EMPLOYMENT TRIBUNALS

JUDGMENT

BETWEEN

CLAIMANT		RESPONDENTS
MRS H CARTLIDGE	**V**	**221B LIMITED (1)** **MS A VON EHRENSTEIN (2)** **MR J AIDINIANTZ (3)** **MS L VON EHRENSTEIN (4)**

HELD AT: LONDON CENTRAL (BY VIDEO)

ON: 28, 29, 30 NOVEMBER, 1, 2 DECEMBER 2022 & (IN CHAMBERS) 4 JANUARY 2023

EMPLOYMENT JUDGE: MR M EMERY
MEMBERS: DR V WEERASINGHE
MR S PEARLMAN

REPRESENTATION:

For the claimant	Mrs D Baker (counsel)
For respondents 1, 2 & 4	Mr B Uduje (counsel)
For respondent 3	In person

JUDGMENT

The Tribunal declares the claimant was an employee of the 1st respondent only.
The Tribunal declares the claimant was unfairly dismissed.
The claim of automatic unfair dismissal fails and is dismissed.

The claim of unlawful deduction of wages – bonus payment – fails and is dismissed.
The claim for unlawful deduction of wages – holiday pay succeeds.
The claim for unlawful deduction of wages – unpaid wages fails and is dismissed.
The claim of wrongful dismissal succeeds.
The schedule 5 Employment Act claim – failure to provide particulars of employment succeeds.

REASONS

1. The claimant was dismissed without notice and with no dismissal process, the respondents say because the directors of the 1st respondent (respondents 2 & 4) considered she had committed gross misconduct by demanding £500,000 from the business, alternatively this amounted to a repudiatory breach of trust and confidence by the claimant. The respondents say the claimant's actions justified summary dismissal.

2. The claimant alleges that in January 2018, she was promised a £500,000 bonus by respondents 2 & 4, to be paid to her in Summer 2019. She alleges that the failure to pay her amounts to an unlawful deduction from her wages.

3. The claimant alleges that she was employed by the 1st respondent also by respondents 2 – 4 as she was required to undertake work for them for which she says she was paid.

4. The claimant alleges that her solicitor's correspondence of 8 September 2020 contains a public interest disclosure, and she was dismissed because of the disclosure.

Preliminary issue – claim of unfair dismissal

5. One issue to determine is whether the claimant had made a claim of unfair dismissal, whether she was required to apply to amend her claim to include that of ordinary unfair dismissal, and whether she had done so. The respondents say that this claim has been brought out of time with no application to accompany it and the Tribunal does not have jurisdiction to hear this claim.

6. The claimant ticked the 'unfair dismissal' box at 8.1 ET1. The claim narrative, paragraph 9, states that the claimant was dismissed on grounds of purported gross misconduct: the tribunal took the view that the clear implication behind these statements is that the claimant was challenging the fairness of her dismissal. However, paragraph outlines the legal claims, it specifies a claim for "automatic unfair dismissal", it does not reference 'ordinary' unfair dismissal (27).

7. The claimant confirmed at the 21 April 2022 case management hearing that she was seeking to apply to amend her claim *"to make clear"* her claim included ordinary unfair dismissal. The Case Management Order states that the claimant was to provide particulars of her claim for ordinary unfair dismissal *"these particulars can stand as an amended claim if permission to amend is granted",* also that the claimant must make an application to amend.

8. The Amended Particulars of Claim dated 9 May 2022 sent to the tribunal and the parties states that the claimant was unfairly dismissed, as the respondents had *"no grounds"* for believing the claimant had committed an act of misconduct. No separate application to amend the claim was made at this time (103).

9. On 29 July 2022 Ms Baker wrote to the ET stating that she had not realised that an application was required as no separate facts had been pleaded for the unfair dismissal claim. The application states that the claimant had already brought a claim of unfair dismissal, she was not relying on new facts/allegations; also it had been clarified at the Preliminary Hearing that the claimant was claiming unfair dismissal.

10. In allowing the claim of unfair dismissal to proceed, we considered Rule 29 and we considered the *Selkent* guidance. We concluded that the claimant was seeking to relabel allegations contained within the original claim, that the original claim alleged unfair dismissal and in terms makes it clear that the claimant does not accept her dismissal for gross misconduct was fair. She is clearly asserting in the phrase the respondent had 'no grounds' to dismiss her that she does not accept the respondent's rational for her dismissal. We concluded that the claimant is adding a label to an allegation which is implicit within the claim.

11. We also concluded that this was an issue which needs to be addressed in evidence in any event – the reason why the claimant was dismissed and the lack of a process are all issues of evidence in the claim.

12. We did not consider that the respondents are prejudiced by the amendment: their evidence addresses the issue of process and the reason why the claimant was dismissed. Because the parties accept no dismissal process was undertaken there is no significant evidential argument – it is a matter of submissions as to whether the claimant's actions entitled the respondents to dismiss without a process.

13. Conversely, not allowing the amendment would cause the claimant significant prejudice, as an allegation which is within the claim form would not be considered, depriving her of a possible remedy.

14. To be clear, because this was a claim we felt was contained within the claim form, we did not accept that it was a new claim brought out of time. The factual basis for the claim of unfair dismissal was set out in the claimant's pleaded case, the claimant's application was seeking to add a label of unfair dismissal to these factual issues.

The Issues

15. Employment status

    a. Was C an employee of Rs 2-4 within the meaning of section 230 of the Employment Rights Act 1996?

    b. Was C a worker of Rs 2-4 within the meaning of section 230 of the Employment Rights Act 1996?

16. Protected Disclosures

    a. Did C disclose information to R? C relies on the letter sent by her solicitors dated 8 September 2020 which states the 1st respondent's Directors may have put funds beyond the reach of creditors with a view to pursuing unlawful dividends, or may have committed other legal breaches?

    b. Did C believe the disclosure of information was made in the public interest?

    c. Was that belief reasonable?

    d. Did C believe it tended to show that:

        i. a criminal offence had been, was being or was likely to be committed;
        ii. a person had failed, was failing or was likely to fail to comply with any legal obligation?

    e. Was that belief reasonable?

17. Automatic unfair dismissal

    a. If the claimant made a protected disclosure, was the making of this disclosure the reason (or principal reason) for her dismissal?

