EMPLOYMENT TRIBUNALS

Claimant: Mr J Desmond

Respondent: SJB's Mechanics Ltd

Heard at: Bristol (sitting remotely) **On:** 18&19.02 2021 & 19.03.2021

Before: Employment Judge David Hughes

Representation
Claimant: Ms Ruth Kennedy (Counsel)
Respondent: Ms Dawn Oliver (18 & 19.02.2021), Mr Sean Morris 19.03.2021

JUDGMENT

1. The Claimant's claim for unlawful deduction of wages, concerning a failure to pay wages for 28th & 29th April 2019, is well founded and succeeds.
2. The Claimant's claim for breach of contract in failing to pay contractual notice pay, is well founded and succeeds.
3. The Claimant's claim for unfair dismissal is well founded and succeeds.
4. The Respondent is ordered to pay to the Claimant the following sums:
   (a) In respect of unfair dismissal, compensation in the sum of £67,017.04;
   (b) In respect of unpaid notice pay, the sum of £11,313.74, being 11 weeks' net pay;
   (c) In respect of the unpaid wages, £293, being 2 days' net pay.
5. The Respondent is ordered to pay the Claimant the sum of £20,000 in costs.

REASONS

Introduction

1. The Claimant was employed by the Respondent from 06.10.2007 until 29.04.2019. He was dismissed on the latter date. The Respondent company owns and operates Station Garage in Liphook, Hampshire. I understand the Respondent has been owned by Mr Graham Beer and Mr Simon Beer, both of whom are also directors, since April 2018, when they bought the company from its previous owner, one Mr Dyer. Graham Beer is Simon Beer's father.

2. The Claimant brings these proceedings, claiming that his dismissal was unfair, and also claims for unpaid notice pay, unpaid holiday pay, and unpaid wages. The Respondent denies his claim in its entirety.

Preliminary matters

3. The case has not had a smooth progress through to this hearing. On 15.12.2020, the case came before Employment Judge Livesey, and the record of that preliminary hearing is illustrative of the procedural history. I do not need to repeat what Employment Judge Livesey said, but I have been mindful of it during this hearing.

4. The case was listed for 2 days, on 18th & 19th February 2021. Although it was possible to hear the evidence and submissions on those days, it was not possible for me to give my decision, and the case had to be adjourned for me to deliver my decision. That was done on 19.03.2021.

5. At the start of the hearing, Ms Kennedy, counsel for the Claimant, advised me that she had received, at about 20:00hrs the previous night, additional papers in the case, amounting to over 100 pages. These documents fell into 3 categories:

   a) A minute of the meeting on 29.04.2019, at which the Claimant was dismissed;

   b) Invoices, and;

   c) References.

6. The Respondent was represented at the hearing, as it had been at the preliminary hearing before Employment Judge Livesey, by Ms Oliver. She is, or was at the time she represented the Respondent, a senior consultant at Peninsula Business Services Ltd. Peninsula have represented the Respondent since 12.09.2019, but I understand that, for much of that time, individuals other than Ms Oliver were working on the case. At the hearing at which I gave judgment and stated my reasons, Ms Oliver had been replaced by Mr Morris, a solicitor employed by Peninsula. Ms Oliver explained that she had received the new material at about 10:00hrs that morning, had "*skimmed*" it, and forwarded it to those representing the Claimant and to the Tribunal. She explained that the invoices were to show that the allegations of theft or fraud made against the Claimant were true. This was, Ms Kennedy said and Ms Oliver did not dispute, not apparent on their face. Ms Oliver explained that she would want to lead evidence from Messrs Beer, to explain their significance.

7. I heard argument from the parties as to the appropriate course. In a ruling delivered on the first day of the hearing, I denied the Respondent permission to rely on the late documentation, save the minute of the dismissal meeting.

8. In making that ruling, I was not influenced by the fact that the late documents were not able to be located in the Tribunal office's emails.

9. I recognise that Ms Oliver, who represented the Respondent with energy, was somewhat thrown by my refusal to allow the Respondent to allow her to rely on the bulk of the additional material. She should not have been. Had I allowed the Respondent to rely on it, an adjournment would have been necessary, to allow the Claimant to have proper notice of the evidence the Respondent's witnesses intended to give about serious accusations of dishonesty. The alternative would have been an unfair trial by ambush. Given the procedural history as set out in the record of the preliminary hearing before Employment Judge Livesey, the self-evident gravity of an accusation of theft from an employer, and the observations of Sedley LJ in James -v- Blockbuster Entertainment Ltd [2006] EWCA Civ 684 – which deal expressly with late material at para 21 – it was entirely foreseeable that I would refuse to allow the Respondent to rely on this material.

10. The Claimant had sought to have the Response struck out before Employment Judge Livesey. Ms Kennedy, who argued for the Claimant with economy and focus, asked me to strike out the Response, under rule 37(1)(b). In the same ruling in which I dealt with the use of the late material, I found that the Respondent's conduct had been unreasonable, but declined to strike out the Response.

11. A considerable part of the first day was taken up with argument about this additional material and the consequences of its late delivery to the Claimant's representatives. There were also technological difficulties during the course of the hearing. It appeared for some time that the Beers, who were sat together in the same room throughout the hearing, did not have access to the bundle. Graham Beer, whose evidence was started on day 1, had not read his statement before starting his evidence, meaning that time had to be allowed for him to do so. Eventually, all three witnesses from whom I heard had access to their statements, and to the bundle, when giving their evidence.

12. In order to ensure that the evidence and submissions were finished in the two days listed for the hearing, I decided not to require Ms Kennedy to go over with Simon Beer the ground she had gone over with Graham Beer, who gave evidence before his son. Instead, I allowed her to invite Simon Beer to adopt his father's answers or indicate where he had any disagreement with them.

13. Simon Beer had not read his statement before giving evidence. It emerged in the course of his evidence that he is dyslexic and has difficulties in reading. I was concerned that the short time he had been allowed to read his statement may not have been enough, so I interrupted his cross-examination and allowed the Claimant's evidence to be interposed. Simon Beer had that time, and the short adjournment, in which to read his statement, and I allowed his father to speak to him whilst the Claimant was interposed, to assist him reading his statement. I then had him recalled,

and he indicated that he adopted the content of his statement and his father's answers in evidence.

Substance of the dispute

14. The Claimant describes his post in his ET1 as "*Garage Manager*". The witnesses for the Respondent, Graham Beer and Simon Beer, disputed this title – they called him "*workshop manager*" – but it is clear to me that that was more a question of semantics than substance.

