none of them were.

Matters arising from the evidence

75. Before commenting on the evidence of the witnesses it is appropriate to set out some of the background to the giving of evidence particularly in relation to the cited witnesses.

76. With regard to Rebecca Foy the respondent had, in or about September 2021 successfully applied for the Tribunal to grant an order that Mr McGilvray (who later appeared as a witness for the claimant) provide them with various pieces of information. One of the pieces of information which was sought was the identity of the person who would have answered their telephone and that person's address. Mr McGilvray responded to the order on or about 1 October. With regard to the person answering the phone he gave Ms Foy's name. He stated that she had now left the employment of MRDS. He stated that he understood that she was extremely upset at the idea of giving evidence. He indicated that he was concerned about giving her address to the Tribunal without Ms Foy's consent and he sought the guidance of the Tribunal as to how he should deal with the matter. The respondent were advised of this response at the time but did not make any application to the Tribunal nor did they request that the Tribunal make any response to Mr McGilvray in relation to this. On the first day of the hearing the respondent's representative raised the

matter and indicated that the respondent were very keen to hear the evidence of Ms Foy. Clearly her evidence was crucial to the case and in the circumstances the Tribunal agreed to re-issue the order to Mr McGilvray confirming that he should respond with the address by close of business the following day. Mr McGilvray contacted the Tribunal again to advise that he was concerned about the GDPR implications of giving out someone's address without their consent. The Tribunal clerk then advised him that since this was a Tribunal order no GDPR issue arose and he was safe to provide the information. Mr McGilvray then provided Ms Foy's current address. Ms Foy was then cited to attend the Tribunal on the following Monday which she did.

77. Witness orders were obtained by the respondent for Ms Deborah Bruce and Ms Deborah McFarlane in advance of the hearing. Both wrote to the Tribunal in similar terms indicating that they were no longer employed by the respondent and that the idea of giving evidence was causing them stress. Both supplied medical evidence to the effect that their GP believed they would suffer stress if they were required to give evidence at the Tribunal. The Employment Judge then caused the Tribunal to write to both of them indicating that it is an unfortunate fact that giving evidence before a Tribunal can often be stressful but that a Tribunal order had been made and ought to be complied with. Both of these witnesses did comply with the order. They gave their evidence on Wednesday 16 February.

78. The Tribunal also granted an order for Mr Sinclair to attend on the first day of the hearing. Mr Sinclair responded to advise that he did not wish to become involved in the matter and had no real recollection of anything which would be helpful to the Tribunal. He also indicated that he would be travelling on a pre-arranged motoring holiday in Scotland during the week commencing 14 February and would be unavailable in any event. He expressed in trenchant terms his view that he did not wish to give evidence and did not consider he had anything useful to contribute. He did not appear when cited on the first day of the hearing. The Tribunal consulted with parties and the Tribunal Judge agreed to issue Mr Sinclair with a fresh witness citation stating him to attend the following Monday when his motoring holiday would be over and it was anticipated that there would be

a slot for him to give evidence. Mr Sinclair did appear on the following Monday and gave his evidence.

79. Following the evidence being given by Mr Black, Ms McFarlane and Ms Bruce on Wednesday 16 February the respondent's representative indicated that he wished to make a further application. It was clear that Ms Bruce and Ms McFarlane were at best reluctant witnesses. Essentially their evidence was vague and they purported not to remember anything. Both of them indicated in their evidence that they had given a statement and that the Tribunal should be referring to that statement and not their evidence. It was fairly clear to the Tribunal that neither of them really wanted to say anything at all about the case. They only reluctantly gave any evidence which came from genuine recollection other than that phone calls had been made. Eventually the emails they had sent to Ms Csorba on 7 April (some weeks later) were put to them and they both agreed that these were reasonably accurate records of what had taken place in the phone calls. (Despite the fact that they all refer to the wrong date). When asked what they meant by statements they referred to statements they had given during the course of preparation of this case to the respondent's solicitor Mr Robert Phillips. It should also be recorded that the evidence (such as it was) given by Ms McFarlane was diametrically at odds with the evidence given by Mr Black with regard to whose idea it had been to make the phone calls in the first place. Ms McFarlane said that she did not know but thought it must have been Mr Black. Mr Black's position was that he had a clear recollection that it was Ms McFarlane. He indicated that if Ms McFarlane was now saying different then she was lying.

80. At the end of the day's evidence on the Wednesday the respondent's representative indicated that he now wished to lodge transcripts of the statements which Ms Bruce and Ms McFarlane had given to Mr Phillips. He stated that there was also a recording and that he was happy to make this available to the respondent so that they could check the transcript. If necessary the recording itself could be lodged and played to the Tribunal. He confirmed that this was a transcript of what was essentially a precognition taken by the respondent's agent in the course of preparing for the hearing. He also said that he would <u>not</u> be seeking to recall

Ms Bruce or Ms McFarlane in order to speak to the transcript but would instead intend to call on Mr Phillips, the solicitor who had taken the precognition to give evidence about it. Matters were left that the respondent's solicitor would make a copy of the transcript (and if necessary the recording) available to the claimant's agent prior to the next day on which the case was to be heard which was Monday 21 February. If matters could not be agreed then each party would have the opportunity to make submissions as to whether or not to grant the applications made by the respondent.

