EMPLOYMENT TRIBUNALS

Claimant: Mr Wayne Hibbert

Respondent: Fortitude Nicsa Global Ltd

AT A FINAL HEARING

Heard: Remotely by CVP (nominally at Nottingham)

On: 2-5 May 2022
And in chambers in private on 11 & 13 May 2020

Before: Employment Judge R Clark
Mrs D Newton
Mr C Goldson

Appearances
The claimant: Ms A Pitt of Counsel
The respondent: Ms W Miller of Counsel

JUDGMENT

1. The claim of breach of contract **fails and is dismissed**.

2. The claim for accrued but untaken annual leave outstanding at the date of termination **fails and is dismissed**.

3. The claim of unfair dismissal **fails and is dismissed.**

4. The claim of unfavourable treatment because of something arising in consequence of the claimant's disability **fails and is dismissed.**

REASONS

1. Introduction

1.1 On 12 October 2020, Wayne Hibbert was dismissed from his employment with the respondent. He presents two principal claims of unfair dismissal and discrimination arising in consequence of disability. He also brings two further claims associated with the termination of his employment. One is for compensation in respect of accrued but untaken annual leave, the other is a claim of breach of contract in relation to a bonus payment.

1.2 Those employment matters are found beneath many layers of complicating factors. First, they sit within a web of related legal disputes, actual and potential. The claimant was one of three directors of the respondent along with Katy Upton, now his ex-wife. The demise of that marriage is central to this case. The claimant was also a minority shareholder in this small business. The potential for any minority shareholder claim seems to have been overtaken by the divorce and associated financial remedy proceedings. Secondly, these events play out during the first national lockdown, creating obvious pressure and uncertainty for all concerned. Thirdly, they coincide with a transfer of the predecessor business to this respondent. On top of all that, the claimant is disabled by virtue of two distinct impairments. The mental impairment of borderline personality disorder is directly relied on in his claim under section 15 of the Equality Act 2010. The second impairment of dyslexia does not directly engage with a disability claim but is relied on as part of the wider circumstances of the case.

2. Preliminary matters and adjustments

2.1 This hearing was conducted by CVP. That was, in part, a necessary adjustment in view of the history of the family proceedings but also as an adjustment for Mr Hibbert. He did not wish to have to see Ms Upton during the proceedings. The use of CVP enabled cameras to be disabled save for when evidence was being given, during which it was a matter for the other party whether they observed the video or not. We also maintained the adjustments agreed at a preliminary hearing to allow extra time for breaks and to permit a person to sit with Mr Hibbert whilst he gave his evidence and to help locate and read documents as necessary. We are grateful to Mr Freitas for the support he gave to the claimant which ensured his engagement with the process.

2.2 We also wish to record our gratitude to both Counsel for the manner in which they have conducted this hearing. Both adopted the principles and techniques encouraged by ‘The Advocates Gateway’ to ensure best evidence is given and a fair hearing maintained.

3. The issues

3.1 The issues were identified at an open preliminary hearing on 3 February 2022. We have adopted those. We agreed with both Counsel that this hearing would focus on liability only, albeit that our decision would also include any “Polkey”, “Chagger” or wider questions of principle as might become relevant, depending on the outcome.

4. Evidence

4.1 For the claimant we have heard from: -

a) Mr Hibbert.

b) Maria Freitas, Mr Richard Freitas' Mother

4.2 Ms Pitt also relied on a witness statement of Mr Richard Frietas. His evidence was unchallenged.

4.3 For the respondent we heard from: -

a) Katy Upton,

b) Three employees of the respondent; Greg Upton, Jenna Blurton and Deborah Harriott.

c) Mr Mario Renzo Menendez Pastor, the third director and majority shareholder of the respondent.

4.4 Mr Menendez was located outside the jurisdiction. We acknowledge the initiative of the respondent's solicitor for approaching the ToE unit of the FCDO immediately on the publication of the very new joint presidential guidance concerning the taking of evidence from foreign states. On 28 April, Mr Johnson confirmed to the tribunal that he had applied for, and received, confirmation from the ToE unit that there were no diplomatic objections to Mr Menendez giving his evidence from Australia. That potentially avoided what would have been an unwelcome postponement.

4.5 All witnesses called affirmed or adopted their evidence on oath and were questioned. We received a bundle running to 433 pages. We received additional disclosure during the course of the hearing in the nature of phone records and text messages. Both parties made oral closing submissions.

4.6 We had anticipated giving an oral decision. At the outset, we were told that the time for cross examination and additional breaks for Mr Hibbert would likely mean that the time would only just permit the parties' active participation to conclude. That meant the tribunal has had to reserve this decision. Fortunately, we have been able to reconvene relatively quickly.

5. Facts

5.1 It is not the Tribunal's function to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues before us and to put the case in its proper context. That is particularly pertinent in this case where there are family proceedings still to be determined. We were concerned that in order to deal with the claims before us, we may have to reach findings on matters which could have implications for another jurisdiction. Except where we have found it absolutely necessary to discharge our own function, we have tried to avoid making findings of fact which may affect any other proceedings. Similarly, we have received detailed evidence about the marital relationship,

sometimes in circumstances of its utmost intimacy, which we have not felt necessary to repeat in this public judgment. We also record our assessment of the evidence given, in general terms. We found all witnesses sought to give honest accounts to assist us in our task but we felt aspects of the evidence of both Mr Hibbert and Ms Upton needed to be treated with some caution. We found Mr Menendez to be an impressive witness. He displayed a conscientious yet measured approach and we found his account of events reliable and consistent. On that basis, and on the balance of probabilities, we make the following findings of fact.

5.2 Wayne Hibbert and Katy Upton had been in a relationship since around 2001. They were married in 2011 and have four children together whose ages range from 4 to 16.

5.3 Mr Hibbert has a background in mechanical and electrical engineering in various industrial settings in the midlands. That career followed a period of time in the British Army. He has a long history of poor mental health. At a preliminary hearing, he was found to be disabled at the material time by virtue of a mental impairment of Borderline Personality Disorder. We have had regard to the reasons given by EJ Ayre in her judgment that the claimant was disabled. She heard evidence of how he finds it hard to concentrate and describes his mood as "like a rollercoaster"; that he took medication to help control his moods and frequently suffered from intrusive thoughts making it difficult for him to sleep as he relived the events of the day over and over at night. She heard how he found confrontation difficult and would become agitated and aggressive. In summary, she found that long standing mental impairment has affected certain day-to-day activities from time to time and to a greater or lesser extent. They were identified as including difficulty getting dressed due to low motivation; difficulty eating, difficulty going out of doors; intrusive thoughts; persistent distractibility or difficulty concentrating. At that hearing, he was also found to be disabled by virtue of dyslexia.

5.4 We find Katy Upton has had a long and successful career in the global I.T. industry. We find she has a positive reputation in that sector and the evidence before us suggests that other organisations would happily compete to secure her skills. Renzo Menendez has had his own successful companies in that sector which have operated principally in Latin America and the Asia - Pacific regions. He owns Nicsa, a company based in Australia. The two were well acquainted through their respective work and they had a great deal of mutual respect for each other.

5.5 We find Ms Upton’s successful track record led her to develop aspirations to run her own enterprise in this sector. At some time during or before 2016, Ms Upton and her then husband, Mr Hibbert, discussed the possibility of starting such a business. She was supported and encouraged in this endeavour by Mr Menendez. Their relationship was good enough for him to act as a mentor to them both.