15. The Claimant, probably throughout his time working for the Respondent and certainly for the time the Respondent was owned and controlled by the Beers and for a considerable time before that, occupied a post of considerable responsibility. The Claimant's evidence, which was not disputed in cross-examination, was that he had been running the garage since 2015 or 2016, when the previous owner had become ill. There was a bookkeeper, Ms Lewcock, present to manage decisions alongside him. The Claimant had access to the company's bank accounts, credit card and debit card, could pay staff wages, and overtime if necessary, could manage payments coming in, credits from suppliers, and choose which suppliers were to be used.

16. Cash payments that came in were recorded and put into a cash box. The cash was counted daily, in manuscript by Ms Lewcock. Julie Law, the receptionist, was also authorised to take cash payments.

17. On 29.04.2019, at 09:52hrs, the Claimant received a text message from Graham Beer, that read as follows:

    We have a meeting with accounts at 2:15 I will meet you there James.

18. The Claimant replied, "*OK, what about?*", to which he received the reply, "*Viv said that we could have a meeting*".

19. At the meeting, the Claimant was handed a letter that read as follows:

    "*Dear James,*
    You will recall that I have said to you multiple complaints and we need to improve our customer and suppliers confidence in us.
    Unfortunately this has developed into an avalanche of complaints from customers and suppliers.
    I have attended a meeting of customers, at their request, and a meeting with suppliers, at their request who have made their concern quite apparent.
    I have no choice but to let you go.
    So please hand over the safe and building keys.
    I hope you find a change of garage which matches your desire.
    Yours sincerely
    G Beer
    Director"

20. The witnesses differ in their accounts of what happened at that meeting, and what led up to it. Graham Beer's statement can be summarised as follows:

    a) That the Claimant was rude to people. Just before the Beers had acquired the garage, the Claimant had told the bursar of the Royal School at Hindhead – a good customer of the garage -to "*Fuck off"*. When challenged about this, he had responded that they were arguing with him, and that "*anyway there are plenty of customers out there*";

    b) That the Claimant's attitude to the garage's income was to spend freely, in the belief that it was "*allowable against tax*";

    c) That the Claimant was living a lifestyle beyond his means;

    d) That friends, customers and suppliers were telling Graham Beer that the Respondent was trying to run down the garage, as he planned to set up a garage around the corner. When this was raised with the Claimant, he was evasive;

    e) That, prior to the acquisition of the business from Mr Dyer, Graham Beer had been warned that money was being "*syphoned off*", and that the Claimant should be sacked as responsible. Graham Beer decided to give the Claimant the benefit of the doubt;

    f) That a customer had seen the Claimant pocked £40 when another customer was paying an invoice;

    g) That Mr Beer personally saw the Claimant pocket £10. Shortly after this, a cash register was installed;

    h) That, prior to the setting up of a control system by the Beers, there had been a "*free for all*" and little or no control of cash or accounting;

    i) That the Claimant's performance had started to decline noticeably in the spring of 2019, he appearing to spend more time hatching his own business plans. Graham Beer learned that the Claimant had contacted the owner of a property he wanted to lease, but this fell through;

    j) Again in the spring of 2019, Graham Beer was told by suppliers, other garage managers and owners, and the garage's own customers and staff, that the Claimant was deliberately causing problems for the business, as he was planning to set up his own business;

    k) That the Claimant downloaded the garage's 40,000 customer base onto his mobile phone, and, so Graham Beer believed, a missing USB thumb drive, that files had been removed from a filing cabinet for which only he had the keys, and that a total of over 84 gigabytes of information had been deleted from the computer hard drive. Graham Beer had to ask 8 suppliers for copy invoices and statements, and those suppliers put the Respondent "*on stop*". Graham Beer says that

this meant that, until they were paid, the Respondent could not perform work in the garage, meaning that a day was lost due to parts not being delivered. The Respondent had to accept the suppliers' invoicing as correct, without knowledge of whether the parts represented on the invoices had gone, and the Respondent lost any purchase rebate as the Claimant had not sent the signed suppliers' rebate forms;

l) That the Claimant was not charging VAT if customers paid in cash. In his statement, Graham Beer says that "*….I'm not sure if the old computer is available but staff can be asked for a declaration of truth*";

m) That the Claimant started a Friday lunchtime fish & chips group for the staff, paid for by the Respondent. This expanded, without the Respondent's agreement, to daily sandwiches and drinks. Staff now expect their lunch to be paid for by the Respondent;

n) That the Claimant sought to drive a wedge between the Beers and the Respondent's staff;

o) That the Claimant would buy vehicles that had failed their MOTs from customers, use the Respondent's staff to repair them, and sell them on, pocketing the profit. At least one customer had approached Graham Beer, asking after the owner of the garage – apparently intending to refer to the Claimant – wanting to buy a car for cash;

p) Graham Beer and his son had an off-site meeting with customers, who told the Beers that they were not happy and would not come back unless something was done about the Claimant;

q) The Beers had a meeting with the Area Manager of ASAP, a supplier. Other suppliers had expressed disappointment, but left it to closer suppliers to raise their grievances. The manager from ASAP was unhappy about alleged verbal abuse and swearing from the Claimant, especially in front of their customers. It was said that the Claimant would frequently throw returned parts across the counter at the supplier's premises and tell them to "*fucking sort it out*" in front of their customers;

r) During this time – which I take to be the spring of 2019 – sales were falling and the Respondent's customers were dropping what Graham Beer describes as "*soft warnings*" that they may go elsewhere.

21. Graham Beer says in his statement that the Respondent wanted to see what it could do to help the Claimant, but that "*…he was not interested as he was already set up and working for himself after hours*". This suggests that, by this point, the Respondent had taxed the Claimant with the alleged problems that Graham Beer has identified by this point in his statement.

22. Immediately after this in his statement, Graham Beers says the Claimant was breaking his contract of employment. He refers in his statement to pages 17 and 18 of the contract, which he says "*explicitly forbid this work*".

23. Graham Beer's statement continues. He says that he and Simon Beer continued their investigation, asking staff what the Claimant had been up to. Staff told them, Graham Beer says, that the Claimant would regularly ask them to work on private jobs of his, referred to as "*Homers*". These allegations were put to the Claimant, but he refused to admit them.

24. Graham Beer says that an exploratory meeting was arranged on neutral ground, with an independent witness at the Respondent's accountant's offices. Graham Beer says that the Claimant was invited to attend, was made aware of the concerns, and that he – the Claimant – told staff that he was going over to the accountant's office to be sacked.

25. The Claimant is said not to have responded to the Graham Beer's questions in a forthright manner. Although the meeting was intended to be an exploratory one, not a disciplinary meeting, Graham Beer makes the point that the Claimant did not ask anyone to accompany him. It was intended to be an opportunity to discuss work matters on neutral ground.

26. At the meeting, Graham Beer says that the Claimant declined to offer any explanation, or to ask for time to consider his reply. Graham Beer says that it was apparent to him that the Claimant realised that he had been "*rumbled"* and did not want to engage.