81. On Monday 21 February the respondent's representative confirmed that he wished to proceed. The claimant's representative confirmed that he strenuously objected. The respondent's representative then made his application. His application was in two parts. First of all he wished the Tribunal to admit the transcript as an additional production in the case. He confirmed it would then be his intention to call Mr Phillips in order to speak to the transcript. The second part of his application was that if the Tribunal was minded to receive the transcript then he would wish the Tribunal to issue a direction that the evidence of Mr Phillips in respect of the transcript would not be of the effect so as to waive legal professional privilege more generally so as to allow Mr Phillips to be cross examined in regard to his dealings with Mr Smith. He referred to section 1 of the Evidence Scotland Act 1852. The respondent's agent then made a full submission and he quoted extensively from ***Whitbread Group plc v Goldapple Limited*** [2003] SLT 256 and ***Young v Guild*** [1985] SLT 358. His position was that the witnesses clearly struggled in their recollection of the two calls. They had said that their recollection had been clearer at the time they had spoken to Mr Phillips and given their statement. They then accepted what was put to them in the emails. He considered their evidence to be relevant. He was not in any way suggesting that if the Tribunal accepted the evidence from the transcript as being more likely to be correct that that would necessarily mean the witnesses had been deliberately misleading the Tribunal. It was simply a question of weight. With reference to ***Young v Guild*** he noted that evidence was admissible if it was relevant and that in general everything else is a question of weight. The Tribunal would be free to attach whatever weight they wished to the evidence given by

Mr Phillips in relation to the transcript and the parole evidence given by the witnesses. He indicated that if the Tribunal were minded to accept the transcript then it was his view that Mr Phillips would effectively be giving evidence of fact. His evidence would be admissible at common law and not only admissible by virtue by section 1 of the Evidence Scotland Act 1852. There would therefore be no question of him having to waive professional privilege as provided for in the final paragraph of section 1.

82. The claimant's representative then made his submissions. He indicated that he had listened to the transcript. He considered that there were at least five separate points where the version of events given in the transcript differed from the evidence given by Ms Bruce and Ms McFarlane. He also had concerns regarding the circumstances under which the transcript had been produced. It was his view that leading questions had been asked. He was also concerned that both witnesses appeared to have been interviewed on the telephone together. The key issue was not admissibility but that of fairness. The witnesses had given their evidence. It would have been open to the respondent to put the transcript to the witnesses at that stage and seek an explanation as to why the transcript differed from the evidence which the witnesses were giving. It would then have been open to the claimant's representative to cross examine the witnesses with a view to ascertaining what had actually happened. It could be assumed from the fact that the respondent was now seeking to lodge the transcript, that the statements which the witnesses were alleged to have made in the transcript were better for the respondent's case than the evidence which the witnesses had themselves given before the Tribunal. It would be extremely unfair if this evidence was put before the Tribunal in circumstances where the claimant had realistically no way of challenging it. The claimant's representative confirmed that they accepted that Mr Phillips would be giving evidence of fact and that there would be no question of him waiving professional privilege so long as his evidence was restricted to issues of fact. The claimant's representative did however anticipate that there might be some difficulty if Mr Phillips was for example cross examined about why he had asked certain questions in the way he had or more generally about the circumstances in which he had come to take the transcript. Evidence

might be given which might only be admissible in terms of Section 1 of the 1852 Act and in that event then the waiver of professional privilege may be important. The claimant's representative also spoke of the difference recognised in English law between litigation privilege and legal advice privilege. He also referred on the question of general fairness and the requirements of Article 6 of the Human Rights Convention. It was his view that the claimant would be denied a fair hearing if the transcript was submitted without the claimant having the opportunity to cross examine the witnesses.

83. The Tribunal retired for a short time to consider the matter. The Tribunal then confirmed to the parties their view. The Tribunal accepted that the evidence would be admissible. The issue however was one which invoked the general case management powers of the Tribunal. It was up to the Tribunal whether to allow this document to be lodged or not. The Tribunal required to do so in terms of the overriding objective. The Tribunal judge indicated to the parties that having considered matters thus the Tribunal did not consider that it was appropriate for it to exercise its discretion in order to allow the document to be lodged. This was essentially on the basis that the evidential assistance which this would give the Tribunal was fairly minimal compared to the additional time that would be taken. The reasons given on the day were fairly short. It is probably as well that these are expanded upon and I do so below.

84. The parties were agreed that the issue before the Tribunal was whether or not the claimants were in repudiatory breach of their contracts of employment on 17 March so as to entitle the respondent to accept that breach and summarily dismiss them. The Tribunal had already heard evidence from Mr Smith to the effect that the reason the respondent had dismissed them was because they were working for MRDS. Mr Smith had confirmed that this was the sole reason relied upon by the respondent and indeed from the pleadings this was the case which the respondent were offering to prove. The question for the Tribunal was therefore whether or not, as at 17 March, the claimants were in breach of their contracts of employment, either the express terms of any written contract or implied

terms or indeed of their fiduciary duties. The Tribunal required to decide as a matter of fact whether the claimants were working for MRDS or not.