18. Unfair Dismissal

    a. What was the reason for C's dismissal? R asserts that it was gross misconduct and/or a fundamental breakdown of trust and confidence because of C's actions. ~C asserts it is because she made a protected disclosure.

    b. R(s) must prove the reason for dismissal. The Tribunal will need to decide whether R(s) genuinely believed the claimant had committed misconduct.

    c. If the reason was misconduct, did R(s) act reasonably in all the circumstances in treating that as a sufficient reason to dismiss C? The Tribunal will usually decide, in particular, whether:

        i. there were reasonable grounds for that belief;

        ii. at the time the belief was formed R had carried out a reasonable investigation;

        iii. R otherwise acted in a procedurally fair manner;

        iv. dismissal was within the range of reasonable responses.

    d. If the dismissal was unfair, did C contribute to the dismissal by culpable conduct?

e. Can R(s) prove that if it had adopted a fair procedure, would have been fairly dismissed in any event (Polkey)? And/or to what extent and when?

19. ACAS Code of Conduct

a. Did R fail to follow a relevant ACAS Code of Practice?

b. If so, should any compensation awarded to C as a result of his allegations be increased, and if so by what amount?

20. Holiday Pay (Working Time Regulations 1998)

a. Did R(s) fail to pay C for annual leave the claimant had accrued but not taken when their employment ended?

b. Were any days carried over from previous holiday years?

c. How many days remain unpaid?

21. Unauthorised deductions

a. Did the respondent make unauthorised deductions from C's wages by way of its failure to pay C a bonus in Summer 2019?

b. If so, how much is C owed?

22. Breach of Contract – wrongful dislissal

a. What was the claimant's notice period?

b. C guilty of gross misconduct? Or do something so serious that the respondent was entitled to dismiss without notice?

23. Schedule 5 Employment Act 2002

a. When these proceedings were begun, was R in breach of its duty to give C a written statement of employment particulars?

b. If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

c. Would it be just and equitable to award four weeks' pay?

Witnesses and evidence

24. We heard evidence from the claimant and respondents 3 and 4. The 2nd respondent did not attend the hearing, notwithstanding that it was by video. On date, a two-line medical certificate was provided, in German, the translation of which states that due to an acute spinal injury, she is unable to

travel. Again, this did not address why the 2nd respondent could not have planned to give evidence by video. We read the 2nd respondent's witness evidence. Noting the criticism of the claimant as to the 2nd respondent's conduct, we placed little wight on this evidence. Our findings are primarily based on the witness evidence of those we saw and heard, and the documentary evidence

25. The Tribunal spent much of the first day of the hearing reading the witness statements and the documents referred to in the statements. There are many disputed issues, and we set out below our 'factual findings' in respect of all relevant issues.

26. This judgment does not recite all of the evidence we heard, instead we confined our findings to the evidence relevant to the issues in this case. For example, there was considerable evidence on the ownership structure – previous companies in which the 3rd respondent was involved which ran the museum, the ownership structure of the parent company of the 1st respondent. We did not consider this relevant to the issues, noting that our conclusion, below, is that the 3rd respondent exercised significant control over the strategic decision making of the 1st respondent and its Directors, and that he directed his wife and stepdaughter in respect of important decisions affecting the 1st respondent.

27. The judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions

The evidence

28. The 1st respondent (and its predecessor companies) run the Sherlock Holmes Museum in Baker Street, London. The 4th and 2nd respondents are daughter and mother – both are the Directors of the 1st respondent.

29. The 3rd respondent has been a company director heavily involved with the Sherlock Holmes Museum via different companies for many years. He is married to the 2nd respondent, the 4th respondent is the 2nd respondent's daughter and the 3rd respondent's stepdaughter.

30. The 3rd respondent's case is he transferred ownership the 1st respondent to the 2nd respondent in March 2015, and from this date he effectively relinquished control of this company *"I have no steer of how [R4] is running the business… I have no interest … I hope she is doing well."* He retains control of other companies in the UK and Germany, including Rollerball Ltd, the freehold property owner of the museum site.

31. The claimant's case is that the 3rd respondent's purported lack of involvement in the 1st respondent is a sham, that he maintains control with the directors there *"as convenience".*

32. While the 3rd respondent is not a director of the 1st respondent, and he is content to allow the 4th respondent to take day to day operational control of the business, the Tribunal accepted that he was involved in all major decision-making during the claimant's employment. He was involved at least

as much as the 2nd and 4th respondents in all the relevant decisions in this case.

33. The claimant started working for the 1st respondent in around February 2013 initially self-employed. She became an employee from 1 June 2014. The respondents' case was that she was given a contract of employment, however none has been provided which is signed by her. The claimant says she was not given a contract. In her evidence the 4th respondent accepted that the claimant was not given a contract of employment.

34. The claimant's role evolved over time, and we accept that she played a significant role in increasing the Museum's profitability: for example we accepted that she was responsible for decisions on the supply of products, which led to the 1st respondent sourcing products for the museum directly rather than through wholesalers; she was involved in the design of products. She was also involved in senior management administration of the 1st respondent. This involved securing contracts with suppliers, including visiting suppliers overseas. She also recommended securing design rights over products.

35. We rejected the respondents' evidence, which was that many of these functions were not undertaken by the claimant. We rejected as a deliberate mischaracterisation the statements the claimant had no design skills or no involvement, this was said on several occasions by the 3rd respondent, and we considered that this was a deliberate inaccuracy in his evidence.

36. We accepted the 4th respondent's evidence as an indication of how closely her and the claimant worked together. The 4th respondent and the claimant commenced a relationship in 2013. From this time to the break-up of their relationship in April 2019 they spent the majority of their time together. They went to trade fairs together, they worked together on many of the design and sourcing issues set out above *"…We had opinions – ideas - about new souvenirs together … so we worked closely together and as my partner … we were so involved, always together."* For example on the copyright issue, *" … we had to change the design and then we started to inform ourselves about how we can copywrite our own products…".*

37. The tribunal concluded that the claimant's work was recognised within the business as increasing its profitability, she and the 4th respondent worked very well together as a team. Her salary increased from £54,000 to £120,000 between 2016 and 2019. The respondents were very happy with her work and we have no doubt that it was accepted that the claimant's work had contributed to more merchandise ranges, more attractive products, and increased profit margins on merchandise sales.

38. The claimant alleges that she was performing duties for respondents 2, 3 and 4, that she was required to undertake these duties, she was acting under instruction when she did so, she was paid for many of these duties by way of regular payments to her from the 4th respondent, accordingly she was an employee of these respondents. The duties included assisting with home purchase; assisting with renovation of the 2nd respondent's property in London; assisting with the renovation of the 4th respondent's property in London; babysitting and childcare for the 2nd and 3rd respondent's baby; dog-sitting for 5 years;

39. The 4th respondent's evidence is that the claimant was a *"member of the family"* that they regularly visited the 2nd respondent, and both often babysat together; the claimant enjoyed doing so and would volunteer to babysit. The 3rd respondent says the claimant never visited their property alone, she always came with the 4th respondent.

