EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4104185/2023 and 4103934/2023

Held at Edinburgh Employment Tribunal

on 21, 22, 25 and 26 March 2024

Employment Judge Campbell

Mrs A L Blanche	**1st Claimant** **Represented by,** **Ms A Graham,** **Solicitor**
Mr S Boyd	**2nd Claimant** **Represented by,** **Mr D Ogilvy,** **Solicitor**
Boyd Brothers (Fauldhouse) Ltd	**1st Respondent** **Represented by,** **Mr D Hay,** **Counsel**
BES Group Electrical Ltd	**2nd Respondent** **Represented by,** **Mr D Hay,** **Counsel**

E.T. Z4 (WR)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimants were not unfairly dismissed in terms of the Employment Rights Act 1996;
2. The claimants were not wrongfully dismissed and their employment contracts were not materially breached by virtue of their dismissal without notice;
3. Those claims are dismissed;
4. Each claimant's complaint in relation to accrued holidays, not being decided by this hearing, is not dismissed at this time and will be the subject of further procedure.

REASONS

Introduction

1. This hearing dealt with the joined claims of two individuals whose circumstances were closely related. They are sister and brother, and were both dismissed from their employment with the first respondent. Both claimed that they were unfairly dismissed, and also had an unfulfilled entitlement to pay in respect of notice and holidays. The first respondent admitted that it dismissed the claimants but argued that it did so fairly and reasonably based on sufficient evidence of misconduct. It resisted each of the claims.

2. The first claimant was represented by Ms Graham and the second claimant was represented by Mr Ogilvy. Both are solicitors. The respondents were represented by Mr Hay, of counsel.

3. The hearing took place over four days. The tribunal heard evidence from witnesses in the following order:
    a. Mr John Lennox – Group COO;
    b. Mr Paul Hirst, MD of Inspection Services;
    c. Mr Andrew Kinsey, Chief Risk Officer;
    d. Mr David Gill, Operations Director;
    e. Mr Julian Oldroyd, accountant;

f. The first claimant;
g. The second claimant;
h. Ms Julie McVicar, accountant.

With the exception of Ms McVicar and the claimants themselves, each witness was called by the respondents.

4. It had been agreed that each witness would give evidence in chief by way of a written statement.

5. The parties had helpfully agreed and provided a joint bundle of documents. Numbers in square brackets below correspond to page numbers in the bundle. The first respondent provided a set of further and better particulars in response to questions issued by the claimants [152-158].

6. The parties' representatives provided oral submissions after the evidence was heard. Mr Hay provided a written skeleton. These are not repeated in this judgment but were noted, and reviewed in the course of preparing this judgment. Certain particular submissions are referred to at various points within the 'Discussion and decision' section below.

7. The hearing was concerned with liability only.

8. Many disputes in the evidence were related to matters of experience, judgment or opinion rather than directly conflicting accounts of fact. Where there was a dispute of fact on a key matter that is dealt with in more detail below.

Legal Issues

The parties had not provided an agreed a list of issues but they can be set out simply as follows (in relation to each claimant and for the purpose of this hearing on liability):

Unfair dismissal

1. Was the claimant's dismissal by reason of conduct?

2. If so, did the respondent have a genuine belief in that conduct?

3. If so, did the respondent have reasonable grounds for that belief?

4. If so, had it carried out reasonable investigation in coming to that belief?

5. If so, was the decision to dismiss within the band of reasonable responses open to an employer in all of the circumstances of the case?

Breach of contract

1. By giving no notice of termination of employment, did the respondent materially breach the claimant's contract of employment?

2. Alternatively, was the claimant in material breach of contract, entitling the respondent to terminate the contract immediately?

3. If so, did the respondent terminate the contract immediately by reason of the claimant's material breach?

Relevant Law

1. By virtue of Part X of the Employment Rights Act 1996 ('ERA'), an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity

and the substantial merits of the case. The onus of proof is neutral at that stage.

2. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and decision'.

3. An employee will be entitled to notice of termination of their employment based on the terms of their contract or the provisions of section 86 ERA, whichever is the more generous. Unless the employer brings the contract to an immediate end by reason of the employee's material breach, it must make a payment equivalent to the wages it would have paid had the notice period been served. It may have to do so as provided by the contract itself, or otherwise it will be obliged to pay the sum as damages for breach.

4. It is settled law that where an employee commits an act of gross misconduct the employer may be able to treat this as a fundamental breach of contract, and by immediately ending the contract in acceptance of that breach, it is released from the obligation to pay for notice.

Findings of fact

The tribunal made the following findings of fact based on the evidence and as relevant to the legal issues on the claims.

Sale of the company and earn-out

1. The first respondent is the company Boyd Brothers (Fauldhouse) Limited. In these findings of fact it is described as 'the company', to distinguish it from the second respondent, BES Group Electrical Limited, which is a company within the same group structure. The company is a civil electrical contractor business. It is nowadays based in Livingston, West Lothian and specialises in the installation of systems and infrastructure for electrical vehicles.

2. The company was established by the Boyd family, and at one point came to be run by John and Lorraine Boyd, a married couple. In May 2020 their son Stephen Boyd, the second claimant became its Commercial Director, having been employed by the company since 25 July 2000 as an electrician and working up through the structure. The first claimant, Amy Blanche, is the couple's daughter and the sister of the second claimant. She joined the company on 30 July 2018, having been employed there previously before leaving to pursue other career options. She rejoined on that date as an Administrative Assistant and was promoted to Office Manager in May 2021.

3. In March 2022 all of the company's shares were held by John Boyd, Lorraine Boyd and the second claimant. On 7 March 2022 via a Share Purchase Agreement ('SPA') the shares were sold to British Engineering Services HoldCo Limited [386-467]. In doing so it became part of a group of 14 similar trading entities known collectively as the 'BES Group'. As part of the transaction the second claimant ceased to be a statutory director and took on the role of Managing Director of the company. He signed a service agreement, also on 7 March 2022 [259-281] and that represented his most current set of written contractual terms. It purported to discount any previous period of continuous service with the company, but in law did not achieve that effect. The first claimant did not own any shares in the company, and therefore was not a party to the SPA. Her role was unchanged by the transaction.

4. Payment for the shares of the company was to occur in up to three stages described in the SPA as either 'Initial Consideration' and 'Additional Consideration', each to occur on certain dates and conditions. The Initial Consideration was paid on completion of the purchase of the shares, and the second claimant and his parents received the agreed amounts corresponding to their individual personal ownership of shares.

5. The Additional Consideration was to be calculated and paid under the terms of schedule 8 to the agreement [460-462]. It was potentially earned in two tranches, one each on 30 April and 31 December 2022. By each date the

company's earnings before interest, tax, depreciation and amortisation (i.e. the value 'EBITDA' as commonly used in accounting practice) had to equal or exceed a stated value. Earnings for that purpose would be calculated based on the value of work invoiced and the accrual of revenue. Revenue could be treated as accrued if a value could reasonably be attached to work in process or materials purchased, even if the client had not yet been invoiced for them. This was the company's 'revenue recognition policy' and it is a standard practice within the industry. It is compatible with external accounting standards including in particular 'FRS102', which is the Financial Reporting Standard for Companies in the UK and Republic of Ireland.

6. In summary terms, Section 23 of FRS102 deals with the valuation of services rendered. It says that when the outcome can be estimated reliably, revenue associated with the transaction should be recognised based on its stage or percentage of completion. The outcome can be said to be estimated reliably when all of the following apply:

    a. The amount of revenue can be measured reliably;
    b. It is probable that the economic benefits associated with the transaction will flow to the client;
    c. The stage of completion can be measured reliably; and
    d. The costs incurred so far and the costs required to complete the transaction can be measured reliably.

An entity should determine the stage of completion of a transaction using the method that measures most reliably the work performed. If the outcome cannot be measured reliably then the service provider must only recognise as revenue any expenses that it is probable will be recovered.

7. The respondent's group of companies do not treat management time as revenue. Management time in that sense could include time spent in connection with pitching or quoting for work, negotiating the terms, or during the life of a contract whether for supervision of staff or client relationship

management. It would only be charged to the client indirectly by being reflected in the rate for the physical work carried out.

8. FRS102 also deals with the valuation of goods supplied. In a business such as the company this applies to materials used on jobs, if charged to the client. It states that value in those goods can be recognised as revenue if all of the following apply:

    a. The provider has transferred the significant risk and reward of ownership to the client;
    b. The provider does not retain continuing managerial involvement normally associated with ownership of the goods;
    c. The amount of revenue can be measured reliably;
    d. It is probable that the economic benefits associated with the transaction will flow to the client; and
    e. The costs incurred or to be incurred to complete the transaction can be measured reliably.

9. The respondent's group of companies would not include goods or materials purchased for a job as revenue before they had taken delivery of those items themselves, and then transferred them to the client site to be used on the job.

