EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr B Palmer	v	Cavendish Philatelic Auctions Limited

Heard at: London (Central) (via CVP) **On:** 15 & 16 February 2024

Before: Employment Judge Fredericks-Bowyer

Appearances
For the claimant: Mr R Dunn (Counsel)
For the respondent: Mr J Ratledge (Counsel)

RESERVED JUDGMENT

1. The claimant was unfairly dismissed on 28 April 2023. The principal reason for his dismissal was to remove him from the respondent business to gain control of it, which is not a potentially fair reason.

2. The claimant was also wrongfully dismissed on the same date.

3. The claimant is entitled to his notice pay, and to a basic award and a compensatory award.

4. Remedy is to be determined at a separate remedy hearing.

REASONS

Introduction

1. The claimant was employed by the respondent as a Describer, and he managed the London office of the respondent. His employment with the business began in 2013. The claimant became a director of the respondent company upon its incorporation in November 2016, and he owns half of the shares of the respondent company. He remains a director and shareholder, but his employment as a Describer was terminated by the respondent for alleged gross misconduct on 15 April 2023. The respondent is an international auction company specialising in postal history, philatelic books, and related ephemera.

2. The claimant claims that his dismissal was unfair because it was motivated or caused by a director/shareholder dispute about the future of the respondent. He claims that this caused the other directors, the married Dr and Mrs Spring, to create an opportunity to try to dismiss him from the business. In this way, the misconduct alleged is said not to be the reason for dismissal. It is also claimed that the dismissal falls foul of all of the ***Burchell*** principles, did not follow a fair procedure, and was in any case too severe a sanction for the conduct for which the claimant might be criticised. The claimant also claims that he had not committed gross misconduct, and so the respondent was not entitled to dismiss him without notice. He brings a wrongful dismissal claim.

3. The respondent resists the claims, and submits that, if found to have been unfairly dismissed, the claimant's awards should be reduced to reflect (1) the likelihood he would have been fairly dismissed if there is a procedural failing, and (2) the claimant's conduct which related to the timing of the dismissal.

4. The claimant was represented by Mr Dunn of counsel, and gave evidence himself in support of his claim. The respondent was represented by Mr Ratledge of counsel. The respondent's evidence was presented by Dr Greg Spring, one of two other directors of the respondent, the only other shareholder, and the person who dismissed the claimant. I also had access to a bundle of documents that ran to 298 pages, and heard a recording of the claimant's telephone call to the respondent's bank in the days following his dismissal.

Issues to be decided

5. The issues to be decided were:

5.1. ***Unfair dismissal –***

5.1.1. What was the reason or principal reason for dismissal? The respondent says the reason was conduct.

5.1.2. Did the respondent genuinely believed the claimant had committed misconduct?

5.1.3. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In particular:

5.1.3.1. Were there reasonable grounds for that belief?

5.1.3.2. At the time the belief was formed, had the respondent carried out a reasonable investigation?

5.1.3.3. Did the respondent otherwise act in a procedurally fair manner?

5.1.3.4. Was dismissal was within the range of reasonable responses?

5.2. ***Wrongful dismissal –***

5.2.1. What was the claimant's notice period?

5.2.2. Was the claimant paid for that notice period?

5.2.3. If not, was the claimant guilty of gross misconduct? Ie. did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Findings of fact

6. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are references to the bundle of documents I was provided with prior to the hearing starting.

Background

7. The claimant began working for the business that is now carried on by the respondent in 2013. In 2014, he became a director of the company which previously operated the respondent's business. Dr Spring became a director in that legacy company in January 2016. The respondent company was incorporated in November 2016 (page 60). The claimant was a director upon incorporation to date. Dr Spring was another director and he also remains so – as does his wife, Mrs Susan Spring. Mrs Spring is the company secretary. The claimant and Dr Spring are 50% shareholders each, with each owning 3 ordinary shares.

8. In March 2017, the respondent company acquired the business for the sum of £30,000 (page 95). The claimant's employed role as Putney Office Manager and Describer transferred to the respondent as a result of that acquisition, and he was informed as such by a letter from Dr Spring on 1 March 2017 (page 73). As a matter of fact, the claimant had two distinct roles with the respondent. He had his employed role as Putney Office Manager and Describer, which ended and is the subject of these proceedings. He also has his director role, with its separate particular duties as regulated by *Companies Act 2006*. Additionally, he was and remains owner of half of the business. Consequently, the claimant has a multi-faceted relationship with the respondent, as well as with Dr and Mrs Spring.

Royal Philatelic Society issue

9. A shareholders agreement was prepared to regulate the shareholder relationship between the claimant and Dr Spring, but it was never signed. Both witnesses say, and I accept, that their working relationship was largely positive and productive until

around the end of 2021. In 2019/2020, an incident occurred where the claimant says he was sexually harassed by a fellow director of The Royal Philatelic Society. Following that incident, he did not wish to engage with that individual and expressed a wish that the respondent did not deal with him. In 2021, the claimant raised the issue at the society's AGM and news of that public conversation reached Dr and Mrs Spring at the respondent. The Springs refused to rule out doing business with the individual and, as they were a majority of the directors, the claimant's wish was not acceded to.

10. E-mails between the claimant and Mrs Spring about the sexual harassment allegations were shown from page 148 to 155. I find that there was friction between the claimant and the Springs about this issue, which Dr Spring also confirmed in his evidence. Dr Spring expanded on these concerns in his evidence. His witness statement presents as evidence in chief:-

> *"12. Competitors of the business were in attendance at the AGM and so would have seen what had happened. The day after the AGM a business associate told me that he had had three telephone calls from people in attendance at the AGM, saying that if Ben ran Cavendish they didn't want anything to do with the company…*
>
> *13. I believed that after the AGM incident, Cavendish had potentially lost several major or influential customers as a result of Ben's actions. At our directors meeting in December 2021 I discussed my concerns with Ben about the impact of what happened on the business, but he seemed unconcerned…".*

11. In cross examination, Dr Spring confirmed that this issue was one key issue which led to the breakdown of the effective working relationship between him and the claimant. I accept that Dr Spring was concerned at this point about the relationship between he and the claimant and how it impacted the respondent.

12. In my view, it is important that the concerns raised about the claimant were in contemplation of him *running* the respondent company, and not about him being employed by it. I consider that the concern that Dr Spring understood and articulated was that people were turning away from the respondent because of the claimant's involvement with the managing and owning of it. This, I find, are concerns related principally to the claimant's directorship and ownership of the respondent. This finding is further supported by Dr Spring choosing to raise the impact on the business at a directors' meeting, where all attendees were present in their role as directors of the company.

Proposal for the claimant to exit the respondent by selling his shares

13. After Dr and Mrs Spring voted against the claimant in respect of his respect to stop doing business with the claimant's alleged harasser, the claimant decided that he wished to exit the company and spoke to Dr Spring about Dr Spring buying his shares. Dr Spring agreed to explore this as he was, in his own words, aware that his working relationship with the claimant *"had become more difficult"*. A valuation was conducted by the respondent's accountants, and that suggested (on 26 September

2022) the respondent business was worth something in the region of £204,000 to £220,000, with a winding up value per shareholder of £102,000 (page 156).