40. The 2nd and 3rd respondent deny knowing the claimant and 4th respondent were in a relationship. The 2nd and 3rd respondents say the claimant never assisted with their home renovation. The 4th respondent says the claimant did assist with her home renovation, but this was in the context of their relationship and intending to live together.

41. On her employment by the 4th respondent in respect of childcare and house renovation, the claimant's answer to questions was that the 4th respondent was the *"middle-person"* who facilitated her employment by respondent 2 and 3. She said that she would have to *"ask permission"* from the 4th respondent to leave her 1st respondent role to look after the child. The clamant said the majority of the babysitting role was in 2014-15, after which the 2nd and 3rd respondents employed nannies who lived with them and who also worked in the museum.

42. The claimant's evidence was that there was an inherent power imbalance, and that she was required to undertake these duties. She relies on evidence that the 2nd and 3rd respondents spent time seeking a live-in nanny paying £15.00 per hour; that she was expected to undertake this role without pay.

43. We note that at no time during this period did the claimant question the amount of work she was undertaking for the 2nd – 4th respondents. The documentary evidence shows that she asked to look after the child, for example offering to take him to the zoo when in Germany. Her evidence was *"for a long time I felt that [the 2nd and 3rd respondents] were friends, and I adored the child - but I was required to be babysitter when required."*

44. The claimant received significant payments from the 4th respondent, totalling £145,000 over several years. There was a dispute as to whether they were gifts or payment for work undertaken by the claimant for respondents 2-4. The claimant argues that these payments were for work she undertook for respondents 2 and 3, that there was an agreement to pay her £2,500 per month for this work as she was "on call 24/7" for the family. The 4th respondent's case, put to the claimant in evidence, is that these payments were money given to her by the 4th respondent *" to assist you when needed money, for rent etc - rather than payment for services rendered".* The claimant was insistent that these were payments for assistance she had given to respondents 2 – 4 *"with what was needed".* The 4th respondent's evidence was that they were payments *"in the relationship - I was helping out when she was asking me for money on several different occasions".* We noted that text messages showed the claimant seeking money for differing reasons on occasions from the 4th respondent, for example flights to Brazil.

45. We concluded that the 2nd and 3rd respondents saw a clear and close relationship between the claimant and 4th respondent; that the claimant became involved in the family's issues and she was happy to agree to undertake activities on their behalf. We also concluded that at the time the

claimant was undertaking these activities, she did not see them as employment, she was a willing participant in the respondents' family life.

46. We concluded that the payments made to her by the 4th respondent were made in the context of a relationship. We accepted that some of the payments may well have been in part because the claimant was so willing to assist the family, some were a gift, some were made on the claimant's request because she needed money for different purposes. In answers to questions from the 3rd respondent, the claimant accepted that payments were *"… either for work or a present from [the 4th respondent]…".*

47. We did not accept that at the time any of the payments were made, either the 4th respondent or the claimant regarded them as wages for work undertaken by the claimant.

48. The claimant had been paid a bonus of £3,000 in 2016 (271). We accept that she expressed unhappiness at the size of this bonus. The claimant did not receive a bonus in 2017.

49. In January 2018 the claimant and 2nd and 4th respondents were staying at the 2nd and 3rd respondent's property in Germany, in part for work reasons. The claimant says that at a meeting over dinner she was promised a bonus of £500,000. She says that this was offered because of the significant increased profits she had brought into the 1st respondent's business.

50. The claimant says that she was given a detailed explanation during this dinner, being told that she would be paid this bonus in Summer 2019. She says she was told it could not be paid earlier because the size of the dividend taken by the 2nd respondent meant there was a significant tax liability in the UK; also in 2018 money was needed to renovate the 4th respondent's property.

51. The claimant's account of this conversation: *"We were talking about refurbishment – and [the 2nd respondent] said that when that finishes, from the company profits in Summer 2019 we will give you £1/2m. And then Andrea came down and said are you unhappy expecting more, and I said no, thank you, that's perfect."* The claimant said she did not feel she needed to thank the 2nd respondent in writing *"I had thanked her in the house, money was a sensitive subject, and I did not need to thank her again."*

52. The respondents' case is that during dinner their recent property purchases came up, the claimant expressing sadness that she could not afford a property in London. The 4th respondent's evidence was that the claimant was *"asking/hinting for a loan"* from the 2nd respondent, *"…who said she would see what she could do".*

53. There was significant contested assertions made during evidence about the profitability of the 1st respondent and its predecessor companies. The claimant argues that the evidence of her work can be shown in the increased profitability of the 1st respondent during her employment. The respondents' case is that the majority of the profits can be attributed to tv adaptations – in particular in recent years Sherlock with Brendan Cumberbatch – which increased attendance at the museum. Profits would have been higher prior to the claimant joining, says the 3rd respondent, but for a series of court cases

and loan repayment issues involving the 1st respondent's predecessor companies which drained would-be profits up to 2015.

54. The claimant and 2nd respondent's relationship ended in April 2019. The 4th respondent says one reason was the financial demands of the claimant; between 2017-19 she had *"helped"* the claimant by paying her £131,000. Following the break-up the claimant continued working for the 1st respondent. Matters between her and the 4th respondent became strained although they continued their working relationship and the 4th respondent made some further payments to the claimant in 2020. The claimant stopped assisting with many of her prior activities with respondents 2-4.

55. The claimant was not paid a bonus in Summer 2019 as she says she was promised. She did not raise the issue in writing, she says that she regularly raised it with the 4th respondent verbally.

56. The first mention of a bonus is in a text from the claimant to 4th respondent dated 19 May 2020, following the 4th respondent's text calculating that she had given the claimant *"nearly £140,000"*. *"Laura, the company owes me a barely £500,000 which is less than 10% yearly income, that I helped to achieve…".*

57. The 4th respondent's subsequent texts talk about money in general but do not challenge the claimant's assertion. Her evidence was that she did not do so because the texts are *"… an argument, she is talking nonsense. I may not pay attention as she often asks for money. I see this and I blank it, not listen … she often asked for money because of the profit of the business – she was very money orientated."*

58. In July 2020 because of tensions between the claimant and other respondents, a decision was made to take back from the claimant a dog she had been given by the family, the 4th respondent and another family member turned up to the claimant's flat and took it back. The dog had been in the claimant's possession for 5 years. We saw this as an act of maliciousness by the respondents which badly hurt the claimant, and which significantly contributed to the claimant's next actions.

59. The next reference to a bonus in in the claimant's text to the 4th respondent on 13 August 2020 *"I was offered shares … as well as a barely £500,000".* In a subsequent text that day *"I could have bought a flat in London, if you have paid my bonus, or at least paid partially when I asked several times. There was never any money to pay me…"* . A further text: *"Today you have money … based on hard work and good ideas from us both. … I do deserve what I work for and was guaranteed to be paid."* (157-9). Again, the 4th respondent's texts in respond do not mention or query the fact of a bonus or the sum of £500,000.

