EMPLOYMENT TRIBUNALS

Claimant: **Mr A J Finegan**

Respondent: **Ainsty Timber Marketing Limited**

Heard at: **Hull (by video)** **On:** **30 and 31 July 2024**

Before: **Employment Judge Miller**

Representation
Claimant: Mr Haywood
Respondent: Mr Boyle

RESERVED JUDGMENT

Unfair Dismissal

1. The complaint of unfair dismissal is not well-founded and is dismissed.

Notice Pay

2. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

Wages

3. The complaint of unauthorised deductions from wages is well-founded. The respondent made an unauthorised deduction from the claimant's wages in the period **June and July 2023.**

4. The respondent shall pay the claimant **£1918.44** which is the gross sum deducted. The claimant is responsible for the payment of any tax or National Insurance.

Employer's contract claim

5. The Tribunal does not have the jurisdiction to hear the employer's claim for breach of contract and the complaint is dismissed.

REASONS

Introduction and claims

1. The claimant has brought claims of unfair dismissal, breach of contract in relation to his notice pay and unauthorised deductions from wages in respect of underpayments of employer pension contributions, a car allowance and recoupment of one day's holiday. The claims for unauthorised deductions from wages turn on what contractual terms were in place at the time of the claimant's dismissal on 10 July 2023. This is also relevant to the notice pay claim.
2. The claimant undertook early conciliation from 25 July 20203 to 5 September 2023 and submitted his claim on 2 October 2023.
3. The respondent says that the claimant was dismissed for some other substantial reason and was in repudiatory breach of contract. They deny the other claims on the basis of the particular terms of the claimant's contract they say were in force at the date of his dismissal.
4. The respondent also makes an employer's breach of contract claim for repayment of a director's loan. The claimant had not provided a response to that claim but I allowed the claimant to participate fully in the hearing of that claim for reasons given at the time.
5. The hearing was conducted over two days but, because of the volume of documents and the number of witnesses it was not possible to give oral judgment. I apologise for the delay in preparing this judgment which has been due to pressure of work.
6. The claimant produced a witness statement and attended and gave evidence.
7. The following people from the respondent produced witness statements and attended and gave evidence:
    a. Rober Whamond – managing director and shareholder
    b. James Lee Dawson – Director of Shared services and shareholder
    c. Kevin Graham – Commercial Director
8. I had an agreed file of documents of 564 pages and an additional file of documents produced by the claimant of 85 pages.

Findings of fact

9. The claimant was engaged by the respondent as a Finance Director initially as an agency worker from around September 2018. The respondent employed around 100 people with a substantive turnover. They are involved in vegetation management, fencing landscaping and ecology.
10. From 1 February 2019 the claimant was engaged to provide the services through his personal service company TotalFD Ltd (TotalFD) and did so under a contract. Then from 1 July 2019 the claimant was employed

directly by the respondent under a contract of employment. That contract of employment provided for the claimant to be paid £45,000 a year. There were no specified hours of work. The contract said the hours of the role were "to meet the requirements of the role", but it was agreed around the time that the claimant would work for two to three days a week.

11. The contract provided that the claimant had 12 ½ days holiday at that time, which reflected his part time status, and the holiday year ran from 1 January to 31 December. Employees were entitled to additional statutory public holidays amounting to a further eight days per year. The contract provided that the claimant would be enrolled in a pension scheme. It did not specify an employer's contribution in that contract and it provided for either party to be able to terminate the employment on one calendar months' notice in writing.

12. The claimant's contract of employment was then varied by agreement with effect 1 October 2019 by a document, of which there were a number in the same format in the bundle. That document provided that the claimant would be working four days a week and being paid at £67,000 per year with effect from 1 October 2019. That variation document was signed by Kelly Thomas the HR and Office Manager and then signed by the claimant on 4 November 2019.

13. There was a further agreed variation to the claimant's contract of employment on 6 October 2020. That provided for the claimant to be paid the whole time equivalent salary of £100,000 per year pro-rated to reflect his then four days per week so that he would be paid £80,000 per year or 80% of the whole time equivalent. This was effective from 1 August 2020. In this variation the claimant was given an employer pension contribution of 10%. The document does not specify, but it appeared to be agreed as 10% of his gross salary. The claimant was given the right to obtain a company car using the salary sacrifice scheme. It is not entirely clear how a car paid for out of a salary sacrifice could in any meaningful sense be said to be a company car.

14. In that variation, which is not disputed, the notice period to end the employment was said to be six months. It does not specify whether that is six months to the claimant or from the claimant but as far is relevant it was not disputed that the claimant was entitled under this variation to six months' notice from the respondent to terminate his employment. That variation notice came from Sarah Purser, HR and Office Manager, and was signed by the claimant on 6 October 2020. The changes took effect from 1 August 2020.

15. The claimant became a statutory director of the respondent on or around 1 January 2021. At this point a Mr Clive Freeman was a shareholder and director and he facilitated, together with another director, the claimant becoming a statutory director. Mr Whamond did not know at the time that the claimant had been appointed as a statutory director. It appears that there may have been an agreement or promise of some kind by Mr Freeman that the claimant would at some point become entitled to a

payment of £250,000 in cash or shares. That issue may yet be the subject of a dispute in a different jurisdiction and I make no findings about that agreement.

16. There was a management buyout of the respondent proposed around this time and the claimant also became a director of ATM Group Ltd, which was the respondent's parent company, on 30 March 2021.

17. There were four shareholders at this point, the claimant, Mr Whamond, his wife Mrs Whamond, and Mr James Lee Dawson. The claimant, Mr Dawson and Mr Whamond were also directors, Mr Whamond being the managing director. The management buyout took effect on 31 March 2021. In the meantime, the claimant increased his hours to five days per week and had an increase in his salary to £100,000 per year. Accordingly there is another variation letter which was again signed by Kelly Thomas dated 17 March 2021 and signed by the claimant on 17 March 2021 which reflects this change. The changes took effect from 1 February 2021.

18. Following the management buyout there was a further variation to the claimant's employment contract dated 1 April 2021. The directors all agreed to take a reduction in their pay. It wasn't clear whether all directors were taking a reduction or some of the directors were reducing their pay to the same as the other directors to maintain parity, but in any event the claimant agreed to a 10% reduction in his salary to £90,000 per year without an attendant reduction in his working hours. This was said to be to help facilitate the payments required to be made to Mr Freeman as part of the management buyout and Mr Freeman's exit from the respondent company. It was agreed that each director would take a three months drop in salary to £90,000 per year subject to "Q1 performance" at which time after three months the salary would go back up to £100,000 per year, provided performance had been adequate.

19. There are two versions of this variation letter, both apparently signed by Kelly Thomas, but only one of which is signed by the claimant. Other variation letters were signed by the relevant HR manager and the claimant.

20. The one <u>not</u> signed by the claimant says

    "Please note as agreed between your fellow directors/shareholders to aid short term cash flow following the share purchase deal and exit of CF last month, each director will take a three month drop in salary to £90k pa. Subject to Q1 performance in line with the agreed +/- 10% of forecast, your salary will move to £100k pa.

    Salary: £90k

    Effective date: 1 April 2021.

    Pension: 10% employer pension contribution.

    All other terms and conditions remain the same".

