THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**
BETWEEN:

Mr P Wyatt Pike

Claimant

AND

WCL (UK) Ltd

Respondent

ON: **2, 3, 4 and 5 March 2021**

Appearances:
For the Claimant: **Mr L Varnam, counsel**
For the Respondent: **Mr T Dracass, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

1. The claim for unfair dismissal succeeds.
2. The claim for unlawful deductions from wages succeeds from January 2020 to 7 July 2020 in respect of the failure to pay the national minimum wage.
3. The claim for breach of contract succeeds in relation to the claimant's pay for 1 August 2017 to 16 October 2017 and in respect of the shortfall in pay for January and February 2018.
4. The claim for holiday pay succeeds for 43.4 days.
5. The claim for failure to provide written particulars of employment succeeds in respect of the failure to give notice of a change of particulars.

REASONS

1. By a claim form presented on 12 October 2020, the claimant Mr Paul Wyatt Pike brings claims for unfair dismissal, breach of contract for notice pay and for unpaid wages, holiday pay, unlawful deductions from wages and failure to

provide written particulars of employment.

2. The claimant worked for the respondent from 1 August 2017 to 7 July 2020. His job title was given in his particulars of employment was Partnership Director reporting to the managing director. The respondent is an IT company operating a procurement framework for the public sector.

CVP hearing

3. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

5. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

6. The participants were told that it was an offence to record the proceedings.

7. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

8. There was an agreed list of issues between the parties. In discussion with the parties we agreed a further issue, which was whether the parties could contract out of the statutory entitlement to the National Minimum Wage. There had been no case management hearing prior to this hearing and I was grateful to the parties' legal representatives for the way in which they had prepared and managed the case, ensuring it was ready for the hearing. The issues were as follows:

<u>Unfair dismissal</u>

9. Can the respondent show that the reason for dismissal was a potentially fair reason within the meaning of section 98(1) ERA 1996? The respondent relies on some other substantial reason (SOSR) under section 98(1)(b) (namely, a serious breakdown in the respondent's trust and confidence in the claimant and/ or a serious breakdown in the working relationships between the claimant and the other directors/ members of the respondent's senior management team) or, in the alternative, conduct under section 98(2)(b).

10. The respondent conceded in submissions that this was not a conduct dismissal and this was no longer relied upon.

11. If the reason for dismissal was SOSR, did the respondent act reasonably or unreasonably in treating that as a sufficient reason for dismissal having regard to the circumstances (including the respondent's size and administrative resources) and the equity and substantial merits of the case (section 98(4) ERA 1996)?

Unlawful deduction from wages claim (section 13 ERA 1996)
Non-payment of salary

12. Did the respondent make unlawful deductions from wages in respect of his monthly salary from the claimant? In particular, in respect of the relevant period of the complaint, was the total amount of wages paid to the claimant by the respondent on any occasion less than the amount that was "*properly payable*" (section13(3)) on that occasion?

13. The respondent relies on the claimant having agreed either expressly or impliedly to a variation of his employment contract in respect of his contractual salary. In particular, for the period from March 2018 onwards, the respondent's case is that the claimant agreed, either expressly or impliedly (i.e. by his conduct and/or subsequent acquiescence), that his salary would be reduced to nil. The claimant's case is that in March 2018 he (and the other directors) agreed they would simply defer taking any contractual pay (and therefore would be paid no salary) until such time as the risk of insolvency (to the respondent) had abated. The following particular sub-issues arise:

14. If the respondent did make unlawful deductions from wages, did any of the payments made to the claimant on various dates between August 2017 and December 2019 break the 'series of deductions' such that the claimant is out of time to include any of those earlier periods in claim under section 13 ERA 1996 (section 24(3) ERA 1996)?

15. If the respondent made unlawful deductions from wages, can the Tribunal consider any such deduction arising more than 2 years prior to the presentation of the claim (i.e. earlier than 12 October 2018) having regard to section 24(4A) ERA 1996? The claimant accepted in submissions that the tribunal could not consider any deduction prior to 12 October 2018 for the purposes of a claim under section 13 ERA. The claim prior to 12 October 2018 was pursued as a breach of contract claim.

16. Did the claimant suffer any consequential losses arising from any deduction in wages pursuant to section 24(2) ERA 1996? Specifically, can the claimant recover any damages in in representing any losses in relation to the value of, or the sale of, his shares? This is an issue to be dealt with at remedy stage.

Failure to pay the National Minimum Wage (National Minimum Wage Act 1998)

17. Can the parties contract out of the statutory entitlement to the National Minimum Wage (NMW)? This issue was introduced by the Judge at the outset of the hearing. In submissions (paragraph 30) it was conceded by the respondent

that the parties cannot contract out of the entitlement to the NMW, by virtue of section 49 NMW Act 1998.

18. Did the respondent make unlawful deductions from wages by failing to pay the claimant the (NMW) for any pay period between August 2017 – July 2020?

19. Did the payments that were made to the claimant in the pay periods between August 2017 – December 2019 (in particular, between August and December 2019) break the 'series of deductions' such that the claimant is out of time to bring a NMW claim for any pay periods prior to August 2019 in accordance with s.23(2) ERA 1996. It was accepted by the claimant in submissions (paragraph 22) that the series of deductions was broken for deductions preceding January 2020 for the purposes of the NMW claim.

20. If the respondent made unlawful deductions from wages can the Tribunal consider any such deduction arising more than 2 years prior to the presentation of the claim (i.e. earlier than 12 October 2018) having regard to section 23(4A) ERA 1996? In submissions the claimant accepted in submissions that the tribunal could not consider any deduction arising prior to 12 October 2018 by virtue of this section.

21. Is the claimant entitled to recover additional remuneration, calculated in accordance with section 17 NMW 1998 as an unlawful deduction from wages? This is a remedy issue.

22. The respondent accepted in submissions that it had no defence to the claim for failure to pay the national minimum wage from 1 January 2020 to termination of employment on 7 July 2020. As to quantum it remained an issue for the tribunal as to whether the amount due should be reduced by up to 25% under section 207A TULCRA 1992 (see Remedy issues below).

Breach of Contract claim (Employment Tribunals (Extension of Jurisdiction) Order 1994

23. Was the respondent in breach of the claimant's employment contract in respect of a failure to pay the NMW during the period of his employment from August 2017 – 7 July 2020?

24. Was the respondent in breach of the claimant's employment contract in respect of a failure to pay the claimant's contractual salary during his period of employment?

25. Is the claimant entitled to recover the sums claimed at paragraphs 50 – 55 of the Particulars of Claim as damages for breach of contract?

Holiday Pay claim

26. Is the claimant entitled to recover accrued holiday pay under Regulation 13 of the Working Time Regulations 1998 for holiday that was accrued from 1 January 2020 – 7 July 2020?

27. Did the respondent fail to permit the claimant to take holiday to which he was entitled under the Working Time Directive and Regulation 13 of the Working Time Regulations 1998 throughout his employment?

28. Is the claimant entitled to carry his accrued holiday entitlement over from each leave year he was employed to the next and was the claimant entitled to a sum in lieu of this leave pursuant to Regulation 14(2) of the Working Time Regulations 1998?

29. Was the respondent entitled to require the claimant to take his accrued holiday during his notice/ garden leave period with the effect that any potential liability for holiday pay on termination was thereby extinguished?

Failure to provide a written statement of changes to employment particulars

30. If the claimant's contract of employment was varied, did the respondent provide the claimant with a written statement containing particulars of a variation to the claimant's employment contract pursuant to section 4 ERA 1996?

31. In an opening note the respondent conceded that it had not complied with the requirement to provide written confirmation of changes as required by section 4 and therefore the matter went to remedy, if applicable.

Remedy

32. If the claimant succeeds in any of his claims, the Tribunal will be concerned with issues of remedy, including but not limited to:

    a. Whether the claimant agreed to the variation of his salary such that his salary was reduced to nil pay from March 2018 with the result that his basic award and compensatory award for unfair dismissal should either therefore be nil or should be calculated based on the National Minimum Wage;
    b. Whether, even if the respondent was in breach of contract by its failure to pay the claimant the correct level of salary, his compensatory award for unfair dismissal should be assessed as nil on the basis that he suffered no loss of earnings consequent upon his (unfair) dismissal (the loss being attributable, on the claimant's case, to antecedent breach(es) of contract by the respondent).
    c. Whether the claimant would have been dismissed fairly in any event had a fair process been followed (*Polkey*);
    d. Whether any compensatory awarded should be reduced due to contributory fault/conduct of the claimant;
    e. Whether the claimant has taken reasonable steps to mitigate his loss.
    f. Whether the claimant's subsequent loss of new and permanent employment obtained following his dismissal breaks the chain of causation in relation to any claimed losses after that point.
    g. If the claimant succeeds in one or more of his other claims, what level of award should be made under section 38 EA 2002 (between 2 - 4 x his

'week's pay') in respect of any failure to provide a written statement of changes to employment particulars?

h. Should any compensation the claimant would otherwise receive in respect of a successful unlawful deduction of wages/ breach of contract claim relating to non-payment of his salary and/ or NMW be reduced by up to 25% (pursuant to section 207A TULCRA 1992) by reason of his non-compliance with the ACAS Code of Practice in failing to raise a grievance with the respondent at any time in relation to those matters?

33. Although the remedy issues were set out in the List of Issues, it was clear that the hearing allocation was such that there would not be time to deal with remedy and I informed the parties that there would be a separate remedy hearing, if applicable.

34. It was agreed with the parties that the tribunal would make findings at this stage on *Polkey*, contributory fault and the section 207A TULCRA point but quantum would be dealt with at a remedy hearing, if applicable.

