Case No: 2300305/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr G Nolan

Respondent: 1) Phase II International Ltd
2) Scientific Education Support (SES) Ltd

Heard at: London South **On:** 9th – 13th January 2023

Before: Employment Judge Reed

Representation
Claimant: Mr Melvyn Harris, Counsel
Respondents: Mr Edward Kemp, Counsel

RESERVED JUDGMENT ON LIABILITY

1. The Claimant was employed by the 1st Respondent. All claims against the 2nd Respondent are therefore not well founded and are dismissed.

2. The claimant was not constructively dismissed by the 1st Respondent. To the extent that his unfair dismissal claim was based on constructive dismissal it is not well founded.

3. The claim for unfair dismissal arising from the 1st Respondent's decision to dismiss on 20th November 2020 is well founded. The 1st Respondent unfairly dismissed the Claimant.

4. The claim for breach of contract amounting to wrongful dismissal is not well founded and is dismissed.

5. The claim for breach of contract and unlawful deduction of wages in respect of the £25,000 bonus is well founded.

REASONS

Claims and issues

1. The claimant, Mr Nolan, brought four claims: constructive unfair dismissal in relation to his resignation of 30th September 2020; unfair dismissal in relation to his dismissal by the respondent during his notice period on 20th November 2020, breach of contract / wrongful dismissal in relation to that dismissal and breach of contract / unauthorised deduction of ages in relation to an alleged failure to pay him a bonus.

2. The parties produced a list of issues prior to the hearing, p84-90 of the Witness Statements / Additional Documents bundle. At the beginning of the hearing both parties confirmed that this was agreed as accurate.

3. Both parties agreed that, save in relation to any Polkey reduction to the claimant's compensation, this hearing should deal only with liability.

Procedure, documents and evidence heard

4. The tribunal heard evidence from the claimant and on his behalf from Paul Barrance, Adrian Hill, Adam Smith, Amanda Sergison-Main and Rianna Hanif. The tribunal heard evidence from the following witnesses on behalf of the respondents: Derek MacLennan, Charlene Brown and Gareth Jarman.

5. There was tribunal bundle of 1711 pages. Various further documents, including written submissions, were provided in the course of the hearing. References to page numbers in this decision are references to the tribunal bundle (unless it is indicated otherwise).

6. Both parties were legally represented and made submissions on both the facts and law. I have addressed these submissions as they arise in my reasons.

7. This judgment has taken significantly longer than anticipated to produce due to the pressure of other work and personal circumstances. I apologise to the parties for the delay.

Findings of fact

8. I considered the oral evidence and the documentary evidence to which I was referred. All findings of fact are made on the civil standard of proof. That means that they are reached on the basis that there are more likely to be true than not.

9. The written findings are not intended to address every point of evidence or resolve every factual dispute between the parties. I have made the factual findings necessary to resolve the legal disputes before me. Where I have made no findings or made findings in less detail than the evidence presented, that reflects the extent to which those areas were relevant to the issues and the conclusions reached.

Background

10. The respondents are companies involved in the life science and medical sectors. They provide various education and communication services to their clients. Both companies were founded by Derek MacLennan who was the Managing Director and effective owner. In addition to the two respondent companies Mr MacLennan was the founder and owner of Hamflo International Ltd and Phase II US Inc (a US company based in New Jersey).

11. In broad terms, Hamflo acted as holding company, being the sole shareholder of both Phase II International Ltd and Scientific Education Support (SES) Ltd.

12. At various points in his employment and this litigation Mr Nolan has expressed concern about the nature of the group's structure. In particular, he has questioned whether Hamflo owned the two respondent companies. In crossexamination, however, it was put to him that the Company House records showed that Hamflo owned both Phase II International Ltd and Scientific Education Support (SES) Ltd. He accepted this. I accept that, at all relevant times, Hamflo was the sole shareholder of both companies.

13. Mr Nolan was originally employed by Phase II International Ltd on 25th July 2005 as a Creative Assistant. At the time he was 19 and this was a junior role, primarily concerned with typesetting.

14. Over the following years Mr Nolan was promoted to increasingly senior roles. In 2008 he became a Creative Executive. In 2010 he became Creative and Digital Manager. In 2014 he became Associate Director and Digital Team Leader. In February 2016 he was promoted to Deputy Managing Director.

2006 Contract

15. In 2006 Mr Nolan signed a contract of employment with Phase II, p1331-1334. At that stage he is described as a Project Assistant.

16. That contract provides that Mr Nolan will work a minimum of 45 hours per week, with a 1 hour paid rest break each day. Under the heading 'Restraint of Employment' it provides that:

a. Mr Nolan will not, either during his employment or for 12 months after termination, solicit, contact or approach any client of Phase II to attempt to obtain their business.

b. Mr Nolan will not disclose any confidential information that he obtained during the course of employment. Confidential information is not directly defined, although a (expressly non-exhaustive) list of examples is set out. This indicates that Phase II regards marketing, sales, pricing, customer or client, accounts supplier and technical information as confidential. The contract states that information about clients is also regarded as confidential.

17. It is also agreed that despite his promotions Mr Nolan did not receive a revised contract of job description between 2006 and 2016. There is a dispute about whether Mr Nolan received a new contract at the point he was appointed as Deputy Managing Director.

Appointment to Deputy Managing Director

18. Mr Nolan was appointed as Deputy Managing Director of Phase II in February 2016. There is some dispute between the parties about what that role involved.

19. Mr Nolan says that from that point (or at any rate shortly after) he was in practice acting as Managing Director of the group of companies and that Mr MacLennan's involvement significantly reduced.

20. Mr MacLennan, while accepting that Mr Nolan was in a senior position, does not accept that he was acting as Managing Director. Mr MacLennan claims he remained very involved in the business. His account is that Mr Nolan was given responsibility for the day to day running, while Mr MacLennan focused on strategy. In addition, Mr MacLennan says that he supervised and supported Mr Nolan in his role as Deputy.

21. Both parties agree that there was a shift in approach between 2016 and 2020, with Mr MacLennan playing a greater role in the day to day running during the earlier part of that period when Mr Nolan was less experienced and a less active role as Mr Nolan became established in his post.

22. Consideration of this matter is complicated by the lack of formality in the respondents' procedures and the absence of contractual documentation. The respondents were run on an informal basis. Neither Mr MacLennan or Mr Nolan sought to formalise or record in writing their relationship or the scope of Mr Nolan's role. The relationship and their respective roles also changed and developed over time.

23. I find that Mr Nolan and Mr MacLennan, at least after Mr Nolan had been in post as Deputy Managing Director for a few years, were not in conventional Deputy Managing Director / Managing Director positions. Mr Nolan had

considerably more autonomy and responsibility than would normally be expected from his title. He was the person primarily responsible for the day to day running of all the group companies. Mr MacLennan was considerably less involved than would be generally expected for a Managing Director.

24. There are a number of indications of this:

    a. The announcement of Mr Nolan's appointment refers to Mr MacLennan turning his attention outside the business to seek new business opportunities, p1337. It states that Mr Nolan will immediately take responsibility for: staff wellbeing and conflicts, operational processes, recruitment expenditure, company management and marketing communications.
    b. Mr MacLennan accepted that, from time to time, he said in conversation with Mr Nolan that Mr Nolan was the Managing Director. He describes this as an attempt to motivate him and to give him the opportunity to grow into the Managing Director role, rather than a statement of any formal or legal change. It is nonetheless an indication of Mr Nolan's considerable role and how Mr MacLennan perceived it.
    c. Bonus letters to in July 2017 were signed by both Mr MacLennan and Mr Nolan. By June 2018 similar letters were signed by Mr Nolan alone.
    d. Mr MacLennan accepted that in 2016 he had weekly meetings with Mr Nolan, which had reduced by fortnightly by 2017. After that there were ad hoc meetings, approximately monthly, depending on events in the business. Mr MacLennan accepted that as long as six weeks might pass between meetings.
    e. Mr Nolan was permitted to use Mr MacLennan's office, in part because Mr MacLennan did not need it since he was not regularly attending the office.
    f. Senior employees, including Paul Barrance, Adrian Hill, Amanda Sergison-Main and Rianna Hanif worked primarily with Mr Nolan, rather than Mr MacLennan. All describe Mr MacLennan as not being active in the business on a day-to-day basis.
    g. In his communications with both Mr Jarman and Ms Brown Mr MacLennan acknowledge the scope of Mr Nolan's role. For example, he described Mr Nolan to Ms Brown as 'effectively managing the business', p1555.

25. At the same time, Mr MacLennan had not stepped back entirely from the business and Mr Nolan was not acting as de facto Managing Director. Mr MacLennan continued to be involved in strategy, continued to meet with Mr Nolan, was involved in recruitment of some senior posts and with important business meetings. He also retained some responsibility for financial matters. Mr MacLennan described this as scrutinising the profit and loss. Mr Nolan's evidence was that he produced the profit and loss tracker, but he accepted that he then passed the information to Mr MacLennan who was responsible for informing the accountants. This is a greater level of involvement that would be expected, for example, in a Board Chairman or non-executive director.

26. In summary he roles that would generally be carried out by a Managing Director were split between Mr MacLennan and Mr Nolan. Mr MacLennan remained, however, the most senior manager within the respondents and Mr Nolan's line manager.

2016 Contract

27. Mr MacLennan's evidence was that in 2016, following his appointment as Deputy Managing Director, Mr Nolan was given a revised contract and asked to sign it. This contract was produced at p 582-592. Mr Nolan denies seeing the contract at that time.

28. This issue is significant because it goes to the substance of a number of the issues in these claims and because its resolution sheds light on the credibility of Mr MacLennan's evidence.

29. The most detailed evidence on this matter was given by Adrian Hill. He was employed by Phase II from January 2013 until September 2019 (and then was a part-time consultant until February 2020). Between October 2015 and September 2019 he was Director of Business Services, which included responsibility for HR.

30. Mr Hill said that he had been aware that Mr Nolan had not been provided with an updated contract or job description since 2006 and had mentioned this to Mr MacLennan. Mr Hill said that he became particularly concerned about this from February 2016 when Mr Nolan had been appointed as Deputy Managing Director. He said that following the appointment he raised his concerns several times in conversation with Mr MacLennan. He then emailed Mr MacLennan on 31st May 2016, p152. Attached to that email was a revised job description, which Mr Hill had discussed with Mr Nolan. Mr Hill also drew up the 2016 contract that has been produced around this time but did not show it to Mr Nolan at this stage. He says that he was waiting for Mr MacLennan's authorisation to proceed further.

31. Mr MacLennan responded by email on the same day, p151-152. He refers to a discussion with Mr Hill and says that that matter requires considered thought. He describes Mr Nolan's role as Deputy MD as 'a big experiment' that was done on an informal / give it a go basis, with its continuation being at his discretion. Mr MacLennan suggests that, if Mr Nolan wants to move the relationship to a contractual basis he would want a probationary period and performance objectives that could be reviewed at 3, 6 and 12 months.

32. In cross-examination Mr MacLennan accepted that he had sent the email on 31st May 2016 to Mr Hill. He accepted that this instructed Mr Hill not to proceed at that stage and that he had not gone back to Mr Hill with further instructions.

33. Mr MacLennan also agreed that he did not have any direct knowledge of Mr Nolan being given the revised contract or being asked to sign it. Essentially, he said that it was a matter for HR and that he believed that they would have

presented Mr Nolan with the revised contract in the course of updating the employment contracts generally around this time.

34. I accept Mr Nolan and Mr Hill's accounts that this did not occur. In particular, Mr Hill's evidence is supported by the contemporary documentation. That indicates that Mr Hill was seeking to produce a written contract, while Mr MacLennan expresses his reluctance to do so and instructs Mr Hill not to proceed.

35. Mr MacLennan's evidence suggests that he believes Mr Hill would have proceeded to present the written contract to Mr Nolan and to have it signed by him, without consulting Mr MacLennan further or even telling him what had been done. I do not accept that Mr Hill did this. He had already expressed his view that he required Mr MacLennan's authorisation to proceed. Not only did he not have that authorisation, he had been told by Mr MacLennan not to go forward, because Mr MacLennan was not satisfied with the approach Mr Hill had suggested. For him to proceed on his own in those circumstances is implausible.

36. I also do not think that Mr MacLennan would have believed this at the time for the same reason. If following his 31st May 2016 email, Mr Hill had given Mr Nolan a written contract without consulting with him Mr MacLennan would understandably have felt that Mr Hill had far exceeded his authority.

Business growth / restructuring

37. Between 2016 and 2020 the business of the group companies continued to grow. There was a move into the US and a general expansion of work. Mr Nolan's estimate, which I accept as broadly accurate, was that sales revenue progressed from approximately $3.7 million in 2016 to approximately $8 million in 2020.

38. By 2018 it was apparent to both Mr MacLennan and Mr Nolan that the business needed to prepare for its next phase. Mr MacLennan arranged a number of meetings with private equity and merger & acquisitions consultants to discuss potential future business structures. Mr MacLennan had in mind a future exit from the business. Mr Nolan, who by this stage was responsible for the majority of the day to day running of the group, wished to establish some form of equity stake in the business that would reflect his contribution to its success.

39. Both Mr MacLennan and Mr Nolan agree that, at the start of 2020 their intention and expectation was that the business would be restructured, that Mr MacLennan would continue to withdraw from day-to-day work and that Mr Nolan would take over the full scope of the Managing Director role.

40. At this stage Mr MacLennan and Mr Nolan were broadly in agreement on what they wished to achieve. Mr Nolan recognised that Mr MacLennan was the owner and founder of the business. He would inevitably receive most of the financial rewards from its success. Mr MacLennan recognised that Mr Nolan

had made significant contributions to that success. He also anticipated that, as he continued to withdraw from day-to-day work, Mr Nolan's contribution would increase. Mr Nolan, quite reasonably given his seniority, wished to have a greater equity stake in the business. In his own words he wanted 'to own a part of what I grow'. In principle Mr MacLennan accepted that.

41. Unfortunately, despite this common understanding Mr MacLennan and Mr Nolan were unable to agree how it should be put into effect. This led to an atmosphere of increasing mistrust and acrimony between them, which ultimately led to Mr Nolan's resignation.

42. In early 2020 both Mr MacLennan and Mr Nolan prepared business growth plans that they discussed. It is not necessary to deal with these discussions or the plans in detail. In summary, both expected the business to grow and prosper, but Mr MacLennan's plans were more ambitious and Mr Nolan doubted they were feasible. He proposed a less ambitious growth plan.

43. In February 2020 there was a series of meetings with Adam Smith, who was a friend and mentor of Mr Nolan's. Mr Smith is the Executive Director of XE2 Ltd, a business working in digital platforms and consultancy. In 2019 Mr Smith had been engaged by Mr Nolan to review the respondents IT platforms.

44. Mr Smith, Mr Nolan and Mr MacLennan met to discuss the future of the Group. This included discussions of revenue and earnings projections in the context of the possible value of the companies. It also included discussion of the business plans that Mr MacLennan was producing and Mr Smith gave some advice on this. There was some discussion of the possibility of Mr Smith becoming a Board non-executive, but this was not pursued.

45. Mr MacLennan and Mr Smith did not have contact after April 2020.

46. Both Mr MacLennan and Mr Nolan agree that there were ongoing discussions about the group's future and Mr Nolan's role in 2020.

April 2020 – Letter of Intent

47. One element of these ongoing discussions was the senior management structure of the group and Mr Nolan's place in it. Mr MacLennan's plan in early 2020 was to create a senior leadership team, which would report to Mr Nolan who would take on the role of Group Managing Director.

48. Reflecting that intention, Mr MacLennan sent Mr Nolan a letter of intent on the 29th April 2020, p238-244.

49. The key proposals in this letter were:

    a. Mr Nolan would be promoted to Group Managing Director (with Mr MacLennan remaining involved as Founder & Group Chairman)
    b. An increase in basic salary from £93,177 to £111,850 (20%).

c. A net profit share scheme based on 0.5% of profits across the group companies.
d. Participation in a Growth Share Equity Scheme

50. Two different possibilities are suggested for the Growth Share Equity Scheme. The first involves dissolving the current EMI Scheme and replacing it with the new Growth Share Equity Scheme. In broad terms it would involve Mr Nolan receiving growth shares worth 15% of the company's value above £3 million. The second option retains the existing EMI scheme, with Mr Nolan to receive growth shares worth 5% of the company's value above £3 million.