21. The other version of this document is also dated 1 April 2021 and is purportedly signed by the claimant on 1 April 2021. It also is from, and apparently signed by, Kelly Thomas. This says:

"Please note:

As agreed between your fellow directors/shareholders to aid short term cash flow following the share purchase deal and exit of CF last month, each director will take a three month drop in salary to £90k pa. Subject to Q1 performance in line with agreed plus +/- 10% of forecast your salary will move to 100k pa

Salary:	90k pa (moving to 100k pa subject to Q1performances as defined above).
Effective date:	1 April 2021.
Pension:	10% employer pension contribution,
Vehicle:	comparable vehicle/equivalent monthly allowance across all three director roles.
Minimum period of employment:	Agreed minimum service term as per the previously defined not before date of 7/7/2023, after which a 12 month notice period will apply. Please note after 7 July 2024 a six month notice only will apply.

All other terms and conditions remain the same".

22. It was the claimant's case that he signed this document in good faith and believed that these were his terms of employment. It is the respondent's case that this document was not a genuine document. Mr Dawson said that he created this document without the knowledge of Kelly Thomas (even though her signature appears on it) in August 2021 with the intention of having it available to use in the event that the business was sold to a third party. The respondent was trying to sell its business and this is part of the background to these proceedings.

23. This document was produced late in these proceedings by the claimant. The respondent said they do not have a copy of it. I note also however that the respondent did not disclose another set of relevant documents until the course of these proceedings namely some emails relating to the director's loan (which is addressed below).

24. On balance, I prefer the evidence of Mr Dawson that he created this document with no belief in its validity, for the purposes of conferring additional benefits on the directors in the event that they sold the company. He referred to this being part of the due diligence and the suite of documents that will be made available for a potential buyer to ensure that the directors have a long notice period in the event of a buy out so that they would have some protection.

25. It is difficult to understand how this was not dishonest, although both representatives were very careful not to make any suggestions or representations about that. The document is said to take effect from 1 April 2021 even though Mr Dawson said he had no belief that that was the case. The claimant was very careful in the way that he gave his answers and did not volunteer helpful information on every occasion. I prefer the evidence of Mr Dawson and I find that this document at no time reflected an agreement between the claimant and the respondent about the terms of the claimant's employment. I further find that the claimant had no genuine belief that the document at pages D29 and D30 of the claimant's bundle reflected his genuine contractual terms.

26. In any event the only difference that is relevant for these purposes between the two versions of the contract is the notice period. There was a dispute as to whether the claimant was entitled to six months' notice or 12 months' notice at the date of the termination of his employment. The six months' notice period was set out explicitly and uncontroversially in the variation of 6 October 2020.

27. After three months the claimant's salary went back up to £100,000 per year and at that time his entitlement to an employer pension contribution was 10% of salary, which was £10,000 a year. The claimant was receiving a car allowance of £750 per month paid by the company to the claimant. Up to the last two payslips, this was the amount the claimant received every month by way of car allowance The claimant had also entered into a salary sacrifice car purchase scheme which was taken from the claimant's salary.

28. During this period (the first half of 2021) the directors were seeking to negotiate service level agreements which set out their obligations as employees and directors. It was the respondent's case that these were never agreed and in submissions the claimant conceded and agreed that they had never been agreed and did not in fact reflect the terms of his employment as late as January 2023. The claimant agreed that they were still being negotiated so that the SLA, in whatever iteration, cannot ever have been and, I find, was not at any time as far as is relevant to these proceedings part of his contract of employment.

29. In May 2021 the claimant says, and it did not appear to be disputed, that the respondent company was approached by a third party who expressed an interest in buying the respondent. There were a number of buyers on the horizon as far as I am aware. This was the circumstances in which the parties, the claimant and the other directors, were trying to agree a service level agreement to set out their terms of employment in favourable terms that would protect them in the event of a purchase of the company by a third party.

30. The next relevant event is that in February 2022 the respondent contracted with an organisation called the Legal Director for the provision of third party de facto in-house counsel to provide legal advice, and some advice to the board specifically.

31. In April 2022, the claimant proposed a change to his terms of engagement to the effect that he would reduce his salary to 25%, namely £25,000 per year, and that he would provide 75% of his services through TotalFD under a contract with the respondent. The claimant says that TotalFD were providing a distinct separate service relating to changing the culture in the respondent and providing coaching and similar sorts of things. It was a specific project and the claimant would continue to provide financial director duties for the remaining time.

32. The respondent, I find, was only happy with this arrangement provided that the claimant dedicated 100% of his time to being a financial director. The reason for this proposed change was for personal reasons for the claimant. The claimant said that it was to benefit the company as well because the work needed doing, and potentially also to reduce the employer's tax burden, but on balance I prefer the evidence of the respondent's witnesses and find that the only reason for this change was to benefit the claimant for his own personal reasons. This related in some way to a requirement to pay child maintenance, but I heard no specific detail about it and I make no further findings about that.

33. This arrangement was set out in a series of emails, the first being on 28 April 2022 at 15:23 from the claimant to Mr Whamond and Mr Dawson. That says:

    "Gents,

    The current remuneration is £100k gross plus employer's NI (15.05%) and £10k pa pension; plus Car/Allowance, Healthcare, DIS [death in service] and CIC [critical illness cover].

    The only element that would change is

    25k PAYE plus employer's NI (as above). This would be for my office holder and FD duties. Contract will be amended to reflect the same values.

    75k TotalFD. This would be for my organisation development and business transformation services. A service contract will need to be co-terminous with the above (eg: the not before July 2023).

    Claritas [the claimant's tax advisors] said that if the duties are "different" then it is possible for an office holder to fall outside of IR35.

    We remain equal in our remuneration.

    For the purposes of a buyer, I am moving to part time in anticipation of being the first out the door (which both are already expecting).

    Need to get this resolved urgently please".

34. Mr Whamond responded to that on 4 May at 12:16 ostensibly agreeing to the proposal subject to some terms. He says

    "Under normalised circumstances this arrangement is not a complication that the company needs or wants. It is not in line with the agreements made on formation and presents potential issues around the lack of parity with other directors. However, we appreciate your circumstances are

similarly unwanted personally, and the alternative is not tenable given our current direction and given the workload faced by the Directors in maintaining growth and the associated improvement of company processes and systems.

This is entirely at the company's discretion and is granted on a trial basis on the assurance that attendance and conduct will be unaffected, and will remain as expected from a full time directly employed FD role.

The company is prepared to accept this proposal strictly on the following basis"

35. Mr Whamond then sets out the conditions which will apply.

36. It is these first two paragraphs that lead me to conclude that the proposal was at the claimant's instigation and for his benefit. The respondent was prepared to agree to it reluctantly to retain the services of the claimant but they certainly did not see it as a benefit to the company.

37. Mr Whamond then goes on to say this is entirely at the company's discretion and is granted on trial basis on the assurance that performance, attendance and conduct would be unaffected and will remain as expected from a full time directly employed FD role. One might conclude that the suggestion that TotalFD were providing separate services was somewhat of a fiction, certainly as far as the respondent was concerned on the basis of this email, to avoid the requirements of the tax provisions under IR35. Questions about that are outside my jurisdiction, but in my view such an attitude or approach is consistent with the creation of a fictional contract to obtain a longer notice period from a prospective buyer and this strengthens my confidence in my findings about that.

38. Mr Whamond goes on to say

"The company reserves the right to retract this privilege with one months' notice and revert to a full time directly employed remuneration should any of the below – or similar – issues occur.

