Case No. 1403254/2022

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**AND**	**RESPONDENT**
Mr W. Parshall		**LREsystem Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held by Cloud Video Platform **on Monday, the 20th March 2023 and Tuesday, the 21st March 2023**

Employment Judge: **Mr D. Harris (sitting alone)**

Representation:

For the Claimant: **Miss Helena Ifeka, counsel, instructed by Keystone Law**

For the Respondent: **Mr David Laskow-Pooley (a director of the Respondent company)**

JUDGMENT

1. The claimant succeeds in his claims of unfair dismissal and arrears of pay.

2. In respect of the claim of unfair dismissal, there shall be judgment for the claimant in the sum of £14,213.00 comprising:

(1) the sum of £1,713.00 in respect of the Basic Award;
(2) the sum of £12,500.00 in respect of the Compensatory Award (inclusive of the sum of £500.00 in respect of the loss of statutory rights).

3. In respect of the claim for arrears of pay, there shall be judgment for the claimant in the sum of £74,800.00 (gross).

REASONS

1. By his Claim Form received by the Tribunal on the 12th October 2022, the claimant brings claim against the respondent alleging (i) unlawful deduction from his wages and (ii) unfair dismissal.

2. The respondent is a medical technology company, which was incorporated, according to Companies House records, on the 27th September 2017. The company produces an elbow resurfacing product which goes by the name of the LRE system. LRE stands for "lateral resurfacing elbow".

3. At the time of incorporation, the directors of the respondent included David Laskow-Pooley, Mr Joseph Pooley and Mrs Jane Pooley.

4. For some time prior to the incorporation of the company, Mr David Laskow-Pooley and Mr Joseph Pooley had known the claimant through his involvement with other medical technology companies. The claimant's professional background was in the field of marketing.

5. On the 22nd December 2017 a consultancy agreement was entered into between the claimant's company, Orthopedia Consulting Limited, under which the claimant's company agreed to act as an independent consultant for the respondent. The consultancy agreement commenced on the 1st January 2018.

6. Clause 6 of the consultancy agreement made the following provision for the remuneration of the claimant:

> **Consulting Fee: For the provisions of the Services, the Company shall pay to the Consultant a Consulting Fee in accordance with Schedule 2 to this agreement. The Consultant shall invoice the Company by the 7th day of the month in respect of i) the Consulting Fee for the previous month and ii) expenses in accordance with Clause 4 above for the previous month. Receipts are to be held by the Consultant and provided upon request as required by Clause 4 above. The Company will make payment to the Consultant within 14 days, and with a backstop of the 21st of the month in which the invoice is provided. Any disputes are to be raised within the same period and resolved expeditiously in good faith by both parties. For the avoidance of doubt, scanning and emailing of invoices and receipts is agreed to be acceptable to both parties.**

7. Schedule 2 to the agreement contained the following provisions as to the "*consulting fee*":

> **1. Subject to the thresholds in paragraph 2 below being met, the Company will pay a Consulting Fee as follows to the Consultant:**

a. For the period 1 January 2018 to 28 February 2018, a fee of GBP100 per hour worked by the Consultant's representative; and
b. From 1 March 2018, a fee of GBP4,000 per calendar month.

2. The Consulting Fee will be increased as follows:
a) From the initial LRE device system sale: a fee of GBP5,000 per calendar month
b) From Sales attaining 25 LRE device systems per calendar month: a monthly fee of GBP6,000
c) From Sales attaining 35 LRE device systems per calendar month: a monthly fee of GBP7,000
d) From Sales attaining 45 LRE device systems per calendar month: a monthly fee of GBP8,000.

3. All payments are exclusive of VAT, if applicable.

4. If a threshold trigger is reached under paragraph 2 above, the relevant payment applies for that full month's Consulting Fee.

5. Once a threshold trigger is reached under paragraph 2 above, the increased payment applies even if Sales drop in subsequent lmonths.