60. On 8 September 2020 the claimant's then solicitors Clarke Willmott sent a pre-action protocol letter to the Directors of the 1st respondent seeking payment of the bonus of £500,000. The letter states that the Company has *"insufficient funds"* to pay the bonus because sums had been taken out of the business as dividend payments to directors. *"In the event that [the 1st respondent] should fail to pay the bonus …. Then it shall be insolvent",* and the claimant would *"… seek an investigation into that fact that sums due have*

been put beyond the breach of creditors with the view to pursuing unlawful dividends, misfeasance and /or antecedent transactions".

61. The claimant's evidence is that she became suspicious the respondents were drawing money from the 1st respondent and were therefore not able to pay her bonus, in particular she had a conversation with the 4th respondent on 17 August 2020 and was told that there was no money in the business *"… I tried to work out where money coming from".* She looked at company accounts and saw loans to the 3rd respondent of £2m. She says that there is no evidence that this money reached his account.

62. She said that prior to this she believed the 1st respondent was *"a clean company".* But then £3m was taken out of the company, and she was being given excuses, *"meaning there was not enough money to pay me."* She accepted that she was accusing the directors of dishonesty, that there as *"misappropriation … serious misconduct"* in relation to the loan to the 3rd respondent.

63. The claimant's case is that she believed the following: because the 3rd respondent is not a director of the 1st respondent, a loan to him is not a Director's loan, and there is therefore no corporation tax penalty if it is not repaid within the 9 month and 1 day time limit. Also, if the company fails to sue him, there is no prospect of the money being repaid. By paying these sums to the 3rd respondent, her £0.5m contractual bonus was taken out of her reach.

64. In further answers, the claimant said that the accounts *"were a mess – monies being loaned, for house purchase and lifestyle; and loans which did not make sense".* The loans to the 3rd respondent "… *is tax evasion, taking dividends and saying it is a loan, bed and breakfast HMRC call it."* Another issue for the claimant is that the respondent was at the time facing being struck-off the companies register because of a failure to issue accounts, that the claimant had a *"genuine reason"* to be suspicious because this was a profitable company.

65. The respondents' position is that all loans were filed as such in the accounts; the claimant's case is that there is *"a difference between a declaration and where the money went to."* In answers to questions, the 4th respondent accepted that *"potentially"* the claimant could have reasons to be suspicious because of the loan to the 3rd respondent.

66. The 3rd respondent's evidence was *"I had my own reasons"* for borrowing money from the 1st respondent (an answer again indicative of the control he continued to have over this company), and that he declared these sums in his personal tax returns as dividends. *"Whatever I have done is legitimate. If it saves tax, that's quite legitimate. There's nothing wrong with borrowing money and then paying it back the following year by dividend".* He did not accept it was legitimate for the claimant to have suspicions: *"Why would she be suspicious. She can see the published accounts and that I am repaying it. … The accounts show that a loan was taken out and repaid – clear as a whistle. Why would anyone be suspicious?"*.

67. Also on the same date, 8 September 2020, the claimant submitted a grievance to the 1st respondent, complaining about the 1st respondent *"reneging"* on its *"contractual commitment to pay me a bonus of £500,000".* She said she was remaining in employment *"under protest"* despite her contract being repudiated. The claimant referred to being *"assured"* by the 4th respondent her bonus would be paid *"I had several discussions"* about the bonus, including one in which payment was promised in instalments. She said that she was told on 17 August 2020 that the company *had no money to pay me the bonus and no company would pay an employee"* this size bonus *"It has led me to believe that you will seek to renege"* on the *"contractual commitment"* to pay the bonus (393-5).

68. The company responded to the claimant by way of a letter from the 2nd respondent: It states that the Clarke Willmott letter *"clearly infers"* that the 1st respondent has *"acted unlawfully in relation to the declaration of dividends…".* It denies the allegations. The letter states that the *"allegations of unlawful action … clearly amount to gross misconduct by you as well as amply demonstrating that you have fundamentally breached the implied duty of mutual trust and confidence…".* It says the company is entitled to dismiss her for gross misconduct with no notice, and it did so. Alternatively, the company accepts her fundamental breach of contract *"is bringing your contract of employment to an end forthwith"* (778-9).

69. In the claimant's answers to questions she accepted that neither she nor her solicitor had mentioned her being employed by other respondents, she accepted that the correspondence on behalf of the respondents only purported to dismiss her from her employment with the 1st respondent. this was first mentioned in a lawyer's letter on her behalf on 1 December 2020.

70. The 2nd respondent responded to Clarke Willmott's letter stating that there was no agreement to pay a bonus *"or even discussing the matter of a bonus"* in January 2018 or any other time.

71. On her holiday pay claim, the claimant argued that she did not have holidays in previous leave years, *"we all worked flat-out";* her only holiday was a week in Greece in May 2019. She said she is owed 88 days holiday based on carry over from previous years.

Closing Submissions

72. Ms Baker provided a skeleton argument at the outset of the case; Mr Uduje provided a skeleton on its conclusion. The tribunal read both documents and the cases referred to. We heard oral arguments from both advocates. Where appropriate their arguments are addressed in the conclusions section below.

Relevant law and cases

Disclosures in the "public interest"

73. Employment Rights Act

> 43A Meaning of "protected disclosure"
>
> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with

any of sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

a. that a criminal offence has been committed, is being committed or is likely to be committed

b. that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject

…

74. It is for the claimant to show that his disclosure was in the *public* interest, not just a vehicle for a private grievance. The 2013 amendment added the following words in italics to s 43B(1) which now defines a 'qualifying disclosure' as 'any disclosure of information which, in the reasonable belief of the worker, is made in the public interest and tends to show one or more of the following…'

75. The public interest test is that it must be in the reasonable belief of the employee that the disclosure was made in the public interest.

76. *Chesterton Global Ltd v Nurmohamed [2017] ICR 731:* In a case of mixed interests, it is for the tribunal to rule as a matter of fact as to whether there was *sufficient* public interest to qualify under the legislation. "The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

"… In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case …

"… The four factors adopted are as follows: (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing

disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

77. *Ibrahim v HCA International [2019] EWCA Civ 207*: The mental element imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing? The fact that a motivation for making the disclosure may be different: "the necessary belief [of the employee] is simply that the disclosure was in the public interest".

78. *Parsons v Airplus International Ltd UKEAT/0111/17:* The necessary reasonable belief in that public interest may arise on later contemplation by the employee and need not have been present at the time of making the disclosure. Where an employee makes a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a dispute with the employer, the tribunal was held entitled to rule that they were made *only* in her own self-interest – the fact that an employee *could* have believed in a public interest element is not relevant.