- Representation from HMRC, CPS or other relevant agency.
- Advice received from our legal representatives, tax advisors, HR advisors, accountant, auditor or other similar professional advisors.
- Any change in legislation or compliance, (eg IR35 or similar).
- Any objection to this arrangement by a buyer or potential buyer [which reflected the fact that the company was still proposing to be sold],
- Any failure to perform anticipated or expected duties/conduct commensurate with a full time company FD role.

The company will require terms of engagement from TotalFD comparable in scope and duration to the agreed/proposed director's SLA.

This concession in no way represents differentiation in terms from those originally agreed for the directors on formation, and is simply a different

method of remuneration dictated by personal circumstance. This is not in any way an agreement/mechanism for AF to reduce the overall cumulative FD hours, transition a premature exit from the business. Nor does it represent different ongoing terms/expectations to those of the other directors. It does not allow AF reference/precedence and negotiate standalone terms of the buyer or potential buyer.

This arrangement will, subject to the agreement of the above, commence effective from 01.05.22. The company will reflect this date in any formal queries/questions raised by any external party or our professional advisors".

39. I conclude that the meaning of the agreement set out in this correspondence, as far as is relevant to the matters I have to determine, was that the claimant would continue to receive in addition to £25,000 per year salary, £10,000 per year by way of employer pension contribution and his car allowance as well as healthcare, death in service benefits and critical illness cover.

40. This is what the agreement says. The claimant's offer email says

"plus employer's NI (as above)…We remain equal in our remuneration".

41. The expressed intention was for all of the directors to receive the same remuneration. Whether or not the 75% the transfer of work to TotalFD was a tax avoidance measure, the claimant wanted, and made it clear that he wanted, to retain the right to the full £10,000 pension contributions, notwithstanding the fact that part of his income would now be paid to his company, and that part would not attract a pension contribution. Similarly the claimant wanted to retain the car allowance and other associated benefits because he wanted to retain parity with the other directors.

42. The respondent set out clear terms in their response. That included the terms that I have already set out but did not say anything about pro-rating additional benefits beyond salary. The claimant was reasonably clear that the only thing that would change would be his actual gross salary from £100,000 to £25,000 and payment of £75,000 to his personal service company. Mr Whamond is clear in his response that the changed arrangement was not to reflect a differentiation in terms**.**

43. It was suggested in the course of cross examination that the claimant had wrongly instructed payroll to make the payments as set out – that is to say without pro rating his pension and car allowance. To the extent that the claimant actually did instruct payroll to make those payments – rather than them just continuing – I find that that was because he believed that he had agreed the terms set out above and consequently had a contractual entitlement to them.

44. After this there was then a board meeting in July 2022 at which this arrangement was discussed. The meeting was on 20 July 2022 and present were Mr Whamond, Mr Dawson and the claimant. Lucy Rowlinson who was the in house lawyer working through The Legal Director was also in attendance. An item is recorded in the minutes of that meeting relating to the claimant's change in circumstances.

45. It says

> "It was noted that the draft director SLAs are being amended to reflect the claimant's change in status whilst Kelly [being the person responsible for payroll] was not aware of this yet, this has been adjusted on the payroll to reflect the new 25% employment status and holiday/pension have also been adjusted on a pro rata basis.
>
> It was agreed that the signing process would be controlled by LR [Miss Rowlinson] once the SLA is in agreed form.
>
> AF [the claimant] further noted his consultancy agreement [namely the agreement with TotalFD] (needed to reflect a 75% of work done through his private company) would be sent across to LR [Miss Rowlinson] for review".

46. The reference to draft SLAs is a reference to the draft director service agreements that were continuing to be negotiated as discussed above. The suggestion to pro-rata the claimant's entitlement to pension and holiday pay came from Miss Rowlinson.

47. It appears from the documents, and I find, that the claimant was present for and part of that discussion. The claimant said he did not agree in that meeting to his pension and holiday being pro-rated and I accept that evidence as it is consistent with what happened next.

48. On 5 August 2022, the claimant sent a document to Mr Dawson attaching a draft SLA and he said in that email, about the wording in the draft:

> "This reflects the £25k change. Pension and holidays amended to ensure we are all entitled to the same. Other than that I think it is good to go".

49. That draft SLA retains the claimant's pension contribution as £10,000, not 10% of his salary, and 27 days holiday plus statutory holidays. It provides for £10,000 pension contributions and the salary of £25,000 per year. This, it was agreed, was not a binding contract but the claimant relies on it to show that he explained to Mr Dawson exactly what existing terms were agreed and in force for the claimant at that time: namely £25,000 per year salary, £10,000 per year employer contributions to the claimant's pension, 27 days holiday plus bank holidays and a car allowance.

50. Mr Dawson replied to that email and answered a query the claimant had raised about life insurance but did not make any comment on the other points. I note that the claimant did say pension and holidays are amended to ensure we are all entitled to the same which in my view shows that the claimant was trying to bring attention to the fact that he believed that the agreement was £10,000 and 27 days (not pro-rated). Not only were the direct SLA's not agreed and finally executed, the agreement with TotalFD was also not completed and executed. However, the claimant's company sent invoices from TotalFD for his work under that 75/25 agreement and they were authorised and paid by Mr Dawson.

51. The claimant continued to be paid his salary plus employer contributions equivalent to £10,000 per year each month for the following few months and the car allowance of £750 per month. I find that this was the agreed total

amount of car allowance the claimant had been entitled to while working 100% and continued to be payable under the new terms.

52. The next relevant thing that happened is that on 27 March 2023 the claimant requested a director's loan of £25,000 from Mr Whamond to pay for a kitchen. There was a meeting about it between the claimant and Mr Whamond. I find that there was some misunderstanding or miscommunication about the loan in this meeting. The claimant says that he spoke to Mr Whamond about having the directors loan and that Mr Whamond said words to the effect of as long as it is affordable, that's fine go ahead and do it.

53. Mr Whamond says that he said he didn't think it was a very good idea because the respondent had at that time made recent redundancies, and he therefore asked the claimant to do an affordability check, meaning that the claimant was to return to discuss it with him again once he had done the affordability check.

54. The claimant says that he did the affordability check. He says that £40,000 was not going to break the bank even though the respondent was thinking about insolvency at this point and was going to, or had, instructed Begbies Traynor (Insolvency Practitioners) to advise them on that. The reason that the loan was said to be £40,000 rather than £20,000 was that it was agreed, however that agreement came about, that Mr Whamond would also take a loan for £20,000 if the claimant was taking one.

55. The context of this is that Mr Dawson had had a director's loan for £20,000 the previous year on terms including that it would be repaid on payment of a dividend or disposal of the company. The claimant says that he proposed that the loan to him and to Mr Whamond be made on the same terms. In any event the claimant did not revert back to Mr Whamond and arranged for payments of £5,000 per week for four weeks from 13 April 2023 to both him and to Mr Whamond. Although Mr Whamond continued to express the view that taking a loan when the company was potentially facing insolvency and, in any event, redundancies had been made, was perhaps rash, he did not return the payments.

56. I do not know what the detailed terms of that loan were then said to be. However, I conclude that they were anticipated by the claimant to be on the same terms as Mr Dawson's loan which are set out in broad terms in the minutes of a board meeting. I find that this loan was made, and able to be made, solely by virtue of the fact that the claimant was a director of the respondent. No employee would be able to demand and facilitate a loan for themselves in such a way and on terms that it would be repaid on disposal of the company or payment of a dividend.