6. Once monthly payments have commenced, there is no set requirement in regards to the hours to be worked by the Consultant's representative.

8. Clause 8 of the consultancy agreement was headed "*One agreement*" and it provided as follows:

> **All the terms of the agreement between the Consultant and the Company are set out in this agreement and the schedules attached (which form part of the agreement), the Company Confidential Disclosure Agreement and the Shareholders Agreement to be entered into by the Shareholders of the Company and may only be varied by agreement in writing between the Consultant and the Company.**

9. Clause 9 of the consultancy agreement made the following provision as to the claimant's status:

> **Independent contractor: During the term of this agreement, the relationship of the Consultant and the Consultant's representative to the Company shall be that of independent contractor and not that of**

employee. As a result the Company will not be responsible by virtue of this agreement or otherwise for the payment or deduction of any amount whatsoever required by law to be made by an employer in relation to its employees. The Consultant's representative will not be covered by any Company life, accident or travel policy, pension provision or any other Company insurance policy not available to any member of the public.

10. The consultancy agreement continued until the end of March 2020. On the 30th March 2020, the claimant entered a contract of employment with the respondent. Under the terms of the written contract of employment, the employment commenced on the 1st April 2020. The claimant's job title was Global Head of Marketing. Relevant to the present claim are the following provisions of the written contract of employment:

2.1 The Appointment shall commence on the Commencement Date and shall continue, subject to clause 2.2 and the remaining terms of the agreement, until terminated by either party giving the other not less than 3 months' prior notice in writing.

2.2 Notwithstanding clause 2.1, if within 6 months from the Commencement Date, the Employer ceases trading, either party can terminate the Appointment with immediate effect.

…

7.1 The remuneration and minimum working hours of the Employee will be calculated as set out in the table below:

Trigger	Monthly salary	Minimum Weekly Working hours
Commencement	£4800	15
Initial LRE device system invoiced sale	£5000	16
Invoiced sales of 25 LRE device systems in a calendar month	£6000	19
Invoiced sales of 35 LRE device systems in a calendar month	£7000	23
Invoiced sales of 45 LRE device systems in a calendar month	£8000	26
Invoiced sales of 55 LRE device systems in a calendar month	£9000	29

Invoiced sales of 60 LRE device systems in a calendar month	**£10850**	**35**

7.2 If a trigger is reached in a calendar month then the new salary level and contractual working hours will apply from the following calendar month.

7.3 Once a salary level has been reached for a calendar month, then that amount will continue to be paid until the next trigger level is reached, regardless of the number of sales of LRE system devices in the intervening months.

7.4 The Employer's salary shall accrue from day to day at a rate of 1/365 of the Employee's annual salary and be payable monthly in arrears on or about the 15th of each month directly into the Employee's bank or building society.

7.5 The Employee's salary shall be reviewed by the Board annually, the first such review to take place on 1 April 2021. The Employer is under no obligation to award an increase following a salary review. There will be no review of the salary after notice has been given by either party to terminate the Appointment.

7.6 The Employer may deduct from the salary, or any other sums owed to the Employee, any money owed to the Employer by the Employee.

…

9.1 The Board may in its absolute discretion pay the Employee a bonus of such amount, at such intervals and subject to such conditions as the Board may in its absolute discretion determine taking into account specific performance targets, as agreed between the Employee and the Board from time to time.

9.2 Any bonus payment to the Employee shall be purely discretionary and shall not form part of the Employee's contractual remuneration under this agreement. If the Employer makes a bonus payment to the Employee in respect of a particular financial year of the Employer (being the period from January 1 to 31 December 2020, it shall not be obliged to make subsequent bonus payments in respect of subsequent financial years of the Employer.

9.3 The Employer may alter the terms of any bonus targets or withdraw them altogether at any time without prior notice.

9.4 Any bonus payments shall not be permissible.

…

13.1 Provided that the Employee holds a current full driving licence, the Employee shall receive a car allowance for use of the Employee's own car of £12,000 per annum which shall be payable together with and in the same manner as the salary in accordance with clause 7. The car allowance shall not be treated as part of the basic salary for any purpose and shall not be pensionable.