79. *Darnton v University of Surrey* [2003] IRLR 133 *EAT* - The test is whether or not the employee had a reasonable belief at the time of making the relevant allegations that they were true. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

80. *Babula v Waltham Forest College [2007] EWCA Civ 174* - "Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong — nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to criminal offence — is, in my judgment, sufficient of itself to render the belief unreasonable and thus deprive the whistleblower of the protection of the statute."

81. *Blackbay Ventures Ltd v Gahir [2014] IRLR 416 EAT* – the EAT provided the following guidance to tribunals:

    i. Each disclosure should be separately identified by reference to date and content.
    ii. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.

iii. The basis upon which each disclosure is said to be protected and qualifying should be addressed.
iv. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation.
v. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, … whether it was made in the public interest.
vi. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant…
vii. The Employment Tribunal … should then determine … whether the disclosure was made in the public interest."

Dismissal

82. Employment Rights Act 1996 – Pt X Dismissal

s.94 The right

a. An employee has the right not to be unfairly dismissed by his employer

s.98 General

1. In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show

a. the reason (or, if more than one, the principal reason) for the dismissal, and
b. that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

2. A reason falls within this subsection if it—

a. …
b. …
c. is that the employee was redundant…

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 reason shown by the employer)

a. depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably

in treating it as a sufficient reason for dismissing the employee, and

b. shall be determined in accordance with equity and the substantial merits of the issue

s.103A Protected disclosure.

1. An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

83. *Harrow London Borough v Knight [2003] IRLR 140, EAT - The* act or deliberate failure to act of the employer must be done 'on the ground that' the worker in question has made a protected disclosure. This requires an analysis of the mental processes (conscious or unconscious) which caused the employer so to act and the test is not satisfied by the simple application of a 'but for' test. The employer must prove on the balance of probabilities that the act, or deliberate failure, complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not *materially influence* (in the sense of being more than a trivial influence) the act complained of.

84. *Jesudason v Alder Hey Children's NHS Foundation Trust [2020] EWCA Civ 73* – the tribunal must consider the employer's *motivation* for taking a particular course of action after a whistleblowing allegation; an employer who is motivated to act for reasons unconnected to the allegation will not have subjected to the employee to an unlawful detriment.

85. *Fecitt v NHS Manchester [2012] ICR 372 CA - s.48c* puts the burden on the employer to show on the balance of probabilities that the act complained of was not on the grounds that the employee had done the protected act; meaning that the protected act did not materially influence (in the sense of being more than a trivial influence) the employer's treatment of the employee.

86. *Kuzel v Roche Products Ltd [2008] IRLR 530, CA* (a *dismissal case but which the CA said "as a proposition of logic" must apply to detriment cases)* - if the employer fails to show an innocent ground or purpose, the tribunal *may* draw an adverse inference and find liability but is not legally bound to do so. *"Accordingly, if a tribunal rejects the employer's purported reason for dismissal [or detriment], it may conclude that this gives credence to the reason advanced by the employee, and it may find that the reason was the one asserted by the employee. However, it is not obliged to do so. The identification of the reason will depend on the findings of fact and inferences drawn from those facts. Depending on those findings, it remains open to it to conclude that the real reason was not one advanced by either side."*

87. *Yewdall v Secretary of State for Work and Pensions UKEAT/0071/05* – the initial burden on the claimant to show a prima facie case that they have been subjected to a detriment because of their protected act, *"… the burden of proof only passes to the employer after the employee has established a prima facie or arguable case of unfavourable treatment which requires to be explained"*.

88. *Panayiotou v Kernaghan [2014] IRLR 500* - it is a defence that the reason for the detrimental treatment was not the doing of the protected act in question, but the unacceptable way in which it was made – an employee's dismissal in part because of an obsessive pursuit of PIDs was "in no sense whatsoever connected to the PIDs: *"There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. … Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."*

Dismissal - process

89. *BHS v Burchell test - Graham v Secretary of State for Work and Pensions (Jobcentre Plus) [2012] EWCA Civ 903:*

"35 …once it is established that employer's reason for dismissing the employee was a "valid" reason within the statute, the ET has to consider three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of and, thirdly, did the employer have reasonable grounds for that belief.

"36 If the answer to each of those questions is "yes", the ET must then decide on the reasonableness of the response by the employer. … In performing the latter exercise, the ET must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to the ET's own subjective views, whether the employer has acted within a "band or range of reasonable responses" to the particular misconduct found of the particular employee. If the employer has so acted, then the employer's decision to dismiss will be reasonable. However, this is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse. The ET must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The ET must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which "a reasonable employer might have adopted". An ET must focus its attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any internal appeal process) and not on whether in fact the employee has suffered an injustice."

90. The ACAS Code states that a properly conducted investigative process:

- enables the employer to: discover the relevant facts to enable him to reach a decision as to whether or not an offence has been committed;
- secures fairness to the employee by providing him with an opportunity to respond to the allegations made and, where relevant, raise any substantive defence(s); and

- even if misconduct is established, it provides an opportunity for any factors to be put forward which might mitigate the offence, and affect the appropriate sanction.

91. *W Weddel & Co Ltd v Tepper [1980] IRLR 96 at 101:*

> "… [employers] do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, in the words of the [employment] tribunal in this case, "gathered further evidence" or, in the words of Arnold J in the Burchell case, "carried out as much investigation into the matter as was reasonable in all the circumstances of the case". That means that they must act reasonably in all the circumstances, and must make reasonable inquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate inquiries or giving the employee a fair opportunity to explain himself, their belief is not based on reasonable grounds and they are certainly not acting reasonably'.'

Conclusions on the evidence and law

Employment – respondents 2 - 4

92. The Tribunal did not reach unanimity on the precise amount of work undertaken by the claimant for respondents 2 – 4. Apart from text messages asking the claimant to undertake babysitting, there was little actual evidence of the tasks the claimant undertook. Much of the time she was asked by way of ad hoc requests.

93. We accept from the evidence that in the period 2015 to 2019, the claimant undertook significant activities for the 2nd, 3rd and 4th respondents outside of her role with the 1st respondent, including babysitting and providing assistance to the 2nd and 4th respondents home renovations.

94. The Tribunal did agree unanimously that much of the work undertaken was because of the claimant and 4th respondent's relationship – they were intending to live together and the 4th respondent's home renovation was, we concluded, part and parcel of a personal relationship, in no way did it involve any intention to create an employment relationship.

95. We also concluded that the work undertaken by the claimant for respondents 2 and 3 manifested itself naturally as a response to this personal relationship. We concluded that at no time did the parties consider that there was any kind of obligation on the claimant to undertake these tasks had she not wanted or not been able to do so. Many of them were undertaken by her and the 4th respondent together. At no time did the parties believe that wages were due for these additional duties.