85. The evidence of Deborah Bruce, Deborah McFarlane and Mr Black was all effectively hearsay re-telling what they had been allegedly told by Ms Foy. Ms Foy herself was in the waiting room ready to give evidence. If the Tribunal allowed the affidavit to be lodged and then spoken to by Mr Phillips there was a fairly high chance that Mr Phillips' evidence would take most of the rest of the day. It was extremely likely that issues would arise throughout his evidence in relation to whether by giving evidence on a specific point Mr Phillips had waived privilege or not. These matters would require individual adjudication by the Tribunal in each case. The likelihood was that as a result the Tribunal would not be in a position to hear the evidence of the two cited witnesses Ms Foy and Mr Sinclair on the Monday. Both were attending under the compulsion of a witness citation. Mr Sinclair had in his correspondence with the Tribunal already made it clear that he was attending on sufferance. He had indicated that he was incurring a very high daily charge through being absent from his business for which the respondent would be responsible. The likelihood at the time was that if we heard from Mr Phillips we would not be able to finish his evidence on the Monday even if we got to it. As it happened it was around 4:30 in the afternoon before his evidence was finished. There was a fairly high likelihood that the timetable of the Tribunal would be disrupted. As against that the Tribunal in exercising its case management discretion required to consider what the probative value of Mr Phillips' evidence was likely to be. The Tribunal had not seen the transcripts but it appeared that at the end of the day the Tribunal would be faced with having to decide on whether the version of events given by the two witnesses at the Tribunal was correct or whether the evidence in the transcript was correct. In weighing this evidence we would require to take into consideration the fact that the claimant's representative would not have had the opportunity of cross examining those witnesses. At the end of the day the Tribunal considered that it would for this reason by unlikely that the Tribunal could give a great deal of weight to the transcript so far as it related to the key issue of whether or not the claimants were, as a matter of fact, working for MRDS. At its highest we would be able to make

a finding that on a certain date a witness told someone else what someone else had told them and this in a situation where the Tribunal were shortly to be hearing from the person who had given the information to Ms Bruce and Ms McFarlane in the first place. We should make it clear that we did not prevent Mr Phillips giving evidence since at the end of the day it is for a party to decide themselves who their witnesses are going to be so long as they are capable of giving relevant evidence. What the Tribunal was not prepared to do was to allow the transcript to be lodged halfway through the hearing at a point where the witnesses who could speak directly to the events had finished their evidence.

86. One other matter we should mention whilst dealing with the evidence in general terms was that the respondent's agent made an application that Mr Kay and Mr Allan be out of the room while Mr Kennie was giving evidence and as we understood it that each of the claimants would in turn be out of the room whilst Mr Kay and Mr Allan were giving evidence. The Tribunal refused this application. All three claimants were involved in the case. They sat through all the evidence as indeed had Mr Smith. The claimants were there to instruct their agents. There were no specific matters put to the Tribunal as to why it was of a particular importance to exclude them nor were we directed to any particularly sensitive passages of evidence which were anticipated. The application was refused.

87. With regard to the witnesses themselves the Tribunal considered that Christopher Smith was giving truthful evidence so far as he saw it. He was combative in his approach and there were a number of matters where he indicated that he simply could not remember. His evidence was extremely vague about matters of which the Tribunal would have expected him to have a clear memory and for this reason we did not consider his evidence entirely reliable. Mr Smith believed that Deborah McFarlane and Mr Black had both seen the text message sent to Mr Lamb on 16 March. Ms McFarlane was quite clear that she hadn't and in fact only recalled with difficulty that there had been any discussion at all. Mr Black did not believe that he had seen it. Mr Smith did not have any clear recollection of what the message actually said. He said he had initially understood it had been sent to Mr Lamb but only later discovered that it had been forwarded to

Mr Lamb by Mr Mair. Mr Smith gave extensive evidence about his meeting with Mr Sinclair. It was his position that Mr Sinclair had been quite clear that Mr McGilvray had accepted he told Mr Mair said words to the effect that Mr Allan was now working for MRDS. Mr Sinclair initially denied that he had said this but then indicated that he had felt very uncomfortable about the situation he found himself in. He was unsure what he had said. What he clearly indicated was that Mr McGilvray had not told him that Mr Allan was working for MRDS. At the very most there had been some jocular remark made. Mr Sinclair's final position was that he certainly did not recall at any time clearly telling Mr Smith that he ever been told Mr Allan was working for MRDS. At the end of the day we accepted that Mr Sinclair's evidence was more likely to be correct and preferred this.

88. Mr Smith accepted that he had never seen a signed employment contract from any of the claimants. He could not cast any light on the course of events relating to the contract and could not with any specificity identify that the contracts lodged had been shown were the ones which had been shown to the claimant. In general terms the Tribunal found Mr Smith to be a credible witness albeit somewhat unreliable in that he appeared keen to jump to conclusions and hear what he wanted to hear.