27. With the business losing money and customers leaving, Graham Beer decided that the Claimant's lack of engagement with the process amounted to gross misconduct, and dismissed him with immediate effect.

28. Simon Beer's statement says that he had worked at the garage before he and his father took over the ownership, as it was short staffed and had a surplus of work. This gave him what he describes as "*insights into the way the garage was being managed by the Claimant in the absence of Mr Dyer*". He professes to have found the way cash was handled difficult to understand at first, with cash being left out of the cash box, no reconciling taking place, and there being no accounting system of which he was aware.

29. Other mechanics with whom he became friendly told Simon Beer that they had evidence that the Claimant was benefitting financially from his position managing the business. The mechanics had approached Mr Dyer about this, and Mr Dyer discussed this with his bookkeeper and accountant. The staff gave invoices for parts that did not correspond to invoices raised. Simon Beer says that he was aware of a shortfall of £14,000, which could not be explained.

30. The Claimant would disappear, sometimes returning with parts from ASAP next door, then visit his own car and return with no parts. This struck Simon Beer as suspicious.

31. Simon Beer also says that customers would ask for the Claimant personally, so that they could pay cash for their repairs, and that the

Claimant's friends would regularly bring their vehicles in and pay cash, the arrangement appearing to be that they did not have to pay VAT when paying cash.

32. Simon Beer says that, on several occasions, he witnessed a customer he doesn't name approach the Claimant and ask if he had any cheap cars to purchase.

33. Having taken over the garage, the Beers ask staff to fill in a weekly time sheet. He says that the Claimant would put that he had worked up to 20 hours a day. The Respondent's accountants are said to have thought that the Claimant was fraudulently claiming excess hours.

34. Simon Beer, like his father, says in his statement that he thought the Claimant to be living beyond his means. He says that he believes the Claimant to have put the cost of two replacement "*turbos*" for drones that he has, onto the garage's bill.

35. Simon Beer says that numerous people had approached him to tell him that the Claimant is rude and obnoxious. He says that customers who pay cash approve of him, but that a number of people in the garage trade – which, I was told in live evidence, is a small world in that area – found the Claimant to be rude and offensive, and this was not helping the Respondent's business reputation.

36. Simon Beer believed that the Claimant had been approaching the Respondent's customers, as he wanted to set up his own business in competition with the Respondent.

37. Simon Beer says – and I quote this directly from his statement – as follows:

> "*31. After our meetings with suppliers and customers we were left with no option but to investigate what we had been told and we clearly had many suspicions of our own. We decided to arrange an exploratory meeting with Mr. Desmond.*
>
> *32. We arranged for an offsite meeting at our accountant's office so that we could have the meeting where we put the allegations with an independent witness. The Claimant was invited to the meeting.*
>
> 33. *Mr. Desmond did not have much to say and was vague in his answers when we put these allegations to him. We were getting nowhere. He did not deny or try to supply an answer to any of the questions. After some discussion, it was decided to dismiss the Claimant for Gross Misconduct, effective immediately. He was asked for his keys to the garage*."

38. The Claimant's statement explains that Mr Dyer sold the garage to the Beers in April 2018. He queries which corporate body he was working for in October 2017 – his statement suggests that the garage was sold by Mr

Dyer to the Respondent company, whereas I had understood that the Beers had bought the company that ran the garage – but nothing is said to turn on this.

39. The Claimant says that, initially, he carried on working much as he always had, and had access to accounts and invoicing systems to help him with his managerial duties. That changed over time. One problem was that he no longer had access to accounts, and could not manage how payments were made to staff or suppliers.

40. The Claimant says that Graham Beer was the main director, but was rarely in the garage, and communication with him was mostly by text message. The Claimant says that he often had to check with Graham Beer whether customers had paid, and to prompt him to make staff payments.

41. Simon Beer, in addition to being a director, worked in the garage as a mechanic. The Claimant was responsible for managing Simon Beer in his role as a mechanic, but Simon Beer was also a director, and sometimes made decisions without reference to the Claimant, such as allocating work to members of staff. Simon's sister, Debbie, would also attend sometimes and work in the office or on reception, and would also sometimes try to get involved in decision-making.

42. The Claimant says that, by the end of 2018 and into 2019, the atmosphere in the garage was sometimes tense. The Claimant felt that he was being gratuitously undermined by Simon Beer. He gives the example that Simon Beer would criticise him for the amount of overtime that he worked, but also if he left on time, which the Claimant says he resented. The tension led to disagreements, and on 2 or 3 occasions, he says, voices were raised.

43. The Claimant says in his statement that he believed Graham Beer to be happy with his work. Although there was tension with Simon Beer, both Graham Beer and Debbie said to the Claimant that they knew what Simon was like.

44. By early 2019, the Claimant wasn't happy with how things were going. He was thinking about how the possibility of setting up his own business. He says that this hadn't progressed very far when he approached James Iddenden about investing in the idea. He did so because, when Mr Dyer had decided to sell, Mr Iddenden had mentioned to the Claimant that he might be interested in buying. He disputes the suggestion made in an undated letter included in the bundle that he had all the details of the Respondent's customers. The Claimant acknowledged that he wanted to set up in Liphook, as that was his local area, and that doing so would inevitably put him in competition with the Respondent.

45. The Claimant says that, prior to 29.04.2019, he had no idea what was going to happen. He had not been told about any complaints about his work, had had no formal or informal warnings.

46. He received the text message, to which I have referred above. He then emailed Viv, to ask what the meeting was about, so that he could be prepared. Receiving no reply, he telephoned her, and she told him that the meeting was about clarifying who was responsible for various tasks, to make sure that everyone knew what they had to do and that there was no overlap. She said that the meeting shouldn't take very long.

47. When he got to the office, Viv wasn't there. Present were Graham and Simon Beer, and a woman he took to be Liza Casteller. Ms Casteller was responsible for the payroll, but she seemed to the Claimant to be there to take notes. She had a pen and a notepad, but he did not see what - if anything – she wrote down.

48. Graham Beer asked the Claimant to sit down. The Claimant has Graham Beer visibly shaking, and looking angry. The Claimant sat down. Graham Beer handed to him a letter, and said "*read this, we are letting you go, this will explain everything, and we want your keys back now*". Although the letter referred to an "*avalanche of complaints*", the Claimant wasn't given any details. No questions were asked of the Claimant.

Assessment of the evidence and findings of fact

49. Before I set out my specific findings of fact, I will say a little about the witnesses in this case.

50. Save on one particular matter, I have attached no weight to the demeanour of the witnesses when giving their evidence. There were some difficulties at the Beers' end, which may have impacted on their demeanour when giving evidence.