Witnesses and documents

35. The tribunal heard from the claimant.

36. For the respondent, the tribunal heard from 3 witnesses: Mr Neil Watkins, the Chief Executive, Mr Paul Miller, the Finance Director and also the dismissing officer and Mr Nigel Hall, the Operations Director and the appeal officer. All these witnesses are statutory Directors of the respondent company.

37. There was an electronic bundle of just under 800 pages including the index, plus a very helpful Agreed Chronology introduced on day 3.

38. I had an opening note from the respondent and written submissions from both sides to which counsel spoke. They are not replicated here. All submissions and case law referred to were fully considered even if not expressly referred to below.

Findings of fact

39. The claimant first began working for the respondent as a consultant in 2008, invoicing through a personal services company.

40. The respondent is a very small company providing cloud IT solutions to organisations. During the material times in these proceedings, it had around six employees at any one time. This was inclusive of the Directors.

41. The claimant was a shareholder and a Director of the respondent and part of the Senior Management Team. In 2017 the respondent's shareholding was divided as to 34% to the claimant, 34% to Mr Watkins, 18% to an entity called WCL, 9% to Mr Hall and 5% to Mr Miller. The shareholders agreement was at page 127-144.

42. There is no company Head Office, everyone worked from home, even before lockdown. Prior to the pandemic they held their Board Meetings, conferences and significant client meetings in person. Post-pandemic all relevant meetings have been on line.

43. The claimant chose to be known by his colleagues as "Pikey" and this is how he is often referred to in the documents in this case. It was a self-given nickname and not imposed on him by anyone else.

44. The respondent's CEO Mr Neil Watkins first met the claimant in 2011 when the claimant was working as Education Lead at BT Global Services. They worked together on a number of projects and considered working in business together. They considered each other as friends.

45. The E2BN was one of nine Regional Broadband Consortia set up by Government in 2000 to provide internet connectivity to schools. E2BN approached the respondent to work with them. As it is a public sector body they were required to go through the necessary procurement process. The respondent was awarded a contract in August 2014 and it used the trade name "Think IT".

46. The respondent's business was not profitable in 2014, 2015 and 2016. The business again made a loss in 2017. The Directors took the view that the business would eventually start to make a profit. As individual Directors and employees they were not restricted from seeking consulting work elsewhere in the meantime.

47. The claimant's co-Directors had issues with his working practices from about 2016 when he was working as a consultant. These matters were not brought to his attention even though the respondent's evidence was that it took a couple of years to sort out with customers, some of the problems they considered the claimant had caused. The co-Directors were concerned about the claimant's lack of record keeping and documentation and some of his interactions with customers.

48. In 2016 the respondent employed Mr Oliver Pearson in a marketing role. Mr Pearson was responsible for dealing with regular customer orders and dealing with suppliers. The respondent acts as an intermediary between customers and suppliers, taking a commission on supplier invoices. It does not provide goods or services directly to the customer. Mr Pearson was given a shareholding of 2.4% in 2018 in recognition of his contribution to the business.

<u>The Directors' Service Agreements</u>

49. In 2017 the respondent was hoping to attract significant investment. Directors' Service Agreements were entered into for all Directors so that they could show these to potential investors when they carried out their due diligence. The key personnel, in addition to the claimant in this case, were Mr Neil Watkins, the Chief Executive, Mr Paul Miller, the Finance Director and Mr Nigel Hall, the Operations Director. They all entered in to Director's Service Agreements. This

was despite the concerns the other Directors had about the claimant. They entered into these Agreements without bringing their concerns to the claimant's attention.

50. On 4 September 2017 the claimant entered into his Director's Service Deed which incorporated written particulars of employment under section 1 of the Employment Rights Act 1996 (page 149). It was executed as a Deed and signed an witnessed by the parties (page 169).

51. The commencement date of the claimant's employment was 1 August 2017 and his job title was that of Partnership Director reporting to the Managing Director. His gross annual salary was £100,000 per annum. The other Directors entered into the same form of Service Deed on the same salary, with Mr Hall on a pro-rated 80% as he did not work full time. It was only Mr Stuart Abrahams, who was employed in October 2017, who had a higher salary.

52. Clause 10.2 of the contract (page 155) gave a right the respondent to review salary from time to time. There was no contractual obligation on the respondent to increase salary. The claimant agreed that it could result in a reduction of salary.

53. The notice period was three months on either side.

54. The respondent accepted that this Service Agreement was the claimant's contract of employment and it was binding on both parties.

Payments made to the claimant
Pay from 1 August 2017 to 16 October 2017

55. Prior to entering in to the Service Agreement the claimant was paid under a consultancy agreement. The payments made to him as a consultant were set out in a spreadsheet at page 713.

56. The first payment the claimant received via payroll was on 31 October 2017. There was an email exchange between the claimant and Ms Helen Watkins, the Finance Manager, on 30 and 31 October 2017 (pages 172-174). Ms Watkins said that Mr Watkins had asked her to put him on payroll. She said "*I'm to pay you £3,500 net for October*". On 31 October 2017 Ms Watkins told the claimant that she had processed his pay and said: "*have changed your start date to 17th October as this means you officially worked half a month…… I have paid you for half of your full monthly wage of £8,333.33…".* Within a matter of minutes the claimant replied "*I am really grateful to you for sorting this."*

57. The respondent relied upon this as showing an agreement to vary the claimant's start date in employment and that he remained a consultant during the period 1 August 2017 to 16 October 2017. I found no evidence of any such agreement. The Directors Service Deed makes clear that the claimant's employment began on 1 August 2017 and that his period of continuous employment ran from that date (page 152). The tribunal was not told that the respondent reached such an agreement with the claimant. I find that in saying that he was grateful to Ms

Watkins for "*sorting this*", I find that the claimant was thanking her for making a payment. He was not confirming an agreement to change of his start date. In evidence the claimant could not remember the reason for any such change of date. Ms Watkins simply told him that she had changed his start date. She did not confirm that it had been agreed and I find that it was not.

58. In addition, the respondent admitted in the ET3 (box 4.1 bundle page 50) that the claimant's dates of employment were correct, the pleaded start date being 1 August 2017.

59. I find that the claimant is entitled to be paid in accordance with his contract of employment from 1 August 2017 to 16 October 2017.

60. The claimant received his gross pay for November and December 2017 in the sum of £8,333.33 (page 706). The sums paid in November and December 2017 represented the claimant's full salary under the terms of his contract of employment based on £100,000 gross per annum.

Pay from 1 January 2018 to 28 February 2018

61. In January and February 2018 the claimant was paid £3,550 gross for each month.

62. The respondent had employed Mr Stuart Abrahams as a Sales Director on a salary of £150,000. He worked for the respondent from 1 October 2017 to 23 March 2018.

63. On 29 January 2018 Mr Watkins sent an email to Mr Miller saying: "*I've paid Stuart [Abrahams] on a 2/3 basis and Pikey on a ½ basis for Jan, but told both that unless we get funding we can't pay Feb. Stuart is very likely to leave at that point….."* (page 206).

64. There was a transcript of a Skype exchange between the claimant and Mr Watkins on 29 January 2018 (page 205) in which the claimant said "*J…..[the claimant's partner] says yes, I couldn't keep it from her but she said we need £2,750 net – she doesn't want us to not pay the credit card as we won't have enough money for company expenses. Sorry".* Mr Watkins replied "*nice – will sort out payroll this afternoon*" and then "*money paid*" and the claimant replied "*thanks Neil*".

65. The respondent relies on this exchange as showing an agreement to reduce to half salary. I find that this exchange does not show this. Firstly, the Skype message exchange on 29 January does not show any earlier communication which on my finding clearly exists. When the claimant said that his partner said "*yes*", the messages do not show what she was saying "*yes*" to. Secondly, I find that the claimant thanking Mr Watkins for organising a prompt payment into his bank account shows no more than that. It was thanks for a payment made. It is not evidence of an agreement to forego any entitlement to salary or to reduce his salary to half pay.

66. Mr Abrahams replied to Ms Watkins on receipt of his payment on 29 January 2018 by saying: "*Bookkeepers don't like woolliness, so just to confirm: I confirm I've agreed to a temporary monthly salary reduction of 33.33% to start with my January salary, which was paid at the reduced rate today. As soon as possible (to be reviewed each month) will be reinstated at the normal level, and any shortfall will be made up as soon as funds allow. So I can plan, it would be useful if you could let me know a week before salaries are paid how much I'm likely to receive."* (page 208)

67. Mr Watkins did nothing to contradict what was said in this email from Mr Abrahams despite considering it a tactical email and believing that Mr Abrahams might be setting himself up to bring a claim against the respondent.

68. The claimant and Mr Abrahams were in a similar position to the extent that they were both told that they were being paid less than their contractual entitlement for January and February 2018. Mr Abrahams' contemporaneous email refers to the shortfall being made up "*as soon as funds allowed".* I find on a balance of probabilities that Mr Abrahams' contemporaneous record is more likely to be accurate than Mr Watkins' recollections three years later. Mr Watkins agreed that he did not keep a record of any such agreement with the claimant or Mr Abrahams in respect of their January and February 2018 salaries.

69. I find on a balance of probabilities that in the absence of any written record on the part of Mr Watkins and as the claimant and Mr Abrahams were in a similar position, the same agreement was reached with both of them. This was that the shortfall would be made up when funds allowed. It was an agreement to defer salary and not to relinquish the entitlement to the balance.