89. Mr Lamb's evidence was also surprisingly vague about the key points in the case. The Tribunal accepted that he had received some sort of text message from Mr Mair and that this said something along the lines of did he know Mr Allan was working for MRDS. He had not kept the text message and could not really give any good explanation as to why he had got rid of it and that he was aware of the aftermath. Mr Lamb also gave evidence regarding the meeting with Mr Sinclair and Mr Smith which took place in December. He was extremely vague as to what Mr Sinclair had said. He stressed that his main concern at that time was to repair any damage which had occurred to the relationship between Mr Mair and Mr Sinclair as this was an important business relationship for the company. It has to be said that Mr Lamb's account of the meeting with Mr Sinclair did not accord in its details with the account given by Mr Smith but he did say that at some point Mr Sinclair said he had asked Mr McGilvray what James Allan was doing at the meeting and

Mr McGilvray told Brian Sinclair that James Allan had started with them the previous week. When shown the email from Mr Sinclair, Mr Allan's evidence was that this was "other than a change of phrase or wording that is what he recalled Mr Sinclair saying". He maintained this position when it was put to him that Mr Sinclair's email said nothing about the alleged conversation where Mr McGilvray had stated Mr Allan had started working for them he was unable to provide an explanation. At the end of the day the Tribunal were prepared to accept his evidence for what it was worth albeit it did not directly assist us with the issue of whether the claimants were in fact working for MRDS. We were not prepared to accept, on the basis of his evidence, that Mr Sinclair had indeed said that Mr McGilvray had ever told him any of the claimants were working for MRDS.

90. We have already mentioned that both Ms Bruce and Ms McFarlane were unsatisfactory witnesses. It appeared to us that Ms Bruce was extremely nervous and clearly did not wish to be there. She did however appear to be prepared to give truthful evidence so far as she could recall matters. Ms Bruce no longer worked for the respondent and it was clear she did not want to get involved. She confirmed that she knew all three claimants. She had been at the Malmaison albeit she had no recollection of any discussions there. She could not recall if she made the telephone call in the morning or afternoon. She mentioned that there had been a bit of a "commotion" in the office, people had been speaking about the night before. She stated that John Black had told her that he had heard the three claimants were working for a different company and asked her and Ms McFarlane to phone up to check if they were there. She said that she did not have an understanding of who the three guys were and she did not know what the different company was. She could not recall what she did or said. She confirmed she made a phone call. She said that she had given a statement at a later stage. She said her initial recollection of the call was "I remember talking to a lady I can't recall which of guys I asked to speak with, I asked to speak with one of them and she said he would be in after 10 that is all I remember." Eventually she confirmed that it had not been Mr Kennie since she knew him but she did not know which of the other two it was she had asked for. She couldn't recall how the conversation had ended. She said that Debbie McFarlane had been in

the office at the same time as she was making the call. Eventually when the email was put to her she agreed that this would be correct.

91. Debbie McFarlane's evidence was of a similar type albeit she evinced more hostility. She no longer works for the respondent. She accepted she had a bit more knowledge of MRDS and that she knew that there was an issue with a bill. She had been at the Malmaison dinner and recalled a discussion during dinner. She was very clear that she had never been shown a text message. Her position was that Mr Black had come to her the following day and said he believed James Allan was working at MRDS. He said that Mr Black, Deborah Bruce and herself had a general discussion about it and that Mr Black had suggested making the phone calls to MRDS to find out if James Allan was working at MRDS. She could not remember the order the calls were made in. She said all the calls were done from her office. She could not recall which of the three claimants she had asked for. She said that she had been told the one she asked for was not in and didn't come in that often. She was told the other one was due in and she was asked if she wanted a mobile number. She said she couldn't recall if she took the mobile number or not. She said she was asked who she was and said she was some Stacey. She then said there had been a general chat about covid and thanked her for her time. She then said that John Black made his call but she was not present when he made his call. She said she was present when Ms Bruce made her call but could not remember the content. She then said that after John made his call the matter was not really discussed. Eventually when the email was put to her she accepted that her recollection would have been better then.

92. Mr Black gave his evidence in a much clearer way albeit he could not remember any more about the call. He was quite clear that the initiative had come from Deborah McFarlane and when advised that she had said it had come from him he said she was lying.

93. Neither of the three witnesses could answer any of the obvious questions which required to be asked about these calls namely why they came to be made and in particular why it was that it was decided to ask for all three claimants when taking it at its very highest the only allegation that had

been made was in respect of Mr Allan. Potentially it appeared to the Tribunal that the three witnesses knew that these were the obvious questions to ask and did not wish to give any answers which was the reason their evidence was so unsatisfactory.

94. Ms Foy gave evidence next. She was also very clearly a nervous witness but the Tribunal accepted that she was genuinely trying to assist the Tribunal by giving truthful evidence to the best of her recollection. Unfortunately her recollection as to precisely what was said was extremely vague. What was clear was that she saw herself as more than simply a receptionist. She was aware of the business relationship between MRDS and Texo and in general terms would try to be as helpful as possible if anyone phoned. She accepted that she may well have offered to pass a message on for someone from CNR who phoned. She said that she would not have been able to put callers through to any of the claimants since she could only re-route calls to a fixed line telephone and neither of the three had fixed line telephones at MRDS. She confirmed that none of the three claimants worked at MRDS to her knowledge. She indicated that she had mobile numbers for one or two of the claimants because of her ongoing business contacts with them. She gave her evidence before Mr Kay had given his evidence about the call she made to him and the fact of her making the call was not directly put to her. The fact the call was made however was generally in line with the evidence which she gave which was that she would have tried to do her best to help a caller who was trying to get in contact with someone she knew. The Tribunal considered her evidence to be both credible and, accepting the limitations of her memory, reliable. She fully accepted that she was reluctant to become involved in the matter since she felt things had nothing to do with her. This is entirely understandable.