10. The company's financial accounts for the year ended 31 December 2021 – the year before its sale – stated that 'Turnover' was calculated to include net invoiced sales of goods and services in respect of electrical contracting, excluding value added tax. Sales were recognised at the point at which the goods were delivered, or the service was complete. 'Work in Progress' or 'WIP' was based on direct material and labour costs, based on a normal level of activity and without any profit element. This was consistent with FR102. It did not include any management time. Managers, unlike the skilled tradespersons who worked on client jobs, did not record their time against jobs. Their costs were not 'direct'. They did not complete timesheets or record their time in any other systematic way.

11. The SPA provided that such standards would be applied in preparing the relevant accounts in which EBITDA would be evaluated.

12. The target for 30 April 2022 was defined as 'Base EBITDA' in the sum of £1,100,000. It was not achieved by the company as its actual EBITDA for the year to that date was lower. This meant that a payment to the sellers termed the 'First Additional Consideration' was not triggered.

13. The next and final opportunity for the sellers to receive payment in relation to their shares was by achieving the Base EBITDA figure in the year from 1 January to 31 December 2022. If that happened the sellers would receive the 'Second Additional Consideration', which in summary was an amount equal to the figure by which actual EBITDA had exceeded the Base EBITDA figure of £1.1 million, multiplied by six. Put another way, the sellers would be paid six pounds for every pound of EBITDA over £1.1 million for the calendar year. If actual EBITDA was equal to or less than Base EBITDA, no Additional Consideration would be paid.

14. Different calculation rules came into play if the company achieved a higher 'Target EBITDA' figure, but in the course of 2022 it became clear that this would not occur.

15. In short therefore, each of the sellers had an interest in the company maximising its earnings up to 31 December 2022 and EBITDA of more than £1.1 million would need to be reached to trigger any payment of Additional Consideraton. The payment would increase with every pound achieved above that figure and the highest possible payment that could be achieved would require the company to reach an EBITDA figure of £2.2 million by that date. Any performance above that would be beneficial to the company but would not gain the sellers any higher payment for their shares.

16. Paragraph 2.8 of schedule 8 provided, among other things, that were the second claimant to be summarily dismissed after an act of gross misconduct, all of the sellers would lose any right to be paid any Additional Consideration.

However, paragraph 2.9 stated that were he found to have been dismissed unfairly or wrongly by a court or tribunal of competent jurisdiction with no right of appeal, no seller would lose any right to receive Additional Consideration.

17. From March 2022 the second claimant reported to a Mr Paul Trivett who was employed by the company's ultimate parent company, British Engineering Services Limited ('BESL'). In October 2022 Mr Trivett moved to another role and the second claimant reported directly to Mr Paul Hirst, Managing Director of Infrastructure with BESL. He had been Mr Trivett's line manager.

18. By the end of November 2022 the company's EBITDA year-to-date figure was £1,026,000 according to its management accounts [1103]. Its target to that point was £1,082.000 and so it was short by £56,000. The gap between achieved and target EBITDA had been wider in the previous month, and so was reducing. The accounts only covered the period from March 2022, the month of acquisition. The company's financial year was the calendar year, and so in calculating whether any EBITDA targets had been achieved in terms of schedule 8 of the SPA, the figures for January and February 2022 would be added. Importantly, the available figures were from internal management accounts. The definitive figure for EBITDA would be as stated in the company's completion accounts, prepared after the period ended and in according with the accounting practices referred to in the SPA. Those were not finalised until well into 2023. As such, the real-time figures in 2022 were indicative but not authoritative. The company therefore provisionally had a good chance of reaching Base EBITDA but that was not guaranteed. Even if it was reached there was still an incentive for the sellers under the SPA to maximise the figure.

19. The second claimant attended management meetings with Mr Hirst, and before him Mr Trivett. In connection with the meetings monthly financial statistic packs were available for discussion. He also met monthly with Mr McInnes, an external accountant referred to further below. The question of how EBITDA performance was comparing to the targets in the SPA was discussed.

20. On 14 November 2022 the second claimant made a payment to another employee of the company named Matt MacDonald in the sum of £5,500 from his personal bank account. Mr MacDonald had just joined the company in a sales role. The money was paid in lieu of a performance-based incentive by the company, which the second claimant had wished to be made but which Mr Hirst said should not be. The second claimant had suggested to Mr MacDonald that a bonus might be possible and effectively felt morally obliged to make good on that after it had effectively been promised to Mr MacDonald. As it was not paid via the company's payroll system, no deductions were made.

21. On or around 16 December 2022 the company's largest client named Swarco suspended its business dealings with the company. Swarco provides infrastructure services for end user clients, often in the public sector. It subcontracted the company to install electric vehicle charging points. From that date on existing jobs were carried on to completion but no new jobs were awarded. The relationship was not terminated altogether but individuals within the group had to try to persuade Swarco to instruct the company again in the future. Any remedial work on the existing jobs in the interim had to be done at no cost. Some steps towards repairing the relationship had been taken, but no further orders had been placed.

Invoicing for the claimants' parents' property

22. On Thursday 22 December 2022 a large number of invoices were finalised and issued by the company. This was the second last working day before the Christmas break began. The office was busy. The first claimant and her team had a large number of invoices to prepare, finalise and send out by email or post. The first claimant estimated that between 25 and 30 client invoices were prepared at that time.

23. There was a generally settled process for preparing monthly invoices. A person in the first claimant's team, Ms Weir, would attend planning meetings

with the second claimant and other contract managers and take a note of all live jobs. She would list them in an email to the managers and ask them to mark which ones should be invoiced that month. For those jobs, Ms Weir would prepare a draft invoice for the relevant manager which they would approve, with or without any amendments. The approved invoices would be input into the company's accounting software by the first claimant and then finalised with individual numbers. The first claimant used a template covering email or letter and added details of the addressee and job each time she sent an invoice to a client.

24. One such job invoiced in December 2022 was in respect of a quotation for work to be carried out at a property owned by the claimants' parents in Fauldhouse. The quotation had been prepared in September 2022 [469-470]. Ms Weir prepared a draft invoice by hand based on information she had been given in a meeting with the managers [1333]. The invoice was to be for £41,800 plus VAT. This was not the full value of the whole job as quoted, which was £43,675 before VAT. It omitted one aspect of the quote dealing with the replacement of sinks in two toilets. At this time none of the quoted work had been carried out, save the repair of an external light fitting affected by water ingress.

25. Based on email evidence, it is most likely that the second claimant asked Ms Weir verbally to prepare an invoice for the job in the morning of 22 December 2022, specifically between her emailing him an estimate of WIP for the month at 10.09 and then emailing an increased estimated figure at 11.59, with the difference between the figures being the value of that invoice.

26. A formal invoice was prepared for this job by the first claimant (the 'Fauldhouse invoice') [482]. It was addressed to her father. She sent it to her mother's email address on that day.

27. An external accountant who provided services to the respondents' group named Tim McInnes was asked to prepare a set of completion accounts for the company to December 2022. The group had engaged him to prepare

completion accounts after the acquisition of other companies in the past. He worked on the task predominantly in January, February and March 2023.

28. On 11 January 2023 the second claimant emailed Mr McInnes a spreadsheet containing figures for the company's WIP for December 2022 [484-494]. The second claimant discussed the position with Swarco WIP with Mr McInnes around this time, including specifically on 9 and 18 January 2023. Mr McInnes began to think that the second claimant was giving a contradictory account of the figures. He believed that the second claimant had initially told him that a new set of purchase orders for jobs worth £111,259.24 were to be issued, suggesting that this could be accounted for as future revenue. The second claimant then said that all outstanding work for Swarco had been billed in December 2022. That cast doubt over whether any of the above figure could be invoiced to Swarco in the future as there had been no new jobs after 16 December.

29. On 1 February 2023 Mr McInnes emailed the second claimant to ask when the Fauldhouse invoice would be paid. He copied in Mr Hirst and the first claimant. He received no response and so sent a follow-up email on 7 February. The next day at 14.17 the first claimant emailed the second claimant [495] with the wording of a suggested reply to Mr McInnes as follows:

> *'Hi Tim*
> *Apologies for the delay in getting back to you.*
> *I have been looking into this project and speaking with Stephen and I don't believe I should have invoiced this job yet. Therefore I will need to credit this invoice.*
> *Kind regards,'*

30. The second claimant emailed the first claimant 15 minutes later with revised wording of that email [495] to say:

> *'Hi Tim*
> *Apologies for the delay in getting back to you.*
> *This should not have been invoiced as we are having trouble accessing due to the number of tenants involved. This will need to be credited.*
> *This was a miscommunication between contracts and admin.'*

31. The first claimant replied to Mr McInnes using the revised wording three minutes later [497-498]. She said in evidence that it was not unusual for her to ask for help in wording emails to ensure they made sense. There were not emails between the claimants around the same time, for example the first claimant asking the second claimant to help with her reply to Mr McInnes. Any further exchanges between them were not recorded.