70. By February 2018 it became clear that the investment the respondent was hoping for was not going to materialise.

<u>The Stoke Rochford Board Meeting – March 2018</u>

71. An in-person Board Meeting was held on 12 and 13 March 2018 at Stoke Rochford in Lincolnshire to discuss the company's position. The Finance Director Mr Miller gave a slide presentation (copy slides starting at page 214) to show the seriousness of the respondent's financial situation. His preparation notes for that meeting were at page 219. During his presentation Mr Miller explained the position in terms of directors' duties, that they could not trade insolvent and said that it was necessary to agree not to take further salary. In the light of this Mr Abrahams resigned on 13 March 2018 as he could not afford to work for no salary (his email page 220-221).

72. The respondent's case was that at this Board Meeting the Directors agreed that in order to comply with their fiduciary duties, all salary and other payments would have to cease immediately. It is the respondent's case that the Directors' Service Agreements were either expressly or impliedly varied so that the claimant and the other directors were not entitled to be paid any salary for an indefinite period. The respondent says that this ended with the termination of the claimant Service Agreement on 7 July 2020. It is not in dispute that the

agreement as to salary reached at the March 2018 Board Meeting was not documented.

73. Upon failing to secure the anticipated investment, the company was in a "*perilous state*". Mr Miller's view was that unless the Directors agreed to forego their salaries, the company would be trading as insolvent. The claimant does not dispute that he agreed at that meeting not to take his salary, but the issue was whether he agreed to relinquish it on an indefinite basis or whether he agreed to defer his entitlement to a later date.

74. The claimant accepts that he knew and agreed that the salaries would go to nil. Mr Miller's evidence was that the claimant's suggestion in his Particulars of Claim, that the Directors agreed to defer taking a salary was "*simply incorrect and was never proposed or discussed*" (his witness statement paragraph 27). The claimant's evidence was that Mr Miller proposed that the Directors should defer taking their pay until such time as the risk of insolvency abated and he agreed to this, as did all the Directors save for Mr Abrahams (claimant's statement paragraph 13). Yet at paragraph 17 his evidence was: "*I do not believe that there was any express discussion as to whether the salary payments that I was not receiving were being lost forever, or whether they were being deferred*." These two statements were inconsistent. In cross-examination the claimant was unclear as to what was agreed at that Board Meeting.

75. In the absence of any other documentation, I took account of Mr Miller's preparation note for the Board Meeting which was in the form of a handwritten "mind map" at page 219. It said "*Remove Dir Sals"* meaning "*remove Directors' salaries*".

76. The claimant's case was that by September or October 2018 the company was viable. At no point from October 2018 onwards did the claimant seek reinstatement of his salary at £8,333.33 per month. The claimant made a subject access request under the GDPR through which he obtained about 33,000 emails. From this exercise no email was brought forward into evidence to show the claimant seeking his salary from the point at which he considered the company was no longer at risk of insolvency.

77. Based on Mr Miller's witness evidence and his contemporaneous preparation note, the inconsistencies in the claimant's evidence and his failure to pursue his salary once he considered the company to be viable, I find that the claimant agreed at the 13 March 2018 meeting to forgo his salary on an indefinite basis.

78. The claimant was questioned as to what was "*in it for him*" such that he was prepared to agree to this. He agreed that he would continue to assist the company so that his employment would continue and financial reward would ultimately come his way. He said: "*absolutely, that was the point of doing it".* I find that all the Directors save for Mr Abrahams agreed to continue to provide their services to the company and forgo their salaries for the benefit of one another as employees, Directors and shareholders with a view to the continuation of the company, their continued employment and the ultimate

financial rewards that they each confidently expected.

79. It is not in dispute that from March 2018 until August 2019 the claimant received no salary from the respondent yet he continued to work during this period. From time to time he asked Mr Watkins for funds to assist him with his living expenses, some of which took the form of a Director's Loan Agreement and some of which was for reimbursement of company expenses such as for travel. For example on 18 March 2018 in an email titled "*Expenses plea*" the claimant told Mr Watkins that he needed money to pay for fuel, phone, rail fares and car tax. He said he had no access to funds and otherwise someone else would have to pick up his meetings (page 222).

The April 2018 Board Meeting

80. There was a further Board Meeting on 24 April 2018. As set out above, the claimant's co-Directors had issues about the way in which the claimant worked. Mr Miller raised with him an issue around the lack of contractual paperwork for several of his major projects. The claimant admits that he became angry at that meeting and agreed that his conduct was less than acceptable.

81. On 26 April 2018, following that meeting, the claimant sent an angrily worded email (page 251) to Mr Watkins saying that he would continue to work his way as this was more successful for him. Both Mr Watkins and the claimant accepted of themselves that they could sometimes respond in the moment with too much emotion and could regret this once they had time to think clearly about the matter.

82. In an email on 8 September 2018 (page 258) Mr Watkins asked Mr Miller how likely it was that they would "*get enough big deals in soon"* to make the company viable without the anticipated investment. Mr Watkins replied "*we are now viable, and with the surpluses we have generated in the first 8 months of this year close to recovering the losses of our early years*" (page 258).

83. Mr Miller's evidence was that this meant that they were now moving into a small amount of profit on each transaction they made but that they still had historic losses of around £200,000 to make good. That figure of £200,000 was reflected in Mr Watkins' email of 8 September. The claimant relied upon Mr Miller's email to support his claim that the respondent was sufficiently viable to reinstate his salary. I accepted Mr Miller's evidence that the company was only viable to the extent that it was trading without the need to pay the Directors' salaries. In any event, I have found above that the claimant agreed to forgo his salary and not to defer it temporarily.

84. In about October 2018 the respondent engaged Mr Ross as a Microsoft consultant paying him £60,000 plus expenses. Mr Miller said it was worthy of this further investment and Mr Ross was not an employee or a Director.

85. On 8 January 2019 Mr Watkins met with the claimant in Bedford to discuss a complaint received in December 2018 from the CEO of a supplier. It was an allegation of aggressive behaviour on the part of the claimant. Mr Watkins told

the claimant that he had considered resigning as he was not sure if he could continue to work with the claimant and was not sure they shared the same values.

The Cambridge Management Team meeting – March 2019

86. A Management Team Meeting was held in Cambridge on 18 and 19 March 2019. Mr Watkins' Agenda for that meeting was at page 301. Once again one of the matters he wanted to discuss was the claimant's lack of documentation on his projects. At that meeting they carried out some "*resegmenting*" of work by allocating different segments of their customer/partner base to individual members of the Management Team. The claimant was to concentrate on building relationships with some of their largest partners and was to hand over some of his work to other team members.

87. Between January to July 2019, the claimant sold 2,000 shares back to the respondent in six tranches. He was paid £20,000 and this reduced his shareholding in the respondent to 12.57%. One of the conditions of this agreement was that the claimant would reduce his Directors Loan Account. Details were set out in Mr Watkins' email to the claimant at page 289.

88. A Board Meeting was held on 9 April 2019 East India Club attended by the claimant, Mr Miller, Mr Watkins, Mr Hall and Mr Pearson, (Agenda page 304). They agreed that team satisfaction was low and that there had been talk of people leaving plus internal arguments (page 305). It showed a management team in conflict and difficulty, but I find that this was not solely due to the claimant. The lack of money was also putting a strain on their situation.

Payments to the claimant

89. On 29 July 2019 Mr Miller sent an email to the company's accountant Mr Greenhead stating that the company had a bank balance at that date of £573,059 and confirmed orders of £2m (page 317). Mr Miller agreed in evidence that the respondent company was no longer in imminent danger of trading whilst insolvent. He said that they were "*turning it around*" but not yet in a position to pay dividends.

90. In August 2019 after entering into a contract with a university, Mr Watkins agreed that bonus payments could be made including to the claimant. It was agreed that the claimant would receive the "*lion's share*" of the bonus payments to recognise his significant contribution towards this contract. He was paid a bonus of £7,800 but no basic pay. This was confirmed in an email from Ms Watkins to Mr Miller on 18 November 2019 (page 436). This email also confirmed that for September and October 2019 Ms Watkins had been instructed by Mr Watkins to pay the claimant "*£3,500 after tax as basic pay – this equated to Gross of £5,000 in September and £5,100 in October".*

91. In September 2019 a number of payments were made to the claimant so that he could cover his mortgage and living expenses. The respondent described these as discretionary payments. I find that they were not contractual salary

payments.

92. The claimant received salary payments in September, October, November and December 2019 (spreadsheet at page 710). For the 2017/2018 tax year he was paid £27,933.33 gross; he received no salary in the tax year 2018/2019 and for the 2019/2020 tax year he received £28,100 gross.

Working relationships deteriorate

93. On 1 October 2019 Mr Watkins and Mr Miller had a meeting at which Mr Miller informed Mr Watkins that he intended to resign due to the difficulties he had working with the claimant. Mr Miller also expressed concern about the welfare of Mr Pearson. He thought Mr Pearson might be "*close to reconsidering his position with the respondent".* Both sides agreed that Mr Pearson was an important "*cog"* in the business. Mr Miller said that he would complete the 2019 year end accounts and leave after this. This did not transpire because even as at the date of this hearing, 1 year and 5 months after that conversation, Mr Miller remains employed by the respondent.

94. On 24 October 2019 Mr Watkins met with Mr Pearson who said he had been applying for other jobs and gave the main reason as the claimant's behaviour towards him. Mr Pearson alleged that the claimant behaved in an aggressive and bullying manner. Mr Watkins was concerned that if both Mr Miller and Mr Pearson left the respondent, there was a risk that the business would collapse. Mr Hall agreed with that view.

95. The claimant accepts that it was a concerning situation for Mr Watkins for both Mr Miller and Mr Pearson to be considering leaving the company because of their working relationship with him. At that point the claimant did not know anything about their views or intentions.