95. As noted above the respondent's representative sought to essentially cross examine Ms Foy by asking her leading questions during his examination in chief. I allowed this to continue and overruled the objection of the claimant's representative. It was clear to me that Ms Foy's evidence was going to be useful to the Tribunal particularly as she was the person whose statements the other three witnesses had been giving hearsay

evidence about. I considered that given that the respondent wished to put their version of events to Ms Foy it was appropriate to allow this to be done albeit it involved the asking of leading questions.

96. Similarly with Mr Sinclair we considered that it was in the interests of justice to allow the respondent to effectively cross examine their own witness. Although Mr Sinclair made it very clear that he was an unwilling witness the Tribunal felt that his evidence had the ring of truth about it. His take on events was that essentially he had had a chance meeting with Mr Allan on the Teams call and they had spoken for a few seconds. He had then referred to this in a fairly offhand casual message to someone who is a very close friend of his. He had not ever considered that his remark was going to be taken seriously and lead to the dismissal of three individuals. Mr Sinclair referred to the Aberdeen oil community as a village. He required to keep good commercial relationships with all those involved and would much prefer not to be required to give evidence. At the end of the day however having been forced to come along to the Tribunal the Tribunal were satisfied that the evidence he was giving was truthful. He was not in a position to give any first or even second hand evidence to demonstrate that Mr Allan or any of the other claimants were working for MRDS.

97. Mr McGilvray was called on behalf of the claimant. He was extremely clear in his evidence that the claimants had not at any time been working for MRDS. He explained the various relationships and encounters which had taken place. He explained the background of MRDS and generally speaking the Tribunal accepted his evidence.

98. The Tribunal also considered the evidence of the three claimants to be both credible and reliable. All three had been upset by the way they had been treated. Mr Kennie summed up his position by saying that he had been dismissed for gross misconduct purely on the basis of gossip. All three were subject to fairly rigorous cross examination and whilst they made appropriate concessions their evidence was if anything strengthened by the answers they gave. Mr Allan in particular was quite prepared to give an extremely detailed blow by blow account of the Teams meeting which he had sat in on and explained quite clearly his purpose in

attending as part of his duties for Texo. The Tribunal accepted this evidence albeit the respondent's agent attempted to cut him short. Mr Kay gave very detailed evidence about the private meeting which he had had with Mark Robertson. The Tribunal's view was that this was indeed a private meeting and essentially the respondent would not have known about it if Mr Kay had not volunteered the information to them.

99. All three claimants gave evidence about their recruitment to the company and the draft service agreements which had been sent to them. Essentially their evidence forms the basis of the Tribunal's findings in fact above. The Tribunal accepted their evidence that the documents lodged before the Tribunal were not in fact the draft documents which had been sent to them. The respondent were not in a position to lead any evidence to contradict this. It would have been entirely possible for them to lead evidence from Aileen Uwins or Samantha Csorba had they wished to do so. At the end of the day although a considerable amount of evidence was heard over a period of five days there was not at the end of the day a great deal of dispute over the basic facts. Mr Smith had dismissed the claimants because he said he thought they were working for MRDS. The evidence for this consisted of a text message from Mr Sinclair to Mr Mair which had been forwarded to Mr Allan and then shown to Mr Smith which text message was deleted shortly afterwards and a verbal report to Mr Smith by three of his employees to the effect that they had telephoned MRDS and asked to be put through to the claimants and that the response to these calls in some way indicated the claimants were working for MRDS.

Issues

100. The sole issue to be determined by the Tribunal was whether or not the respondent had wrongfully dismissed the three claimants on 17 March. The joint statement of facts accepted that each of the claimants was entitled to six months' notice. Mr Kennie and Mr Kay were actually on gardening leave having in Mr Kay's case been dismissed with notice on 17 December and in Mr Kennie's case having resigned on or about 10 February and in Mr Allan's case around 23 January. The question was whether as at 17 March the respondent were entitled to terminate the

contract without notice because the claimants were in repudiatory breach of contract.

Discussion and decision

101. Both parties made full submissions. The claimant's submissions were submitted in writing and expanded upon orally. The respondent's submissions were given orally. Although both parties were agreed on the basic legal propositions behind the claim there were some differences in their approach and it is probably as well to set them out here. Both were agreed that it was trite law that under the law of contract more particularly the law of master and servant a master may dismiss a servant summarily where the servant is in material breach of contract. Both accepted that the evidential burden was on the party asserting a breach to prove that the breach had taken place.