13.2 The Employer shall reimburse the Employee in respect of fuel costs for business miles at the Employer's business mileage rate and reasonable private mileage.

13.3 The Employee shall immediately inform the Employer if he is disqualified from driving and shall cease to be entitled to receive the allowance under clause 13.1 or reimbursement of fuel expenses under clause 13.2.

…

17.1 Notwithstanding clause 2.1, and provided that clause 2.2 does not apply, the Employer may, in its sole and absolute discretion, terminate the Appointment at any time and with immediate effect by notifying the Employee that the Employer is exercising its right under this clause 17 and that it will make within 3 months a payment in lieu of notice (Payment in Lieu), or the first instalment of any Payment in Lieu, to the Employee. This Payment in Lieu will be equal to the basic salary (as at the date of termination) which the Employee would have been entitled to receive under this agreement during the notice period referred to at clause 2 (or, if notice has already been given, during the remainder of the notice period) less income tax and National Insurance contributions. For the avoidance of doubt, the Payment in Lieu shall not include any element in relation to:

- **(a) any bonus or commission payments that might otherwise have been due during the period for which the Payment in Lieu is made;**
- **(b) any payment in respect of benefits which the Employee would have been entitled to receive during the period for which the Payment in Lieu is made; and**
- **(c) any payment in respect of any holiday entitlement that would have accrued during the period for which the Payment in Lieu is made.**

17.2 The Employer may pay any sums due under clause 17.1 in equal monthly instalments until the date on which the notice period referred to at clause 2 would have expired if notice had been given. The Employee shall be obliged to seek alternative income during this period and to notify the Employer of any income so received. The instalment payments shall then be reduced by the amount of such income.

17.3 The Employee shall have no right to receive a Payment in Lieu unless the Employer has exercised its discretion in clause 17.1. Nothing in this clause 17 shall prevent the Employer from terminating the Appointment in breach.

17.4 Notwithstanding clause 17.1 the Employee shall not be entitled to any Payment in Lieu if the Employer would otherwise have been entitled to terminate the Appointment without notice in accordance with clause 18. In that case the Employer shall also be entitled to recover from the Employee any Payment in Lieu (or instalments thereof) already made.

11. The claimant's employment commenced 8 days after the countrywide Covid-19 lockdown that was imposed on the 23rd March 2020.

12. On the 6th April 2020, the claimant was also appointed a director of the respondent.

13. By September 2021, the respondent had only sold one of its LRE device systems. That sale appears to have occurred in June 2020.

14. There is no doubt that the effects of the Covid-19 pandemic negatively impacted the respondent's plans for trading and, as a result, efforts began to be made by the directors to sell the company to a third party. On the 17th September 2021, Mr David Laskow-Pooley sent the following email to shareholders:

> **As you are aware, we were provided with an offer of investment from Aedesius, to place capital into the company, together with the prospect of purchase of some of the current shares, enabling a partial exit. Through the intervening period, economic conditions have continued to be impacted by the ongoing pandemic. These have not only affected our ability to commercialise, we have only been able to sell one LRE implant set since April 21, but also Aedesius's own ability to complete their own investment and other related deals.**
> **We have therefore rather limped on over the past months, reducing outgoing costs to a minimum.**
> **The period has also shown both Aedisius and us that recovery from the pandemic in terms of surgical procedures, together with the introduction of what is viewed as a new device, is likely to take substantially longer than envisaged even a few months ago and will undoubtedly involve greater capital expense in the process. By way of example, we have only been able to sell one LRE set since April 2021.**
> **Aedesius have re-evaluated their offer, following in-depth review of the global economic situation, the market and the overall positioning of the LRE set within it and have revised it from one of investment into and partial exit offering to one of a bid for the company as a whole. The exact share price will be confirmed immediately prior to completion but will be in the range of 2-2.5 times return for the friends and family investment rate of £2.14.**
> **This will we believe not only provide a healthy return upon investment but will also ensure that the LRE set receives the significant capital**