14. Following receipt of that valuation, Dr Spring offered £80,000 to buy the claimant's shares. The claimant noted that this was far lower than the valuation suggested, and describes the offer as *"derisory"*. Dr Spring sought to explain why his view of the commercial risk of being the only shareholder led him to offer that reduced sum (page 172). The claimant did not respond to this justification and was unable to find any other buyer of the shares. Dr Spring was critical in his evidence of the claimant's lack of response to his justification for a lower offer value. He was critical in correspondence with the claimant on 2 March 2023, also, when he said that the claimant *"showed contempt by not even replying"*.

15. It is plain to me that, at the time of the valuation and initial negotiation about buying the claimant's shares, the claimant and Dr Spring were frustrated with each other. The conversation was about the claimant leaving the business. Dr Spring says, and I accept, that he had no interest in selling his shares. He also notes, and I agree, that the shareholders were making good return on their investment in the respondent. I find that Dr Spring wanted to continue to operate the respondent in light of that return, and that he was the shareholder at that time who contemplated running the respondent into the future. The claimant wanted to sell his shares and leave, and had proposed doing so in two ways: (1) by selling his shares to Dr Spring, and (2) by all of the respondent company shares being sold to a third party. In either scenario, the claimant would exit the business. In that context, it is plainly the case on the balance of probabilities that these were the expectations of the parties from 26 September 2022, and this is a fact that I find.

Closing of the respondent's London office

16. Very shortly after, the respondent held a board meeting on 10 October 2022. At that meeting, the future of the London office (which the claimant managed) was discussed. All three directors (the claimant, Dr Spring, and Mrs Spring) were present. Dr Spring and Mrs Spring voted to allow the lease for the premises to expire in February 2023. The claimant voted against that proposal, and was out-voted 2:1. This meant that the respondent resolved to end the lease on the premises from which the claimant's employment was based. Dr Spring asserts that the reason for the decision was because the claimant was by then the only person working in the London office, which made it commercially un-viable. I was shown no analysis or figures which supported that contention. The claimant considers that the respondent needs a London footprint, and that was the basis on which he objected.

17. There is then a conflict in the evidence of the parties about whether or not the respondent was to have a London footprint. Dr Spring says that the claimant was instructed to find alternative premises, smaller and cheaper, for the respondent to have a London office which he would work from. To support that contention, Dr Spring references the minutes of the board meeting of 10 October 2022. These were not shown in the bundle, but were referred to in the board meeting minutes from the meeting on 10 March 2023 (pages 145 to 147). The claimant did not attend that meeting and had no role in approving the document. It is apparent that Dr Spring required amendments to the 10 October 2022 minutes when they were reviewed

again on 10 March 2023. The relevant extract, which contains matters the claimant says did not happen, is:-

> *"The minutes of the meeting held on 10 December 2022 were read because these were not reviewed at the December meeting. SS spotted some typographical and grammatical errors. GS asked for some items to be recorded more explicitly namely,*
>
> ***Cavendish the Future:***
>
> *BP had stated, more than once, that he "WOULD" not work from home.*
>
> *GS had suggested that as BP lives in London he is best placed to find an alternative office with suitable facilities (easy access, parking spaces and good transport links, flexible terms, etc), and circulate details to the other directors for comment and/or approval.*
>
> *Action: BP to find suitable alternatives for discussion."*

18. As the company secretary, Mrs Spring prepared the board minutes. The claimant contends that this is a false record of the discussion from 10 October 2022 because he was not tasked with finding an alternative. He considers that the Springs capitalised on his absence to invent a task which he would not do in order to justify taking later action against him. Indeed, he tells a completely opposite narrative about the consideration or otherwise of a London office between October 2022 and March 2023. He says that he thought that the respondent should retain a London office, preferably its current one. He accepts that he did not wish to work from home, and said that he spoke to Mrs Spring on 3 February 2023. He says that Mrs Spring telephoned him to talk through the arrangements for closing the London office. He says that he told Mrs Spring that the respondent should have a London office, and that he could find one. He says that Mrs Spring told him that he had not been tasked to find a London office.

19. These arguments were played out in an e-mail exchange between Dr Spring and the claimant on and following 20 February 2023. On 20 February 2023, the claimant e-mailed Dr Spring and said, relevantly for this issue (page 180):-

> *"I refer to the communications which we have had in relation to your insistence, in the face of my objection, that the London office permanently close.*
>
> *As you well know, my involvement with the company and its business is, and always has been, on the basis that I would work at and manage the London office. While I recognise that there could be financial savings on work which I undertake… requires a suitable office. The work which is required cannot be undertaken at home… For this reason, if the current office is to close, then it requires to be relocated to suitable premises in London".*

20. In reply, on 22 February 2022, Dr Spring writes, relevantly:-

> *"It was never suggested by anyone that the London office permanently close (as attractive as that idea is)… You know this isn't true…*
>
> *At that meeting [October 2022] I then told you that you would need to find another office in London, you had 4 months to do so before we had to vacate the existing office".*

21. The claimant then responded (page 182 to 183) and writes, relevantly:-

> *"You have used your majority on the board to engineer a position… so that there is no London office…*
>
> *Sue made it clear in her conversation with me on 3 February 2023 that I had not been tasked by you or her with finding a new office… When I expressed doubt that an insurer would offer cover without an alarm [at home], Sue indicated she would provide one, which she would not have done if the closure was intended to be temporary."*

22. I need to resolve this conflict in the evidence. I prefer the account of the claimant, and I do so for the following reasons:-

    22.1. Dr Spring and Mrs Spring were expecting the claimant to leave the business, and expecting that they would continue to operate it. I consider it unlikely that, with that mindset and with the on-going tension between them and the claimant, they would task the claimant with such a commercially important consideration as finding a new London office;

    22.2. Dr Spring sought to down-play the likelihood that he and his wife would vote as a block (saying she had voted contrary to him previously), which I find extremely unlikely given that the respondent is a profitable asset from which both Springs would benefit if Dr Spring came to own all of the shares;

    22.3. The board minutes from the October board meeting were not shown in original or amended form, which leads to me to draw an inference that they do not support what Dr Spring says about them;

    22.4. The specific tasking of the claimant with the premises search is a detail which was added on 10 March 2023 and which, on a plain reading of the document I have seen, was likely not contained in the original October board minutes in any case;

    22.5. Other parts of the March board minutes (explored further below) clearly show that Dr Spring, and possibly both Springs, have negative feelings towards the claimant;

    22.6. There is no direct evidence from Mrs Spring to refute the claimant's account of their 3 February 2023 conversation because she did not give evidence in the hearing; and

    22.7. Dr Spring and Mrs Spring had not circulated the board minutes to the claimant, which contained these statements he says are false, even though the

claimant remains a director of the respondent in an effort, I consider, to hide the amendments from him.