96. On 25 October 2019 Mr Watkins sent an email to Mr Miller, who was setting off on holiday at the time, saying: "*I have thought long and hard about our conversation at the East India Club and I have decided to take your advice with regard to [the claimant]. You are absolutely right and I have tolerated his Viking behaviour for too long*." He said his current plan was to ask for the claimant's resignation and he asked if Mr Miller would reconsider his decision to leave, or delay it into 2020.

97. In that email exchange Mr Miller said in relation to Mr Pearson, "*I told him of my plan to let Pikey go and he seemed both pleased and reassured…… The conversation with Ollie made me even more determined that letting Pikey go is the right thing to do*." (page 326).

98. On 30 October 2019 the claimant and Mr Watkins had a meeting to discuss Mr Watkins' concerns about the claimant's behaviour and the proposed departure of Mr Miller and Mr Pearson. Part of this meeting was a protected conversation under section 111A Employment Rights Act 1996. This was the first time that the claimant became aware of Mr Miller and Mr Pearson's concerns about him.

99. On 31 October 2019 Mr Watkins had an email exchange with Mr Miller and Mr Hall about their next steps. He told them that the claimant would not "*go quietly"* and the claimant asked for "*arbitration*" between himself, Mr Miller and Mr Pearson. Mr Hall said: "*And I think we're way past the point of even thinking about keeping him on aren't we? There's really no coming back from the conversation you had yesterday….*".

100. On 1 November 2019 the claimant contacted Mr Watkins to follow-up on their 30 October meeting. Mr Watkins said that mediation was an option. Mr Watkins took HR advice which recommended that Mr Pearson should be asked whether he wished to present a formal grievance, but that in any event the allegations of bullying should be investigated.

101. Also on 1 November 2019 Mr Watkins said in an email to Mr Hall: (page 340):

> *"I also now have access to Pikey's emails. Before I met him on Wednesday I had Lightpath switch on the Litigation feature that means even if he deletes any emails they will be kept in a secret folder he can't access. One possibility is that if he's been using the email inappropriately then we could have a gross misconduct case, but I need to see what's in there first ….."*

102. Lightpath is the respondent's IT provider. I find that Mr Watkins was looking to see whether he could find any examples of misconduct against the claimant by looking through his emails.

The claimant's suspension

103. On 5 November 2019 the claimant was suspended from work by email from Mr Watkins on allegations of potential bullying and behaviour likely to bring the company into disrepute. In the suspension email (page 352) the claimant was told not to contact any employees, customers, suppliers or stakeholders until the investigation was complete, unless instructed to do so by Mr Watkins. I find that the reason for the suspension was the allegations of bullying. The allegations of bullying came from Mr Pearson.

104. Mr Hall had responsibility for HR matters and he was asked by Mr Watkins to conduct an investigation.

105. On 11 November 2019 Mr Hall held an investigatory meeting with Mr Pearson to discuss his complaints against the claimant. The notes of that meeting were at page 380.

106. At 10:29am on 12 November, Mr Watkins sent an email to the claimant informing him that Mr Pearson had withdrawn the allegations but said that he thought the trust between the claimant and Mr Pearson was broken and similarly with Mr Miller and between the claimant and himself. He said "*So for me the logical decision is clear. I need to stay to keep the company going. That means you need to go.*" (page 407). The claimant agreed to Mr Watkins suggestion of a meeting.

107. In reply at 11:22 on 12 November the claimant said: "*SO – Now I shouldn't be suspended as this is no longer a disciplinary issue…".*

108. At 12:48 on 12 November 2019 Mr Watkins emailed Mr Hall and Mr Miller (page 410). He told them that the bullying allegation had been withdrawn. He said: *"It causes a minor blip in the process, but it does not stop then direction of travel".* Mr Watkins accepted in cross examination that the direction of travel was towards the claimant departing and I find that this is what he was working towards.

The events of 13 and 14 November 2019

109. On 13 November 2019 at 10:52 Mr Watkins emailed the claimant to say that he had been advised to write to the claimant confirming that he remained suspended "*because of the breakdown in trust between the management team and yourself"* (page 414). Mr Watkins said "*To be honest, given we're meeting later, I was hoping to avoid that so it stays off the official record".* The claimant said that he did not understand this to mean that he was still suspended. After sending that email Mr Watkins set out on a five hour drive for a meeting with the claimant.

110. On 13 November 2019 at 12:21 Mr Hall emailed the claimant to inform him that the bullying allegations had been withdrawn and his investigation was closed (page 415).

111. At about 6pm on 13 November 2019 the claimant and Mr Watkins met at a pub close to the claimant's home. Mr Watkins came to that meeting with the intention of asking for the claimant's resignation and agreeing terms for his departure. The claimant argued for the continuation of his employment and Mr Watkins accepted that the claimant made an eloquent case for this which was sufficiently convincing to cause him to consider changing his mind.

112. The claimant said that as the bullying allegation had gone the suspension should be lifted and he should be allowed to return to work. In his witness statement at paragraph 42, Mr Watkins said he explicitly told the claimant that the suspension would have to remain in place for the time being and that he "*explicitly*" told him not to contact customers or suppliers save for one client who is referred to as KG from an Academy Trust. In cross-examination Mr Watkins was much less certain as to whether he had told the claimant he remained suspended.

113. The claimant's evidence (statement paragraphs 48 and 49) was that the question of his return to work was discussed and that Mr Watkins agreed that as the complaint had been withdrawn, he should be able to return to work. The claimant said Mr Watkins told him that he would have to "*talk to everyone else*" but he left under the clear impression that he could go back to work the following day. The claimant said he told Mr Watkins what he planned to do at work the following day, including that he would be speaking to an external stakeholder, Mr K. He said that Mr Watkins did not "*push back"* or object.

114. Given the different witness accounts and Mr Watkins' uncertainty as to what he told the claimant, I find on a balance of probabilities that he did not tell the claimant that he remained suspended and the claimant was under the impression that the suspension had been lifted with the withdrawal of the bullying allegations. I find that Mr Watkins failed to make the position clear. The claimant got up at 5am the following day to be on the road to travel to a meeting with a local authority. He arrived there at about 08:45. He went ahead with this meeting and no action was taken against him for this.

115. In a subsequent investigation meeting on 17 January 2020, referred to in more detail below, the claimant told Mr Hall that he contacted Mr K "*on the assumption that he was no longer suspended which he [Neil] did not dispute*". My finding is that the claimant took the view, although he had not been told expressly, that his suspension had been lifted. I find that the position had not been made clear to him and having told Mr Watkins what he planned to be doing by way of work, he formed the view he was no longer suspended.

116. At 08:19 the following morning, 14 November 2019, Mr Watkins sent an message to the claimant. He said "*thanks again for last night. This is the toughest decision I've ever had to make because whatever I choose is wrong. I'm going to reflect on the things we talked about this morning and make a final decision while driving home."* (page 501).

117. The claimant replied at 08:43 with a long message (page 502) saying that he was prepared to work out a solution to allow them to continue working together. He said he was putting the company first but that "*the legal risk from me will be big and I will be prepared to push the button on it" and* "*I will go for Ollie [Pearson] in that legal process*". Mr Watkins said that the reference to "*going for"* Mr Pearson was for him, "*the last straw".*

118. At approximately 1pm on 14 November the claimant contacted Mr K, which he believed he was permitted to do, but which the respondent considered to be a breach of the terms of his suspension. The other Directors were concerned about this because they were in the middle of contract negotiations with Mr K. The claimant and Mr K had a long standing friendship and it was a relationship that Mr Watkins acknowledged could benefit the respondent. The claimant told Mr K about his suspension and problems with the respondent. He wanted to make sure that he told Mr K "*before anyone else did*".

119. At 1:03pm on 14 November 2019 Mr Watkins sent to his co-Directors the claimant's message of 08:43 hours, saying he would "*go for Ollie*" in his legal process. He copied the message saying: "*Gents, please see text below that I got from Pikey as I was driving home. It pretty much confirms what he said previously, but the threat to go after Ollie personally is new, and disappointing, but to be expected in the circumstances. I'll draft the termination letter now.*" (page 417). Mr Watkins accidentally sent this to the claimant. He agreed that termination of employment was in his mind that day.

120. Although the claimant spoke to Mr K at around 1pm on 14 November, I accepted the claimant's evidence that he had not seen the accidentally-sent

message at the time he called Mr K. The claimant explained in evidence exactly what he had been doing at the time and I found his evidence convincing. I find it was a coincidence of timing and that the claimant did not call Mr K in response to receiving the email sent to him by accident.

121. At 3:18pm Mr Watkins sent an email to the claimant (page 421) saying: "*I regret to inform that you are currently under suspension…. while we carry out investigations into the breakdown in trust between you and members of the management team*".

122. At 15:22 the claimant replied: "*Your message to Nigel said that you are drafting a termination letter. So I guess the process is a waste of time as you've made your minds up. I have spoken to [Mr K] about my problems. Luckily that's before you suspended me – again."* The claimant's reference to being suspended again, supports my finding that he considered the suspension lifted at the meeting on 13 November 2019.

123. At 15:32 Mr Watkins told the claimant that although he said he was going to draft a termination letter, he had spoken to his lawyer and decided to follow process.

124. In the evening of 14 November, Mr Watkins sent an email to Mr Miller and Mr Hall with a draft dismissal email for the claimant (page 428). Ultimately this email was not sent to the claimant.

18 November 2019 Board Meeting

125. Mr Watkins took the view that the claimant was in breach of the terms of his suspension by discussing his suspension and issues with Mr K. Mr Watkins called an Emergency Board Meeting for 18 November 2019. It was attended by Mr Watkins, Mr Hall, Mr Miller and Mr Pearson. The Minutes were at page 429.