input and additional time required to full commercialise, resulting in patients globally being able to receive the correct treatment for their very debilitating elbow pain …
Whilst we are not there yet, and deals can fail to be completed, we feel comfortable that the proposed sale to Aedesius, is the most positive route for the shareholders of LREsystem Ltd and are therefore give it our wholehearted support.
We would therefore ask for your support in its acceptance and your permission for us as Directors to sign on your behalf.
We look forward to hearing from you and to then providing you with updates as we move from non-binding acceptance to closure over the forthcoming period.

15. From August 2021 onwards, the respondent ceased paying the claimant's salary. On the 16th November 2021, the claimant emailed Mr Laskow-Pooley expressing his concern that payment of his salary had stopped and requested immediate payment of the salary arrears. Mr Laskow-Pooley replied on the 17th November 2021 in a short email, saying that the claimant deserved a fully reply, which would shortly be forthcoming. No such reply was forthcoming and on the 11th February 2022, the claimant contacted Mr Laskow-Pooley again about his ongoing unpaid salary. He indicated that he had been in touch with ACAS and that he was contemplating Employment Tribunal proceedings. The amount due to him at that stage was £44,600 (gross). He asked what was the respondent's plan to pay his outstanding salary.

16. A Zoom meeting took place with the claimant and the respondent on the 18th May 2022. There is little evidence about the detail of what was discussed at that meeting though it is clear that the decision to dismiss the claimant was taken by Mr Laskow-Pooley at that meeting. It is equally clear that the decision to dismiss the claimant was not clearly communicated to the claimant at the meeting on the 18th May 2022. It was on the 28th May 2022 that the claimant received a notice of termination of his contract of employment. The letter of dismissal stated as follows:

> **As you know, there has been considerable discussion between us about the nature of your position in the company for a number of months now.**

We mentioned during our recent Zoom meeting that you had pointed out as early as September last year that the company simply could not afford you in your current role. In retrospect, you were of course quite right (as ever) but we had thought that in fairness to you as an important member of the company from the very start, and your contribution to its development since, your employment should continue unchanged, if at all possible.

In other words, we thought that it was in your best interests for you to remain as an employee in the company despite the financial situation towards the end of last year of which of course, like us, you were aware and, like us, have remained aware since.

We appreciate your decision to remain with us during this time despite knowing that you were working 'at risk' as far as future remuneration was concerned, and consequently we kept you appraised of all the developments as they occurred.

For our part, we felt comfortable in the knowledge that the success of the company would ensure that your initial shareholding and subsequent tranche of 'sweat equity' shares would then prove to be of considerable value and compensate for all your hard work. We acknowledge however that there was a degree of risk involved in this is as our company is effectively a 'Technology start-up, company' and consequently there is a significant degree of inherent risk.

As you know, the company has two options. One option is an outright sale of the company to a corporate group. The other option is to obtain significant investment with a view of growing the company to the point at which it would be attractive to a corporate group within the next 18-24 months.

It is clear however that whichever of these two options becomes available to us, your role in its current form would no longer exist.

If the company was acquired by third party then your role would become an integral part of their internal commercial group.

The investment option would result in an outsourcing of our commercial functions to a third-party and, as you know, we are in discussions with Ortho Consulting Group and we anticipate signing an agreement with them very soon.

They would therefore then act as our commercial arm within the UK and Europe and will assist us directly or indirectly into other markets, including the USA and the Far East.

Consequently, as the structure of the company is changing, and your role will inevitably become redundant, we are now placing you on notice as of this date.

We will naturally continue to communicate with you about business matters throughout your notice period until the last day of your employment, the 28th August 2022, which would be the end of your 3 month notice period.