Report of Tim McInnes

32. Mr McInnes was asked to formalise his observations and concerns. He prepared a report [511-517]. It was undated, but most likely prepared in March 2023. The report had six further documents attached as appendices.

33. The report quoted the accounting policy of the company in relation to calculation of turnover to be that it was stated net of VAT and trade discounts, and that services were recognised in the period in which they were provided. He said this policy was in place before the company's acquisition, and was still in place. This meant that for revenue to be included, a project had to have commenced. He also stated that he had discussed with the second claimant in October 2022 that monthly work in progress ('WIP') had to be calculated more accurately based on actual work done on site in the month. The second claimant agreed to do so, obtained a list of ongoing projects, assessed the percentage completion of each, and attributed a corresponding monetary value. He did that for October and November 2022.

34. Mr McInnes' report concluded that, in his view, the company's financial performance as at December 2022 was overstated as a result of values attributed to WIP by the second claimant for December 2022. The figure for that month had been calculated and submitted on 22 December as £337,368. Mr McInnes met with the second claimant on 9 January 2023 to review the figures. It emerged that figures relating to Swarco involved duplication of some WIP as the company had been asked to submit new purchase orders for some work, and both the old and new purchase orders had been included.

The second claimant reviewed the Swarco projects and updated Mr McInnes on 11 January 2023. Removing duplication had resulted in a revised WIP figure of £310,424.

35. On 12 January 2023 Mr McInnes reviewed the WIP values provided in relation to other client projects. The figure initially appeared high to him. He reached the view that a large amount of that WIP should not have been included as supporting timesheets showed some projects had not had any physical work carried out on site. That work had been valued by the second claimant at £120,140. This reduced the correct WIP figure to £190,283 (after rounding) in Mr McInnes' view. The year-end accounts were prepared using this value.

36. He recorded that at a meeting on 18 January 2023 the second claimant had told him that all work for Swarco had been done and invoiced. This to Mr McInnes contradicted what the second claimant had told him on 9 January 2023.

37. Mr McInnes went on to say that he now believed even that reduced value was overstated. Firstly, he reported, £18,500 was recorded for a project at Heathrow Airport where work did not commence until February 2023 and also work at Falkirk High railway station valued at £26,934 did not start before February 2023 but was also included in the year-end WIP figure. Finally, he found out through discussing with the first claimant an invoice rendered by a sub-contractor in January 2023 that the company had invoiced two councils for the installation of electric vehicle chargers a number of times in 2022 when no work had been done in that year. The total net value of those invoices was £18,990.50.

38. Mr McInnes also reported on what had happened in relation to the claimants' parents' property in Fauldhouse. He said a quote for £52,035 (which appeared to be an incorrect figure) was approved on 5 December 2022 with work being due to begin in the week of 12 December. £41,800 plus VAT was invoiced on 22 December, which he was told was less than the quote as the

sink replacement work had not been undertaken. Mr McInnes had been pressing both claimants for payment of the invoice from late January 2023, before the first claimant told him on 8 February that the job should not have been invoiced due to a problem accessing the property because of other tenants, that the invoice would need to be credited and that it was a miscommunication between the contracts team and admin (who prepared and issued invoices).

39. Mr Hirst interviewed Mr McInnes on 29 March 2023.

40. At the time of its acquisition the company did not have a written disciplinary policy or set of procedures. The second claimant's service agreement contained terms dealing with grounds for summary dismissal and disciplinary action. It stated that any rules or procedures which the company operated could be varied to reflect his seniority.

41. The BES Group has a set of disciplinary rules and procedures which were adopted in the events described below.

Investigation – Stephen Boyd

42. John Lennox was asked by an HR Director within the company's group to conduct an investigation interview with the second claimant. Mr Lennox was the Chief Operating Officer of the BES Group and employed by BESL. It was decided that meetings with the first and second claimants would be scheduled for the same time on the same day and away from the company premises, to avoid either potentially tipping off the other about what was discussed. This therefore required two senior employees from the group to conduct the meetings. Mr Hirst was identified to interview the first claimant.

43. For background Mr Lennox was given copies of some emails and the report prepared by Tim McInnes.

44. Mr Lennox's meeting with the second claimant took place on 11 April 2023. Mr Philip Stec, an HR Business Partner, attended and made notes of the

discussion which were later typed and circulated [331-341]. Mr Lennox opened the meeting by saying that its purpose was to discuss serious concerns and allegations relating to invoices and WIP relating to work that had not yet taken place, and which was inconsistent with the company's normal accounting procedures. He added that this was suspected to be related to the earn-out provisions of the SPA, and that if the allegations were proven they could amount to misconduct.

45. Mr Lennox asked the first claimant if he was familiar with the earn-out provisions of the SPA, and in particular EBITDA and how it was measured. The second claimant said he was not. Mr Lennox summarised the provisions and the second claimant confirmed he accepted the description, and had met occasionally with Mr McInnes to discuss whether EBITDA was on target.

46. Mr Lennox moved on to ask about the second claimant's understanding of the company's invoicing practices. He used the analogy that a customer would not be invoiced until a spade had been put into the ground. The second claimant agreed, and said that the invoice would be based on a proportion of work done. He confirmed that he liked processes to be simple, and that invoices were finalised internally by email.

47. Mr Lennox asked the second claimant about the invoicing process used with Swarco. In particular he asked the second claimant to explain why he had told Mr McInnes in January 2023 that he would need to provide new quotes and purchase orders for jobs which had been instructed up to 16 December 2022, when Swarco ceased providing further orders. The second claimant said that this was necessary whenever the company found itself needing to raise an invoice after the 'hard stop' date specified in connection with the purchase order. Mr Lennox referred to three invoices issued to Swarco in December 2022 but the second claimant said he had no specific recollection of them. Mr Lennox did not think the second claimant had given a clear or satisfactory answer to his initial question.

48. The second claimant was next asked about the invoicing for his parents' property. He agreed that the invoice should not have been issued and had been told it was sent in error. He said it was not signed off using the normal procedure he had described, but had been verbally approved by him instead. He believed that when approving the invoice initially, he had been thinking about another, smaller job.

49. When asked about the email that the first claimant sent to Mr McInnes on 8 February 2023, the second claimant said he could not understand why she said there was a miscommunication and that the work had not been completed and needed to be credited.

50. Mr Lennox asked the second claimant about particular jobs done for, and invoices rendered to, other clients. He maintained that the invoices validly reflected work done, which included management time and materials purchased. He believed that around 90% of Mr McDonald's time was spent on the Heathrow project. He believed this could be verified by checking Mr McDonald's diary.

51. Mr Lennox briefly adjourned the meeting before resuming to say that the investigation process would continue, and that in the interim the second claimant was being suspended from his duties. The terms of the suspension were described. Mr Lennox told the second claimant that if he was aware of any relevant documents he should identify them, and that if he needed access to the company computer system he should ask, and this could be accommodated under supervision. The second claimant was asked to return any items of company property and was given a letter confirming the position [342-345]. He handed the second claimant a letter confirming the terms of his suspension. This had been prepared in advance in case needed. Mr Lennox had not however decided before the meeting whether he would suspend the second claimant, and therefore issue the letter.

52. Later in the day on 11 April 2023, the claimant remotely accessed the company's computer network, shared a folder of documents with two personal email accounts, then deleted some files from the network.

53. The minutes of the investigatory meeting were emailed to the second claimant, via his wife's email address as he had requested, on 1 April 2023.

54. On 21 April 2023 Mr Stec telephoned the second claimant about two new matters arising. The first was the payment to Mr MacDonald in November 2022, which Mr MacDonald had brought to Mr Hirst's attention following the second claimant's suspension. Mr Hirst had prepared a record [537] of the conversation. The second was the second claimant's login to the company's system on the day of his suspension. The second claimant stated his position in relation to each [353-355]. On the latter point, he said that he had accessed the system to delete some personal files. When put to him that he had deleted some work files as well, he said he apologised if so. Mr Stec also put to him that he had shared a particular folder of work-related documents to a personal email address in his own name, despite telling Mr Lennox in their meeting that he did not have a personal email address, and that his wife's address should be used instead. He said he could not remember his own email address at the time. He also apologised for sending the folder to his wife's email address at the same time as his own.

55. An investigation report was prepared by the group HR function [378-385]. It summarised the allegations and described the process which had been followed to date. In an appendix was a table detailing who had been interviewed as part of the investigation and there was a list of further documents designated as appendices.

Investigation – Amy Blanche

56. Mr Hirst was appointed to hold an investigatory meeting with the first claimant. On the morning of 11 April 2023 he attended the company's offices and asked her to meet with him. The meeting began at 11.40am. Notes were made and

typed up by an HR Business Partner in attendance [1224-1232]. They are accepted to be a sufficiently accurate summary of the discussion in what they record, but they did not capture everything said. So, for example, the first claimant gave a slightly longer answer to a question about who has asked her to raise the Fauldhouse invoice, when she said that there had been a miscommunication between the second claimant and herself [1228].