126. They discussed the fact that the claimant had been suspended since 5 November and that this suspension would remain in place while they investigated issues around the breakdown in trust between the claimant and the Senior Management Team. They considered he had breached his contract of employment by phoning Mr K and informing him of the confidential internal process. They considered it an attempt by the claimant to undermine the respondent pending the signing of a new contract.

Mediation in December 2019

127. On 20 November 2019 the claimant's solicitors wrote to Mr Watkins (page 440). It dealt with the recent events including the mis-sent email and the suspension and requested mediation. There was nothing in this letter dealing with any failure to pay the claimant's salary, which supports the finding that the claimant had agreed to forgo his salary.

128. In December 2020 the parties engaged in mediation which ultimately failed.

This was dealt with by Mr Miller in his grievance outcome to the claimant dated 26 February 2020. At the outset the mediator asked for the claimant's "*red line*" which was to return to his employment and Mr Watkins' "*red line"* which was that the claimant would not return to his employment. I find that on the respondent's part this was not a mediation aimed at restoring the working the relationships. Mr Watkins' "*red line*" was the termination of the claimant's employment. (Grievance outcome letter at page 593). Mr Miller accepted in the grievance outcome that the mediation did not allow for the repairing of relations to allow the claimant to continue in employment.

Disciplinary and grievance proceedings

129. On 2 January 2020 Mr Watkins sent an email to the claimant informing him of disciplinary proceedings and inviting him to a disciplinary hearing on 7 January 2020 (page 486). The disciplinary charges were the contacting of Mr K on 14 November whilst under suspension, divulging confidential information and acting in breach of his fiduciary duty to the company in breach of his employment contract.

130. On 6 January 2020 claimant raised a grievance against Mr Watkins (page 490-493). The claimant raised 12 points of grievance, none of which relate to the non-payment of his salary which supports my finding that he had agreed to forgo his salary. In the grievance the claimant said that he wanted to regularise the working relationship and restore it. He did not accept that the relationship was broken. He also made a subject access request under the GDPR.

131. A Board Meeting took place on 7 January 2020 at which it was decided that Mr Hall would hold an investigation meeting with the claimant and that he would receive HR support from external HR advisors. Mr Hall prepared an "*Investigation plan*" setting out how he was going to conduct the investigation (page 513).

132. On 17 January 2020 the investigatory meeting took place between the claimant and Mr Hall with the support of an HR consultant (notes page 515). The claimant did not believe the process would be fair and said "*You've made your minds up".* He also raised with Mr Hall his concerns about not receiving financial benefits from the company and having to borrow money. He described it as a breach of his employment contract. This was not explored by Mr Hall as it was not the purpose of the meeting.

133. On 22 January 2020, as part of the investigation Mr Hall met separately with Mr K and Mr Watkins for their accounts of events. The Investigation Report into "*Allegations of gross misconduct*" was at page 545. Mr Hall considered that formal disciplinary action was not warranted (page 554). Mr Hall was aware that the claimant and Mr K had known each other for a long time and accepted that the relationship was of value to the company. The claimant does not have any dispute with the way in which Mr Hall carried out his investigation and accepts that he carried it out in good faith.

134. On 17 February 2020 Mr Miller heard the claimant's grievance again with HR

support - notes pages 563-578.

135. The grievance recommendation was sent to the claimant on 26 February 2020 – pages 586-598. The claimant continued to make it clear that he did not want to leave the company. He told Mr Miller (page 573) that no issues were ever raised with him. Mr Miller did not accept this but agreed that no formal action had been taken against him. He said that there had been actions in the background to try to help the team communicate better but no formal action. It was a very detailed grievance outcome and five out of the claimant's 12 points of grievance were upheld.

136. The claimant was asked what he was looking for as an outcome to the grievance. He said he wanted *"bygones to be bygones and get on with the job"* (page 574). He also said he was willing to *"sit down and talk things through with people".* He said he would go to court if things did not go his way.

137. The grievance recommendation was that the management team should meet to discuss potential return to work for the claimant and to consider whether there were grounds to believe that the personalities of the management team could be reconciled so that they could continue to work together. Mr Hall recommended that if a member of staff was suspended, the suspension details should be made clear, including likely period of suspension, the restrictions and the likely events that would bring suspension to an end.

138. On 2 March 2020 the claimant said he would not appeal the outcome of the grievance. He queried why he remained suspended.

<u>The 6 March 2020 Management Team meeting</u>

139. On 6 March 2020 the Management Team met to discuss the grievance recommendations – the notes of that meeting, at page 600, were prepared by Mr Miller. There was a discussion about whether mediation might enable them to work together (page 602). The attendees at that meeting were Mr Watkins, Mr Pearson and Mr Miller with Mr Hall attending by Skype.

140. The following discussion took place as shown at point (e) of the Minutes:

> *"Would we, (the leadership team) be open to sitting down with [the claimant] either individually, or as a group, or both, to 'clear the air'? If not, why not? We all felt that the breakdown of trust was not a 'clear the air' type issue. It was not as if there was a difference of opinion or interpretation or misunderstanding that could be reasonably explained and jointly resolved. Further we didn't want to hold a meeting and potentially have a contrived conversation just 'to be seen to hold a meeting and talk to [the claimant]'. We all thought this would be a charade and that it would be unfair on [the claimant] to present him with the possibility that there might be a reconciliation."*

141. They discussed whether there were any measures they could consider putting in place to enable them to continue to work together, even if the personality

clash could not be resolved. They all felt that this was not an issue of personality clash but a lack of trust around the claimant's corporate and professional behaviours which they thought could irreparably damage the company's corporate responsibilities.

142. They said that they had reviewed "*re-segmenting our systems and processes*" but they considered there was no evidence that the claimant would follow or adhere to any changed processes. They looked at whether they could realign business areas of responsibility to move the claimant to more front of house role. They did not think this would work. They thought about creating a corporate role such as chair or non-executive director, to keep him engaged in the company but they thought that corporate governance was not an area in which the claimant had any skills or interest. The note recorded their view that *"All four members of the management team independently indicated that they would not be prepared to work for [the respondent] were [the claimant] to take up such a senior role."*

143. They took the view that whilst they might be able to address one or two of the ways in which trust had been broken, they would not be able address the depth of mistrust. I find that they did not have an open minded approach and they formed these views without any discussion with the claimant as to what he was prepared to do. They were continuing in the "*direction of travel*" mentioned by Mr Watkins on 12 November 2019. This was towards the claimant leaving the company. The Management Team nevertheless decided to reflect on matters for a week and called a further meeting 13 March 2020.

144. The next meeting took place on 13 March 2020 when it was agreed that Mr Watkins would write to the claimant to say that there appeared to be an irretrievable breakdown of trust and confidence and to invite him to a meeting so that he could respond. The Minutes of that meeting were at page 605. Mr Hall said in evidence that by March 2020 he could not envisage a way in which the claimant could return.

<u>The dismissal meeting</u>

145. Mr Miller wrote to the claimant on 18 March 2020 in the terms agreed by the Management Team and invited him to a meeting on 26 March 2020 (page 606-607) In that letter Mr Miller said:

> *"In summary I feel that we have fully investigated your concerns and explored how it may be possible to resolve working relationships, but as you will see from the notes of the management team meeting of 6 March 2020, we do not believe that they are capable of restoration. It is also important to note that we are a very small organisation with only six employees, of which you are one, therefore the options available to us are limited in the circumstances where relationships appear to have broken down irretrievably. I feel therefore that we have exhausted all reasonable steps that we could take as an employer to ensure an amicable and collaborative employment relationship. I am at a loss as to what other steps the Board or management team can take to resolve the situation. It is with great regret that in these circumstances I believe we are*

left with only one option and that is to contemplate your dismissal from the organisation."

146. The meeting notes of 6 March 2020 were included with this letter. This set out the perceptions of the Directors of their working relationship with the claimant, including from Mr Hall "*my working relationship with [the claimant[is broken*", from Mr Pearson "*my working relationship with [the claimant[is strained to breaking*", from Mr Miller "*my professional trust in [the claimant] (dealing with the Public Sector) is broken*" and from Mr Watkins "*I knew I was lying to myself and you to cover up for his poor behaviours*" (page 601).

147. These comments were made in advance of the meeting at which a final decision was to be made and clearly showed a very negative view of the claimant and pointed strongly in the direction of travel already indicated by Mr Watkins four months earlier.

148. On 20 March 2020 the claimant sent an email to the Board suggesting mediation (page 738). He made the valid point that the previous mediation session was not a success, as Mr Watkins wanted to use it to remove him from the company. The claimant wanted a mediation with a view to resolving differences and thought that if the only solution on the table was his removal, this was not a fair way to proceed.

149. The meeting to consider the claimant's dismissal took place on 26 March 2020 by Skype as by then the country had gone into lockdown (notes page 608-618). It was chaired by Mr Miller with a notetaker/HR consultant present. The meeting lasted over two hours. The claimant was given an opportunity to state his case. One of the options he raised was that he would be prepared to take a course through the Institute of Directors to help him become a more corporate minded Director. When the claimant asked Mr Miller "*How would you see me fixing it?*" Mr Miller replied *"I may choose to go anyway. For all sorts of reasons…."*. I find that Mr Miller approached this meeting with a closed mind based on the discussions at the 6 March 2020 Board Meeting.

150. The claimant said at that meeting that he had to "*be who I am. I can't change that*". He thought the working relationship could be fixed. Mr Miller concluded the meeting by saying that at one end of the spectrum they could dismiss the claimant and at the other end there were lesser sanctions or measures. He said he would put the decision in writing to the claimant.