102. With regard to the approach to be taken to assessing whether a breach has taken place and whether it is material or not the respondent referred to the case of ***Blyth v Scottish Liberal Club*** [1982] SC140 where the approach in the case of ***Wade v Waldon*** [1909] SC571 was recommended. It was the respondent's approach that the question was whether or not the breach was material. Materiality was a question of fact and degree. In this case as in the ***Blyth*** case one of the matters to be taken into account was that at the time of the alleged breach Messrs Kay and Kennie were on gardening leave and therefore their duties to the company were of restricted scope. Essentially all they had to do was comply with their obligations of trust and confidence, confidentiality and other fiduciary duties to the company. This made it more likely that any breach of those obligations would be considered material. The claimant's representative referred to authorities on repudiatory breach which were more familiar to modern employment lawyers in particular the case of ***Adesokan v Sainsbury Supermarkets Ltd*** [2017] EWCA civ 22. In the ***Adesokan*** case LJ Elias referred to the issues being whether the conduct was sufficiently grave and weighty so as to amount to a repudiatory breach.

103. The Tribunal considered that in the vast majority of cases the differing approaches was essentially a distinction without a difference. There may be cases where the ***Adesokan*** approach would lead to a different outcome than if the matter were approached in the manner set out by the second division in the ***Blyth*** case. In the present case however the Tribunal considered it appropriate to follow the lead of the second division of the Court of Session in considering whether the conduct amounted to a material breach on the basis that this was a matter of fact and degree.

104. The parties also differed in their interpretation of the contractual position between the parties. It was the respondent's position that although the service agreement had never been signed that the respondent were in fact bound by this. They pointed out that a contract of employment is not only valid where it is set out in an executed deed. They referred to various sections of McBride on contract. The respondent's view that by continuing to work following the submission of the draft service agreement the claimants were bound by its terms.

105. The claimants' position was that there was indeed a contract of employment but this had been constituted long before the service agreements were sent to the parties. It should be noted that as a matter of fact the Tribunal did not find that the service agreements which were sent to the parties were those lodged in the bundle on which the respondent appeared to be seeking to rely.

106. The Tribunal preferred the claimants' approach to this issue. It was absolutely clear that the claimants had commenced work on the basis of the verbal contract which they had entered into with the respondent following their discussions with Mr Dalziel supplemented by the emails which had been sent in each case (but which were not lodged before the Tribunal) which had contained bullet points setting out the salient details of the contract. In the view of the Tribunal whatever service agreement which was sent to the claimants by the respondent was an attempt to vary the terms of that contract. The variation had not at any point been agreed by the claimants. The claimants made it crystal clear at all times that they were not prepared to sign the agreement unless and until the supplementary documents namely the shareholders' agreement and the

articles of association were also present for them to agree. Indeed, their position appeared to be that they were not even prepared to take advice on the service contract unless and until all of the other documents were available to them. It was therefore the view of the Tribunal that the contractual obligations on the claimant were those to be implied into a contract of employment by common law together with those matters which had been expressly agreed verbally and in the emails between the parties.

107. The respondent's representative also sought (albeit half-heartedly) to suggest that the letters sent to Mr Kay regarding gardening leave amounted to a variation of the contract which had been accepted by Mr Kay. The Tribunal did not consider this to be the case.

108. It was clear to the Tribunal that the reason that the respondent's representative was so keen to have the written service agreements incorporated into the contract was so as to allow the respondent to rely upon section 20.2.3 and section 20.2.4. Section 20.2.3 states

> "Is guilty (or is reasonably believed by the company to be so guilty) of any act of gross misconduct including any fraud or dishonesty or 20.2.4 Has acted (or is reasonably believed by the company to have acted) in a manner (whether or not during the course of his duties) tending to bring the executive, the company or any associated company into disrepute ….."

109. The Tribunal's clear view was that these contracts had not been agreed to by the claimants and that those clauses could not be deemed to be incorporated into the contract. In any event we entirely agreed with the claimants' representative that the position was immaterial. Whilst the respondent might seek to hide behind the words

> "(or is reasonably believed by the company to be so guilty)"

the Tribunal entirely agreed with the claimants' representative that in order to avail themselves of the protection of a reasonable belief the respondent would require to show that their belief was indeed reasonable. The Tribunal's clear view was that even if it were accepted that the respondent in the form of Mr Smith believed that the claimants were working

elsewhere (which we did not accept) such a belief would not be reasonable. For a start it was clear that Mr Smith had carried out no investigation whatsoever, in particular he had not asked the claimants or MRDS for their comments on such limited evidence (amounting to little more than gossip) that was available.

110. It was also the respondent's position that the claimants owed fiduciary duties to the company. We were referred to the case of ***Nottingham University v Fishel*** [2000] IRLR 471. The Tribunal agreed that the approach set out in this case was the correct one in that whether or not fiduciary duties were owed was a question of fact and degree.