51. Graham Beer was rather gruff when giving evidence. I do not read anything into that – it may be consistent with regarding these proceedings as a tiresome irritation, but it may equally be consistent with frustration at having to explain what seems to him to be self-evident. Gruffness of demeanour is, in itself, proof of nothing other than that a man is, or can be, gruff.

52. Graham Beer also appeared to me to be the dominant personality between himself and Simon Beer. Simon Beer appeared to me to be someone who, in these proceedings at least, followed his father's lead.

53. The Claimant was more personable in demeanour. But that a man who is now running a business that, I was told, has managed to attract a significant amount of custom from the Respondent's former customers, can be personable is no surprise. That he can have a personable demeanour when giving evidence to an Employment Judge is still less of a surprise. But that a man can be personable does not mean that his evidence is, for that reason, necessarily reliable or, indeed, honest. I note what the Beers said in evidence, and Ms Oliver submitted in closing, that the Claimant can be different in other circumstances, that he can be aggressive. That may be so. The fact that he was not aggressive before

the Tribunal does not mean he can't be aggressive elsewhere. But I have no satisfactory evidence that he is aggressive elsewhere, and I do not so find.

54. I find that Graham Beer and Simon Beer were extremely unreliable as witnesses. On some matters, I find that the shortcomings in their evidence went beyond mere unreliability, into dishonesty.

55. The one late document that I allowed to be introduced was a minute of the meeting of 29.04.2019. It is headed "*Dismissal meeting minutes SJB Mechanics Ltd*". It lists Graham Beer as chairing the meeting, with the Claimant and Simon Beer as present, and one Clare Porthwaine, described as "witness". It reads as follows:

"*Graham opened the meeting by indicating that customers and suppliers were not happy with James attitude and that he cannot allow him that to continue and that he would like James to leave immediately and return all keys and remove all personal items.*

Graham then passed a sealed envelope to James indicating that everything was explained in the letter. James replied "well we'll see about that", "I can't get rid of my things today, I will have to come back for my tools" Graham confirmed that was OK.

The following keys were returned to Graham:
front door key
alarm fob
safe key
key cupboard key
James then stood up and walked out saying you'll be hearing from me", Graham replied "I expect we will" James then exclaimed "F'ing right you will" (expletive was said as actual word) and he left the building.

Graham and Simon left 5 minutes later."

56. At the hearing, Graham Beer told me that he was the author of that minute. He maintained that, notwithstanding its contents, he had, at the start of the meeting, sought to engage the Claimant in dialogue, to find out what the problem was. He said that he had drafted the letter referred to above just in case.

57. Simon Beer's account of the meeting was confused. He was shown the minute, and at first said that he was consistent with what he recalled, but he had earlier agreed with his father's answers, he expressly said that the Claimant was invited to discuss matters, and later said that his father had taken the note of the meeting.

58. As to the meeting on 29.04.2019, I find as follows: I find that the Claimant was summoned to the meeting without any indication that he was to be dismissed. He was misled by Graham Beer as to the nature of the meeting.

59. I find that Graham Beer and Simon Beer's evidence that the meeting was intended to be exploratory was dishonest. I find that their evidence that they opened the meeting by seeking to engage the Claimant in a dialogue about problems was dishonest, as was their evidence that Graham Beer took the minutes of the meeting, and Graham Beer's evidence that the dismissal letter was written just in case. In finding that their evidence was dishonest, I rely on the following:

    a) The minutes of the meeting – which were disclosed very late – are headed "*dismissal meeting minutes…".* This makes no sense if the meeting was not intended to be a dismissal meeting. I appreciate that the minutes would have been typed-up after the meeting, but there is no reason why it would have been inaccurately recorded;

    b) The minutes refer to Graham Beer in the third person. At no point in his evidence, in his statement, or in any other document that I have seen, does Graham Beer engage in illeism. The minutes were, I find, written by Ms Porthwaine ;

    c) The minutes don't mention any discussion before Graham Beer refers to the supposed unhappiness of customers and suppliers. Although a minute is not a verbatim transcript, I think it is not without importance that neither the Beers, nor Ms Oliver, suggested that this had simply been missed out. Indeed, whilst that might have been a possible, if implausible, suggestion if the Respondent had accepted that Ms Porthwaine had written the minutes, on the Respondent's case – that Graham Beer wrote the minutes – I find this wholly incredible;

    d) The suggestion that the dismissal letter was written just in case, defies credibility. If it had been written just in case, one might have anticipated that it would include some reference to the attempt to engage in dialogue at the outset of the meeting. If drafts were being prepared just in case, one might have expected a draft to be prepared just in case the Claimant had engaged in dialogue, in which case he may have been given some kind of warning. I was shown no such draft;

    e) In the course of these proceedings, I find that the Beers have been happy to make very serious allegations against the Claimant, with little or any evidence to support these allegations. Whilst the making of allegations without evidence is not, in itself, necessarily dishonest – one can form an honest belief for which there is little or no evidence – I consider that this goes beyond merely impacting on the reliability of their evidence. I note that, at times during the hearing, Ms Oliver said to me words to the effect that she was not able to demonstrate the Respondent's case because she was unable to rely on the late material. That might be thought to be an invitation to engage in speculation about what might be in the excluded material. I decline that invitation.

60. Ms Oliver, sensibly, did not argue that the Claimant's dismissal was procedurally fair. It was not. The Respondent has a disciplinary policy. It did not follow it.

61. The question then becomes, was the dismissal substantially fair.

62. That requires me to find why it was that the Claimant was dismissed. That task is not made any easier by the differing accounts provided on behalf of the Respondent:

    (a) In the letter handed to the Claimant on 29th April, the reason for the dismissal is said to be the complaints from customers and suppliers;

    (b) In the minute of the meeting, the reason is recorded as being that customers and suppliers were not happy with the Claimant's attitude;

    (c) In the ET3, it is said that Graham Beer had concerns about the Claimant's conduct, including;

        (i) Theft;

        (ii) Discounted products;

        (iii) Uncorroborated stock;

        (iv) Client communications;

        (v) Loss of a key client, the Royal School;
        That these were put to the Claimant at the outset of the meeting, the Claimant refused to engage with the Respondent and left the premises without providing any rationale or justification to the allegations. In the absence of any mitigation, the Respondent substantiated the allegations, and the Claimant was dismissed for actions of gross misconduct;

    (d) Graham Beer's statement lists a litany of complaints against the Claimant, but, properly considered, it appears to say that the reason for his dismissal was his failure to engage in the meeting.