<u>Board meeting 8 April 2020 and dismissal letter</u>

151. Mr Miller concluded that the breakdown in trust and working relationships was both serious and irretrievable and his decision was that the claimant should be dismissed. A Board Meeting was held on 8 April 2020 at which his decision was ratified (Agenda page 626). The attendees were Mr Miller, Mr Watkins and Mr Hall.

152. On 8 April 2020 Mr Miller sent a dismissal letter to the claimant. It was a detailed letter, 16 pages in length, explaining why they considered trust and confidence

in the claimant had irretrievably broken down and why they considered the working relationship untenable (letter pages 628-643). The claimant's employment was terminated giving three months' notice with the last day of service of 7 July 2020. They placed him on garden leave under clause 18 of his Service Agreement for the duration of his notice period.

153. Mr Miller was clear in evidence that he did not regard this as a conduct dismissal. In his mind it was a "*trust and confidence*" dismissal. I find that misconduct was not the reason for dismissal.

154. In relation to the possibility of working in another role as they had discussed at the Cambridge meeting in March 2019, Mr Miller said (point d. on page 638) that he was not convinced that the claimant had thought "*long and hard*" about it and that he had little to add to indicate how it would work. I find he was putting the onus on the claimant to prove that the relationship had not broken down irretrievably.

155. It was put to Mr Miller that with him as the disciplinary officer, dismissal was inevitable. He had made it clear to Mr Watkins in October 2019 that he intended to resign because of his difficulties with the claimant. Yet it was Mr Miller who held the dismissal meeting and made the decision to dismiss. Whilst this was a small company and it was hard to find anyone who was not involved in the issues, I find that Mr Miller was the least impartial officer to hold this hearing. He had a personal vested interest in the outcome in terms of his own future with the company.

156. The disciplinary procedure (page 85) said at clause 13.1 "*There may be occasions when we deem it appropriate for an alternative person of appropriate seniority to conduct one or more stages of the process…… The alternative person may be an independent third party.".* I find that no consideration was given to this, despite having the benefit of HR advice.

<u>The appeal against dismissal</u>

157. The claimant was given a right of appeal which he exercised on 15 April 2020. Some extensions of time were granted and he set out his full grounds of appeal in a letter dated 14 May 2020 – page 653. He had four main grounds of appeal and these were: (i) the decision to dismiss was predetermined, (ii) no fair process was followed, (iii) the facts found were not based on a balanced view of the evidence and (iv) dismissal was a disproportionate sanction.

158. The appeal hearing took place on 27 May 2020 chaired by Mr Hall with an HR consultant as notetaker – notes page 678. The appeal was to consider whether there was any way that the claimant could come back to work. Mr Hall accepted that in March 2020 he was one of the decision makers to the effect that the claimant could not return either to his current role or in any role that they could envisage. Once again I find that no thought was given to whether the respondent could have brought in an independent third party to conduct the appeal hearing.

159. Mr Hall dismissed the claimant's appeal and sent an outcome letter on 4 June 2020 which ran to 14 pages (pages 683-696). Mr Hall agreed in evidence that he rejected the appeal for the same reasons that the Board had considered on 6 March 2020.

160. At the appeal hearing the claimant asked for a "*proper mediation*" and not the "*ambush*" he had in December 2019 when Mr Watkins' bottom line was his removal from the company. Mr Hall accepted in evidence that this was a reasonable request. It was not done. Mr Hall also thought it was easy for the claimant to say he would do a course through the Institute of Directors but he thought this did not mean that the claimant would do anything differently after he had done the course. He could also not see any realistic means by which the claimant's "*reinstatement might be enacted that has not already been considered and rejected as unworkable in Paul Miller's [dismissal] letter of 8 April"* (page 696).

161. In terms of sanction, the claimant put to Mr Hall that it would have been more proportionate to give him a warning to "*sort [himself] out*" (page 679). He said he had never been threatened with losing his role until his discussion with Mr Watkins in late October 2019. Within a few days he was suspended and did not effectively return to work.

162. Mr Hall made clear that the claimant was not being dismissed for any disciplinary or capability issues (outcome letter, bundle page 694) and he confirmed this in evidence. I find that whatever criticisms the respondent's witnesses brought up in evidence about the claimant's conduct, they were not relevant to the decision to dismissal or the appeal outcome.

163. Mr Hall also expected the claimant to put forward "*further new options"* that could enable him to return to work, effectively putting the onus on him. He said that "*sadly"* no other options were put forward other than repeating the statements he had already made to Mr Miller at his dismissal hearing (page 687).

164. The claimant did not challenge the processes followed either for his grievance, dismissal or appeal. He considered that his colleagues acted professionally in conducting those processes.

165. There was a conflict in the claimant's evidence as to the fairness of his dismissal. During his cross-examination on day 3 of this hearing, he accepted that there were *"ample grounds to dismiss [him]"* and it was reasonable for Mr Miller to dismiss him. The claimant was asked in re-examination whether he supported the decision to dismiss. He said: "*No I don't. Whilst the process was right I don't agree with how we got there".* He said he not been given notice of the behavioural changes that were required of him and he was not given time to fix the problems with notice that his job was under threat.

166. I find that the claimant has no issue with the way in which the process leading to dismissal was conducted. He considered the process was reasonable but the decision to dismiss was not reasonable. I find that there was some

confusion on his part between these two matters. On a balance of probabilities I find that the claimant did not intend to concede his unfair dismissal claim with this answer in cross-examination and he maintained the position that the decision to dismiss was unfair.

Holidays

167. Mr Miller's evidence was that the Directors could take holiday whenever they wished. He agreed and I find, that no remuneration was paid to the claimant during holiday. The claimant also accepted that he could take holiday whenever he wished. There was no procedure for booking holiday.

168. Under the terms of his contract of employment, clause 15, the claimant was entitled to 25 days holiday per annum plus the 8 statutory bank holidays. The holiday year was the calendar year (page 156). He said that he and his co-Directors did not take all the holiday to which they were entitled in any one year. Clause 15.7 provided for carry over of untaken annual leave, to a maximum of 10 days, into the following leave year.

169. Under clause 15.5 the respondent could require the claimant to take any outstanding holiday entitlement during his notice period.

170. The claimant took 5 days paid leave in February 2018 (his calendar entry at page 717). This predated the March 2018 agreement to forgo salary.

171. The claimant agrees and I find that he took five days holiday in August 2018 and five days holiday in August 2019. He took a further five days holiday in April 2019 and two days holiday in December 2019. None of this holiday was paid save for the two days in December 2019. In December 2019 the claimant received what was described as a "*discretionary payment*" of £5,100 gross (spreadsheet of payments through payroll at page 710).

172. In his dismissal letter (page 643) the claimant was required to take any outstanding annual leave during his notice period, under clause 15.5 of his contract. The notice period was three months from 8 April 2020.

173. It is not in dispute that the claimant did not raise a grievance in relation to lack of paid holiday. The respondent submits that he unreasonably failed to raise a grievance such that his entitlement to paid holiday should be reduced by up to 25%. The claimant knew that he could raise a grievance because he did so on 6 January 2020 on other matters (grievance page 490).

174. The claimant submits that there was no unreasonable failure to raise a grievance because he was clear as to what the respondent's position would be. I find that it was not unreasonable for the claimant to fail to raise a grievance on the issue of paid holidays. I find that the respondent stood firm on the issue of foregoing salary and there was little to be gained by the claimant raising a grievance for his holiday pay. I find no unreasonableness on his part.

The relevant law

Changes to written particulars

175. Under section 4 of the Employment Rights Act 1996 if there is a change in any of the matters particulars which are required by sections 1 to 3 to be included in a statement under section 1, the employer shall give to the worker a written statement containing particulars of the change. The notice of the change is to be given within one month of the change.

Unfair dismissal

176. The categories of potentially fair reason for dismissal are set out in section 98 of the Employment Rights Act 1996. SOSR is a potentially fair reason under section 98(1).

177. Section 98(4) of the Employment Rights Act 1996 provides that 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.

SOSR dismissals

178. The case of ***Perkin v St George's Healthcare NHS Trust 2005 IRLR 934*** deals with SOSR where there is a breakdown in working relationships. In that case the dismissal was on the grounds of conduct in circumstances where the employee, a Finance Director, had caused a breakdown in relationships with other members of the senior executive committee by reason of his manner and management style. The Court of Appeal said that although personality could not of itself amount to misconduct as a reason for dismissal, it could manifest itself in such a way as to amount to a fair reason for dismissal. The CA considered that where the personality clash led to a breakdown in the functioning of the employer's operation, that could amount to some other substantial reason for dismissal. The CA also stressed that it is necessary for the employer to prove the necessary facts.

179. In ***Ezsias v North Glamorgan NHS Trust 2011 IRLR 550, EAT*** the NHS Trust was permitted to change the basis for disciplining a consultant, with whom colleagues found it difficult to work, from misconduct to SOSR after the investigations had begun. This meant that the Trust did not have to go through detailed conduct procedures laid down at the time by the Department of Health. The dismissal was held to be fair. It was a relevant feature of that case that there was an urgency to resolve the position because the relationship breakdown was said to be affecting patient care.

180. In ***Phoenix House Ltd v Stockman 2017 ICR 84*** the EAT held that it was unfair, in that SOSR dismissal case, to place the onus on the employee to show

that the relationship had not broken down irretrievably (judgment paragraph 16).

181. There is no requirement for an employer to conduct a further process or take a further step if it would serve no meaningful purpose - ***Jefferson (Commercial) LLP v Westgate EAT/0128/12*.** In that case the employee had stated that he was not prepared to return to work and that he had lost all trust in his employer. The EAT agreed in that case that a further meeting to discuss that position would serve no meaningful purpose.

