

WRITTEN REASONS – LIABILITY AND REMEDY



EMPLOYMENT TRIBUNALS

Claimant: Mr R Taylor

Respondent: Dresler Smith Limited

Heard at: Leeds Employment Tribunal (by CVP)
Before: Employment Judge Deeley

On: **Liability hearing:** 27, 28 and 29 February 2024
Remedy hearing: 28 March 2024

Representation

Claimant: **Liability hearing:** 27 and 28 February 2024 - Mr Smith (attending as a pro bono representative) and 29 February 2024 - in person

Remedy hearing Mr Smith (attending as a pro bono representative) until 2pm, then in person

Respondent: **Liability hearing:** Mr R Katz (Consultant)
Remedy hearing: Mr R McLean (Counsel), with Mr Katz observing

WRITTEN REASONS – LIABILITY JUDGMENT AND REMEDIES JUDGMENT

1. The respondent applied for written reasons following the Tribunal's oral judgment at the last day of the hearing on 29 February 2024. The Liability Judgment promulgated on 29 February 2024 stated that the claimant's complaints of unfair (constructive) dismissal under s98 of the Employment Rights Act 1996 and of wrongful dismissal (notice pay) succeeded and were upheld.

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2. The Tribunal held a separate remedies hearing on 28 March 2024, during which the Tribunal gave oral judgment. The respondent applied for written reasons relating to remedy at the end of that hearing. The Remedies Judgment promulgated on 28 March 2024 awarded the following compensation to the claimant:
 - 2.1 £15,536.88 (net) in respect of his complaint of wrongful dismissal (contractual notice pay); and
 - 2.2 £102,157.50 in respect of his complaint of unfair (constructive) dismissal, which consisted of:
 - 2.2.1 Basic award - £8,279.50; and
 - 2.2.2 Compensatory award - £93,878 (gross).

WRITTEN REASONS – LIABILITY JUDGMENT

TRIBUNAL PROCEEDINGS

3. The respondent has been represented in these proceedings by Peninsula Business Services (“**Peninsula**”). Peninsula’s original advocate was unwell during the week before these proceedings. The respondent applied to postpone the Liability Hearing on that basis, to which the claimant objected. However, Mr Katz confirmed that the postponement application was withdrawn at the start of this hearing.
4. During Mr Dresler’s evidence, it became apparent that there was a potential conflict of interest between the respondent and Peninsula. The Tribunal adjourned for Mr Katz to discuss the matter internally within Peninsula and Mr Katz confirmed that Peninsula remained able to continue representing the respondent.
5. The Tribunal considered the joint file of documents and witness evidence from the claimant and from Mr Dresler. The respondent also provided a witness statement from Ms Virginia Cullen (Director – Property Management), who was appointed after the claimant. However, Ms Cullen was not called as a witness in these proceedings.
6. The claimant requested specific disclosure of Ms Cullen’s contract of employment and the respondent agreed to provide this on the morning of the first day of the hearing. The contract was added to the hearing file.

ADJUSTMENTS

7. The Tribunal noted that Mr Dresler was sadly suffering from continuing ill health and asked the representatives whether he (or anyone else participating in the hearing) may need adjustments to be made to the hearing. The Tribunal explained the normal hearing timetable and stated that anyone in the hearing could request additional breaks at any time. The respondent asked for breaks every 30 minutes during Mr Dresler’s witness evidence and the Tribunal agreed to this request.

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CLAIMS AND ISSUES

8. There was no separate case management hearing of this claim because it involved constructive (unfair) and wrongful dismissal claims. The Tribunal therefore prepared a draft list of issues (or questions that the Tribunal would decide) on the first morning of the hearing. The Tribunal noted that the respondent had accepted at paragraph 47 of its Grounds of Resistance that there was a 'breakdown in the relationship' between the claimant and the respondent.
9. The Tribunal agreed the list of issues set out below with the parties before hearing evidence and provided a copy to both parties, who confirmed that it was correct.
10. The respondent applied to amend its claim on the first morning of the hearing, to state that it would be just and equitable to reduce any compensation awarded to the claimant as part of any remedies issues. The claimant's representative provided the wording set out below, to which the respondent did not object. The Tribunal therefore permitted the amendment set out below to the respondent's response.

"Just and Equitable:

1. *The Respondent submits that the breakdown in the relationship was caused or contributed to by the actions of the Claimant.*
2. *The Respondent verbally raised issues relating to the Claimant's failures of management of 'Queensferry', which were causing harm to the Respondent.*
3. *In addition to the verbal discussions, these matters were fully set out in the interview which the Respondent completed with Peninsula as part of the grievance process, which the Claimant had sight of.*
4. *The Respondent avers that these failures – and the Claimant's failure to acknowledge these and address them – were the sole cause of the rising tension and ultimate breakdown in the relationship.*
5. *In the alternative, these were a significant contributory factor in the breakdown of the relationship.*
6. *The Respondent pleads that should the Tribunal make a finding of fact that the Claimant's actions / omissions in this respect were the cause, or contributed to the breakdown of the relationship, it would be just and equitable for the basic award to be reduced in a sum to be determined by the Tribunal to reflect this."*

LIST OF ISSUES

References to:

- 10.1 "GoC" are to the claimant's Grounds of Complaint; and
- 10.2 "GoR" are to the respondent's Grounds of Resistance.

1. **Unfair dismissal**

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- 1.1 Was the claimant dismissed?
 - 1.1.1 Did the respondent do the things set out in **Paragraphs 8(a)-(q) inclusive of GoC**?
 - 1.1.2 **[Paragraph 11 of GoC]** Did the those matters (taken separately or cumulatively) breach the implied term of trust and confidence? The Tribunal will need to decide:
 - 1.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and
 - 1.1.2.2 whether it had reasonable and proper cause for doing so.
 - 1.1.3 **[Paragraph 11 of GoC]** Alternatively, did those matters (taken separately or cumulatively) the implied terms that:
 - 1.1.3.1 an employer will reasonably and promptly afford a reasonable opportunity to obtain redress of any grievance they may have; and/or
 - 1.1.3.2 an employer will not unilaterally vary or seek to vary an employee's remuneration or benefits package for the work undertaken during an employee's employment
 - 1.1.4 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.
 - 1.1.5 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.
- 1.2 The respondent has not pleaded a potentially fair reason for dismissal at **Paragraphs 54-63 of GoR**. Therefore, if the Tribunal finds that the claimant was dismissed, any such dismissal will be held to be unfair dismissal for the purposes of s98 of the ERA 1996.

2. Wrongful dismissal / Notice pay

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The claimant resigned with immediate effect and did not receive any pay from the respondent for his 3 months' notice period.

- 2.1 Was the claimant dismissed as set out in paragraph 1.1 above? If so, the claimant is entitled to his notice pay.

3. Remedy for unfair dismissal

- 3.1 What basic award is payable to the claimant, if any?
- 3.2 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
- 3.3 If there is a compensatory award, how much should it be? The Tribunal will decide:
- 3.3.1 What financial losses has the dismissal caused the claimant?
- 3.3.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 3.3.3 If not, for what period of loss should the claimant be compensated?
- 3.3.4 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 3.3.5 Did the respondent unreasonably fail to comply with it by **[Paragraph 15 GoC]**:
- 3.3.5.1 Delaying the grievance process;
- 3.3.5.2 Holding a 'sham' grievance process; and/or
- 3.3.5.3 Failing to deal with the grievance and/or grievance appeal impartially?
- 3.3.6 Did the claimant unreasonably fail to comply with it by **[Paragraph 61 GoR]**:
- 3.3.6.1 Failing to engage with the grievance appeal process prior to the claimant's resignation?
- 3.3.7 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

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- 3.3.8 If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
- 3.3.9 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 3.3.10 Does the statutory cap apply?

FINDINGS OF FACT

Context

11. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible:

"Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

12. I wish to make it clear that simply because one or other witness' version of events are not accepted in relation to a particular issue does not mean that I consider that witness to be dishonest or that they lack integrity.

Background

13. The respondent is a property management business, based in Leeds. The respondent had a total of four staff at the relevant times, consisting of the individuals set out in the table below and one further administrative member of staff (Karen, surname not provided by the parties). I note that Ms Atkins is still employed by the respondent but was not called to give evidence at this hearing.

Name	Role
Mr David Dresler	Director and owner
the claimant	Head of Property Management
Ms Sue Atkins	Administration

14. After the claimant's employment terminated, Ms Virginia Cullen was appointed into the role of Director (Property Management). The respondent provided a witness statement for Ms Cullen but she was not called to provide oral evidence at this hearing.