63. I will now consider all the reasons advanced by or on behalf of the Respondent.

64. I do not accept that there was an avalanche of complaints from customers, or anything like it. No actual complaints were supplied to the Claimant at or before the meeting. I accept that complaints will not necessarily be in writing, but if they reached a level that would cause concern – some volume of complaints is to be expected against even the most diligent and courteous of workers – I would expect to see that recorded. I was told in oral evidence by Graham Beer that there was a book in which complaints were noted. I have not seen any such book, and it would be wrong for me to engage in speculation about the existence or content of material that may or may not exist. The relevance of such a book would have been

obvious to Graham Beer, whose witness statement refers to his background in the chemical industry and appears designed to give me the impression that he is a man of considerable business acumen. If it existed, and was genuine, it is surprising that it was not mentioned before the hearing.

65. There is no evidence of any complaint made about the Claimant before he was dismissed. There is a letter dated 13.05.2019 – 2 weeks after the dismissal meeting – from Mr Karl Fortenbacher. He describes himself as the branch manager of Auto Spares and Parts – ASAP – and he complains of the following:

    (a) The Claimant had switched to other suppliers;

    (b) When taxed by Mr Fortenbacher about this, the Claimant didn't answer, which Mr Fortenbacher found rude;

    (c) The Claimant has continued using ASAP's parking space, even though he had started using other suppliers – there had been a gentlemen's agreement that each business could use parking spaces of the other when their own were full. A member of staff of ASAP on one occasion asked the Claimant to move a customer's car that was blocking an ASAP dispatch van. The Claimant did move his car, but is then said to have opened ASAP's shop door and shouted at one of the customers that he should probably move his car as ASAP would probably ask him to "*fucking*" move it. The customer is said to have been neither amused nor surprised.

66. Mr Fortenbacher's letter – which post-dates the Claimant's dismissal – has all the appearance of having been written by a supplier unhappy that the Claimant chose to use other suppliers. In his live evidence, Graham Beer accepted that the Claimant had the authority to make a decision as to which suppliers to use, although he later said that the Claimant had the authority to advise him as to which suppliers to use.

67. Mr Fortenbacher was not called to give evidence, and did not produce a statement. All that I have about this alleged incident is a letter post-dating the Claimant's dismissal, from someone who appears to be a supplier disgruntled by the Claimant's choice to use other suppliers.

68. I am not satisfied that I can accept the account in Mr Fortenbacher's letter. I am doubtful that Mr Fortenbacher made any complaint about the Claimant swearing and throwing stock before the Claimant was dismissed, and I do not find that he did. I therefore find that, when the Claimant was dismissed, Graham Beer and Simon Beer did not believe that the events described in the letter had happened.

69. I was specifically told by Graham Beer in evidence that he had had meetings with Matthew Bartlett and Justin King. But the bundle includes a letter from Mr King, and an email from Mr Bartlett, denying any meeting with the Respondent. I do not have statements from either man. I am,

however, not satisfied that either met with the Respondent as the Respondent alleges.

70. I do not accept the Beers' assertion that there was an avalanche of complaints from customers, and on the evidence before the Tribunal, I find that there was not. Although there may have been some level of complaints, as I have said already, that can happen with even the most conscientious and professional of tradespeople. I am not persuaded that any complaints made regarding the Claimant were of a level to cause serious concern to the Beers. If they had been, I would have expected the Beers to have raised questions of the Claimant's performance formally, pursuant to the Respondent's disciplinary procedure.

71. Another specific issue raised in evidence was the allegation that the Claimant had told the bursar of the Royal School to "*fuck off*". I do not accept that this happened. I was told in evidence that the Royal School is now a customer of the Claimant's new garage business, and this was not disputed. That is hardly consistent with him having offended its bursar. In evidence, Graham Beer said that the school was unaware that the Claimant was behind the garage it now uses. However, I was told in evidence that the garage industry is a small world in the Liphook area. I do not accept that the Royal School are unaware that the Claimant is behind the garage it now uses.

72. I move now to the allegations about the Claimant's conduct included in the ET3.

73. The first of these is the allegation of theft. In their statements, the Beers expand upon this. Graham Beer said that a customer saw the Claimant pocket £40, and that he himself saw the Claimant pocket £10. Simon Beer said that Mr Dyer's accountant had identified a shortfall of £14,000 in the accounts, and identified the Claimant as the likely culprit. Graham Beer mentioned the £14,000 in his live evidence, claiming that there had been a case by the previous owner, which the Beers decided to drop. He said that they had tried to get Mr Dyer, and Lorraine, and the accountant, to put something in writing, but both had refused. He said that one customer, a man named Dave, had spoken to the Respondent's solicitors – by which I understood him to mean Peninsula – but had not wanted to go on the record. At one point, Ms Oliver attempted to confirm this to me. I told her that that would be crossing over from the role of advocate into that of witness, which I would not permit.

74. I find the Beers' accounts of alleged theft wholly unconvincing. These are serious allegations to raise, and unpleasant ones too.

75. The Beers' own behaviour is at odds with any suspicion that the Claimant was stealing money from the business. When they bought the business, their evidence suggests that they looked at the accounts – or at least discussed the position with Mr Dyer's accountant. If they are right that he suggested that the evidence pointed to the Claimant, I find it incredible that the accountant would have been unwilling to say something like that

in a statement, either then or now. If the Beers had had a serious suspicion that the Claimant had stolen £14,000 – a significant amount of money – I find it incredible that they would not have asked Mr Dyer to dismiss him before buying the garage, or taken some disciplinary action themselves against him. They did not do the former, and although they said that they spoken to him numerous times about his performance, there is nothing like the formal investigation I would have expected had they genuinely had such suspicion.

76. As to the smaller amounts, I note that Graham Beer says that he personally saw the Claimant pocket some money. Admittedly the amount in question is small, but an employer is entitled to take the view that theft in the workplace of any amount is serious, and it was not suggested to me that Graham Beer would have viewed theft of a small amount as a triviality. It may be that, if Graham Beer did indeed see the Claimant pocket some money, that there was the risk of some misunderstanding - for example, possibly the customer in question was known to him and the £10 was a private debt owed. But it is noteworthy that Graham Beer did cite this possibility as a reason for not raising the matter with the Claimant. It is wholly incredible that the Claimant would be permitted by the Beers to remain in a position of managerial responsibility if there were serious concerns that he had his hand in the till.

77. I do not accept that the Beers' had any genuine suspicion that the Claimant was engaged in theft, of amounts large or small. There is no evidence that had been put before the Tribunal that would support such a conclusion. The Beers' willingness to make such serious accusations without any supporting evidence, and when their own behaviour is wholly at odds with them having such suspicion, is not to their credit. I consider that their evidence on this was not merely unreliable, but dishonest.

78. I do not forget that the Beers introduced new cash-handling systems at the Respondent. I do not think this can be said to support the suggestion that they suspected – or knew – that the Claimant was engaging in theft. The system that the Claimant described before their acquisition of the garage seems to me to have been rather antiquated.