111. We should say that having accepted the evidence of Mr Kennie and Mr Allan that they had not actually been asked for their formal consent to be directors we would have been reluctant to make a finding that fiduciary duties were owed simply on the basis that the company appeared to have sent a form to Companies House that they had been appointed directors without consulting them. On the other hand, we accepted the respondent's alternative argument that given the position held by each of the parties within the company it was entirely reasonable to expect that they each owed a fiduciary duty to the company. All three were appointed to senior positions. They were to be referred to as directors although the Tribunal accepted the evidence that within the oil industry the use of this word in a job title does not necessarily imply that the holder will be a "Companies House statutory director". The claimants' own evidence was that they had been brought in with a view to being part owners of the company. The aim was to build the company up over five years and then sell it at a profit to themselves and the investors. They were the three most senior people in the company. The Tribunal accepted that in those circumstances it could readily be inferred that they owed fiduciary duties to the company.

112. Finally, the Tribunal also accepted that the claimants owed a duty to the company generally referred to by the term trust and confidence which is to be implied in to all contracts of employment. The Tribunal's view was that had the claimants been working for MRDS Limited as the respondent allege then there is really no question but that this would amount to a

breach of that implied term and indeed to a material breach of that implied term. It would also amount to a breach of their fiduciary duties.

113. The claimants' representative in his submissions freely acknowledged that if this had been the case then the respondent would have been entitled to dismiss. The difficulty for the respondent however and the elephant in the room for much of the hearing was that it was absolutely crystal clear to the Tribunal that there was really no evidence whatsoever that the claimants had been working for MRDS.

114. Both parties made it clear that the Tribunal should consider each case individually and we shall therefore analyse the evidence and our take on this below.

115. So far as Mr Kennie was concerned the evidence that he had been working for MRDS was totally non-existent. The sole adminicle of evidence put forward was the evidence of Mr Black who stated he had asked for Mr Kennie and that he had been told he wasn't there and that the receptionist had then gone to check his number and Mr Black had hung up before she came back. Ms Foy's evidence was that having received a call from the man (presumably Mr Black) he had asked her to check he had the right number for Mr Kennie and she had gone looking for Mr McGilvray to get Mr Kennie's number and by the time she got back the man had hung up. Such evidence does not even justify gossip. It was certainly not evidence from which the Tribunal could infer that Mr Kennie was working for MRDS.

116. During submissions the respondent's representative also made an oblique reference to Mr Kennie being guilty of a breach of his fiduciary duty by not telling the respondent that Mr Kay and Mr Allan were working for MRDS whilst still employed by the respondent.

117. There are two difficulties with this. The first is that there was not one scintilla of evidence to support the assertion that Mr Kennie knew that Mr Kay and Mr Allan were working for MRDS. As will be noted below the Tribunal's view was that they quite clearly were not. Apart from this Mr Kennie was asked about it in cross examination and denied it and absolutely no other evidence was put forward to suggest that he had this

knowledge. The second point which is probably less important given the first is that the respondent's case on record was quite clearly based on the assertion that Mr Kennie was working for MRDS. The issue of him being aware of the other two directors working for MRDS was only mentioned in the counterclaim. It was therefore not part of the respondent's pled case and it was inappropriate for them to try to seek to bring this in.

118. The Tribunal's view was that Mr Kennie had not been in breach of contract at all at the point where he was summarily dismissed by the respondent. He is therefore entitled to damages for breach of contract. Parties had helpfully agreed prior to the hearing that in the event of success each claimant would be entitled to a payment in the sum of £25,000 being the amount of the statutory cap on awards of this type which can be made by the Tribunal.

119. With regard to Mr Allan there was more evidence albeit it was entirely unconvincing. Ms McFarlane said in her emailed statement that she had asked for Mr Allan and been told that he only came in now and again but that if she left her number she would get one of Mr Allan or Mr Kay to call back. Ms Bruce also confirmed her emailed statement to the effect that she had asked for James Allan and been told that he wasn't in yet and didn't normally come in until 10am and did she want his mobile number. The Tribunal did not find these adminicles of evidence to be in any way indicative that Mr Allan was working for MRDS particularly given the context which was that we heard direct evidence from Ms Foy that her normal approach was to try and be helpful and that she would try to give out a mobile number of someone who did not work for MRDS if she had it. Ms Foy did not accept making the comment about him normally coming in after 10 o'clock and we accepted her evidence on this. The additional context to this was that Mr Allan was at that time in fairly regular attendance at the MRDS premises carrying out his role as a director of Texo Engineering Limited trying to finalise the invoices and obtain payment.

120. With regard to the evidence of Mr Sinclair the Tribunal accepted Mr Allan's evidence as to the circumstances at which he came to be on the call at MRDS premises. We accepted Mr Sinclair's evidence so far as it went

about seeing Mr Allan on the call and remarking on this in a text message to Mr Mair with whom he was on friendly terms.

121. With regard to the issue of whether Mr McGilvray told Mr Sinclair that Mr Allan had started with them the Tribunal accepted Mr McGilvray's evidence to the effect that he had not specifically said this. Mr Sinclair in his evidence was extremely vague about the issue. At its very highest it could be said that in cross examination he left open the possibility that he may have said something to Mr Mair in a jocular context and in the context that Mr Mair was someone with whom he had a longstanding friendship and would not expect such statements to be taken seriously.