15. Mr Dresler established the respondent's business before employing the claimant with effect from 1 August 2012. The claimant was brought on board to run the

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respondent's property management work. The claimant stated that he also occasionally dealt with some agency and professional work (e.g. rent reviews and lease renewals). The claimant had previously worked in-house and the clients that he worked with when he joined the respondent's business were the respondent's existing clients.

Claimant's remuneration structure

16. Mr Dresler and the claimant agreed that he would receive a remuneration package consisting of a base salary of £30,000 and 50% of residual income (after additional costs had been paid).
17. Mr Dresler and the claimant decided to change the claimant's remuneration structure with effect from 1 April 2016 and this remained in place until the claimant's employment ended. The claimant's remuneration structure was set out at clause 4 of his new contract of employment:

"4. Remuneration

As at 1st April 2016 your salary is £55,000 per annum.

You will be paid monthly in arrears on the last working day of every month.

Commission is calculated by way of 50% of agreed personal billings (which have been paid) less the Agreed Costs.

The Agreed Costs are made up of three elements:

1) The Management department's independent costs: Primarily this includes specific IT, support staff, National Insurance, Pension contributions and the Employees personal expenses. For the year 2016/17 a figure of £40,000 is to be relied upon. This amount may change from time to time as costs vary.

2) Central Overheads: This is made up of a contribution towards the general costs including IT, Telephones, Rent, Rates, Service Charge etc from which the Management department benefits. For the year 2016/17 a figure of £40,000 is to be relied upon. This amount may change from time to time as costs vary.

3) The base salary of the Employee

Example

If the Employee has agreed personal billings in 2016/17 of £230,000 net of VAT his commission would be calculated as follows:

<i>Agreed Personal billings</i>	<i>£230,000</i>
<i>Management department cost</i>	<i>-£40,000</i>
<i>Central Overheads Contribution</i>	<i><u>-£40,000</u></i>
<i>Net Total</i>	<i>£150,000</i>
<i>Less 50%</i>	<i>-£75,000</i>

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<i>Less base salary</i>	<i>-£55,000</i>
<i>Commission</i>	<i><u>£20,000</u></i>

Commission is paid once Dresler Smith is in receipt of cleared funds from the client and is paid under PAYE, as normal salary.

Going forward the Employer will notify the Employee of the amounts set out in paragraphs 1) and 2) above as soon as possible after the commencement of the new financial year”

18. Mr Dresler confirmed during his oral evidence that there were three pots of work from which the claimant could generate fees that counted towards his commission:

- 18.1 Management work;
- 18.2 Professional work; and
- 18.3 Agency work.

19. Mr Dresler also confirmed that he and the claimant had never had any disagreement during the period from 2016 onwards regarding the calculation of ‘agreed personal billings’ or of ‘agreed costs’.

20. The claimant earned significant amounts of commission during his employment with the respondent. The claimant’s commission was adversely affected by the Covid-19 lockdowns during 2020 and 2021. His last six years’ remuneration (including a salary of £55,000, the remainder being commission for each financial year) for the respondent’s financial years 1 April to 31 March is set out in the table below.

Financial Year	Total (gross)
2017/18	£92,505.78
2018/19	£103,325
2019/20	£87,726.21
2020/21	£67,118.06
2021/22	£92,135.50
2022/23	£101,444.58

21. Mr Dresler stated in his witness statement that the amount of property management work grew since 2016, due to Mr Dresler’s client relationships rather than the claimant’s client relationships. This in turn increased the claimant’s commission significantly. Mr Dresler stated that ‘in hindsight’ he should have changed the claimant’s commission at that point:

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“However, I did not do that because I did not want to discourage him, he was meant to be making the most of this arrangement and trying to find additional work during the whole time, he never did this or felt it was his responsibility.”

22. Mr Dresler confirmed during cross examination that he agreed that remuneration was a fundamental term of the contract, which could not be changed by the respondent without agreement. Mr Dresler also stated that:

“I always paid in line with the contract that was agreed. The deal was that on different instructions due to their nature it may be appropriate for Richard to at least be involved in the agency or letting of a property, but it will be done on a basis where it was discussed between us and ultimately at my discretion. It’s my business and my clients.”

Events up to September 2022

23. The claimant and Mr Dresler appeared to have had a good working relationship up until 2022. Unfortunately, Mr Dresler suffered a period of serious ill health starting in 2017, which impacted on the capacity that he had to run the respondent’s business on a day to day basis. Mr Dresler stated that:

“As the years moved on, this situation was fine and with no disagreement, that I can recall. however, when I became ill in 2017 and missed some work with and was working from home a lot of the time. Richard took advantage of this with less frequent office attendance himself and it began to damage the chain of communication because we were not sitting across from the desk from each other anymore and we couldn’t hear what phone calls were being made or discussed matters in the way we always had done.”

24. Mr Dresler noted that the situation was exacerbated by the Covid-19 lockdowns, which meant that the office was closed for some periods. Mr Dresler said that the claimant preferred working from home, due to the long commute.

25. The Tribunal concluded that:

25.1 communications had started to break down between the claimant and Mr Dresler prior to 2022;

25.2 Mr Dresler, by his own admission, tends to avoid ‘conflict’ and did not raise matters directly with the claimant until September 2022. For example, Mr Dresler stated in his oral witness evidence:

“I have a complicated life, I’m confrontation avoidant. I wanted to avoid any conflict or anything like that.”

25.3 matters came to a head in Autumn 2022 as set out below.

ALLEGATIONS REGARDING CHANGES TO CLAIMANT’S REMUNERATION

29 September 2022 meeting – golf club

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26. The claimant became aware in mid-August 2022 that Mr Dresler had received a offer from a third party to buy the respondent's business. The claimant offered to buy the property management side of respondent's business from Mr Dresler. They met on 29 September 2022 outside of the office to discuss the claimant's offer. The claimant intended to offer Mr Dresler for £550,000, which he intended to finance over a 10 year period.

27. The claimant stated that before he had the chance to discuss his offer for the business:

“David instructed me that part of my role would be removed from me without further discussion or consultation, in April 2023. When I challenged the validity of this, David said he could do this “whether I liked it or not” and specified that “I have made sure of that in your contract” or words to a similar effect.”

28. Mr Dresler states that he did not tell the claimant that any agency work would be 'removed' from the claimant's personal billings for the purposes of calculating commission. Mr Dresler stated that they had a conversation, during which he told the claimant that the agency work needed to be done 'properly', after the issues at the Queensferry site. He noted that the claimant did not actually generate any agency fees between September and the end of the 2022/23 financial year and stated:

“I wanted the claimant to give me input as to how the claimant thought it could work – I didn't have time to do all of the agency work and wanted to come to a mutually acceptable solution.”

29. Both sides agree that Mr Dresler stated that he would consider the claimant's offer and speak to his accountant. He was then away on holiday. The claimant asked Mr Dresler by email on 13 October 2022 whether he had made a decision on the offer and Mr Dresler responded stating:

“... I still have no intention to sell I'm afraid, sorry if you're disappointed (I did ask Stu about other structures, but it's only downside for me) but the discussion has given me some other ideas to implement which I'll tell you about when I see you.”

24 October 2022 meeting – Café Nero

30. Mr Dresler stated that he had concerns about the claimant's management of a client site at Queensferry in Cheshire.. The respondent had been instructed by the client to let the site, but when Mr Dresler visited the site on his way home from a holiday in Wales at the end of August/beginning of September, there were no letting boards at the site. Mr Dresler stated that it was from this point onwards, that he realised that he had to do something. Mr Dresler stated during his oral evidence:

“I didn't want to take agency off him – I just wanted to avoid this situation happening again.”

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31. Mr Dresler stated that prior to the issues at Queensferry, he had some concerns around the claimant's 'secrecy'. He stated that he did not know what the claimant was doing half of the time and that the claimant failed to provide him with satisfactory responses.

32. Mr Dresler stated that his concerns regarding the claimant's 'secrecy' related to a different client, known as 'Peak Village', who brought a considerable amount of revenue to the respondent. Mr Dresler stated during his oral evidence:

"I was trying to think why he would not want me to know what was going on at Peak Village in particular, I think he was hoping to take the job with him – that didn't happen, but it was his intention

I was also concerned that it's a primarily retail instruction and it's our biggest single job – I was concerned that client not getting the benefit of my full retail input. Whereas previous owner (my direct client) often involved me heavily in lettings for Peak Village at that point – that had been diluted for the claimant.