5.6 We find it was always the common intention that the company would be owned by both Mr Hibbert and Ms Upton. We also find there were two obstacles to her immediate direct involvement in the business. One was the need to maintain some family income during the start-up period. The other was that Ms Upton’s employment status at the time meant she

was subject to restrictive covenants preventing her from acting in competition with her employer.

5.7 On 25 August 2016, Fortitude Global IT Support Limited was incorporated ("Fortitude Global"). For the reasons stated, upon its incorporation Mr Hibbert became the sole director and 100% shareholder.

5.8 Fortitude Global sought to enter the same global I.T. market. That is the market in which Ms Upton had experience, contacts and in which her expertise was valued. Broadly speaking, that market is for hardware maintenance, 24/7 service desk support, wireless surveys, installations, and other IT related professional services. The business was obviously a fresh start up. Indeed, to begin with it was literally a "kitchen table" business. There were no staff and we find there were very minimal set up costs. A few years earlier Mr Hibbert had suffered an accident at work for which he had received compensation. The exact figure is not important but it was somewhere between £19,000 and £30,000. He says that money was used as the start-up capital for this business. We do not accept that proposition in its strict sense and we find it was not invested as part of the business capital. However, we are satisfied that the fact he had access to that money played an important practical role in the couple's ability to set up the company as did the continued receipt of Ms Upton's salary until she resigned in 2017.

5.9 We find Mr Hibbert had no meaningful previous experience in the global I.T. sector. He took on a sales role in this new business. We find he also had no meaningful previous sales experience either. Although we were told he may have some relevant sales related skills and experience in the past, which may well be correct, it was not such as to warrant any of it being included in his CV. Nevertheless, he set to work with enthusiasm and commitment. The first few months were spent trying to generate leads and contacts and to sell the notion of Fortitude Global as a player in this market. We find the contacts he approached were given to him by Ms Upton and Mr Menendez. Indeed, for some time the only business conducted by Fortitude Global came directly from Mr Menendez under some form of subcontract arrangement to service the work Nicsa already had. It follows that we do not accept Mr Hibbert's characterisation that he set up "his own" business which Ms Upton joined some years later and then took from him. We find both set up the business with a plan that she would join the formalities at a later date once released from her restrictions.

5.10 By 2017 with the work now arriving we find Greg Upton joined. He is Ms Upton's brother and had worked with her previously at more than one employer. Gradually, other staff were appointed. We find Ms Upton resigned from her employment in 2017. She was subject to a lengthy period of notice and post termination restrictions. We find she did some self-employed contract work in the interim. On or around 1 January 2018, we find her restrictions expired and she was appointed as a director and member of Fortitude Global. We do not accept Mr Hibbert's account that she forced or threatened him in that development in any way at all. We are satisfied it was always the plan. In any event, the shareholding and directorships that were then agreed appear to remain in place to this day.

5.11 By 2018 the business relationship with Mr Menendez was growing ever closer and stronger with mutual benefits. There were discussions about working closer together. This was not something Mr Menendez was particularly looking for or pressing for. However, there came a time when it seemed to make sense to all. This turned into plans for a merger. On 15 July 2018 the respondent in this case, Fortitude Nicsa Global Limited ("Fortitude Nicsa") was incorporated. It remained dormant for over a year whilst the practical arrangements for the merger were worked out. We reject Mr Hibbert's contention that this was done without the claimant's knowledge. He was a director and shareholder of Fortitude Global and in a position to veto how the business was operated. He was also named first as a director and a shareholder in the incorporation documentation for Fortitude Nicsa.

5.12 Fortitude Global was still a small company and still in its infancy. On balance, its internal management systems and professional support was similarly immature. It may be that NICSA had similarly unsophisticated systems as there is next to no documentation before us concerning the merger and the transfer of staff and contractors to the new enterprise. Questions put to Mr Menendez on his due diligence process may have missed the point. His principal business return was to be working with Ms Upton and the business success that that generated. We make the following findings of fact concerning the merger itself.

a) It was felt that both NICSA and Fortitude Global were bringing equal value to the merger. Consequently, the shareholding was split 50/50. We find that was Mr Hibbert's suggestion. That meant, Mr Menendez acquired a 50% shareholding in the respondent, Mr Hibbert and Ms Upton a 25% shareholding each.

b) We find the merger took effect in January 2020. The business began trading and operating under the Fortitude NICSA Global Limited banner. It was managed separately to Fortitude Global with separate accounting systems. Some transitional period was necessary over the first few months due to the way invoices were settled by clients.

c) In line with this, it was intended that the fortitude Global staff would transfer to Fortitude Nicsa by around March or April 2020. However, before that could happen Covid-19 hit the UK and the accountants raised a concern about the operation of what was then the brand-new concept of 'furlough' and the employer's associated access to the CJRS. It advised the directors to continue to pay the staff through the existing payroll of Fortitude Global. It did this as a means of ensuring that any claims to the CJRS would not be refused. In time, that advice proved to have been incorrect and furlough reimbursement would have been available to Fortitude Nicsa had the staff transferred as planned. The staff eventually transferred from 1 November 2020.

5.13 We pause there to record that the TUPE transfer of employees occurs after the claimant's dismissal but the transferee is named as the respondent. This is not a TUPE case and we find, as is common ground, that the claimant's employment with the respondent arises from his position as a director. As such there is no dispute that he has been an employee of the respondent at all times.

5.14 Business had been growing steadily before the merger. By 2020, the business employed around eight people plus international contractors and in the year ending 2021 had turned over around £1.6m. However, that progress was stalled by the worldwide effect of Covid-19 and profit was affected. In a board meeting in December 2020, we find the board of Fortitude Nicsa declared no dividends for that year and paid no discretionary staff bonus.

5.15 We turn to the contractual arrangements between the relevant parties. Mr Menendez received his remuneration from the business entirely through the dividends on profits paid to him by virtue of his shareholding. We find the two UK directors also took the majority of their remuneration from dividends as shareholders. Unlike Mr Menendez, however, they also each drew a modest salary as employed income. The reason for the difference may relate to their UK residency and tax affairs but whatever the reason it is immaterial. In respect of their employed income, Mr Hibbert was paid a salary of £719 and Ms Upton a similar modest figure, albeit for some reason slightly different.

5.16 There is an absence of formal documentation in this case. We have not seen a contract of employment for Mr Hibbert save for a blank template which we are invited to find was issued to him but not signed. This is a blank form of contract of employment with Fortitude Nicsa. It has within it terms which would not work meaningfully if the employee was himself also a director (e.g., “duties to be advised by a director”). We do not accept that document was issued to the claimant. There is no signed version of an earlier contract with Fortitude Global to provide any basis to infer this is the usual practice. There is no surrounding contemporary evidence to suggest contracts were issued to the directors. There is no other equivalent contract for the other director, Ms Upton. We note Fortitude Nicsa did not inherit and pay the employees until November 2020, when those staff transferred. Whilst that does not preclude an earlier contract of employment being evidenced in writing, it puts the likely time frame of any contract being issued into the end of 2020, after Mr Hibbert’s employment was terminated. This absence of any documentation to support the contract being issued to the claimant might, in itself, be evidentially neutral. However, it stands in contrast with the positive presence of another form issued to evidence acknowledgment which was signed by Mr Hibbert on 3 March 2020. That was in respect of the notice that the “new trading name of the company will be Fortitude Nicsa Global Ltd”. However, so far as this template contract may have any relevance to the facts of this case we record that the holiday year ran from 1st January each year. The holiday entitlement itself was 20 days plus bank holidays. In essence, it reflected the minimum annual leave entitlement for a five day per week full time working of 5.6 weeks or 28 days.