51. As Mr Harris accepted in his submissions this letter was not intended, by itself, to form a binding contract or even a formal offer. It states clearly that a formal offer letter, employment contract and shareholder's agreement would be prepared if Mr Nolan accepted the role in principle. Further, the basis of Mr Nolan's equity involvement is presented as two alternatives, which would have required a decision by Mr Nolan before any agreement could be reached.

New-Co Proposals

52. On or around 30th May 2020, Mr Nolan presented an alternative proposal. This was titled 'A new partnership approach' and set out in a series of slides, p775789.

53. Mr MacLennan and Mr Nolan met on the 8th June 2020 to discuss the proposal. Mr Nolan followed this up with an email on the 9th June 2020, p 773.

54. The key proposals in this plan were:

a. That Phase II and SES would continue, managed by Mr Nolan
b. A new company be created for new business developments that would be owned 49% by HamFlo, 39% by Mr Nolan and 11% by a Non-Executive Director and / or a Finance Director.
c. The New-Co would operate under the umbrella of the HamFlo name, remaining from an external perspective, entirely part of the group.

55. In his evidence, Mr Nolan said that the two proposals were essentially the same. He said that the difference was a slightly different business context or concept. I understand his position to be that the two offers achieved much the same practical end, but with a slightly different corporate structure. Essentially, he said that the difference was a matter of form rather than substance.

56. I do not accept that. At one level the two offers seek to achieve something similar: to give Mr Nolan an equity stake in the business. But the nature of that stake is very different. In Mr MacLennan's proposals Mr Nolan would be entitled to something somewhat below 15% of the business (including any growth in value from new business or expansion). The exact figure would have depended on which of the two Growth Share Equity Scheme options was pursued and the ultimate value of the company.

57. Under Mr Nolan's proposal, he would not necessarily have received any equity stake (beyond the existing EMI Share Option Scheme) in the existing business, but would have held a substantially larger share at 39% of New-Co.

58. There is, self-evidently, a substantial difference in these two approaches. Which approach would have been more valuable would have depended on the growth of both the existing business and the potential New-Co.

59. It is possible that this would have resulted in the two options achieving much the same financial results for Mr MacLennan and Mr Nolan. Or it might have led to radically different results. For example, if New-Co failed, Mr Nolan's 39% equity in it would be worthless. In that eventuality it would be expected that Mr Nolan would receive far more value from Mr MacLennan's suggested approach, provided the existing business continued. But, if New-Co prospered to become equally valuable as the existing business, Mr Nolan's larger equity stake under his proposal would mean that he would receive significantly more value than if the same expansion were to occur within Mr MacLennan's suggested structure.

60. The two approaches would also have different implications for the control of the business. In Mr MacLennan's approach Mr Nolan would be a minority shareholder and Mr MacLennan would retain the majority position – with the control over the business that implies. Under Mr Nolan's suggestion no individual would have a majority shareholding in New-Co.

61. Mr MacLennan has said that he believed that Mr Nolan intended that Adam Smit would be the sole additional shareholder. This, he suggested, would give Mr Nolan and Mr Smith effective control of New-Co.

62. Mr Nolan accepts that Mr Smith was a possible Non-Executive Director, but that he intended that any Financial Director would have had an equity holding (part of the remaining 11%). In any event, he denies that he and Mr Smith would have formed a controlling block in the way Mr MacLennan suggests.

63. For these purposes, it is not necessary to resolve what Mr Nolan intended or what would have transpired had the New-Co proposal been implemented. It is sufficient to note that the fundamentally different corporate structure / equity holding it involved was a difference of substance, not of form.

Beginning of relationship tension

64. It was at this stage that the relationship between Mr MacLennan and Mr Nolan began to come under significant stress.

65. I accept Mr MacLennan's evidence that his reaction to the proposal was markedly negative. He describes his reaction as being 'very surprised'. He says that the counter proposal made it clear that Mr Nolan was seeking to set up a competitor to the group companies. He says that he felt that this 'did not

demonstrate loyalty' to either the group companies or a commitment to working through the negotiations. He says that he took it as a clear rejection of his offer in the letter of intent that Mr Nolan become Group Managing Director. He says that the New-Co suggestion made him fundamentally question whether he could trust Mr Nolan any further, because it made clear that Mr Nolan wished to set up his own competing business.

66. On the face of the proposal it is not obvious why Mr MacLennan's reaction to the New-Co proposal should be quite so negative.

67. It is understandable that he might not wish to enter into the business structure or business plan that Mr Nolan had proposed. Mr Nolan's proposal gave him a considerable equity stake in the new business and Mr MacLennan might well have concluded that it was excessive, given that Hamflo would be to be responsible for the necessary financial investment. He might also have been concerned that a structure in which Mr Nolan continued to manage the existing companies while also running a new business in which he had a much greater stake would not be sustainable.

68. At the same time, Mr Nolan was not proposing to set up a new business in competition with the Hamflo group. He was proposing a similar business plan that Mr MacLennan had advanced – to move into new markets. But while Mr MacLennan proposed to do so with the existing companies, Mr Nolan proposed to create a new company to do so and one in which he would have a larger share.

69. It was perfectly reasonable that Mr MacLennan might prefer not to do this. But I do not take Mr Nolan's proposal as indicating that Mr Nolan intended to set up a competing business. That was not what he was proposing and his proposal, that the new company operate under the existing group identity and in partnership with Mr MacLennan, was incompatible with him doing so.

70. I do find that it is likely that Mr MacLennan's perception of Mr Nolan's proposal was sharpened by subsequent events, and this has, to some degree, affected his recollection of his feelings at the time. I do not think that he viewed the proposal as a sign of fundamental disloyalty. If he had, I do not think he would have made the series of offers that he went on to make to Mr Nolan. It would not make sense to seek to make such offers to someone he viewed as fundamentally disloyal.

71. At the same time, the negative reaction he describes and a belief, on his part, that Mr Nolan was not as committed to the business as he had previously thought or might have ambitions beyond it is the most plausible explanation for his later actions.

72. In my view, Mr MacLennan's markedly negative response arose from a number of factors.

73. First, Mr MacLennan must have realised at this stage that there was a difference of view between him and Mr Nolan about the appropriate size of any

equity stake that should be granted to Mr Nolan. Mr Nolan plainly wished for a larger share than Mr MacLennan intended. Mr MacLennan must have realised that it was possible that they would not be able to reach agreement. I also think that there was a degree of umbrage taken that Mr Nolan rated his contributions to the business as sufficient to justify the large share of equity he was seeking.

74. At about this time, Mr MacLennan realised that the fact that Mr Nolan's written contract was long out of date might have implications in relation to his duties not to compete or in relation to confidentiality. To examine this factor in his thinking it is necessary to return to the 2016 contract discussed earlier.

75. For the reasons set out above, I do not accept that Mr Nolan had been given a draft contract in 2016 or that, in 2016, Mr MacLennan believed that he had.

76. I have considered, however, whether by 2020 Mr MacLennan might have forgotten what had happened in relation to the contract in 2016 and come to assume that Mr Nolan must have been given the contract but not signed it. I have rejected this possibility.

77. There are a number of reasons that I conclude that Mr MacLennan knew Mr Nolan had not been presented with the 2016 contract. First, I have not found Mr MacLennan a generally credible witness and on occasion I am satisfied that he has given deliberately misleading evidence. I bear in mind that a witness who has been misleading in relation to one area is not necessarily so in relation to others. Nonetheless it is relevant to his general credibility.

78. Second, if he had had forgotten what had happened in 2016, but was concerned and frustrated to the extent he suggests, it is implausible that he would proceed on the assumption that Mr Nolan had been given a contract in 2016 but not signed it. Given his stated level of concern it would have been natural to make enquires, either to Mr Hill (who had only recently left the business) or to Mr Nolan himself.

79. Further, although it is not implausible that Mr MacLennan might have forgotten, in the intervening years, that a contract had not been signed or at least it was not a matter that he had particular regard to, I do not think it is plausible that once he had focused his mind on the issue he would have forgotten his conversations or correspondence with Mr Hill. It also seems likely that even a cursory email search would have discovered the email to Mr Hill in which Mr MacLennan instructed him not to proceed.

80. I am satisfied that Mr MacLennan now became concerned that there might be inadequate protections for him and the respondents, particularly in relation to the duties imposed upon Mr Nolan in relation to confidentiality and noncompete clauses – since the 2006 contract did not contain the sorts of restrictions that would be normal for a senior executive in Mr Nolan's position.

81. A concern of this nature is the only adequate explanation for Mr MacLennan's production of the 'mock up' contract, the discussion of the contract in later

meetings and Mr MacLennan's focus on it during the later disciplinary proceedings against Mr Nolan.

82. In addition to this, around 22nd June 2020, Mr MacLennan learned from Mr Nolan that he had been offered a role with IMC, a competitor, but turned it down. Mr Nolan's intention in communicating this to Mr MacLennan was to reassure him of his commitment to the respondents' group, but it had the opposite effect. My MacLennan says that he was shocked and disappointed that Mr Nolan had interviewed at a competitor.

83. There was no reason that Mr Nolan should not consider an offer of employment elsewhere and I do not consider there is anything unusual or improper in referring to a headhunting approach in the context of his discussions with Mr MacLennan. An employee referring to such an offer as evidence of their value and their potential opportunities elsewhere is a perfectly normal approach to employment negotiations of this type.

84. Indeed, by referring to a role that he had rejected, Mr Nolan was seeking to emphasise his commitment to the group. The most plausible explanation of Mr MacLennan's later actions however is that he was genuinely concerned that Mr Nolan might not remain with the respondents.

5th July 2020 Meeting

85. Mr MacLennan and Mr Nolan met on the 6th July 2020 to continue their discussions. Mr MacLennan sent Mr Nolan an email following that meeting summarising his position at that stage, p790-791.

86. Both Mr MacLennan and Mr Nolan agree that, in the course of this meeting, Mr MacLennan clearly rejected Mr Nolan's New-Co proposal.

87. It was suggested to Mr MacLennan that this meeting and the email was, in effect, moving forwards with the proposal contained in the letter of intent. He denied this, saying that in his view the letter of intent 'was over'.

88. I do think that, at this stage, Mr MacLennan's intentions had begun to shift, although he avoided saying so explicitly. The email notably avoids mentioning a particular role. Having said that, I do not accept Mr MacLennan's evidence that he wished to retain Mr Nolan in the business but had no view about his likely role at this stage. That is unlikely on its face, given Mr Nolan's seniority in the business and his importance to its ongoing operations.

89. Such an open and speculative view would also be incongruent with Mr MacLennan's expressed intentions in the later 24th July 2020 meeting, only a few weeks later, in which he suggested that Mr Nolan would progress to Group Managing Director.

90. Instead, I conclude that Mr MacLennan intended that Mr Nolan would progress towards the Group Managing Director role, but had begun to have some doubts

about this. By this stage he was less confident that it would be possible to reach agreement with Mr Nolan. He also started to consider keeping his options open to some degree by appointing Mr Nolan to the Group MD role on an interim basis.

24th July 2020 Meeting

91. Mr MacLennan and Mr Nolan met again on the 24th July 2020. A slide deck has been produced entitled 'Partnership Discussion 'Take Homes' DM / GN Meeting, which was produced by Mr MacLennan, p864-936. There was some debate as to whether these slides were produced before or after the meeting. Mr MacLennan's evidence is that they were produced before, although he accepted that there might have been amendments following the meeting to reflect the discussion. He said that this was a normal working practice for him. He could not recall whether there had been amendments on this occasion. I accept Mr MacLennan's evidence on this point. Although the introductory slide appears to refer to the meeting in the past tense, reading the document as a whole it does not strike me as a record of a meeting. Rather it sets out the points that Mr MacLennan wished to make. I accept, however, that the meeting followed the plan as set out in the slides.

92. The meeting involved discussion of Mr MacLennan's plan for the business. Much of it was concerned with details of the business development and intentions which are not relevant to this case.

93. The key points relevant to this matter are:

    a. The plan envisages consolidating all of Mr MacLennan's companies as subsidiaries under the Hamflo company.
    b. Mr MacLennan is to retain between 76.5% and 85% of Hamflo, while Mr Nolan is to have approximately 15%. Any remaining share would be divided between other company directors (each of whom might receive 1% to 1.5%).
    c. Organograms are set out indicating the intended leadership structure. These anticipate that Mr Nolan will become Group Managing Director. There are also, however, references to this initially being on an interim basis.
    d. In particular, the slide at p896 sets out a timetable of events. This anticipates that Mr Nolan will be made Interim Group MD in July, with Directors of the group companies being appointed in August and September.

94. I find that these slides are a broadly accurate account of the proposals Mr MacLennan was making at the time.

95. It is also necessary to resolve a conflict of fact between Mr MacLennan and Mr Nolan, relating to whether Mr MacLennan during this meeting showed Mr Nolan a 'mock-up' of the 2016 contract. The incident is not important of itself but is significant because of its relevance to Mr MacLennan's credibility more

generally and because of what Mr MacLennan said about it during the later disciplinary process.

96. Mr MacLennan has suggested that, in preparing for this meeting, he wished to emphasise that any promotion would require Mr Nolan to sign a new contract. He says that he was frustrated over what he understood to be Mr Nolan's refusal to sign the 2016 contract.

97. He says that he therefore produced what he describes as a 'mock-up PDF version' of the 2016 contract Mr Hill had drafted. On its face this appears to be a scanned version of a contract that was signed by Mr Nolan and dated '31-516', p1335. The PDF metadata, however, demonstrates that it is not, because it shows that the document was produced on 22nd June 2020.

98. Mr MacLennan accepts that and says that prior to this meeting he produced it by inserting a picture of Mr Nolan's signature into the draft contract and then saving it as a PDF.

99. He says that he did so in order that he could demonstrate to Mr Nolan where he would need to sign and this would give a very clear message about what was required.

100. He says that during the meeting he showed Mr Nolan the unsigned version on a PowerPoint Slide and then toggled to the PDF version with the signature in order to make his point.

101. Mr Nolan denies that this incident occurred. He says that he only saw the apparently signed PDF when it was sent to him by Mr Jarman as part of the later investigation. He says that at that point he was able to demonstrate (by reference to the PDF's metadata) that it could not be what it appeared. He says that Mr MacLennan then produced this explanation, which he argues is false.

102. In my view, Mr MacLennan's account of this incident is wholly unlikely and I do not accept it.

103. Under cross-examination Mr MacLennan inevitably had to agree that there was no need to explain or demonstrate to Mr Nolan the concept of signing a document. To produce a mocked-up contract of this type in the way he suggests to any employee in any context would be unusual, even bizarre.

104. Mr MacLennan suggests that he did so 'tongue in cheek' because of his frustration that Mr Nolan did not sign the contract in 2016. But I find that particularly implausible in this context. Mr MacLennan was engaged in serious discussions about the future of his business with his most senior employee. It was apparent by this stage that there were important disagreements between them. To behave in the way that he suggests he did would trivialise those discussions, likely insult Mr Nolan and risk a serious deterioration in their relationship. I do not accept that a man of his business experience would be likely to do this. It also appears implausible that Mr MacLennan would produce

such a document on the 22nd June 2020 in order to deploy it in the way he suggests at a meeting that took place over a month later.

105. Further, I find that he would have been particularly unlikely to do so on such a flimsy basis and without making any enquiries to establish what had happened in 2016. His account is that he went to check Mr Nolan's contract on or around the 15th June 2020, and discovered only an unsigned version on file. He says that he assumed from this that Mr Nolan had been presented with the contract but refused to sign it. This would be a considerable logical leap, ignoring any number of possibilities (for example that a signed version had been misplaced or misfiled). Yet Mr MacLennan does not suggest that he spoke to anyone with HR responsibilities, tried to contact Mr Smith or asked Mr Nolan what had happened.

106. It is also significant that the date provided in the document was in 2016, rather than 2020. I agree with the claimant's submission that, if Mr MacLennan's account were true it would be far more likely that he would have given a contemporaneous date. This does not prove that his evidence is inaccurate, but does make it less plausible.

107. Mr MacLennan's account also relies on him having accidently sent the wrong document to Mr Jarman later. If Mr MacLennan's account was true this is not inherently implausible. Errors of this kind are not unusual. But it adds to Mr MacLennan's already strained account a further coincidence.

108. Given this finding, I have concluded that Mr MacLennan deliberately sought to mislead the Tribunal about these events, which is significant to his credibility on other matters.

109. I do accept that the need for a new contract was discussed. It is referenced in two slides, p887 & 888. I accept that Mr MacLennan indicated that, for Mr Nolan to become Group MD he would need to sign a new contract.