I'm not accusing him of anything – I felt uncomfortable."

33. The claimant and Mr Dresler met on 24 October 2022. They discussed matters, including the management of the Queensferry site. The claimant alleged that during the meeting, Mr Dresler threatened to professionally discredit him in front of a client. The claimant said that Mr Dresler stated: *"I could just pick up the phone to [a client] right now"* and tell him that the claimant had not returned a phone call to a professional tenant.

34. Mr Dresler's view was that the claimant had failed to manage the Queensferry site properly, for example by failing to put up lettings boards on the site, creating particulars and placing details of the vacant lots on the internet. The claimant disagreed and said that he was overseeing letting agents who were working on behalf of the client. Both agreed that the claimant stated that he was too busy with other work to manage the lettings himself.

35. They also discussed the claimant's remuneration again. The claimant states that Mr Dresler told the claimant that he would *"take the agency off me"* (i.e. any agency work that the claimant performed and for which he claimed commission, alongside the property management work) with effect from the respondent's next financial year starting on 1 April 2023.

36. Mr Dresler did not provide any evidence as to the specific discussions at the October meeting in his witness statement. Mr Dresler stated during his oral evidence that:

"I said to the claimant – I don't want this to happen again, can you make sure you keep me informed of everything. Queensferry was grey area – if there was something the claimant was not sure of, he should have discussed it.

...

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As far as I was concerned, I was waiting for the claimant to come back to me with solution”

...

It was a very uncomfortable situation – it fell into my concerns re his general secrecy

It was solid proof to me that maybe the claimant’s commission structure leading him to do things that not in anyone’s best interests – including himself, as if we lose the instruction, he would lose commission too”

37. Mr Dresler also stated:

“I’m not a HR expert – but I know I cannot just change [someone’s] level of remuneration. I never said anything about reducing the level in emails or verbally – I wanted to change structure so as to take temptation out of his way to try and take on jobs that maybe he shouldn’t be doing or that fell outside of his remit because they were beneficial to him; they were linked to the way he was paid.”

38. Mr Dresler later stated in his interview regarding the claimant’s grievance in February 2023 regarding the agency work:

“It’s been stripped of him, I suggested that I thought that the best way you know come to me before April, but I think the best way is for us to pick this stuff up and do it properly as well. Yeah, as I can’t expect us to do it. No, OK, I’m not denying that. I’m not denying that he has the agency and I hope going forward that he will do bits again”

39. The Tribunal finds that the claimant came away from the meeting on 24 October 2022, feeling genuinely aggrieved because he believed that:

- 39.1 the ‘other ideas’ that Mr Dresler’s email of 13 October 2022 included changes to the claimant’s remuneration structure. In particular, Mr Dresler was going to remove the agency work that the claimant previously performed from him with effect from 1 April 2023;
- 39.2 Mr Dresler and the claimant disagreed about the way in which the claimant had managed the Queensferry lettings. However, the claimant was alarmed that Mr Dresler was suggesting that he could call the client in order to discredit the claimant. The claimant believed that Mr Dresler was placing him under scrutiny in order that Mr Dresler could ‘take over’ all agency work from the claimant; and
- 39.3 there would be a significant reduction (at least £10,000) in the claimant’s commission potential, as a result of the removal of agency work from the claimant. Mr Dresler did not seek to reassure the claimant by telling him that he intended this to be a ‘restructure’ of his remuneration.
- 39.4 Mr Dresler did not tell the claimant that the claimant’s overall level of his potential remuneration would remain the same at this meeting or in any

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correspondence around this time. Mr Dresler stated during cross-examination that the removal was ‘temporary’ and that:

“I was hoping he would come up with an answer – I was hoping we could resolve things before April.”

- 39.5 Mr Dresler also confirmed during cross-examination that he did not discuss retaining the claimant’s previous level of potential remuneration and stated that this was:

“Because he didn’t want to have a dialogue with me – he wanted to press eject button straight away

I now know there were other reasons for that.”

40. From 24 October 2022 onwards, the previously good working relationship between the claimant and Mr Dresler deteriorated even further.

Events in late 2022

41. Mr Dresler and the claimant’s relationship continued to deteriorate for the rest of 2022. The claimant and Mr Dresler agreed in their evidence that communication between them was poor and was increasingly limited to emails only. The claimant stated that he expected Mr Dresler to follow up their discussion on 24 October 2022, but that Mr Dresler did not raise anything further. Mr Dresler stated that he expected the claimant to come back to him with ideas regarding the best way to take things forwards and therefore did not raise matters with the claimant again during this time.

42. The claimant stated in his oral evidence in relation to their relationship:

“I think it was fairly poor following meeting in October – I just came in and did my job. Mr Dresler was not in office very often. We did not see each other a great deal, there were not a lot of communications between us. Yes, we would still attend meetings and the work would carry on, but there’s a backdrop of emails not included in the [hearing] file but the atmosphere at that point was pretty poor and I felt the attitude towards me was significantly changed.”

Appointment of HR Consultancy (Peninsula)

43. In late 2022, Mr Dresler decided to appoint a HR consultancy company (Peninsula), to resolve the conflict between him and the claimant, regarding the claimant’s remuneration. Mr Dresler later stated in February 2023, during an interview with regarding the claimant’s grievance:

“I should reiterate, my involvement with Peninsula is not to do anything other than get the way Richard is paid”

44. The Tribunal therefore concluded that Mr Dresler appointed Peninsula in order to implement changes to the claimant’s remuneration structure.

45. Mr Dresler stated in his oral evidence to the Tribunal that he would have been willing to restructure the claimant’s pay, such that the claimant did not ‘lose out’ in financial

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terms. However, he did not state this to the claimant at the time. The Tribunal accepts the claimant's oral evidence that:

"At no point I was informed that I would be no worse off...At no point did Mr Dresler say my remuneration would stay the same."

46. During cross-examination, Mr Dresler was asked why he did not talk to the claimant about the points that he had asked Peninsula to raise with the claimant. Mr Dresler stated:

"...in hindsight that would have been a good thing to do – to be honest, I just did what Peninsula told me to do at that point"

January 2023 meetings and correspondence

47. Mr Dresler (accompanied by his wife) drove to the claimant's house on 12 January 2023, to tell the claimant that he had appointed Peninsula as HR consultants to the respondent.

48. The claimant states that Mr Dresler told him that Peninsula had been appointed due to new legislation and that they would provide a presentation to the respondent's staff:

"I was told firstly that there was new legislation – this was not a discussion about new legislation. I was also told it was a presentation to the whole company – that wasn't the case."

49. In the meantime, Mr Dresler and the claimant were also corresponding regarding agency work and management work. The claimant emailed Mr Dresler regarding two potential tenants' interest in a client's units at the Portrack Lane site. Mr Dresler responded stating:

"Up to you If you want to do it but if it isn't done and paid for April, its not a management instruction. You should really have passed the enquiry on. We don't know what you are doing most of the time."

That remains the case for everything, So be aware of that. Copy us in on everything, why didn't you do so already?

Hopefully, this change will avoid any ambiguity going forward, if not then maybe commission isn't appropriate, and we need a different method of remuneration?"

50. Mr Dresler stated during cross-examination that this work was an agency work instruction (which fell within Mr Dresler's remit), rather than a management instruction (which fell within the claimant's remit). He stated:

"At this point, I wanted to nip secrecy and grey areas from happening again – trying to impose a deadline so it's not left to drift (which is the claimant's modus operandi)."

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51. Mr Dresler was asked during cross-examination why he referred to things changing from the new financial year in April. He stated that he did not make a formal proposal to change the claimant's remuneration structure because he wanted to discuss things with the claimant:

"I was waiting for his input on that – I wanted him to come back to me with a solution."

52. Mr Dresler and the claimant discussed matters by email on 14 January 2023. Mr Dresler emailed the claimant and the respondent's two administrative staff members, stating:

"As discussed we have outsourced our 'hr'. There are various protocols which will need to be followed and we have neither the time or in house knowledge to satisfy these requirements. Peninsula will be coming into the office to look at the business and how we 'set up'.

They will want to talk to us, so please expect a call from them directly at some point to arrange a meet in the office."

53. Mr Dresler stated during his evidence that:

"I didn't know what they were going to do, I just understood that they were going to put HR compliance in place for me. I knew they would put an employee handbook into place and speak to everyone."

54. The claimant emailed Mr Dresler later that day stating:

"I am a little perplexed at why you urgently needed to see me face to face, to tell me about the HR company getting involved.