23. This means that I find the following facts in relation to this period:-

    23.1. Dr Spring and Mrs Spring voted against the claimant to close the London office;

    23.2. The claimant was not tasked with finding an alternative premises and he would be expected to work from home to the extent that work was not moved to the Spring's part of the business in Derby;

    23.3. Dr Spring was motivated to make working life more difficult for the claimant because of their friction but also to try to resolve the deadlock about his shares and to elicit his sale to Dr Spring;

    23.4. Any reference to the claimant being required to find an office in London is false;

    23.5. On 3 February 2023, Mrs Spring told the claimant not to search for alternative office because the respondent would have no London office; and

    23.6. Dr Spring and Mrs Spring created the board minutes which gave the impression that the claimant had been given that task when he had not.

The claimant's alleged misconduct

24. In the e-mail of 22 February 2023, on page 183, Dr Spring raises the possibility of taking disciplinary action against the claimant. He wrote:-

> *"At the moment you appear to be resigning. It is also likely that you are in breach of your statutory duties to act in the best interests of the company, which I shall investigate further. In addition, your opposition to working from home and lack of output in recent weeks would appear to be grounds for disciplinary action to be taken against you and I shall start an investigation accordingly and let you know if this results in the need for disciplinary action against you."*

25. Dr Spring also raised the prospect of winding up the respondent company to, in my view, force the issue with the claimant's shares: *"I have decided to keep my options open about winding up the company at this time"*.

26. At the end of the same e-mail, Dr Spring wrote: *"As you have been unsettling the staff by undermining both Sue and myself through them, attempting to frighten them with misinformation, we have no trust in you"*.

27. The claimant denied the allegations raised in the e-mail. He explained that he had consigned the largest collection he had ever seen in his career in that month. He also pointed out that he had been working in the office for 6 or 7 days per week over the period, and was not suffering from a lack of output. The claimant said that the security information from the office could be checked to verify the work done. When

this was put to Dr Spring in cross examination, he said that that information would show entry and exit but not the amount of work done. It then transpired that Dr Spring had never sought to gather that information anyway. Dr Spring also diminished the claimant's claims about his work output in the period, saying the work done had been unnecessary. This is, plainly, not the same as saying he was 'absent' or 'not working' or had 'no output'.

28. I prefer the claimant's account of his work output. He would not have offered for Dr Spring to verify his time on site if he had not been on site. There can be no sensible reason for the claimant to be on site but not working for the respondent. In my view, Dr Spring's objections to the claimant's points showed me that he was determined to paint the claimant as obstinate, unproductive and deceptive come what may even in the face of plausible explanations. This, in the context of my findings about his expectation and motivation for the claimant to leave the business, means that significant elements of Dr Spring's evidence lack credibility. I find as a fact that the claimant was working to his contract during the period, cataloguing significant collections. I accept that he may not have been describing as Dr Spring would wish, but I accept the claimant's evidence that he was some weeks away from an upcoming auction and he would have been able to compete all required tasks before the deadline.

29. Dr Spring agreed in cross examination that, from his perspective, the relationship between him and the claimant had broken down by this point. I accept that Dr Spring and Mrs Spring had no trust in the claimant from 22 February 2023, as Dr Spring recorded in the e-mail. What is also plain is that Dr Spring was communicating with the claimant about his employment with the respondent and disciplinary issues as well as in relation to his role as a director at the same time. In his evidence, Dr Spring was unable to un-link those two roles and was clear that he considered that the claimant's actions as a director informed also his employment relationship. I find, on Dr Spring's own evidence, that he considered the two roles to be blended for the purposes of taking disciplinary action against the claimant. At this time, Dr Spring was already envisaging the claimant selling his shares in the business as outlined above.

30. The conversations between the claimant and the Springs upset the claimant and he was unhappy with the direction of the relationship. He shared his thoughts with colleagues at around this same time, and relayed aspects of the conversations. As outlined in his evidence, I find this included the claimant saying that he may take legal advice and one consequence of the dispute was that the respondent might be wound down, much as Dr Spring warns or threatens in his e-mail of 22 February 2022. The respondent says this is misconduct as it unsettled staff and brought a private dispute to the knowledge of staff. There is limited direct evidence about the impact of the claimant's actions, but what there is is considered below.

Dr Spring's e-mails of 2 March 2023

31. Dr Spring picked up correspondence again on 2 March 2023 and sent two e-mails within six minutes of each other. The first (titled "Deadlock") relates to the dispute between Dr Spring and the claimant about the business and the shareholding (page 189). The second (titled "Re: investigation into your actions") relates to a disciplinary investigation (page 190).

32. Dr Spring's frustration with the claimant is plain from the first e-mail and sets out clearly how Dr Spring perceived the claimant and how they got to the position they were in. The most relevant parts are:-

> *"…We have had 5 years of a good working relationship but because we disagreed over the banning of one single individual for allegations on your part, which we will not do due to the company damage that will occur as a result, you seem determined to destroy all of our hard work.*
>
> *… I do not believe you will abide by any further valuation and I therefore do not see any point in undergoing expense and delay of this process again. I think it is simply an attempt on your part to waste time and cause further disruption to the business.*
>
> *As you have removed yourself from the business by not describing to any meaningful degree at a critical time, I cannot see that there will be a viable June auction, and as I do not wish to sell my shares, I therefore see no way forward but to agree with you that the company should be closed, assets realised, and debts paid… We will also have to hope that the bank will not simply foreclose on the mortgage as you and I will both immediately need to find the funds to appease them (c.£90k each)… but as far as I'm concerned this will still be cheaper than wasting time and being extorted by you over the value of your shares.*
>
> *I await your decision on the matter but if I have not heard from you in a reasonable time period I will begin planning to carry out this process myself. If however, you wish to sit down and discuss this matter in a sensible manner, I am prepared to make myself available".*

33. In my view, it is not credible that Dr Spring seriously thought that finding £90,000 to pay off the mortgage, to cover other expenses in business wind down, and losing the value of the respondent, was 'cheaper' than dealing with the claimant's quite reasonable expectation to be paid in line with the valuation for his shares. Instead, I find that this e-mail was intended to leverage a negotiation position by threatening to destroy all value in the claimant's shares through winding down the business, essentially without notice. It is clear, and I find, that Dr Spring entirely blamed the claimant for the problems within the respondent business, and it is clear that those problems (as much as 'problems' is a fair characterisation) were principally caused by the claimant acting in his capacity as a director and a shareholder.

34. It is in that context, through a desire to force a break in the deadlock by threatening to remove all value from the claimant's hand, that Dr Spring sent the second e-mail:-

> *"Dear Ben*
>
> *I am investigating various allegations against you which potentially amount to breaches of your statutory duty to promote the success of the company. I will let you know when this investigation has been concluded and if there is to be any further action.*

Yours sincerely,
Greg".