110. The meeting also involved discussion of the corporate structure, both current and future of the group. This is set out in the slides on p869 and 870. Mr MacLennan told Mr Nolan that both Phase II International Ltd and Scientific Education Support (SES) Ltd were owned by Hamflo International Ltd. He produced a slide with screenshots from Company House that appear to demonstrate that.

111. Mr MacLennan also said that Hamflo did not, at that point in time, own Phase II US Inc. He said that the intention was to transfer ownership of that company to Hamflo. This, he suggested, would follow a tax clearance process with HMRC and was expected to be completed by September 2020.

112. The current and future structure is also referenced by the slides on 879881. These include reference to two other companies Pharmawork International Ltd and Pharmowork US Inc, which are describes as dormant.

113. A number of variations on the organogram, current and proposed are set out. Essentially these repeat that Phase II US is owned directly by Mr MacLennan, but the intention is to bring it within Hamflo under the new structure.

29th July Meeting

114. Mr MacLennan and Mr Nolan continued to meet to discuss the future of the business. One of these meetings occurred on the 29th July 2020.

115. On the 3rd August 2020 Mr MacLennan sent an email to Mr Nolan following the meeting, p271-273.

116. The email itself covered a number of matters. The element with significance to this case was discussion of the Business Unit Directors recruitment. Mr MacLennan indicates that he has considered this further following the meeting and wishes to inform Mr Nolan of his current views. It is clear from the email that these were not views discussed at the meeting, but decisions Mr MacLennan reached subsequently.

117. Mr MacLennan sets out his view about the need to recruit Directors for each of the companies within the group. He writes that he does not believe that a 'standard recruitment approach' is appropriate. Instead he intended to conduct what he describes as an 'executive search'. This would include seeking out individuals not actively looking for a new role, but who might be open to the right opportunity. Mr MacLennan then goes on to say that, as a result, he has requested Carys Mills, a recruitment consultant who both Mr MacLennan and Mr Nolan had worked with in the past to carry out such a search.

118. There were two attachments to the email. One is an organogram, setting out the proposes leadership structure of the group, p274. This repeats one of the earlier organograms from the 24th July meeting. Mr Nolan is placed a Hamflo Group MD, with the three Business Unit Directors reporting to him. Mr MacLennan is named as Group Chair.

119. The second attachment is a document described as 'Partnership Discussion 2: Take Homes', which is effectively a summary of the meeting, p275-291. I accept that this was produced following the meeting. It is written in the past tense and refers to a question Mr Nolan had asked following the meeting, including the answer received by a third party.

120. Before dealing with the extent to which this document was an accurate reflection of the meeting, it is convenient to set out what is suggests occurred. Much of the document relates to business planning and other matters that are outside the scope of this claim. The significant points for my purposes are as follows.

121. *Corporate Structure*: Mr MacLennan reiterated his comments from the earlier meeting to the effect that Hamflo currently owned Phase II and SES, but not Phase II US (or the two dormant Pharmawork companies). He indicated that, following the tax clearance relating to Phase II US, all companies would be brought within Hamflo.

122. *Ownership*: The relevant slide also confirms that, under the proposed structure, Mr Nolan would own approximately 15% of Hamflo.

123. *Employment Contract*: Mr MacLennan also reiterated the need for a new employment contract, with appropriately reflected Mr Nolan's position, including the enhanced terms in relation to title and remuneration that were anticipated and duties in relation to confidentiality, intellectual property and posttermination restrictions that were commensurate to the intended position.

124. *Position:* Mr MacLennan reiterated his suggestion from the 24th April meeting that Mr Nolan should become Group Managing Director, but first be appointed as Interim Group Managing Director. He told Mr Nolan that he wished to move with caution and that, while the Business Unit Directors were being appointed and settling in, Mr Nolan would need to remain in the business working closely with the new directors. He suggested that an interim title would facilitate that. Mr Nolan objected to the interim title, saying that it might compromise his leadership position. Mr MacLennan maintained his basic position that there should be a transition period, but said that a term such as
'Acting' or 'Deputy' Managing Director might be used.

125. *Recruitment of Business Unit Directors:* This section repeats the material set out in Mr MacLennan's email. It is therefore a departure from the rest of the document, since (as the email makes clear) this was not discussed in the meeting. This, however, is not apparent if the Take Homes document is read in isolation, because the material has been incorporated as if it was part of the discussion.

126. In his witness statement, Mr Nolan says that he received this email and was alarmed to learn that Mr MacLennan had initiated the executive search, because recruitment was Mr Nolan's responsibility. He also says that he was very concerned that Mr MacLennan had started issuing meeting minutes that did not remotely reflect the actual discussion. Mr Nolan does not expressly say in his witness statement what he saw as inaccurate. In the context of his evidence as a whole, however, it appears to be a reference to the Take Homes document referring to Mr MacLennan's statements on recruitment of Business Unit Directors as if they had occurred in the meeting.

127. Matters are further complicated because in cross-examination on this document, Mr Nolan said that he had not seen the Take Home document at the time. He then went on to say that it was possible that he had received the email, but he might not have read it.

128. I do not accept either of these suggestions and have concluded that Mr Nolan both received and read the email, with its attachments, at the time.

129. Mr Nolan had not previously suggested that he had not received the 3rd August email or its attachment. His witness statement says explicitly that he did. His witness statement account is also not a passing reference, which might be made in error. It includes detail of his reaction to the email and his decision to address his concerns to Mr MacLennan in person, rather than by email. In addition, his allegation that Mr MacLennan had begun to, in effect, fabricate meeting minutes, makes no sense unless Mr Nolan had received the document.

130. Further, it seems to me highly unlikely that Mr Nolan would receive an email of this kind and not read it, along with the attachments. In the context of meetings to discuss his imminent promotion and the restructuring of the group, he had every reason to do so.

131. In addition, Mr MacLennan and Mr Nolan discussed the recruitment of the Business Unit Directors in the subsequent meeting – on the basis that Mr Nolan was aware of the proposal. The most plausible explanation for him being aware of the proposal at that is simply that he read the email he had been sent.

132. Overall, therefore I conclude that the evidence on this point in Mr Nolan's witness statement is accurate and his account during cross-examination was not.

133. So far as the allegation that Mr MacLennan was issuing meeting minutes that did not reflect the actual discussion is concerned, I find it to be unreasonable. Reading the attachment alone would suggest that Mr MacLennan had discussed the executive search during the meeting. The covering email, however, makes it clear that this section reflects Mr MacLennan's thoughts and actions following the meeting. The document is a working paper, not a formal record or legal document. It must be read in that context.

11th August 2020 Meeting

134. Mr MacLennan and Mr Nolan met on the 11th August 2020 to discuss the Business Unit Directors recruitment. Mr Nolan's describes the content of that meeting being reflected in his subsequent email. This was not challenged by the respondents.

135. Mr Nolan emailed Mr MacLennan on the 11th August 2020, p295. He says that 'It would also be good to reconnect on the decision to brief and commission Carys for the BUDS'. He describes himself as being 'a little taken back' that Mr MacLennan had not discussed this decision before instructing Carys. He notes that he had already asked her to carry out a more conventional recruitment and

says that he is concerned there may be some 'misalignment' between them. Mr Nolan goes on to say that he feels this was a decision that should have been discussed, rather than made unliterally by Mr MacLennan.

136. Mr MacLennan replies to this email on the 11th August. He writes that he had thought Mr Nolan had understood his intentions following the 29th July meeting.

137. As a matter of detail, this cannot be right. Mr MacLennan's email of the 29th July describes the decision to carry out an executive search as part of Mr MacLennan's ''further thoughts / actions' to that meeting. And Mr MacLennan was aware that Mr Nolan had not received that email until the 3rd August.

138. Nonetheless, I am satisfied that Mr MacLennan did not see his involvement with the recruitment of the Business Unit Directors or his instructions to Carys as anything unusual or untoward. It was not an attempt to undermine Mr Nolan.

139. It was the case the Mr MacLennan had previous left recruitment to Mr Nolan, rather than being involved so directly. This, however, was recruitment at a more senior level and in the context of the ongoing business restructuring. It was understandable that Mr MacLennan wished to be more involved. There was no contractual or written documentation that suggested such recruitment should be Mr Nolan's responsibility alone. There was no particular custom and practice established within the Group, since such recruitment had not occurred previously.

25th August 2020 – Deputy Group Managing Director

140. Discussion between Mr MacLennan and Mr Nolan continued into August. On the 25th August 2020, Mr MacLennan offered Mr Nolan the role of Deputy Group Managing Director, reporting to Mr MacLennan as Group Managing Director.

141. Mr MacLennan's offer is set out in his email of 25th August 2020, p302. Attached to the email was a further offer letter, p321 and a contract (described as an Executive Service Agreement), p303-320.

142. Mr MacLennan in his evidence described this role as a promotion, because it officially recognised Mr Nolan as holding a group level role. I do not find this convincing. Mr Nolan had already been operating at a senior group level for some time, regardless of his official title.

143. It is relevant, however, to note that the offer included in increase in annual salary to £111,850, which was the same salary referred to in the letter of intent. It also refers to a Relevant Incentive Payment scheme which essentially replicates the profit share provisions of the letter of intent. It does not, however, refer to any particular equity involvement. There is a reference to an enterprise management incentive scheme,

but this is simply a reference to participation in such a scheme on such terms as might be agreed in the future – there is no definite offer.

144. Essentially, I find that this offer, if it had been accepted, would have had the effect of formalising the position that Mr Nolan held at the time, while significantly increasing his pay.

145. The covering letter refers to the role being 'Appointment as Deputy Group Managing Director with mechanism for becoming Group Managing Director'. This is a reference to clause 2.1 in the contract, while states 'The parties acknowledge and accept that the Executive had the opportunity but no guarantee of being promoted from Deputy Group Managing Director to Group Managing Director'. It states explicitly that someone else might be appointed. The contract then goes on to say that the decision regarding a promotion will take account Mr Nolan's performance at Group level taking into account a number of factors (including the recruitment of the Business Unit Directors, attainment of revenue and other performance indicators, management of the Unit Directors for a reasonable time and achievement of personal development objectives specified by the board).

146. Reading this correspondence, it is striking that Mr MacLennan and Mr Nolan had begun to speak past each other. Mr Nolan was proceeding, essentially, on the basis that his New-Co proposal had been rejected and that they were therefore returning to the proposal Mr MacLennan had set out in his letter of intent back in April. Mr MacLennan saw things very differently. His view was that he had made one proposal in April, Mr Nolan had rejected it through his counter proposal of New-Co. Now he was making a new proposal to Mr Nolan.

147. This fundamentally poisoned the discussion. Mr Nolan was aghast that, as he saw it, Mr MacLennan was reneging on the letter of intent. He was also, understandably upset (he describes himself in a later email on 7th September 2020 email as disheartened) that the offer he was being made was less than he had expected and hoped for. Given the clear previous intention that he would be made Group Managing Director this was inevitable.

148. On the 27th August Mr Nolan emailed Mr MacLennan, saying that he intended to take legal advice on the agreement, p331-332. He writes that he is concerned, because Mr MacLennan had previously said that he wished to protect the company, and therefore himself, in the event that they fell out. Mr Nolan writes that he feels that he also needs to make sure he is protected.

149. Mr MacLennan replies the same day, p330-331. He writes that he is sorry that the offer has caused so much angst and that this was not his intention. He refers to the exciting time that the group is going through and the need to introduce effective corporate governance policies, including a professional employment agreement.

150. Mr MacLennan also writes that he is happy for Mr Nolan to seek legal advice, but that he is unwilling to enter into 'extensive renegotiation of the key terms'.

151. Mr Nolan has disclosed the advice he received. This is in the form of an email from the solicitor instructed by Mr Nolan sent on the 3rd September, p327328.

152. The misapprehension that the offer was intended to implement the letter of intent also appears to have created confusion in the legal advice that Mr Nolan received on it. This, accurately, noted that the offer did not reflect the letter of intent. But at this stage, from Mr MacLennan's point of view, this was a moot point – it was not intended to.

153. The email also refers to the agreement containing 'some very unreasonable sections', which were apparently identified in a version of the contract with tracked changed sent with the email. Unfortunately, this has not been provided. I have not received any detailed evidence or submissions as to what was identified as unreasonable. My own reading of the contract is that there is nothing unusual for a contract of this type.

154. Mr Nolan and Mr MacLennan met on the 4th September 2020 to discuss the agreement and Mr Nolan's concerns. Mr Nolan says that he raised concerns that:

a. The agreement did not reflect the terms of the LOI.
b. That the EMI scheme and ESA were in a dormant micro company (referring to Hamflo)
c. That his role had been demoted to a Deputy Position
d. That Carys had been instructed in the recruitment of the Business Unit Directors, without Mr Nolan's involvement.

155. Mr Nolan says that he raised, at this stage, the possibility that the relationship between him and Mr MacLennan had broken down.

156. For his part, Mr MacLennan raised his own concerns that Mr Nolan had been using the title of Managing Director improperly. This arose from emails in which Mr Nolan had used 'Managing Director' in his signature.

157. Mr MacLennan says that he became aware of this in August 2020, when he noticed that Mr Nolan was signing himself as 'Managing Director' in emails that Mr MacLennan was copied into. He says that he was concerned that this was misleading and fraudulent.

158. Mr Nolan says that, in the 4th September meeting, Mr MacLennan showed him examples of what he described as misuse of the Managing Direct title. In his witness statement, Mr Nolan refers to p796 of the bundle. This is a document that was produced later, in the context of the

subsequent investigation. The emails within that document are not copied to Mr MacLennan.

159. Mr MacLennan has said that he had not, at this point, begun to monitor Mr Nolan's emails. If he had produced emails that Mr MacLennan had not been copied into at this time, I think it is likely that Mr Nolan would have noted this and wished to know how the emails had come to Mr MacLennan's attention. Even if he had not raised this at the time, he would have done so later.

160. I have therefore concluded that Mr MacLennan did not show Mr Nolan the examples found at p796, but other examples where Mr MacLennan had been copied in.

161. Mr MacLennan says that Mr Nolan seemed to accept that he had acted wrongly.

162. On the 5th September Mr Nolan emailed Mr MacLennan, p797. He says that he writes following their conversation 'regarding my misuse of the Managing Director Job title'. He says he will 'immediately refrain from using this'. In explanation, Mr Nolan writes that he adopted the title in client communication, following 'us agreeing verbally and then in a letter of intent that

I would be appointed to Group Managing Director'. Mr Nolan goes on to say that he acknowledges that 'this could be perceived as unacceptable and expose the business to unnecessary risk'.

163. It is agreed that no further action was taken by either Mr MacLennan or Mr Nolan on this point, until the issue of Mr Nolan's use of the MD title resurfaced following his resignation. They did not discuss the matter again and no written warning was issued.

164. Since it will be relevant later it is convenient to deal here with both Mr MacLennan and Mr Nolan's view of the title issue at this stage.

165. In his evidence, Mr Nolan agreed that he had sent the 5th September email, which appears to accept wrongdoing on his part. He denied, however, that it represented his view at the time. He said that he was trying to get matters with Mr MacLennan on better footing. He said that, when Mr MacLennan was being difficult, he would do his best to placate him by acting humbly. He also said that he wanted to get the fact that he had been threatened with disciplinary action on the record and the email was a way of doing that.

166. In terms of his use of the title, Mr Nolan said that he had understood that Mr MacLennan had not merely allowed him to use the title Managing Director outside the business but encouraged it. Mr Nolan's account was that Mr MacLennan used the title to refer to Mr Nolan himself – both in conversation between the two of them and in meetings with clients / prospective clients. He also said that it was not uncommon, within their industry, for there to be some fluidity in the use of job titles.

167. In his evidence Mr Nolan said that he had used the title Managing Director before April 2020, but accepted that he had used it more often following the Letter of Intent that he had received in April.

168. For his part, Mr MacLennan accepted that, on occasion, he had used it himself in reference to Mr Nolan. He accepted that he used it in conversation with him. During the later investigation, he also accepted that he used it with clients, introducing Mr Nolan as the Managing Director in order to impress them (see p1555 and p1557).

169. Mr MacLennan, in his evidence, sought to draw a clear and principled distinction between what he had done which he described as using the term in the context of Mr Nolan's role, rather than as an official title or in writing and what Mr Nolan had done, which he described as 'misleading and fraudulent'. This was a difficult position to sustain and Mr MacLennan did not succeed. Mr Nolan was not doing something fundamentally different to Mr MacLennan. They were both referring to Mr Nolan by a title that he did not formally have to highlight his seniority and importance within the organisation. Both had in mind that, in practice, Mr Nolan was carrying out substantial part of what would normally be a Managing Director role.