You have not been over to my house in 10 years, so just to tell me they were instructed has left me a little confused and concerned as to their role.

Can you give me more details as to what it is exactly they will be doing and assurances as to the security of my position within the business."

55. Mr Dresler responded stating:

"As I explained on Thursday I'd wanted to tell you about this before Christmas but with my bout of flu our paths have not crossed. It was a working day so I came to tell you. It would have been preferable to just tell you in the office but I didn't want further delay.

We are currently not hr compliant. I'm working from home on Monday but in the office on Tuesday. I would imagine they will be in touch by then.

For a small business with effectively a sole owner and only a handful of employees my understanding is that this is quite usual practice.

They are going to do a presentation to us all I believe, Karen was discussing a date with them yesterday.

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Hopefully this will clarify everybody's responsibilities moving forwards and be helpful to all of us"

56. Mr Dresler stated in his oral evidence that he visited the claimant's house because of Peninsula's advice that discussions should take place in person. There appeared to be no reason why Mr Dresler could not have called or emailed the claimant to discuss this matter instead, which would have caused the claimant less alarm.

57. Mr Dresler invited the claimant to attend a meeting with Peninsula by letter dated 16 January 2022. The letter stated that the meeting was an *"informal meeting to discuss the current circumstances within the business"*. The letter also stated:

"please rest assured the meeting is informal and the "Face-2-Face" consultant, who is HR trained will be able to explain matters in full and be able to answer subsequent questions you may have."

58. The claimant and Mr Dresler exchanged emails on 17 January 2023 regarding the claimant's concerns about the meeting with Peninsula . The claimant stated:

"Just to confirm that I received your letter of 16th January 2022[3] inviting me to an in formal 'Face2Face' meeting with Peninsula HR.

On receipt of this letter, I felt it prudent to share my concerns.

In October 2022, you shared with me that the business had been valued with a view to you attempting to sell this on; at this point I made an offer to you for the business which you subsequently turned down. Since this point there has been a significant shift in the dynamic in the office and your approach towards me.

On Thursday last week (12.01.23) you uniquely came out to see me at home, accompanied by your wife, to share with me that you had appointed a HR company. The reason you then gave for this was that you needed this to make the business compliant in the light of new legislation.

After reflecting on the above conversation, I requested further clarification from you (under my e-mail of 14.01.23) as to the purpose of the meeting and to seek assurance as to my position within the company. Whilst you have acknowledged this email, you have not answered my question, other than to say therein, that we are not currently HR compliant and that there is to be a short presentation.

Of greater concern however is the fact that you have not sought to reassure me as to my position within the business.

In tandem with the instruction of an HR company (and the shifting reasons given as to their instruction), you have (under e-mail of 13.01.2023) now sought to raise significant issues with our long established working practise, asking me to now copy you into everything, asking why I have not previously done this, and raising issue with our agreed method of remuneration.

The unwillingness to offer me an assurance as to my position within the business, the instruction of the HR company, the contents of your email of 13.01.23, the

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demand to change our long established working practise, the threatening nature to change my contract of employment at your discretion; all lead me to raise issue with whether there is an agenda to bring about my dismissal?

I would be grateful for your comments on this.”

59. Mr Dresler responded briefly stating:

“Richard

I am not looking to dismiss anybody but I do need the involvement of an hr firm moving forward.

Regards”

60. Mr Dresler did not seek to reassure the claimant regarding his position or to confirm that he had no intention of changing the level of the claimant’s remuneration.

61. A HR consultant from Peninsula (Ms Nadine Foster) met with the claimant on his own on 20 January 2023. The claimant stated during his oral evidence:

“I then got invited to a meeting titled “How the business is set up” – once again, this is not what this was. I was quite taken aback by what occurred in the meeting

Most of it was statements being put to me – some of them two page long statements about how rude I am or how I don’t speak to staff or questions about my honesty and where I am half the time or I don’t appear to be doing my expenses correctly or fiddling mileage, or being tracked in case I get abducted ‘by gypsies on site’ – the consultant’s line, not mine.”

62. The claimant commented:

“It wasn’t like a normal interview – it was very sarcastic, rather aggressive and lots of insinuations made – there were lots of statements made to me, rather than questions. It was nearly 2 hours long.”

63. The Tribunal read the transcript of the interview included in the hearing file, which were typed from the recording that Peninsula made during the interview. The tone and contents of the interview were more akin to a disciplinary hearing, than a general discussion as to the respondent’s business’ set up. Ms Foster asked very detailed questions around matters, such as the claimant’s working hours, site visits, communication with other staff and other matters. However, the nature of the questioning and the manner in which they were asked was frequently inappropriate in tone or length.

64. For example, Ms Foster ‘grilled’ the claimant s regarding why the claimant was not in the office on 12th January, i.e. the day that Mr Dresler visited him at home. It is not clear why Ms Foster chose to question the claimant at length regarding that particular day, given that the purpose of the meeting was stated to be an ‘informal’ meeting to discuss how the respondent’s business worked. Ms Foster’s questions appeared to be designed to ascertain the claimant’s honesty and were at odds with the level of autonomy and flexibility in work location arrangements that the claimant had

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enjoyed. The quotes below contain Ms Foster's questions in bold and quotes with "RT" refer to the claimant:

"So, what time did you get visited?"

RT: *By David?*

Yes.

RT: *I think it was about 1 o'clock last Thursday.*

Okay. So, last Thursday at 1 o'clock was during your working hours, but you weren't in the office..

RT: *No, because my car was in the garage.*

Okay.

RT: *That was why I wasn't in.*

So, is there no other way of getting to work?

RT: *No, not where I live.*

In what respect?

RT: *Well it's quite difficult, I would have to-, I have to catch the bus to catch a train, so, and then to catch a bus and a train home.*

Okay.

RT: *So again, its simpler, or I thought so, it would be easier just to work from home because I can then get a lot more work done.*

So, what was the problem?

RT: *I got a puncture.*

So, you got a puncture?

RT: *Yeah.*

So, how long does it take a fix a puncture?

RT: *I've got run-flat tyres, so they have to order them in. That was on a Wednesday night, it was fixed by Friday, so I was in on Monday.*

So, why didn't you come in on Friday after they were fixed then?

RT: *Because I didn't get the car until , they didn't fix it until fixed some time on Friday, and I got a phone call at 3 o'clock to say my car's fixed.*

Okay. So, did you think that it were acceptable just not to come into the office for two days because of your car?

Okay.

RT: *I let people know and people knew in the office.*

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Okay.

RT: But, like I say, I'm working, I'm on the phone, I'm emailing, I'm working. I would never, I'm not taking the day off. If there's an implication that when I work from home that I'm taking the day off then that's not true.

Okay. So, on the Wednesday when the incident occurred with your car-

RT: Yeah, driving home from work.

Did you go directly to the garage?

RT: I rang the garage up actually on the way home, yeah.

So, but what I'm saying to you is did you go directly to the garage or did you go home?

RT: I went home, and the next morning on my run-flat tyre, I drove down to the garage first thing in the morning to give them the car, yeah.

So, did it need to be booked in?

RT: It's a local garage, so they're quite good. I pre rung them and they said, "Bring it down and we'll see what we can do."

So, if you, I don't know, your car's due an MOT, you would tend to pre-book that in advance, but are they pretty good at being ad hoc with things like that with your car?

RT: Like I will book that in, in advance, yeah. So, it would be carried out during that day.

But what I'm saying to you is your MOT you would book in, but because of the incident that you had on Wednesday are they pretty good at ad hocing and booking things in?

RT: They did that quite well, yeah.

So, is it just a local garage?

RT: Yeah.

So, it's not like, I don't know, National Tyres?

RT: No, it's a local garage.

And is that the place that you always go to?

RT: Yeah.

Okay. Who did you let know that you wouldn't be in the office, and when did you let them know?

RT: I would have let Karen and Sue know the next morning.

Okay. So, it happened on the Wednesday night and then how would you let them know?

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RT: I'd have sent them an email.

Why would you not ring them? Would you think that's not more courteous to ring them?

RT: I don't think that was not courteous.

Okay.

RT: That's how I would normally do it, yeah. That's how I would normally do it. I would send an email."

65. Ms Foster questioned the claimant in depth on the expenses that he claimed, evidence regarding site visits and communications with clients. She also suggested that a 'tracker' could be used on the claimant's mobile phone to confirm his whereabouts. Some of Ms Foster's language was highly inappropriate, for example:

"One of the things is tracking where people are...To me it's the easiest thing in the world to be tracked on your phone. Your phone goes everywhere with you and if something happens to me my employers know roughly where I am because your phone gives off a signal...if you was to go to a site and you turned up there and there were a load of gypsies in there and they kidnapped you if you've got your phone on you the chances are they're going to find you..."