57. The first claimant was asked some questions about the SPA and its provisions. She had not been a party to that agreement and knew very little about its terms. Similarly, when asked some questions about the degree of completion of various jobs, principally for Swarco, she was not familiar with them. She was asked about the company's process for raising invoices generally, which she did know about, and described. Mr Hirst asked her more detailed questions about the creation and issuing of the Fauldhouse invoice. She gave a recollection of that. The minutes recorded her saying that she thought the work had been done. She either said that, but in error as it was not her position, or it is an error in capturing what she did say. Her true position was that she did not think the work had been done. She did not raise what to her would have been an inaccuracy in the minutes when she received them. She was unfamiliar with any accepted process in that regard. She clarified that this was her position (in relation to knowledge of completion of the works) in the disciplinary hearing which followed.

58. The meeting was adjourned and then reconvened. MR Hirst said that the matter was being treated as serious, that there would be further investigation and that she would be suspended in the meantime. She was asked to hand back her company laptop and provide her login details. This was so that the finance and payroll systems could be accessed.

59. The claimant's suspension and the terms which applied to it were confirmed in a letter dated the same day and handed to the first claimant at the point the meeting was reconvened [1233-1236]. As with the second claimant, it had already been substantially prepared so that if Mr Hirst decided to suspend the first claimant he had it ready.

Interviews with other employees

60. Following the two investigatory meetings, Mr Hirst conducted further enquiries in relation to both claimants. He interviewed Ross Macdonald (Contracts Manager), Robbie Compton (Contracts Manager), Stephen Jamieson (Procurement Manager) and Ms Weir. Notes were taken. The first three were consulted as they managed the various projects which were under review, and were believed to have the most detailed knowledge of them. Ms Weir was interviewed as she was part of the invoicing process and had been involved in the creation of the Fauldhouse invoice in particular.

61. Mr McDonald told Mr Hirst that on-site work on the Heathrow project started on 6 February 2023. This was based on a project tracker document, a site diary and materials request sheets. He had conducted 'start-up and catch-up calls' with the client from November 2022 and discussions about the project had begun around mid-2022. His first visit to the site had been on 10 January 2023. He did not have a practice of keeping timesheets and so there were none relating to this contract. He believed he had spent around 12 to 15 hours on the project. A Quantity Surveyor colleague had also spent some time reviewing the job and preparing. WIP of £18,500.00 was allocated to the work in December. Mr Hirst believed that figure could not be justified.

62. Mr McDonald also provided his recollection of the East Lothian Council contract. This involved a number of individual jobs being done at different times from mid-2022 onwards. Work had been done to allow Scottish Power to arrive on the sites an perform works that they were contracted to do. The company would then return to the sites and carry out further work after that. WIP of £36,635 was attributed to the job.

63. Further contracts which Mr McDonald had overseen were discussed. Those were for owners of a farm and a transport company. For the latter, the work was carried out from 10 January 2023 and the only time spent in 2022 was to provide a price for the job.

64. The two individuals met the next day, 12 April 2023. Mr McDonald had checked records and was able to confirm the start dates of nine jobs, which were between 9 January and 6 March 2023.

65. Mr Compton met with Mr Hirst on 11 April 2023. Again, the subject of discussion was projects and their timings. In relation to a number of jobs for a doctor client, Mr Compton said that some work had been started in December 2022 but the installation of the EV chargers happened after Christmas, and therefore believed to be in January. He estimated that eight days of work were undertaken before the end of December, which was about half of the work required overall. None of that was physical work, which only began in January. The WIP figure attributed to the job in December 2022 was £66,331.20. Mr Hirst considered that to be unrealistically high given what had and had not been done.

66. For another client which owned a nursing home, Mr Compton said that the project had started months before the year end but there was a lack of progress due to a high price being quoted by a supplier for solar panels. No employees were on-site before Christmas. Some kit and materials would have been ordered by the second claimant earlier. In relation to three other jobs he was asked about, he said the work began in 2023. One of them had a December 2022 WIP value of £16,096.00, another £26,934.00. Mr Hirst considered those unjustifiably high.

67. Mr Hirst met with Mr Jamieson the same day. He asked questions about the process used for ordering materials. Mr Jamieson confirmed he had not been asked to source any materials for the claimants' parents' property in Fauldhouse. He provided copies of order sheets which showed which materials had been ordered and when for various jobs.

68. Mr Hirst met with Ms Weir on 12 April 2023. She explained her involvement in the company's invoicing process. She described how she attended planning meetings, prepared a list of potentially billable jobs, and then drafted

invoices for those selected by each contract manager. She only knew of one invoice being prepared for the claimants' parents' property and could not recall any conversations with the second claimant about invoicing in relation to it.

69. Mr Hirst prepared a table summarising what he had gained from the meetings and the relevant job sheets, materials order forms and the like [648-650].

70. An investigation report was prepared by group HR on or around 21 April 2023 [1237-1242]. This contained a summary of the allegations and the process followed. It listed in an appendix the individuals who had been interviewed and a number of evidential documents.

71. On 5 May 2023 Mr Lennox met with Ms Weir. This was to ask her some follow-up questions which Mr Hirst had not covered in his meeting with her on 12 April 2023. A note was taken of the discussion [1147-1149]. Ms Weir's recollection was that there was only one invoice prepared for the claimants' parents' property in December 2022. She could not specifically remember any conversations with the second claimant about the invoice. She was reminded that she had sent an estimate of December WIP to him in the morning of 22 December, then emailed an updated figure which included the value of the Fauldhouse invoice a short time later that day. She could not remember any conversations around these emails, but accepted that the increase in the figure was through the addition of that invoice.

Disciplinary meeting – Amy Blanche

72. On 25 April 2023 Mr Stec wrote to the first claimant to invite her to a disciplinary hearing, to be chaired by Andrew Kinsey, Chief Risk Officer on 27 April [1290-1291]. There was one allegation to answer, that she fraudulently processed the Fauldhouse invoice in order to exaggerate the company's financial performance. It had been decided therefore that she was no longer under suspicion of involvement in inflating revenue figures or

invoicing for any other work which might not have been justified – matters she had been asked about in her meeting with Mr Hirst.

73. The first claimant attended the meeting. She chose Mr Jamieson to accompany her.

74. Mr Kinsey was accompanied by Mr Stec in the capacity of HR support and note-taker. Following the meeting a minute was prepared from the notes [1308-1315].

75. The first claimant confirmed that she had received the documents sent to her, understood the process to be followed and that she was content to continue. There was a discussion about her role and how she worked with others in the company. The focus moved to the Fauldhouse invoice. The first claimant recalled the interactions she had had with the second claimant on 22 December 2022. She said that he told her to hold the invoice, which she would have received in draft from Ms Weir, but that she was very busy, put it in the wrong pile and sent it out by mistake. She knew no work had been done on the property. Mr Kinsey questioned her on whether that was the same as a miscommunication, as she had described the situation to Mr McInnes in February and at the investigatory stage. She initially suggested those were the same thing, although conceded to a degree that there was more of an oversight on her part than any miscommunication. She later clarified that she was referring to the second claimant initially telling Ms Weir to invoice the job, and then telling herself to hold the invoice. She also explained that she had emailed the invoice to her mother's account but that her mother did not respond to it and the matter was not discussed among the family over the Christmas period. She added that it appeared that the email had gone into a junk folder and had not been seen, a point which was only appreciated when she told her mother that the invoice would need to be reversed following Mr McInnes pressing the matter.

76. Mr Kinsey also brought up the email exchange between the claimants which resulted in her replying to Mr McInnes on 8 February 2023 using wording

provided by the second claimant. She said she lacked confidence when emailing people within the company's group and was asking her brother for confirmation that what she wanted to say was correct. She had asked people to check her emails before.

77. Mr Kinsey adjourned the meeting for around 30 minutes to consider what had been said. He decided that she would need further time to reflect and to check on some matters raised. He confirmed he would arrange a follow-up meeting and brought the hearing to an end.

78. Mr Stec emailed the first claimant on 10 May 2023 to ask her to attend a reconvened meeting with Mr Kinsey. This took place on 11 May. On 5 May Mr Stec emailed her a copy of the minutes of her disciplinary hearing.

79. The meeting on 10 May 2023 proceeded as scheduled. The same people attended as had been at the original disciplinary hearing. Mr Stec again took notes and produced a minute [1330-1332]. Mr Kinsey stated the conclusions he had reached. He took the view that the claimant's account in the disciplinary hearing varied from what she had said in her investigatory interview, and that this inconsistency counted against her. He believed that she had consciously issued the invoice to her parents at a time when she knew no work had been done, to inflate the company's performance. He did not accept that the invoice was sent in error. He considered that as the invoice was going to close family members, the amount of the invoice was not minor, and the first claimant knew at the time that no work had been done, it would have registered with her when seeing the draft that it should not have been processed. He also concluded that she colluded with the second claimant on 8 February 2023 when agreeing with him how to reply to Mr McInnes' query about payment of the invoice.