Contributory fault

182. Under section 123(6) ERA, if the tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount of any compensatory award as it considers just and equitable. For the basic award section 122(2) provides that where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, it can reduce the amount accordingly. The test under each section is slightly different.

Consideration

183. On the issue of consideration the basic proposition is that in order for a contract to be valid it must be supported by consideration. This means there should be some benefit passing from each of the parties to the other. Once a legally binding contract has been formed, it can only be varied by agreement, again supported by consideration. The position is more complex when the employee agrees to have his or her pay cut.

184. Three cases were relied upon by the respondent, taken from the IDS Handbook on Contracts of Employment. They were ***Norbrook Laboratories Ltd v Smyth 1987 4 BNIL 14, ChD*** where the High Court in Northern Ireland decided that an agreement that the employee would not to disclose confidential information was supported by consideration when the employer refrained from dismissing him. In ***Lee v GEC Plessey Telecommunications 1993 IRLR 383*** the High Court said that where, in the context of pay negotiations, increased remuneration wads paid and employees continued to work as before, there was consideration for the increase because of the settlement of the pay claim and the continuation of the employment. In ***Attrill v Dresdner Kleinwort Ltd 2012 IRLR 553 (CA)*** the employer contended that the employees had not provided any consideration in respect of a promise to pay bonuses. The High Court found that the employer benefited from this promise in the retention and incentivisation of staff, and found there was consideration.

185. There is a general proposition in contract law that the mere payment of a lesser sum in place of a greater sum cannot amount to good consideration for an agreement to accept a lesser sum: see ***Vanbergen v St Edmunds Properties Ltd 1933 2 KB 223***, quoted in ***Re Selectmove Ltd 1995 1 WLR 474 (CA)*** at 480A.

186. The case law has considered whether a practical benefit may in some circumstances be good consideration, for example in ***Williams v Roffey Bros & Nicholls (Contractors) Ltd 1991 1 QB 1***. This approach was distinguished in ***Re Selectmove Ltd (above)*** which considered whether a practical benefit amounted to good consideration. This was not an employment case but concerned a company which owed sums to the Revenue. It was found that a promise to pay existing liabilities by instalments and future payments when they fell due, failed for lack of consideration. The practical benefit put forward was that the Revenue was likely to recover more by not enforcing its debt than from a putting the company into liquidation.

187. The claimant relied on the decision of the High Court in ***Corbern v Whatmusic Holdings Ltd 2003 EWHC 2134 (Ch)*** which concerned an application by the company to restrain a strike out petition. In that case a director was alleged to have agreed not to draw his salary until the company could afford to pay. He presented a winding up petition in respect of unpaid salary. The company sought to rely on that alleged agreement. Without determining whether the agreement had been made Hart J found that the agreement would not have been enforceable because it was unsupported by consideration. Following ***Re Selectmove*** the High Court rejected the argument that the continued survival of the company was good consideration for an agreement not to take his pay (judgment paragraph 6).

188. The respondent relied upon the decision of the Court of Appeal in ***Stack v Ajar-Tec 2015 IRLR 474.*** This case has similarities to the present case in that it concerned a three-person company in the audio-visual business. The three individuals were shareholders and directors. Mr Stack was not paid for his work and never sought payment although spent about 80% of his working time on the business. The relationships between the three individuals deteriorated and the other two terminated Mr Stack's directorship. He claimed for unlawful deductions from wages. The issue was whether Mr Stack had been an employee or worker within the meaning of section 230 ERA 1996. There was a finding that he had been an employee and an implied term that he would be paid a reasonable amount for what he did. The respondent company appealed submitting that the issue of remuneration was pivotal. The EAT allowed the appeal holding that there had been no consideration. This was overturned by the Court of Appeal which said that the EAT had erred in finding that Mr Stack had not had an employment contract as there had been no consideration, despite his never having been paid. The CA found that each of the three individuals had agreed to contribute different things to the venture Mr Stack and one director had agreed to contribute their skills and money and the other director his skills. The CA held that ample consideration was to be found in the mutuality of the promises.

189. The case of ***Secretary of State for Business, Innovation and Skills v Knight EAT/00073/13*** concerned a company director who claimed a redundancy payment from the insolvency service. She had not been paid any salary for the last two years of the company's trading. Her evidence was that because times were hard she forfeited her salary to enable other employees and creditors to be paid. On the issue of consideration, the EAT held that there was no lack of

mutuality or consideration. The EAT said (judgment paragraph 23):

> *"On the findings to which I have referred, the argument that the arrangement between Mrs Knight and her company in the last two years had no mutuality or was not a contract at all because there was no consideration moving from the employer to the employee cannot, in my judgment, succeed. In any event, although McKenna J suggested in* Ready Mix *that remuneration in some form is an essential ingredient of a contract of employment, there may be a contract of employment, as I see it, in which the employee does not seek payment, yet which would not fail for lack of mutuality or absence of consideration. Under such a contract an employee could owe a duty to carry out whatever work he or she had agreed to do; and the employer would have to fulfil obligations which might not involve the payment of money, eg the provision of tools and equipment or the taking of reasonable care for the employee's health and safety. Money is not the only consideration which may move from an employer under a contract of employment."*

190. After close of submissions and on the working day following the hearing the respondent submitted a further authority and copied this to the claimant. I agreed to accept this giving the claimant a brief right of reply, which was considered. The case was ***GAP Personnel Franchises Ltd v Robinson EAT/0342/07,*** HHJ Peter Clark, who said at paragraph 14:

> "*Before turning to the issue of affirmation I should deal with the question of consideration. In my view it is generally accepted law that consideration for a variation in the terms of a contract of employment is mutually provided by the employer continuing to employ the employee and the employee continuing in that employment. Thus the question of consideration all does not assist in resolving the real issue of affirmation."*

<u>Unlawful deductions from wages</u>

191. Section 13(1) of the ERA 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

192. Section 13(3) provides that where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him….., the amount of the deficiency shall be treated … as a deduction made by the employer from the worker's wages.

193. On the question of backdating section 23(4A) provides that an employment tribunal is not to consider so much of a complaint as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint. The date of the presentation of the complaint in this case was 12 October 2020.

194. Section 24(2) of the ERA 1996 provides that where a tribunal makes a declaration that the claimant is entitled to payment of any unlawful deduction, it may order the employer to pay to that worker, in addition to any other amount

ordered to be paid to the claimant, such amount as the tribunal considers appropriate in all the circumstances to compensate him for any financial loss sustained, which is attributable to the matter complained of. The loss must be as a result of the unlawful deduction. This is a remedy issue not dealt with at this hearing.

ACAS Code

195. Section 207A (3) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA) provides that if, in the case of proceedings to which the section applies, it appears to the employment tribunal that (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employee has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable it may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%. A claim for unlawful deductions from wages is a claim to which section 207A applies.

Holiday pay

196. Regulation 13(1) of the Working Time Regulations 1998 provides that a worker is entitled to four weeks' annual leave in each leave year. The claim and the issues for determination are based on the right in Regulation 13 and not the extended right under Regulation 13A.

197. Under Regulation 14(2), on termination of employment, where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of that leave.

198. As a matter of EU law, the right to annual leave and the right to a payment for annual leave are two aspects of a single right and that when taking annual leave, a worker must be able to benefit from the remuneration to which he is entitled: ***King v Sash Window Workshop 2018 ICR 693 (CJEU)***, paragraphs 35-36.

199. The CJEU also held that where a worker is not permitted to take paid annual leave, then his rights carry over to the next leave year. It is not permissible to limit the ability of a worker who has not been allowed to take paid annual leave to carry-over his entitlement from one year to the next. Such a worker may continue to carry-over and increase his accrued entitlement until either he is permitted to take the paid leave, or his employment ends: ***King*** paragraphs 58-65. This applies to the statutory leave of 20 days in Regulation 13 Working Time Regulations 1998, as derived from the Working Time Directive.

Conclusions

Unlawful deductions from wages

200. I have found above that the claimant is entitled to his contractual pay based on

£100,000 gross per annum for the period 1 August 2017 to 16 October 2017 which succeeds as a breach of contract claim. It is accepted by the claimant that it cannot succeed as a claim for unlawful deductions from wages because of the two year backdating provision.

201. I have found above that the claimant is entitled to the balance of his contractual salary for January and February 2018 which succeeds as a breach of contract claim. It is again accepted by the claimant that it cannot succeed as a claim for unlawful deductions from wages because of the two year backdating provision.

The issue of consideration

202. On the issue of consideration I have considered the submissions and authorities referred to by both counsel and find that the agreement on the part of the claimant to work for no salary from March 2018 onwards is not void for lack of consideration. This is of course subject to his statutory right to be paid the national minimum wage from which he could not contract out.

203. The authorities show that in a contract of employment consideration may pass to the employee in a form other than remuneration. This is clear from both the ***Stack v Ajar*** and ***Knight*** cases set out above. As stated in ***Knight***, *"money is not the only consideration which may move from an employer under a contract of employment*". The ***Stack*** case has similarities with the present case. In Stack, the three directors benefited from one another's contributions to the running of and skills provided to the company such that there was ample consideration, notwithstanding Mr Stack had never been paid. I find that this is on point with the present case where all the directors had agreed to forego their salaries whilst to work for the company and provide their skills with a view to ensuring the survival of the company in the short term and with a view to the gains they expected to make in the long term. To the extent that ***Stack*** conflicts with ***Corbern***, I prefer ***Stack*** as it is a Court of Appeal authority. Whilst ***Corbern*** in turn relies on ***Selectmove***, which is also a Court of Appeal authority, it is not an employment case. For these reasons I prefer the ***Stack*** line of authority, including ***Knight.***

204. There are good reasons in my view why employees should be permitted to forego salary, subject to their right to the national minimum wage, when the survivability of the organisation and their continued employment may be at stake. In 2020 and into 2021, many employees have agreed to forego 20% of their salary through the Furlough Scheme without any suggestion that it might subsequently become repayable. A variation of contract process may also be undertaken by employers to reduce salary when it appears essential to the survivability of the organisation. I have also taken into account in the present case, as with ***Stack***, that this does not involve any appreciable inequality of bargaining power.