66. Mr Dresler stated during cross-examination that he did not expect Peninsula to discuss matters such as the claimant's expenses with him, there having been no previous issues. Ms Foster also raised the possibility of the respondent employing a member of staff to assist the claimant with his work. Mr Dresler also stated that he did not ask Peninsula to raise the possibility of employing someone to work alongside the claimant, challenge him regarding his car difficulties or to suggest mobile phone tracking. Mr Dresler stated:

"I didn't know what to expect – I put myself in their hands completely

I wanted to be HR compliant and I wanted to ask qus as an employer is allowed to do under auspices of employment law

In that regard, I trusted Peninsula without any thought beyond that – it's not for me to decide whether meeting is formal or not, that's what I'm paying them for.

...

I was assured that Peninsula do it all the time and it was within my rights to do this.

...

I put myself in the hands of Peninsula, I didn't want the claimant to leave – I just wanted to get to the bottom of what was going on. If they overstepped their mark, it must within their reasonable bounds because they know what they are doing."

31 January 2023 – letter from Mr Dresler to the claimant

67. Mr Dresler wrote a formal letter to the claimant on 31 January 2023 setting out his 'expectations' of the claimant's work and duties going forwards. The letter stated,

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amongst other things, that any professional or agency work that the claimant wished to undertake for clients was subject to Mr Dresler's sole discretion.

"Further to the meeting on 20th January 2023. I feel it is appropriate to formally outline the issues that have been identified regarding my expectations going forward.

As you are aware the topics of the meeting was:

All non-attendance to the office to be recorded and reasoned.

a) Any absence from the office due to Domestic Absence, Sickness, Time off for Dependants, and Holidays to be recorded. (Please note Time off for Dependants and Domestic Absence will be deemed as unauthorised and unpaid).

b) Any person late to the office or leaving the office early without prior authorisation will be unpaid. (Please note this will be unauthorised and unpaid).

c) When on holiday on a handover to be given to other parties in the office to enable great service to be given in the person's absence.

d) The out of office function to be used on email with Karen and I as the point of contact in your absence to answer any queries.

Communication and contact to and from Clients

a) Any documents or letters to be sent in the Standard Dresler Smith Ltd Format, Page 3 of 35 specifically Heads of Terms, Terms and Conditions, Reports, Minutes, Particulars. (To be completed by Karen).

b) All correspondence from Peak Village sent or received to be open cc'd to both Karen and I.

c) All potential new clients and tenants' correspondence sent or received to be cc'd to both Karen and I.

d) Any significant correspondences sent or received to be cc'd to both Karen and I.

e) No contact to be made to clients via text, a non Dresler Smith Ltd email, or any other platform.

f) Notification is required, by CC of the instruction of all third-party consultants inclusive of Solicitors and Building surveyors.

g) All Managed Estates to be visited quarterly and one-off property sites to be visited annually.

h) Karen and I to be informed if any existing tenants indicate a desire or possibility of vacating or relocating from our client's property.

i) All vacant properties or potential vacant properties to have the correct Dresler Smith boards displayed for new rental or lease.

j) Any non-management work such as letting or professional work needs to be agreed with me before being carried out by the Property Management Department.

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General

- a) A working schedule of non-management related work, including rent reviews, lease renewal, development consultancy and investment instructions to be kept live and up to date. Karen to provide a table to populate.
- b) No Pets allowed in the office (Not covered by Insurance)
- c) Any mileage for site visits to be calculated to and from the office.
- d) All expenses should have a receipt where possible to be approved and processed by Karen.
- e) All documents and the spreadsheets of the Property Management Department to be accessible by Karen and I.
- f) Susan and Richard to share their Calendar, Diary with Karen.
- g) Amendments to contracts agreed in the meeting, (namely addresses)
- h) Employee handbooks with clear policy and procedures in line with current ACAS Guideline, Code of Practice following Employment Law (amendments to be issued for any changes).
- i) All work to grow the Business, ensuring a Continued Personal Development is completed in line with roles, responsibilities, and accountabilities.

This letter is to be treated as confirmation that I have discussed my concerns with you and that you are expected to make every effort to address any shortcomings that have been identified. I expect you to follow these requirements at all times.

This letter is not intended to be a formal warning and does not form part of the company's disciplinary procedure; however, it will be kept in your personnel file and thus takes the form of what we consider to be a reasonable written management instruction.

Should there be any deviations from these requests, or indeed any misconduct in general you may be subject to formal disciplinary action. Please find enclosed a copy of the company's disciplinary rules and procedures in this regard."

68. Mr Dresler stated that he drafted the letter of 31 January 2023 for him, but that Peninsula had some input into it. The Tribunal notes that the letter of 31 January includes some of the bullet points set out in Mr Dresler's previous emails to the claimant.

69. The claimant stated in his oral evidence:

"I don't believe that the conclusions that NFO reached – which are mirrored in DD's letter – reflect the meeting at all, no.

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They were discussed and these apparently are agreed with me, but they're not – it doesn't reflect what came out of meeting.

Also there's conclusions drawn in the meeting that were not discussed in the interview.

Also the handbook dated December 2022 has a list of expectations to be followed by me – it's dated December 2022 and it has the same conclusions drawn from NFO's interview that was after the date that document [was dated].

It seems that the conclusions already decided on."

...

I didn't understand where any of this was coming from – I concluded that Mr Dresler wanted me out of the company, I didn't understand why that would be – perhaps he was trying to change my contract of employment."

70. The Tribunal concluded that the tone and wording of the letter was at odds with the claimant and Mr Dresler's previous good relationship. The Tribunal concluded that any employee receiving that letter would have cause for concern regarding their relationship with their employer, regardless of whether or not there were financial implications for the employee's remuneration.

Claimant's grievance

71. The claimant raised a formal grievance on 30 January 2023. His grievance centred on the meetings and correspondence between himself and Mr Dresler from October 2022 onwards and the conduct of his interview by Ms Foster. The claimant concluded by stating that:

"I am not sure as yet as to how this grievance may be formally considered and by whom, albeit it clearly can not be you that hears this grievance, nor can it be the HR agents you have already instructed, since my grievance includes the interview on Friday, which was undertaken by them.

Your continued actions towards me, further cement my belief that this is a preordained process to dismiss or otherwise force me from my post.

My position at the company is becoming increasingly untenable due to your (and your agents) actions towards me."

72. The respondent then appointed another HR consultant from Peninsula to hear the claimant's grievance (Ms Amanda Stevens). The claimant objected, stating that part of his grievance related to the way in which Peninsula had conducted the January meeting with him. Mr Dresler stated:

"I did ask Peninsula if they were okay to act as an independent third party. They said this had been challenged before, but it was proven in the High Court many times that they were independent.

I'm busy at work and at home – I put myself in their hands.

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...

All I can tell you is that I took advice from them and trusted it – I am clueless in relation to HR”.

73. On 1 February 2023, the claimant was on his way to work when he received a phone call from Ms Atkins saying that a Peninsula representative was coming to the claimant. The claimant arrived and Ms Stevens was already at the respondent's office. Ms Atkins later recalled Mr Dresler giving her a 'dressing down' because she had told the claimant that Peninsula were at the office. The Tribunal accepts the respondent's evidence that they had failed to send an invitation letter to the claimant by mistake and notes that the grievance meeting was rearranged. The claimant then sent an amended grievance, which included the issue regarding arrangements for the meeting.
74. Ms Stevens investigated the claimant's grievance. During the grievance process, Mr Dresler provided some documents to Peninsula which they did not share with the claimant. Peninsula drafted an outcome letter, which Mr Dresler signed on 21 February 2023. Mr Dresler's letter stated that:
- 74.1 he agreed with Ms Stevens' recommendations;
 - 74.2 the claimant's grievance had been upheld in part; and
 - 74.3 he would arrange for a mediation for him and the claimant using a third party: *“to work towards rebuilding our working relationship this will include reviewing job descriptions and objectives; and*
 - 74.4 that he would complete Ms Stevens' suggested training on “Effective Communication and Managing Behaviour & Harassment Awareness”.
75. The respondent did not take any steps to arrange such a mediation. Mr Dresler confirmed during his oral evidence that any mediator appointed by the respondent would probably have been a Peninsula consultant.
76. The respondent enclosed documents with the grievance outcome, including the transcript of an interview between Ms Stevens and Mr Dresler that took place on 7 February 2023. The letter included comments by Mr Dresler to the claimant that the claimant regarded as:
- 76.1 derogatory comments about the claimant, both personally and professionally, including that the claimant was 'messing around' by raising a grievance;
 - 76.2 accusations of disloyalty to the company for personal gain, in relation to the claimant's work for particular clients;
 - 76.3 accusations that the claimant had lied about working from home and the reasons for him working from home.
77. The claimant then appealed against the grievance outcome on 29 February 2023. The grounds of the claimant's appeal included that:

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77.1 the respondent had refused the claimant's request for an impartial individual to decide his grievance, given that his complaint included the manner in which Ms Foster conducted her meeting with him;

77.2 that the respondent intended to remove both the agency work and the professional work from the claimant, which the claimant quantified as around £35,000 in commission during the respondent's previous financial year;

77.3 that the respondent had in effect removed all autonomy and responsibility from the claimant, when Mr Dresler set out his requirements going forwards for the claimant's work and duties in his letter of 31 January 2023;

77.4 the statements made by Mr Dresler during his interview with Ms Stevens:

"I said to him in that meeting, I think Richard, we need to think about maybe a different way of remuneration..."