We do of course respect your statutory rights and we will endeavour to honour these in full providing of course that the company has the capability to do so.

We well understand that you have not received any salary since August 2021 (last salary paid on Friday 27th) and since that time the

amount you are due has continued to accrue. We also understand that there was an underpayment of £200 per month since the end of June 2020, which is something which both you and I inadvertently missed.
We do not think we need to remind you of our current financial position and/or the risks involved in an investment raise, however I can confirm that the company does intend to pay your remuneration in full. We would do that immediately on completion of an acquisition by any of the companies with we are currently in discussioins.
If there is no acquisition achieved with these companies but instead we agree a significant investment then the company would immediately pay you 20% of your outstanding salary on completion of the investment deal. The remainder of your outstanding salary would then be paid within a 12-month period after the company attained a cash flow positive position.
This agreement would be subject to their being no restrictions being placed upon the use of proceeds from the significant investment raise. If such restrictions were placed upon us and if we were then unable to pay the initial 20%, the whole sum would then be paid within 12-month period of the company achieving a cash flow positive position.
We would like to take this opportunity to thank you for all your hard work, expertise and input in developing the company to its present position.
On a personal level, we would very much like you to continue to be involved in LREsystem Limited, going forwards.
Furthermore, as a shareholder, we hope that you will share in and benefit from the success of the company, which is something that you fully deserve.

17. The claimant's last day of employment was the 28th August 2022.

The evidence

18. I heard evidence first of all from Mr Joseph Pooley. His witness statement stood as his evidence-in-chief. He stated that a CE mark had been awarded to the respondent in respect of the LRE device system in March 2020. He stated that the first Covid lockdown resulted in a virtual cessation of elective orthopaedic surgery and that then effectively prevented sales of the respondent's product. The financial position of the company became increasingly precarious. The finances of the company did not allow active marketing

operations or surgical development or teaching on its product to take place.

19. I then heard evidence from Mrs Jane Pooley. Her witness statement stood as her evidence-in-chief. She stated that there had been a meeting with the claimant on the 3rd March 2021 due to delays in sales resulting from the Covid pandemic. The view, on behalf of the respondent, was that the respondent would not be able to continue to employ the claimant on his current terms. Mrs Pooley stated that the claimant was asked to consider his options of which there were three: namely, defer receipt of his salary or resign and revert to being an independent consultant or simply look for alternative employment. Mrs Pooley confirmed, however, that there was no concrete outcome following the meeting on the 3rd March 2021.

20. I then heard evidence from Mr Laskow-Pooley. His witness statement stood as his evidence-in-chief. He stated that it was his understanding that the claimant had accepted, first of all, the consultancy agreement and then his employment contract subject to an overarching business partnership with the respondent under which it was agreed that the respondent would only pay the claimant his consultancy fees and, later, his salary when the respondent was in a position to be able to afford to do so. As to the Zoom meeting on the 18th May 2022, which preceded the letter of dismissal sent to the claimant on the 28th May 2022, Mr Laskow-Pooley stated that the claimant was not informed of any right to appeal against any decision to dismiss him at the meeting on the 18th May 2022 and no alternative roles for the claimant within the respondent's organisation were discussed. Mr Laskow-Pooley's position was that the respondent had treated the claimant reasonably in all the circumstances. Mr Laskow-Pooley did not dispute the arrears of pay claimed by the claimant but he stated that it was not payable yet pursuant to a term of the alleged business partnership with the claimant under which the salary would only be paid when the respondent could afford to do so.

21. I then heard evidence from the claimant. His witness statement stood as his evidence-in-chief. He disputed that there was an overriding business partnership and he disputed that there had been any agreement to vary the terms of his contract of employment. He stated that in his marketing role, he had no intimate knowledge of the financial affairs of the respondent. He was nevertheless aware, particularly following the cessation of payments of his salary from August 2021 onwards, that the respondent was struggling financially. He was aware that efforts were being made by Mr Laskow-Pooley to sell the respondent company but the claimant was not directly involved in the sale negotiations. When he received the letter of dismissal on the 28th May 2022 he had had no warning that he was about to be dismissed but he said that it was not unexpected to receive the letter of dismissal. By that stage he had not been paid his salary for some nine months.