170. Ultimately, I find that the distinction in Mr MacLennan's mind was not so much in what either he or Mr Nolan did, but their right to do it. Mr MacLennan felt that he was entitled to describe Mr Nolan's role as he wished, being the Owner / Founder of the business. At times, in particular with clients, it suited him to place emphasis on Mr Nolan's seniority and importance within the organisation. In so far involved giving Mr Nolan a title which that he did not actually have, he saw it as part of the normal amplification that might take place in a sales or client environment.

171. When, however, Mr Nolan used the term Mr MacLennan saw it as seeking to assume a position that he was not entitled to. This had particular resonance, given the ongoing discussions of Mr Nolan's future role.

172. I accept that he did feel that Mr Nolan had overstepped the mark by using the title excessively. His concern was not a mere fabrication or an excuse to make unjustified threats.

173. I also find, however, that there was an element of seeking to put Mr Nolan in his place, which can only be properly understood in the context of their ongoing negotiations. Mr MacLennan was seeking to reassert his authority; to make clear to Mr Nolan that he was not yet the Group Managing Director and that it would be Mr MacLennan's decision whether he was appointed. This led him to treat more seriously a matter that, in other circumstances, he might have ignored or passed over more lightly.

174. For his part, I accept Mr Nolan's evidence that he did not see anything dishonest about his use of the title. In his mind he was following Mr MacLennan's lead. He was also influenced by his view that he was, in practice, carrying out the Managing Director role (which to a significant extent he was) and by his understanding of the letter of intent as a promise that he was shortly to have the formal role.

175. I do not, however, think that he was wholly disingenuous in his email of the 5th September. It is most likely that he accepted that he had used the title too often and prematurely, in a way that Mr MacLennan was entitled to object to if he wished. I do not think that, had he viewed Mr MacLennan's objections as without any substance, he would have been as apologetic as he was in that email or offered to accept a written warning. I note that where, on other occasions, he disagreed with Mr MacLennan (for example over the recruitment of the Business Unit Directors) Mr Nolan had no difficulty making that plain.

Further discussion of the offer

176. On the 7th September 2020 Mr Nolan sent a copy of his solicitor's advice email, together with the tracked changes version of the agreement to Mr MacLennan, p326-7. He described the changed version as being for Mr MacLennan's consideration. The final paragraph of the email reads: 'Thank you for allowing me to better understand the implications of the contract and provide feedback. I appreciate and fully understand you are under no obligation to accept any suggestions.'

177. Mr MacLennan replies the same day, p325-326. He reiterates that he views a revised agreement as an important part of the evolution of the business. He says that he will share the comments with the group's legal advisers. He suggests that, once he has their feedback, he and Mr MacLennan meet to discuss the key points of principle.

16th September 2020 Meeting

178. On the 16th September 2020, Mr MacLennan and Mr Nolan were interviewing a candidate, Louse Verral for the post of Managing Director of Phase II. Following the interview they were joined by Carys Mills.

179. Mr MacLennan then suggested that he would hire Ms Mills as Group Managing Director for both Phase II and Phase II US. This would have required making significant changes to the intended structure of the other group companies. Mr MacLennan suggested that it would mean there should be a dedicated Manager Director of SES, which was a role that Mr Nolan might take on. Obviously, that was a significant departure from what had previously been discussed.

180. Mr Nolan's evidence is that this was presented to him as a fait accompli, rather than an offer. He says he was told 'I would be Head of SES'. I accept Mr MacLennan's evidence that this was not the case and that he did not attempt to unilaterally place Mr Nolan in that role. It seems unlikely that he would have taken such a firm position at this stage. This was the discussion of a new structure, Ms Verral had not been made any offer and the whole idea was at an early stage. It also does not reflect either how Mr MacLennan had acted up to this point (all the previous discussions having been framed as offers to Mr Nolan) or the correspondence that followed. I therefore accept Mr MacLennan's evidence that this was an offer to Mr Nolan, rather than an instruction that he was required to assume the SES role.

21st September 2020 Email

181. On 21st September 2020, Mr MacLennan emailed Mr Nolan, reiterating the offer he had made on the 16th September, p1237. He attached a letter setting out the thinking behind the offer, p1238-1239. He indicated that a formal offer is being prepared.

182. Mr MacLennan acknowledged, that this proposal differs from previous offers. He says that he believes appointing dedicated leadership to each business is the best course and that appointing Mr Nolan to the SES role will allow him to focus on its development.

183. Mr MacLennan also indicates that he intended to form a Group Leadership Team comprising Mr MacLennan, Mr Nolan, Ms Verral and the Financial Director.

22nd September 2020 – Managing Director of SES

184. On the 22nd September Mr MacLennan made the formal offer anticipated by his previous email, p237. It was accompanied by a further Executive Service Agreement.

185. The Executive Service Agreement appears to be a somewhat amended version of what had been sent previously. The job title is now Managing Director, SES Ltd and Schedule 1 of the agreement sets out a conventional list of key responsibilities for such a role. The annual salary has been changed to £120,000 per annum. In relation to the profit share agreement, it is proposed that Mr Nolan receive 1.5% of the net profits of SES (a 1% increase over the previous proposal) and Mr Nolan would still receive an incentive payment of 0.5% of the net profits attributed to Phase II US Inc and Phase II International Ltd.

186. Mr Nolan suggests that this offer was a clear demotion from his existing role as, effectively, Group Managing Director. Mr MacLennan suggests that it was a clear promotion. I do not accept either proposition; the situation was more complex.

187. There were elements of the offer that were positive and elements that were negative for Mr Nolan. The salary and financial benefits were significantly greater than Mr Nolan's position at the time. He would formally become a Managing Director of the largest of the group companies and he would be part of the Group Leadership Team. The inclusion within the contract of an incentive payment on profits attributable to Phase II was a strong indication that Mr MacLennan's statements about including Mr Nolan in the Group Leadership team were genuine.

188. At the same time, there were negative elements. Although Mr Nolan was promised a role in the Group Leadership Team, he had previously been in an effective Group Leadership Team of two: himself and Mr MacLennan. And, in practice, he had been responsible for the day-to-day leadership of the group. In practice, it seems inevitable that his power and influence over the group companies would be diluted as the leadership group expanded.

189. He was also not receiving the role that had previously been set out in the Letter of Intent and which he felt he deserved: Group Managing Director. I think it is obvious, given the structure that Mr MacLennan was proposing, that Mr Nolan might face competition from the other members of the new Group Leadership team for that role in the future.

190. In my view the offer must be judged in the context that some form of business reorganisation was at this stage was inevitable. Mr MacLennan had taken the reasonable decision that he and Mr Nolan could not continue to run the group companies as they had done previously. The organisation has grown too large for that and they wished to grow it further. This was not a situation where MacLennan was seeking to move Mr Nolan from one position in a static organisation to another. Rather, it was a situation in which the whole business was in a degree of flux.

191. It is also important to note that Mr MacLennan was making an offer of the role, not seeking to place Mr Nolan in it unilaterally.

30th September 2020 -- Resignation

192. Mr MacLennan and Mr Nolan met on the 30th September 2020. At the beginning of the meeting Mr Nolan tendered his resignation and handed Mr MacLennan a letter of resignation, p798.

193. The letter sets out a number of allegations of incidents that Mr Nolan says have completely broken down his trust and confidence in Mr MacLennan. They are as follows:

a. Divergence from the 29th April 2020 letter of intent
b. Receipt of lengthy, confusing and inaccurate emails and reports following every exchange with Mr MacLennan.
c. Discovery that Hamflo was a dormant micro company with no assets.

d. Not being informed that Carys Mills had been commissions to carry out an executive search for the Business Unit Directors.
e. Divergence from the offer of a Group Managing Director role to lessor posts.
f. Threats of a written warning in respect of the use of the Manging Director title.
g. Failure to respond to Mr Nolan's comments on the 7th September offer.
h. Failure to respond to Mr Nolan's concerns raised on the 4th September and reiterated by email on the 7th September.
i. Sudden and repeated allegations that Mr Nolan was not the right person for the job and blaming him from the breakdown in their relationship.
j. Delay in paying an agreed bonus of £25,000.
k. Removing Mr Nolan's responsibilities within Phase II and any opportunity to gain the Group Managing Director or Deputy Group Managing Director role.

194. Mr Nolan resigned on notice, giving his last day as the 31st December 2020.

Post resignation Events

195. Following his resignation, the respondent's carried out an investigation and disciplinary process in relation to Mr Nolan. The investigation and disciplinary process was conducted by external HR professionals engaged by Mr MacLennan. Mr MacLennan then made the decision to dismiss Mr Nolan.

196. There were a number of allegations involved. The volume of material considered and generated by the process was substantial. In order to deal with the various issues involved I have needed to make a series of findings of fact, some in relation to the subjective views reached by Mr MacLennan and the HR professionals and some on the basis of what I believe to have occurred.

197. What follows is a chronological account of the events leading up to Mr Nolan's dismissal. That is followed by a section dealing with my own findings in relation to the allegations, in so far as such findings are required.

Decision to investigate

198. Mr MacLennan attended the Phase II offices on the 1st October 2020. There he found some discarded notes, p838-841. Upon reading them he identified them as a business plan, possible produced by or with Mr Nolan.

199. Mr Nolan accepts that they were notes, written by Adam Smith, during a discussion the two of them had had about the possibility that Mr Nolan might take a role with IMC.

200. Although in his evidence Mr MacLennan described this as a detailed business plan, showing that that Mr Nolan intended to create a business competing with the respondents, the notes fall well short of this. They run to four pages of bullet point notes and diagrams. The gist is the Mr Nolan create and grow a new business with IMC (also referred to as IME in the notes). There are figures given for revenue over four years and a broad organogram showing where such an entity might fit within IMC's corporate structure. There is also what appears to be a brainstorming exercise on the merits / demerits of Mr Nolan pursuing this.

201. I do accept that the assessments of Mr Nolan's likely compensation were based on knowledge of the respondents' revenue and profits. I accept, however, Mr Nolan and Mr Smith's evidence that this would have been known to Mr Smith from his earlier work with the respondents. I do not think that, in those circumstances, it can be said that Mr Nolan was sharing confidential information with Mr Smith.

202. Mr MacLennan describes himself as being astounded and very worried by this discovery. He says that as result, he began to monitor Mr Nolan's email. Having done so, he says, that he discovered further examples of Mr Nolan using the Managing Director title.

203. Mr MacLennan says that the combination of the notes and the additional examples of Mr Nolan misusing the Managing Director title led him to further question Mr Nolan's integrity. This led him to him deciding to appoint an investigator to look into Mr Nolan's conduct and to consider disciplinary process.

Start of Investigation – November 2020

204. Mr Gareth Jarman was appointed an investigator in early November 2020. Mr Jarman is a human resources consultation and the Managing Director of Gentium, a human resources consultancy that he founded.

205. Mr Jarman met with Mr MacLennan on 3rd November 2020. He took notes, which I accept are a broadly accurate account of the meeting, p979p986.

206. As part of this meeting, Mr Jarman asked Mr MacLennan to set out his concerns about Mr Nolan. Mr MacLennan describes a number of issues:

a. *Misuse of Managing Director Title:* Mr MacLennan says that he had discovered Mr Nolan misusing the title of Managing Director, which he describes as dishonest and 'incredibly dangerous in our regulated industry' He sets out a number of examples.
b. *IMC Notes / Intention to compete*: Mr MacLennan describes his discovery of the IMC notes. He says that these are, effectively, a replication of his own business plan and demonstrate that Mr Nolan was seeking to compete with the Hamflo group.

c. *Use of personal Gmail account*: Mr MacLennan also says that Mr Nolan has forwarded company literature (financial planning material) to his personal email account.
d. *Use of Gilead documentation*: Mr MacLennan describes an enquiry from a customer about appropriate fair market value payments to their advisors. He says that, in response to this query, Mr Nolan adapted a confidential document from another client, Gilead and sent it to the client. He describes this as dangerous misuse of confidential information.

207. It is notable that in that meeting, when discussing the use of the Managing Director title, Mr MacLennan makes no reference to his own use of that title with regard to Mr Nolan. This was obviously relevant to any consideration of Mr Nolan's use of the title – even if Mr MacLennan felt (as I have found he did) that Mr Nolan had overstepped in his use of it.

208. Mr MacLennan also referred to Adam Smith and his meetings with him in February 2020. He told Mr Jarman that he had been introduced to Mr Smith by Mr Nolan and that 'it was very clear that he was there to ensure Gary got his pound of flesh'. He does not mention Mr Smith's work with the respondents. He goes on to say that he strongly suspects that the IMC notes had been written in collaboration with Mr Smith.

Investigation

209. On the 4th November 2020 Mr Jarman was introduced to Mr Nolan by Mr MacLennan. He conducted an investigatory meeting in relation to the allegations Mr MacLennan had raised. He took notes, which I accept are a broadly accurate account of the meeting, p987-1008.

210. Mr Jarman raised and discussed with Mr Nolan the conduct issues as set out above. At the end of the meeting, following discussion between Mr Jarman and Mr MacLennan, Mr Nolan was suspended.

211. In relation to the use of the Managing Director title, Mr Nolan told Mr Jarman that he had used the title, but in his view had not done anything wrong. He referred to the intention to appoint him as Managing Director and said that Mr MacLennan had been aware of his use of the title. He had said that he had first used the title in March 2020, after conversation about his appointment had begun. Mr Nolan described it as 'a stupid thing to do' but said that he has stopped immediately when it was raised by Mr MacLennan.

212. Later in the meeting Mr Jarman produced an example of Nr Nolan using the title of Managing Director in January 2020, which Mr Nolan accepted he had done. He said, however, he had not used the title frequently until the letter of intent.

213. In relation to IMC, Mr Nolan agreed that IMC had sought to headhunt him, but that he had turned down the offer of employment with them. Mr

Jarman asked if Mr Nolan had discussed the offer with anyone in the office, which Mr Nolan denied. Mr Jarman also raised Mr Nolan's relationship with Adam Smith, who Mr Nolan described as a long-term mentor.

214. In relation to forwarding email to a personal email account, Mr Jarman asked whether Mr Nolan had ever taken or misused confidential information, which Mr Nolan denied.

215. Mr Jarman then showed Mr Nolan an email to his personal Gmail account, in which he had forwarded a number of files to himself (Bus plan xls, Bus Plan ppt, Operational Plan xls) on the 14th October. It is agreed that these are the business plan documents found at p800-837.

216. I accept the respondents' submission that this document represents confidential information belonging to the respondents. They contain detailed financial information that would not be in the public domain, financial projections from 2020 to 2025, details of the expected valuation of the company and the growth plan for the next five years (albeit in broad terms).

217. Mr Nolan said that he might well have done this and that he was taking material off his personal Dropbox account. He described using his own Dropbox account because it was a convenient way of working. He said that he might have been emailing himself files so that he could place them on his Dropbox account in order to assemble them in one place so that they could be handed over. He said that he had technical difficulties in doing this any other way.

218. Mr Jarman suggested that Mr Nolan might have done this in order to set up a competing business. Mr Nolan denied this, saying that implementing any such plan would require substantial capital, which he did not have.

219. Mr Jarman also showed Mr Nolan the handwritten notes relating to IMC. After some discussion Mr Nolan identified the handwriting as Adam Smith's. He agreed that he had discussed the IMC offer with Mr Smith. There was some discussion about whether the notes represented a plan to compete with the Hamflo companies.

220. In relation to the Gilead documentation, Mr Jarman asked whether Mr Nolan had taken confidential documentation from one client and passed it off as Hamflo information. Mr Nolan agreed that he had used a Fair Market Value template / guide to produce a Phase II template, which had sent to another client. He denied that this represented confidential information, saying that the numbers were standardised from EU criteria.

221. Mr Nolan also referred to his resignation and raised with Mr Jarman the matters that he had indicated previously meant that he had been constructively dismissed. I note that Mr Nolan continued to raise these

matters throughout the investigation and disciplinary process, with both Mr Jarman and later Ms Brown. I have not dealt with these conversations in detail, since both Mr Jarman and Ms Brown regarded these matters as outside the scope of their work.

222. Mr Jarman conducted a further investigatory meeting with Mr MacLennan on 6th November 2020. He produced notes, which I accept as a broadly accurate account of the meeting, p 1009-1014.