80. Mr Kinsey therefore concluded that she was guilty of gross misconduct in relation both to her actions in issuing the invoice and her account of it subsequently, including in the disciplinary process itself. He said that trust and confidence were an important part of her role and that she had caused a

complete breakdown which made it impossible for her to remain in the company's employment. Her dismissal would be with immediate effect.

81. His decision was confirmed by letter dated 12 May 2023 [1336-1339].

Disciplinary meeting – Stephen Boyd

82. The second claimant was invited to a disciplinary hearing with Mr Kinsey, to take place on 27 April 2022 [1150-1152]. The purpose of the hearing was said to be to discuss serious concerns relating to fraudulent actions designed to achieve personal gain and enrich the second claimant and is family. This was suspected to have happened by dishonestly booking revenue to exaggerate the EBITDA figure leading to achievement of the earn-out target in the SPA. A number of examples were listed. The hearing would also review the invoicing of the second claimant's parents for their Fauldhouse property. Further allegations were that he had made an unauthorised bonus payment to Mr MacDonald, which could have been seen as tax evasion and that he had directly disobeyed a direct management instruction by accessing the company's IT system immediately after being suspended. The range of possible outcomes was from no action to dismissal. Mr Stec emailed a pack of documents which would be discussed.

83. The second clamant wished to gain access to other documents on the company's network in preparation and so the meeting was postponed and system access was arranged for 27 April 2023 under the supervision of Mr Kinsey and Mr Stec. The disciplinary hearing was rescheduled for 4 May 2023.

84. At the second claimant's request Mr Stec emailed a number of further documents, including a full list of duplicated invoices for the year, the company's revenue recognition statement, a separate list of Swarco duplicated invoices and a copy of schedule 8 of the SPA.

85. The disciplinary hearing tool place on 4 May 2023. Present were the second claimant, Mr Kinsey and Mr Stec in an advisory and note-taking capacity. The

second claimant declined to bring a colleague and was not a member of a trade union. Mr Stec prepared a minute of the hearing from his notes [1162-1176].

86. The second claimant asked at the outset whether a decision had been made on the outcome. Mr Kinsey said that it had not, and that he may not be able to reach a decision that day. Mr Kinsey then read out the disciplinary invitation letter and the remainder of the meeting was taken up by discussion of each of the allegations. At various points the report of Mr McInnes and other documents were referred to.

87. The first allegation discussed was whether revenue from Swarco jobs had been deliberately duplicated in December 2022, in the amount of £111,259. The second claimant said it was not uncommon for duplicate invoices to be sent, and sometimes jobs were invoiced before they started. Mr Kinsey explained that accidentally issuing duplicate invoices was not the allegation. The second claimant accepted that. He said that he was not aware of levels of WIP on every job, and relied on the management team and perhaps should have known more. He said that he had been calculating WIP the same way since the acquisition and had not been told he was doing anything wrong. Mr Kinsey put to him that the December figure was significantly higher than for previous months.

88. Mr Kinsey next discussed the allegation that the second claimant was recording revenue prematurely, before jobs had commenced. He referred to the Heathrow project, where 15% of the contract value had been recorded as revenue despite work on site only beginning in February 2023. The second claimant said that any work completed or work in progress had been claimed. He said that his comment in the investigatory meeting that Mr McDonald had always been on site was a throwaway remark. He accepted that no physical work had been carried out or materials ordered in 2022, but said that a lot of management time had been spent and he felt the company needed to be reimbursed. Many meetings had happened and five or six people had been involved. He accepted when asked that he did not rely on any timesheet data,

as management do not complete timesheets. He was asked what he based his valuation on and said that the contract kept being mentioned to him, and he was relying on feedback from his team. Mr Kinsey put to him that other managers questioned about the contract did not agree that there had been so much activity on the contract. He accepted that they would have the benefit of going back through their diaries. He agreed that he had 'claimed for a percentage which is not correct'.

89. Mr Kinsey asked about the treatment of revenue for other clients. He said that revenue of £25,458 had been recorded for a client when again no work had been carried out or materials ordered. The second claimant again said that the figure had been chosen to reflect the amount of management time he believed had been spent by Mr McDonald, and that this was a challenging client. There was discussion about how accurately management time was recorded. It was recognised that there was no properly effective system of capturing how much of a manager's time was spent on each job.

90. The second claimant was asked whether his responses would be the same in relation to revenue figure of £40,873.20 for another named client where no physical work was carried out or materials ordered in 2022, and he said they would. He was asked whether he wished to comment on any other client revenue figures highlighted in the materials and he confirmed that he did not and was content to move on to the next allegation.

91. Mr Kinsey next raised the Fauldhouse invoice. He asked the second claimant to recall the chain of events involving the invoice being issued. He said that when Ms Weir came to him and asked for approval to invoice for the job, he believed her to be asking about either different client job which he believed should be invoiced, or the repair of a light at the parents' property. He did not however think that an invoice should be issued for any other work at his parents' property as he knew none of the work had been done. He said he was only aware that the invoice had been sent when Mr McInnes asked about it, which was in early February 2023. Mr Kinsey pointed out that the Fauldhouse invoice did not include some separate work for replacement of

toilets which had been quoted for, and this suggested that the second claimant may have discussed with Ms Weir how much the invoice should be for. He mentioned that Ms Weir had emailed him a provisional revenue figure for the month on that morning, and that a short while later she emailed him again with a higher figure, with the increase being equal to the value of that one invoice. He accepted that a conversation was possible although could not say he remembered one. He admitted that he did not follow the normal invoicing process, which would have involved Ms Weir sending him details of the proposed invoice by email and him responding to either approve it or provide alternative instructions.

92. Mr Kinsey brought up the emails exchanged between the first and second claimants on 8 February 2023 in response to Mr McInnes' query about payment of the Fauldhouse invoice. He said that this made him concerned. The second claimant said that his sister was not confident and always asked him how to word emails.

93. The next matter raised was the payment that the second claimant made to Mr MacDonald in November 2022. The concern around this was that it could be perceived as an attempt by the company to avoid payment of lawful deductions. The second claimant explained how he had sought authorisation from the group to pay some individuals a bonus, that this had not been approved, but that he wanted to reward Mr MacDonald who also had financial challenges at the time. He ended up paying the sum from his own personal account 'out of friendship'. He did not believe there were any implications for the company. He confirmed that he did not make a similar payment to anyone else.

94. The last matter to be discussed was the second claimant's apparent access of the company's computer system after being suspended on 11 April 2023, in contravention of directions given by Mr Lennox. He accepted that he did so, downloading documents to two personal email accounts before deleting them on the system. He believed that the documents were all personal to him

and apologised for deleting any work documents. He accepted that he had acted against Mr Lennox's instructions.

95. Mr Kinsey said at this point that he had no further questions. He asked the second claimant whether he wished to say anything further, and he did not. Mr Kinsey asked him whether he felt he had had a fair meeting and he confirmed so.

96. Mr Kinsey then adjourned the meeting for around two and a half hours until later that afternoon to consider the second claimant's responses and reach a decision. When he reconvened the meeting he stated that he had been able to reach a decision in relation to each of the allegations, which he explained in turn. In summary, he found the allegations to have been proven and the second claimant responsible. He concluded that he found the second claimant to have been dishonest, involving deliberate and fraudulent attempts to inflate the company's financial performance for personal gain via the earn-out provisions. He was therefore guilty of gross misconduct and his employment would be terminated with immediate effect. He said he had considered other sanctions, but there had been a complete breakdown of the company's trust and confidence in him as an employee. The second claimant replied that he was shocked, that he disagreed with the conclusions and would appeal.

97. Mr Kinsey's decision was confirmed by letter dated 5 May 2023 [1183-1186]. This essentially repeated his findings as expressed verbally at the end of the meeting the day before.

Appeal against dismissal – Amy Blanche

98. The first claimant indicated that she wished to appeal against her dismissal by emailing dated 19 May 2023 [1352]. She gave 3 reasons for appealing:

    a. The case against her was based on the belief that she colluded with her brother to produce and issue the Fauldhouse invoice, but there was no reasonable basis for that conclusion;

b. Even if the issuing of that invoice had the effect of increasing the company's performance to the financial gain of the second claimant and their parents, she was not familiar with the terms of the SPA and did not know how the mechanism for payment worked;

c. Even if there were grounds for believing this was the motive of the second claimant, there was still no basis for concluding that she had knowledge or was involved. In particular, it was unfair to interpret her emails with her brother on 8 February 2023 in response to Mr McInnes' enquiry in a way which supported that finding.