57. In March 2023 the claimant decided to end his 25/75 arrangement with the respondent and TotalFD. I prefer the claimant's evidence that this was because it would no longer be possible to do it without incurring personal tax liability under IR35 because of changes in legislation. From that date therefore the claimant simply worked 25% of his time for the respondent

and was paid at the rate of £25,000 per year. There was no subsequent variation to the terms of his employment contract and I find that the terms that he remained entitled to included £10,000 per year employer pension contributions, a full car allowance of £750 per month and a full amount of holidays (27 days per year plus bank holidays).

58. This may see surprising in the circumstances, but there was no subsequent variation of the claimant's employment contract. The two contracts – the employment contract and the service contract with TotalFD – were, on the basis of the evidence I have seen, completely separate. The claimant terminated, whether unilaterally or otherwise, on behalf of TotalFD their contract with the respondent and the claimant was left as an employee on 1.25 days per year being paid £25,000 per year with the pension, holiday and car allowance contractual entitlements described above. The claimant said that he had been discussing this position throughout with the respondent and it seems likely the claimant said he intended to retire in 2024 when he was 50 or around that time depending on how the sale of the company went. The claimant was winding down.

59. Throughout this period, there had been a high degree of uncertainty and disagreement between the directors as to the terms of the management buyout that had been made the previous year, including payments that were to be made to various parties and other matters. This had resulted in protracted negotiations and discussions over the previous 10 months which resulted in something called a letter of clarification. This was ultimately drafted by lawyers for the respondent's directors to sign. The letter of clarification included a provision relating to the £250,000 (referred to above) that the claimant said Mr Freeman had promised him for the work of him or TotalFD prior to the management buy-out. The precise reason for the promise of payment was unclear in the tribunal and as discussed above may be the subject of other proceedings.

60. The letter of clarification provided the payment mechanism for the £250,000 payment, or the award as it was called, and it also provided for a payment mechanism for payment to Mr Whamond of some money that was owed to him.

61. The terms of the clarification letter were such that Mr Whamond's payments received preference so that nothing would be paid to the claimant in respect of the £250,000 until after liabilities to Mr Whamond had been settled. The terms of the clarification letter were that payment of the award of £250,000 would be made to TotalFD not to the claimant personally. There was some dispute about whether that reflected the original agreement to pay the £250,000 or not but that is not a matter for me to resolve. By the time of the letter of clarification that was certainly what was said.

62. The letter of clarification was to be signed by all the directors to become binding and the respondent says the claimant gave them reassurances that he would sign the letter of clarification. Mr Whamond was concerned, and it turns out with some justification, that in fact the claimant would just use the letter of clarification as the basis for making a claim for the payment of

£250,000. I understand that this was because the document potentially formally recognised the existence of the award of £250,000 and the claimant's right to it whether personally or through Total FD.

63. In the event a letter of clarification was circulated by the claimant for all parties to sign on 18 April 2023 but the claimant did not sign it. He said that he was unhappy with the payment terms. This is difficult to believe given that the claimant had been negotiating it for some substantial period of time, and I find that it did not come as a surprise to the claimant on 18 April 2023 that the term that he was unhappy with, prioritising Mr Whamond's payments over other payments, including the £250,000, was included.

64. Shortly after 18 April 2023, therefore, the letter of clarification was then in existence and signed by the other directors but not the claimant. The claimant resigned his directorship of TotalFD and sold his shares in it to his friend, Mr Paul Hewitson, for £1. This happened on 4 May 2023. Very shortly thereafter Mr Hewitson on behalf of TotalFD sent a letter before action to the respondent claiming the £250,000. The claimant said he had nothing to do with this. The respondent says the claimant was acting as a shadow director of TotalFD. In my view, the timing of these events – the claimant's sudden decision not to sign the letter of clarification, his disposal of Total FD and the commencement of proceedings by TotalFD – is certainly very suspicious. I find that Mr Whamond came to the conclusion at this point that the claimant's primary objective was to extract £250,000 from the respondent however he could and that this was putting a strain on the relationships between the directors.

65. The respondent then instructed Mr Strickland, its in-house counsel engaged through The Legal Director, to advise on what to do about this.

66. Mr Strickland expressed concerns about the potential apparent conflict between the claimant in his role as finance director for the respondent and his personal link with the debt claim now being brought by TotalFD. Additionally, around that time, Mr Strickland disclosed some information about the respondent's response to the TotalFD claim to Mr Hewitson accidentally or inadvertently. Mr Whamond's evidence was that the claimant sought to discredit Mr Strickland taking sides against the claimant in the dispute about the £250,000. The claimant says that in fact Mr Strickland made a serious error in disclosing information to Mr Hewitson with whom the respondent was in dispute.

67. Mr Strickland wrote, in an email on 10 May 2023,

"You and Rob was the intention as the email was intended for you two. I apologise for this.

It was not an email intended as veiled threats - it was intended as an email you two to work out a plan to deal with the external issue of Total FD and its letter.

I remain concerned for you on a personal level as to how you square the duties. It is not my place to advise you personally (although I do care), but from ATM's perspective there is a factual concern which I was trying to keep

clear - not taking sides but simply stating the law on this thing. It needs to be carefully trodden.

I am genuinely attempting to advise the company with the information I am given.

We have spoken and I think it is right that you and Rob decide if I can continue to act. I will try and speak with Rob on this as well".

68. It is clear that Mr Strickland recognised the seriousness of his mistake and that the claimant and Mr Whamond would be within their rights to decide to dispense with his services. The claimant replied to say that in respect of the apparent conflict "if the company meets its obligations, there is zero risk".

69. By this I conclude that the claimant means the respondent's obligations to pay TotalFD. The claimant was of the view that the debt was owed, so there was no conflict in paying the debt. Mr Whamond did not agree that £250,000 was owed to TotalFD.

70. In respect of Mr Strickland's admission that it might not be appropriate for him to continue to act, the claimant said that Mr Strickland had undermined his own position and an alternative adviser from The Legal Director ought to be provided.

71. I find that there was a legitimate reason for Mr Strickland to not continue to act for the respondent – namely his disclosure to Mr Hewitson. I also find that the claimant did not agree there was any conflict for him as finance director for the respondent relating to the claim for £250,000 from TotalFD because he was of the firm view that a debt of £250,000 was owed and it was the respondent's obligation to pay it. I find that, notwithstanding Mr Strickland's error, the claimant's actions in rejecting Mr Strickland's advice about a potential conflict and insisting that the money was payable further increased tensions between the claimant and Mr Whamond.

72. The claimant said in evidence that there was no formal or informal obligation on Mr Hewitt to pay him any of the £250,000 if it was recovered by TotalFD and the money was otherwise committed to setting up an organisation called HeadStart to work with SMEs in the North East. There was some suggestion that the claimant might be part of that.

73. The claimant mentioned this for the first time in his oral evidence. I find that given the nature of the relationship between Mr Hewitson and the claimant and the appearance of a continual interest in that £250,000, Mr Strickland was correct to raise concerns about a potential conflict of interest.

74. After Mr Strickland left, subsequent solicitors, Loney Stewart Holland, were engaged to advise on the dispute. It is clear that the instructions they received from the respondent were to resist the claim for £250,000. They sent a response to TotalFD's letter before claim on 28 June 2023 setting out a clear basis why they believed that the money was not payable.