The findings of fact

22. I find that an informal business arrangement was entered into and developed between the parties from 2016 onwards. I accept Mr Laskow-Pooley's characterisation that the early arrangement was a joint enterprise between a group of individuals with different sets of skills. Their joint intention was to bring the respondent's product to the market place.

23. The joint enterprise resulted in the incorporation of the respondent company in September 2017 and in December 2022 it was decided that the respondent company would formally engage the claimant as a consultant under the written terms of the consulstancy agreement to which I have referred.

24. I find that by March 2020, notwithstanding the arrival of the Covid-19 pandemic on the shores of the UK and the uncertainties that that must have given rise to in respect of the respondent's business plans, it was decided that the claimant's status would be changed from independent consultant to employee. I find it was mutually beneficial to both parties for that to take place. There were tax changes due to

be implemented in April 2020 which made it beneficial to both parties that the claimant be an employee rather than an independent contractor. There was also some benefit to the claimant arising from business asset disposal relief that might be available to him if he became an employee.

25. I find that a draft written contract of employment was found on the internet by the claimant and he provided the draft to the respondent. The claimant's wife, who happens to be a commercial solicitor, gave him some informal legal advice about the terms of the contract. I find that Mr Laskow-Pooley thoroughly reviewed the draft contract before it took its final form.

26. I find that the trigger for the claimant's salary to increase (i.e. the sale of an LRE system) occurred in June 2020.

27. I find that the increase in pay to which the claimant was entitled following that trigger event was not paid to him by the respondent.

28. I also find, it not being in dispute, that the respondent stopped paying the claimant's salary completely from August 2021 onwards. I am satisfied that the reasons for the non-payment of the salary were the financial difficulties that the respondent found itself in following the impact of the Covid-19 pandemic. Having sold one of its products in June 2020, it appeared that no further products were sold after that time. There was simply no demand for the respondent's product at that time. It was as a result of the respondent's financial difficulties that the respondent's attention became focused on selling its business to a third party. Unfortunately, though some potential purchasers were found and negotiations took place, no sale of the business occurred.

29. I find that by the 18th May 2022, when the Zoom meeting with the claimant took place, a decision had already been made by the respondent to terminate the claimant's contract of employment. That decision was communicated to the claimant by means of a letter of dismissal sent on the 28th May 2022. I find that there was no consultation with the claimant about his impending dismissal or alternative roles that might be found for him within the respondent's organisation prior to the dismissal. The meeting on the 18th May 2022 was an opportunity for there to be some consultation regarding the redundancy situation that the claimant faced but no real consultation took place regarding the redundancy. The purpose of the meeting appears to have been to discuss the financial difficulties that the respondent was facing due to the effects of the Covid pandemic. The clear impression given to the Tribunal by the respondent's witnesses was that they just expected, or hoped, that the claimant would resign given the financial difficulties that the respondent faced and wait patiently to receive his arrears of pay when the respondent was in a position to pay them.

<u>My decision</u>

30. Dealing first of all with the claim for arrears of pay. The respondent contends that the claimant is not entitled to his unpaid wages from August 2021 to the date of the termination of his contract of employment because of the informal business partnership between the claimant and the respondent's shareholders (following the incorporation of the respondent company) under which it was agreed that the claimant's salary would only be paid to him when the respondent could afford to pay the salary and a further that the claimant would accept deferment of the payment of his salary until such time as the respondent was in such a financial position as to be able to pay the salary. I note that it is the respondent's case that it continues to be in a position to be unable to pay the claimant's arrears of pay. The respondent further contends that the contract of employment is unenforceable because there was a failure on the part of the claimant to advise the respondent to seek independent legal advice regarding the contract of employment before signing it. That contention stems from the fact that the claimant received some informal advice from his wife about the contract of employment. The respondent contends that it was incumbent upon the claimant and/or his wife, in those circumstances, to advise the respondent to seek its

own legal advice about employing the claimant under a contract of employment.