99. She was invited to an appeal hearing on 24 May 2023 [1353]. David Gill, Operations Director, would hear the appeal.

100. By choice the first claimant was not accompanied at the appeal hearing. An HR Business Partner attended to take notes and prepare a minute [1357-1361]. Mr Gill explained that the meeting would focus on the grounds of appeal rather than be a complete re-run of the original disciplinary hearing. He explained that he did not expect to make a decision that day, so that he could give the issues full consideration.

101. Mr Gill read out the first two grounds of appeal. He said that, as he understood them, they were appeal points about the process which had been followed for the second claimant rather than her. They could be dealt with in any process he was involved in, and were confidential to him. Mr Gill recognised that the third point however was about how the first claimant herself had been treated. The first claimant agreed.

102. In relation to the third ground, Mr Gill asked the first claimant to describe the process which had taken place. She said that the invoice had originally been raised by a colleague (Ms Weir) who had spoken to the second claimant and been told that the invoice should be issued. Then, when asked to prepare the invoice from Ms Weir's draft, the first claimant had checked with the second claimant whether the invoice should be sent, and this time was told 'no'. However, the first claimant then put the invoice on the wrong pile (i.e of those

invoices not yet approved, or not ultimately to be issued) rather than the pile of invoices which had to be formalised and sent. Consequently, the invoice was sent out when it should not have been. The matter only came to light when Mr McInnes got in touch asking whether it had been paid at the beginning of February 2023.

103. Mr Gill asked the first claimant to explain why she had initially wanted to say that the work had been held up through an issue with other tenants of the property affecting access. She explained that there are other business tenants on the property, which was where the company first operated from.

104. She was asked whether the business had sent any other emails to her mother, and if so what had happened to them given that it was claimed that the email attaching the invoice went into a junk folder. She did not think any other emails had been sent to that account.

105. Mr Gill next asked her whether she would check if work was complete when asked to issue an invoice. She explained that Ms Weir would have that knowledge as she attended the management meetings and emailed the project managers about which jobs to invoice each month. The second claimant herself would not know.

106. She was asked how often mistakes were made with invoicing clients. She replied, 'Quite regularly'.

107. The meeting was adjourned briefly. When Mr Gill reconvened he confirmed that he had no other questions for the first claimant, and she had nothing further to add. He said he would issue his response by 31 May 2023.

108. Mr Gill issued an outcome letter to the first claimant on 31 May 2023 [1365-1367]. He reiterated the ground of appeal which had been discussed and summarised what had been said in the meeting. He said that the first claimant's appeal would not be upheld after consideration of the facts. He considered that she had provided no additional evidence or arguments to persuade him that Mr Kinsey's original decision was wrong. He believed she

held a position of responsibility and had caused the loss of the company's trust and confidence in her.

109. This represented the final step in the company's disciplinary process.

Appeal against dismissal – Stephen Boyd

110. The second claimant indicated that he wished to appeal Mr Kinsey's decision by email dated 12 May 2023. He set out five numbered grounds of appeal [1188-1189]. Those were, in summary:

a. He had asked at numerous times whether he was preparing figures for WIP correctly but received no answer. There was a lack of support or training. He did not know the precise status of each job but relied on information provided by the project managers;
b. Related to the first point, he was aware that some management time was being spent on jobs but not how much. He made educated assumptions. Timesheets are not always filled in accurately by tradespeople and were not fully reliable;
c. The Fauldhouse invoice was issued in error as he had explained;
d. Any payment he personally made to Mr MacDonald has nothing to do with the company; and
e. He accepted he accessed the company's computer system to download files, but believed the files only to be personal ones and admitted he had done so when asked.

111. He was invited to an appeal hearing on 24 May 2025 by letter [1190]. This meeting was also to be chaired by Mr Gill.

112. The appeal hearing was also attended by an HR Business Partner who took notes and produced a minute [1191-1196]. The second claimant was again accompanied. Mr Gill explained at the outset that the appeal would not fully investigate the allegations or re-run the disciplinary hearing, but would focus on the grounds of appeal. He also said he thought it unlikely that he would be

able to make a decision that day. Each of the appeal points was then discussed in turn. The second claimant expanded on his written grounds.

113. After discussion of the appeal grounds Mr Gill briefly adjourned the meeting to reflect. When the meeting resumes he confirmed that he wished to speak to three individuals about matters the second claimant had raised. Those were Mr Hirst, a Mr Lomax and Mr Kinsey. He expected to do so and then issue a written decision by 31 May 2023. The meeting was then brought to a close.

114. Mr Gill decided on reflection that he did not need to speak to Mr Lomax, as he wasn't involved in the process of preparing the Fauldhouse invoice, as previously had been assumed. Nor did he think that he needed to speak to Mr Kinsey. He did speak to Mr Hirst. He also spoke to Mr McInnes about what exchanges had occurred with the second claimant about accruing revenue.

115. Mr Gill wrote to the second claimant on 31 May 2023 to confirm that the decision of Mr Kinsey would be upheld, and his appeal points were not accepted. The format of the letter was to detail each appeal point and provide a response to it. In brief:

a. Mr Gill believed that as a senior employee of the company, the second claimant had many opportunities to address any perceived knowledge gaps and receive support and training. He should also have had a better understanding of work carried out and, as Managing Director, was ultimately accountable for all aspects of business performance;
b. A level of validation is required to record WIP accurately. As Managing Director the second claimant had ultimate responsibility to ensure there was a system to achieve that. Any assumptions being made about WIP should have been supported by evidence;
c. It was simply not believed that the issuing of the Fauldhouse invoice was anything other than intentional;

d. There was a sufficient connection between the payment to Mr MacDonald and his performance at work for there to be a risk of avoidance of tax; and
e. As the second claimant had admitted the allegation there could be no valid appeal against the finding.

116. Mr Gill concluded by saying that the second claimant had not satisfied him that there were any substantial grounds for reversing the decision the business had taken. As Managing Director, ultimate responsibility lay with him. Mr Kinsey had been entitled to conclude that the second claimant knowingly exaggerated the performance of the company in order to improve the earn-out payment under the SPA.

117. This was the last step in the disciplinary process for the second claimant.

Discussion and decision

118. In this section of the judgment the first respondent is simply referred to as the respondent, given that the issues and evidence did not relate to the second respondent at this stage.

The reason for dismissal – section 98(1) and (2) of ERA

119. The onus falls on the respondent to prove, on the balance of probability, that the reason for dismissing each claimant was potentially fair. It alleges that each was dismissed for the permitted reason of conduct.

120. In the case of the first claimant, she was invited to her disciplinary hearing by letter which set out one allegation – that she had fraudulently processed the Fauldhouse invoice with a view to intentionally exaggerating the company's performance. Her dismissal letter confirmed that the allegation had been found to be proven and a finding of gross misconduct had been made. Mr Kinsey found her to have been dishonest in preparing and issuing the invoice, and in later stating the position in relation to it to Mr McInnes when asked.

121. The language clearly used indicates that the claimant was dismissed because she deliberately acted dishonestly and in a way she knew was unacceptable. It was not considered that she lacked expertise, training or awareness of what she had done. The process followed was a disciplinary procedure in commonly recognisable form. There was a suggestion at certain points in cross-examination of the respondent's witnesses that the first claimant's dismissal was effectively collateral damage in building a case against the second claimant. This was revisited in closing submissions. When considering both the evidence in support of the second claimant's dismissal and her own, however, it was accepted that Mr Kinsey did genuinely believe she had been dishonest in her own right and that was why he decided to dismiss her.

122. In relation to the second claimant the suggestion was made more forcefully that dismissal was for an ulterior motive. This was an understandable position to adopt given the immediate and significant financial consequences for the parties of his dismissal on grounds of misconduct. In simple terms, the SPA provided that the fair dismissal of the second claimant for gross misconduct would remove his and his parents' entitlement to any Additional Consideration, even if provisionally earned by way of the Base EBITDA figure being reached. Conversely, a dismissal found to be unfair would not so disentitle them.

123. The process the respondent followed was considered closely. Ultimately, the number and nature of the concerns they had, as initially discovered by Mr McInnes and then as explored with the second claimant by Mr Lennox and later Mr Kinsey, were such to satisfy the tribunal that the respondent dismissed him because of his deliberate actions and the consequences of those actions and not for any other reason. It could never be completely ruled out that the respondent dispensed with the second claimant's services after the completion of the sale had been implemented, so as to save itself potentially millions of pounds in the short term at least, but against the weight of evidence pointing towards a genuine belief in wrongdoing by a senior and trusted employee, that was notably less probable.

124. On behalf of the second claimant it was separately argued that, as the headline charge against him was ' *your fraudulent actions'*, the fourth and fifth allegations could not be described as such and so could not fairly be part of the reason for dismissal. This is to take too narrow a view. In the letter of invitation to his disciplinary hearing, those were introduced with the wording *'In addition, further allegations relating to…'*. They were distinguished from the preceding allegations and clearly described factually. They were still matters of conduct.