35. This e-mail must, in reality, relate to the claimant's directorship, as the wording relates to the statutory duty of directors in respect of companies where they hold office. I am not clear, having been shown no evidence, whether there was any mechanism to discipline a director for not complying with that duty. Ordinarily, sanction lies with the courts in relation to making the director personally liable for any losses that arise as a result of the breach of duty. However, again Dr Spring appears to have considered at the time that the respondent could discipline the claimant for these actions as a result of his employment relationship.

36. Dr Spring says that he has started an investigation in this e-mail. I find that Dr Spring was already arguing that the claimant had done as alleged, because he accuses the claimant of not acting in accordance with his duties, of unsettling staff, of wasting time, of not doing his job role properly in earlier e-mails.

The 10 March 2023 board meeting and misconduct investigation

37. The 10 March 2023 board minutes record that the claimant was a topic of reporting:-

> *"The June sale is looking very poor at the moment because BP has only described less than 20 lots when he would ordinarily have done in the region of 150 by this time. The financial impact on the June sale of BP's recent actions is further discussed in agenda item 'Staffing'"* (page 146).

38. And:-

> *"**Staffing***
>
> *GS reported that BP appears to be staging a 'go-slow' in that he has not described very much for June and has kept no consignments or lotting materials after the closure of the London office at Dowgate Hill. He has not responded to email requests for information about his movements. Concern was expressed that he appears to be taking holiday without reference or agreement. GS is also conducting an investigation after a grievance was raised by a staff member after it came to light that BP has been spreading falsehoods concerning two members of staff. It was agreed that GS should keep a 'watching brief' and begin disciplinary action if necessary, with the assistance of an independent HR consultant.*
>
> *Action: GS to continue to investigate and to take advice on disciplinary proceedings if necessary"* (page 146).

39. The investigation appears to have begun before the date that Dr Spring had told the claimant he would begin an investigation, which was 2 March 2023. The first e-mail is from Mrs Spring, Dr Spring's wife and the third director. Sent on 28 February 2023, it reads:-

> *"Thank you for enquiring about the nature of my telephone conversation with Ben concerning the London office closure. From what you have told*

> *me he has said, I wish to protest in the strongest possible terms that my words and intentions appear to have been so wilfully misrepresented. I wish to raise a formal grievance about this and request that I am not placed into any future situation with Ben where I am left without witnesses to his and my conversation. This includes telephone calls. I am very disappointed that a fellow colleague is behaving in this way and do not feel safe in his company anymore, if I cannot trust that anything I say will not be twisted, as appears to have been the case in this incident" (page 212).*

40. I am sceptical about Mrs Spring's account, although she did not appear in the hearing to justify these views. I have found that Dr and Mrs Spring would both benefit from the claimant leaving the respondent company. The sending of an e-mail, in this formal tone, from wife to husband, is likely an artifice to present a perception of process where the reality is overwhelmingly more likely that the couple talked about the incident directly. The words are, I find, crafted to inflict maximum damage to the claimant. It is not credible that Mrs Spring felt 'unsafe' by a disagreement over what was said in this conversation. The e-mail was written with the intention of justifying disciplinary action against the claimant, and that is a fact that I feel secure in finding in the context of this case.

41. The first e-mail about the claimant from a colleague who was not related to Dr Spring was sent on 1 March 2023, and reads:-

> *"Regarding conversations with Ben, Ben would express he was unhappy with regards to the London office closing, and mentioned he was being forced to work from home, which he didn't want to do. He would also mention how the directorship he felt was an unfair balance. On the very last conversation with Ben, he expressed he was seeking legal advice, this would make me feel uncomfortable when Ben would go into these conversations with me" (page 210).*

42. The next e-mail reads:

> *"I have taken a couple of calls from Ben where he has expressed that he felt bullied by you and Sue. On one of the calls he said he was seeking legal advice, then the following day told me he may have to wind the company down if he didn't receive a reply to his e-mail from you on the Thursday.*
>
> *I didn't really have any feelings of being worried as I knew he was talking rubbish" (page 210).*

43. On 2 March 2023, Dr and Mrs Spring's daughter Anna sent an e-mail about the claimant. The most relevant parts are:-

> *"Thank you for bringing the comments made by Ben Palmer to my attention.*
>
> *…I am very shocked to learn of the allegations he has made…*

> *…The comments made by Ben have made me feel very unsafe about the fact what I said could be twisted in such a way… I feel like I constantly have to monitor my conversations for any comments I have made which may be misconstrued at a later date, which is exhausting. I also feel uncomfortable about engaging in conversations with Ben where there are no witnesses (eg. Over the phone or alone in person)" (page 211).*

44. I am also sceptical about Dr Spring's daughter's account. The wording and phrasing used is nearly identical to Mrs Spring, and so I make a similar assessment about the purpose of the e-mail from Anna Spring. It is not credible, in my view, that these e-mails are frank and honest views – or capture the whole of the conversation between Dr Spring and his family members about the claimant. It is not credible, again, that a disagreement about what was said in a conversation would lead to serious concerns about safety. I find that these comments were inserted to justify action against the claimant, and so were not honest comments about the claimant's conduct and the feelings that conduct triggered.

45. On 3 March 2023, Mrs Spring sent another e-mail which sets out the respondent's account of the conversation with the claimant about the London office closure, which I have found to be untrue above. The e-mail begins with: *"You have requested I give further information about a particular telephone call with Ben"* (page 213).

46. On 5 March 2023, another colleague e-mailed about the claimant:-

> *"I can reveal a few things regarding Ben which were not said in confidence.*
>
> *The majority of the conversations were about items he needed advice on…*
>
> *He said he was against the closing of the London office and could not work from home.*
>
> *He said that he had several potential new people who would work at Cavendish's in London.*
>
> *He said that he was going on gardening leave from the end of Feb until whenever.*
>
> *We never discussed salary, finance or his personal problems.*
>
> *He never mentioned that fact that you had asked him to find another office…"* (page 214).

47. Considering the colleagues' e-mails from those not related to Dr Spring, I find some commonality across the responses. I was not shown what they were sent which prompted those responses. Plainly, Dr Spring has prompted the replies somehow, with each individual expressing how the conversation with the claimant has made them 'feel', usually with reference to worry or safety. The comments from colleagues without the surname 'Spring' are also factual and measured, and not sensationalising what was said by the claimant. Only one disclosed that the claimant caused anything like worry or discomfort.

Dr Spring's acting under advice

48. In cross examination, Dr Spring was challenged about whether he was the correct person to carry out a disciplinary investigation given the relationship issues he admitted he was already experiencing with the claimant. He said that there was nobody else to conduct the investigation, and said he was advised that it should be him. He was then asked to clarify this, and re-asserted that the respondent's HR advisers said he needed to do the investigation. He also asserted that there was a clause in the claimant's contract which directed that he should do the investigation. He conceded that he was mistaken when he was shown that this was not the case.