5.17 We are not satisfied that these holiday terms were intended to apply strictly to the two directors in respect of their positions as employees. First, they were free to come and go as they pleased. Secondly, we have seen no records of holiday. Thirdly, their role as owners of what is essentially a micro-family the business does not sit comfortably with their notional position as employees entitled only to what the contract says, although as a matter of fact and law they of course were employees. There is no evidence before us of either actually taking leave or, if they did not, of carrying over unused leave from one year to the next. To the extent that there was any consideration of the statutory holiday entitlement to director

employees, and so far as it is then necessary to consider the contractual position, we would infer the holiday leave year would apply to directors as it did to all employees for two reasons. First, if there was any sense of managing annual leave across a small business, a degree of consistency would be desirable in an employer running the same leave year for all concerned. Secondly, Mr Hibbert's holiday claim is entirely premised on the existence of this leave year his ability to carry over untaken leave from 2019 into the 2020 leave year. We accept Ms Upton's evidence that neither she nor any staff carried leave over and the employee handbook in any event precludes this. We do not accept that Mr Hibbert was either not aware of this handbook or that it was not available to him. Again, it does not sit well with someone who is also the owner and director of the business.

5.18 Although Mr Hibbert's holiday claim is only in respect of the carry-over from the 2019 leave year, his evidence is that he has in fact never taken holiday during the 5 years he was involved in the business. That, we find, says more about the nature of his role and the complete freedom with which he could operate as a director and owner and, for the first few years as a 100% owner. We also find that in November and December 2020, the final payments made to Mr Hibbert following his dismissal expressly include a payment of £709 which is not challenged as amounting to all the accrued holiday for that particular leave year.

5.19 The blank contract does also refer to performance/profit related bonus/commission. It provides: -

> ***"…Any Commission / bonuses will only be paid on the condition that you are in our employment and not serving notice at the time that the Commission / bonus is due to be paid. The details included above do not form part of your contract of employment and may be amended or withdrawn at anytime"***

5.20 Mr Hibbert denies receiving the contract, as we have found, and does not therefore rely on its terms as governing his legal relations with the respondent so far as that relationship is one of employer and employee. The handbook also provides the disciplinary and dismissal procedures. The contract simply refers to the handbook but also provides the basis for an appeal process to a director in writing within 5 days of the action. The handbook sets out a typical disciplinary procedure. It also contains a provision permitting the delegation of the process. It says,

> ***"R) THIRD PARTY INVOLVEMENT***
>
> ***We reserve the right to allow third parties to chair any meeting, for example disciplinary, capability, grievance, this is not an exhaustive list."***

5.21 Returning to the chronology, during the relatively short life of these companies there is something of a history of adverse reports being made to Ms Upton concerning Mr Hibbert. They relate to his commercial dealings and interpersonal disputes with various potential customers and other industry contacts. We do not need to go into the detail of these. Save to make some general findings:-

a) First, we do not know the underlying truth of these allegations nor do we seek to reach a finding of fact on them.

b) We accepted Mr Menendez's evidence that he was not aware of most, if not all, of these at the time. He gave his response from the witness box having read some of the messages for the first time in the trial bundle. Some were instinctively dismissed as coming from a competitor and based on his own personal knowledge of the third party concerned.

c) Where Mr Menendez was aware of any tensions in relationships, they were no more than that and we accept that his response at the time had been to support and encourage Mr Hibbert such as encouraging research on the national culture of some of the international partners they worked with.

d) On first reading, these incidents read as if they might have relevance to the final decision to dismiss. We do not find that to be the case. The relevance of their inclusion does appear somewhat unclear save in respect of one significant matter. That is that they serve to undermine the contention that Mr Hibbert's dismissal was the culmination of a long held a plan of Ms Upton, and possibly even a conspiracy with Mr Menendez, to have Mr Hibbert removed from the business. If that was her plan, it is hard to think of a better or more effective vehicle for achieving that aim than for her to have pounced on these repeated and apparently unsolicited allegations of his inappropriate behaviour. Not only did she not take that action, we find she positively supported him, accepted the account he gave in rebuttal and then defended him and his position to some of the external sources.

5.22 The personal relationship between Mr Hibbert and Ms Upton had had its ups and downs, as many do. We find it markedly deteriorated in the latter part of 2019 when Ms Upton began contemplating the reality that, from her perspective, their marriage was over. She did not want to be married to him or with him any longer. The breakup proper occurred in February 2020 and she told Mr Hibbert of her wish to have a divorce. We were unnecessarily occupied in the evidence with who did or did not sleep downstairs for a period of time before Ms Upton moved out of the family home temporarily. Mr Hibbert permanently moved out in March 2020. Mr Hibbert suggested that Ms Upton had formed a new relationship. She denied that although it does seem to be the case that the person Mr Hibbert had in mind was someone known to her at the time and someone she would accept she later did form a relationship with.

5.23 The separation was a particularly difficult one. As with many, the separating parties remained tied by their family of four children. This was also a long relationship. The split was not clean and nor was it instantaneous.

a) We find in the initial months post separation there was a period where the ups and downs continued with intensity, relations were strained and emotional.

b) Both make serious allegations about the behaviour of the other.

c) We find, but we put it no higher than this, that in response to one exchange Ms Upton contemplated the involvement of the police.

d) At one point in time there was a brief period when their relationship might have appeared to be salvageable, at least from Mr Hibbert's perspective. This partly had the effect of encouraging some of the contact he would then attempt with Ms Upton.

e) Papers concerning Ms Hibbert's intention to petition for divorce were served on Mr Hibbert in May 2020.

5.24 At the same time, of course, they also had their business to run. Both attempted to continue to work in the business. We cannot be sure that either positively gave this thought at the time. At least, we do not detect there was a positive decision that either thought they could make it work or that they would give it a try. As a fact they did give it a try but we view that as a matter of practical necessity. We suspect that the initial period of lock down may have given hope that it might in fact have been possible for them to continue to work together in the business despite the pressures and consequences of the break-up. For a time neither was in the office for any length of time and the fact that each was working from home meant there were few initial opportunities for them to come into contact. However, if there was in fact such initial optimism, we find it did not last. First we find it was absolutely essential that the two did have a constructive working relationship for them each to perform their particular functions in the business and particularly to fully discharge their statutory fiduciary duties to the company. We find there had to be contact for the business to operate and this had to be civil, professional and constructive. The separation and imminent divorce served as a significant distraction to that aim and we find prevented any productive or professional dealings in the workplace.

5.25 We find Mr Upton began working odd hours, often through the night. We cannot be sure of the purpose of this. We accept Mr Hibbert has a history of a back injury which has often meant he could not sleep and would either sleep on the floor (as Mrs Frietas recounted) or would not sleep at all through the night. We also know that his thinking processes would often keep him awake and that sometimes his medication would do likewise. Amongst all that, we know he also had agents across the globe and would need to communicate with them in different time zones. All those reasons are likely to have played some part.

5.26 We find Mr Hibbert, as the unwilling party to the separation, attempted whatever he could to rescue the marriage. As we have said, for most of the time that was done in the face of a clear and unambiguous position that Ms Upton viewed the relationship to be over. Briefly, their conduct towards each other gave him a different impression. The result was that throughout the period, his contact with Ms Upton was intense and we find she could not cope with that. We find Mr Hibbert was contacting Ms Upton at a level and frequency described as 'bombarding' to the point where, by the Autumn, she had blocked him on all social media and other digital platforms save for the work email. That then became the principal medium through which he sought to express his emotions and the practical implications of their separation. Mr Hibbert accepts that he mixed work topics with personal matters. He accepts that he used his relationship with the staff as both an emotional crutch and as a conduit to get personal messages to Ms Upton. We have no doubt this was an immensely difficult time for all. We find Mr Hibbert was extremely upset by the separation but was unable to separate the issues in his personal life from his business connections. We find

Ms Upton found this unworkable. She found she could not bring herself to open what looked like a work email through the fear that it would engage in personal or emotional matters.