75. On 29 June at 2.51pm Mr Whamond sent an email to the group accountants, copying the claimant, refusing to sign off the Group Accounts

on the basis that the alleged debt of £250,000 was recorded as payable when in fact it was disputed. The claimant replied at 2.55pm and said

"This is nonsense. You have already signed to say that the £250k is payable to TotalFD, so has Jim".

76. He followed up with another message at 5.57pm as follows:

"To add further to this.
The "dispute" appears to be, based on the information I have been sent, a personal matter raised by Rob hence
"Our Client: Robert Whamond..." as per the attached.
As far as I'm concerned, being a Director of ATMGH and ATM, the £250k is a valid claim.
I do not recognise/accept this law firm as acting for either of those two companies.
I have signed ATMGH Accounts properly and they represent a true & fair view, no need to delay their filing.
If arob (sic) wants to shift things arpund (sic) in ATMGS, only, then that will have to be dealt with in YE23.
As I have just said to Rob, however, he is far better off doing what we all know he is good at and then the £250k plus the "earn out monies" and interest will all be paid off from net profits in only a matter of months".

77. The reference to a personal matter and "our client" was a reference to an invoice sent by Loney Stewart Holland to the respondent but addressed to Mr Whamond and referring to Mr Whamond as their client on or around 28 or 29 June 2023.

78. The remainder of the email is consistent with Mr Whamond's evidence that the claimant was trying to persuade Mr Whamond to pay the claimant £250,000 in weekly instalments of up to £30,000 in circumstances where the respondent company was having to sell equipment to meet outgoings. and this adds further weight. I prefer Mr Whamond's evidence about that and find that these representations from the claimant added to the strain on the relationship between the directors and caused Mr Whamond to question whether the claimant was acting in the company's interests or his own.

79. At 6.14pm the claimant sent an email to Sian Small, the finance manager, instructing her not to make the payment of the solicitor's invoice in dogmatic and declaratory terms.

80. Mr Dawson clarified the next day that, obviously, the legal bill was for work for the company and not, as the claimant purported to believe, for personal legal advice to Mr Whamond. The claimant replied to say "there is no debate ... they have stated their client is Robert Whamond".

81. I do not believe that the claimant did believe this. The claimant's evidence about this was simply lacking in credibility and I find that the claimant deliberately instructed Sian Small not to pay the bill on the basis that it was a personal expense for Mr Whamond with no belief that it was a personal

expense for Mr Whamond. In the event, Ms Small was persuaded to pay the invoice by the other directors.

82. On 29 June 2023 the claimant also sent an email to Ms Small instructing that his wife be engaged as an employee on the same terms as Mrs Whamond, Mr Whamond's wife. The terms of her engagement were said by the claimant to be that she was paid £25,000 for doing nothing. In reality, Mrs Whamond appears to receive a share of Mr Whamond's salary rather than being a genuine employee. Presumably, again, for tax "efficiency" reasons, but again I make no comment about the lawfulness of this arrangement.

83. The terms of the claimant's email demanding that his wife be appointed were strident and demanding and brooked no dissent. He said, effectively, I am a director, I have the authority to bind the company individually and you must do this.

84. The claimant said in evidence that he was doing this to make a point, referring to Mrs Whamond's "employment". He had no real intention of his wife being employed, but the terms of the email certainly made it clear whether that was intentional or not that Ms Small should implement that instruction.

85. This was an inappropriate email for the claimant to send and although he said he perhaps regrets it now, it was, in my view, petty and petulant.

86. This was on late on a Friday night on 29 June and the claimant then went on holiday. The next day, Mr Graham emailed the claimant to say he was not going to action the instruction to appoint the claimant's wife as an employee, and he confirmed that the invoice for legal fees was for work done for the respondent, not Mr Whamond personally.

87. While the claimant was on holiday Mr Dawson and Mr Whamond met and resolved to dismiss the claimant. They said it was for a breach of trust and confidence. The claimant returned on 10 July and was handed a dismissal letter signed by Mr Whamond and Mr Dawson. The dismissal letter says

> "We are writing to inform you that following recent events and in view of the seriousness of the impact of your behaviour, it has been decided that your employment as Finance Director should be terminated without notice and with immediate effect.
>
> The reason for your dismissal is that there has been a complete breakdown of trust and confidence in our relationship with you. We both believe this to be an irreconcilable state of affairs and one which is causing substantial disruption to the business at a time when the business is in a critical condition and fighting for survival".

88. The letter did not set out any further factual details and the reasons for the decision to dismiss the claimant are not clear from the letter.

89. Whamond says in his witness statement:

> "The Claimant was clearly and absolutely not acting in the best interests of the Respondent and his focus was purely on his own personal gain. This was overshadowing his director duties and responsibilities. Moreover, the Claimant's irrational behaviour appeared to be a reaction to him losing control of things that he had previously been able to heavily influence in his position of trust as the Respondent's Finance Director".

90. This was in reference to the claimant's apparent obstruction of the defence to the claim for £250,000 which included blocking payment of legal fees, his insistence that the debt was payable and recording it as a non-contingent debt in the accounts when it was disputed by Mr Whamond.

91. He also said

> "By now though, the Claimant had deliberately brought the disputes, the rising tension and his unilateral decision-making, to the attention of at least three other members of staff in open forum, and had furthermore then called into question in that open forum, the integrity and authority of other directors. He had made it clear that he was not interested in the opinion or authority of the other directors and had repeatedly tried to ignore and overrule clear objections of his co-directors, in open forum, in verbal and email exchanges including other staff members from finance, payroll and HR".

92. This related to the dogmatic instruction to appoint his wife as an employee and to not pay the legal fees.

93. Mr Whamond also said

> "I had been appalled in the Claimant's conduct for the last 2 years at least, in disputing the terms of the MBO within days of its completion, and for his conduct such as favouring himself above all things, by breaching his fiduciary and statutory duties and by abusing his position.
>
> Other examples are how the Claimant became a director of the Respondent, registering himself at Companies House without board approval, making unilateral decisions about a car for his wife, failing to pro rata his benefits when it was his decision to reduce his salary to £25,000, manipulating the company accounts to include his alleged sum of £250,000, obtaining a director's loan without board approval and when the Respondent was struggling financially, lying about having no intention of pursuing the Respondent for a debt recovery, working only 25% for the Respondent without board approval or consultation and lying to Kevin about what was required to become a board member".

94. I have addressed the majority of those issues above. I heard no evidence about a car for the claimant's wife, but the reference to lying to Kevin refers to the claimant wrongly telling Mr Graham that he would need to provide some kind of financial guarantee in order to become a director, thereby dissuading him from doing so. I prefer Mr Graham's evidence that the claimant did do this, but Mr Whamond and Mr Dawson did not find out about this until after the claimant's dismissal so this cannot have been part of the reason for his dismissal.

95. Mr Whamond goes on to conclude that ”Categorically, the claimant was destructive and was not acting in the best interests of the company”. I find that Mr Whamond genuinely believed that at the time of his decision to dismiss the claimant and that was the reason for his decision to dismiss the claimant.

96. Mr Dawson had stepped back from active involvement as a director from February 2023 because of his health. On 29 June 2023 he logged on and saw the email exchanges I have set out above. He said that the instructions to employ the claimant's wife put HR staff in a very difficult position, and that the claimant was bringing staff in to the conflicts between directors.