49. He was also forced to concede that the respondent's HR advisers had not been engaged during the investigation process he undertook. Page 193 shows an e-mail from Mr Mukusha, an HR Business Partner at Quest, and a reply from Dr Spring. The exchange occurred on 20 March 2023. The e-mail from Mr Mukusha reads: *"Thank you for your time earlier. Here is my e-mail address"*. I find that this is the date upon which the respondent started to take advice about the disciplinary procedure for the claimant. This is also consistent with the board minutes, where Dr Spring had authority to engage HR professionals after 10 March 2023.

50. On 21 March 2023, Dr Spring e-mailed the claimant to ask him to view two possible properties for the London office (page 195). The claimant is clearly pleased by Dr Spring's apparent u-turn, saying in his reply (page 194): *"I'm pleased you recognise that a customer-facing business requires an office but neither of these locations are strategic positions.."*. Dr Spring was unhappy with the negative ending to the response, and forwarded the chain to Mr Mukusha on 22 March 2023. His e-mail includes the final paragraph:-

> *"I think it's time to proceed with our plans before this progresses any further. He is still not doing his job, and setting up a new office will result in further delays before he begins work.."*

51. The wording is, again, illuminating. Dr Spring is not talking about escalating an investigation into a disciplinary process. He had not, at this point, spoken to the claimant as part of an investigation process. His intention is to stop the claimant *progressing any further* with setting up an office. I consider that Dr Spring's intention was to accelerate the claimant through to dismissal and those are the plans that he refers to. In my view, on the balance of probabilities, Dr Spring has made the decision to dismiss the claimant from his employment at a point no later than 22 March 2023. I find this on the basis of this e-mail, and also on the basis of earlier findings about how Dr Spring perceived the future of the respondent, his relationship with the claimant and the nature of correspondence between them, his expression that he and Mrs Spring had *"no trust"* in the claimant on 22 February 2023, and the artificial and manufactured e-mails from Mrs Spring and Miss Spring which were written to cause the claimant's employment status the most damage.

The claimant's involvement with the disciplinary process

52. On 27 March 2023, Dr Spring e-mailed the claimant to say that he needed to meet with him to discuss *"matters of concern that have been brought to the company's*

attention" (page 196). The invitation to the discussion gave no more detail than that about the subject of the concerns. It was proposed to meet either two or three days later.

53. The claimant objected to the invitation to the meeting, and is clearly concerned about the conflation between their shareholder dispute and his employment (page 197). He points this out and says he does not know what the matters of concern are, ending:-

> *"In the meantime, I see no reason why we should meet as you suggest, and I am certainly not prepared to do so without (a) first knowing what the subject is proposed to be and (b) having someone with me, (c) reasonable notice being given"*.

54. On 29 March 2023, Dr Spring sent the claimant an e-mail containing 23 questions that he wished to have answered as part of his investigation. This was sent because the claimant had not attended an investigation meeting. The list was described as being *"questions [Dr Spring] would like [the claimant] to answer about your alleged behaviour and conduct towards the company and employees"*. The list covers matters relating to conversations the claimant had with others about:-

    54.1. Unhappiness with the closing of the London office;

    54.2. The directorship being an unfair balance;

    54.3. Seeking legal advice;

    54.4. Feeling bullied by Dr and Mrs Spring;

    54.5. The possibility of the company being wound down;

    54.6. The issue with the Royal Philatelic Society;

    54.7. The London office closure being permanent;

    54.8. Insurers being unhappy with him home working;

    54.9. Improvements he would make to the auction process; and

    54.10. Identifying potential new workers for the respondent.

55. All of the questions are preceded with the phrase *"it is alleged"*, apart from the final one which is not subject to the same caveat. It reads:-

> *"For the past few weeks you have refused to perform your duties, despite numerous requests, citing to staff that you have no access to IT systems? Is this true?"*

56. The claimant is told that *"due to the serious nature of the complaints and allegations"*, he may be suspended on full pay whilst Dr Spring takes legal advice.

57. The specific allegations made against the claimant are not clearly set out in the list. It is a series of questions which touch matters relating to the claimant's day job, but also to the director dispute and the shareholder dispute. It is also not clear from these questions where any allegations had come from. It is also notable that one of the questions put to the claimant was about the possibility of winding down the company, and he is asked *"was this a threat?"*. This question comes after Dr Spring has already issued that threat to the claimant, as is outlined above.

58. The claimant was given 48 hours to answer the questions. He did not answer the questions, and on 31 March 2023, Dr Spring forwards the list to Mr Mukusha with the words: *"As expected Ben has not answered the questions I sent to him on Wednesday, despite not doing any contracted work, and having 16 working answers to answer 23 basically yes/no questions on things he himself has said"* (page 204). Again, at risk of sounding repetitive, it is plain at this point that Dr Spring has drawn conclusions on the process despite not having yet completed the investigation phase, or having heard the claimant's point of view.

59. On 5 April 2023, the claimant was invited to a disciplinary hearing (pages 206 to 207). He is told:-

> *"The disciplinary hearing is to consider the following allegation(s) (which are breaches of both your statutory duties as a director of the company and your duties as an employee of the company"*.

60. The allegations put are also couched in terms which reveal confusion about in what capacity the claimant is being disciplined. Three allegations of misconduct were put to the claimant in the invite and, for completeness, they are reproduced in full below:-

    60.1. *"Conduct and behaviour that has been detrimental to the harmonious workplace environment namely, unwelcome behaviour leading to negative effects on employee morale and productivity leaving them to feel unsafe and unable to approach you without fear of being placed in fear of being placed in an uncomfortable position or situation. In doing so, you also acted in breach of your statutory duties in your capacity as a director of the company under The Companies At 2006 to exercise reasonable care, skill and diligence."* ("**Allegation 1**")

    60.2. *"Dereliction of duties as a Describer since the 1 February 2023 which has been detrimental to the business. In doing so, you acted in breach of your statutory duties in your capacity as a director of a company under The Companies Act 2006 to promote the success of the company for the benefit of its members."* ("**Allegation 2**")

    60.3. *"Refusing to respond to a reasonable request to attend an investigation meeting and a request to submit a written response to investigation queries. In doing so, failing to co-operate in a disciplinary procedure."* ("**Allegation 3**")

61. The claimant was also sent copies of the e-mails from colleagues as described in the paragraphs above. The meeting was to take place on 19 April 2023. Allegation 1 remains vague in the manner it is phrased, but by this point the claimant is likely able to discern what it is *probably* about from what is written in the e-mails from

colleagues. No evidence at all is presented to the claimant about Allegation 2. Dr Spring explained this in cross examination as being the case because both he and the claimant knew he was not doing his job. The claimant contested this, and I have found facts to the opposite. No further explanation or evidence is offered about Allegation 3, but the claimant knew he had not engaged with that process because he did not trust it and did not think it was a reasonable request. Given the lack of explanation or evidence presented for Allegation 2 and 3, and the perceived purpose of the whole process, it is unsurprising that the claimant did not trust that Allegation 1 would actually be much broader in scope than what was recorded in the e-mails.

62. The claimant was told that the allegations if found proven would be considered as gross misconduct which may lead to summary dismissal. He was entitled to take a colleague or union representative to the meeting. He was warned that failure to attend could lead to further disciplinary proceedings or the hearing going ahead without him.