205. My view and decision on the consideration issue, is supported by the authority submitted by the respondent after the close of the hearing, which I agreed to accept, namely ***GAP Personnel Franchises*** (above) and the passage quoted at paragraph 14 of the judgment in that case. The EAT said that it is generally

accepted law that consideration for a variation in the terms of a contract of employment is mutually provided by the employer continuing to employ the employee and the employee continuing in that employment. In reaching this conclusion I have taken into account the claimant's additional submissions of 9 March 2021 on the point, but take the view that contracts of employment stand in a different category.

206. On the claim for unlawful deductions from wages, I find that the claimant agreed at the Board Meeting in March 2018 to forego his salary on an indefinite basis. His claim for unlawful deductions from wages succeeds only in relation to the National Minimum Wage, from which he could not contract out.

Unfair dismissal

207. As I have found above, the claimant does not challenge the process leading to his dismissal, but he does challenge the substantive decision to dismiss.

208. My finding above is that the decision to dismiss was made at the Board Meeting on 6 March 2020 and it was part of a direction of travel that had been followed for at least 4.5 months. Thus the decision to dismiss was made before the claimant had an opportunity address the case against him. When the claimant said at his dismissal meeting "*I can't believe this is going to be neutral. You've made your minds up",* he was right. The claimant was unhappy and distrustful of the respondent, but not to the extent that he was no longer prepared to work for them or to seek a solution.

209. The dismissing officer Mr Miller did not have an open mind and had a personal interest in the decision because it affected his own plans in terms of whether he wanted to remain with the company. Mr Hall similarly was tainted by the decision thus the decision to dismiss made at the March 2020 Board Meeting. No consideration was given to appointing an independent third party to hear the dismissal meeting or the appeal, yet there was provision for this in the respondent's procedures and they were in receipt of external HR advice. In those circumstances it ought not have been difficult to identify a suitable person to conduct those hearings.

210. I have found above that the first time the claimant became aware of Mr Miller and Mr Pearson's concerns about him was at his meeting with Mr Watkins on 30 October 2019. He was suspended just under a week later on 5 November 2019 and effectively did not work again prior to his dismissal five months later. He did not have an opportunity to show how the working relationships might be remedied, once he knew that his job was under threat.

211. The claimant was prepared to undertake a course through the Institute of Directors to help him with his understanding of corporate governance principles. The respondent was not willing to see what benefit this might have had. For example Mr Hall thought it was easy for the claimant to say he would do a course, but it did not mean that he would do anything differently. This demonstrated a closed mind and an unwillingness to take this practical step towards resolving the concerns.

212. The claimant expressed his willingness to participate in mediation and this was ruled out by the respondent on grounds that they had already attempted mediation. The claimant wanted a mediation focused on restoring the working relationship rather than a mediation which was focused on his departure. The respondent was not prepared to take this step.

213. In terms of considering an alternative role, the respondent placed the onus on the claimant to show them how an alternative would work, rather than exploring or attempting a change in role to see whether it would work. Following ***Phoenix House v Stockman*** (above) I find that this was unfair.

214. For the above reasons I find that the dismissal was unfair. The dismissing officer and appeal officers had made up their minds on 6 March 2019 before giving the claimant an opportunity to address their concerns. The respondent had a closed mind towards the possibility of resolving the problems in the working relationship. The claimant did not have a chance to work differently and to seek to restore the working relationships once he became aware of the respondent's concerns in October 2019. Shortly thereafter he was suspended, through to the termination of his employment. There was no attempt at a mediation with a view to restoring the working relationship which the claimant was willing to undertake. The respondent ruled out the claimant's willingness to undergo training and they relied on him to convince them that an alterative role would work without trying it.

215. In addition, find that the present case can be distinguished from the ***Jefferson*** case (above) because in ***Jefferson*** the employee had made clear that he would not return to work. The claimant in the present case was far from saying that he would not return to work. This was what he wanted.

216. For the following reasons I find that the respondent acted unreasonably in treating SOSR as a sufficient reason for dismissing the claimant by approaching the decision with a closed mind and without taking any of the available practical steps to see whether the working relationships could be restored. The dismissal was unfair.

<u>Contributory fault</u>

217. The parties were agreed that a finding should be made on this issue at this stage. The claimant was unaware until 30 October 2019 of the issues with his work and working relationships that led to his dismissal. He was not given the opportunity in practical terms to address those issues before the decision to dismiss was made. He remained on suspension until the termination of his employment

218. The respondent submits that he "*contributed to his own downfall through a series of ill-judged and inappropriate actions and statements*". Whilst the claimant had some working practices that needed to be addressed and he sometimes responded unwisely in the moment, Mr Watkins also accepted that at times he could respond in the moment, in a way that needed to be reflected

on and changed. An example was saying that he was going to draft a termination letter and then taking advice and deciding to follow process. Emotions ran high and possibly more so given that the claimant and Mr Watkins had been personal friends as well as business colleagues.

219. I find in these circumstances the claimant's actions were not culpable or blameworthy such as to justify a reduction in compensation for contributory fault.

Polkey

220. The parties were agreed that a finding should be made on this issue at this stage. The respondent submitted that if the dismissal was held to be unfair by reason of some procedural failing, such as a failure to take some further step before reaching the point of dismissal, then it was highly likely, if not inevitable that, even if a fair process had been adopted, the outcome would have been the same. I am unable to make such a finding. I find the claimant was likely to have approached the practicality of his job differently once he was working with the knowledge that a failure to change might cost him the job he wanted to retain. He was heavily invested in the company both personally and financially having worked for many months unpaid whilst anticipating future success. He was willing to engage in mediation and I am unable to say that a skilled mediator could not have helped these parties to find a solution to their difficulties. Training may have assisted the areas in which his colleagues felt he lacked knowledge on corporate governance. As the parties agreed that such a finding should be made at this stage, I find that there should be no reduction under *Polkey.*

Holiday pay

221. I have found above that the claimant took a small amount of annual leave in 2018 and 2019, but none of it was paid.

222. ***King v Sash Windows*** (above) applies to this case. The claimant was not permitted to take paid annual leave and therefore at the end of each leave year his right to paid annual leave carried over into the next leave year.

223. The claim is put on the basis of his Regulation 13 leave of 20 days per annum. It is not put on the basis of Regulation 13A or his contractual leave. I have found that the claimant had five days paid leave in February 2018. I have also found that he was not paid his full contractual pay in that month and he is therefore entitled to the balance of his holiday pay for February 2018 based on his full contractual salary. The balance of 15 days carries over following ***King.***

224. In 2019 he was paid £5,100 gross in December so that his two leave days in that month were paid.

225. Thus, at the end of the 2018 leave year, he carried over 15 days, and at the end of the 2019 leave year, he carried over those 15 days plus the additional 18 days from 2019. This is a total of 33 days.

226. In the 2020 leave year the claimant was required to take his accrued annual leave during his notice pay. The respondent was entitled to require him to take this leave under clause 15.5 of his contract but again it was unpaid. The proportion of accrued leave in 2020 was 10.4 days (1 January 2020 to 7 July 2020).

227. When the claimant's employment ended on 7 July 2020, he remained entitled to all his unpaid annual leave under Regulation 13 that he had accrued plus his unpaid annual leave for 2020.

228. Accordingly, upon the termination of the claimant's employment he became entitled to a payment in lieu of his total accrued but untaken *paid* leave under regulation 14(2) of the Working Time Regulations. This amounts to 43.4 days.

229. In submissions the respondent rightly made the point that the quantum of the claimant's holiday pay claim would be significantly impacted by the tribunal's finding on the core dispute as to the agreement reached at the 18 March 2018 Board Meeting. As I have found that the claimant agreed to take nil salary, the quantum of his accrued and unpaid holiday pay is to be based on the national minimum wage, from which he could not contract out.

230. The parties sought a finding at this stage on the issue of section 207A TULRCA 1992 as to whether there should be any reduction from the claimant's entitlement to holiday pay because he had unreasonably failed to raise a grievance about it. I have found above that it was not unreasonable for the claimant to fail to raise a grievance in relation to his lack of paid holiday. In terms of section 207A TULRCA.

231. On the question of whether it would be just and equitable to make any such reduction under section 207A, I consider that it would be a very rare situation where it would be just and equitable in relation to the entitlement to the national minimum wage. Even if I had considered it unreasonable for the claimant to have failed to raise a grievance I would have found that it was not just and equitable to make any reduction from the statutory national minimum wage. This is because of the statutory protection that the minimum wage affords, which on my finding should not be reduced by any percentage at all.

<u>Written particulars</u>

232. As set out in under the Issues above, in an opening note the respondent conceded that it had not complied with the requirement to provide written confirmation of changes as required by section 4 and therefore the matter went to remedy, if applicable. No notice of change was given on the critical issue of the agreement in March 2018 to forgo salary. This claim therefore succeeds.

233. I expressed my thanks to both counsel for the high standard of their work and to the solicitors for the case preparation, all of which assisted the tribunal greatly.

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Employment Judge Elliott
Date: 15 March 2021

Judgment sent to the parties and entered in the Register on: 15/03/2021
_____ for the Tribunal