122. At the end of the day the issue for the Tribunal was whether as a matter of fact Mr Allan was working for MRDS. Even if the Tribunal accepted the very highest gloss which could be put on the evidence by the respondent (and we did not) this fell far short of evidence which could lead us to believe that Mr Allan was working for MRDS. As against these two extremely circumstantial points both of which were explained away during the course of the Tribunal we have the clear evidence of Mr Allan, Mr McGilvray and Ms Foy to the effect that Mr Allan was definitely not working at the respondent. We also have the evidence of Mr Allan's tax return and the statement on headed paper from Mr Robertson of MRDS. The Tribunal's conclusion was that as a matter of fact Mr Allan was not working for MRDS.

123. As noted above the Tribunal's view was that the terms of the service agreement had not been incorporated into the claimants' contracts of employment however even if it was we would not have been able to make a finding that the company held a reasonable belief that Mr Allan had been working for MRDS. The company did not carry out any investigation whatsoever. They did not ask Mr Allan to explain what he had been doing at the MRDS meeting. They did not actually make any attempt to find out when the MRDS meeting had taken place.

124. The Tribunal's finding was that Mr Allan was not in material breach of contract and the respondent were therefore in breach of contract when they dismissed him without notice on 17 March. As with Mr Kennie the

parties had helpfully agreed in advance of the hearing that were the claimant to be successful then they were each entitled to be paid £25,000 being the amount of the statutory cap. Mr Allan is entitled to the sum of £25,000 as compensation for breach of contract.

125. With regard to Mr Kay the Tribunal did not consider there was sufficient evidence to show that he was working for MRDS. In Mr Kay's case the respondent appeared to rely on the phone calls from Ms McFarlane and Mr Black. Ms McFarlane in her email stated that she had asked to speak to Mr Kay and been told that he didn't come in here every day. Ms Foy did not accept that and the Tribunal did not accept that was said. We accepted that Ms Foy had offered a mobile number for Mr Kay. Mr Black's email indicated that having asked for Mr Kennie he was offered to be passed through to Mr Kay. This was not backed up by Ms Foy and we preferred her evidence. We have no idea why, if Mr Black was offered to be put through to Mr Kay why he did not simply stay on to be put through. We also accepted Mr Kennie's own evidence that he was working in his workshop at Gartmore that day.

126. The other adminicle of evidence upon which the respondent sought to rely was Mr Kay's own statement to the effect that he had gone to see Mr Robertson and offered to help out Mr Robertson with a couple of tasks as an obligement. It was clear to the Tribunal that Mr Kay had volunteered this information and that this information had not been known to the respondent at the time of dismissal. That having been said if as a matter of fact Mr Kay had been working for MRDS in breach of his fiduciary or other duties to the company then it would not matter if the respondent only became aware of this at a later date. The Tribunal accepted Mr Kay's evidence about what had been said at this meeting and what he had agreed to do. The Tribunal accepted that this was a personal private conversation between Mr Kay and Mr Robertson and had no reference to MRDS. Mr Kay agreed to try to do some 3D printing for Mr Robertson's home workshop. This was the kind of obligement which Mr Kay is in the habit of doing. It was being done for Mr Robertson in a private capacity and had nothing to do with MRDS. There was no expectation of any payment being made. With regard to having a look at the software the

Tribunal accepted Mr Kay's explanation. The Tribunal noted that Mr McGilvray had thought that it was a different product which was being looked at but his evidence was that he had not been party to the conversation and did not know much about it. Mr Kay on the other hand gave clear evidence as to what the package was. He was clear that this was something that had been bought by Mr Robertson personally. It was not work being done for MRDS. It was not done with any expectation of payment.

127. There was some suggestion in the respondent's submission that Mr Kay had discussed the circumstances of his own and Mr Dalziel's dismissal during this meeting which was in breach of his duty of confidentiality. First of all we should say that the Tribunal was satisfied on the evidence that no such discussion took place. Mr Kay in his evidence was clear to confirm that although he had been contacted by a number of people wishing to discuss this he had not discussed his dismissal with anyone. Secondly, it was clear that this was in no way part of the respondent's pleaded case.

128. The Tribunal was entirely satisfied on the evidence that Mr Kay was not working for MRDS at the time of his dismissal. He was not in repudiatory breach of contract. Accordingly, the respondent were in breach of contract when they summarily dismissed him without notice. As with the other two claimants it had been agreed prior to the hearing that if they were successful then Mr Kay would be entitled to compensation of £25,000 being the amount of the statutory cap.

129. The Tribunal's finding is that all three of the claimants were wrongfully dismissed. The Tribunal orders the respondent to pay the sum of £25,000 to each of the three claimants as compensation therefor.

Counterclaim

130. At the beginning of his submissions the respondent's representative confirmed that the counterclaim was being withdrawn and should be dismissed. In his submission he indicated that he was doing so because he accepted that no evidence had been given during the hearing in relation to the respondent's losses therefore he accepted the counterclaim could

not be proceeded with. The Tribunal's view was that not only had nothing been said about the respondent's losses but that quite clearly there was absolutely no evidential basis on which a counterclaim could be asserted. In any event, the counterclaim is dismissed following withdrawal.

Employment Judge I McFatridge

Date of Judgement: 24th March 2022

Date Sent to Parties: 24th March 2022