31. There is a particular difficulty that the respondent faces in respect of the argument that there was an overarching business partnership between the claimant and the respondent under which it was agreed that the claimant's salary would only be paid when the respondent could afford to do so and under which the claimant agreed to defer receipt of his salary. The difficulty is that that contention was not pleaded in the respondent's response to the claim or dealt with at all in the respondent's evidence. It only arose as an issue when the claimant was being cross-examined. For that reason alone, this particular contention raised by the respondent must fail but, for reasons of completeness, I will go on to explain why the contention was, in any event, doomed to fail.

32. I am satisfied that whatever the business relationship was between the parties before the consultancy agreement, that the relationship between the claimant and the respondent was subsequently regulated entirely by the consultancy agreement and then by the employment contract. I am satisfied that the respondent entered into the contract of employment with its eyes open. The contract had been thoroughly reviewed by Mr Laskow-Pooley and there was ample opportunity for the respondent, if it had so wished, to obtain legal advice about the contract of employment. Mr Laskow-Pooley accepted before me that it was in the mutual beneficial interests of the parties to enter into the contract of employment. There were legal consequences of so doing, the main one being that the claimant became an employee of the respondent under the written terms of the contract of employment. I reject the contention that the terms of the contract of employment were somehow subservient to an informal enduring business partnership between the claimant and the respondent's shareholders. I reject too the notion that there was a duty of care on the claimant or his wife to advise the respondent to seek independent legal advice about the contract of employment. I am satisfied that there was no inequality of bargaining power between the parties to have justified the existence of such a duty of care. I am satisfied that the contract of employment was binding upon the parties and that no basis has been shown to exist as to why the

written terms of the contract should be amenable to variation because of the informal and unwritten business partnership contended for by the Respondent.

33. The claimant therefore succeeds in his unlawful deduction of wages claim, it not being disputed by the respondent that the claimed sum is owed by the respondent to the claimant and the respondent having failed in its contention that there was an enduring business partnership between the claimant and the respondent that took precedence over the terms of the contract of employment.

34. Turning to the claim of unfair dismissal, the first question to consider is whether the respondent has established a prima facie fair reason for the dismissal under section 98 of the Employment Rights Act 1996. The reason for the dismissal advanced by the respondent is redundancy and so I then have to consider whether there was a redundancy situation within the meaning of section 139 of the 1996 Act. If I find that there was a genuine redundancy situation, I then have to consider whether that was the operative cause of the claimant's dismissal. If I find that redundancy was the operative cause of the dismissal, I then have to determine whether the dismissal was fair in all the circumstances as defined in section 98(4) of the 1996 Act, which involves two questions: firstly, did the respondent act reasonably or unreasonably in treating the redundancy as a sufficient reason for the dismissal and, secondly, the fairness or unfairness of the dismissal is to be determined in accordance with equity and the substantial merits of the case.

35. I am satisfied that a redundancy situation within the meaning of section 139(b)(i) of the 1996 Act existed at the time of the claimant's dismissal. The respondent was in the business of selling its LRE system kits. They had sold one in June 2020. Its business was therefore obviously failing. I am satisfied that that would have been obvious to the directors and to the claimant as an experienced marketing expert. Though it is not necessary, in the context of considering section 139 of the 1996 Act, to examine the underlying causes of a redundancy situation, the fact that the respondent was

not selling any of its product, bar one, was, I am satisfied, down to the effects of the global Covid-19 pandemic. There being no demand for the respondent's product, the requirement of the business for the claimant to carry out marketing activities had ceased or certainly diminished. I am accordingly satisfied that a redundancy situation arose in 2021 when the respondent became no longer able to pay the claimant's salary, and the situation was still persisting in May 2022.