96. We accept that during 2014-16 the claimant was often performing a role as babysitter which the 2nd and 3rd respondents were otherwise willing to pay for, and they did not pay her. But this does not mean that there was any contractual arrangement to pay her for these activities. She was seen as *"part of the family"*; as above many of these activities were undertaken by the claimant and 4th respondent together.

97. We accepted the legal position put forward by Mr Uduje – there was no intention to create legal relations, there was no intention to pay for these duties, there was "a total lack of certainty".

98. The claimant says she received wages – as set out above we concluded that the claimant received gifts and other monies from the 4th respondent, that these were not regarded by either as wages for work undertaken.

Unlawful deduction from wages claim - bonus

99. Mr Uduje's argument is that there was no contractual right to a bonus, that the lack of communication from the claimant after the alleged agreement to pay it *"screams out loudly that there was no such promise"*. Mr Uduje accepted that the claimant *"may have had an expectation that something would have been offered to her"*. He argued that this could not *"suddenly morph into a promise with contractual effect"* following the end of her and R4s relationship.

100. We concluded that the failure of the claimant to record at any point prior to May 2020 that she there was a verbal contract in January 2018 to pay her a bonus of £500,000 in Summer 2019 is fatal to her argument that a binding agreement was reached to pay this amount. We find it incredible that the claimant said she considered that she did not need to acknowledge the promise. Given the numerous discussions between the claimant and 4th respondent about money – for example her unhappiness with her 2016 bonus, requests for income – we felt sure that had a binding agreement been reached to pay her the sum of £0.5m the claimant would at least have referenced such a promise in some way in writing to the 4th respondent, if not the 2nd respondent. We noted the claimant thanked the 2nd respondent for her hospitality. We did not accept the claimant would not have thanked the 2nd respondent had there been a binding agreement to pay it.

101. We find it equally incredible that the claimant did not raise the failure to pay the bonus when she says it was promised, in Summer 2019. While we accept that the claimant was in a relationship with the 4th respondent and there was therefore an element of trust, we did not accept that the claimant would not have mentioned this in writing by Summer 2019.

102. The 2nd and 4th respondents say that the discussion about money in January 2018 was about a possible loan for a property purchase. We accept that this was the context of the conversation; we accept that the claimant was left with the impression that a loan or a bonus – a large sum of money – may be forthcoming when the business could afford it, but no more than this. We accept Mr Uduje's characterisation that at most the claimant was offered encouragement that she would receive a bonus in the future when the company's profits allowed. We accepted that at this time a possible loan was in the mind of the respondents - given the 3rd respondent's use of a loan facility from the 1st respondent, this was a realistic option.

103. We therefore did not accept that a specific sum was mentioned, either as a loan or a bonus, or specifics of profit share discussed. We characterise this as a discussion which resulted in the 2nd respondent saying she would agree

to pay the claimant an unspecified sum – perhaps as a loan – to assist the claimant to purchase a property at some point in the future.

104. We accept that over time the claimant became frustrated that no decision was taken to pay her a bonus/loan and she started raising this in messages after her relationship break-up. In her messages she refers to profit related bonus as well as £500,000. We saw this as an indication that the claimant was not precise in her demands at this time because nothing precise had been agreed.

105. We concluded therefore that the claimant did not have a contractual right to a bonus of £500,000 or any other sum, as there was no statement made by or agreement reached with any of the respondents that she would be paid this or any other sum as a bonus.

Protected disclosure

106. The claimant asserts that she made a protected disclosure via her solicitors on 8 September 2020. The respondents' position is that this letter contains no disclosure of information, there is no disclosure of a relevant failure, the claimant did not have a reasonable belief that the information disclosed a relevant failure, and the claimant did not have a reasonable belief the disclosure was in the public interest.

107. Was there a disclosure of information? We concluded yes – that the letter is stating that the respondents have taken payments from the company meaning it may not be in a position to meet its legal obligation to pay the claimant a bonus, an unlawful act. In the response to the claimant, the 2nd respondent characterises this as an allegation the company has acted unlawfully in relation to the declaration of dividends. This is quite specific information; it is not a generalised allegation.

108. The claim, paragraph 9 page 27 states that she had legitimate grounds for believing the directors conduct *"gave rise potentially to breaches of directors duties to act in the best interest of the company, its tax obligations and an infringement of anti-money laundering law…".*

109. The relevant legal obligations or criminal liabilities - the specific company law, tax requirements and anti-money laundering legislation - have never been specified by the claimant at any stage in the proceedings.

110. Notwithstanding the lack of specificity of the legal obligations, we considered the legal test: does the solicitor's letter in fact say that the 1st respondent "has failed, is failing or is likely to fail to comply…" with a legal obligation? We concluded not.

111. The claim form refers to a "potential" breach of legal obligations. We concluded that the allegation in the letter says the same – that the 1st respondent *may* breach its legal obligations/the law at some point in the future.

112. The letter is a demand for payment. It requests payment of £500,000 and it gives bank details for the 1st respondent to make this payment. It says that the 1st respondent *"currently"* does not have the funds to pay, that *"in the*

event" the bonus is not paid the company would be insolvent, leading to the unlawful act/legal breach.

113. In terms the letter says that any legal breach is conditional on the loans not being paid. It is implicit in this statement that if the payment was made, as requested, the company would not be breaching any legal obligations.

114. We concluded that this letter did not amount to an allegation that there is currently a breach, or a likely future breach, of legal obligations. Instead it says that there will be a failure to comply if future conditions – the company not being put in funds or payment not made to her – are not met. This is at most a statement that the company *may* act unlawfully at some point in the future if it does not pay the bonus. As the claim states, this is a potential breach. We did not consider this to be an allegation of a likely failure to comply with a legal obligation in the future. Therefore this statement does not amount to a public interest disclosure.

115. The Tribunal accepted that the claimant did have a belief that she was owed something; but we concluded that she was not sure what she was owed, or the basis on which the payment would be made – bonus, loan, profit share etc. She did however have a genuine belief that she was owed something.

116. We also accept that the claimant formed the view there had been dubious transactions involving the 1st and 3rd respondents after examining company house accounts and noting large loan payments out of the 1st respondent. We accept that this fired her up and she decided to legally challenge the respondents.

117. But was the claimant's belief that the 1st respondent was breaching its legal obligations a reasonable belief? We concluded not. For this to be reasonable, we concluded that the claimant must reasonably believe that there was a contractual agreement to pay her £0.5m bonus. For the reasons set out above, this agreement was never reached. In the absence of an agreement, we did not consider that the claimant could have a reasonable belief she had a contractual entitlement to this sum. Her belief was grossly misguided.