97. Around the same time, the claimant offered to buy Mr Dawson’s shares.

98. On 4 July 2023, Mr Dawson spoke to Mr Whamond and Mr Graham and Mr Dawson also concluded that the claimant was acting in his own interests, rather than that of the respondent. He said in his witness statement

    “…I had seen the emails and that I was very concerned. I felt the Claimant had stepped over a line and that we were left with no option. He was acting only in his best interests and it had to change. We had over 100 people who worked hard for us whose livelihoods needed protecting and I worried this might cause us to lose staff. I was already aware that Kevin had resigned and we could lose more. It was in my opinion, business critical. I agreed to meet with Rob and Kevin.

    I met Rob and Kevin the next day on Wednesday, 5th July and we discussed the situation. I knew the Claimant’s destructive behaviour had to stop. I agreed as a director of the Respondent to sign a letter that would dismiss the Claimant. I am very clear that this was my decision”.

99. I find that this was what Mr Dawson believed and that this was his reason for dismissing the claimant.

100. It was suggested that Mr Dawson and Mr Whamond had been inconsistent in their reasons for dismissing the claimant in oral evidence and their witness statements and with each other. I do not agree. It is clear to me that it became clear to Mr Dawson and Mr Whamond that the claimant was acting in his own interests in obstructing the resistance to the claim from TotalFD, and that he was being belligerent and awkward in his dealings with the directors and staff culminating in the odd and dogmatic email exchanges on 29 June 2023. Further, they – and particularly Mr Whamond – then had cause to reconsider the claimant's earlier conduct in relation to the directors loan and other issues relating to the management buyout.

101. I respect of the emails specifically, I find that they were merely the latest demonstration of the claimant’s conduct. The claimant accepted that he had a habit of sending objectionable emails late on a Friday and this had never previously been a problem. However, I find that it was not the email’s themselves that were the problem on this occasion, but the content of them- the attempts to obstruct the defence of the claim for £250,000 by preventing payment of the solicitor’s invoice, and bringing members of staff into board

level disputes that really escalated matters as far as Mr Whamond and Mr Dawson were concerned.

102. The claimant returned from leave on 10 July 2023 and was summarily dismissed. I heard evidence about the claimant's conduct at the premises after he received that letter. There was a dispute about whether he was argumentative, swearing and aggressive or not but ultimately that is not relevant and I do not need to make any findings about it. It is enough to say that there was no opportunity for the claimant to address Mr Whamond or Mr Dawson's concerns – he was simply dismissed – and he was given no right of appeal, even though the claimant's lawyers specifically asked for one on 17 July 2023.

103. The claimant was removed as a statutory director on and from 14 August 2023.

Findings of fact about money claims

104. The claimant was paid at the end of each month. In so far as it is relevant, he received a car allowance of £750 per month except in June and July 2023 when he received £187.50 and £34.62 respectively.

105. He received an employer pension contribution of £833.33 per month except for June and July 2023 when he received £208.33 and £86.54 respectively.

106. In July 2023, the claimant had £562.50 de ducted for overpaid holiday of one day. The claimant seeks recovery of this sum on the basis that his holiday entitlement was wrongly reduced on a pro rata basis – he does not seek any balance or additional holiday pay in respect of untaken holiday.

Law and conclusions

Unfair dismissal

107. Under section 95 Employment Rights Act 1996, employees have the right not to be unfairly dismissed.

108. Section 98 Employment Rights Act 1996 says, as far as is relevant

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> …
> (4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

109. In this case, the respondent says that the claimant was dismissed for some other substantial reason. They do not rely on any of the reasons listed under section 98(2).

110. It is for the respondent to show that the reason for dismissal was a substantial reason of a kind such as to justify the dismissal of the finance director (being the position that the claimant held).

111. I was referred to the following cases:

a. *A v B* UKEAT/206/09 (approved in Leach v Office of Communications [2012] EWCA Civ 959)

b. *Governing Body of Tubbenden Primary School v Sylvester* UKETA/527/11

c. *Jefferson (Commercial) LLP v Westgate* UKEAT/0128/12

d. Ezsias v North Glamorgan NHS Trust [2011] IRLR 550

e. Moore v Phoenix Product Development UKEAT/0070/20/OO

f. Handshake Ltd v summers UKETT/0216/12/KN

112. I have reviewed those case and the following principles emerge:

a. The tribunal must identify the acts or allegations relied on by the employer as the reason for the dismissal. I refer also to *Abernethy v Mott Hay and Anderson* [1974] IRLR 213, [1974] ICR 323 in which it was held that "*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*" so that when identifying the acts or allegations relied on, I must consider what the dismissing directors knew or believed at the time of dismissal.

b. It is a question of fact for the tribunal as to whether that reason was a reason that made it impossible for the employer to continue to continue to employ the employee. In a trust and confidence case, it is not enough to show there has been a breach of trust and confidence, but also that that was then a reasonable reason to dismiss the employee.

c. The tribunal is permitted to consider the acts or circumstances leading up to the breach of trust and confidence and it may be relevant to consider the employer's response to those acts (eg – have there been previous warnings, has the conduct previously been tolerated).

d. In a quasi-conduct case, it may be appropriate to take an investigatory approach and to allow a right of representation.

e. However, a failure of a disciplinary type process will not always mean that the dismissal is unfair – it depends wholly on the circumstances. Here, I contrast the cases of *Moore* which was a dispute between

directors where the claimant was a senior manager involved in a dispute with fellow directors, and *Turner v Vestric* where the claimant was a junior employee in a dispute with a senior manager. The steps required in each case in respect of the employee were and are likely to be different.

f. A failure to grant a right of appeal may be a relevant factor but is unlikely to necessarily and of itself render a dismissal unfair.

g. In any event, however, "invocation of SOSR is limited to genuine cases and must not be used to sidestep dealing with conduct issues, however difficult they may be" (*Handshake ltd*).

113. In summary, the decision was to whether the reason was sufficient to justify dismissal and whether the dismissal was fair or unfair depends on the particular facts of the case. As with any unfair dismissal case, I must consider at every stage whether the acts of the respondent were within the range of reasonable responses of a reasonable employer and avoid substituting my own decision.

114. I start by considering the reason for dismissal. The dismissal letter does not set out any factual basis of the dismissal. The reason must also be the reason that the respondent pleads in their defence (*Abernathy).*

115. In their ET3, the respondent says.

57. Following recent events the Claimant had:

(a) acted without prior written consent of fellow directors;
(b) failed to comply with all reasonable and lawful directions given to him by fellow directors;
(c) failed to act within his powers as a director, in particular within his powers as a Finance Director;
(d) placed himself in a position where there is a conflict or possible conflict between the duties he owed to the Respondent, ATM Group Holdings Limited and his personal interests;
(e) failed to act in a way that promotes the success of the Respondent;
(f) failed to abide by the standards and expectations of a director; and
(g) not acted at all times in a manner that was in good faith and fidelity to the Respondent or to ATM Group Holdings Limited.

58. As a result of the seriousness of the Claimant's behaviour, the impact upon the directors and the senior management team, his conflict of interests favouring himself above all things, his breach of fiduciary and statutory duties and abuse of his position, there was an irreconcilable state of affairs that was causing substantial disruption to the Respondent's business. Therefore, the Respondent had a reasonable belief that there had been a complete breakdown of trust and confidence in the Respondent's relationship with the Claimant.