5.27 We find the dynamic also materially affected the staffing and client relations. Mr Hibbert was both emotional and oversharing in his interactions with the staff and started to use his contact with them as means of off-loading his personal and emotional feelings. We find Jenna Blurton, the respondent's Global Finance Manager, was extremely supportive of Mr Hibbert. She had been through a separation and he looked to her for advice and emotional support. As would be the theme, however, the line between work life and personal life was more than blurred. We find the nature and frequency of what he was sharing became a burden to her. We find he shared inappropriate details about the relationship that made her and other colleagues very uncomfortable. We find they recognised the emotional situation and were very supportive but when that sharing extended into references to his and Ms Upton's sex life, they felt they had to put a marker down that he had gone too far. Mrs Harriott, the operations manager, had been equally supportive but had to take steps when she too felt his conversations were going too far. She had to ask him to stop. On 21 July 2020 she discussed her concerns with Ms Upton. Ms Upton was concerned but felt unable to engage with Mr Hibbert in the circumstances she herself was in. She advised Mrs Harriott to send an email directly to Mr Hibbert. This was sent that day. We find Mr Hibbert acknowledged it. The staff continued to be supportive and although there was no repeat of the intimate disclosures, we find they continued to feel the strain of the separation in the emotional support they were expected to carry.

5.28 We find Mr Hibbert was similarly oversharing matters with other industry contacts. A curious aspect of Mr Hibbert's evidence about these was his initial position of denying that he had been saying anything to any business connections about the divorce. He was adamant that he did not raise the split with anyone or volunteer any private matters. He explained that a number of contacts had asked him about it, particularly after Ms Upton had publicly changed her name from Hibbert back to Upton. His position was that he had explained to them that it was not appropriate to go into it and that he didn't disclose anything personal. His evidence appeared logical and convincing. It was then put to him that his disability seemed not to prevent him from applying an appropriate filter to the work situation in order to separate the personal world from the business world. It seemed he was in control of his actions, despite the emotional pressure of the divorce. Mr Hibbert then sought to restate his earlier answer. In fact, he then said he had been unable to stop himself telling everyone he came into contact with everything about his and Ms Upton splitting up and that he broke down into tears in most of his conversations.

5.29 We find Ms Upton was concerned about this and the effect it was having on the professionalism of the respondent business. We were taken to one such contact in early September 2020 which tends to suggest Mr Hibbert's second answer was closer to the truth. We gained two further insights into the case from this message beyond the concern about the professionalism of Mr Hibbert. One is that it confirmed Ms Upton's position and reputation in the industry. The other is that there may even have been a hint of an approach to her, a

tentative ‘feeler’ as to whether this situation she was in meant she was in the market for a job move.

5.30 We find and accept that it was now as good as impossible to run a small business against that background, even before account is taken of the stress and pressures of trying to do so in an unprecedented national lockdown and at the same time to manage a merger. We find the management burden of those issues fell to Ms Upton. Over the same period, we find the occasions on which it was necessary for the two to work constructively together did not work at all well and presented further indications this was not going to work out. We find both missed meetings. We find both were uncooperative during those meetings, either not contributing or discounting the contribution of the other. We find each alleged the other was failing to provide essential pieces of work they needed to do their job. Problems and issues in the running of the business were simply not getting addressed.

5.31 Viewed objectively, we accept that the attempt to continue working together in the business was clearly not working by the Autumn of 2020. Both parties now agree in their evidence to us that the situation was totally ineffective. For completeness we should add this was not all one way. One way or the other both have a role to play in the state things had got to by September. We are seized of a claim brought by the claimant who understandably seeks to argue that his behaviour was the cause and that that behaviour arose in consequence of his disability. But what has failed here is a long standing personal, private and emotional connection between two individuals who once loved each other. There will undoubtedly have been aspects of Ms Upton’s own emotional strain that caused her to behave in a certain way towards Mr Hibbert. It is not a concern of ours who was at ‘fault’ for the position the two found themselves in the running of the business, for present purposes it is sufficient that they accept they found themselves in a position where it was not workable.

5.32 In September, Ms Upton formally issued the petition for divorce. Around this time, we find the effect the separation was having on her and her view of their ability to work together led her to conclude something had to give. We find as a fact that she decided she would be the one to leave the business.

5.33 She had discussions with her brother, Mr Upton. His response meant her decision was not as simple as she might have hoped. He made clear that he would not continue working with the claimant if she left. Similar feedback was received from other key employees who also indicated that they did not see their future in the respondent without Ms Upton in it. Those responses may sound like the staff were making a choice based on the personalities involved. To be absolutely clear, that is not our finding of fact. All three were clear in their evidence that they understood “the business” was Ms Upton. Without her, their job security would be in doubt. Ms Blurton gave us her reasoning very much from the position of her own personal circumstances and her absolute need to retain long term employment and financial security. We find Mr Upton held a similar view of the role his sister had as the catalyst for the business’ success although his family loyalties and his history of following her professional career will no doubt have also been a factor in his decision making. In short, the commercial reality of Ms Upton not being in the business was a plain enough fact for the staff themselves to recognise its devastating consequences.

5.34 We find Ms Upton informed Mr Menendez of her decision in early October. We accept that he was presented with her decision that she would leave the business. The commercial reality that the staff could see was even more apparent to Mr Menendez. He made clear he had not gone into the business to work with Mr Hibbert, he went into it to work with Ms Upton. Despite that, we find he held and expressed genuine regard for Mr Hibbert. He made clear he had no problem with him as an employee and director and he tentatively explored what steps he could take to resolve the situation. In essence, he was searching for a solution which might keep both in the business. He was prepared to talk with Mr Hibbert and encouraged Ms Upton to consider other options herself. We find he expressed genuine concern about their personal situation. We find he had known of the separation and the divorce earlier that year and he knew that Mr Hibbert was not dealing with things well. We were taken to a long series of Skype messages between him and Mr Hibbert. Our overall impression was of him giving a great deal of personal support to Mr Hibbert. At the same time, we find he was cautious to trespass on matters in the marriage which he regarded as personal to them as husband and wife. He was fearful that his interventions might make the situation worse. We find Ms Upton was private and restrained in the extent of her disclosures to Mr Menendez. As he knew the basic situation, he interpreted her reticence to say much as potentially indicating that she might have been exposed to some form of domestic abuse. We are satisfied this was no more than a fear he held and not something he was told. He was challenged for not investigating that suspicion further. If he had done so, we suspect the result would have been more likely to have reinforced that suspicion and not to dispelled it, but we do not need to say any more that that here. Ultimately, he was forced with taking some action. He did so principally because there was no alternative to one or other leaving the business and the consequences of which of them would leave were as stark and extreme as they could be. If Mr Hibbert left, his role could be replaced and the business would continue. If Ms Upton left, there simply was no business. His conclusion was that he had only one option. We accept Mr Menendez was not entirely comfortable with the situation that had arisen and we can see he wanted to express the decision referencing matters more typical of an employment relationship, but this situation was not based on poor performance or conduct as in a typical employment relationship. It was a personal matter on the end of a marriage and, from his perspective, it had become existential.

5.35 He asked Ms Upton to obtain professional advice in respect of the UK employment law. Advice was sought from the respondent's HR advisers and Ms Upton also spoke with the solicitors dealing with the family proceedings.