223. It is notable that, although Mr Jarman raises Mr Nolan's statement to him that Mr MacLennan himself referred to Mr Nolan as Managing Director, he does not tell Mr Jarman that this is true. He does not – quite – deny it. But he states that Mr Nolan becoming MD was the goal / intention, but that it never happened. He says that he has not been promoted to, announced as or offered the job as MD. He says that 'If he started using that phase, it was his call. That was his call'. I take the reference to 'announced as' Managing Director to refer to an official announcement as some kind, rather than Mr Nolan being introduced as Managing Director in a meeting.

224. Essentially, Mr MacLennan talks around the subject without addressing the substance of Mr Nolan's position. All of this would, inevitably, given Mr Jarman the impression that Mr MacLennan had never referred to Mr Nolan as Managing Director and that what he was being told by Mr Nolan was entirely untrue.

225. I do not accept that this was inadvertent. As noted above, Mr MacLennan's use of the term in reference to Mr Nolan was clearly relevant to these allegations. Mr Jarman had expressly raised with Mr MacLennan Mr Nolan's main defence. I have therefore concluded that Mr MacLennan deliberately spoke in such a way to give a misleading impression to Mr Jarman.

226. Similarly, Mr MacLennan acceptd that he has had some business discussions with Adam Smith but was not frank about their extent. He describes them as verbal conversations, in which he provided only information that was available through Companies House. The impression he gives Mr Jarman is that he has not shared substantive business information with Mr Smith at all. As set out above, I have accepted Mr Nolan and Mr Smith's evidence that the discussions were considerably more extensive that this. Most importantly, Mr MacLennan had discussed with Mr Smith the information he was now suggesting that Mr Nolan must have shared with Mr Smith in breach of confidence. Again, I have concluded that Mr MacLennan deliberately sought to give a misleading impression to Mr Jarman.

227. On the 7th November Mr MacLennan wrote to Nicola Blakely, who he described as a friend who was both a lawyer and had previously worked at Gilead. He asked her for her views on the Gilead document being used as a template for another client, p445-446.

228. It is fair to say that Mr MacLennan's email is not couched in neutral terms. He refers to the 'highly confidential text' and says that if Gilead became aware of the incident 'I have no doubt we would be sued'.

229. Ms Blakely replied on the 8th November, p442-445. She says that, in her view, the Gilead document was Gilead's intellectual property, and these was a risk of litigation. She suggests that there could potentially be damages to the value of a licence for the work. She said that, on balance, she would not expect

Gilead to bring a claim and were more likely to send a 'very stern threatening 'Cease and Desist' legal letter'. It appears that Mr MacLennan shared this email with Mr Jarman, since it is referred to in his later report.

230. Mr Jarman met with a number of other employees:

a. Amanda Sergison-Main, Operations Director, on 9th November, p10151024.
b. Alexander Maurer, Medical Director, on 9th November, p1025-1028
c. Claire Aukim-Hastie, Medical Director, on 9th November, p1029-1032
d. Vera Valota, Senior Account Manager, on 9th November, p1033-1035
e. Dan D'Akesio, Senior Vice=President, on 11th November, p1058-1059

231. Mr Jarman met Mr Nolan again on the 10th November 2020. He produced notes, which I accept as a broadly accurate account of the meeting, p1036-1050.

232. A key part of this discussion was in reference to the signed version of the 2016 contract, which Mr Jarman had sent Mr Nolan the previous day. Mr Nolan denied having signed this document and suggested that it had been manufactured by Mr MacLennan. He described it as false and fabricated.

233. Mr Jarman met with Mr MacLennan later that day. He produced notes, which I accept as a broadly accurate account of the meeting, p1051-1053.

234. Mr Jarman raised with Mr MacLennan Mr Nolan's allegations regarding the contract and his denial that he had ever signed it. Mr MacLennan repeated his account that Mr Nolan had been provided with the proposed contract but refused to sign it.

235. Mr MacLennan also gave his explanation of having created a mock-up version of the contract in order to demonstrate that Mr Nolan would have to sign a new contract if he was appointed to a new role. Shortly after the meeting Mr MacLennan emailed Mr Jarman, repeating that explanation, p849.

236. For the reasons set out above, I have not accepted Mr MacLennan's account of how the signed version of the contract had been produced. It

follows from this that he had deliberately sought to mislead Mr Jarman about what had happened and presented false documents to support his account.

237. Mr Jarman had a telephone call with Adam Smith on the 10th November. He made notes of this call and I accept them as a broadly accurate account, p1054-1057.

Investigation report

238. Mr Jarman produced an investigation report. It was sent to Mr Nolan by email on the 11th November 2020, p477. The report, together with its attachments are p478- p949.

239. Overall, Mr Jarman concluded that his factual findings supported a case to answer by Mr Nolan in relation to the allegations. He recommended that the matter proceed to a disciplinary hearing.

Client contact

240. On 11th November 2020, Mr Nolan emailed Mr Jarman, copying in Mr MacLennan to inform them that he had been contacted by a client of Phase II, who had been told that he was absent due to resignation, p944-945. He also said that the client had referred to uncertainty caused by him not having signed a contract in 2016 He suggested that what the client had been told had been inappropriate.

241. It was not suggested to Mr Nolan in cross-examination that he said anything inappropriate to the client. It is also obvious that he could not prevent a client seeking to contact him. He might have declined to take the call, but I do not think there was anything wrong with having an innocuous conversation with a client in those circumstances.

242. Mr MacLennan then emailed Mr Jarman, indicating that he had only spoken to one client, who had called him after he had been sent a generic email indicating that Mr Nolan was absent from the business, without giving any detail, p946. He said that he was worried about what Mr Nolan might have said to this client and whether he had spoken to anyone else – particularly given that the terms of the suspension letter had said he should not have contact with clients.

243. Mr Jarman then emailed Mr Nolan, requesting that he disclose the client's identity, p954-955. Mr Jarman also asked Mr Nolan to confirm whether he had been contacted by any other client or employee during his suspension.

244. Mr MacLennan replied. He confirmed that he had not initiated any such contact. He described the call he had had with a client as a social one to check on his welfare.

245. Mr Jarman then replied, asking again for the client's name and whether any other client had contacted Mr Nolan, 953-954.

246. By this point it was late on the 11th and Mr Nolan's substantive reply came on the 12th November, p953. He repeated his confirmation that he had not sought to contact 'employees, clients etc'. He refused to name the client who had contacted him.

Disciplinary Process

247. Mr MacLennan wrote to Mr Nolan on the 12th November, inviting him to a disciplinary hearing to be conducted by Charlene Brown, p1060-1061. Ms Brown is the co-founder and Managing Director of Howlett Brown, which she describes as a people intelligence company. One of its services is to provide an external HR function, in particular to conduct disciplinary processes.

248. The letter informed Mr Nolan that he was required to attend a disciplinary hearing on the 17th November 2020. It described the allegations as follows:

a. You may have deliberately and dishonestly misrepresented yourself as the Managing Director of the Company in your communications with clients (including email signatures).
b. You may have misused confidential information of the Company, including making unauthorised disclosures of company confidential information.
c. You may have misused confidential information of the Company's client, Gilead, including by taking and using Gilead confidential information for the purposes of another client of the Company without authorisation.
d. You may have breached your duty of fidelity, fiduciary obligation and express obligations of your employment contract by conspiring to compete against the Company; and
e. You may have unreasonably refused to follow reasonable management instructions by not informing the Company about communications you have had with employees and customers during your period of suspension.

249. Solicitors on Mr Nolan's behalf replied on the 13th November, p10621063. Their reply was somewhat combative, they suggested that Mr MacLennan had 'apparently decided to launch a vendetta against our client' and made a number of demands. It suggested that a great deal of further information was required, which Mr Nolan was entitled to receive prior to any disciplinary meeting. It requested signed statements from the witnesses quoted in the report and suggested that they should attend the disciplinary meeting to answer questions from Mr Nolan. It accused Mr Jarman of making covert recordings without Mr Nolan's consent. Finally, it suggested that there was inadequate time for Mr Nolan to prepare for a disciplinary meeting for the 17th and suggested that it should be postponed.

250. Ms Brown replied on the 15th November, p1064-1067. In substance, she suggested that Mr Nolan had sufficient time to prepare and said that, if he did not attend the meeting, the decision would be made in his absence. There follow various proposals in relation to Mr Nolan providing further information and indicating what questions he might wish to put to potential witnesses. Ms Brown refused, however, to agree that Mr Nolan would be permitted to cross examine witnesses.

251. Mr Nolan's solicitors replied on the 16th November, p1068-1070. They reiterated their objections to the timetable and referred to Mr Nolan having an imminent surgical appointment on the 18th November. They indicated that Mr Nolan had written separately requesting further information and documents. They suggested that it was appropriate to delay the disciplinary hearing by 14 days, to allow Mr Nolan to consider the investigation report (and the documents he had requested) and to recover from the surgery.

252. Mr Nolan also wrote to Mr MacLennan on the 16th, requesting further information prior to the disciplinary hearing, p1074-1077. Although it is framed in terms of requesting further information, it raises a wider range of issues. In particular.

a. It requests written and signed witness statements from those questioned during the investigations.
b. It requests Mr Nolan be able to put questions to six individuals during the disciplinary process, including Mr MacLennan.
c. It requests and explanation as to why a number of witnesses were not interviewed.
d. It requests evidence to support the allegations addressed in Mr Jarman's report, but in very broad terms.

253. Also on the 16th November 2020 Mr Nolan wrote to Mr MacLennan making a subject access request under GDPR. He requested all personal data held about him, including his personnel file and electronic records.

254. Mr MacLennan replied on the same day, p1080. He acknowledged the subject access request and said that it would be reviewed. In relation to the information request, he said that this was not required prior to the disciplinary meeting and the information would not be provided.

17th November 2020 Disciplinary Meeting

255. Ms Brown and Mr Nolan met on Tuesday 17th November 2020. Notes were taken by one of Ms Brown's colleagues, p1523-1530. I accept that these notes are a broadly accurate account of the meeting.

256. Ms Brown opened the meeting by acknowledging that Mr Nolan thought that the process was moving too quickly and suggesting that the meeting be postponed until Thursday 19th November 2020. After some discussion, Mr Nolan agreed.

19th November 2020 Disciplinary Meeting

257. The meeting reconvened on the 19th November 2020. Mr Nolan was accompanied by Rianna Hanif. Ms Brown again brought a colleague to take notes, p1530-1550. I accept that the notes are a broadly accurate account of the meeting.

258. Ms Brown opened the meeting by explaining to Ms Hanif the role of a companion. She said that she could ask for a break if Mr Nolan appeared to need one and that she could ask Ms Brown question. She should not, however, answer questions for Mr Nolan or give evidence. Ms Brown then reiterated that Mr Nolan could request a break at any time, acknowledging that he had mentioned he was fatigued as a result of his operation.

259. The meeting ultimately lasted between 14.00 and 17.18. Ms Brown offered Mr Nolan a break on a number of occasions. Most of these offers were refused, with Mr Nolan indicated he would rather proceed. One was accepted and there was a short break between 16.13 and 16.20.

260. During the meeting Ms Brown questioned Mr Nolan about his response to the various allegations and the investigation report. Although Mr Nolan has said that Ms Brown's questioning during the hearing was unfair and demonstrated that she had made up her mind I do not accept this. Ms Brown asks Mr Nolan the sorts of questions that she would be expected to ask given the allegations she was considering. Mr Nolan is given an opportunity to explain his position. On occasion Ms Brown seeks to press for an answer or to bring Mr Nolan back to the issue she is considering. That is a normal part of a disciplinary hearing.

261. In relation to the use of the Managing Director title, Mr Nolan reiterated his view that he had done nothing wrong. He said that Mr MacLennan had also used multiple titles and was aware of his use of the title.

262. There was also discussion of the client who had contacted Mr Nolan. Mr Nolan maintained his position that he would not name the client, because it had been a personal communication. He said he had been contacted by other clients and he had responded 'I can't talk to you right now, but we will catch up in the future'. Mr Nolan also noted that, from the documents that he had received, it appeared that Mr MacLennan had, in any event, identified the client her had referred to in his email.

263. In relation to the use of Mr Nolan's private email address, Mr Nolan said that he had sent the business plans to himself in error. He went on, however, to say that he had sent some emails to himself, because he wished to keep a record. He suggests that Mr MacLennan was untrustworthy and that this had motivated him to keep a separate record to protect himself. He says that this represents a handful of emails from July 2020 onwards.

19th November 2020 Ms Brown / Mr MacLennan Meeting

264. Following her meeting with Mr Nolan, Ms Brown met with Mr MacLennan. A notetaker attended and took notes, which I accept are a broadly accurate account of the meeting, p1551-1559.

265. There are two incidents of particular note in this meeting. First, Mr MacLennan reiterated his account of the how the signed version of the 2016 contract came into being and denied the allegation Mr Nolan had made that this had not occurred.

266. Second, in relation to Mr Nolan's use of the Managing Director title, Mr MacLennan reiterated his statement that this was inherently inappropriate. He described what Mr Nolan had done as being to 'impersonating being the MD'.

267. When Ms Brown pushed back on this and noted that Mr Nolan had shared an email with her in which Mr MacLennan had used the title in reference to Mr MacLennan, he somewhat modified his position. He said that 'There is a fine line there, and in passing I have said to clients GN will be able to look after you, he's the MD. There is a very fine line there, it does depend on the situation and he was never given the authority to use that title. On the one or two occasions he has done it I may have turned a blind eye but this was in an exception'.

268. Although this was a franker account than Mr MacLennan had given previously, it still fell well short of a full and honest explanation of how he had used the term in the past.

Recommendation

269. Mrs Brown wrote to Mr MacLennan on the 20th November, by email, setting out her recommendations, p1098-1106.

270. She concluded that Mr Nolan had been guilty of gross misconduct and recommended dismissal. Essentially, she upheld all the allegations against Mr Nolan.

271. In particular, Mrs Brown concluded that Mr Nolan had dishonestly misrepresented himself as Managing Director. She concluded that he had used the title without being appointed to the role. In her letter of recommendation, she describes her conversation with Mr MacLennan in which he had said that, while there was a practice of changing titles within the company / industry, it was restricted to 'core function titles for junior … staff'. She went on to say that Mr MacLennan had told her it was 'certainly not a practice that you would endorse a senior leader undertake' and concluded that 'I found no evidence to suggest that this behaviour was officially endorsed and supported by you'.

272. There is reference to an email that Mr Nolan had produced from the 30th

March 2020, in which Mr MacLennan had described Mr Nolan as 'Gary-MD' to Adam Smith. It was not, she concluded, an example of Mr MacLennan endorsing Mr Nolan's use of the title, but discussion of his possible future role.

273. I accept that Mrs Brown accurately recorded the conversations she had with Mr MacLennan in this respect and that her letter expressed her genuine views on this point. Mr MacLennan, however, must have realised that although Mrs Brown had seen no evidence to suggest that Mr Nolan's actions had been endorsed by him, this was because he had not been honest with her about his own actions.

274. Had Mr MacLennan been frank and explained that he had referred to Mr Nolan as Managing Director this would inevitably have affected her thinking on this point. She might have reached a similar conclusion, but it was undoubtedly relevant information that he concealed from her.

275. In relation to the use of confidential information, Ms Brown concluded that Mr Nolan had acted wrongly in his use of Dropbox and his personal email to deal with matters related to the business. Most significantly, she did not accept Mr Nolan's explanation that he had inadvertently sent the business plans to his private email. She did not accept that any concerns Mr Nolan might have about disclosure for the purposes of a future Employment Tribunal claim could justify this or the similar treatment of documents relating to the negotiations over Mr Nolan's position. She found that this all amounted to a deliberate contravention of Mr Nolan's responsibilities in respect of confidential information.

276. In relation to the use of the Gilead document, Ms Brown concluded that Mr Nolan had misused Gilead's confidential information. She found that it had simply been copied and issued to another client. She concluded this was a misuse of confidential and sensitive information.

277. In relation to Mr Nolan conspiring to complete with the respondents, Ms Brown concluded that he had done so. In particular she relied upon the notes that Mr Nolan had produced with Mr Smith. In this regard, I do not accept that her conclusion was a reasonable one. The strongest inference that can be drawn from the notes is that Mr Nolan had considered taking a role with IMC. That would not have amounted to a breach of Mr Nolan's duties to the respondents, because he was entitled to take employment elsewhere if he wished, even if it competed with the respondents.

278. Finally, Ms Brown concluded that Mr Nolan had refused a reasonable management instruction when he had refused to name the client who had contacted him during his suspension.

20th November – Dismissal

279. Mr MacLennan then wrote to Mr Nolan on 20th November 2020, dismissing him, p1108-09. He enclosed a copy of Ms Brown's recommendations.

280. Although the letter describes the dismissal as being based on Ms Brown's recommendation, Mr MacLennan accepts that it was his decision.

281. The letter records the reason for dismissal as being:

a. Misuse of the Managing Director Title
b. Misuse of confidential information, including unauthorised disclosures
c. Conspiring to compete against the Company.
d. Misuse of Gilead's confidential information
e. Unreasonably refusing to follow reasonable management instructions by not informing the Company about communications during suspension.

282. I accept that, at least as broad headings, these matters were all in Mr MacLennan's mind at the point he decided to dismiss and that Mr MacLennan believed that they amounted to serious misconduct on Mr Nolan's part.

283. Most importantly, however, I do not accept that Mr MacLennan began the disciplinary process or received Ms Brown's recommendation with a neutral or open mind. His efforts to mislead both Mr Jarman and Ms Brown strongly suggest otherwise.

284. Rather, I find that Mr MacLennan had decided he wished to dismiss Mr Nolan at the point he engaged Mr Jarman to being his investigation and sought to orchestrate the process to achieve that end. Again, that is indicated by his consistent efforts to mislead both Mr Jarman and Ms Brown on key points.

285. This also meant that the misconduct Mr MacLennan had in mind was in a number of respects different to that set out in Ms Brown's recommendation and his letter.

286. He did not believe that Mr Nolan's misuse of the Managing Director title was as serious as Mr Jarman and Ms Brown had concluded. This was because he was aware of his own actions in using the title, both internally and externally. Although he genuinely believed that Mr Nolan had overstepped, he knew that it was with significant encouragement from his own use of the title.

287. I do not think that, but for Mr Nolan's resignation and the other allegations the use of the title would have caused Mr Nolan to be dismissed. Mr MacLennan had not taken steps to take any formal disciplinary action following his discovery of its wider use in early September. There was no evidence, either during Mr Nolan's employment or after, that he had continued to use the title after Mr MacLennan raised the issue on 7th September.

Nonetheless, I find that this contributed to Mr MacLennan's decision to dismiss.

288. Similarly, Mr MacLennan was aware that Mr Nolan had not shared confidential business information with Adam Smith in the way that Mr Jarman and Ms Brown believed, because he knew that Mr Smith had worked with the respondents to a significantly greater extent than he had told them.

289. I also do not think that Mr MacLennan could have believed that Mr Nolan had retained the business plans in order to compete with the respondents. The business plans related to the respondents' business and were of only very limited value to anyone else. Mr Nolan had already referred to the possibility of a claim for constructive dismissal. It is therefore most likely that Mr MacLennnan recognised that his motive was to retain the documents for that purpose.

290. Overall, however, I accept that Mr MacLennan dismissed Mr Nolan because he genuinely believed that he had committed serious misconduct.

Conclusions in respect of the allegations

291. Although in respect of the unfair dismissal claim I must focus on what was in the mind of the respondents during the disciplinary process, to deal with the wrongful dismissal claim I must consider whether Mr Nolan had committed an act of gross misconduct.

292. In that respect, I make the following findings of fact:

a. Mr Nolan had deliberately sent the confidential business plan to his private email. I do not accept his account that this was done in error or because he was experiencing technical difficulties. In my view he did so because he wished to preserve documents that he considered might be relevant in a future claim to the Employment Tribunal.

b. Mr Nolan also sent documents relating to the negotiations over his position and the offers he had received. I do not accept that these were confidential or that there was anything improper in him seeking to retain them.

c. I find that Mr Nolan's use of the Gilead documents was plainly a breach of Gilead's confidentiality. The document is marked as confidential and such payment information is, on its face, likely to be confidential. I have seen no documentary evidence to support Mr Nolan's contention that the substance of the document was in the public domain, although that should have been easy to provide if it was the case. I also accept Ms Blakely's statement, in her email to Mr MacLennan, that the information was confidential and the issue was likely to be taken seriously by Gilead.

d. I do not, however, find that Mr Nolan had acted deliberately wrongly. I found his evidence that he saw the matter as trivial plausible and his indignation that it was used to justify his dismissal genuine. It was an error of judgement stemming from his desire to assist a client, rather than a deliberate act of misconduct.

Honoured Time

293. Mr MacLennan's evidence is that, in the course of preparing for this case he, with his lawyers, carried out a search of Mr Nolan's email. In doing so he discovered an email from Mr Nolan to Adam Smith, sent on 23rd August 2018, p201.

294. The email is titled 'WIP'. There is no content in the email body. Attached is a PowerPoint document titled 'Honoured Investor Doc V2 21 Aug(GN)', p201206.

295. The PowerPoint is a proposal for a business called Honoured Time: a digital platform for companies within the Life Science industry who contract with academics, medical professionals, patients and carers. As the proposal notes, such agreements have significant regulatory and compliance requirements. Honoured Time is intended to facilitate the administration and payment of such contracts and honorariums.

296. The proposal lists both Mr Nolan and Adam Smith as the founders of Honoured Time. Mr Nolan is described as follows:

> *Gary Nolan is a Pharmaceuticals marketing professional, with 14+ years experience in building communication and education programmes for large pharmaceutical companies. Over recent years he has created innovative digital services for the Pharmaceutical industry, notably in Oncology and Haematology. He is Chief Operating Officer at PHASE II which is a specialist marketing agency for the life science industry*

297. The proposal also says: '[Honoured Time] will be managed through build and launch by Gary and Adam, leveraging the existing capabilities available through the Founders' networks and businesses, to ensure a low-cost and efficient use of early-stage resources.

298. The respondent's case is that this email demonstrates that Mr Nolan was committing serious misconduct in relation to Honoured Time, which has implications for any award of compensation. This is put in two ways. First, it is suggested that the proposal shows that Mr Nolan intended to use confidential information from the respondents to support his own business.

299. I find this fundamentally unconvincing. The highest this element of the case can be put is that I should draw an inference from the references to Mr Nolan's experience and the statement that the founders will leverage their networks in relation to Honoured Time. Such generic statements do not in any way support

an inference that Mr Nolan was intending to make any use of confidential information from the respondents. A reference to the experience and contacts of a senior executive is commonplace in such documents. It is not the case, as suggested by the respondents, that where an ex-employee benefits from the knowledge and contacts they have made in their previous role they are thereby acting on confidential information.

300. The second way the respondent's case is put is that the email demonstrates that Mr Nolan was working on his own business during company time.

301. In his evidence Mr Nolan could not recall any details of the circumstances in which he sent the email. He speculated that he might have been on holiday at the time. I accept the respondents' submission that, if Mr Nolan had been on holiday, he would have been likely able to produce evidence to support that, which he did not. The reality, in my view, is that Mr Nolan does not remember the events surrounding the email being sent. This is unsurprising given the passage of time.

302. I do not accept that a single email of this nature can support the inference the respondent seeks. It is a single data point. All it demonstrates is that Mr Nolan sent this particular version of the proposal to Mr Smith during work hours on this particular date. I accept Mr Nolan's evidence that he was a senior and trusted employee who, in practice, worked flexible hours. I note that, although the respondents' have plainly carried out a search for potentially incriminating material, this is the only email that has been produced to support this argument. There has been no evidence that Mr MacLennan or anyone else had concerns about Mr Nolan's work ethic, commitment to the business or timekeeping in 2018.

303. I also do not accept that, in considering an alternative to his current employment Mr Nolan was acting improperly. The only restrictions on his ability to compete with the respondents were those set out in the 2006 contract. There is nothing there to prevent him going into business with Mr Smith, provided he did not solicit or approach the respondents' clients within 12 months of leaving. Similarly, there was no contractual term requiring him to bring a potential business idea to Mr MacLennan.

Bonus

304. It is agreed that this issue arose from a conversation over dinner on 21st September 2019. Phase II US had closed an account with a client in the US and there had been a celebratory dinner. It is common ground that there was discussion of Mr Nolan receiving a bonus, but disagreement about the specifics.

305. Mr MacLennan's account was that there was no definite agreement on the amount, because there remained uncertainties about the value of the contract, whether it would actually go ahead and differing views about whether it was Mr Nolan or another employee who was primarily responsible.

306. Mr Nolan's position in his witness statement was that the £25,000 bonus arose from the letter of intent. Over the course of the hearing, however, this shifted somewhat to greater reliance of the later WhatsApp discussions between himself and Mr MacLennan.

307. The first of these occurred on 23rd July 2020, p267. In the course of other small talk Mr Nolan sends a message 'Need the money'. In context this is a reference to earlier discussions they had had about Mr Nolan's financial position, which was under temporary strain as a result of purchasing a house.

308. Mr MacLennan proposes making a £25,000 payment in relation to Mr Nolan's profit share for the year ending May 2020. He describes this as an advance, indicating it would be subtracted from the later year end payment.

309. Mr Nolan replies, expressing his thanks, but saying he would like to agree the principals of 'our partnership' before the money is transferred.

310. There was not therefore a binding agreement at that stage. Mr MacLennan had made an offer, but Mr Nolan had refused it (while obviously expecting to accept a similar offer once other matters had been settled).

311. The Oyster Bar bonus is referred to again in Mr MacLennan's email of the 3rd August 2020. Mr MacLennan indicates that he is awaiting Mr Nolan's bank details in order to facilitate 'the agreed advance of £25k on your 2020 projected profit share in keeping with our discussions at the Short Hill Mall Oyster Bar'.

312. Again, this cannot amount to a binding agreement at this stage, because it is a statement by Mr MacLennan reiterating his offer. It would need to be accepted by Mr Nolan to become a contract.

313. On the 21st September 2020, Mr Nolan sends Mr MacLennan a WhatsApp message, p356. He says he has completed on his house and asks whether Mr MacLennan can arrange payment of the Oyster Bar bonus. He also provides his account details. The message is sent at 19.16.

314. Just under 20 minutes later Mr MacLennan replies 'Amazing! Of Course! Will do!' He goes on to congratulate Mr Nolan on his house purchase.

315. The respondent urges me to consider this WhatsApp message in the context of the ongoing and lengthy negotiations. I accept that this is right. Although Mr MacLennan has made a clear offer to advance the £25,000 on the 3rd August, by the 21st September there had been consideration developments. Taken in that context, I do not think it would have been reasonable for Mr Nolan

to regard the offer as remaining open. Indeed, he did not. His message to Mr MacLennan is clearly couched in conditional terms and acknowledges the possibility that it will not be possible to make the payment (which in context must mean that he anticipated Mr MacLennan might be unwilling, since there is no suggestion that the funds were unavailable or there would be any practical difficulty in making a payment).

316. In contractual terms, therefore, Mr Nolan's message was not an acceptance of Mr MacLennan's earlier offer, but an invitation to remake the offer. Mr MacLennan would have been entitled to refuse, but he did not. Rather, his message is a clear agreement that he will provide Mr Nolan an advance on his bonus. As Mr MacLennan acknowledge during his evidence, it was an unequivocal statement that a £25,000 bonus would be paid.

317. Shortly before his resignation, on 28th September 2020, Mr Nolan sent a further message reading 'Hi Derek, are you able to transfer the agreed funds above?'. Mr MacLennan did not respond.

318. It is common ground between the parties that the £25,000 was not paid.

The law

Constructive dismissal

319. Unfair dismissal necessarily requires that an employee have been dismissed by their employer. s95(1)(c) of the Employment Rights Act 1996 creates a legal route by which a dismissal can be established on the basis of an employee resigning (with or without notice). This will be deemed to be a dismissal if the employee is entitled to resign without notice, because of the employer's conduct. This is known as a constructive dismissal.

320. For there to be such a constructive dismissal there must be:

a. A breach of contract by the employer, that is sufficient serious to be repudiatory / fundamental.
b. The employee must have resigned in response to that breach.
c. The employee must not have affirmed the contract prior to the resignation.

321. Not every breach of contract is a fundamental breach. The conduct involved must be a significant breach that goes to the root of the employment contract or which demonstrates that the employer no longer intends to be bound to an essential term, see *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761.

322. In this case the Claimant argues that there was a breach of the implied term of trust and confidence. This is an implied term, established in its

current form in *Malik v Bank of Credit and Commerce International* [1997] ICR 606. The term requires that an employer must not, without reasonable and proper cause, conduct itself in a way that is calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence that exists between an employee and her employer.

323. The test is therefore in two parts. First, whether there has been conduct that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between the parties. Second, whether that conduct was without reasonable and proper cause.

324. Any breach of the implied term of trust and confidence will amount to a fundamental breach the contract because there can only be a breach if there is action that is calculated or likely to destroy or seriously damage the employment relationship.

325. The implied term of trust and confidence may be breached by a course of conduct in which a number of acts and omission together amount to a breach of the term – even if the individual actions do not do so, see *Omilaju v Waltham Forest LBC* [2005] ICR 481 and *Kaur v Leeds Teaching Hospital NHS Trust* [2019] ICR 1.

326. In *Kaur* the Court of Appeal laid down guidance for dealing with constructive dismissal claims based on an alleged breach of the implied term of trust and confidence. It is generally sufficient to consider:

a. What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
b. Has he or she affirmed the contract since that act?
c. If not, was that act (or omission) by itself a repudiatory breach of contract?
d. If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)
e. Did the employee resign in response (or partly in response) to that breach?

327. It is possible for a number of different acts and omissions to collectively amount to a breach of the implied term of trust and confidence, even if no single event is sufficiently serious to reach that threshold, see *Omilaju v Waltham Forest LBC* [2005] ICR 481.

328. The interaction between the implied term of trust and confidence and the exercise of an employer's discretionary powers has been considered by the Court of Appeal in *IMB United Kingdom Holdings Ltd v Dalgleish* [2017] IRLR 4. In the context of an employee denying a pay rise to an employee, the Court of Appeal accepted that, although the employee

had no contractual right to a pay rise, withholding such a rise could be a breach of the implied term of trust and confidence. It would, however, need to be an unusual case, in which the employer had acted arbitrarily or capriciously.

329. Following *IMB United Kingdom Holdings* the correct approach for a Tribunal considering an alleged breach of contract arising out of an exercise of an employer's discretionary powers is to apply the well-known *Wednesbury* test for irrationality. That requires consideration of 1) whether the relevant matters (and no irrelevant matters) have been taken into account and 2) whether the result is one that no reasonable decision-maker could have reached.

330. If there has been a fundamental breach of contract, the Tribunal must consider whether that was the reason for the resignation. It must be a substantial part of the reason an employee resigned but need not be the sole reason.

331. It is also necessary to consider whether an employee has affirmed the breach of contract (that is by their behaviour, whether express or implied, indicating that they intend for the contract to continue notwithstanding the breach). Within the employment context, this most commonly occurs through an employee continue to work for the employer. The longer this is done, the more likely that the reasonable interpretation of events is that the employee intends the contract to continue. Continuing in employment or, put another way, delay in resigning does not, however, itself mean that an employee has affirmed the contract. The whole factual circumstances must be considered to determine whether the employee has acted in such a way that is only consistent with the continued existence of the contract.

Unfair dismissal

332. The general approach to determining whether a dismissal is fair is set out in s98 Employment Rights Act 1996. s98(1) requires the employer to establish the reason for the dismissal and that it is one of the potentially fair reasons set out in s98(2). In this case the reason relied upon is conduct. The reason for dismissal is the factor or factors operating on the mind of the person who made the decision to dismiss.

333. If an employer succeeds in showing that the reason for the dismissal is potentially fair, the Tribunal must consider whether the dismissal was fair. S98(4) requires that, in doing so, it considers whether in all the circumstances (including the size and administrative resources of the employer) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. The fairness of the dismissal must also be determined in accordance with the equity and substantial merits of the case. Neither the employer nor the employee bears the burden of proof on the question of fairness, which is to be approached neutrally.

334. A fundamental element of considering fairness properly, in the context of a claim for unfair dismissal, is that a tribunal must not substitute its own view for that of the employer. Instead, the Tribunal's role is to consider the employer's actions and decide whether they were within the range of possible options open to a reasonable employer in the circumstances. This is often known as the 'range of reasonable responses'. See in particular *BHS Ltd v Burchell* [1980] ICR 303 and *Iceland Frozen Food v Jones* [1983] ICR 17.