125. The tribunal therefore concluded that the respondent had satisfied the requitement of proving that each claimant had been dismissed for a potentially fair reason, being their conduct under section 98(2)(b) of ERA.

General reasonableness of the respondent's process – section 98(4) of ERA

126. The parties disagreed over whether all of the requirements of section 98(4) of ERA had been satisfied.

127. In assessing the overall reasonableness of an employer's actions in cases of dismissal for conduct, the principles in ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will be relevant According to that authority three things must be established for a conduct related dismissal to be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

128. Importantly, the respondent is not required under this test to prove that the misconduct occurred. Only that it was reasonable for it to believe that it did after a reasonable investigation, and that following on from that dismissal was a proportionate sanction.

129. Similarly, the tribunal does not need to decide whether the misconduct occurred or not. It is more concerned with assessing what the respondent thought and did in terms of the preceding paragraph.

Burchell part 1 – genuine belief in misconduct

130. The respondent maintained that it genuinely believed the claimant was guilty of misconduct. It was argued that both Mr Kinsey and Mr Gill, the disciplinary and appeal hearer respectively, reached that view. The onus does not fall on either party to prove its side of the issue.

131. Again, the oral evidence of the relevant witnesses and the documents generated in the course of the process consistently point to a genuine belief in misconduct having occurred.

132. The possibility of the alternative is discussed above in relation to the reason for each dismissal. The issues are closely related in these claims. The tribunal did not accept that Mr Kinsey dismissed each claimant without genuinely believing they had acted dishonestly and irrevocably damaged trust which was fundamental to their role.

133. It could have been possible that Mr Kinsey both believed the claimants were guilty of misconduct and also realised that this presented an advantage to the group in the short term to dispense with their services and be released from any obligation to pay Additional Consideration under the SPA. Both of those thoughts could exist at the same time. On the evidence presented, however, the group had more to gain overall in terms of the market value of the respondent were the earn-out to be maximised and the claimants to remain in place. That this would be the longer-term picture was not challenged by the claimants. Therefore, the argument that dismissing the second claimant was too good an opportunity to pass up was not so clear-cut. Furthermore, by the point that the disciplinary action was initiated, Mr McInnes had uncovered a number of ways in which EBITDA for December 2022 had been overstated. If the respondent had been primarily motivated by the desire to avoid paying Additional Consideration then evidence had emerged, and continued to

emerge, to suggest that this was more likely simply on the figures and without the need to dismiss the second claimant for gross misconduct.

Burchell part 2 – genuine belief is reasonably held

134. The respondent argued that it had reasonable grounds on which to form its belief in the claimants' misconduct. This is discussed separately in relation to each claimant below.

Reasonable belief in misconduct – Stephen Boyd

135. The second claimant did not dispute that the December 2022 WIP figures contained duplicate counting of revenue for Swarco jobs, in that work was counted both as having been invoiced and as WIP to be billed in the future. Mr Kinsey found it not to be credible that the second claimant would be unaware of that, especially given the magnitude in monetary terms. He expected someone in the second claimant's position of experience and seniority to have sufficient awareness to prevent that from happening. As well as his experience generally, the second claimant discussed the practice with Mr McInnes on at least two occasions, in October and November 2022. Mr Kinsey believed that the increase of over £100,000 above the monthly norm for Swarco WIP was so significant that it should have raised a question about its accuracy and prompted further checking. He considered it notable that every potential error, estimate of WIP based on judgment or failure to check the accuracy of figures appeared to increase revenue and not lower it. He did not believe that the issues were caused by a gap in training or understanding of correct accounting practices on the second claimant's part.

136. Mr Kinsey reached the view that the second claimant had not calculated the WIP values of a number of projects appropriately. Those included the Heathrow project, where £123,336.02 was assigned to materials and labour but, in Mr Kinsey's view, without any detailed evidence of what work had been done. He had said in the disciplinary hearing that the name of the project was mentioned frequently in project management meetings. Mr Kinsey considered that the explanation of what the figure covered had changed. The

second claimant had told Mr McInnes on 18 January 2023 that materials had been ordered, which would have accounted for part of the amount, but in the disciplinary hearing he said that no materials had been ordered, and he believed that the figure was a fair percentage of the overall contract value based on 'the amount of moaning' about it by Mr McDonald. There was not a sufficiently reliable system in place to value management time, were that a practice the respondent was to adopt. Job Materials Request forms showed that the earliest requests for materials were made in January 2023. In any event FRS102 states that goods ordered on behalf of a client cannot be treated as revenue until the beneficial ownership and risk associated with them passes to the client. That clearly had not happened in December. Mr Kinsey considered, as he was entitled to do, that the second claimant had given no satisfactory explanation of his valuation of WIP for the contract, and that any management time spent by Mr McDonald would have been much less, if chargeable at all. The gap between what the second claimant had done and what Mr Kinsey believed was acceptable practice was not down to a difference of interpretation of the nuances of FRS102.

137. Mr Kinsey considered other client jobs which were suspected to be overstated in value. He believed that the first claimant had applied unjustifiably high WIP values to those, again without there being supporting evidence of chargeable work being done. There was a lack of record keeping generally, and Mr Kinsey thought the method used to arrive at the figures was inadequate.

138. In relation to the Fauldhouse invoice Mr Kinsey considered the recollections of the second claimant and Ms Weir. It was not in dispute that there had been a discussion between them about whether the job should be invoiced, which the second claimant confirmed had occurred but which he said involved him mistakenly agreeing to render an invoice when thinking that was for another job. Mr Kinsey was entitled to conclude that they had spoken also about the amount of the invoice, given that it was less than the original full quote, and equated to all of the work save separately itemised work for replacing two toilet sinks. Ms Weir prepared a draft invoice by hand on that basis, but would not have known or thought to do that on her own; she must have been told

by the second claimant who was the only manager having any familiarity with the job. This led Mr Kinsey to believe that the second claimant consciously asked Ms Weir to prepare the invoice and also gave consideration to the amount. This was supported by the two emails from Ms Weir to him, a few hours apart on the day, each with an estimate of how the revenue for the month stood. The second figure was higher than the first by the amount of that invoice. The second claimant was candid in saying that he knew no work had been done save the replacement of a light fitting affected by water ingress, which was a very small job. Mr Kinsey also noted that the first clamant said the second claimant had told her to 'hold' the invoice but that the second claimant did not himself say he had done this. He only mentioned speaking to Ms Weir. Mr Kinsey thought it was unlikely that both claimants had made separate individual errors which when combined resulted in a substantial invoice going out to their own parents, without realising at any point that this is what had happened. Given the evidence, Mr Kinsey was entitled to conclude that the second claimant had deliberately asked for the job to be billed when he knew no substantial work had been done.

139. In relation to that invoice, Mr Kinsey considered the email exchange between the claimants on 8 February 2023, after Mr McInnes had chased for an update on payment. This, along with the inconsistencies in their accounts of how the invoice had come to be rendered, supported his belief that the two individuals were colluding to conceal what had happened. He was entitled to reject the suggested explanation that the first claimant was merely asking for help in wording an email to a senior colleague, that the email attaching the invoice went to the claimants' mother's junk folder and so was not noticed at the time and that the matter was not raised at all when the individuals gathered together over Christmas a few days later.

140. Mr Kinsey believed some degree of culpability attached to the payment to Mr MacDonald in November 2022. He saw this as a less serious matter compared to the issues which had a bearing on the earn-out value. Similarly, the second claimant admitted contravening the instruction of Mr Lennox when he accessed the company's IT system on the day of his suspension. He tried

more than once, having been denied access in his initial attempt. He emailed a folder of documents to his own personal account (having said he did not have one) and his wife's. He said the items in the folder were personal, but accepted that some were work documents. He deleted those documents on the system. This again was a matter of lesser severity to Mr Kinsey, but did point to the crucial issue of trust in a senior employee.

Reasonable belief in misconduct – Amy Blanche

141. The case against the first claimant was narrower in scope. She was suspected to have knowingly colluded with the second claimant to issue the Fauldhouse invoice, in the knowledge that the necessary work had not been done, and in concealing what had happened when Mr McInnes later enquired about it.

142. As detailed above in relation to Mr Kinsey's conclusions about the second claimant, he noted the inconsistency between the claimants' accounts. The second claimant only mentioned speaking, briefly, to Ms Weir to approve an invoice being rendered. The first claimant said that she had gone to the second claimant as she knew the work had not been done, and he agreed that it should be held back. Mr Kinsey was entitled to think that this is something the second claimant would remember doing.

143. The first claimant initially described the matter as a 'miscommunication' between her and the second claimant. Mr Kinsey did not think that her more detailed account represented a miscommunication. The communication, from the second claimant, was clear. She understood it correctly. The issue she said was that she made an error by herself in not then doing what she had been asked.