'So, during the meeting I made various suggestions, one of which was I'll do the agency with you on peak village...'

'It's been stripped of him, I suggested that I thought that the best way you know come to me before April, but I think the best way is for us to pick this stuff up and do it properly as well...'

'So yeah, so, I should reiterate, my involvement with Peninsula is not to do anything other than get the way Richard is paid, right. I did say I would take everything Agency off in April...'

'well, what I want to do is I want to change the way he's paid.'

[in respect of the professional work fees] 'Yeah, you know, I'd like to say by accident, but I suspect partly through stealth as well because of the commission arrangement and I want to do away with that you know, not take money out of his pocket...'

77.5 other matters relating to the claimant and Mr Dresler's meetings in Autumn 2022 and the communications between the claimant and Mr Dresler since that time;

77.6 matters relating to the arrangements for Peninsula's meeting on 20 January 2023 with the claimant and discussions during that meeting, in addition to Mr Dresler's letter of 31 January 2023.

78. Another Peninsula HR consultant was appointed to hear the appeal. The claimant again objected and suggested that an independent third party should instead be appointed, subject to agreement between the claimant and the respondent. The respondent refused this suggestion. The claimant noted that Mr Dresler made various statements to Ms Stevens during the grievance interview including:

'With hindsight, I wish Peninsula had said to me, look, I want to re-establish some boundaries, you know, get everybody understanding what's going on, but they didn't tell me to say that and they told me not to respond to any e-mails unless I get their

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advice on them, so that's what I've done so they didn't respond to the first one, it's probably because I sent it on to Peninsula and hadn't had a response.'

"Peninsula met with me and told me what to do with Richard..."

"I didn't know a lot of things that I needed to do. I'll put myself in the hands of Peninsula, might make no bones about it you know that's what I've instructed them for.'

79. On 2 March 2023, the claimant received an email invitation from Mr Dresler to a grievance appeal hearing, which stated that:

"An impartial Consultant from Peninsula's Face2Face service will hear your appeal on Tuesday 7th March 2023 at 9.30am.

I understand you state in your letter that you do not feel the matter can be addressed by a Consultant from Peninsula Face2Face however the Face2Face Department, who will be conducting the interview operates on the principles of no prior involvement, no predetermination, and with complete impartiality. The Face2Face Consultant has the authority to disagree with any previous advice provided, and the authority to reverse any previous decisions. I understand from Peninsula that no Tribunal has ever suggested that the Peninsula Face2Face Service cannot or does not offer an impartial service, regardless of their contractual relationship in other areas of a business."

80. The claimant was unwell shortly after that date and was in hospital for a few days. On 6 March 2023, the claimant requested the postponement of the grievance appeal meeting on the grounds that he was still in hospital. Mr Dresler wrote to the claimant, using a letter which he stated that Peninsula drafted on his behalf. The letter stated that the grievance appeal hearing would proceed in the claimant's absence, although he could send written representations. The claimant objected and Mr Dresler agreed to rearrange the appeal hearing. Mr Dresler stated that he had previously asked Peninsula whether the hearing should go ahead, given the claimant's illness, and Peninsula had stated that it was 'perfectly acceptable' to proceed in his absence.

81. The claimant also stated that any appeal heard by Peninsula would be flawed: *"due to Peninsula's conflict of interest"*.

82. The appeal hearing was originally rearranged to 10 March 2023. Mr Dresler's letter to the claimant reiterated that Peninsula were impartial for the purposes of hearing the appeal. The claimant objected again to Peninsula's involvement, but remained on sick leave. His appeal hearing was rescheduled for 31 March 2023.

83. The appeal hearing later took place after the claimant's resignation in his absence on 18 April 2023.

Termination of employment

84. The claimant resigned from his employment on 31 March 2023 with immediate effect. The Tribunal asked the claimant why he resigned and he stated:

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“I decided to resign because I could see no way forward – I felt DD was being so unreasonable and at every single step of the way, became more unreasonable

Peninsula seemed to be set up to have a conclusion that satisfied DD in changing my T&C – it felt it was so substantial – on top of way he had been talking to me and emailing me – huge change in our relationship, could only see it going one way

I got nothing back when suggested getting someone else in – it got blocked at every single step of way.

It seemed from end of August/September that something occurred. I appeared to be getting railroaded. Even after the grievance I knew if I stayed, I wasn't sure what would happen. But I knew I couldn't stay because David and I were not getting on, there was no way of coming back from this.

The reason for the 31st March was that I actually received a chunk of commission – I thought it would be withheld and I wanted to receive it

I couldn't go on any longer – consistently more and more things were happening.

I received another email right at the death – it was untenable – our relationship was dead and buried.”

85. The claimant's detailed resignation letter referred to many of the matters set out in his grievance and appeal. He highlighted Mr Dresler's email of 30 March 2023 stating:

“Also, on 30 March 2023 (yesterday) you emailed me to say that future agency work/jobs would need to be confirmed with you. This re-iterates my fears as set out in points 9 and 12 (above), so it was clear to me that you were making detrimental changes to my remuneration, had no regard to my contractual entitlements and were not going to change your approach towards me.”

86. The claimant's letter concluded:

“In conclusion, I have tried my very best to address matters with you, through the (albeit ad hoc) grievance process. I have patiently tried to work these things through with you. I have found the last couple of months particularly unbearable, given the changes you have implemented in the ways of working and creating what has become a hostile working environment.

However, due to your previous conduct and your continuing refusal to engage an independent assessor to the grievance and your persisting intention to retain Peninsula, I am not even going to have a fair grievance. What little hope I had of resolving this has gone.”

87. Mr Dresler responded by letter on the same day and offered the claimant the opportunity to retract his resignation. The claimant did not do so.

SUMMARY OF RELEVANT LAW

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Constructive (Unfair) Dismissal)

88. In order to bring a claim for unfair dismissal under s111 of the ERA, the claimant must first show that her resignation amounted to a 'dismissal', as defined under s95(1) ERA.

s95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—...

...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

89. The claimant must show the following key points to demonstrate that her resignation amounted to a dismissal under s95(1) of the ERA:

89.1 that a fundamental term of the contract was breached;

89.2 that they resigned in response to that breach; and

89.3 that they did not waive or affirm that breach.

90. Employees sometimes rely on a particular act or omissions as being the 'last straw' in a series of events. In the case of *Omilaju v Waltham Forest Borough Council* [2005] IRLR 35 it was held the last straw may not always be unreasonable or blameworthy when viewed in isolation. But, the last straw must contribute or add something to the breach of contract.

Mutual trust and confidence

91. The implied term of mutual trust and confidence was held in the cases of *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 642 (as interpreted by the EAT in *Baldwin v Brighton and Hove City Council* [2007] IRLR 232) as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

92. It is not necessary for the employer to intend to breach the term of trust and confidence (*Leeds Dental Team Ltd v Rose* [2014] IRLR 8): *"The test does not require an ET to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence then he is taken to have the objective intention..."*

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93. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833, Underhill LJ considered previous caselaw and held that the Tribunal must consider the following questions:

“(1) 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?”

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) 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 Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation...)

(5) Did the employee resign in response (or partly in response) to that breach?”

(6) intention...”.