36. I am also satisfied that the redundancy situation was the operative cause of the claimant's dismissal. The reality, I find, was this. The claimant was legitimately demanding that he be paid his salary. The respondent was not in a financial position to be able to pay the salary because of the effects of the Covid-19 pandemic upon its business activities. Put bluntly, the respondent was simply not trading. It was not selling its product. The claimant had been more than patient in waiting the length of time that he had in the hope that his salary be paid to him but the respondent had no legitimate expectation that the claimant could go without his salary indefinitely. I am satisfied, in those circumstances, that the operative cause of the decision to dismiss the claimant was the redundancy situation that existed in May 2022.

37. I turn then to the question as to the fairness or unfairness of the decision to dismiss the claimant by reason of redundancy, that being an issue upon which the burden of proof is neutral. I am satisfied that the respondent acted reasonably in treating the redundancy situation as a reason to dismiss the claimant but I am equally satisfied that the respondent went about the process of dismissing the claimant in a manner that was fundamentally flawed from a procedural perspective. Though there had been meetings in 2021 and 2022, about which little evidence was heard, at which the financial difficulties of the respondent were discussed with the claimant, such discussions did not amount to a fair warning or fair consultation as to the impending redundancy that the claimant faced. I am satisfied that there was no adequate consultation process with the claimant regarding the prospect of him being made redundant. The respondent seems to have taken the view that there were no other options but to make the claimant redundant and that there was no need for any proper consultation with him about the redundancy. Given the absence of any adequate consultation and the failure to

consider possible alternatives to immediate redundancy, and the failure to inform the claimant of a right to appeal the decision to dismiss him, I am satisfied that his dismissal was procedurally unfair (that is to say, the process by which the claimant was dismissed fell outside the band of reasonable responses of a reasonable employer).

38. I then turn to consider the position had there been a fair procedure by the respondent and I ask whether this is a case in which the Tribunal could, and should, reduce the level of the claimant's compensation for unfair dismissal on the basis that the respondent has shown that the dismissal would have followed a fair procedure? That is a question that inevitably involves a degree of speculation on the part of the Tribunal.

39. I remind myself of the following passage from the judgment of Pill LJ in the case of Scope v. Thornett [2006] EWCA Civ 1600:

> ***"The Tribunal's statutory duty may involve making such predictions [i.e. what would have been the outcome of a fair procedure] and tribunals cannot be expected, or even allowed, to opt out of that duty because their task is a difficult one and may involve speculation."***

The matter is one of impression and judgment for the Tribunal. The Tribunal has to decide whether the unfair departure from what should have happened was of a kind which makes it possible to say, with more or less confidence, that the failure made no difference, or whether the failure was such that one cannot sensibly reconstruct the world as it might have been.

40. I am satisfied in this case that had a fair procedure been followed the likelihood of the C being dismissed has to be put at 100%. This is therefore a case in which it is inevitable that the C would have been dismissed had there been a fair procedure. The practical consequence of that finding is that the Compensatory Award to which the claimant is entitled is reduced for a period of 2 months to reflect the time that a fair procedure would have taken and the loss of an opportunity for the claimant to look for alternative employment.

41. In summary, for the reasons set out above, the claimant succeeds in his claims for arrears of pay and unfair dismissal. As to the remedies that he seeks, there is no dispute between the parties as to the quantum of unpaid salary that the claimant is owed. The agreed figure is £74,800.00 (gross). In respect of the claim of unfair dismissal, the remedy that the claimant seeks is compensation. I find that the Basic Award to which he is entitled is the sum of £1,713.00 and the Compensatory Award, taking into account the reduction referred to in paragraph 40 above together with the sum of £500.00 for loss of statutory rights, is £12,500.00.

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Employment Judge David Harris
Dated: 12th May 2023

Sent to the Parties on
19th May 2023 by Miss J Hopes

For the Tribunal Office