335. This means that the tribunal must not 'stand in the shoes' of the employer and decide whether it would have reached the same decision. That would, inherently, involve the Tribunal replacing the employer's decision with their own. The Tribunal must focus on assessing the employer's decision, by reference to the range of reasonable responses. At the same time, that range is not infinitely wide and a finding that dismissal fell outside the range should not inevitably suggest that a Tribunal has substituted its own view for that of the employer, see *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734.

336. In the context of a constructive dismissal, the Tribunal must still consider the employer's reason for dismissal. Upon initial consideration this seems artificial since it is the employee, not the employer, who has decided to end the relationship. The correct approach has been explained by the Court of Appeal in *Berriman v Delabole Slate Ltd* [1985] ICR 546. It is to focus on determining the reason for the employer's breach of contract that led the employee to resign. That is the reason for dismissal, for the purposes of an unfair dismissal claim.

337. If the employer establishes a potential fair reason in relation to the constructive dismissal, the Tribunal must go on to consider the fairness of the dismissal. In practice, however, it would require very unusual facts for a constructive dismissal based on the implied term of trust of confidence to be found to be fair.

338. In the context of a conduct dismissal, it is appropriate to analyse an employer's decision to dismiss by applying the Burchill test – drawn from the case of *BHS Ltd v Burchell* [1980] ICR 303, although it has been further developed by subsequent case-law. This requires consideration of:

    a. Did the Respondent have an honest belief in the allegations?
    b. Did the Respondent have reasonable grounds to support that belief?
    c. Did the Respondent carry out a reasonable investigation into the allegations?
    d. Given all the circumstances, were the allegations sufficiently serious that dismissal fell with the range of reasonable responses open to a reasonable employer?

339. Mr Harris submits that in considering whether a dismissal is fair I should have regard to whether the decision maker considered all the relevant factors, including both an employee's length of service and any mitigation. I accept that this is the correct approach.

Polkey Reduction

340. Where a dismissal is found to be unfair, it is open to a Tribunal to reduce any compensatory award to reflect the possibility that the employee may still have been dismissed had the employer acted fairly. This is described as a Polkey reduction, following the case of *Polkey v AE Dayton Serviced Ltd* [1988] ICR 142.

341. As in relation to unfair dismissal, the Tribunal must not substitute its own view for that of the employer, the key questions are a) Whether the employee could have been fairly dismissed? and b) Would the actual employer have done so? See *Hill v Governing Body Great Tey Primary School* [2013] IRLR 274.

342. The assessment of a Polkey reduction is an inherently uncertain exercise, since it inevitably involves an element of speculation. Although there are cases in which the evidence related to any potential reduction is so riddled with uncertainty that no sensible assessment can be made, this is unusual. Tribunals should only proceed on the basis that employment would have continued indefinitely where the evidence that it would not have done so can properly be ignored, see *Software 2000 v Andrews* [2007] IRLR 568.

343. A similar principle applies where it can be shown that the employee could have been dismissed for misconduct that occurred during employment, but was not discovered until after employment ceased, see *Devis v Atkins* [1977] ICR 662.

Confidential Information

344. Since a number of the matters and allegations related to this case concern the use or alleged misuse of confidential information, it is appropriate to set out briefly the relevant law.

345. This is conveniently set out by the Court of Appeal in *Faccenda Chicken Ltd v Fowler* [1985] 1 Ch 117, 135F-138 to which I was referred by the respondents. There was not significant legal argument on these points from either counsel. I do not understand the following principles to be in dispute.

a. Where there is a contract of employment, that contract will determine the obligations of the employee in respect of confidential information.
b. If the contract does not contain an express term, there is an implied term that the employee will act in good faith and fidelity to the employer.
c. This includes obligations that survive the end of the employment relationship. In particular, there is an ongoing obligation not to use or disclose confidential information.
d. Confidential information for the purposes of that implied term, however, is not all information that an employee obtains during their employment.

Rather it is information that amounts to a trade secret or is equivalent to a trade secret.

e. In considering whether information falls within that category it is necessary to consider:
   i. The nature of the employment and, in particular, the extent to which an employee habitually handles confidential matters and is aware of their importance. ii. The nature of the information itself
   iii. Whether the employer indicated that it regarded the information as confidential.
   iv. Whether the information can be separated from other information which is not confidential.

Breach of contract / Wrongful dismissal

346. The claimant was dismissed summarily, which would only be lawful if he had committed an act of gross misconduct. In determining whether gross misconduct has occurred it is for the tribunal to decide whether the contract was fundamentally breached by an act of serious misconduct. This type of claim is therefore approached quite differently to a complaint of unfair dismissal, where a tribunal is required to focus on the reasonableness of an employer's beliefs and actions.

347. An act of gross misconduct is something more serious than mere misconduct. It must be sufficiently serious and damaging to the relationship to justify summary dismissal. A deliberate refusal to obey a lawful order, significant dishonest, theft and violence in the workplace are all likely to amount to gross misconduct.

348. An employer may rely on an act of gross misconduct which was not discovered until after the dismissal, see *Boston Deep Sea Fishing and Ice Co. v Ansell* (1888) 39 Ch D 339.

349. Mr Kemp has also referred me to *Brandeaux Advisers (UK) Ltd v Chadwick* [2011] IRLR 224. This is a High Court cases concerned with an employee sending confidential documents to their private email address in order to secure them for the purposes of anticipated litigation. As a Queens Bench Division case, it is not binding on the Employment Tribunal, but I accept it has persuasive value.

350. In *Brandeaux* the employee had taken a very substantial and wide range of documents (when printed out they ran to 49 box files). Mr Justice Jack concluded that this exercise was entirely unjustified. While not purporting to lay down any general rule, he doubts that the possibility of litigation could ever justify an employee is transferring or copying confidential information to their private control. Even if there is doubt that the employer will meet their disclosure obligations, Mr Justice Jack suggests, an employee must rely on the court to ensure compliance, rather than breach their contractual obligation in respect of confidential information.

351. I am less certain than Mr Justice Jack that retaining documents against future litigation could never justify an employee transferring a copy to their private control. In an exceptional case, such as where an employer had made an express threat to destroy a crucial document, or where transfer of the document to the employee was the only practical mechanism for a public interest disclosure, there might be sufficient justification either to mean that an employee had not breached their contract or that such a breach should not be viewed as serious enough to be gross misconduct. Such exceptional circumstances were not before the High Court in Brandeaux. Mr Justice Jack does not seek to deal with them or to lay down a general rule. It would be wrong to take a generalised comment made in the course of the judgment as laying down an absolute rule.

352. I accept, however, that this will only be the case in exceptional circumstances. As a general rule an employee cannot rely on their desire to secure documents for the purposes of future litigation to justify a breach of their contractual obligations in respect of confidentiality.

353. I bear in mind, however, that there is a distinction between the contractual question (i.e. whether an employee is in breach of their contract) and the relevant question for the purposes of an unfair dismissal claim (which is likely to be whether it is within the range of reasonable responses to dismiss the claimant on the basis of their transfer of a copy of a document to their private control).

Conclusions

354. Applying the relevant law to my findings of fact, I reach the following conclusions. These are structured by reference to the parties agreed list of issues although I have not sought to replicate their list precisely.

<u>Employing entity and contract</u>

Was the Claimant's contract of employment signed in October 2006 the only contract of employment he received and worked under?

Was the Claimant given another contract of employment in 2015 or 2016?

355. For the reasons set out above, I have concluded that the October 2006 contract was the only written contract that Mr Nolan received.

Did the First Respondent or the Second Respondent pay the Claimant's salary?

356. It was not in dispute that Mr Nolan was paid from Scientific Education Support (SES) Ltd (the 2nd Respondent)'s bank account.

Was the Claimant's contract of employment with the First Respondent or the Second Respondent?

357. I have concluded that Mr Nolan was employed by Phase II International Ltd. That is the legal entity which entered into the written contract and I am satisfied that nothing occurred to displace or supplant that contractual relationship.

358. The claimant's submission is, in effect, that the fact that he was paid from the SES account or spent more time working on the SES business meant that he must have been employed by it. I do not accept this.

359. In my view, there is nothing to prevent an individual being employed by one of a group of companies, while spending most or even all of their time working for another company in the group. Indeed, this is not uncommon in the context of group companies. Which company directly pays an employee might have tax or accounting implications beyond the scope of this case, but it does not in itself determine the employer. In a case where the agreement was unclear it might shed light on the relationship between the parties. It is not, however, sufficient to displace a clear agreement such as exists in this case. So, while I accept that Mr Nolan was paid by SES, that did not create an employment relationship between them.

Constructive unfair dismissal

360. In principle, I accept the respondents' submission that Mr Nolan's employment only ceased once – on the 20th November when he was summarily dismissed by Mr MacLennan. That actual dismissal caused the employment to come to an end before Mr Nolan's resignation on notice took effect.

361. In my view, however, the question of whether Mr Nolan would have been constructively dismissed, had the actual dismissal not intervened, is an important one, because of its consequences for any issues of remedy. I have therefore reached conclusions as to whether Mr Nolan would have been constructively unfairly dismissed.

8. Was there a fundamental breach of the employment contract by the Respondent?

362. Conclusions on the alleged breaches are dealt with below. In order to deal with allegations arising from connected facts together, I have somewhat departed from the order of the agreed list of issues.

9.1 a: The Claimant discovered in May 2020 that HamFlo was not the owner of the Respondents and the EMI scheme was valueless to the Claimant and this was confirmed to him end of August 2020;

363. I do not accept that HamFlo was not the owner of the respondents or that the EMI scheme was therefore valueless to the Claimant. Rather I

have concluded, as Mr Nolan accepted in his evidence, that Hamflo owned both respondents.

364. It follows that there was no breach of contract as alleged.

9.1 c Mr MacLennan unilaterally assuming recruitment responsibilities and unilaterally changing the Claimant's role

365. For the reasons set out above, I found that Mr MacLennan was not acting outside his role as Founder and Managing Director in dealing directly with the recruitment of the Business Unit Directors.

366. I have not accepted that Mr Nolan was solely responsible for recruitment. Mr MacLennan had stepped back from other recruitments, leaving them to Mr Nolan. The Business Unit Directors, however, were a fundamentally different exercise. It was at a more senior level and formed part of the significant restructuring of the group's business. It was unsurprising that Mr MacLennan would wish to be more involved.

367. For the reasons set out above, I found that Mr MacLennan did not unilaterally change Mr Nolan's role or seek to do so. He made a serious of offers of different roles.

368. The circumstances in which the offer of a different role in an organisation could, in and of itself, amount to a breach of the implied term of trust and confidence are narrow. The offer of a role is very different from a unliteral move. Even if it is a demotion, there may be reasons that an employee might wish to accept.

369. There are, of course, circumstances in which such an offer might breach the implied term. In particular, an offer of a much more subordinate role might, in the right circumstances, demonstrate such contempt for an employee that it was a breach.

370. I do not consider that such circumstances existed in this case, especially given the context of the more general reorganisation. It was understandable that Mr Nolan was disappointed that he was not being offered the role he wanted, that of Group Managing Director. The final offer was to the post of Managing Director of SES, which was a significantly lessor role than he had hoped for.

371. But an employer is not obliged to offer an employee a promotion to any particular role. There was reason for Mr Nolan to be disappointed and I accept that he believed that his contribution to the business meant that he deserved to be appointed as Group Managing Director. Contractually, however, there was no binding agreement that he be placed in that that role.

372. I also accept that, in a number of ways, the post of Managing Director of SES was a less desirable post than the one that Mr Nolan held at the time. But there were also a number of ways in which it was more desirable, in particular in regard to the proposed remuneration. It was not a breach of the implied term of trust and confidence for Mr MacLennan to offer Mr Nola that role, especially in the context of the ongoing restructuring of the business.

373. It follows that there was no breach of contract as alleged.

9.1 d. On 25th August 2020, providing the Claimant with a draft ESA which was: i) Under the name HamFlo, ii) Had vague and onerous objectives, iii) No Job description, iv) Did not commit to the role of Group Deputy Managing Director or the opportunity to become the Group Managing Director

374. In my view, none of these allegations approach the threshold of acting in a manner that was calculated or likely to destroy or seriously damage the relationship of trust and confidence.

375. For the reasons set out above, I have concluded that there was no reason that Mr MacLennan should not offer to employ Mr Nolan through HamFlo.

376. While I accept that it would be possible for the setting of vague or onerous objectives or not providing a job description to be to a breach of the implied term of trust and confidence, this would require an exceptional situation or some form of malice on behalf of an employer. I do not find that there is anything of this nature in Mr MacLennan's offer of the 25th August.

377. In so far as the 25th August 2020 ESA sets out objectives, in particular in relation to the possibility of Mr Nolan being appointed as Group Managing Director, it does so at a very general level and by reference to other documents. I do not find this to be unreasonable. It is common for such contracts to deal with these matters at a high level, with the detail to filled in elsewhere – particularly in relation to such matters as targets and objectives, which will inevitably change over time. I would not expect a contract of this nature to bind an employer to a particular promotion if certain preconditions were met. While that would be perfectly possible it would be unusual.

378. Similarly, although the Job Description provided in Schedule 1 to the contract is quite brief and general, it is a job description. There is no implied term that requires a job description to meet a particular standard of detail or for an employer to provide a job description with an offer at all. There is no merit in the suggestion that failing to provide a job description that meets a particular standard should lead to a breach of the implied term of trust and confidence in these circumstances.

379. Finally, Mr MacLennan was under no contractual or any other requirement to appoint Mr Nolan to the role of Group Deputy Managing Director or to give him the opportunity to become the Group Managing Director.

380. It follows that none of these matters amounted to a breach of the implied term of trust and confidence.

9.1 e Frequent threats of disciplinary action whenever the Claimant did not agree with him, including 4th September

9.1 f On 4th September 2020 threating the Claimant with disciplinary action for use of the title Managing Director, despite the Claimant previously being told he could use the title

381. I have accepted that Mr MacLennan referred to the possibility of a written warning, when he discussed Mr Nolan using the title of Managing Director.

382. This is the only threat of disciplinary action which the Claimant has referred to in evidence. I do not find that it amounts to a repudiatory breach.

383. Mr MacLennan did no more than to say that the misuse of a title in this way could justify a written warning. That is obviously true. I do find that, at this stage, he did so with the intention of re-establishing his authority and pushing back against Mr MacLennan's assumption that he was or would definitely become Managing Director. The framing of his remarks as a potential disciplinary manner no doubt flowed from this intention.

384. As Mr Nolan noted in his evidence, he had used the title more often following the Letter of Intent, on the basis that Mr MacLennan has, as he saw it, committed to making him Managing Director.

385. For the reasons I have set out above, Mr Nolan reliance on the Letter of Intent was unreasonable. He had not accepted the offer it contained and Mr MacLennan had moved on – as he was entitled to do.

386. In those circumstances, it was not unreasonable for Mr MacLennan to pull Mr Nolan up on the use of the title. It could have been done more tactfully and there was perhaps no need to refer to formal disciplinary action. Mr MacLennan might also have acknowledged that is own actions in referring to Mr Nolan as Managing Director had contributed to the issue.

387. Nonetheless, Mr MacLennan's actions in suggesting that disciplinary action was possible do not amount to a repudiatory breach of contract.

9 .1 h On 16th September 2020 unilaterally demoting the Claimant to "Head of SES"

9.1 i On 16th September 2020 unilaterally removing half of the Claimant's responsibilities and the Group role

9.1 j Informing the Claimant of the demotion in front of an external party, Carys Mills

9.1 l On 22nd September 2020 confirming the removal of Claimant's group role and his demotion to Managing Director at SES only in writing

9.1 n Constantly changing the Claimant's job title

388. For the reasons set out above, I have not found that Mr MacLennan sought to unilaterally demote Mr Nolan or to unilaterally remove his responsibilities / role. Rather there were a series of job offers for different roles, none of which were accepted Mr Nolan.

389. As I have noted it was reasonable for Mr Nolan to be disappointed by Mr MacLennan's change of mind in relation to the role of Group Managing Director and I have found that, to a significant degree, Mr MacLennan was motivated by factors (such as his fear that Mr Nolan was seeking to set up a competing company) where I have disagreed with his conclusions.

390. I do not, however, find that Mr Nolan's decision in respect of the job offers he made fell outside the bounds of Wednesbury reasonableness.

391. I bear in mind that an employer has a wide range of managerial prerogative in relation to decisions relating to job offers and promotions. It is an area where the Tribunal must be cautious of the dangers of substituting its own view for that of the employer.