94. In this particular claim, the respondent accepted that:

94.1 the relationship of trust and confidence between the claimant and the respondent had broken down, albeit that they submitted that the respondent was not responsible for that breakdown;

94.2 if the Tribunal found that the claimant was dismissed, then:

94.2.1 the claimant’s resignation was in response to any breach by the respondent; and

94.2.2 the claimant did not waive or affirm any breach by the respondent.

Wrongful Dismissal (Notice Pay)

95. A claim for wrongful dismissal is a breach of contract claim for notice pay. The Tribunal’s contractual jurisdiction is governed by section 3 of the Employment Tribunals Act (ETA) 1996 together with the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 SI 1994/1623.

96. In this particular claim, the respondent accepted that if the Tribunal found that the claimant was dismissed, then his dismissal was wrongful and he would be entitled to his three months’ notice pay. The respondent did not seek to rely on any potential gross misconduct by the claimant.

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APPLICATION OF THE LAW TO THE FACTS

97. The Tribunal applied the law to our findings of fact and reached the conclusions set out below. This claim is somewhat unusual in that the respondent accepted at the outset of the final hearing that:

97.1 as pleaded in the respondent's Grounds of Resistance, the relationship of trust and confidence between the claimant and the respondent had broken down, albeit that they submitted that the respondent was not responsible for that breakdown; and

97.2 if the Tribunal found that the claimant was dismissed, then:

97.2.1 the claimant's resignation was in response to any breach by the respondent; and

97.2.2 the claimant did not waive or affirm any breach by the respondent;

97.2.3 the claimant was wrongfully dismissed.

98. The sole question for the Tribunal was therefore whether the respondent had committed a fundamental breach of contract.

99. The Tribunal concluded that the respondent had committed several breaches of contract during the period from 29 September 2022 to 31 March 2023. These breaches (taken together or separately) amounted to fundamental breaches of contract entitling the claimant to resign and treat himself as dismissed. The key conduct amounting to such breaches include those set out below:

99.1 Mr Dresler informed the claimant that he intended to 'remove' agency work from the claimant with effect from 1 April 2023 at their meeting on 24 October 2022. He reiterated that the agency work would no longer form part of the claimant's commission in later correspondence, as set out in the Findings of Fact section of this judgment. The claimant was understandably very concerned by this, because it would have a significant impact on his potential to earn commission. Mr Dresler did not tell the claimant that this was supposed to be 'restructure' of the claimant's remuneration and that he had no intention of reducing the overall level of the claimant's remuneration. This meant that the claimant understood that the commission element of his remuneration would be significantly reduced from 1 April 2023 onwards;

99.2 Mr Dresler and the claimant's relationship deteriorated significantly in Autumn 2022. Mr Dresler did not hold any direct discussions with the claimant, stating that he was waiting for the claimant to approach him with a solution for the issues that Mr Dresler had discussed with the claimant. Mr Dresler stated that this was because he normally sought to avoid conflict;

99.3 Mr Dresler as the owner and line manager for the claimant should have taken the initiative to resolve matters. Instead, he appointed Peninsula as HR consultants and instructed them to handle matters with the claimant on his

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behalf. In doing so, Mr Dresler appeared to abdicate his line management responsibilities towards the claimant to Peninsula.

- 99.4 Mr Dresler's actions and correspondence with the claimant regarding the appointment of Peninsula in January 2023 caused the claimant considerable disquiet. The claimant sought reassurance from Mr Dresler regarding his position with the respondent in several emails during mid-January 2023, but Mr Dresler refused to provide such reassurance, stating only that he had no intention to dismiss anyone.
- 99.5 The 'informal' meeting between the claimant and Ms Foster (Peninsula's HR consultant) on 20 January 2023 escalated the difficulties between the claimant and the respondent. Ms Foster approached the meeting in a manner akin to a disciplinary meeting and subjected the claimant to lengthy and inappropriate questions, examples of which were set out in the Findings of Fact. Ms Foster asked questions on matters, such as tracking the claimant's whereabouts using his mobile phone and querying his expenses, which Mr Dresler had not envisaged that she would raise. However, Peninsula were engaged by the respondent to act as its agent in HR matters and the respondent is therefore liable for Peninsula's actions.
- 99.6 Mr Dresler then compounded matters by sending a letter which he stated was drafted by Peninsula, but he signed, setting out the respondent's detailed expectations of the claimant's conduct going forwards. The letter stated that any failure to meet these expectations could result in disciplinary action. The contents and tone of this letter marked a significant departure from the flexibility under which the claimant and Mr Dresler had operated during the ten years of the claimant's employment prior to this time. They also contained several matters which had not been discussed with the claimant, despite the letter stating that this had been done.
- 99.7 The claimant's grievance and appeal contained concerns regarding Ms Foster's conduct of the meeting with the claimant on 20 January 2023. The claimant was rightly concerned that the respondent's appointment of two further Peninsula HR consultants to hear these matters meant that they may not be able to act impartially when carrying out that function. Mr Dresler's correspondence with the claimant on this issue did not address his concerns fully. The particular concerns in this situation related to Ms Foster's conduct towards the claimant, as well as more general concerns about the fact that the respondent was paying Peninsula to provide HR advice.
- 99.8 Mr Dresler stated that he would make arrangements to hold a mediation between himself and the claimant as part of the grievance outcome. However, the respondent took no steps to arrange such mediation by the date of the claimant's resignation. In any event, Mr Dresler stated that the mediation would also have been facilitated by a HR consultant from

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Peninsula, despite being aware of the claimant's concerns regarding Peninsula.

99.9 Mr Dresler initially required the claimant to attend a grievance appeal hearing whilst the claimant was in hospital. Mr Dresler stated in evidence that he was acting on Peninsula's advice. The Tribunal notes that Mr Dresler later agreed to postpone the hearing after the claimant objected. However, it is inconceivable that any employer should insist on a grievance appeal hearing proceeding in the circumstances that the claimant was in.

99.10 Mr Dresler's email to the claimant of 30 March 2023, stating that any future agency and professional work instructions should be at his sole discretion was the final straw that led to the claimant's resignation, as evidenced by the claimant's resignation letter and oral evidence to the Tribunal. However, the claimant was 'working under protest' from mid-January 2023 onwards, as demonstrated by the concerns raised in his emails from 13 January 2023 onwards and in his grievance and grievance appeal.

100. In reaching this decision, the Tribunal has taken into account the small size of the respondent's organisation and its lack of HR function. However, the breakdown in the relationship between the parties was in large part caused by the failure by Mr Dresler to discuss matters with the claimant and instead to rely on HR Consultants from Peninsula to handle matters for him.

CONCLUSION

101. The claimant's claim of constructive (unfair) dismissal and wrongful dismissal succeeds and is upheld.

WRITTEN REASONS – REMEDY JUDGMENT

Proceedings

102. The Tribunal heard evidence from the claimant and considered a joint file of Remedy Hearing documents. The respondent did not provide any witness evidence at the Remedy Hearing.

Wrongful dismissal

103. The parties agreed that the claimant's notice pay was £15,536.88 (net).

Basic award

104. The parties agreed that the claimant's basic award was £8,279.50.

Compensatory award

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105. The parties agreed that the sum for the claimant's loss of statutory rights was £500.

106. The first question for the Tribunal to decide was the amount of the claimant's wages. Mr Dresler gave evidence during the Liability Hearing when he stated that the claimant's commission formed part of his wages, along with the claimant's salary. However, the Tribunal had to decide the amount of the claimant's wages for the purposes of calculating:

106.1 the claimant's loss of earnings for the purposes of the compensatory award; and

106.2 the statutory cap on the compensatory award.

Statutory cap

107. The Tribunal considered the claimant's compensatory award, which was subject to a cap of the lower of:

107.1 £93,378 (for termination of employment between 6 April 2022 and 5 April 2023); and

107.2 52 weeks' wages and employer pension contributions (which were paid at the rate of 3% in respect of the claimant's employment).

108. The Tribunal noted that s226(2) of the Employment Rights Act 1996 (the "ERA") defines a week's pay for the purposes of s117 of the ERA (which governs unfair dismissal compensation) as follows:

"226 Rights on termination.

..

(2)Where the calculation is for the purposes of section 93, 117 or 125, the calculation date is—

(a)if the dismissal was with notice, the date on which the employer's notice was given, and

(b)otherwise, the effective date of termination."

109. The date for calculation of the statutory cap was therefore 31 March 2023. The claimant's remuneration for the respondent's financial year 2022/23 was in excess of £93,378. The statutory cap for the purposes of this claim is therefore £93,378.