63. On 12 April 2023, the claimant's solicitor sent correspondence to Dr Spring objecting to the process being applied to the claimant and categorising the dispute as a company law unfair prejudice matter. It asserts that Dr Spring has no authority to lead that process (page 215 to 216).

64. The disciplinary hearing was re-scheduled to 27 April 2023 when the claimant did not attend the first arranged meeting on 19 April 2023. That was added as a fourth allegation of gross misconduct for the re-scheduled meeting. The claimant sent an e-mail on the morning of 27 April 2023 to object to the meeting, and to attach a statement which aimed to answer the questions which had been asked of him (page 223).

65. The claimant's statement in response to the questions was at pages 224 to 226. In cross examination, he did not deviate from his witness statement about his views about this part of the process and his objections to it:-

> *"On 27 April 2023 I emailed (page 223) and made it clear again that I objected to Dr Spring holding and summoning me to a disciplinary meeting which was unfair and which I had no intention of attending. I sent him a statement (pages 224-226) which I think made my position clear. As I pointed out it was after I refused to agree to Dr Spring's absurdly low offer to buy my shares that steps were taken to get statements from other employees, including those who were related to him and of whom he was clearly able to exert his influence to convene a disciplinary meeting to oust me. I also pointed out that Dr Spring was acting as complainant, investigator and decision maker so determined was he to get me out.*
>
> *I pointed out that no attempt appeared to have been made to take a statement from Scott Treacy about what Anna Spring said to him at Stampex between 28 September and 1 October 2022. Scott had told me that he had asked her what was going on, to which Anna had said that the ball was in my court at that time, and that I had no responded to an email. It was clear that she which she could only have known if she had been told it by her father or mother…".*

The claimant's dismissal

66. The disciplinary hearing took place in the claimant's absence. Dr Spring and Mr Mukusha considered the claimant's statement as part of that meeting and determined that he should be dismissed summarily for gross misconduct. The claimant was informed by an e-mail sent on 28 April 2023 (pages 227 to 229). The respondent considered that all four allegations had been made out when it came to the decision to dismiss. Dr Spring's letter only gave reasoning for Allegation 1. There was no reasoning at all as to the factors taken into account when considering Allegation 2 or Allegation 3, why those matters were considered to be gross misconduct, or anything about the reasoning behind the sanction levied. The reasoning offered for Allegation 1 is:-

> *"On the basis of the information I have before me, the company believes the allegations that your conduct and behaviour has been detrimental to the harmonious workplace environment namely, unwelcome behaviour leading to negative effects on employee morale and productivity leaving them to feel unsafe and unable to approach you without fear of being placed in fear of being placed in an uncomfortable position or situation has been substantiated. This is due to the fact that you confirmed that you did have conversations with the witnesses, however you have failed to respond to the accusations regarding your behaviour or give a satisfactory explanation for your statements towards them."*

67. Dr Spring then addresses the claimant's statement paragraph by paragraph. Dr Spring disagrees with each point made, and assert that the process was properly convened and that the claimant has unreasonably failed to comply with it. I find as a fact that Dr Spring makes assertions that he knew were untrue when responding to the statement. In this way, I find as a fact that he was dishonest in the correspondence which dismissed the claimant. The offending parts relate to responses to the claimant's 'point 3' and 'point 6'.

68. Point 3 relates to the disagreement between the claimant and Dr Spring about the value of the claimant's shares. It is plain from any reading of the correspondence that there has been disagreement about that, and indeed in cross examination Dr Spring admitted that this is one significant disagreement which led to the breakdown in relationship between he and the claimant. However, in the dismissal e-mail, Dr Spring wrote:-

> *"Regarding point 3 of your written submission, I am not aware of any overriding disagreements that we have had in relation to the business of the company of which we are joint owners…"*

69. Point 6 also relates to the disagreements between the claimant and Dr Spring, which the claimant euphemistically described as a difference of opinion. Again, Dr Spring responds with:-

> *"Regarding point 6 of your written submission, I am not aware of a difference of opinion you are referring to. Since being offered 50% each joint ownership of the company by the previous owner, and only meeting*

for a few hours on average every 3 months, I can state that we have had a fairly good relationship for nearly 6 years."

70. Dr Spring's e-mail also finds that the claimant had breached his statutory duties as a director to (1) exercise reasonable care and skill, and (2) promote the success of the company for the benefit of its members. These findings, which are not explained and have no narrative as to how a director can find a fellow director in breach when that is the Court's role, are grouped together with the others to conclude that gross misconduct has been considered. The claimant was offered a right of appeal.

71. The claimant exercised his right of appeal but made it clear that he had lost trust and confidence with Dr Spring and the respondent. He also objected to the appeal being carried out by Quest, and after correspondence about that, Quest wrote on 27 July 2023 dismissing the appeal in the claimant's absence (pages 279 to 280).

72. The solicitors for the claimant and for Dr Spring (or for the respondent company – the position seems confused and changes) continue to engage in correspondence about the dispute throughout the end of the disciplinary process. The claimant's credit card and company phone were de-activated, and he was upset enough about that to make telephone calls to those service providers to remonstrate with the action taken. I heard one recording of such a telephone call, and find that the claimant was rude and unconstructive in that call. This was, though, conduct *post-dating dismissal*.

Relevant law

Unfair dismissal

73. Under s98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal and that it is either for a reason falling with section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee. The respondent asserts that the claimant was dismissed by reason of the claimant's conduct. Dismissal for conduct is a potentially fair reason falling within section 98(2). The Tribunal will make a finding about the real or principal reason for dismissal on the available evidence. It is possible for the Tribunal to conclude that the dismissal occurred because of some other potentially fair reason to that asserted by the employer. In those situations, it is unlikely to be a fair dismissal because the employer is likely to have asked itself the wrong questions when considering the question of dismissal (*Governing Body of John Loughborough School and anor v Alexis EAT 0583/10*).

74. In *Associated Society of Locomotive Engineers and Firemen v Brady [2006] IRLR 576 EAT*, the employee was dismissed ostensibly for misconduct following a fracas at a workplace barbeque. At first instance, the Tribunal considered that the misconduct alleged may well have been sufficiently serious to justify dismissal. However, it found that the 'real' reason for the dismissal was not the misconduct as asserted, but because of political antipathy towards the claimant by the employer. The claimant was therefore successful in his unfair dismissal claim. On appeal, the EAT upheld the decision, agreeing that, where an employer has seized upon a potentially fair opportunity to dismiss to hide its unfair purpose, the dismissal will be unfair.

75. Where the employer has shown a reason for the dismissal and that it is for a potentially fair reason, section 98(4) of the Employment Rights Act 1996 states that the determination of the question whether the dismissal was fair or unfair depends on whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and must be determined in accordance with the equity and substantial merits of the case.