5.36 The result of that advice was that a dismissal letter was prepared. Although Ms Upton was literally handling the advice in the UK, it was Mr Menendez in Australia who ultimately accepted it and made the decision to dismiss Mr Hibbert.

5.37 Mr Menendez decided that the decision simply had to be made and communicated. The view taken was that there was no point in adopting any formalities. That was in part down to Mr Menendez being in a wholly different time zone on the other side of the world although that in itself ought not to have been a problem insofar as the employer purports to be able to appoint third party agents to conduct formal meetings such as a termination of

employment. We find the principal reason was the view of the futility that there was any other option available.

5.38 On the morning of Monday, 12 October 2020 Mr Hibbert was sent the letter of dismissal by email. There was some technical confusion first thing that morning as Mr Hibbert could not gain access to his emails. That appears to have been in some part down to the timing of the practical measures that flowed from the decision getting ahead of themselves. Access was restored and he was able to read the letter. It provided: -

a) Dismissal was with immediate effect. He was said to be entitled to one month's notice which was paid in lieu of notice.

b) The reason for dismissal was stated as being: -

We judge the breakdown in your relationship with Katy to be so irreconcilable that it entirely undermines your ability to work together for the good of the business.

In our view there is no longer a relationship of trust and confidence between the directors/ shareholders. It seems to us impossible to expect you and Katy to able to continue to work together closely, which is clearly what would be required for the well-being and success of the business in the future.

c) The letter positively stated there was no route to appeal

d) The letter went on to touch on the consequential implications for the company law relationships.

5.39 We find as a fact that the letter accurately expressed the position and Mr Menendez's genuine belief. We can go further to find that that belief did, objectively, reflect the true state of affairs.

~~5.40~~ On 19 October 2020 Mr Hibbert replied challenging the decision. He challenged the absence of any procedure. He requested documentation concerning himself and alleged this amounted to 'constructive' dismissal ~~ (but~~and that he expected~~has been dismissed)~~

~~5.41~~5.40 to be paid as an employee until matter resolved.

~~5.42~~5.41 In the following correspondence Mr Hibbert asserted his right to his accrued but untaken annual leave. The respondent paid it to him in his final two payments. We have not been given an explanation for why there were two payments but the sums involved look as though he may first have been paid for that much of his 2020 leave accrued to 12 October and then a further payment paid to him for his entire 2020 entitlement, even though his employment had terminated within the year.

~~5.43~~5.42 By November 2020 family proceedings were underway. Correspondence continued on the implications for Mr Hibbert's shareholding and directorship. In the course of these, Mr Hibbert expressed his position as: -

because of everything, I am trying to get contracts as a salesperson

can you both help me with [references] I [know] what is going on is best for the company

i hope after everything we can still be friends I didn't want any of this

6. ISSUE 1 – Holiday

Law

6.1 Regulation 14 of the **Working Time Regulations 1998** provides a right to a worker to compensation for any statutory annual leave accrued but untaken at the date of termination. The entitlement is made up of 4 weeks, derived from the original EU directive, and 1.6 weeks, derived from the subsequent UK amendment equating to a further 8 days for a worker working a 5-day week.

6.2 At the material time, regulation 13(9) provided that the 4 week's leave must be taken in the leave year to which it applies. The additional 1.6 weeks under regulation 13A may be carried over where a relevant agreement permits it. A relevant agreement for these purposes must comply with regulation 2.

6.3 That restriction on carry over is subject to some qualification. The 4-week entitlement may be carried over as of right when the worker has been absent or where he has been otherwise prevented from taking it in certain circumstances (see for example **King v The Sash Window Workshop Ltd C-214/16**). From 26 March 2020, regulation 13(9) was amended to extend the period in which leave could be taken to the two years following the current leave year but only where it had not been reasonably practicable for the worker to take it due to the circumstances and covid-19. That modification can only apply to the leave entitlement in a leave year which included 26 March 2020. It cannot provide any retrospective assistance to carry forward leave accrued in an earlier leave year that the employee was not otherwise permitted to carry forward to 2020.

Discussion and conclusions

6.4 There is a staff handbook and draft contract setting out the local rules. Whilst we have not found there to have been a written contract with Mr Hibbert, we have found those basic provisions would have applied to the circumstances of any leave taken by the directors which is purported to be an entitlement under their contract of employment.

6.5 The key factors in our assessment of this claim are these: -

a) Accrued but untaken annual leave outstanding at the date of termination on 12 October 2020 was paid to the claimant in his November and December wages.

b) There is no claim before us that the claimant is owed compensation for accrued annual leave so far as his 2020 entitlement is concerned.

c) His claim is entirely founded on the assertion that he has carried over annual leave from his 2019 entitlement.

d) The local rules make clear that this is not permitted. We are satisfied that would apply to him in principle. Those rules are consistent with the statutory scheme. There is no relevant agreement permitting him to carry over unused leave.

6.6 The claimant says as a director and shareholder he could grant his own permission to carry over annual leave. There is no evidence of any exemption, there is no evidence of such a practice happening, there is no evidence of the other directors doing it or agreeing to it. In short, other than his assertion in this claim there is no evidence of this happening. There is no place for such informality where a director seeks to enforce a statutory right such as this as between himself as employee and the company as the employer. There is no evidence of agreement to carry over or that any past practice somehow acquired the status of a contractual right. There is no basis, nor necessity, for retrospective agreement. In those circumstances, he must make out his claim according to the statutory rules. We are not satisfied that he has shown there to be any shortfall in his entitlement to the compensation for accrued annual leave paid to him on the termination of his employment.

6.7 Even if there was any untaken leave as of 31 December 2019, the starting point is that he lost it. The next question is whether there was any contractual term or agreement or convention that he carry it over. There was not. The next question is, so far as the outstanding leave represented the 4-week EU leave, has he been prevented from taking it? He had not. The final question is whether the amendments to the regulations in respect of coronavirus serve to extend the period in which that leave can be taken. They do not as this is leave accrued and otherwise lost before the implications of coronavirus and the associated amendment regulations.

6.8 In short, we are not satisfied there is any basis to carry forward as a matter of law. As a matter of fact, we cannot reach a finding that there was any leave to carry forward.

6.9 In conclusion, this is put as a claim under regulation 16. As such, the claimant has to show that there was accrued leave outstanding at the date of termination for which he has not been paid compensation. We are not satisfied he has done that. Moreover, we are satisfied that the sums paid are, by consent, full payment for the leave accrued but untaken during the part of 2020 that the claimant remained an employee.

7. ISSUE 2 - Breach of Contract

Law

7.1 By article 3 of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**, the tribunal has limited jurisdiction to determine a common law breach of contract claim by an employee against an employer. It must relate to a breach of the employment contract, must not fall within the exceptions set out in article 5 and must arise or be outstanding on the termination of the employment.

7.2 It is axiomatic that in any common law claim for breach of contract, the claimant must identify the term of the contract that the employer has breached and the loss that flows from it as a result.

Discussion and conclusions

7.3 Mr Hibbert has not been able to advance any basis on which we could conclude his contract of employment was breached in respect of any entitlement to bonus or commission. The claim fails and is dismissed for the following reasons.

7.4 We heard some evidence of a previous individual bonus scheme under Fortitude Global which was then replaced with a company profit related scheme with Fortitude Nicsa. The blank contract of employment we were shown certainly refers to such a scheme. Mr Hibbert denies he was bound by that contract. In doing so, he abandons the only basis on which he might be able to argue the existence of an express contractual term to any bonus. That is the essential first question in any claim of breach of contract. Having said that, it is equally clear that that provision in that draft contract is expressly stated not to form part of the contract of employment and the scheme it provides is entirely discretional.