118. It follows that her belief that the respondent was breaching its legal obligations by taking funds away from the company which she was contractually entitled to cannot be a reasonable belief.

119. We also concluded that the complaint was one in any event which was in the claimant's sole private interests and was not in the public interest. We did not consider it conceivable that an allegation of a failure to pay a solely private interest (a bonus) which may at some point amount to an (unspecified) criminal issue or breach of legal obligation was a statement in the public interest. We did not accept that the claimant could have believed her statement was in the 'public' interest. We concluded that her sole motivation for raising the allegation was to gain her bonus, a private interest.

120. The fact that this was a private interest can be seen in the focus of her solicitor's letter, which was to secure payment of £0.5m to her. The possible future breach was alleged as a lever in order to secure her payment. This was not a statement that the claimant could have reasonably believed was

one in the public interest, because it was made solely to secure a private benefit.

121. In addition, given our conclusion that the claimant was misguided in her belief she was owed a bonus, we did not consider that the claimant could show that any belief she held of some public interest element was a reasonable belief.

122. In conclusion: the claimant did not make a qualifying protected disclosure for the following reasons: her disclosure did not suggest it was likely the company was breaching or was likely to breach a legal obligation; she did not have a reasonable belief that the claimant was breaching a legal obligation/the law; her disclosure was made solely for to gain a private interest; she did not have a reasonable belief that the disclosure was in the public interest.

Automatic unfair dismissal

123. We accept that a significant reason to dismiss the claimant was because of the solicitor's letter – this is made clear in the company's dismissal letter. Mr Uduje sought to distinguish between the statement in the letter and the claimant's conduct; that the allegation of breach of a legal obligation/breach of the law was not a principal reason for dismissal; that the reason for the dismissal was because she says she is entitled to a £0.5m bonus which her employer considered to be dishonest; and on her making this statement, trust and confidence "evaporated".

124. We concluded that had the claimant's statement via her solicitor's letter been a public interest disclosure, her dismissal would be automatically unfair. This is because a principal reason why the claimant was dismissed is clearly specified in the dismissal letter – her allegations of *"unlawful action"* by the company amount to gross misconduct. We concluded that the allegations made by the claimant of unlawful acts as set out in her solicitor's letter of 8 September 2020 was the principal reason why she was dismissed.

125. Because we did not consider the claimant made a qualifying protected disclosure, her dismissal cannot be automatically unfair, and this claim fails.

Ordinary unfair dismissal

126. We accept that the respondent had a genuine belief that the claimant had committed an act of misconduct and that it had a genuine belief that the trust and confidence between the 1st respondent and the claimant and the other respondents had irretrievably broken down as a result of the claimant's allegation in the solicitor's letter.

127. This is because the respondents believed that the claimant's allegations had no merit. Their view was that while a payment had been discussed, no action had been taken to formalise what the payment would be, its format (bonus, loan, profit share), while the claimant may have intended to enter into a contract, the respondents had not, and did not. The respondents genuinely believed that the solicitor's letter was misconceived in its demand for a £0.5m bonus. The claimant's communications with the 4th respondent were becoming increasingly demanding. We accept that the respondents

genuinely saw the solicitor's letter as the last straw in an increasingly difficult work and interpersonal situation.

128. We accept that the claimant's view she had a contractual entitlement to a bonus was misguided. However we also believe that the claimant came to have a genuine view she was entitled to a bonus: there was the relationship between her and the 4th respondent and the claimant's view she had significantly contributed to the 1st respondent's profitability; she gained an expectation she would be helped out financially in some way.

129. This was a complicated employment and personal relationship which we concluded must have been known to the 2nd and 3rd respondents by September 2020. This is the context of the reasonableness test - how a similarly sized and resourced family business would approach this situation.

130. We did not accept that a decision not to seek an explanation from the claimant was one which was reasonable, or within the range of reasonable responses. We concluded that a similarly sized and resourced employer acting in this situation with access to legal advice would seek an explanation from the claimant, however emotionally hard it might be to do so. We concluded that this employer but would want to hear why the claimant believed she was owed this bonus before taking stock and then deciding whether or not to dismiss.

131. We therefore concluded that this was not one of those exceptional circumstances where it is fair to dismiss without any process. The claimant was not given an opportunity to say why she believed she had an entitlement to the bonus and why she believed the respondents may be acting unlawfully. She genuinely believed she had this entitlement, even if the respondents genuinely believed she did not.

132. Instead, the respondents reacted with anger, rejected the claimant's arguments as without any merit and summarily dismissed her.

133. We therefore concluded that the dismissal was unfair because there was no attempt to conduct any process in circumstances where it was clearly reasonable to do so.

134. We do not accept that the respondents have shown the claimant would have been dismissed for gross misconduct under a fair process. We consider that having heard the claimant, a reasonable similarly sized and resourced family firm where the employee had been in a long-term relationship with a director would consider the claimant was misguided, unreasonably so in asserting her demand for a bonus.

135. But any reasonable employer in this situation, which would be a family-based firm in would also have asked why the claimant had made this allegation. A reasonable process would have considered the claimant's response, as a fair investigation requires.

136. We concluded that a reasonable employer would have taken a more measured approach, would have taken the opportunity to take some advice having heard what the claimant had to say, and approach its decision with a cooler head. We concluded that such an employer, with the 4th respondent's

knowledge in particular, would have concluded that the claimant believed her account to be true, however misguided it was.

137. We did not consider that making such an allegation, however misguided, can amount to an act of gross misconduct or conduct deliberately intended to repudiate the contract. We concluded that a decision to dismiss for gross misconduct would not have occurred in a fair process, that such a decision would be outside the range of reasonable responses of a similarly sized and resourced employer in a similar situation.

138. We considered whether dismissal would have been within the range of reasonable responses following an investigation process. We concluded that it would have been, that following a process, the claimant would have been fairly dismissed.

139. As set out above, on a reasonable analysis of the evidence, we concluded the finding was likely to be the claimant was misguided but believed what she was saying. We concluded that in this situation a reasonable employer would inevitably conclude that the claimant could no longer be employed. We concluded that a reasonable employer would conclude that the claimant must be dismissed for a "substantial reason", that the personal relationship between the claimant and 4th respondent had broken down, the professional relationship had broken down, the claimant had made misguided demands, it was inevitable that there was no longer trust in the employment relationship.

140. We did not consider that this loss of trust amounted to a repudiatory breach of contract by the claimant. We did not consider that making a misguided assertion she was owed a bonus and the respondent was acting unlawfully merited summary dismissal following a fair process.