392. In general terms, an employer is entitled to offer roles and promotion as it wishes to do so – provided it does not operate capriciously, arbitrarily or with some form of malice towards those covered by the implied term of trust and confidence.

393. I do not think that the implied term of trust and confidence is intended to create a system of review in which such decisions can be challenged on the basis that a better decision could have been made (whether substantively or procedurally). I think is also right to be cautious before concluding, on the basis of an analysis of evidence within a Tribunal setting, that an employer has acted irrationally. Otherwise, there is a risk of subjecting such decisions to a level of scrutiny that, in practice, places an unreasonable burden on employers to make decisions as a court or tribunal might, rather than as an employer does.

394. Overall, Mr MacLennan began by seeking to offer Mr Nolan the Group Managing Director role. Mr Nolan made a counteroffer in the form of the NewCo proposal. Mr MacLennan continued to make offers on the basis of the Group Managing Director role until August 2020, when he shifted to offering, in effect, to formalise the Deputy Group Managing Director role that Mr Nolan was in.

395. In large part that was simply because Mr Nolan had not accepted the offers of the Group Managing Director role that had been made. In addition, it arose from Mr MacLennan's increasing caution about Mr Nolan's role on the basis that he had started to doubt Mr Nolan's

commitment to the business. As I have set out above, I have reached different conclusions to Mr MacLennan about what was in Mr Nolan's mind. But that is not relevant to my consideration of whether Mr MacLennan's views and actions were irrational or unreasonable. In my view they did not reach that threshold. There was some reason for Mr MacLennan to conclude that Mr Nolan might have ambitions beyond the respondents. It was not irrational for him to take account of that in the offers he made. It was also not irrational to conclude that some form of interim post was desirable.

396. Similarly, Mr MacLennan's offer of the SES Managing Director role in September 2020 was not irrational or unreasonable. It was a different approach than had previously been discussed, but it was not an irrational or reasonable one. An employer is entitled to change its mind about the business structure it wishes to adopt, whether or not that disappoints an employee who had anticipated receiving a particular role under a different proposal. It would be different if Mr Nolan had already accepted the offer of such a role but he had not.

397. I do not find that Mr MacLennan making the offer of the SES Managing Director in the presence of Carys Mills represented a repudiatory breach of contract. Again, it was in the circumstances less than tactful and it would have been better, particularly given the difficult relationship between Mr MacLennan and Mr Nolan at that point, to have had that discussion privately. It still, however, falls well short of the threshold of the implied term.

398. I also note that it is unclear what would have happened had Mr Nolan declined the SES Managing Director role and sought to remain in his current role. As I understand Mr Nolan's case, his view is that Mr MacLennan would not have allowed this. But Mr Nolan did not take that course and therefore did not give Mr MacLennan the opportunity to respond to that suggestion. Mr Nolan has not pursued his case on the basis of any anticipatory breach of this nature. In any event I do not think Mr MacLennan's actions provided any basis for such a conclusion.

9.1 b Failure to pay £25,000 bonus 9.1 k On 21 September 2020 confirming the £25,000 bonus would be paid, but not paying it

399. For the reasons set out above, I have concluded that Mr MacLennan had agreed to pay Mr Nolan £25,000 in respect of the Oyster Bar Bonus. It is agreed between the parties that he did not do so.

400. Given the timescales involved, however, I do not think that this gave rise to any breach of contract at that time. There had been no express agreement about the timescale of the payment. In these circumstances, I proceed on that basis that there was an implied term that the sum be paid within a reasonable period. At the point that Mr Nolan resigned, nine days later, I find that there had not been an unreasonable delay in payment that would breach that term.

9.2 Fundamental breaches of the express terms of the contract and the LOI

9.2 a. The Claimant discovered that HamFlo did not own the First Respondent, PHASE II US or SES and Derek MacLennan remained the sole shareholder of all companies so the Claimant had been misled about his EMI share scheme entitlement;

401. This is an alternative formulation of the alleged breach in issue 9.1 a. It is rejected for the same reason.

9.2 b The Claimant was not given the role of Group Managing Director nor was the ESA subsequently provided to him promising him that title;

402. For the reasons set out above, I have concluded that Mr Nolan was not contractually entitled to be given the role of Group Managing Director. There was therefore no breach of contract in not giving him that role.

9.2 c The bonus quantified as £25,000 was not paid to the Claimant despite being told that it would be by text message sent after 23 July 2020, 21 September 2020 and 28 September 2020

403. This is an alternative formulation of the alleged breach in issue 9.1 b and k. It is rejected for the same reason.

10. Were the breaches sufficiently serious to amount to a repudiatory breach?
11. If they were not individually sufficiently serious, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?

404. Since I have found that there was no breach of contract as alleged, it follows that none of the alleged breaches amounted to a repudiatory breach of contract.

405. I have also considered whether, the allegations collectively amount to a repudiatory breach of the implied term of trust and confidence. I have concluded they do not. Fundamentally, although Mr MacLennan can be criticised as, on occasion, lacking tact in the way that he dealt with Mr Nolan, the substance of what he did fell squarely within his managerial prerogative to run his business as he wished.

406. While I have found that Mr MacLennan acted dishonestly during the investigation and disciplinary process, that occurred after Mr Nolan's resignation. It cannot therefore form the basis for any claim for constructive dismissal.

12. Did the Claimant's resignation on 30 September treat the employment contract as at an end as a result of the breaches?

13. Did the Claimant waive any breach and/or affirm the contract?

407. Overall, I have concluded that Mr Nolan resigned at the point that it became clear that he would not be appointed to a Group Managing Director role or a role with some immediate prospect of reaching that position.

408. Since I have concluded that this did not amount to a breach of contract there is no question of any waiver of breach or affirmation.

Unfair dismissal

14. Was the reason (or principal reason) for the dismissal one of the five potentially fair reason?
15. The Respondent relies upon the potentially fair reason of gross conduct.

409. Although the agreed list of issues refers to the potentially fair reason relied upon by the respondents as 'gross misconduct', it is more appropriate to consider the precise wording of s98 ERA, which refers to a reason for dismissal that 'relates to the conduct of the employee'.

410. I have concluded that the principal reason for dismissal was conduct and therefore potentially fair. Mr MacLennan did genuinely believe that Mr Nolan had committed serious misconduct and dismissed him for that reason.

411. The precise reasons for dismissal are dealt with in more detail below.

Fairness of the dismissal

412. Although the agreed list of issues raises a large number of procedural criticisms of the dismissal, in my view the most central issue was Mr MacLennan's misleading of both Mr Jarman and Ms Brown. Bluntly, Mr MacLennan lied to the external professionals he had brought in to consider Mr Nolan's potential misconduct. He mislead them about the extent to which he had used the title Managing Director to refer to Mr Nolan; he mislead them about the circumstances surrounding the 2016 contract and he mislead them about the extent to which he had discussed details of the respondents' business with Adam Smith.

413. These were not peripheral or unimportant matters, but rather central to core findings of both Mr Jarman and Ms Brown.

414. Mr MacLennan was the ultimate decision maker in respect of Mr Nolan's dismissal. This was not therefore a situation where an innocent decision maker who was innocently mislead. Mr MacLennan must have known that the recommendation on which he purported to act was to a significant degree flawed.

415. It is unfair for the ultimate decision maker on a disciplinary matter to deliberately lie to those they have charged with investigating and making appropriate recommendations within a disciplinary process.

416. Further, it leads me to conclude that Mr MacLennan had prejudged the outcome of the process. He had a desired end and sought to achieve it. The strength of that view can be seen by his willingness to engage in dishonesty to obtain it. None of that can be viewed as fair.

417. I also considered carefully whether the timescales in which both the investigation and disciplinary process were conducted created unfairness for Mr Nolan. I note that process was conducted at a significant pace; that Mr Nolan faced a number of allegations and the investigation generated a significant amount of evidence for him to absorb. I also note that Mr Nolan had medical issues at the time, most importantly back surgery on the 18th November 2020, the day before the disciplinary hearing.

418. I also note, however, that Mr Nolan was a senior executive, who would be well used to reading documents and articulating his response. He had the support of legal advice during the process. He raised a number of points in his defence, both before and during the disciplinary hearing. Mr Nolan has not identified during these proceedings any specific argument or evidence that he was prevented from deploying as a result of the rapid progress of the procedure.

419. If the disciplinary hearing had gone ahead on the 17th November, I would have found that this was procedurally unfair, on the basis that Mr Nolan had not had adequate time to prepare. On balance, however, I conclude that proceeding with the disciplinary hearing on the 19th fell within the range of reasonable responses – albeit by a narrow margin.

420. For completeness, I would not have found that the other procedural matters raised by the claimant were sufficient to create procedural unfairness. I did not find that Mr Jarman or Ms Brown were dishonest or sought to be unfair to Mr Nolan. Both the investigatory and disciplinary processes which they were responsible for were conducted fairly. It was not unfair to refuse Mr Nolan's requests to cross-examine witnesses or to provide further documents.

18. Was dismissal a sanction within the range of reasonable responses open to the Respondent?

421. Leaving aside Mr MacLennan's procedurally unfair approach to the decision, I have concluded that the allegations against Mr Nolan meant that

dismissal could have been within the range of reasonable responses, had the process been conducted fairly.

422. In particular, Mr Nolan's behaviour in copying the confidential business plans to his private email and then seeking to mislead the respondents about what he had done was serious misconduct. It was highly confidential material, which he was under a duty not to disclose. Mr Nolan was a senior manager within the respondents who understood the importance of confidential information. Sending it to his private email was a breach both of his 2006 employment contract and the implied terms relating to confidential information identified in *Faccenda Chicken Ltd v Fowler.* Claiming that he had done so inadvertently was also a significant act of misconduct.

423. I accept that the reasonableness of any dismissal in respect of these actions needs to consider the full circumstances. It is relevant that Mr Nolan was seeking to preserve documents for litigation. I d

424. A desire to preserve relevant documents for the purposes of litigation will not generally justify an employee breaching their contractual terms in respect of confidential information. But, at the same time, it is a less serious improper motive than retaining documents in order to compete with the employer or to disclose to some third-party for the employee's benefit. I do therefore consider that this makes his actions less serious. Nonetheless, particularly taking into account Mr Nolan's attempts to mislead the respondents, a reasonable employer could have reached the conclusion that dismissal was an appropriate sanction.

425. The misuse of Gilead's confidential information was also a serious matter. I have accepted that Mr MacLennan regarded Mr Nolan's actions as, at the very least, extremely reckless in what he had done. Although I have concluded that Mr Nolan did not intend to do anything wrong, I must focus on Mr MacLennan's view for the purposes of considering the unfair dismissal claim. I find that, based on his view of the incident, it was sufficiently serious to have justified dismissal.

426. Mr MacLennan also considered that Mr Nolan had committed an act of misconduct in his use of the Managing Director title. Although I have found that he misrepresented his view of the seriousness of the matter to Mr Jarman and Ms Brown, I have also concluded that he believed Mr Nolan had overstepped. I would not, however, have concluded that dismissal was a reasonable sanction for this misconduct. Mr MacLennan was aware that he had encouraged the use of the title by Mr Nolan, which meant his use of it was much less serious than it would otherwise have been. It must also be considered in the context that Mr MacLennan had raised the matter with Mr Nolan in September and there was no evidence to suggest that Mr Nolan had continued to use the title after that. It would not have been fair, having indicated that the matter might warrant a written warning and then take no action for two months, to dismiss Mr Nolan on this basis.

427. I have also concluded that Mr MacLennan had reasonably concluded that Mr Nolan had refused a reasonable management instruction in not identifying

the client who had contacted him during his suspension. I do not think it would have been reasonable to require Mr Nolan to provide a complete account of the conversation, because in so far as it concerned personal or social matters that fell outside the scope of his employment relationship. The identity of the client and anything Mr Nolan had said relating to work was, however, a legitimate interest of the respondents. This was a significantly less serious matter than those addressed above and, in the circumstances, would not alone have justified a dismissal. It would, however, have been reasonable for the respondents to take account of it as part of a decision to dismiss.

Polkey Reduction / Atkins Principle

428. My consideration of the *Polkey* principle is complicated by the lack of reliability in Mr MacLennan's evidence. I have concluded that he approached the issue of dismissal with a fundamentally closed mind. I have also found significant parts of his evidence to me to be misleading. It is therefore difficult to assess what he might have done if he had approached the matter fairly.

429. At the same time, I have accepted that Mr Jarman, Ms Brown and Mr MacLennan had reached a genuine belief on reasonable grounds that Mr Nolan was guilty of serious misconduct that could justify dismissal. There was therefore a significant chance that Mr MacLennan might have been dismissed had the process been fair. This is not a case in which the evidence that Mr Nolan would have been dismissed following a fair procedure can properly be ignored.

430. In those circumstances, I have concluded that the appropriate approach is to apply a Polkey reduction of 50%. This is necessarily applying a broadbrush assessment, but I do not have sufficient evidence to reach a more nuanced conclusion.

431. The respondents have also suggested that compensation should be reduced by references to *Devis v Atkins*, on the basis of Mr Nolan's actions in relation to Honoured Time. I have not accepted that the evidence before me establishes that Mr Nolan committed any misconduct in relation to Honoured Time. It would therefore not be appropriate to make any such reduction.

Basis of compensation

432. Given that the parties agreed that I should consider liability alone, save in respect to Polkey, I have not reached any final conclusions in relation to the appropriate award.

433. It may, however, assist the parties if I record my preliminary view that, since I have found that Mr Nolan's resignation did not amount to a constructive dismissal any loss flowing from the dismissal would have ceased on the 31st December 2020 when his notice period would have ended.

Wrongful dismissal

434. I have concluded that Mr Nolan did commit an act of gross misconduct in relation to sending confidential business documents to his personal account on 14th October 2020.

435. In additional to sending the documents to himself, which was itself an act of misconduct, he lied about what he had done during the investigation.

436. I do not accept that this demonstrated any contention to use these documents to compete with the Hamflo group. They are primarily financial projections that would neither apply to any new business that Mr Nolan set up or be of any obvious use to such an enterprise. In so far as that information was of any value to a new business, it would be at an extremely general level. At that level it was information well known to Mr Nolan and which he would recall without any need for the document.

437. Rather I accept Mr Nolan's evidence that he wished to retain these documents for the purposes of bringing a claim to the Employment Tribunal. In my view, however, this action remained in breach of his contractual obligations in respect of confidentiality. In reaching this conclusion I have had regard to a) the fact that the business plans were only of peripheral relevance to any potential claim; b) the importance of the documents and their highly confidential nature and c) that at the point that Mr Nolan sought to retain these documents he did not have any significant reason to suspect that relevant documents would not be disclosed as part of any tribunal process.

438. I also concluded that Mr Nolan had committed an act of misconduct in relation his refusal of the instruction to identify the client to whom he had spoken. This was a significantly less serious matter and do not think that it amounted to gross misconduct. Mr Nolan was under considerable emotional stress at the time and believed that he was acting correctly. There was no element of deliberately unreasonable defiance. Rather his behaviour followed from a difference of opinion as to the scope of the respondent's reasonable enquiry. Although I have found Mr Nolan was mistaken, his conduct has to be considered in that light.

439. I do not consider that the other matters alleged by the respondents amount to gross misconduct.

440. In relation to the use of the Managing Director title, this was not serious enough to constitute gross misconduct. In reaching that conclusion I have considered a) the extent to which Mr Nolan's role was more senior than his job title and included elements of what would generally be considered a Managing

Director role; b) Mr MacLennan's own use of the title and c) the fact that he immediately ceased using the title when instructed to do so.

441. In relation to the other allegations of misuse of confidential information, I have concluded that Mr Nolan did not act in breach of his contract. He did not disclose to Mr Smith information that he did not already possess or share confidential information with IMC. I have concluded that the documents Mr Nolan retained relating to the negotiation of his role were not confidential information.

442. In relation to the allegation that Mr Nolan had conspired to compete with the respondents, I have concluded that Mr Nolan did not act in breach of contract. He was entitled to explore opportunities outside the respondents' employment.

443. In relation to the use of the Gilead document, I have concluded that Mr Nolan did not intend to act improperly. There was no wilful disobedience or deliberate misconduct. I do not accept that Mr Nolan's actions amounted to the sort of gross negligence that could represent a repudiatory breach of his contract.

Breach of contract / Unauthorised deduction of wages

444. I have concluded that Mr Nolan was promised an advance of £25,000 on his bonus payment, which was not paid. I concluded that this was both a breach of contract and an unauthorised deduction of wages.

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Employment Judge Reed

28th June 2023

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Date