EMPLOYMENT TRIBUNALS

Claimant: Michael Sims

Respondent: L M Technologies Limited

Heard at: Watford Employment Tribunal

On: 9th – 12th May 2022 and 9th June 2022

Before: Employment Judge Shrimplin

Representation
Claimant: Mr. Somerville
Respondent: Mr. Braier

RESERVED JUDGMENT

1. The claimant's dismissal was not unfair.

REASONS

Background

1. The claim made by the claimant is that he was unfairly dismissed from his employment at L M Technologies Ltd on 28th August 2020.

2. The claimant was employed as the managing director of L M Technologies Ltd (the respondent) and had been since he formed the company with a colleague in 2008. He was also named as a company director at Companies House and was a minority shareholder of the respondent, holding approximately 14% of the issued shares.

3. The claimant's employment ceased on the 28th August 2020 in accordance with a letter dated the same date which confirmed that was dismissed with immediate effect and would be paid in lieu of notice and for leave not taken. In addition, he was asked to resign as a company director in accordance with his service agreement (clause 15.5).

Hearing

4. The claimant's claim of unfair dismissal was heard by me, via CVP, between 9th to 12th May during which time I heard evidence in person. I adjourned the

case to 9th June 2022 to hear submissions and complete the case. I received written submissions from both counsel for the 9th June hearing, together with one bundle containing authorities that both parties agreed was relevant of 500 pages and one additional bundle from respondent's counsel at 50 pages. Following oral submissions, judgment was reserved.

5. On 10th May 2020, I dealt with two applications made on behalf of the claimant. The first was for details of the recent purchase of Mercia shares in LM Technologies by Ms. Saras-Victoria. This was made apparent by her supplemental witness statement at paragraph 14. The second application by the claimant was for disclosure of the legal advice which is noted in paragraph 95 of Ms. Saras-Victoria's original witness statement.

6. After hearing argument for both the claimant and the respondent and considering a number of authorities which were provided to me, I refused both applications. In respect of the first application, I was not satisfied, given the facts of the case, that the material was relevant to the issues, nor was the disclosure necessary for the fair disposal of the case. In respect of the second application, the issue of whether legal privilege of documents has been waived depends on the specific facts of each case. Having considered the authorities and the facts of this matter, I did not consider that the threshold for waiver of legal privilege had been met.

The issues

7. An agreed list of issues was provided jointly by counsel at the start of the hearing as follows in respect of the claimant's dismissal:

> "1) What was/were the reason(s) for the claimant's dismissal ("the Reason(s)")?
> 2) Was the Reason(s) for the claimant's dismissal, as found at 1. above, the reason(s) given by the respondent in the letter of dismissal? If not, was the dismissal thus unfair?
> 3) Was the Reason(s), as determined in respect of 1) above, potentially fair because it:
>
> a) Was for some other substantial reason pursuant to section 98(1)(b) Employment Rights Act 1996 ("ERA") resulting from an irretrievable breakdown in trust and confidence with the respondent; or
> b) related to the claimant's conduct pursuant to section 98(2)(b)?
>
> 4) If it is found that one or more Reasons for the claimant's dismissal were for a potentially fair reason, for each:
>
> a) Did the respondent conduct any investigation into any or all of either the Reason(s) and/or the reasons set out in the letter of dismissal for the claimant's dismissal prior to:
>
> i) any disciplinary action being taken against the claimant?
> ii) the claimant's dismissal?
>
> 5) Did the respondent provide the claimant with a fair opportunity to answer the allegations against him prior to his dismissal?
> 6) If not, was it within the range of reasonable responses for the respondent to conclude that it was futile to conduct an investigation or provide the claimant with that opportunity to answer the allegations?

7) If the respondent feared that the claimant would cause damage to the respondent during any investigation, was it within the range of reasonable responses for the respondent to dismiss him on 28 August 2020 rather than to suspend him to ensure that a prompt and effective investigation could take place?
8) In all of the circumstances, did the respondent conduct a reasonable investigation prior to the claimant's dismissal?
9) Did the claimant, in his capacity as an employee, engage in any actions that individually or collectively:

a) breached any fiduciary that he held as an employee to the respondent?
b) breached any express or implied contractual duties or obligations that he held as an employee to the respondent?

10) If so:

a) what were they?
b) did they result in any material detriment to the respondent?
c) did they endanger the continued health and solvency of the respondent?
d) did they lead to a breakdown in the respondent's trust and confidence in the claimant? And/or
e) were they sufficiently material to justify the claimant's dismissal?

11) In all the circumstances, did the respondent act reasonably in dismissing the claimant pursuant to section 98(4) ERA?

Polkey Reduction and Contributory Conduct

12) If the claimant's dismissal is found to be unfair, would the claimant have been fairly dismissed if a fair procedure had been followed?
13) If so, to what extent should any compensatory award be reduced?
14) To what extent, if any, should any compensatory award be reduced because:

a) the claimant did not appeal his dismissal?
b) of any action of the claimant that caused or contributed to the dismissal?
c) of any action of the claimant unknown to the respondent until after the claimant's dismissal which renders it just and equitable to reduce the compensatory award?

15) To what extent, if any, should any basic award be reduced because it would be just and equitable to do so in light of any conduct by the claimant prior to his dismissal?"

8. It was accepted by the respondent that the claimant was an employee; that he had at least two years' continuous employment service; that he had been dismissed and that the claim was brought in time.

The Evidence

9. For the claimant, I was provided with the statements of Mr. Sims (the claimant) and Mr. Mason (a former chair of the Board). For the respondent company, statements were provided by Ms. Saras-Victoria (the finance director appointed in 2019) and Mr. Owens (a member of the Board representing Mercia Investments Nominees Ltd). Additional statements were received just before the hearing from Ms. Saras-Victoria and the claimant. The second statement of the claimant was withdrawn before I had read it and was replaced with a redacted version. A bundle of just over 1,000 pages of documents was

supplied in advance and a transcript of a conversation with HSBC was supplied during the course of the hearing by agreement.

10. I heard oral evidence from the claimant on his own behalf and from Mr. Warren Mason, who was a former Chairman of the respondent and at the time of his statement owned just over 20% of the company. On behalf of the respondent, I heard oral evidence from Ms. Penelope Saras-Victoria, Finance Director, and Mr. Nigel Owens, a member of the respondent's Board.

Findings of fact

11. In submissions, counsel for both the claimant and the respondent drew my attention to portions of the evidence given in both statements and in cross examination. I have not addressed each submission on each piece of evidence as it would take a disproportionate amount of time to record. However, I have considered each submission, compared the quotes from the evidence and summaries with my own notes, and my conclusions are reflected in the findings of fact stated below.

12. References to page numbers in this judgment refer to the hearing bundle unless otherwise stated and may refer to the first page of a document or to a particular page within a document.

Background

13. The respondent was established to buy Bluetooth products from businesses in China and sell them into the European telecoms industry, leading to new product design and development of their own products. It was started by the claimant with a colleague, Lee Parry, and incorporated in December 2004. In 2008, Mercia Fund 2 (a limited partnership acting through its manager, Mercia Fund 2 Managers Limited - Mercia) and Advantage Early Growth Limited (AEGF) agreed to invest £200,000 in the company and Warren Mason was appointed as the independent Chair of the Board. The Articles of Association were produced (p154).

14. A service agreement (ps 101 – 117) between the company and the claimant was entered into on 24th October 2008, appointing him as an executive director and managing director. It contained a number of provisions, including the duration of the appointment, its scope, entitlements, restrictions and termination.

15. In 2012, Mr. Parry left and set up a separate company. Despite some issues and differences of opinion which are not relevant for the purposes of the claim, Mercia subsequently invested net funds of £600,000 in July 2015. By 2019, Mark Volenthan was Mercia's representative on the Board.

16. The claimant was dismissed on 26th August 2020 and received a letter informing him of the decision and the reasons for it (p319). The letter stated that the claimant's employment was terminated in accordance with clause 3 of the service agreement and confirmed payment in lieu of notice would be paid in instalments, together with payment for untaken holiday. The reasons were set out as follows:-

"Under the terms of the Service Agreement, you are required to faithfully and diligently perform your duties and exercise powers and comply with the company's Memorandum and Articles of Association together with the Company's rules, regulations, policies and procedures. You were, moreover, under an obligation not to engage in any activity which the Board reasonably considers may be, or become, harmful to the interests of the Company. Furthermore, as a director you owed fiduciary duties to the Company. Chapter 2 of Part 10 of the Companies Act 2006 codifies certain of those duties, in particular (i) section 172 - Duty to promote the success of the company; and (ii) section 175 - Duty to avoid conflicts of interest.
Your actions, as set out further below, are in serious neglect of and in flagrant breach of your duties as both a director and employee of the Company, as illustrated by the following:
1) You have made known to members of staff on many occasions your desire to gain control of the Company at minimal cost and to put your interests ahead of those of the Company. For example, we refer to:

- Your email of 26 March 2020 sent to Paul Levy of Darlingtons Solicitors in which you enquired "…in order to move the majority shareholder from Mercia to myself, I would prefer the company is sold to a newco, Developed wireless [a private limited company incorporated by Mike Sims] in which a new AoA and clean shareholding is set up without any A class shares."
- Your letter of 11 May 2020, where you intimated that in order for the Company to try to obtain a Coronavirus Business Interruption Loan from HSBC Bank plc you "must therefore hold a majority stake within the company's shareholding" and stated "The below is my proposal to purchase 1,000,000 shares in LM Technologies Ltd in my name for a nominal amount to provide a guarantee for loans applications made on behalf of the LM Technologies ltd…Due to the above events and the current position of the company I propose the following; I am allowed to purchase 1,000,000 shares at ; 0.0001 Pence per share, GBP. in LM Technologies Ltd. I also propose that I be allowed the position of majority shareholder, by way of purchasing these shares as preference shares. That these shares hold a majority voting right when voting on rulings within the company."

2) Your email of 20 May 2020 headed "HSBC Loans" in which you stated "This email is to ensure you [Penelope Saras-Victoria] do not send any application to HSBC until I have been given an answer from Nigel [Nigel Owens, Mercia Portfolio Manager] with regards to my proposal. I am quite happy for you to complete an application in readiness but that we must not present this until I have heard back from Mercia." The June Board Meeting Minutes subsequently record at paragraphs 7.2 - 7.4 "MS delayed applying for the government Bounce Back loan and advised the Board it was because he is attempting to reduce his personal guarantee with the bank in order to obtain further personal borrowing levels from other lenders, so he could personally loan money to LM…The Board disagreed and noted that delaying the Bounce Back loan application was disadvantageous to LM…the Bounce Back Loan does not require a personal guarantee nor have any effect on existing personal guarantees."
3) We also refer to the following extracts from the March 2020 Board Meeting Minutes and the June 2020 Board Meeting Minutes:

- "The Board expressed their view that management of LM is out of control, in reference to recent events which included the fraudulent phishing payment, working off 2 different cashflow versions, redundancy announcement and not being clear or in control of future revenue projections."
- "The redundancy process agreed by the Board on 5th May 2020 has been cancelled due to contamination of the process. This was by multiple e-mails & correspondence sent by MS internally and to third parties naming specific people in various departments before and during the process. This was against the advice of the HR consultant running the redundancy process and of the Board."

17. The respondent accepted that there was no investigation prior to the claimant's dismissal to enable him to answer the allegations and steps had been taken to

change the locks on the premises and remove the claimant's access to the company's IT systems and bank accounts. The dismissal letter did indicate that the claimant might appeal but no action was taken by him in that regard.

18. The letter referred to a number of specific incidents as illustrative of the claimant's *"serious neglect of and in flagrant breach of your duties as both a director and employee of the Company".* I have set out the broad headings of those incidents and my key findings of fact below, in broadly chronological order.

Developed Wireless Ltd

19. Developed Wireless Ltd (DW) was set up in October 2019 by the claimant, and he and Ms. Saras-Victoria were appointed as company directors. The original purpose, as set out in the October 2019 Board minutes (p221), was to use the company to explore funding options for manufacturing. The claimant informed the Board that the company would not have a bank account so would be unable to trade, although he had already informed Ms. Saras-Victoria that the company was applying to the Clydesdale Bank (p375). The Board requested the company be made dormant until otherwise agreed. The claimant undertook to do that but did not do so. Ms. Saras-Victoria's evidence was that the claimant told her he was under no obligation to do so and he did not want to make it dormant as it might look odd to investors.

20. The claimant put DW forward as a potential Management buyout vehicle when discussing potential future investment in February 2020 in an email to Fundable (p391) and in March 2020 when seeking advice as to the costs of doing so from the respondent's solicitors (p450).

21. On 5th March the respondent's Board noted that Mr. Sims had not made DW dormant and asked him to dissolve it.

22. On 7th April 2020 at 6.46pm the claimant made a request to Companies House to dissolve DW (p454) and at the date and time, withdrew the strike off application (p456). The minutes of the respondent's Board meeting held on 1st June confirmed that (p281) when asked, Mr. Sims stated that he had confirmation from Companies House that he had shut DW down. The respondent's Board also required the claimant to forward that confirmation within 24 hours. Ms. Saras-Victoria confirmed that she had resigned in May.

23. In cross examination, in general terms, the claimant explained that he had had difficulties in making the company dormant due to problems with the Companies House websites and access and misunderstanding the process, particularly that he had to file accounts. He did not recall withdrawing the application to strike off (p456) and commented that it "does seem weird to me" and that he thought it was "the first time I ever saw this". The claimant stated that, although he had been a director for 16 years, previously the respondent's accountants had dealt with relevant filings so he was unaware of how it should be done.

24. In relation to the email to the respondent's solicitor seeking advice on costs (p450), he accepted that it may read as though this was intending to move the shareholding, however that was "not in his mind" and he was only using DW as a scenario.

25. I found the claimant' explanations to be unconvincing and find that the claimant purposefully did not make DW dormant nor close it in accordance with the requests from the Board. He was not truthful when discussing what he had done with the Board. His application to close the company on 7th April was immediately withdrawn by him. Although not known to the respondent at the time, I find the claimant also put forward the company as a vehicle for a potential transfer of shares from the respondent, commencing in February 2020.

February meeting between Ms. Saras-Victoria and the claimant

26. Ms. Saras-Victoria's statement set out in detail a meeting between her and the claimant on 27th February 2020 shortly after Mr. Sims had raised the issue of redundancies in the office within the hearing of staff. The content of the meeting is also described in her statement given to the Board on 31st March 2020 (p260). Ms. Saras-Victoria set out that the discussion lasted for some four hours and covered a wide range of topics, especially the claimant's plans for the company or "his strategy" as she referred to it in her statement. In particular, Ms. Saras-Victoria recalled that he was "purposely not growing the company in order to regain control of it"; that he would present Mercia with a way out of the company; that he "deliberately spent it (Mercia's) money on things that "would not grow the company nor make it profitable"; that he "did not disrupt the customers too much". Ms. Saras-Victoria commented in her statement that this chimed with what she had heard others report hearing from the claimant, especially that he had been vocal about "buying LM for £1". Ms. Saras-Victoria reported the conversation to Mr. Volanthen the next day (p260).

27. There was a conflict of evidence on this point. In cross examination, this meeting was not put to Ms. Saras-Victoria. The claimant, in his cross examination, did not recall the meeting and doubted that they would have had any meeting that lasted 4 hours. Briefly, when the specific topics of the conversation were put to him, the claimant provided extensive explanations why they were incorrect, for example discussing the skills of the staff in the R&D team when asked about not spending on things to grow the company, the detailed analysis of revenues and profit margins, and whether customers would be disrupted,

28. On other matters allegedly discussed in the meeting, the claimant simply did not recall them, for example being asked why he would not simply walk away from the company or that Ms. Saras-Victoria dissuaded him from holding the staff meeting on redundancies the next day. He stated that the suggestion of "buying for £1" was fictious.

29. Having heard the evidence on this and other matters, I preferred the evidence of Ms. Saras-Victoria that this meeting did take place and as to what was discussed between her and the claimant.

Two proposed redundancy processes – February and May 2020

30. There were two occasions when the possibility of a redundancy process was raised, in February and May 2020. Ms. Saras-Victoria cites these as confirmation of the claimant's intentional destabilisation of the company following their February meeting.

31. Ms. Saras-Victoria's evidence is that the first was initiated on 25th February 2020 by a slack message (the internal company messaging system) sent by the claimant to her and Ms. Patel, who assisted with financial matters (p266), asking them to prepare for such an exercise. The claimant had set up a meeting for 28th February with the staff. Ms. Saras-Victoria's evidence was that there followed internal conversations between the claimant and the staff, at which she was not present, where he explained the need for such a process due to the company running out of money, and some conversations where she was present, for example when the claimant asked for redundancy letters to be prepared. Following the meeting between Ms. Saras-Victoria and Mr. Sims on the 27th February (above), the staff meeting was cancelled. At the Board meeting on 5th March, the claimant spoke of wanting to "let go of the undesirables" and was rebuked by the Board who also then reserved such staff matters to the Board (p250).

32. The claimant also sought legal advice from solicitors on 5th March (p446) seeking advice on removing specific individuals and was advised that a formal process was appropriate and that it was not possible to "cherry pick" (p312). No further action was taken at that time.

33. The second time potential redundancy arose was at the Board meeting on 5th May 2020 at a time when insolvency was expected at the end of July. At that meeting, the claimant again recommended named individuals for redundancy who were at that time on maternity leave. It was resolved to instruct an external HR firm given the previous incident (p272 and p476). The claimant continued to refer to individuals in slack messages to Ms. Saras-Victoria and was informed by the HR firm that he was trying to avoid the law on redundancy processes (p305/6) The external firm withdrew on 28th May, during a telephone call with Ms. Saras-Victoria, as they considered that the process had been contaminated and it would have been impossible for them to continue.

34. In cross examination, the claimant refreshed his memory from the hearing bundle but did not recall many of the events in detail, for example him setting up the meeting on the 28th February, nor the conversation asking for letters to be prepared. He was "suspicious" of the Board minutes (p253) which referred to "undesirable members", as they had been prepared by Ms. Saras-Victoria and he did not believe he would have named people or used those words. He also thought the May Board minutes did not reflect how he had put his points across, although he agreed he had been reproached at the meeting for the comments he made. Mr. Sims recollected the very clear advice from the solicitor and when challenged by counsel for the respondent on why he continued to use the names of individuals he stated that he had only been "spit balling" and "thinking about options".

35. I have considered the evidence carefully, especially the emails by sent by Mr. Sims. I reject his account of how they came about and prefer Ms. Saras-Victoria's account of the events concerning the two redundancy processes. I find that the claimant asked others to take steps to start redundancy processes, did so in a manner which alerted others to the possibility of redundancy and that he continued to name individuals during both processes when he was well aware of the potential legal implications for the respondent and the upset his actions might cause to staff.

Financial control of the company

36. A fraud was perpetrated on the company in January 2020 (referred to as the "phishing incident") as a result of which the company lost £9,548 due to a bank transfer made by a member of staff in response to an email. The claimant was not involved in that incident. The fact that the transfer had been made on the authority of a single member of staff highlighted the lack of a secondary approval process for large payments. The incident was the catalyst for Ms. Saras-Victoria to have full access to the company bank accounts (especially online banking) which the claimant had not provided to her previously and the Board put various spending controls in place.

37. At about the same time, Ms. Saras-Victoria took over the preparation of the cashflow forecasts due to the departure on maternity leave of one of the finance staff. During February 2020, both Ms. Saras-Victoria and the member of staff prepared cash flow forecasts and revenue projections, the latter being marked clearly as "work in progress".

38. The Board meeting on 4th March 2020 (p254) noted their view *"that management of LM is out of control, in reference to recent events which included the fraudulent phishing payment, working off 2 different cashflow version, redundancy announcement and not being clear or in control of future revenue projections"*

CBILS and BBL loans

39. In May 2020 the Board received a report from Ms. Saras-Victoria that insolvency was expected at the end of July (p 459). At the meeting, on 5th May the Board discussed grant funding and resolved that the company should seek a Coronavirus Business Interruption Loan (CBIL) through HSBC (p272).

40. On the 11th May 2020, the claimant wrote to Mr. Owens (p489) with a proposal to purchase 1,000,000 shares of the company for 0.0001 (ie £100) with majority voting rights in order to provide a guarantee to HSBC for the CBIL Loan. Other terms and conditions were proposed in the document.

41. On 20th May 2020, Ms. Saras-Victoria and the claimant had a conversation with HSBC and I was provided with an agreed transcript during the hearing (therefore there is no hearing bundle page reference). In that conversation it was confirmed that the company would not be eligible for a CBIL loan but would be able to apply for a Bounce Back Loan (BBL) which was guaranteed by the government and would not require personal guarantees. Later that day, the claimant sent a slack message to Mr. Owens and Ms. Saras-Victoria (p482) in which he confirmed that conversation. He also stated that a BBL would also come with a request for further personal guarantees and discussed aspects of the existing trade finance repayment plan. Later that evening and the next day, Ms. Saras-Victoria highlighted that personal guarantees were not required and referred the claimant to the recording (p482-3).

42. On 26th May Mr. Owens responded to the claimant's 11th May proposal (p488). He rejected the proposal and highlighted what he called " inaccuracies" such as the need for personal guarantees and the need for the claimant to be a majority shareholder. The proposal was rejected, although Mr. Owens indicated that further offers would be considered. In the meantime, he said

action was required and a Board meeting should be set up. A Board meeting was held on 1st June (p279) at which the claimant explained he had delayed the application for the BBL because he was attempting to reduce his personal guarantee and to raise additional funds to loan to the respondent. The Board disagreed and instructed the application to be made immediately.

43. The claimant was cross examined at length on this issue and he maintained that he was concerned about the extent of his personal guarantees in the event of default. He said that he had got it wrong in the slack message to Ms. Saras-Victoria and it was not what he meant to say. He agreed that the proposal to buy the shares for £100 was a part of his reasons for delay but felt it did not give the company enough money, instead simply extending the cash flow.

44. I found the explanations by the claimant unconvincing in the light of the documents and, on the balance of probabilities, consider that the claimant was delaying the application for the loan in order to put pressure on Mercia to agree a sale of the respondent.

45. It is convenient here to deal with the claimant's suggestion that the real reason for the dismissal was to enable Ms. Saras-Victoria to step into the claimant's position for her own personal gain and to acquire the Mercia shareholding. Ms. Saras-Victoria's supplementary witness statement confirmed that, on 1st April 2022, she purchased Mercia's shareholding in the company and now owned 69.07% of the shares.

46. Mr. Somerville cross-examined Ms. Saras-Victoria at length on the potential benefit she would gain from moving into the claimant's position. In particular, it was put that she would gain in salary from a promotion to the role of managing director. Her response was that she in fact offered to take a salary reduction due to the financial difficulties of the company. She confirmed that she been offered additional shares if she stepped into the role of Managing Director and explained that was part of a package, including an extended notice period, which was intended to give the company more stability until a replacement was found.

47. Ms. Saras-Victoria also accepted that she had not informed all of the shareholders of the issues which had arisen, in particular, she was providing Mercia (through its representatives Mr. Volanthen and then Mr. Owens) and Mr. Shannon with information but not the claimant nor Mr. Mason. She did not provide any explanation for that, save that had she informed the claimant she feared that he would cause the company more damage.

48. I noted an email/letter from Ms. Saras-Victoria to Mr. Owens dated 9 July 2020 in which Ms. Saras-Victoria asked Mr. Owens whether he would consider alternative offers for the company, on the basis that Mr. Sims was no longer in post. (p530). It was not put to the witnesses in cross examination.

49. Although there were some points of detail in Ms. Saras-Victoria's evidence where she contradicted herself, on balance I consider that what clearly came across was her genuine concern for the company, its staff and its shareholders, particularly in the light of the claimant's proposal which they had discussed in the meeting of 27th February 2020. I do not find that her actions were motivated by personal gain. I accept that Ms. Saras-Victoria understood

the duty of directors under s172 Companies Act 2006 and believed that the actions she was taking enabled her to fulfil that duty.

Investigation

50. The respondent accepted that no investigation into the claimant's conduct was undertaken prior to the dismissal and that steps were taken to remove the claimant's access to the respondent's bank, premises and emails/documents. The respondent pointed to further information which had been discovered following the claimant's departure, for example emails to solicitors regarding the redundancy processes, disclosure of information to persons outside the company and Companies House emails relating to the closure of DW.

51. In cross examination, Ms. Saras-Victoria accepted that an investigation may have uncovered further information and allowed the claimant to respond to the allegations. She also commented that it was unlikely that the claimant could have justified his actions or that the Board would have believed any of his explanations, and that, in any event, the Board was satisfied with the evidence it had already received.

52. The claimant's actions in respect of many of these matters had been discussed at Board meetings and in giving his evidence, the claimant was unconvincing in his explanations. I find, on a balance of probabilities, it is likely that, even had he been given an opportunity to respond, the claimant would have been unable to restore the trust and confidence of the Board

Conclusions - The reasons for dismissal

53. Having found the facts as set out above, I conclude that the reason for the claimant's dismissal was that the company had lost trust and confidence in the claimant as its managing director for the future.

54. I find that, on a balance of probabilities, the significance of the claimant's actions on the company both reputationally and on the staff, and the fact he was willing to push the company to the brink financially to engineer a lower price was such that the Board held a genuine belief that it was no longer possible for the company to continue with him as its managing director. Given the difficult financial situation the company was in, I am also satisfied on the evidence that there was a genuine business reason for the respondent's decision to dismiss.

55. I conclude that the incidents set out in the dismissal letter were examples of the events, taken individually or separately, that led to the respondent's loss of confidence. The respondent saw that the claimant was attempting to engineer a management buyout in such a way that he was demoralising the staff – making them fearful for their jobs, preventing the company from getting urgent funding, misleading people as to his understanding of the conditions of government lending, frustrating redundancy schemes and exhibiting poor management overall.

56. I reject the submission that the dismissal was founded purely on the basis of Ms. Saras-Victoria's desire, as Mr. Somerville set out in his submission " to step into his (the claimant's) shoes for her own personal gain and to acquire the Mercia shareholding", and which was supported by the fact that no reasons

for the dismissal were set out in the Board meeting minutes of 26th August 2020 at which Mr. Owens and Ms. Saras-Victoria only were present. I conclude that the dismissal was not automatically unfair because it was for a different purpose than that set out in the dismissal letter.

57. Mr. Somerville for the claimant submitted that the evidence before the tribunal, especially as set out in the exchanges of messages between Ms. Saras-Victoria and Mr. Owens seeking confirmation of whether the decision had been made during August 2020 (ps 550-556), was that it was Mercia's Investment Committee which made the decision to dismiss. He asserted this was supported by Ms. Saras-Victoria's acceptance in cross examination that, had Mercia not approved the dismissal at that time, it would not have happened. Mr. Somerville argued that it cannot be fair for an external third party to make such a decision, and, in any event, there was no evidence as to the reasons for that decision.

58. In response, Mr. Braier asserted that Mr. Owens was a Board member of the respondent and was authorised to act accordingly. The fact it was his proposal put to the Mercia Board did not detract from the reasons formed in Mr. Owens mind in taking the decision as a member of the Board.

59. My note of the cross examination shows that Ms. Saras-Victoria continued in her answer to say that the dismissal would have happened in another way had the investment committee not made that decision at that time.

60. On a balance of probabilities, I am satisfied that, while Mr. Owens may have needed approval for the dismissal in order to exercise his vote at the Board meeting, the decision itself was made by the Board of the respondent.

61. A further point raised by Mr. Somerville is that the Board meeting of 26th August 2020 was held in contravention of Articles 21.12, 21.1 and 21.3 because the claimant was not notified of the meeting and Ms. Saras-Victoria had not declared her conflict of interest, namely that the real reason for the dismissal was "for her own personal financial interest and/or that of Mercia's, Ms. Saras-Victoria wished to take managerial control of the company, replace the claimant as Managing Director with herself and to acquire Mercia's shareholding".

62. In response Mr. Braier submitted that there was no need for the Tribunal to delve into company law matters on the validity of the 26th August 2020 meeting as they were not relevant to the issue of dismissal.

63. I reject the submission of the claimant on this point and agree that there is no need to consider the issue. The relevant date to determine the reason for dismissal is the date of dismissal itself. I note that on the day that the claimant was dismissed, the 28th August 2020, Mr. Owens, Ms. Saras-Victoria, Mr. Sims and Mr. Shannon were all present at a properly called Board meeting and the dismissal letter was appended to the minutes.

The Law

64. Having concluded that the reason for dismissal was the lack of confidence in the claimant's abilities as a managing director. I must consider whether, as set

out in the list of issues, the Reason for dismissal was potentially fair because it:

a) was for some other substantial reason pursuant to section 98(1)(b) Employment Rights Act 1996 ("ERA") resulting from an irretrievable breakdown in trust and confidence with the respondent; or
b) related to the claimant's conduct pursuant to section 98(2)(b)

65. Section 98 of the Employment Rights Act 1996 provides as follows:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
>
> (3) In subsection (2)(a) –
>
> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case."

66. It is often the case that an employer dismisses an employee for what could be regarded as several "reasons". In ***Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323***, at 330B-C, Cairns LJ said this:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

67. Paragraph DI[821] of Harvey on Industrial Relations and Employment Law summarises the position in this way:

> "These words, widely cited in case law ever since, were approved by the House of Lords in W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] 3 All ER 40 and again in West Midlands Co-operative Society v Tipton [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. In Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in Abernethy was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do."

Some other substantial reason

68. The reasons that fall within " some other substantial reason" (SOSR) have been expanded upon through caselaw. Counsel for the respondent referred me to the following cases during his submissions:-

Perkin v St George's Healthcare Trust [2005] IRLR 93
North Glamorgan NHS Trust v Ezsias [2011] IRLR 550
Huggins v Micrel Semiconductor (UK) Ltd [2004] (EATS/0009/04)
Malik v BCCI [1997] IRLR 462
Leach v Ofcom [2012] IRLR 839
Mountain Spring Water Co Ltd v Colesby [2005] (UKEAT/0855/04)

69. Counsel for the claimant referred me to the following cases on this point:-

McFarlane v Relate Avon Ltd [2010 IRLR 196
Leach v Ofcom [2012] IRLR 839
Governing body of Tubbenden Primary School v Sylvester (UKEAT/0527/11)
Handshake Ltd v Summers (UKEAT/0216/12)

70. I have read and considered those cases carefully. In ***North Glamorgan NHS Trust v Ezsias,*** at paragraph 58 in the judgment it states: "We have no reason to think that Employment Tribunals will not be on the lookout, in cases of this kind, to see whether an employer is using the rubric of 'some other substantial reason' as a pretext to conceal the real reason for the employee's dismissal." This was the court's conclusion after considering whether the tribunal in that case had found that Mr. Ezsias had not been dismissed for the things he had done ie his conduct which caused his relationship with his colleagues to break down, but rather for the fact that working relationships had broken down. In other words, the fact that Mr. Ezsias had been in the main to blame for that break down might have been part of the history, but it was immaterial to why the Trust chose to take action against him. If that is what the Tribunal had been saying, then the Tribunal's finding that Mr. Ezsias had been dismissed, not for a reason relating to his conduct, but for some other substantial reason of such a kind as to justify his dismissal, was understandable. The summary of the case confirms that although an employee may have been responsible for, or had contributed to, such a breakdown in confidence, it had been open to the Tribunal to rule that such disciplinary procedures as applied when allegations

of misconduct were made did not have to be involved in his case. The employee's role in the events which led up to that breakdown was not the reason why action was taken against him.

71. In **Perkin**, the Court of Appeal said, "A breakdown in confidence between an employer and a senior executive for which the latter is responsible and which actually or potentially damaged the operation of the employer's organisation, or which rendered it impossible for senior executives to work together as a team, can amount to some other substantial reason for dismissal." The Court of Appeal classified the reason for Mr. Perkin's dismissal as coming within the category of 'some other substantial reason', even though it was his manner and management style which had led to the breakdown of relationships.

72. In **Huggins**, there is a helpful summary of the evolution of the SOSR term and, at paragraph 31 the case quotes Lord Steyn in **Malik v BCCI** in relation to the implied term of trust and confidence.

73. At paragraph 33, in upholding the respondent's case, the court rejected "as wrong in principle the submission that any conclusion based on some other substantial reason must be wholly outwith the issues of conduct. It is probably simplistic, but at least, it does have some reality, in our judgment, for a decision to be based on a breakdown of trust and confidence caused by the conduct of an employee".

74. It further states, at paragraph 35, that there is no error of law when a Tribunal upholds an employer's decision that the breakdown of trust and confidence has been caused or contributed to by the Applicant's conduct, categorising this as some other substantial reason for a dismissal.

75. In **Mountain Springwater Co Ltd**, at paragraph 14, the court accepted that, although the words SOSR were not used during the dismissal, the reality was that it was a breakdown of trust and confidence.

76. I have also considered the cases set out in Mr. Somerville's submission which are noted above. He made a general assertion that those cases were authority for the proposition that "reliance on the loss of trust and confidence alone will not usually be sufficient to establish a fair dismissal". As a general proposition that is well founded, however each of those cases turns on particular facts and also recognise that there is a duty of mutual trust and confidence.

77. In **Macfarlane** for example, the court, at paragraph 40 stated "In the end, a point of categorisation of this kind is not fundamental: if the tribunal's basic reasoning is sound the dismissal was fair, whichever box the case falls into."

78. In **Leach**, at paragraph 53, the court said "The mutual duty of trust and confidence, as developed in the case law of recent years, is an obligation at the heart of the employment relationship. I would not wish to say anything to diminish its significance. It should, however, be said that it is not a convenient label to stick on any situation, in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is not available or appropriate. The circumstances of dismissal differ from case to case. In order to decide the reason for dismissal and whether it is substantial and sufficient to justify dismissal the ET has to examine all the relevant circumstances."

79. Mr. Braier submits that it is possible for an employer to fairly dismiss for SOSR where there has been a breakdown in trust and confidence between the employer and one of its senior executives. In the case before me, that breakdown was caused by the breaches, often repeated, of the claimant's "fiduciary and contractual duties" set out above. Mr. Braier submitted that the fact the claimant had different roles within the company should be seen within the context of his overall service agreement.

80. As a managing director, statutory director and employee, the claimant had a wide range of responsibilities and duties. However, those functions cannot completely be separated, as a matter of fact, when considering the impact of his actions in relation to the company.

81. I have found that the reasons that the respondent dismissed the claimant were those which are evidenced, but not exclusively so, in the letter of dismissal.

Conclusion on grounds for dismissal

82. I am satisfied that, on a balance of probabilities and on the particular circumstances of this case, that the reason for dismissal was a loss of trust and confidence between the respondent company and its managing director, the claimant, and as such falls within s98(1)(b) ERA 96 as "some other substantial reason". Accordingly, the respondent has satisfied the initial burden of proof placed on it and demonstrated that the reason for dismissal was a potentially fair one.

Fairness of the dismissal

83. Having so found, the question of the fairness of the dismissal falls to be determined under section 98(4) of the ERA 1996, set out above. The key question in this context to determine is whether or not the action of the respondent was within the range of reasonable responses of a reasonable employer to dismiss the employee for the reason for which the employee was in fact dismissed.

84. It is not the role of the Tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed or to substitute its decisions for the decisions made by the respondent. ***Sainsburys Supermarkets v Hitt [2003] IRLR 23.*** There is no burden of proof on either party and it is an issue for the Tribunal to decide.

85. In particular I have considered whether the decision to dismiss was within the band of reasonable responses open to an employer and, as part of that, whether the process followed was fair.

86. Mr Braier drew my attention to the case of ***Gallacher v Abellio Scotrail Ltd [2020] (UKEATS/0027/19)*** where the dismissal of a senior manager was upheld as fair where the relationship between the employee and the manager had broken down at the particular time when it was essential that they work together effectively. Mr Braier also referred to ***Cobley v Forward Technology Industries plc [2003] IRLR 706*** where a decision to dismiss a Chief Executive was upheld as fair.

87. On the second point, Mr Braier drew to my attention the case of ***Phoenix House Ltd v Stockman [2016] IRLR 848*** where the EAT held that the ACAS Code of Practice on Disciplinary and Grievance procedures does not apply to SOSR dismissals. However, as he also submitted, that does not mean it will always be fair for there to be no process at all, as happened in this case.

88. Mr. Braier submitted that , in accordance with ***Gallacher,*** it may be within the band of reasonable responses for an employer to consider any procedure "futile" and thus to make the dismissal a fair one.

89. Not surprisingly, Mr Braier referred to the case of ***Polkey v AE Dayton Services ltd [1987] IRLR 503*** and the comments of Lord Bridge

> ".. The Tribunal is able to conclude that the employer himself, at the time of the dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile …."

90. For the claimant, Mr Somerville submitted that the respondent was required to follow the three stage test in ***British Homes Stores Ltd v Burchell [1980] ICR 303*** where the dismissal was in respect of conduct and the spirit, if not the letter, of the ACAS Code. The claimant was therefore entitled to an investigatory and disciplinary process as it would fall within the band of reasonable responses. There was no process and it could not, therefore, have been fair.

91. I bear in mind the circumstances of this case and the financial position of the respondent at this time. These events occurred during the pandemic at a time when supply chains were in difficulty, especially in China where the company sourced its products. The company was in financial difficulty and investment was required to maintain its solvency. It was a small company with just eleven employees and had limited internal resource and limited funds to pay for external resources.

92. Based on my findings of fact, in August 2020, it was clear that the respondent no longer had confidence in the claimant in his role as managing director of the company and it genuinely believed that the claimant was also in a position to do significant damage to the future of the company, for example by speaking to suppliers and purchasers. It is also clear that, had an investigation taken place or other process been followed, the outcome would have been the same, namely that the claimant would have been dismissed.

93. As set out in s98 (4) I have considered "equity and the substantial merits of the case" and conclude that the dismissal was within the range of reasonable responses which was open to the respondent in August 2020.

Conclusion

94. I conclude that the claimant's dismissal was not unfair within the terms of the Employment Rights Act 1996.

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Employment Judge K A Shrimplin

Date: 4 July 2022

Sent to the parties on: 20 July 2022

For the Tribunal Office