141. We concluded that a dismissal within the range of reasonable responses would have been dismissal on contractual notice, or immediate dismissal with a payment in lieu of notice, on the basis that for some other substantial reason the breach of trust meant that the employment relationship could no longer continue.

142. We concluded that a process to the decision to dismiss would have been difficult, perhaps with a 3rd party HR manager needing to be involved. We concluded that this process would have taken approximately 4 weeks, the decision to dismiss made and communicated to the claimant at the end of this process.

Breach of contract claim – notice pay

143. We concluded that a dismissal within the range of reasonable responses would have been a dismissal on notice, and this claim succeeds.

144. The claimant does not have a contract of employment. We doubted that the one contractual document (unsigned) within the bundle was an accurate reflection of the claimant's implied terms of employment. We therefore require evidence on what the claimant's notice period was.

Holiday pay

145. The claimant is criticised by the respondent for not properly setting out her holiday entitlement when she did not have a contract of employment to assist her in this calculation. We accept that the claimant was not required to formally record leave she had taken, we also accept that the claimant rarely took her leave allocation. However we do not accept that the claimant is entitled to carry over approximately 4 years of holiday entitlement, or 88 days leave as she is claiming.

146. We concluded that the likely contractual entitlement was that the claimant can carry over 20 days at the end of each leave year. We gather the leave year was January to December. As at the date of dismissal we concluded that the claimant had not taken any holiday in that holiday year. We therefore concluded that the claimant is entitled to 20 days carry-over from holiday year 2019 and accrued holiday entitlement to date of dismissal. The precise sum/calculation can be addressed at a remedy hearing if not agreed between the parties.

Unlawful deduction from wages - other wages

147. The claim asserts that the claimant was underpaid in her last wages. She gave no evidence in her statement or oral evidence on this issue. We concluded that the claimant has not proven she is owed outstanding wages on the termination of her employment.

Failure to provide terms & conditions of employment

148. It was only conceded during evidence that the claimant was not given a contract of employment. Many of the terms of her employment were not clear to her. We considered that the dispute about bonuses and her employment status with the other respondents in part arose because of a lack of clarity by the respondents as to the claimant's role and contractual terms. A proper contract clearly stating her role, bonus and other entitlements *may* have assisted resolving any dispute before it reached tribunal.

149. There are no exceptional circumstances which would mean the tribunal cannot award two weeks' pay. We concluded that it would be just and equitable to make an award of 4 weeks' pay. In part this is because the respondents asserted until the 4th respondent's evidence that the claimant had been given a contract, when we concluded they knew or should have known she had not been given one. This was a deliberate attempt to avoid liability for the 1st respondent's failure to provide a contract. The claimant had had to expend resources and effort proving she had no contract. In addition, had a contract been provided, this may have avoided at least some of the disputes.

150. We concluded that it would be just and equitable to award 4 weeks' pay for this failure.

151. Notice of a one-day remedy hearing will be sent out shortly.

Anonymity Orders sought by the respondents following the hearing

152. The 3rd respondent made an application under Rule 50 of the Tribunal Rules on 22 March 2023 that:

a. Private addresses of the respondents within the claim form be redacted;
b. Photos of the 2nd and 3rd respondents' child be removed from the hearing bundle or redacted;
c. An anonymity Order is granted in respect of respondents 2-4 should they be found not to be the claimant's employer

153. The application was made on the basis that the 2nd, 3rd and 4th respondent and the child of the 2nd and 3rd respondents European Convention rights are affected by the promulgation of this information, Article 8 – the right to a private and family life.

154. The 2nd and 3rd respondent's adopted this application in their lawyer's letter dated 29 March 2023. The claimant opposes this application.

The application to anonymise the identity of the 2nd, 3rd and 4th respondents:

155. The 3rd respondent argues that he *"does not wish my name to be associated"* with the claimant's case if he is not the claimant's employer, that it would be a breach of his article 8 rights if his name remained on the claim.

156. The Tribunal did not accept that this was a reasonable argument. We have found that the 3rd respondent was involved in material decisions and controlled aspects of the 1st respondent's strategic direction. The 4th respondent is clearly an important witness to the claim against the 1st respondent. The 2nd respondent purportedly took the decision to dismiss the claimant. Given their involvement, their names would be published within a judgment under the principle of open justice, even if they were not named parties.

157. We have criticised many elements of the respondents' defence to the claim. The 2nd, 3rd and 4th respondents' rights need to be balanced against the fundamental principle of open justice. In this balancing exercise, we did not consider that it was in any way a breach of their Article 8 rights for their names to be published as parties to the claim, even though they are not the named employer.

Application to redact addresses and photographs

158. This application was made well after the conclusion of the claim. A public hearing was held and there was no application for redaction during the hearing. No application has been made by a 3rd party to see any documents within the claim.

159. It appears that the 3rd respondent's concern is being publicly linked to the case "should the judgment be published on the internet without any anonymisation and without redaction of photos of my son which have never been published before in any publicly accessible documents". The Tribunal notes that neither photos nor the name of the 2nd and 3rd respondent's son are published in the judgment. No other mean of identifying his son are included in the judgment.

160. The respondents' application is therefore based on a fallacy, because the information they seek to be redacted from the judgment will not be included in the judgment.

161. The parties are reminded that a bundle produced for the purposes of this litigation cannot be disseminated outside of the hearing without the Tribunal's permission.

162. The Tribunal considers that the only possible foreseeable event which could give rise to an Article 8 issue is if a request is made by a 3rd party for access to documents within the bundle. The Tribunal accepts that this may occur, albeit an extremely unlikely prospect given the hearing is now in the past.

163. If any such application was made to the Tribunal for documents, as a matter of practice this would be referred to the Judge who heard the claim and a copy sent to the parties. Documents which have not been referred to in the hearing or considered by the tribunal are not public documents, and the Judge's notes of evidence do not record that any photos of the child were referred to or looked at during the hearing,

164. Given the hearing has passed, the Tribunal concluded that a proportionate approach to adopt, balancing convention rights of the 2nd, 3rd and 4th respondent and the child with the principles of open justice is the following:

    a. If a 3rd party seeks access to a document which may contain photos of the child or the private addresses of the respondents, the request is brought to the attention of the other party and/or their lawyers and the Tribunal;
    b. Any party who considers that disclosure should not occur for any reason, including that the convention rights may be breached by dissemination of such information, or because it is not a public document, may make submissions to the Tribunal for this document not to be disclosed, or to be disclosed with redactions.
    c. Before a decision is made, the party seeking any such document will be given an opportunity to say why access should be provided.

Employment Judge **Emery**

29 June 2023

JUDGMENT SENT TO THE PARTIES ON

29/06/2023

FOR THE TRIBUNAL OFFICE

Notes

Public access to employment tribunal decisions

Judgments are published online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.