79. In evidence, Graham Beer said that swearing is gross misconduct, justifying immediate dismissal. He qualified this by recognising that there is banter in the workshop, which is ignored. Banter is a term that can encompass anything from serious verbal abuse to light-hearted and good-natured exchanges employing informal vocabulary. In this case, there is no suggestion that the banter to which Graham Beer referred was anything to which any employee took objection. It is unsurprising that, in the workshop – as in many a workplace – profanities are used without exception being taken. Graham Beer drew a distinction between workshop conversations, and speech in front of customers. This is understandable, although one can see that relationships may develop with customers in which some swearing, of a good-natured sort, might be viewed with some tolerance. And some instances of swearing might indeed reasonably be characterised as gross misconduct. But I do not accept – and do not

understand the Respondent to contend – that there was a single instance of alleged bad language which the Beers had in mind, save possibly for the allegation concerning the Royal School, which I have already rejected. If it was more a question of a generalised use of inappropriate language, I would have expected it to be raised in some form of warning, prior to dismissal. There is no evidence of that. I therefore do not accept that the Beers, or anyone else at the Respondent, had a genuine belief that the Claimant was swearing at customers.

80. The next allegation is described in the ET3 as "*discounted products*". This is not explained in the ET3, but it may be intended to refer to an allegation that the Claimant would allow customers to pay prices without VAT, if they paid in cash.

81. I do not accept Graham Beer's evidence on this point. I note that it was not alleged that the Claimant had pocketed the proceeds of all cash sales. The cash was, therefore, presumably going into the system that the Respondent had in place at the relevant time. If VAT was not being charged on some products or services on which it should have been charged, I would have expected the Beers to have taken some step to address that. There is no evidence of any step being taken.

82. There was an email dated 15th May, from Deborah Freemantle, that refers to an allegation of VAT being taken off an invoice. This email post-dates the Claimant's dismissal. Ms Freemantle did not give evidence, or make a statement. I am not confident that I can rely on this email, certainly not to the extent that would be necessary to find in favour of the Respondent on so serious an accusation.

83. I do not accept that the Beers had any suspicion that the Claimant was discounting products when cash was paid.

84. The next heading in the ET3 is "*uncorroborated stock*". It is not easy to identify what this went to. It seems to me that it might relate to an accusation made, but only mentioned briefly and not developed, that the Claimant had caused the Respondent to have to accept as accurate invoices from a supplier or suppliers, and lost it credit that it may have been due. As I have said, this was only touched upon very briefly in evidence, and there was no supporting evidence.

85. I am not satisfied that "*uncorroborated stock*" formed part of the reason why the Respondent dismissed the Claimant. This is not a reason mentioned in the minutes of the dismissal meeting. It is not referred to in the letter that was handed to the Claimant at the dismissal meeting. It is not mentioned in the letter of 08.05.2019. I am not satisfied that the Respondent's evidence is at all reliable on this. It had the flavour of an artificial accusation designed to assist the Respondent at this hearing

86. I am not satisfied that the Respondent had any genuine concern about "*uncorroborated stock*".

87. The next concern advanced in the ET3 is "*client communications*".

88. I have already dealt with the question of alleged bad language with customers. Other matters that may fall under this heading were also advanced.

89. It is not disputed that, on 26.04.2019, the Claimant approached a customer of the garage known as Jim. This is the Mr Iddenden, to whom I have already referred. The Claimant enquired with him if he might be interested in loaning the Claimant £20,000 to invest in a rival garage.

90. In his evidence, the Claimant explained that, when the purchase of the garage by the Beers was being arranged – a process which, the Claimant said (and it was not disputed) took some time, Mr Iddenden had expressed interest in buying the garage himself, and asked the Claimant to approach Mr Dyer on his behalf. The Claimant knew therefore that he had had some money and been open to investment opportunities.

91. It is contended on behalf of the Respondent that this approach shows that the Claimant was intending to enter into competition with the Respondent. The Claimant's response to this was, that opening his own garage, or buying a garage, was a long-standing ambition, but one that was, as he put it in answer to questions from me, a "*pipe dream*". He told me that his work at the garage didn't seem fun any more, nor did it seem a challenge.

92. I accept the Claimant's evidence, that having a garage of his own had long been an ambition. I am somewhat more cautious about accepting that he was not actively planning to open a rival garage immediately before his dismissal. The enquiry to Mr Iddenden seems to be in some tension with this being merely a "*pipe dream*", as does the fact that a company was incorporated at Companies House on 01.05.2019 – the certificate showing the received for filing in electronic format date as 30.04.2019.

93. On balance, however, I do accept that the Claimant was not actively pursuing the setting up of a rival business immediately before his dismissal. The speed of acting in setting up his own company is as consistent with speedy action by his solicitors as it is with a ready plan before his dismissal. In that, I note that the Claimant's solicitors wrote to the Respondent on 30.04.2019 – so the Claimant had been in contact with them by that date. They wrote again on 03.05.2019, a detailed letter. On balance, I find that the enquiry of Mr Iddenden was merely the sounding out of the possibility of something that was, at that stage, merely a pipe dream, and that the incorporation of the Claimant's own company was a speedy reaction to his dismissal.

94. There is a letter in the bundle from Mr Iddenden. It says that he showed the text message to Simon Beer. Simon Beer doesn't mention this in his statement. The letter is undated. And Mr Iddenden has not given a statement.

95. It is not in doubt that the text message about the £20,000 did come to the Respondent's attention. But it cannot have formed part of the reason for dismissing the Claimant, if the Respondent was not aware of it until after the Claimant was dismissed.

96. I find that that was the case. I find that the Respondent did not have an honest belief that the Claimant was in the process of setting up a rival business, before he was dismissed.

97. Another matter that may fall under the heading "*client communications*" is a car key tab, on which the Claimant had written "*freeloader*". The Claimant told me that this was a pun on the name of Deborah Freemantle.

98. I accept his evidence on this point. Graham Beer told me that this was put to the Claimant in the dismissal meeting. But it is not referred to in the minute of the meeting. There is no evidence from Ms Freemantle herself.

99. The final heading in the ET3 is "*loss of a key client, the Royal School"*. I have already dealt with this.

100. The other matters that the Beers complain about in their statements are not asserted in the ET3 to be reasons why the Claimant was dismissed. Those that I have not addressed already, I will now deal with briefly.

101. I do not accept that the Claimant had an irresponsible or profligate attitude towards the garage's income. On the contrary, I find that he was a responsible and conscientious employee. The bundle included a text message from Graham Beer to the Claimant, congratulating the latter on a turnover of £96,659.64, dated 30.03.2019.

102. The Claimant told me that, when the garage was purchased by the Beers, insurance was not in place. When he raised that with Simon Beer, the latter did not appreciate the urgency of addressing this, because, for example, customers could not be permitted to drive courtesy cars if insurance was not in place. The Claimant was not challenged about this. Although tangential to the issues in this case, it is, I think, an example of the Claimant behaving responsibly and Simon Beer not doing so, and I accept that it happened.