7.5 Without a written contractual scheme for us to engage with, we are completely in the dark as to where the breach is said to arise. A claim under the 1994 order is not about fairness or reasonableness, it is a common law claim. Although not argued, we have considered whether there is any need to imply a term into his contract of employment and conclude there is not. First, the conflict with the draft contract which contemplates a non-contractual discretionary bonus scheme would erect an insurmountable hurdle to the necessity of any implied term as to a binding contractual bonus. Secondly, even if we felt we could engage with whether to imply a term, it does not seem necessary in the context of a shareholder-director who is also an employee. Anything not paid out to him as a profit related bonus scheme to an employee remains in the company profits to then be paid out in respect of dividends. There is simply no basis on which such a term needs to be implied into the employment contract and, to be fair, that is not contended for.

7.6 The evidence is such that we are left not knowing what sort of scheme actually did apply, what the applicable reference period might have been, any thresholds or targets, any eligibility criteria and any circumstances in which a prima facie entitlement would be lost. Mr Hibbert does not know either. Frankly, there is absolutely no basis whatsoever for us finding there has been a breach of contract.

7.7 In any event, and in case we are in anyway wrong in the analysis so far, we have found the respondent did not make a profit in the final year so much so that no dividend or bonus was paid for 2020, the covid-19 year. On that basis, no bonus would have been payable to Mr Hibbert.

8. ISSUE 3 – discrimination arising from a disability

Law

8.1 By sections 39(2) and 15 of the Equality Act 2010 it is unlawful for an employer to treat a disabled employee unfavourably because of something arising from his disability, save where that treatment can be shown to be a proportionate means of achieving a legitimate aim. The statute puts it thus: -

> ***"(1) A person (A) discriminates against a disabled person (B) if—***
>
> ***(a) A treats B unfavourably because of something arising in consequence of B's disability, and***
>
> ***(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim."***

8.2 The constituent elements of this statutory tort to be addressed start, therefore, with unfavourable treatment. There is no dispute dismissal amounts to unfavourable treatment.

8.3 Next is whether the reason for the treatment was something that arose in consequence of the disability. We were referred to **Pnaiser v NHS England [2016] IRLR 170** for the proposition, in summary, that the something arising may be part of mixed reasons as long as has some significant influence to amount to an effective cause, that motives are irrelevant and that the something arising may be found in more than one step between the disability and the treatment.

8.4 Next is the causal connection. As with all forms of prohibited conduct where the causal link is based on a test of "because of", the question is to identify what it was that consciously or subconsciously caused the alleged discriminator to act. The burden of making out those essential elements rests with the claimant. He may discharge that burden by satisfying us outright that the "because of test" is made out on the on the evidence on the balance of probabilities in the ordinary way. Alternatively, he may rely on s.136 of the 2010 Act so far as that shifts the burden in certain circumstances. It provides: -

> ***136.Burden of proof***
>
> ***(1)This section applies to any proceedings relating to a contravention of this Act.***
>
> ***(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3)But subsection (2) does not apply if A shows that A did not contravene the provision.***

8.5 In short, the claimant need only prove a prima facie case. If he does prove facts from which we could conclude, in the absence of any other explanation, that the reason for the dismissal was something arising in consequence of his disability, we then turn to the respondent to prove that the treatment was not for that reason.

8.6 We then turn to justification. The first part of which is the legitimacy of the aim relied on by the employer and the second is whether the treatment was proportionate means of achieving that aim.

8.7 The approach to whether an aim is proportionate was considered in **Homer v Chief Constable of West Yorkshire Police [2012] UKSC 15**. That is authority for the following propositions: -

a) The test of proportionality means that the measure (the PCP) had to be both an appropriate means of achieving the legitimate aim and reasonably necessary in order to do so.

b) What is being justified is the PCP, not the discriminatory effect of the PCP.

c) However, part of the assessment of whether the PCP can be justified entails a comparison of the impact of that criterion upon the affected group as against the importance of the aim to the employer.

d) To some extent the answer depends upon whether there were non-discriminatory alternatives available.

8.8 In **Hardy's & Hansons plc v Lax [2005] EWCA Civ 846 [2005] ICR 1565,** it was held that the tribunal itself has to weigh the real needs of the undertaking, against the discriminatory effects of the requirement

8.9 Similarly, in **Bank Mellat v HM Treasury (No 2) [2014] AC 700** Lord Reed set out a four-stage test for proportionality: -

> ***"... it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."***

Discussion and Conclusions

8.10 There is no dispute, nor could there be in most cases, that dismissal amounts to unfavourable treatment. We are satisfied that the reason given for that dismissal was as it was expressed in the letter of termination save that that statement leaves as implicit the fact that a choice had been made between which of Ms Upton and Mr Hibbert would leave the business. The underlying reason of the relationship breakdown entirely undermining their ability to work together for the good of the business is something we accept was genuinely in the mind of the employer and, as a matter of fact, accurately describes the state of affairs reached. The choice between the two UK directors was, as we found, a choice between the business continuing or not continuing.

8.11 The key question is whether the claimant has established that the treatment was because of something arising in consequence of his disability of borderline personality disorder. In contrast to other forms of prohibited conduct, the question under s.15 is not only concerned with the motivating decision making of the alleged discriminator, it will also involve a question of fact as to whether the state of affairs that did cause the employer to act arose in consequence or not.

8.12 In this case, our conclusion is that we are not satisfied Mr Hibbert has shown that his dismissal was because of something that arose in consequence of his disability. First, front and centre of this case is the demise of a relatively long relationship. To an extent, everything flows from the fact that Ms Upton simply fell out of love with Mr Hibbert and did not want to be with him any longer. We are not satisfied that any aspect or manifestation of his borderline personality disorder was material to that. She knew him intimately including all aspects of his personality and behaviour traits which had been present for some time. Something else was happening in late 2019/early 2020 for Ms Upton do decide the relationship had run its course. There is no evidence of a deterioration in 2019 or a particular event that caused her to make the decision she did. Secondly, it is important to our analysis that there was a period between the separation in early 2020 and the dismissal in October. During that period the couple attempted to work alongside each other in the business. As we found, we cannot put it as high as saying either consciously contemplated the idea of trying to continue to work together. It was simply a fact that as they were both connected with the business in the way that they were, they both continued as they did. But it is also the case that the decision that Ms Upton could not work alongside Mr Hibbert was not made at the same time. Something during that intervening period made the difference.

8.13 Thirdly, when Ms Upton realised she could not continue working with Mr Hibbert, her initial and instinctive solution was for her to leave. It is that which then causes the principal reason for dismissal, namely the stark reality for Mr Menendez that he had to choose between them. We are clear that there is nothing in the decision of Mr Menendez which, in itself, arises in consequence of Mr Hibbert's disability.

8.14 However, that then requires us to analyse further what it was that led Ms Upton to decide she could not continue working alongside Mr Hibbert in the business and that she had to leave the business. We are satisfied a large part of that flows from the mere fact of the separation. We do not doubt the proportion of divorcing couples who may be able to maintain professional working relationships as they each build new personal lives may well be a small minority. Any number of reasons arise as to why one might seek a complete separation from the other and it need not, and often won't be, anything objectively done by the unwilling party to the separation. In other words, the reason may be more about the thoughts and feelings of the party seeking the separation.

8.15 However, Ms Upton sets out some matters in her witness evidence that formed at least part of her decision to leave. They were, in summary: -

a) her view about Mr Hibbert's approach to work. In particular that he became disinterested in the business and started working odd hours. He denies that he was disinterested. Indeed he says he was working hard. To the extent therefore that Ms Upton had formed a view which was factually incorrect, it cannot be said that it is something which arises in consequence of a disability.

b) Working odd hours. We have not been able to isolate the reason for this as being a reason arising in consequence of a disability.

c) Continuing to contact her excessively to the point that she blocked him. We ask why does that arise in consequence of disability? We have no expert evidence. This is a very difficult disability to define. Whilst any lay assessment of disability is to be approached with extreme caution, it remains the case that certain disabilities and their underlying impairments are easier to bring within the scope of appreciation of lay people than others. Some might disclose obvious disadvantages and the surrounding state of affairs more easily can be seen to arise in consequence of that disability. Borderline personality disorder is not such a disability that we feel comfortable embarking on lay assessment. On one hand, we can accept that someone with borderline personality disorder may well respond to emotional stressors in a particular way. On the other hand, the way Mr Hibbert responded to the emotional stressors was no different to anyone who does not have this particular disability might, particularly where the stressors come not only from the emotional stressor of a life partner disclosing they were seeking a divorce, but also from the fluid mature of the early stages of the separation where at times it may have looked as though he relationship could be salvaged, not to mention to ongoing practical issues of the children. The draining effect that Ms Upton felt from him pleading with her to take him back and telling her he loved her may well show his actions to be a pretty typical response to that situation and that it was her thought processes that she needed to completely sever ties with him because she found it unbearable which actually forms the operative reasoning for her decision.

d) It is a similar conclusion with the discussions with staff. This was a very small business with few employees working closely together. Ms Upton's view of Mr Hibbert's actions discussing things was primarily that of an ex-wife, embarrassed that he was discussing their personal life although she was also concerned about the fact it compromised her relationship with them as their manager. They were supportive, close and in this small business the lines were not as clearly drawn as might be the case in larger organisations. We are not satisfied that Mr Hibbert over sharing or the manner and frequency of his contact with those staff arose in consequence of his disability. In that context, the same applies to contact with Mr Menendez and contact with industry connections.

8.16 We Therefore cannot conclude any of the material reasons arose in consequence of his disability.

8.17 In any event, we must now turn to justification. It is agreed that "safeguarding the business, including the workforce and investment, from the impact of Katy Upton leaving and preventing the business from closing down" is a legitimate aim. The only issue is whether dismissing Mr Hibbert was proportionate.

8.18 We start with the relative balance between the effect of the treatment on the employee and the aim for the employer. This is stark. If the employer does not dismiss, the business collapses on the departure of Ms Upton and the team. Dismiss Mr Hibbert and the business survives. From Mr Hibbert's perspective dismissal is a serious consequence as it always is but, in this case, that may not carry quite the same implications as it does in other cases. So far as this tribunal's jurisdiction is concerned focusing on his employment status, the

dismissal did not affect his statutory directorship for some time and certainly did not affect his shareholding. His economic relationship with the business was tipped in favour of drawing dividends. Losing his employment meant he lost around £700 per month employment incoming only. The shareholding had previously brought him in the region of £3000 per month which was unaffected by the dismissal, at least directly. Any unfair prejudice that followed to a minority shareholder falls outside our jurisdiction but remains amenable to separate challenge elsewhere. So far as balance between the parties alone is concerned, this would lead us towards a conclusion that dismissal was proportionate.

8.19 However, that is not the only consideration. Another aspect of our analysis is to consider whether there was a less discriminatory alternative to the treatment which would equally have achieved the aim. There is no legal burden on the claimant to disprove justification by pointing to a less discriminatory alternative which remains at all times with the respondent. However, alternatives have to be put in issue. In some cases the alternatives may be obvious to the tribunal on the facts of the case. Otherwise, there is an evidential obligation to raise the point or put it in issue. In this case Ms Pitt for the claimant advanced two alternative courses that she says were less discriminatory options that the respondent could have taken.

8.20 The first is that it is said the respondent could stagger the shifts of Ms Upton and Mr Hibbert so that they could both do their own jobs without the need to communicate. There are three reasons why we have concluded that is not a viable alternative. First, it had in practical terms been in operation over the previous 6 or 7 months whilst Mr Hibbert had been working his unsocial hours. It had not worked then and there was no basis for reasonably thinking it would or even could work. Secondly, it is clearly necessary for the two directors to be able to work together and communicate in order to perform their respective roles. That would not change if they worked different shifts. Thirdly, it does not go anyway towards achieving the legitimate aim because we do not accept that such a proposal would have been something which would have changed Ms Upton's mind about leaving.

8.21 The second less discriminatory course suggested on behalf of Mr Hibbert is for Mr Menendez to discipline him short of dismissal and to impose a restriction that he must not make contact with Ms Upton except for work matters. We reject that for similar reasons to the first. Ms Upton had restricted her contact with the claimant through non-work routes already without success. Mr Hibbert continued to contact her using apparently legitimate work matters and the staff as a means of communication to raise personal matters. Finally, it too does not achieve the legitimate aim because we do not accept that would have been something which would have changed Ms Upton's mind about leaving.

8.22 We have had no other suggestions put to us. For our own part, we are unable to see there were any other options than one of the two directors left the business. The choice that Mr Menendez was presented with gave only one obvious outcome. For those reasons, if we are wrong about our conclusion that the reason for dismissal was a reason arising in consequence of borderline personality disorder, we would nevertheless dismiss the claim on the basis that dismissal was justified in this case.

9. ISSUE 4 - Unfair dismissal

Law

1.1. It is for the respondent to prove the reason for dismissal and that that reason falls within one of the potentially fair reasons for dismissal. Section 98 of the 1996 Act states, so far as relevant:

> ***"(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 sub-section (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) …***
>
> ***(3) …***
>
> ***(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 reasons 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."***

1.2. The legal burden of proving a fair reason for dismissal in fact and law rests with the employer. The true reason for dismissal is a question of fact for us to determine on the evidence. The "reason" referred to in s.98(1) is the set of facts or beliefs operating on the mind of the employer at the time it takes the decision, and causing him, to dismiss. (**Abernethy v Mott Hay and Anderson [1974] ICR 323)**. To discharge the legal burden, that factual reason must itself either fall into one of the specific categories of potentially fair legal reasons defined in s.98(1)(b) of the 1996 Act or be of another kind sufficient to justify dismissal. In this case, the respondent says the state of affairs reached in the break down or working relationships between Ms Upton and Mr Hibbert amounted to a substantial reason of a kind to justify dismissal.

1.3. For a relationship breakdown to amount to a substantial reason the situation must be irredeemable. In practice, that means exhausting every step short of dismissal to try to improve the relationship (**Turner v Vestric Ltd [1980] ICR 528**). That reason must satisfy the long-standing requirement that for such a reason to amount to a substantial reason it must not be whimsical or capricious (**Harper v National Coal Board [1980] IRLR 260**).

1.4. If the employer discharges this burden, we then consider the test within s.98(4) of the 1996 Act on the evidence before us, the burden then being neutral. In applying that test we have had regard to the approach in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** and also **Post Office v Foley [2000] IRLR 827**. A reasonable procedure is central to the test of fairness and the range of reasonable responses applies as much to the steps taken to reach a decision as the decision itself (**Sainsbury's Supermarkets Ltd v Mr P J Hitt [2002] EWCA Civ 1588**). The final consideration is whether, everything else being within the range of reasonable responses open to a reasonable employer, the sanction imposed by the employer was itself one that was reasonable. In other words, was the sanction of dismissal a response that was reasonably open to the hypothetical reasonable employer or not.

9.1 On the question of the effect the procedure, or absence of a procedure, has on the fairness and reasonableness we have had regard to the following propositions.

a) There is nothing in section 98(4) which requires any particular form of procedure, whether notice, information, meetings or appeal.

b) It is no part of a fair dismissal for procedure to be conducted simply for the sake of it if the procedure is truly pointless. (**The Jefferson (Commercial) LLP v Westgate UKEAT/0128/12**)

c) For the failure to hold some part of an expected procedure to be a satisfactory reason for holding the dismissal to be unfair, the tribunal must set out what it is about the absence of the procedure that made what would otherwise have been a fair dismissal something that was unfair. In other words, fairness is not in abstract. (**Express Medicals Ltd v Mr J O'Donnell UKEAT/0263/15**)

d) What is required when a dismissal on that ground is in contemplation is that the employer should fairly consider whether or not the relationship has deteriorated to such an extent that the employee in that position cannot be re-incorporated into the workforce without unacceptable disruption. (**Phoenix House Ltd v Stockman [2016] IRLR 848**)

e) It is well settled that the question of whether adopting a procedure would have made any difference to the outcome or not is not in itself a permissible question at the liability stage. (**Polkey v AE Dayton Services 1987] UKHL 8**). However, in Polkey Lord Bridge of Harwich went on to qualify that in one specific situation: -

> ***It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of 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, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [section 98(4)] may be satisfied***

9.2 The ACAS code on discipline and grievances and s.207 TULCRA does not apply to this type of dismissal (**Phoenix House**). To the extent there is any conflict between that and the earlier EAT decision of **Lund v St Edmund's School Canterbury [2013] UKEAT / 0514/12**, we regard the later case of Phoenix House as binding as it addresses the point as part of the ratio.

Discussion and conclusions

9.3 We are satisfied that the principal reason for dismissal was the fact that the two married directors were separating, Ms Upton could not continue to work with Mr Hibbert and Mr Menendez had to choose between one of them going and the consequence of the business continuing or not. We are satisfied the respondent has established that was the true reason. We are satisfied that in the circumstances of this case that amounts to a substantial reason of a kind sufficient to justify dismissal. It was genuine, substantial and could not be said to be whimsical or capricious. At this stage of the test, we are concerned only with whether the reason could be a fair reason, not that it is. That is what we turn to next with the question of fairness under section 98(4).

9.4 We are satisfied that the discussions Mr Menendez had with Ms Upton were sufficient in the circumstances of this case to fall within the range of reasonable responses for him to form a reasonable belief about the state of affairs. In reaching that conclusion we have regard to the fact that he did not accept her position without question. He did probe the situation albeit his questions were understandably reserved as he viewed the underlying situation principally as a matter between husband and wife which had now detrimentally spilled over into the business. He considered alternative remedial action on his part. We are satisfied that so far as he needed to investigate the situation the focus of that was on Ms Upton's decision to leave. We are satisfied he had sufficiently enquired and formed a view that was reasonably open to him to believe (and was indeed accurate) of the reality of Ms Upton's desire to leave and the consequences to the business which were in any event obvious on that event. We are satisfied it was reasonably open to the reasonable employer in this situation for him to accept her account of the view the other staff had about what would happen if she left.

9.5 Of course, over and above that, Mr Menendez had first-hand experience of the problems the couple's break-up was having on the business through his own dealings with both parties which corroborated the view that the relationship was not working. The reality is that he had obtained sufficient information about the situation, he had given thought to alternative options and he had concluded that there really was no alternative other than Mr Hibbert was removed from the business. For our purposes that means his employment contract was terminated. We are satisfied all of that was within the range of reasonable responses. In itself, that would make the dismissal fair.

9.6 However, we have given extensive consideration to the lack of procedure. All three members of the tribunal have an instinctive problem with the approach taken. This was a case of dismissal by letter, no hearing and no appeal. None of the panel can recall a case of this nature and none can recall finding a dismissal fair with absolutely no procedure. We have spent some time putting to one side our instinctive response and revisiting the law and its application to these facts.

9.7 The authorities we have cited make clear that section 98(4) does not in terms say an employer must follow any particular process before dismissing. It simply requires that in order to fall with the test, what happened in fact in the particular circumstances of the case, and having regard to the equity and substantial merits, must fall with the range of reasonable responses that a reasonable employer could have adopted in the situation. In order for us to say that a failure to take one, some or any procedural steps we might expect to see was enough to amount to unfairness, it is necessary to go beyond a mere bald statement to that effect. We have to be able to articulate what it was about the absence of the process which renders the decision unfair. That will usually be obvious having regard to the tenets of natural justice. If an employer accuses an employee of something, that employee has to be able to know the case against him, challenge it and respond. Other cases may have a different focus such as requiring improvements to be made, or selection between different post holders or to establish a future improvement in attendance. Whatever the underlying issues are that lead to contemplation of the employment relationship ending, it is easy to see where the requirement for some sort of process is essential to the question of fairness. It is equally easy to articulate the nature of the unfairness that in fact arises where some aspect of process is not followed.

9.8 In this case, we have come to the conclusion that this dismissal in these very specific facts fell within the range of reasonable responses of a reasonable employer with the result that it was fair. This employment is not in the nature of the typical employment relationship. It is complicated by two other status considerations, either of which could be a basis for taking the exceptional approach to the termination. One is the breakdown of the marriage, the other is that the parties are all members and directors of a very small limited company. Whilst that does not in itself mean the legal obligations in the employment relationship can be ignored, it does mean the nature of the parties' dealings is characterised more by their family or company law relationships than what typically arises in a true employer-employee relationship. To be clear, this does not alter the test of reasonableness, it merely colours the lens through which we consider that test. Secondly, it was within the range of reasonable responses for the reasonable employer in this case to ask itself what is going to be achieved by adopting a procedure. To be clear that is not to say we have concluded there is no unfairness because any procedure would have made no difference, although that is our conclusion for the purpose of Polkey. There is no unfairness because it was open to the employer to reasonable make that decision at the time it dismissed. There is also no unfairness because we are unable to articulate the unfairness as a matter of fact that arises from the failure to embark on any process. Whether that is prior warning, communicating the concerns, holding a meeting or permitting an appeal, the reality is that it was clear to Mr Menendez that there was nothing that Mr Hibbert could say or do to alter the situation that Ms Upton could not work with him in the business and one of them had to go. That is not directly about him or anything he could change.

9.9 If there is unfairness in the lack of process, we are required to address Polkey and, more specifically, the just and equitable question posed by section 123 of the 1996 Act to consider losses arising in consequence of the dismissal. For present purposes we are satisfied with a degree of certainty we can rarely express, that any form of process would

have resulted in the same outcome. If Mr Menendez had explored with the other staff their views about one of the directors, we are satisfied he would have had confirmed the fact that they would not work with Mr Hibbert. If he had explored his nagging suspicion that there was some domestic abuse in the background explaining Ms Upton's reluctance to open up, he would have had that suspicion reinforced. If had held a meeting or otherwise put his position to Mr Hibbert in advance of making the decision, there is nothing that could have been said that could reasonably have altered the course that was in fact taken. Nothing would change Ms Upton's position. We have concluded that if we are wrong in our principal conclusion and the procedure adopted renders the dismissal unfair, there would in any event have been a reduction in compensation under s.123 of the 1996 Act by 100%.

EMPLOYMENT JUDGE R Clark

DATE 16 July 2022

JUDGMENT SENT TO THE PARTIES ON
30 July 2022

AND ENTERED IN THE REGISTER

FOR SECRETARY OF THE TRIBUNALS