Claimant's past and future loss of earnings

110. The Tribunal considered the claimant's loss of earnings (both past and future) and heard witness evidence from the claimant. The Tribunal notes that the claimant was aged 50 at the time that his employment ended and had worked for the respondent for around 10 years.

111. The claimant earned a salary of £55,000 per year plus commission from 2016 onwards. His commission fluctuated from year to year, but were around

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£101,444.58 for the respondent's financial year 2022/23 (please refer to the Liability Judgment).

112. The Tribunal noted that The Tribunal considered the evidence provided by both parties and concluded that it would be appropriate to base any loss of earnings on his financial year 2022/23 earnings of £101,444.58 for the following key reasons:

112.1 the Tribunal accepted the claimant's evidence that his commission was adversely affected during certain financial years (most notably 2020/2021 and 2021/22) due to the Covid lockdown periods, but that his earnings going forwards would not be similarly affected in the absence of further lockdowns;

112.2 the Tribunal also accepted the claimant's submission that any previous years' earnings would have been higher after inflation is accounted for, for the purposes of calculating his average earnings;

112.3 the respondent's representative questioned the claimant regarding the amount of commission that he earned in respect of one particular client (Peak Village) during the financial year 2022/23. The respondent's representative suggested that the claimant's earnings for the financial year 2023/24 would have been lower than for 2022/23 because Peak Village terminated their contract with the respondent shortly after the claimant resigned in June 2023. The respondent referred to an email in the hearing file from the Devonshire Group stating that the contract would have ended regardless of the claimant's resignation. However, the Tribunal concluded that the strongly worded email sent by Mr Dresler on 17 April 2023 was, on the balance of probabilities, a significant factor that contributed towards the respondent's loss of the Peak Village contract. Mr Dresler stated:

"I'm not sure what Richard has told you about me and the circumstances but I feel he has been successful in preventing me from having much awareness about what latterly occurs at Peak, Even though I'm the retail specialist, we subscribe to all the specialist websites and I have established national and regional contacts with retailers and their agents and am sure could have given different ideas in unison to the benefit of Peak Village. He refused to let me know what was available to let, I now know why..."

"I'm anticipating that you will have instructed Richard and will in due course break our contract whilst Richard works incognito for 6 months prior to formal instruction."

Devonshire Group subsequently appointed a local letting agent in January 2024;

112.4 the respondent's calculation of the claimant's earnings contained significant inconsistencies. For example, the respondent contended that the claimant's average earnings for the purposes of his compensatory award would have been lower than those earned by Ms Cullen (who took over the majority of the claimant's role) during the respondent's financial year 2023/24 (i.e. after

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the loss of the Peak Village contract) if he had remained in employment. This was in part because the basis on which the respondent calculated the claimant's earnings included the financial year 2019/2020 when the respondent did not hold the Peak Village contract.

113. The Tribunal concluded that the claimant had taken reasonable steps to mitigate his loss up to the date of the Tribunal hearing. these steps included:

113.1 setting up his own limited company, which unfortunately did not produce sufficient client work to cover its own costs on an ongoing basis;

113.2 applying for appropriate roles, including a role with North Yorkshire Council (which did not lead to an interview) and his current role with Wakefield District Housing ("WDH") in around July 2023. The claimant's current role with WDH involves managing that organisation's commercial property portfolio of around 120 shops and he is no involved with the social housing function of WDH; and

113.3 increasing his working hours in his role with WDH, when he moved to a permanent employment contract with that organisation.

114. The Tribunal accepted the claimant's evidence in relation to his role with Wakefield District Housing that:

"I took it because it was the first decent role that I came up with – I haven't seen any other job (except one) with any salary that was greater than this. If I saw it, I would apply for it

I never expected to be working for a social housing provider. That is only because of the job market – that was the first decent job. I was reluctant at that salary level – I would much prefer to be paid more. The fact that I managed to get this in 3 months, I was very pleased. I remain substantially underpaid for those skills."

115. The Tribunal also accepted the claimant's evidence that he was continuing to work for alternative work, but that the job market for his skills remained 'sluggish at present.

116. The Tribunal notes that the respondent did not produce any evidence, whether witness evidence or documentary evidence, of other jobs that the claimant could have applied for since his resignation on 31 March 2023.

117. The Tribunal therefore concluded that the claimant should be compensated for:

117.1 £24,381.23 which relates to 38.7 weeks' loss of earnings from the termination of his employment on 31 March 2023 to the Remedies Hearing on 28 March 2024, less his notice pay and pay received from WDH; and

117.2 £64,587.30 which relates to 15 months' future loss of earnings from 28 March 2024, less his current salary with WDH.

ACAS Code

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118. The Tribunal also considered whether an increase or a reduction in the compensatory award would be appropriate for any breach of the ACAS Code on Disciplinary and Grievance Procedures under s207A of the Trade Union and Labour Relations (Consolidation) Act 1992:

207A Effect of failure to comply with Code: adjustment of awards

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

119. The Tribunal notes that it is not sufficient for there to be a breach of the ACSA Code; any failure to comply with the ACAS Code must also be found to be unreasonable. In *Lawless v Print Plus* [UKEAT/0333/09/JOJ], Underhill J (President) at paragraph 20 acknowledged that the relevant circumstances to be taken into account by tribunals when considering uplifts would vary from case to case but should always include the following:

119.1 whether the procedures were applied to some extent or were ignored altogether;

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- 119.2 whether the failure to comply with the procedures was deliberate or inadvertent, and
- 119.3 whether there were circumstances that mitigated the blameworthiness of the failure to comply.
- 119.4 the size and resources of the employer were capable of amounting to a relevant factor in the tribunal's consideration of whether an uplift was appropriate and, if so, by how much
120. The Tribunal concluded that an uplift of 10% would be appropriate for the following key reasons:
- 120.1 the respondent did carry out the procedural steps involved a grievance, in that investigated the claimant's grievance, held a grievance meeting with the claimant and offered the right of appeal against the grievance outcome. They initially failed to send an invitation to the claimant to attend the grievance meeting and also insisted on proceeding with the grievance appeal in the claimant's absence whilst he was in hospital. However, both meetings were rearranged;
- 120.2 the respondent stated that the claimant failed to attend the grievance appeal hearing before resigning. However, the claimant had already raised multiple concerns regarding the grievance process by that point, as set out in the Liability Judgment;
- 120.3 the respondent is a small organisation with no separate HR capacity. The respondent had instructed Peninsula to advise on HR matters from January 2023 onwards and had access to their advice and HR consultants. Mr Dresler relied on the HR advice provided by Peninsula because he stated that he was 'not an expert' on HR matters;
- 120.4 it was appropriate for Mr Dresler to appoint a third party to hear the claimant's grievance and appeal, due to the small size of the respondent's organisation. However, it was unreasonable for Peninsula's HR consultants to investigate the claimant's grievance and appeal because both the grievance and appeal related in part to the conduct of Peninsula's own HR consultants. The claimant objected several times to Peninsula's involvement in the grievance process and suggested that the respondent appoint a third party to hear his grievance and appeal. This request was refused. Mr Dresler 'rubber stamped' Peninsula's findings on the claimant's grievance. However, on his own evidence at the Liability Hearing, he failed to apply his own mind to the situation followed Peninsula's advice at all time without question;
- 120.5 the Tribunal has carried out a 'final sense-check' of the amounts involved, as required by *Abbey National Plc v Chagger* [2009] EWCA Civ 1202 CA. the uplift is not unduly large in the circumstances. The Tribunal also notes that, unlike *Chagger* (which involved discrimination complaints), the claimant's compensatory award is in any event subject to the statutory cap.

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121. The Tribunal also notes that the claimant's compensatory award over £30,000 should be grossed up at the rate of 40% (i.e. higher rate tax), to take into account tax payable on that part of the award.
122. The claimant's compensatory award would exceed the statutory cap (after being grossed up for tax) and is therefore capped at £93,878.

CONCLUSION

123. The claimant was therefore awarded:
- 123.1 £15,536.88 (net) in respect of his claim for wrongful dismissal; and
 - 123.2 £102,157.50 in respect of his claim for unfair dismissal, consisting of:
 - 123.2.1 Basic award - £8,279.50; and
 - 123.2.2 Compensatory award - £93,878 (gross).

Employment Judge Deeley
21 May 2024

All judgments (apart from those under rule 52) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

Oral reasons for this judgment were provided to the parties at the conclusion of the hearing. The parties may request written reasons for judgment within 14 days of the date on which this judgment is sent to them.