Reductions to any award for unfair dismissal

76. If a finding of unfair dismissal is made as a result of an unfair procedure, then the tribunal should consider the likelihood that the employee would have been dismissed in any case had a fair procedure been followed. The compensation to be awarded should be reduced to reflect that likelihood (*Polkey v AE Dayton Services Ltd [1987] UKHL 8)*.

77. *Section 122(2) of the Employment Rights Act 1996* provides that the tribunal should reduce the basic award to reflect any circumstances where the tribunal considers the conduct of the claimant before the dismissal makes it just and equitable to do so. By *s123(6) ERA 1996*, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. The tribunal must make a reduction where there is a finding of contributory fault (*Optikinetics Limited v Whooley [1999] ICR 984*). The reduction may be as much as 100% (*W Devis & Sons Ltd v Atkins [1977] ICR 662*).

78. When considering whether or not to make a reduction to the compensatory award for contributory conduct, it is helpful to keep in mind guidance from *Nelson v BBC (No 2) [1980] ICR 110* which said:

    78.1. the relevant action must be culpable and blameworthy;
    78.2. it must have caused or contributed to the dismissal;
    78.3. it must be just an equitable to reduce the award by the proportion specified.

79. Broadly, it is understood that the reduction should be: (1) 100% where the employee's conduct is wholly to blame for the dismissal; (2) 75% where the employee is mostly to blame; (3) 50% where there is equal blame; and (4) 25% where the employee is partly to blame.

Wrongful dismissal

80. An employer is entitled to summarily dismiss an employee (dismiss without notice) where the employee has committed a repudiatory breach of contract such that the employer's trust and confidence in the employee is so damaged that the employer should not be expected to continue with the employee's employment (*Briscoe v Lubrizol Ltd [2002] IRLR 607*). The tribunal is to decide the degree of misconduct necessary for the employee's behaviour to amount to a repudiatory breach of contract.

81. Whether or not the employer is entitled to dismiss summarily is an objective point for the tribunal to decide bearing in mind what the employee actually did or did not do, as a factual finding, on the balance of probabilities. Where a Tribunal finds that the employee did not commit the misconduct alleged, then it follows that there was no entitlement to summarily dismiss.

Discussion and conclusions – unfair dismissal

The reason for dismissal

82. The respondent asserts that the claimant was dismissed for gross misconduct. It therefore pleads that the reason for dismissal, conduct, is a potentially fair reason. No other potentially fair reason is pleaded by the respondent. The misconduct is said to be Allegation 1, Allegation 2, Allegation 3, and a failure to engage with the disciplinary process. Consequently, the respondent asserts that the difficult relationship between the claimant and the other two directors did not inform his dismissal.

83. The claimant claims that misconduct is not the reason for the dismissal. He contends that the real reason for dismissal was to force the issue in respect of the sale of shares in the business, and to drive the claimant out of the business once he and Dr Spring had come to the realisation that their relationship had broken down. He says that none of the allegations of misconduct are fairly made out. On his behalf, Mr Dunn argues that those allegations are not in themselves misconduct. In this way, the claimant's case is that he was dismissed for an unfair reason.

84. If I agree with the claimant, then he has been unfairly dismissed. Where he has been through a process which hides the true reason for the dismissal, then that process will never be fair. I note the principles outlined from the cases of *Alexis* and *Brady*. In my view, this is a case where those principles are relevant. I have found that the claimant had a relationship breakdown with Dr Spring and Mrs Spring. That breakdown was triggered over a dispute which related to the operation of the respondent. That was the claimant's business, literally, by virtue of his 50% shareholding of the respondent and also by his being one of the three directors. The other directors are Dr and Mrs Spring. That dispute was acrimonious. Dr Spring acknowledged in his evidence that the relationship had broken down following a fall out about whether to bar one person from working with the respondent, and following his offer to buy the claimant's shares for less than face value. I found that, from that point where the claimant was proposing to sell his shares to Dr Spring, the parties were envisaging the claimant exiting the business.

85. Those issues outlined above had no direct bearing on the claimant's employed role as office manager and describer. This is the role that is the subject of these proceedings. Throughout the disciplinary process, Dr Spring referred to the director and shareholder issues when addressing the claimant about his employed role. This indicates, very clearly, that the process was driven by that fall out and the desire to get the claimant out of the respondent to assume control. Additionally, I consider that the evidence showing that the alleged misconduct was pre-judged supports the notion that the dismissal was not driven by the allegations put. The claimant was told, before knowing of any disciplinary process, that his fellow directors had lost trust and confidence in him. He was told that he was in breach of his directors' duties.

It was implied that he was not acting in the best interests of the company in respect of his decisions as a director. Those alleged breaches of duty even found their way into the reasons for dismissal, where Dr Spring also sought to draw attention away from their previous conflict by baldly denying that there had been any.

86. I have also found elements of dishonesty in respect of the respondent's conduct during the process. I have found that Dr and Mrs Spring contrived board minutes to record tasking the claimant with finding a new London office when that did not occur. I have found that Mrs Spring and Anna Spring's statements in the disciplinary process are exaggerated and worded beyond an account of the factual conversations to bolster the chances that misconduct could be found against the claimant. I have found that Dr Spring was dishonest in the letter of dismissal where he denied that there had been any prior conflict or disagreement between he and the claimant.

87. Reflecting on Dr Spring's evidence and the respondent's approach, I also consider that the respondent's approach was generally confused and confusing. Dr Spring started the process without taking advice, and the timing of his signalling to the claimant that he was starting a process, just minutes after setting out a robust position in respect of the director and shareholder dispute, is indicative of how the two processes were linked. When Dr Spring started taking advice, the process started to take a more organised shape and was clearly bent on casting the claimant's position as employee misconduct. This explains the exaggeration I have found. It might also explain Dr Spring's denial of any prior disagreement, because by this point he may have been warned that that disagreement gives rise to an inference that the dismissal is not about misconduct at all.

88. In my view, Dr Spring's confusion continued during the hearing. In cross examination, Dr Spring agreed that disagreements with colleagues would not be misconduct. He said that leaking confidential information from the board to staff was misconduct, but that is not an allegation that was ever put to the claimant. Dr Spring repeatedly stated that the claimant was not doing his employed role, but he did not make any attempt to investigate the claimant's working hours or presence on site. He did not take into account the claimant's explanation about what work he had been doing. Dr Spring could not understand that issues relating to directors' duties were separate to the employed role, but in adhering himself so strongly to this view, he showed how driven he was by the wider dispute about the running of the respondent and getting past shareholder deadlock. That was the key consideration, with a recurring theme in the correspondence and in Dr Spring's answers being that the claimant was damaging the business with his position in respect of its running, and that the claimant had unrealistic expectations about the value of his shares.