144. Mr Kinsey also noted that the claimant had not mentioned in the investigatory meeting with Mr Hirst that she had been told to hold the invoice, then put it in the wrong pile. He believed she had changed her account by the time of the disciplinary hearing.

145. Ultimately, Mr Kinsey did not consider what the first claimant told him to be credible. He was mindful of the client being the claimants' parents and that it would be less likely that she would have mistakenly emailed her mother the invoice by typing her address into an email template, after having mistakenly generated the invoice based on Ms Weir's draft, knowing that it should not have gone out. He believed she modified her account of what happened to deflect responsibility for the invoice away from the second claimant and onto herself. As such she had colluded with him. He considered the position of trust and responsibility she held as Office Manager and concluded that that trust had been irreversibly breached.

Reasonable belief – in conclusion

146. In relation to each claimant, the legal test is not whether Mr Kinsey could prove with absolute certainty or even beyond reasonable doubt that each claimant was guilty of misconduct. It is a question of whether he formed a reasonable belief on the balance of probabilities. Given the evidence as a whole, and particularly as he evaluated it as described above, he did form a reasonable belief in each case.

Burchell part 3

147. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every stone, but no obviously relevant line of enquiry should be omitted.

148. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.

149. Neither claimant raised at the appeal stage that the investigation the respondent undertook in relation to them was insufficient. Their position at

that stage was that Mr Kinsey had simply reached the wrong conclusion on the evidence which was available.

150. The respondent submitted that a sufficiently adequate investigation had been undertaken. The claimants disagreed. The second claimants' representative put forward a number of ways in which the respondent was deficient, such as not recording how documents and evidence were passed from one person to another as the processes progressed, Mr Kinsey not coming back to either claimant after Ms Weir was interviewed a second time, Mr Gill nor following up with two individuals he had said he would speak to at the appeal stage, not scrutinising the diaries of the contract managers or interviewing the surveyor used on the Heathrow contract. However, no matter raised, or otherwise detectable from the evidence, was significant enough in itself or cumulatively, to shift the investigation as a whole outside the range of what was reasonable in the circumstances. They were simply too minor, offering too remote a prospect of adding anything to the existing body of evidence.

151. The procedure followed at the appeal stage for each claimant was specifically criticised. It was argued that Mr Gill was given insufficient documentation to understand all of the issues properly, and his input was merely a box-ticking exercise. On behalf of the respondent it was said that it was not being made clear why or how he should have gone beyond the findings and conclusions of Mr Kinsey. No new evidence was brought by either claimant to him, and their appeals essentially amounted to a claim that Mr Kinsey had reached the wrong decision.

152. Mr Gill was clearly less close to the evidence and events than Mr Kinsey, but that is often the case with internal appeals. He made clear when meeting with each claimant that he would not be repeating each disciplinary hearing in full, but would look at the specific grounds put forward, which he did. He had enough evidence and business knowledge before him to be satisfied with Mr Kinsey's approach and conclusions on the issues referred to within each claimant's appeal grounds.

153. The tribunal therefore accepted that the investigation of each claimant's conduct was sufficient to meet the reasonableness test.

The band of reasonable responses

154. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal of an employee on conduct grounds fell within the band of reasonable responses to that conduct which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***.

155. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer in the same situation would only issue a final warning.

156. It is also important for a tribunal to remember that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge what the employer did against the above standard.

157. Mr Kinsey genuinely believed that each claimant was guilty of serious misconduct involving dishonesty. There was adequate evidence for him to be entitled to reach that belief. He considered that each claimant was in a position of responsibility in terms of their seniority or their areas of responsibility within the business. Trust was an essential part of the roles they held. He believed that that trust had been irreparably damaged. He

considered whether a lesser sanction would be appropriate, but believed it was not. In those circumstances dismissal was a permissible option in relation to each claimant.

Breach of contract claim/wrongful dismissal

158. The additional claims of wrongful dismissal must be considered separately. These have to be evaluated on a different common law basis to the approach taken in the unfair dismissal claim, which is statutory. Not all of the relevant principles and considerations are common to both.

159. A fundamental difference is that the question of whether there has been a breach of each claimant's contract is a question the tribunal itself has to decide. This is different from the test for unfair dismissal under section 98 ERA, where the tribunal should examine what the employer did and thought, rather that make its own determination of whether misconduct actually occurred.

160. The tribunal's finding is that the respondent was not in breach of each claimant's contract by dismissing them summarily and without notice pay. This is because both claimants had already materially breached their respective contract themselves, releasing the respondent from its own obligations, and because the respondent ended the contract of each for that reason.

161. The tribunal makes a finding that the first claimant fundamentally breached her contract with the respondent by issuing the Fauldhouse invoice. More specifically, she consciously formalised the draft invoice and sent it to her mother with the knowledge that the work being billed had not been carried out, and with the motive of increasing the company's earnings to achieve the effect of enhancing her brother's and parents' payment under the earn-out provisions of the SPA. It would either help Base EBITDA be reached, or result in a payment of approximately £250,000 if that had already been achieved. The tribunal concluded on the evidence that this was the most probable

account of events. It was not accepted that, had she been told to hold the invoice, she would have sent it to her mother given its substantial amount without realising that she was doing so and in the process failing to remember that she should not.

162. The tribunal also found it more probable than not that the claimant's mother would have received and noted the email, which if genuinely sent in error would have prompted action at that point. Even if the email were not noticed, it would have been unlikely for the topic not to come up in conversation a matter of a few days later when the claimants and their parents came together, or at least at some point before the prompting of Mr McInnes. Finally, it was considered unlikely that the second claimant sent her proposed reply to Mr McInnes' email to her brother, who gave her alternative wording without any record of why that was happening, because she was sensitive about emailing senior people outside of the company. The question posed was not a problematic one if the answer offered was genuine.

163. In acting in this way the second claimant breached the fundamental underlying obligation of mutual trust and confidence underpinning her contract of employment. The respondent brought the contract to an end because of it. It was therefore released from the obligation to give notice or payment in lieu.

164. Similarly, on the balance of probability the second claimant also breached the fundamental obligation of mutual trust and confidence. He did so by colluding with the first claimant to render the Fauldhouse invoice alone. The tribunal considered it more probable that he consciously told Ms Weir that the job would be billed and to prepare a draft of that invoice, knowing that the work had not been done. It is less likely that he mistook the job, involving his parents' property, for another one when asked by her if he wished it to be billed. He most likely told her to bill it and for which amount, given that less than the full value quoted was billed at that time. He would have seen Ms Weir's update by email a short time after, showing an increase in billed WIP for the month corresponding to the value of that invoice. Again on the balance

of probability he directed the first claimant in what to say in response to Mr McInnes on 8 February 2023 in order to deflect his attention away from the real reason why the invoice had been sent. As with the first claimant, it was thought unlikely that he did not discuss the works or the invoice with his parents at any time between 22 December 2022 and 8 February 2023. The work was to have been done by 16 December 2022, and if it genuinely had not been because of an issue with tenants granting access, it is unlikely that the matter was simply left unactioned and undiscussed for nearly two months after.

165. On the balance of probability the second claimant also knowingly caused or allowed revenue values to be overstated, knowing that he and his parents would be more likely to benefit financially. The tribunal cannot conclude and does not conclude that he consciously misstated the revenue value of every job which was under consideration as part of the disciplinary investigation, but reaches essentially the same view as Mr McInnes that, for example, the monthly revenue figure for the client Swarco in December 2022 was so significantly higher than normal that this should have prompted further examination. Despite direction from Mr McInnes in October and November 2022 about the need to have a rigorous system in place for measuring WIP the second claimant placed revenue values on jobs with a number of clients which were a departure from previous practice, were inconsistent with FR102 and the terms of the SPA, and based on inadequate evidence or none at all. Whilst all of that could have occurred because the second claimant knew no better is possible, the timing and consequences when added to the evidence make this unrealistic.

166. For completeness, the tribunal did not conclude that the second claimant materially breached his contract by making a payment to Mr MacDonald in November 2022 or by accessing the respondent's network on the day of his suspensions. Those were however matters which the respondent was entitled to take into account in weighing up the degree of trust it could place in him in the context of his claim for unfair dismissal.

Conclusions

167. The claims for both unfair dismissal and breach of contract or wrongful dismissal at common law are unsuccessful on the evidence presented and when applying the relevant law. The claims therefore are dismissed.

168. Each claimant also made a complaint in respect of accrued annual leave. Those were not addressed as part of this hearing. They cannot therefore be determined and will need to be the subject of further procedure.

169. It would appear that the complaints could be readily quantified and possibly agreed between the parties. They are therefore given a period of four weeks in which to do so. If the complaints are not withdrawn by that point steps will be taken to list the claims for a further hearing.

Employment Judge:	**B Campbell**
Date of Judgment:	**28 June 2024**
Entered in register:	**01 July 2024**
and copied to parties	01/07/2024