116. Mr Haywood's submissions were that this list was ambiguous. It is unclear to what (a) refers and I agree. If it does refer to the loan as Myr Haywood speculated, then I have made findings about that above.

117. He also said it is unclear to what (b) refers and again I agree and again he speculated that it could be a failure to implement the pro rating of benefits referred to in the July board meeting. I have made findings about that – in my view, the claimant was likely silent about it in the board meeting but set his views out relatively clearly in the follow up email and draft SLA,

118. I do not know what (c) refers to.

119. In respect of (d), Mr Haywood said that the conflict in respect of the £250,000 payment had been there since January 2021.

120. Paragraphs (e), (f) and (g) effectively amount to the same thing – Mr Haywood says this is not evidenced.

121. Mr Boyle did not address these individual points one by one, but said that the recent events and different pieces of conduct were not the reason for dismissal. It was the breakdown in the directors' relationship caused by the conduct that was the reason for the dismissal. He said that the witnesses and directors had reached a point in June 2023 where they were irreconcilable.

122. He said that the conduct in the later part of June centred around the way the £250,000 potential liability was entered into the accounts.

123. He referred to the effort that had gone into the clarification letter, for it to be all undone by the claimant's refusal to sign it, and they found themselves back at zero facing a claim from a 3rd party for this money that they thought had been dealt with.

124. The respondent quite properly decided to challenge that claim (as it was entitled to do) and the claimant's acts on 29 and 30 June demonstrate, the respondent says, the irreconcilable breakdown in their relationship.

125. I have found this a difficult issue to decide. However, in my view, the reasons that I have set out above as the reasons for Mr Whamond and Mr Dawson's decision to dismiss the claimant were substantial reasons such as to justify the dismissal of the claimant as finance director.

126. The pleaded response is not helpful and it, and the dismissal letter, could have been a great deal clearer. However, in my judgment the reasons I have found as the reasons of Mr Whamond and Mr Dawson for dismissing the claimant do fall within the reasons set out in the pleaded response. I agree with Mr Boyle's submissions that really the conduct of the claimant from 4 May 2023 when the claimant sold his personal service company up to the end of June completely undermined the relationship of trust and confidence between him and the other directors.

127. Mr Whamond was entitled to take the view on the evidence available that the claimant had orchestrated, or at least relied on, the letter of clarification

to facilitate the recovery of the £250,000 and he was entitled to be suspicious of the arrangement with Mr Hewitson.

128. These suspicions were compounded by the claimant's dismissal of Mr Strickland (albeit with some justification) who questioned the propriety of his circumstances relating to TotalFD, the claimant's wholly unjustified refusal to sign off the payment of the new legal bill and the claimant's insistence that the £250,000 be recorded as a payable debt in the accounts.

129. Mr Whamond was entitled to think that the claimant was acting in pursuit of this money, rather than in pursuit of the best interests of the company.

130. The claimant's emails to Ms Small about appointing his wife, only served to confirm in Mr Whamond's mind that the claimant did not have the best interests of the company at heart.

131. I remind myself that the reason for dismissal is the facts known to , or circumstances believed by, the dismissing person. In light of all of this evidence, I find that Mr Whamond believed that the claimant was not acting in the best interests of the company. This, in my judgment, was a substantial reason sufficient to justify dismissal of the claimant as finance director.

132. Mr Dawson had been absent – he saw the recent correspondence and was brought up to date by Mr Whamond. I find that his reasons were also substantial reasons sufficient to justify dismissal.

133. These circumstances amounted to a breakdown in the relationship of trust and confidence between the claimant and the other directors. I agree with Mr Boyle that this was not a conduct issue. The breakdown in trust and confidence came from Mr Whamond and Mr Dawson's belief, which was based on the acts of the claimant, that the claimant would continue to work for his own ends and do what he could to recover the £250,000. Directors must have confidence that they can rely on each other to work in the interests of the company and clearly Mr Whamond and Mr Dawson did not, and could not, have that confidence in the claimant.

134. I consider together the process for dismissal and whether the reason was sufficient to justify the summary dismissal of the claimant without any process. This is not a misconduct dismissal and the ACAS code does not apply.

135. I have taken into account that this was, in reality, a dispute between three directors, There was no power imbalance. The claimant had made his views about his powers as a director and about the alleged debt clearly known and there was no reason to consider that that would change.

136. It has also been clear that the claimant sought to divide the directors – misrepresenting the position to Mr Graham about the financial risk of becoming a director and attempting to buy out Mr Dawson.

137. In my view, although it would usually be preferable to allow the claimant an opportunity to make representations before being dismissed, this would

have been a fruitless exercise in this case. The parties had been seeking to resolve matters for 18 months through the letter of clarification, and the claimant had simply undone that by refusing to sign it.

138. It was within the band of reasonable responses of a reasonable employer to summarily dismiss their finance director, who had made his position clear about the matters in dispute, and without giving an opportunity to make representations. Mr Whamond and Mr Dawson had an obligation to protect the interest of the company and they did so by taking quick, summary action.

139. For these reasons, therefore, the claimant's claim that he was unfairly dismissed is not well founded and is dismissed.

Contract status

140. The claimant's remaining claims depend, at least in part, on what contract terms applied to the claimant at the date of his dismissal.

141. The claimant was employed under a contract of employment that was subject to several variations. The requires for a valid contract or contract variation are well known – there must be offer, acceptance, consideration and an intention to form a legal relationship. The only points in dispute are what was agreed – the offer and acceptance part. There was ongoing consideration or each of the contracts as varied and an obvious intention to form legal relationships.

142. The position was that the claimant's main terms were governed by the contract the claimant entered into on 20 June 2019. From 1 August 2020, the claimant's contract had been varied so that the claimant would work 4 days per week on a salary of £80,000, with an employer pension contribution of 10% of his gross salary, the right to a company car (value not specified) with a 6 month notice period to terminate his employment.

143. I have found that that agreement was varied on 17 March 2021 with effect from 1 February 2020 only to the extent that the claimant's salary would increase to £100,000 and his working hours would increase to 5 days per week. All other terms remained the same (so, 6 months' notice, 10% employer contribution and company car).

144. From 1 April 2021, I have found that the claimant's contract was varied by agreement again as set out at paragraph

145. Prior to 1 April 2021, there had been agreed variations so that the claimants worked 5 days per week on a gross salary of £100,000. I have found that the claimant's terms were then varied in accordance with the unsigned variation set out at paragraph 21, above, to provide that for three months the claimant's salary would be reduced to £90,000 per year, although his working hours would remain the same He would be entitled to a 10% employer contribution and all other terms the same (6 months' notice, company car). This was a temporary reduction in pay which returned to £100,000 per year form July or August 2021. The claimant's notice period was NOT varied in that agreement.

146. There was one more variation. The next being in the emails from 28 April 2022 to 5 August 2022. This reduced the claimant's employed work to 1.25 days per week at remuneration of £25,000 per year gross plus £10,000 per year employer contribution plus car/allowance of £750 per month and with 27 days per year holiday.

147. These were the terms of the claimant's employment when his employment was terminated, together with a requirement for the respondent to give 6 months notice to end the claimant's employment. There were no other variations to the contract of employment, and the parties did not, as I have set out in my findings of fact, agree to pro rata any of the benefits with the claimant's salary.

Notice pay

148. An employee is entitled to the greater of their contractual notice or the notice set out in section 86 of the Employment Rights Act 1996 to terminate their employment. In this case, the claimant's contractual notice exceed the statutory notice and there is no need to consider that any further.