103. I do not accept that the Claimant was living beyond his means. There is no evidence of him doing so before me. This allegation has all the flavour of something invented to support the allegations of theft, which I have already rejected.

104. I do not accept that the Claimant's performance at work had started to decline noticeably in the spring of 2019. I have referred already to the congratulatory text message regarding turnover.

105. Regarding the expansion of fish & chips to the purchase of lunch every day, this was not dealt with significantly in live evidence, and I make

no finding, other than that it did not feature in the Respondent's decision to dismiss the Claimant. There is no evidence of the Respondent having raised it as an issue before the Claimant was dismissed, having raised it at the dismissal meeting, or in the letter handed to him at that meeting, or in the letter of 08.05.2019.

106. I do not find that the Claimant sought to drive a wedge between the Beers and the garage's staff. There is no satisfactory evidence before me of him attempting to do so.

107. I do not accept the Beers' evidence that the Claimant would engage in work not for the Respondent's benefit on its time and/or premises. I have seen no satisfactory evidence of this.

108. Related to this is the allegation that the Claimant stole the Respondent's customer database, for use in his own business. I do not accept this. I do not think that the apparent success of the Claimant's business – the evidence suggested that his garage has attracted a significant level of business from the Respondent - to the detriment of that of the Respondent, is good evidence of him having stolen their customer database. It is at least as consistent with him offering a service that some customers, perhaps many customers, prefer. The Claimant gave evidence about difficulties that arose at the garage. One was the difficulty relating to insurance, that I have already mentioned. I have also already referred to the tension between himself and Simon Beer, as the latter was both a technician and a director. Simon Beer, the Claimant told me and I accept, would watch him, rather than get on with his own work. There was evidence of tension between them in text messages put before me. This is the one issue on which demeanour may be of some assistance. It is easy to see how the demeanour of the Claimant may be more likely to attract customers than that of the Beers. I also note that the weight of the reviews in the bundle is positive to the Claimant, although I attach little weight to this.

109. Before I move on from the question of the database, I note that, when I asked Graham Beer if the Information Commissioner's Office had been notified of the alleged theft of the database, he responded, "*who are they?"*

110. In closing, Ms Oliver submitted that this was clearly a case of gross misconduct. I do not find that it was. I do not accept that the Beers had any honest belief that the Claimant had engaged in any misconduct.

111. Ms Oliver emphasised the alleged plan to set up a rival business. She stated at one point in her closing submissions that she could confirm that someone had called the Respondent's representatives to confirm this. I did not allow her to develop this point – it is something that should have been in evidence, not something for submission from an advocate.

112. Although this is a question on which I have had more doubt than on others, I have found that the Claimant was not actively advancing that plan

before, and that the Beers did not honestly believe him to be so doing. That he set up a business after being dismissed was, I find, a reaction to his dismissal.

113. Ms Oliver accepted that the Respondent did not follow its disciplinary procedures. She was right to do so. But she invited me to make a Polkey[1] deduction. She submitted that, had a fair procedure been followed, the Claimant would have been dismissed in any event.

114. What was the reason, or principal reason, for the Claimant's dismissal?

115. In a case such as this, it is for the Respondent to show why the Claimant was dismissed, and that that reason is a potentially fair one. I have not accepted the Respondent's contentions why the Claimant was dismissed.

116. It seems to me that the most probably reason for the Claimant's dismissal was tension between himself and Simon Beer. That tension existed. I think that the Respondent was most probably dismissed because the Beers simply wanted him out of the business. They were prepared to say or do anything to achieve that.

117. The reason or principal reason why the Claimant was dismissed does not relate to his capability or qualifications for performing his role. It does not relate to his conduct. He was not redundant. And there was no duty or restriction imposed by law preventing him from carrying on working.

118. Was his dismissal fair for some other substantial reason? The case of Turner -v- Vestric [1980] I.C.R. 528 indicates that a clash of personalities can be a potentially fair reason for dismissal. But it is also authority for the proposition that, before such a dismissal can be fair, the employer must show that it had taken reasonable steps to try to improve the relationship so that it could be said not only that there had been a breakdown but that the breakdown in their relationship was irremediable. I appreciate that, in this case, I have inferred the true reason for the dismissal. But the nature of the Claimant's dismissal – he was deceived as to the nature of the meeting he was asked to attend, and summarily dismissed – is wholly inconsistent with the Respondent being at all open to seeking to achieve better relations.

119. I therefore find that, although the reason for dismissal was potentially fair, it was not a fair response to the position in which the Respondent found itself, and was not in accordance with equity and the substantial merits of the case.

120. It follows that I find that the Claimant was unfairly dismissed.

121. I turn now to quantum.

[1] Polkey -v- AE Dayton Services Ltd [1988] A.C. 344.

122. I was provided at the hearing with an updated Schedule of Loss, to February 2021.

123. The Claimant seeks two days unpaid wages, for 28th & 29th April 2019. Ms Oliver said that this is not in the schedule of loss. That is true. But it is referred to in the record of the preliminary hearing before Employment Judge Livesey. Indeed, at paragraph 53 of that record, he orders a deposit to be paid in respect of that element of the claim. I uphold that element of the claim, and award the Claimant the sum of £293, being two days' net wages. I find that the Claimant was not paid for 28th and 29th April 2019. I find that this was an unlawful deduction from his wages.

124. Ms Oliver contended that, if I did not accept the Respondent's case on liability, then any award should be confined to 2 days' lost wages. That was a somewhat unrealistic position for the Respondent to take, and it was taken at the expense of any attack on the individual items set out in the Schedule of Loss.

125. The Schedule of Loss identifies the basic award, calculated by reference to the statutory maximum per week, as £7,612.50. The calculation of this was not disputed.

126. Moving on to the compensatory award, the sums advanced in the Schedule of Loss were not challenged in evidence or submissions before me.

127. Insofar as the compensatory award is concerned, the Claimant seeks an award based on his basic pay from dismissal through to the date of hearing. I think there is some difficulty with that. Although I have accepted that the Claimant was not actively engaged in setting up his own business before he was dismissed, I find that, given the Beers' attitude towards him as evidenced by their willingness to dismiss him summarily and fabricate accusations to support that dismissal, the relationship between them was probably going to end badly at some point. I think it probable that the Claimant would have ended up setting up his own business at some point. When he would have done that is more difficult. I think it probably would not have been done for at least a year after he was, in fact, dismissed. That brings its own complication, because it brings us into the time of the measures taken in response to the Covid-19 pandemic. I am doubtful that the Claimant would have started his own business during that pandemic. I therefore think that it is appropriate to base his compensatory award on lost earnings to the date of the hearing.

128. The calculations in the Schedule of Loss were not challenged, as I have observed.

129. His basic pay from dismissal to the date of the hearing is £75,115.24. Pension benefit is said to be £1,478.40, and sickness bonus £1,617.66. That brings a sub-total of £78,511.30. I accept these sums.

130. The Claimant is also said to have incurred expenses of £26,893. I have found that the Claimant would probably have started his own business at some point, and I therefore ask myself, was this loss caused by the Claimant's unfair dismissal?

131. I think that it was. My finding that the Claimant would have started his own business in any event at some time is impossible to separate from my findings about the Beers' behaviour towards him.

132. The Claimant has been paid £750 per month from August 2019 – a total of £12,750 to the date of the hearing.

133. I do not find that any Polkey deduction is appropriate.

134. The Claimant seeks an uplift for failure to comply with the ACAS Code for Disciplinary and Grievance Procedures. I think an uplift is appropriate. The Respondent's failings in this respect were serious.

135. The Code provides that employers and employees should raise and deal with issues promptly, and should not unreasonably delay meetings, decisions or confirmations of those decisions. It provides that there should be an investigation and that, in misconduct cases, where practicable, different people should carry out the investigatory and disciplinary hearings.

136. In this case, there was no investigation. The Claimant was misled as to the nature of the meeting he was called to attend. Indeed, I have found that neither of the Beers honestly thought there was anything to investigate.

137. The Code provides that the employee should be informed of the problem, if there is a disciplinary case to answer, in writing. This wasn't done. There wasn't even a good faith but incompetent attempt to inform him. The Claimant was actively misled as to the nature of the meeting. This meant that the Claimant could not avail himself of his right to be accompanied to the meeting.

138. To go through the detail of the Code is, however, to risk missing the wood for the trees. The purpose of the meeting to which the Claimant was called was to communicate to him a pre-determined decision to dismiss him. Any pretence otherwise – and these proceedings have seen the Beers pretend otherwise - is, I find, dishonest.

139. I find that an uplift of 25% is appropriate.

140. That takes us to a figure of £115,817.87, according to the Schedule of Loss.

141. That figure is in excess of the cap imposed by the Employment Rights Act 1996, s124(1ZA). That provisions limits the compensatory award to 52 x the Claimant's actual gross weekly pay or the statutory

maximum. That figure is given in the Schedule of Loss, which was not disputed by Mr Morris and which I accept, as £59,404.80.

142. Together with the basic award, the total award for unfair dismissal is £67,017.04

143. To that sum needs to be added the sum of £293 in respect of unpaid wages.

144. The Respondent also sought contractual notice pay. Although this was stated in the Schedule of Loss prepared for a hearing listed for February 2020 to be 12 weeks' pay, at the hearing it was accepted by Ms Kennedy that the correct contractual entitlement was 11 weeks' pay. This item was not on the updated Schedule of Loss. There was some discussion of this element of the Claim when I stated my reasons to the parties, but it was not contended that this element of the Claim had been waived, and it was accepted that, given the findings I had made, a finding in the Claimant's favour on this item was inevitable. I therefore award the Claimant the sum of £11,313.74, being 11 weeks' net pay.

145. After I had given my reasons, Ms Kennedy on behalf of the Claimant sought an order for costs. She relied on Rule 76(1)(a) and (b) in Schedule 1 of the Employment Tribunal (Constitution & Rules of Procedure Regulations 2013. These provide as follows:

When a costs order or a preparation time order may or shall be made
(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;
(b) any claim or response had no reasonable prospect of success

146. Mr Morris rightly drew my attention to the provisions of Rule 39(5), which provides as follows:

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
otherwise the deposit shall be refunded.

147. As the Reg 39 provision only applies to those issues in respect of which a deposit order has been made, it seems to me to be right to consider the general discretion under Reg 76 first.

148. Mr Morris drew my attention to authority for the proposition – which is not disputed – that I am required to look at the totality of the circumstances. I cannot decide that dishonesty alone, no matter how fundamental, compels me to award the Claimant costs.

149. I exercise my discretion in the Claimant's favour. The procedural history of this case was described by Employment Judge Livesey as a model of how not to run proceedings. I do not repeat what he said.

150. On day 1 of the hearing, I made a finding that the Respondent had behaved unreasonably.

151. And then there is the dishonesty of the Beers. Mr Morris referred me to ET Marler -v- Robertson [1974] ICR 72. Mr Morris submitted that that case is authority for the proposition that conduct is vexatious if a hopeless case is advanced to harass or some other improper motive. Obviously the Respondent was not pursuing a claim. It is entitled to defend a claim made against it. But it did so, advancing a case through to final hearing that I have found to be seriously dishonest, not merely unpersuasive. That might fairly be described as vexatious, and was not done for the proper purpose of defending a case on grounds that the Beers honestly believed to be justified. Combined with the lamentable history of this case, I find that the Respondent has behaved unreasonably, and indicated that I would make a costs order in the Claimant's favour.

152. I then heard argument about the quantum of costs. I was provided with a printout of items representing the Claimant's costs. This had been provided to the Respondent's representatives before the hearing.

153. I had to decide whether I should specify a sum pursuant to Rule78(1)(a), or whether the costs should be the subject of a detailed assessment, pursuant to Rule 78(1)(b). Both advocates agreed that a detailed assessment would be disproportionate, and invited me to determine the sum payable in costs pursuant to Reg 78(1)(a).

154. I referred to the table of hourly rates at table 71.4 in Blackstone's Civil Practice 2020. I canvassed this with the advocates, and neither advocate suggested that it was inappropriate that I do so. That table indicates an hourly rate for a grade A fee earner in Hampshire of £217 per hour. Ms Hows, the Claimant's solicitor, told me that the costs sought on behalf of the Claimant are based on an hourly rate of £240 per hour.

155. I am content to award costs based on that rate. The rates in Blackstone's are old – the most recent is from January 2010. £240 per hour does not strike me as an unreasonable rate for an experienced solicitor.

156. No individual item in the schedule was queried, although Mr Morris did point out that a number of applications were made through the course of the case. That is true, but it is true because of the Respondent's

conduct which Employment Judge Livesey described as a model of how not to run proceedings.

157. Mr Morris, who has stepped into this case and argued for the Respondent today with much good judgement, asked me to have in mind the ability of the Respondent to pay. He pointed out that Rule 84 enables me to consider this. I do consider it, but as Ms Kennedy has pointed out, I have no evidence before me that the Respondent would not be able to pay.

158. I find that the schedule is appropriate. It totals a sum greater than the maximum costs I can award, but I award costs of £20,000.

Employment Judge Hughes
Date: 19 March 2021

Judgment & Reasons sent to the parties: 25 March 2021

FOR THE TRIBUNAL OFFICE