89. In my judgment, reflecting on the findings I have made and the factors outlined in this section, I conclude that conduct was not the real reason for the claimant's dismissal. The real reason was to further the Springs' cause in accelerating the claimant's removal from the business so that they could secure control of it going forward. That is not a potentially fair reason for dismissal. The purpose of the disciplinary process and ultimate dismissal was to try to remove the deadlock over the shareholding. It was also to try to remove the claimant from the management of the business after a rift had opened over key issues over the time period prior to the disciplinary process beginning. Plainly, I agree that destabilising colleagues and not

doing any work *could be* conduct issues which would justify dismissal. However, having found that the dismissal was driven by an ulterior purpose, I am able to conclude that the dismissal is unfair even if the respondent could have concluded that the misconduct alone was sufficient to dismiss the claimant. This is the same as the situation in ***Brady***. This means that the claimant's dismissal was unfair and he was unfairly dismissed and he is entitled to a basic award and a compensatory award as well as the declaration that he has been unfairly dismissed.

90. Before coming to my firm conclusion, I considered ***Alexis***, and in particular given some thought as to whether the respondent's reason for dismissal might have fallen into the definition of *some other substantial reason* given the alleged impact of the dispute on the respondent business. However, this does not assist the respondent for two reasons: (1) it was not pursued as a defence, and so there is limited evidence on the point, and even more limited submissions, and (2) the findings I have found about the dishonesty on the part of the respondent would lead me to conclude that any dismissal would be procedurally unfair at the very least anyway. I also consider that there would be a procedural unfairness in finding a dismissal is fair where the reason is not pleaded because it was not an issue in the case which has been properly argued and considered.

91. I am not now required to consider the purported conduct dismissal, but it seems appropriate to comment given that I have considered evidence about the respondent's process. Even if the respondent had been able to establish conduct was the real reason for dismissal, then I consider that the claimant would have been found to have been unfairly dismissed anyway. Dr Spring did not follow a reasonable investigation. The investigation was contrived in a way that the claimant did not know the detail of the evidence against him. Dr Spring did not seek out evidence which might clear the claimant and had plainly pre-judged the issue. He was involved with amending board minutes to wrongfully record actions. He gathered statements from his own wife and daughter which he must have known did not reflect the whole position. He made no measurement of the claimant's work output or did anything to properly verify his understanding. Some of the allegations do not relate to the employment. It would not be reasonable to dismiss the claimant for matters relating to his shareholding or legitimate positions taken as a director. In those circumstances, the dismissal would not be fair.

Wrongfully dismissed

92. To determine this claim, I consider facts that I have found and consider whether or not the respondent was entitled to repudiate the contract on the basis of the sort of breach outlined in ***Briscoe***. This is an objective assessment and there is no error if I stray into a substitutionary mindset. I am to consider the four allegations as are described above.

93. I have found that only a part of Allegation 1 could have occurred. I reject the position that the claimant's disagreement could have made Mrs Spring or Miss Spring feel 'unsafe'. That is a word utilised, in my judgment, to justify a finding of misconduct serious enough to dismiss. It is not credible that Mrs Spring felt unsafe given her position as a fellow director of the respondent, allied to her husband director on these issues, and working in Derby whilst the claimant was based in London. Although I accept that Miss Spring does not have the same standing, she is the daughter of the

other two directors and it is not credible to feel fear on the basis of what the claimant said to a third party about a conversation that you do not agree happened the way described. I reject the statements of the Springs as true accounts.

94. That leaves the other colleagues' statements. Of those, only one mentions any discomfort. This is expressed in the context of the claimant talking about getting legal advice after outlining his areas of grievance. Although Dr Spring says in the disciplinary outcome letter that at least one colleague was in fear of their job, that is not supported by any evidence shown to the claimant. I consider that if that was a real fear of a colleague, evidence would have been shown of it. In my judgment, it is not misconduct for an employee, even a manager, to outline what they are unhappy about to a colleague and consider getting legal advice. To dismiss someone for seeking to ascertain or rely on legal rights may well give rise to additional claims. I accept that the claimant is in a different position as a senior manager with the ability to affect the respondent significantly, but the wording of the e-mail saying it would make the reporter feel 'uncomfortable' when the claimant aired grievance is clearly not communicating an impact severe enough to constitute *gross misconduct*. The claimant did not commit gross misconduct in respect of Allegation 1. Allegation 1 also accuses the claimant of a breach of directors' duties. Frankly, that is a matter of opinion until a Court fixes the claimant with any liability for his conduct. That has not happened, and so there has been no breach established.

95. Allegation 2 relates to alleged dereliction of duties as a Describer. I preferred the claimant's evidence about his work activity and found that his work output did not reduce in the period alleged. I accept that he was doing consignment work which did not relate to the auction, but also accept the claimant's view that he would have caught up with that work. In any event, the accusation of a dereliction of duties. If the claimant is performing his role, even if with an emphasis that Dr Spring did not agree with, he is still performing his duties. I find that the misconduct alleged did not occur, and so it clearly cannot be the case that Allegation 2 is made out and that the claimant committed gross misconduct. I make the same comment about the allegation of breach of directors' duties as I do in respect of Allegation 1 above.

96. Allegation 3 relates to the claimant's lack of engagement with the disciplinary process, and so I also include the final allegation of failing to present at the first disciplinary meeting. Factually, the claimant did not engage with the process and did not attend that meeting. The underlying conduct is therefore found and established. The question is whether, in the circumstances, this is gross misconduct. In most cases, it could very well be gross misconduct to completely ignore a disciplinary process. This case is not most cases. This is a case where the disciplinary process has been opportunistically constructed to hide an unfair reason for the claimant's dismissal. The process was, factually as well as in the claimant's perception, a sham.

97. It is also relevant to note that the claimant did instruct solicitors during the disciplinary process, and they raised substantial issues with the process and its fairness when explaining why the claimant would not engage. In my judgment, it is not misconduct to choose not to engage with a process where the person going through the process knows that it is a sham designed to engineer dismissal. That is what the claimant did, and his perception has been held true by this judgment. Consequently, I do not consider that Allegation 3 nor his refusal to attend the disciplinary meeting were actions of gross misconduct.

98. The claimant has not committed gross misconduct. The respondent was required to give notice to terminate his contract, and pay him for his notice period. It did not pay him, and so he has been wrongfully dismissed and is owed his notice pay, to cover a notice period of 3 months.

Next steps

99. The claimant was unfairly dismissed and wrongfully dismissed. It should be straightforward to calculate the notice pay the claimant should receive and I do not consider that a hearing would be required to work out what that figure is.

100. However, the respondent has pleaded reductions in respect of *Polkey* and contributory conduct. I do not consider that this case is the sort that would attract a *Polkey* reduction because the respondent has failed to establish a potentially fair reason for the dismissal. It also seems unlikely that the claimant could have culpably contributed to his dismissal in light of the conclusions in this judgment, but I should nevertheless hear submissions on the point before deciding it.

101. A remedy hearing will be listed for this purpose, with directions to be provided shortly. It strikes me that that hearing window would also be a convenient time to hear any other consequential applications arising from this judgment, given that it has made findings relating to the respondent acting dishonestly and conducting an effectively 'sham' process to dismiss the claimant.

Employment Judge Fredericks-Bowyer

13 April 2024

Sent to the parties on:

14 May 2024
…….

For the Tribunal Office:

……..……..