149. An employer is not required to give notice where the employee is in repudiatory breach of contract. This means where the employee has committed such a serious breach of contract that the employer is entitled to treat the employee as no longer intending to be bound by their contract of employment.

150. A breach of the implied term of trust and confidence can amount to a repudiatory breach of contract. All contracts of employment have an implied term of mutual trust and confidence – that is that the employer and employee shall not without reasonable and proper cause, in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

151. It is for me to decide, on the basis of the evidence I now have, whether the claimant was in repudiatory breach of contract and that is a question of fact for the Tribunal (*Leach v Office of Communications* 2012 WL 2500546 (2012)).

152. Mr Boyle's submissions about this were brief and simply that the breach of trust and confidence was sufficient to amount to a repudiatory breach. He said that that submission did not form part of the primary contention.

153. Mr Haywood said, and I agree, that it is for the respondent to show that the claimant was in repudiatory breach of contract. He said that, given the history of the claimant's conduct – that he was already prone to sending lengthy emails on a Friday evening and was combative (my words) throughout his employment, it is not feasible to find that there was a repudiatory breach from the emails of 29 and 30 June 2023 alone.

154. On balance, having considered the evidence I have set out and the reasons Mr Whamond and Mr Dawson had for dismissing the claimant I find that the claimant did act, cumulatively, in such a way as to amount to a repudiatory breach of contract.

155. The claimant's email's refusing to sign off payment of the solicitors' bill in such dogmatic terms, combined with his demand that his wife be appointed as an employee in terms where she would be paid but do no work, demonstrated that the claimant was no longer willing to work properly or productively with Mr Whamond and Mr Dawson. This was on top of his insistence that the £250,000 was payable to his former company in suspicious circumstances and when he had, in my judgment, acted to procure payment for that company – by recording the debt as payable in the accounts when it was contested, challenging Mr Strickland's advice about it and trying to prevent payment for advice about challenging the claim – rather than acting neutrally or proactively in the interests of the company to protect its assets.

156. This, in turn, came on top of the claimant's refusal to sign the long negotiated clarification letter despite assurances that he would do.

157. I also take into account the credibility of the claimant in these proceedings – which was evidence not available to the respondent. The claimant was not, in my view, honest about his belief of the validity of the proposed variation to his contract on1 April 2021. He had no belief in the validity of the contract that he presented to the Tribunal as valid.

158. The claimant also sought to dissuade Mr Graham from becoming a director in, at best, a misleading way.

159. These matters demonstrate to me that the claimant has, throughout his employment, acted in his own interests and is willing to mislead other people to get his own way. In that context, his final actions were simply another instance of the claimant acting contrary to the interests of the company and amounted to an unequivocal break down in the relationship of trust and confidence between the claimant and his fellow directors. This is a repudiatory breach of contract for which the respondent was entitled to dismiss the claimant without notice.

160. The claimant's claim for breach of contract / wrongful dismissal is not well founded and is dismissed.

Unauthorised deduction from wages claim

161. The claimant makes the following claims for unpaid wages:

    a. A shortfall of £625 form his employer pension contribution in his payslip for June 2023. The claimant says he should have been paid £833.33 gross but was paid £208.33

b. A shortfall of his car allowance in his June payslip of £562.50. The claimant says he should have been paid £750 but was paid £187.50

c. A deduction of one day's holiday pay in the sum of £384.62 form his July 2023 pay.

d. A deduction of £672.10 from his car allowance in is July 2023 pay. The claimant says he should have been paid £750, but was paid £77.90

e. A deduction of £746.79 from his employer pension contribution for July 2023. The claimant says he should have been paid £833.33 but was only paid £86.54

162. Under s 13 Employment Rights Act 1996, an employer may not make deductions from a worker's wages unless that deduction is authorised in writing in advance, under the worker's contract or by statute. In determining whether there has been a deduction, the tribunal must decide what is properly payable and whether that was paid.

163. In this case, there is no argument that any deduction was authorised, the deductions are solely about what was properly payable. This turns on the proper construction of the claimant's contract and I have made findings about that.

164. The claimant was entitled to £10,000 per year employer pension contributions from at least 5 August 2022. This is equivalent to £833.33 per month and that is what the claimant was entitled to.,

165. The claimant was entitled for the same period to a full car allowance of £750 per month.

166. The claimant was entitled to 27 days per year holiday. The respondent has deducted one day on the basis that his holiday entitled was in fact 20% of that, being 6.75 days. This was not correct. The claimant only seek repayment of that one day on the basis that he had not taken all of his holiday so he should not have had any deducted.

167. For June 2023, the claimant had an unauthorised deduction of £562.50 from his car allowance and £625 from his employer pension. This is a total of £1187.50.

168. The claimant only worked for 10 days in July. This means that he was owned 10/31 of his car and pension allowances. The total payable for the car allowance was therefore £241.94. the claimant received 77.90 so that there has been a deduction of £164.04

169. The total payable by way pf pension contribution was £268.82. The claimant received £86.54 so there has been a deduction of £182.28.

170. The claimant did not take more holiday than he was entitled to so there has been an unauthorised deduction in respect of one day's alleged excess holiday in the sum of £384.62.

171. The claimant's claims for unauthorised deductions from wages are therefore well founded and the respondent shall pay the claimant the gross sum of £1918.44.

172. In so far as it is necessary to consider it, these deductions arise out of the same circumstances and form a series of deductions so that all the claims are in time.

Employer contract claim

173. The respondent seeks recovery by way of an employer contract claim of the director's loan of £20,000.

174. Article 4 of Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 confers jurisdiction on the Employment Tribunal to hear claims for breach of contract, and provides:

> Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—
> (a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
> (b) the claim is not one to which article 5 applies;
> (c) the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and
> (d) proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.

175. Section 131 (2) of the 1978 Act is now section 3(2) of the Employment Tribunals Act 1996 which says

> (2) Subject to subsection (3), this section applies to—
> (a) a claim for damages for breach of a contract of employment or other contract connected with employment,
> (b) a claim for a sum due under such a contract, and
> (c) a claim for the recovery of a sum in pursuance of any enactment relating to the terms or performance of such a contract,
> if the claim is such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim.

176. This means that the contract in respect of which damages for breach are claimed must be either the contract of employment between the employer and the employee or another contract connected with that employment.

177. I was not referred to any case law about what this means. However, in my view it is clear that it must relate to a contract inherently related to the relationship of employer and employee rather than any other relationship the employer and employee happen to have. Compromise agreement shave bene held to be connect with employment. On the other hand, it is obvious that this would not cover, for example, a transaction in a supermarket between and employee of that supermarket and the supermarket.

178. That is because the parties are entering the transaction as customer and shop, not employee and employer.

179. Similarly, in this case, the contract for the director's loan was in no way dependent on the relationship of employee and employer. A director need not be an employee and there are no conceivable circumstances in which an employee who was not also a director would be able to lawfully arrange a loan (on uncertain terms although that is not directly material to the principle) of their own volition form the company.

180. In my judgment, a contact for a director's loan is not generally, and is not in this case, a contract connected with employment. The parties to the contract are entering into it as director and corporate entity – not employee and employer.

181. Consequently, the Tribunal has no jurisdiction to hear the respondent's counter claim for breach of contract and that claim is dismissed.

Employment Judge **Miller**

Date: 12 September 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS