Case No: 2301645/2016

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE HALL-SMITH**

BETWEEN:

Mr Y Sekander **Claimant**

AND

Rocketmill Limited **Respondent**

ON: **31 July 2017, 1, 2, 3, 4 August 2017**

APPEARANCES:

For the Claimant: **Mr C Adjei, Counsel**

For the Respondent: **Ms J Russell, Counsel**

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL is that:

1. The Claimant was unfairly dismissed by the Respondent.
2. The Claimant's claim for damages for wrongful dismissal is well founded.
3. A Remedy Hearing will be listed.

REASONS

1. By a claim form received by the Tribunal on 26 August 2016, the Claimant, Mr Yousaf Sekander, brought complaints of unfair dismissal and breach of contract against the Respondent, Rocketmill Limited.

2. At the Hearing the Claimant was represented by Mr C Adjei, Counsel, who called the Claimant to give evidence before the Tribunal. In addition, Mr Adjei called the following witnesses on behalf of the Claimant, namely Mr Christopher Hetty, Mr Alex Sebuliba and Mr Krystin Szastok, former work colleagues, to give evidence on behalf of the Claimant.

3. The Respondent was respresented by Miss J Russell, Counsel, who called the following witnesses on behalf of the Respondent, namely Ms Eve Clenell, Director of Eden HR Consulting Ltd, Mr Kevin Porter, Independent HR Consultant, Ms Claire Rutland, Senior HR Adviser, Mr Ben Garrity, Director of the Respondent company, Mr Sam Garrity, Director of Respondent company. In addition, I read witness statements from Jon Withers, former Business Development Director of the Respondent and Kate Watts, formerly Head of Paid Media, of the Respondent company. There was an agreed bundle of documents before the Tribunal and a supplementary bundle.

The issues

4. The issues to be determined by the Tribunal involved the question of the reason for the Claimant's dismissal. The Respondent contended that the Claimant was dismissed for the potentially fair reason of gross misconduct, and that the Claimant was fairly dismissed within the meaning of Section 98(4) of The Employment Rights Act 1996.

5. The Claimant contended that he had been unfairly dismissed by the Respondent and that conduct had not been the genuine reason for his dismissal. The Claimant maintained that he had been unjustifiably subjected to a disciplinary process leading to his dismissal, because the Respondent sought to secure the Claimant's dismissal as a bad lever within the meaning of a service agreement entered into by the parties. The motive behind securing the Claimant's departure from the Respondent company as a bad lever was that as a bad lever the Claimant would only be entitled to par value for his shareholding in the company rather than its actual value which was very significant.

6. The Claimant further contended that he had been wrongfully dismissed in breach of his notice entitlement. Accordingly the issue for the Tribunal to determine was whether there had been conduct on the part of the Claimant which amounted to gross misconduct thereby justifying the Respondent in summarily dismissing him.

The facts

7. The Respondent company, Rocketmill Limited, was established in about 2010 by Sam Garrity and his brother, Ben Garrity. The company is a digital marketing agency and consultancy which provides a range of services.

8. The Claimant, Yousaf Sekander, was recommended to the company to provide websites. The Claimant has a background in web design and obtained a first class BSc having studied digital media development.

9. It was clear that the Claimant was a very accomplished individual and having been introduced to the Garrity brothers began working for them on a project by project basis.

10. The Claimant was invited to join the Respondent and discussions took place between the Garritys and the Claimant about a potential place in the business for him. It is common ground that the Claimant was not merely seeking paid employment with the Respondent, but that he wanted some of the equity in the business and to be a member of the senior structure.

11. The Claimant commenced his employment with the Respondent on 1 June 2010. The Claimant agreed to a salary which represented less than the market rate on the understanding that he would obtain equity in the business. Eventually a joint venture shareholder agreement was entered into between the parties on 13 June 2013, pages 409-439. By the terms of the agreement the brothers Garrity and the Claimant were identified as shareholders. The agreement provided that the Claimant, described as a C shareholder should hold 10% of the company's equity. The Claimant paid the sum of £10 for his shareholder which represented to be par value of his shares.

12. On the same date, 13 June 2013, the Claimant entered into a service agreement with the Respondent which set out the terms and conditions of his employment, pages 366-408. The service agreement concerned the Claimant's start date as 1 June 2010 and defined a "good leaver" as a C shareholder, namely the Claimant who becomes a leaver as the result of ceasing to be an employee due to a number of factors including death, wrongful dismissal and unfair dismissal and terminating employment with the Respondent company provided that he has been employed for a continuous of not less than ten years from the date of first termination.

13. The significance of the good leaver provisions was that the Claimant was committed to working for the Respondent company for a period of ten years before he could realise the market valuation of his shareholding, unless his employment had been terminated by circumstances such as unfair dismissal and wrongful dismissal. The agreement defined a 'bad leaver' as a leaver who is not a 'good leaver'.

14. At the time of the matters complained of, the Claimant received a salary package of about £100,000 per annum, made up of a salary of £27,000 per annum, a 25% share of the dividends and an additional sum of £500 per month by way of an additional dividend.

15. The Respondent company provided a range of services, one of which was identified by the name, Search Engine Optimisation (SEO). The service agreement between the parties identified the Claimant's job well as director of technology, page 371. The Claimant's job description for his role is at page 390 of the bundle.

16. The Claimant's job description at included the following:

> **To manage the group heads on SEO, PPC, Design/Development and Social Media. The group heads should benefit from your insight, advice and experience. This will involve appraising their performance, holding monthly managers' meetings and helping them develop their skill set.**

17. The SEO side of the Respondent's business was very significant. It had developed rapidly from involvement with small accounts to dealing with much larger accounts. The Claimant accepted that there had been some failings on his part which had involved loss of accounts and general management of that side of the business. The Claimant did not accept that he was solely responsible for all the failings and it was his case that the Garritys unfairly attributed the responsibility for failings to him.

18. It was decided to appoint an individual as head of SEO who had management experience. The Claimant accepted that he lacked management experience. The first individual appointed as head of SEO in September 2012 was not a success and he left in June 2013. In July 2013 Simon Howland was appointed to the role. It was the Claimant's case that Simon Howland undermined and marginalised him and that he failed to receive any support from the Garritys.

19. I considered that the Claimant's case was supported by the fact that a member of staff had handed in her resignation because of Simon Howland and that Sam Garrity had informed the Claimant that he would terminate Simon Howland's employment with immediate effect and that the Claimant would need to take on Simon Howland's role for the time being. The Claimant agreed to to cover the role of head of SEO on a temporary basis until a suitable individual had been appointed to the role, particularly having regard to the line management aspect of the role. Accordingly, in May 2014 the Claimant's role included that of Head of SEO.

20. In about the middle of 2012 the Claimant had developed and had built a tool, which he called Social Crawlytics. The tool was able to aggregate the social and sharing data on a website (URL) into a single dashboard. The tool became very popular and the Service Agreement between the parties dated 13 June 2013 provided that the Intellectual Property in Social Crawlytics belonged to the Respondent (Clauses 1.1 and 15.1).

21. I found that from 2013 the working relationship between the Claimant and the Garritys deteriorated. This may have been due to the fact that there had been a long series of negotiations before the service agreement and the joint venture agreement which had provided that the Claimant should

receive 25% of the dividends based on his 10% equity in the Respondent company. The SEO department had also sustained significant losses and according to Sam Garrity in 2015 at the sum of £575, 484 had been lost in annual client revenue.

22. The Garritys attributed the entire responsibility for the failings t0 the Claimant. There was an issue between the parties as to whether the Garritys operated a policy, namely the 'working smart policy' on the SEO department, which involved little or no work being done to undertaken on certain accounts but nevertheless charging for work undertaken on such accounts. A number of accounts were lost as a result of the operation of the working smart policy.

23. In his evidence Ben Garrity denied the existence of the working smart policy, but I was unable to accept his evidence having regard to an email from him to the Claimant dated 2 June 2013, which included the following, supplementary bundle page 130:

> **This is a working smart client since Stewart left and we have now been found out. It is 1K per month and £400 on PPC. This is a decent amount for us to lose.**
>
> **Can we please discuss what we should do with it?**

24. The email referred to an account identified as the Calabash account which the Claimant was subsequently accused of losing. I considered that Ben Garrity's denial of the existence of the working smart policy significantly undermined his credibility as a witness.

25. Whatever the precise cause of the deterioration of the relationship between the parties, I found that the Garritys did have concerns about losses sustained in the SEO department and that with some justification they did endeavour to obtain explanations from the Claimant. Following a board meeting in July 2015 the Claimant was provided with a lengthy feedback summary of concerns identified by the board, pages 3658 2365 p. A flavour of the concerns under the heading 'Current Attitude' stated the following, page 365.

> **Since the SEO department started to lose clients (this can be broadly aligned with the losses of Floorsave, Frontline, GoSkydive, and recently Evental) your attitude appears to have changed. It comes across as defensive, in some cases obstructive and resistant to help.**
>
> **When we discuss matters in managers' meetings or board meetings you often claim that we (Ben and I) are not listening. This again is simply not true. We are always open to discussion of issues at our meetings and welcome your input. We listen to you and hear you clearly, however we sometimes disagree with you. This is allowed in doesn't mean we're not listing to you.**

> **I feel you have worked with us long enough to see how well we treat people and how well we have treated you, so that you shouldn't feel any distance from us. We simply do not agree with all of your opinions, and our board meetings will remain a healthy environment full of creative conflict.**

26. I found that by July 2015 the Garritys, particularly Sam Garrity, had genuine concerns about the Claimant's performance as head of SEO and that at that stage they were seeking an explanation from the Claimant.

27. Unfortunately, the Claimant did not respond at to the lengthy feedback documentation he had been provided with until 2 December 2015, page 365Q when he sent the board of directors a very brief response.

> **In the interest of moving forward, I have refrained from highlighting the areas that we cannot seem to agree on.**
>
> **As per your request, I have highlighted the areas that I will work on, these are:**
>
> **Authority**
>
> **I have voted for the current hierarchy and respect its authority in earnestness. During board meetings I will continue to voice my thoughts in an open way to ensure we have diversity of opinion. However, I am hoping this will not be seen as challenging anyone's authority. I have and always will respect and commit to the final decisions once they are made.**
>
> **Responsibility**
>
> **The collective output of the team is my output. I recognise this and will endeavour to demonstrate this in action. The team suffers from a number of challenges that is hindering their performance. I take full response for this – no ifs, and, or buts.**
>
> **Attitude**
>
> **The last 6 to 7 months have been particularly tough for a variety of reasons, I recognise that my attitude has suffered from time to time, I am aware of it and will work on this.**

28. It was the Claimant's case that he had provided feedback during the period from July 2015 to December 2015 at meetings. I noted that the Claimant's witness statement did not refer to the feedback document provided to him in July 2015 nor in any significant respect to the issues raised in the document. In my judgment the Board feedback document had raised serious issues about the Claimant's performance and I consider that if they had been unjustified the Claimant would have provided an indignant response far sooner than his letter of December 2015, which appeared to take on board the validity of some of the criticism.

29. In January 2016 Sam Garrity contacted Eve Clennell, principal consultant and director of Eden HR consulting Limited. Eden HR was engaged in the business of providing consultancy advice on HR at related matters to its clients. Eve Clennell's witness statement at paragraph 2 stated the following:

> **On 8 January 2016, I was contacted by Sam Garrity, Managing Director of RocketMill Ltd, the Respondent. Sam requested a meeting which duly took place on 18 January 2016. I was asked to review and investigate a potential disciplinary matter which had arisen. My brief was to establish whether the Claimant, who was an employee, director/shareholder, should face disciplinary action for non-performance and failings in his department. Sam had a number of informal discussions with the Claimant and had formalised his concerns in the document to the Claimant in July 2015.**

30. I expressed surprise at the Tribunal hearing why it was necessary to involve an outside organisation in issues which on the evidence were performance issues. I considered that only those who were directly involved with the business were in a position to assess performance of its employees rather than an outside organisation which would have had no insight into the day-to-day intricacies of the business.

31. I bore in mind that in certain circumstances, performance issues can cross the threshold into disciplinary issues, but apart from the Board feedback document of July 2015, there had been no formal meeting with the Claimant relating to his performance nor any proposed strategy to improve performance, if indeed it was so serious that a disciplinary process was being contemplated.

32. On 20 January 2016 Eve Clennell emailed Sam Garrity setting out her terms and conditions pages 44F to 44H.

33. I noted that there were a number of matters bulleted in Eve Clennell's email and in particular the first item bulleted was the following:

- **Under yourselves service agreement it clearly allows the organisation to terminate without notice acts of gross misconduct (clause 18.1 C)**

34. Eve Clennell's email also included the following bulleted item

- **From our conversation when we met and from viewing the "Board Meeting" follow-up there may be a case to answer for gross negligence especially due to the loss of clients and related revenue. However, I would suggest the collation of the backing evidence to support this point, otherwise I would suggest a lesser sanction potentially and performance managing him to an acceptable level. If he does not improve at an acceptable level to then be removed from the business through further disciplinary measures.**

Also Yousaf's response indicates that he is aware of his underperformance.

35. Eve Clennell's email recommended that Sam Garrity should instigate the disciplinary process with the Claimant.

36. I considered that the email evidence reflected a situation in which Sam Garrity could only have approached Eve Clennell with a view to seeking the dismissal of the Claimant. There were genuine performance issues and Eve Clennell herself in her email had suggested an approach involving performance managing the Claimant to an acceptable level.

37. When Eve Clennell was asked in cross examination about her reference to gross misconduct , she replied loss of business in terms of performance issues brought to her intention and that she could not recall whether Sam Garritty had brought to her attention the significance of 'good' or 'bad' leaver. When asked what was the significance of good or bad leaver to performance Eve Clennelll stated that she had been sent all the documents, she was advising on what she had seen. I noted that Eve Clennell was prevaricating in her evidence when asked why the first bullet point in her email to Sam Garritty of 20 January 2016, page 44f, had pointed out that the Service Agreement had clearly allowed the Organisation to terminate without notice of acts of gross misconduct I found Eve Clennell evasive and unconvincing, and an unconvincing witness

38. On 4 February 2016 there was an interim board meeting at which at the Garritys and the Claimant were present. The main issue discussed at the meeting was whether Gary Elliott, head of strategic service, should be at retained.

39. 5 February 2016 Sam Garrity emailed the Claimant and Ben Garrity with a summary of what had been discussed about Gary Elliott. The email bulleted a number of factors discussed involving the effect of the loss of Gary Elliott for the Respondent company and the fact that both Ben and Sam Garrity felt that that the three of them should work towards a solution that involved Gary Elliott remaining. I noted that the email bulleted a number of options which included the following:

- **Recruiting a deed to move him away from the day-to-day**

- **Allow him to run the RM marketing (and therefore become the client)**

- **Work from home one day per week**

- **Be paid via his limited business get more holiday time**

40. I noted that there was no question of involving Eve Clennell in decisions relating to the future or otherwise of Gary Elliott in the business.

41. On 15 February 2016 Sam Garrity sent the Claimant a new job specification. The email, page 44N, included the following:

Ed ahead of our one-to-one tomorrow I have drafted a new job spec for you so that you have been absolute clarity on what is expected of you in your role. All of this is essentially the same as what's been in place for long time now, with you running the SCO team since Simon left.

42. Sam Garrity's email to the Claimant contained no hint of any concerns about performance issues or the fact that disciplinary process had been contemplated a month beforehand. The Claimant replied on 18 February 2016, page 44N, and he raised the following questions, namely:

Why do I need this job description when I already have an agreed/signed Director's Service Agreement that is closely tied to my JV?

In recent months and on several occasions you and Ben told me that you have both lost trust in me doing this role. What's the logic behind giving the job description for this role if you no longer trust me in it?

43. Sam Garrity replied on 18 February 2016, page 44L and included the following

As you point out, I have been very clear on performance feedback, and have tried to communicate my feelings in written, verbal and informal ways. Your performance is very much under of review and needs to improve; this job spec will facilitate the continuing reviewing of that performance. As you know I have now set up weekly meetings with you and and set opposite you in an effort to help you reach the standards we need in order to get the best from our team and retain revenue rather than lose it.

44. The Claimant replied by stating that it sounded as if he was under a formal performance review and that was surely a prescribed process that must be adhered to if he was under a formal performance review. The Claimant also enquired about what was the prescribed procedure.

45. The Claimant received no direct response to his enquiries. On 24 February 2016 the Claimant received an email from Sam Garrity headed 'job spec review'. The Claimant attended the job spec review meeting at which Sam Garrity was present together with Eve Clennell. The Claimant enquired about the identity of Eve Clennell and he was told that she was an HR consultant and that she would explain her presence at the meeting herself. Eve Clement informed the Claimant that he was being suspended pending an investigation into allegations of gross misconduct. The Claimant was presented with a letter dated 24th of February 2016, which is repeated in full.

Suspension pending investigation

I am writing to you to formally notify you of your suspension from work duties, on full pay, until you receive further notification from the organisation. This suspension is made in line with the organisation's disciplinary procedure, of which a copy is attached for your reference. Your suspension is to take place with immediate effect. The suspension will continue pending further investigations into following allegations of gross misconduct:

- **Gross negligence in your duties in the form of both mismanagement of staff and of CRM projects and that this negligence has caused a loss of business and revenue to the company.**
- **A breach of trust and confidence which go to the heart of the employment relationship. A number of senior managers of have expressed serious concerns about your performance in your job role and have highlighted these concerns to the directors.**

I have considered this matter very carefully and have decided the suspension is unfortunately the most appropriate action at this time, subject to ongoing reviews. It does not mean that you have been, all be found guilty of any particular offence or act of misconduct.

This suspension is on full pay and you remain in employment with the organisation. You should therefore, be available to attend meetings as required within your normal working hours. I must point out that any failure to attend without good reason, and any other breach of this suspension, will lead to possible further disciplinary action.

If no disciplinary action is required you also been formed which date to resume work. If the outcome of the investigation requires you to attend a disciplinary hearing, then you will be informed of the date and time of the hearing. Should the hearing take place you will be given a full copy of the investigation and any accompanying evidence gained as part of the process prior to the hearing taking place. At the hearing should one be necessary, you will have an opportunity to state any mitigating circumstances or any details which you feel are pertinent to the case.

These are serious allegations and should the disciplinary process be invoked and the allegations are upheld it may result in your dismissal from the Organisation. If the allegation is not upheld then you will return to work with no action against you and no blemish on your work record.

Eden HR consulting Ltd had been instructed and authorised by RocketMill to act as an independent party to investigate and carry out any hearing if one is required. Please find attached a copy of

the terms regarding to dealing with disciplinary matters of which the Company were required to sign for your reference.

Eve Clennell chartered FC IPD BSC (Hons) of Eden HR Consulting Ltd has been appointed as the investigating officer in this matter and you are required to attend an investigation meeting with her. The Investigation meeting is scheduled to take place with Eve on Thursday, 3 March 2016 at 2 PM.

As best practice you may bring a fellow employee or trade union representative to investigatory meeting. If you wish to bring a companion, please let me know their name as soon as possible so that I may give you permission for you to contact them beforehand to arrange this directly with them. If, for any unavoidable reason, you cannot attend at that time stated please let me know as soon as possible giving the reasons you are unable to attend. For clarification there is not a requirement for the Organisation to allow accompaniment at investigatory stage.

While suspended from duty you must refrain from entering the Organisation's property and must not contact any member of staff, its agents or customers without express permission from Eve Clennell or myself. The only exception to this is that you may communicate with your chosen companion, but this should not be by way of entering any of the organisation's premises. Should the suspension lead to a disciplinary hearing you may request information at your workplace for the purposes of preparing your case and may call upon witnesses at the hearing.

46. In my judgment there was no justification for suspending at the Claimant at that stage for what were essentially alleged performance issues. The Claimant was a senior employee of the Respondent company and was also a Director. The Claimant had also been involved in potentially sensitive discussions with the Garrity's about the future of Gary Elliott, head of strategic service. A few days earlier in an email to the Claimant Sam Garrity had stated that the Claimant's performance was very much under review and needed to improve. Before the Claimant had been afforded any opportunity to improve, the Claimant was suspended on what I considered involved the most draconian terms.

47. The Claimant was treated as if the most serious allegation of misconduct had been levelled against him, which might have justified suspension, had been instructioned not to communicate with any member of staff without express permission or to enter the Respondent's premises. I considered that the Respondent's conduct in suspending the Claimant without warning in the particular circumstances involved a breach of the term of trust and confidence implied into the Claimant's contract of employment. The Respondent's treatment of the Claimant reinforced my conclusion that the Garrity's intention was to secure the Claimant's dismissal.

48. Had it been the case that Eve Clennell was as independent as she alleged she had been, I found it astonishing that as an HR consultant she could

have advised the Respondent, to suspend at the Claimant, a Director and senior employee of the Respondent for performance -related issues. The subsequent approaches to the investigation, such that they were, confirmed my findings that the Respondent's motive was to achieve the Claimant's dismissal.

49. The investigatory meeting was re-scheduled and took place on 17 March 2016. At the conclusion of the meeting the Claimant requested that Chris Hutty and Krystian Szastok who had been digital marketing managers and had recently left the Respondent in February 2016 to be interviewed, because the Claimant considered that their evidence would have been highly relevant to issues involving his performance. The notes of the meeting are at pages 55-126 of the bundle.

50. I consider that the Claimant's suspension was unjustified in circumstances where it was the Respondent's case that the alleged performance issues were long running and in circumstances where I found that the Claimant had been informed that his role as Head of SEO was on a temporary basis.

51. Eve Clennell's investigation involved her sending written questions to the following employees, Adam Craddock, Kate Watts and Rebecca Watson on 7 March 2016 pages 53a-53c. Each individual was asked the following same questions:

> **"1. Can you share with what concerns you have surrounding Yousaf's:**
> **performance as Head of SCO?**
>
> **2. Do you have any evidence to support your assertions?**

52. I considered that the questions were loaded and were based on the assumptions that the individuals concerned had existing concerns about the Claimant's performance. The witnesses proposed by the Claimant were not questioned on the ground later explained in a letter to the Claimant from Kevin Porter, who had been later appointed to chair a disciplinary hearing that they would not be contacted as they were no longer employed by the Respondent. I did not find this a particularly convincing explanation because Chris Hutty had emailed Sam Garrity on 4 February 2016, shortly before the Claimant's suspension, and his email included the following:

> **My main disappointment is in the way that any performance issues have been dealt with during my time at Rocketmill. As we have discussed, although I knew I was struggling at times in my role at no point was it clear to me that my performance was a serious issue. The times I have discussed it directly with Yousaf were on a couple of occasions but I raised it due to my own concerns. Of course there have been times where Yousaf has picked up on things that needed to be dealt with but these were always felt like very informal conversations where I left with the feeling that these were relatively minor**

issues that needed to be addressed rather than serious problems.

My informal reviews/appraisals have followed the same pattern where I was made to believe my performance was generally good and that other things I needed to work on were presented as opportunities to grow further in the role rather than serious failings.

I do not wish to be overly critical of Yousaf as a manager as he has, at times, been incredibly helpful, supportive and inspirational. However at other times I feel I have been left for long periods of time (sometimes weeks) to run campaigns without significant input or insight from the Head of the SCO team. In the last six months I have made no formal campaign reviews and only one DMM meeting. This despite the fact that in June I made it very clear to Yousaf that I was struggling in my role and that the levels of stress I was under were leading me to question my position. Again, this was a conversation initiated by myself."

53. Chris Hutty gave evidence on behalf of the Claimant at the Tribunal Hearing and, having regard to his observations about the Claimant, some of which were complimentary, and which in my judgment did not reflect management failings amounting to gross misconduct, I considered that a reasonable employer would have included interviewing him as part of the investigatory process.

54. The employees who were interviewed were not members of the SCO team, and I was driven to the conclusion that the investigatory process adopted involved building a case against the Claimant.

55. On 17 March 2016 the Claimant received a message through Twitter from a regular user of the social crawlytic's tool, Matt Stannard, enquiring whether social crawlytics was down, page 127. According to the Claimant's witness statement, the Claimant understood that the background data collection processes of the application had stopped but that the site was still live namely that a user could log on because the front end was fine but that a user could not start or process any reports.

56. It was common ground that the server was hosted by Incero Limited (Incero) which was a US based company which offered computer servers and other network and data services. The Claimant had rented a server from Incero in order to host social crawlytics from its set up in 2012 and had used his personal email account with a password set by him. The Claimant had subsequently rented an additional server from Amazon Web Services. It was the Claimant's case that he had chosen Amazon because it was cost effective in the sense that it was dependant on usage rather than having to pay a monthly fee. The Claimant only needed the server in circumstances when there were a lot of users using the social crawlytics tool at the same time and when Incero was unable to handle the volume of data processing generated by the number of users.

57. Although the Claimant was the named party with Incero and Amazon the servers were held by him for the benefit and on behalf of the Respondent, in circumstances where the intellectual property rights to social crawlytics had been assigned to the Respondent.

58. A significant part of the Claimant's evidence at the Tribunal Hearing was in relation to the technical issues involving the use of these servers. The server supplied by Incero was an unmanaged server, which involved the Respondent renting the hardware in the absence of any support services. Accordingly Incero did not monitor the server and the Respondent was responsible for maintaining the server and dealing with any issues which arose.

59. I accepted the Claimant's evidence that he would reboot the server on those occasions when it went down and that he was the only individual within the Respondent organisation who was able to maintain and manage the server and the social crawlytic tool. Incero's involvement was limited to hosting the server, but Incero was not paid for any services involved in maintaining it.

60. The Claimant was also renting another unmanaged server from Incero to host an application called CRO Monitor which the Claimant had created in 2013. The Claimant had also assigned the intellectual property for this application to the Respondent but the Claimant himself was the named party with Incero and he was reimbursed by the Respondent for costs involved with the CRO Monitor application and the social crawlytics application. It was the Claimant's case that on receipt from the tweeted message from Matt Stannard he considered that he had to reboot the server which involved logging onto the relevant account through the Incero website which had the function to reboot. The Claimant required a user name and password to log on.

61. The Claimant maintained that of the user names associated with the two Incero accounts for social crawlytics and CRO Monitior, one corresponded with his personal email address and the other with the Respondent's work email address but he did not know which server was associated with which of the two email addresses. The Claimant also maintained that he did not remember any of the passwords for either of the Incero accounts.

62. The Claimant maintained that he had endeavoured to reset the password for the Incero account associated with his personal email address on the assumption that this was assigned as the user name for the social crawlytics account. The password reset failed and the Claimant received an error message.

63. It is common ground that the Claimant contacted Incero via Skype. A transcript of the telephone call is at pages 132-133 of the bundle.

64. The transcript recorded that the Claimant stated that he was having trouble resetting his password, that he had two servers with Incero and he gave his personal email address and his Rocketmill email address. The

Claimant stated he did not have access to the Rocketmill email address anymore and he needed to change the email address on that account. The Claimant gave his home address for his personal email account and he also stated *"please note that I no longer work there"* after he had given the Respondent's Rocketmill address. The Claimant was asked if there was somebody from Rocketmill able to email confirming that the account should be transferred to him and the following exchange took place:

Incero:	***We have to avoid disgruntled ex-employees taking over accounts (that happens unfortunately).***
Claimant:	***That is impossible I'm afraid.***
Incero:	***OK we'll get back to you.***
Claimant:	***The only reason I'm reaching out is because the server needs a reboot.***
Claimant:	***Social crawlytics is down at the moment. Perhaps if you can just do the reboot that would be fine.***
	Looks like its back up now.
	That's all I wanted, thank you.
Incero:	***I have not touched the server. Please ask Rocketmill to contact us if the account should be transferred to you.***
Claimant:	***I am not asking for a transfer.***
	That's strange though. The app was down and now its back up.
	Anyway, thanks for your help.

65. I consider that the Claimant's conduct and the contents of the transcript would have provided justifiable grounds for the suspicion that the Claimant was endeavouring to transfer the "ownership" of social crawlytics into his personal account.

66. On 18 March 2016 Sam Garrity sent the following email to the Claimant, page 134:

> **Hi Yousaf**
>
> **I received the below and a call from the US a moment ago.**
>
> **Naturally I told them not to transfer the account to your private email at the moment as Rocketmill pay for it.**
>
> **Could you help me understand what you need doing and why? I obviously need to understand and I have copied Eve in so she can determine if any requests in line with the suspension/investigation process we are collectively undergoing.**
>
> **We will obviously help where we can, I just need to know why and what you need doing.**
>
> **Best regards**

67. The Claimant replied by email at 00.14 on 19 March 2016, pages 133-134

stating the following:

> **Hi Sam**
>
> **Incero had confused the situation which I had already clarified during the Skype conversation.**
>
> **To help you understand, I noticed a user had highlighted the social crawlytics was down. Here is the notification (the Claimant gave the Twitter account).**
>
> **The server had fallen over, it needed a straightforward restart to get back up and running. I requested Incero to restart it so it can come live and function for end users. There is no need for changing/transferring ownership. Rocketmill has full access to the Incero account, I would recommend putting someone internally in charge of the server monitoring/maintenance as I wouldn't be able to fix anything (given that I don't know the password and don't have access to my inbox) if the server falls over again. I hope that clarifies the situation."**

68. At 22.24 on 18 March 2016 Sam Garrity had received an email from Gordon Page at Incero, page 135, stating that he had the Claimant on Skype trying to change the ownership of the Incero account from his work email to a personal email of his and that Incero were concerned that this dedicated server might be being used for business needs by Rocketmill and that if the Claimant had been let go the server may be needing to stay with Rocketmill not the Claimant. The email also sought confirmation about who should retain ownership of the account.

69. On 24 March 2016 Eve Clennell emailed the Claimant enclosing transcripts of the investigatory meeting on 17 March 2016 informing him of the following:

> **Also I will have questions in relation to Rocketmill's account at Incero and your alleged unauthorised access while suspended, which has been added as an additional allegation to be investigated.**

70. On 4 April 2016 Eve Clennell sent the following email to the Claimant, page 138:

> **I have now sent out by email the questions that I require to be answered from witnesses in order to gain responses in as swift a manner as possible.**
>
> **There are witnesses with numerous questions asked of them and they have informed me that they will require at least until the end of 11 April 2016 to respond and gather supporting evidence. Of course, if there are any alterations in dates I will let you know and keep you updated on the investigation**

process.

There has been, as stated in my email of 24 March 2016 a further allegation added to the investigation in relation to the company's account at Incero and your alleged unauthorised access and intention to take personal control of a hosted server. I do not believe I needed to ask any questions of you, as part of your investigation, as your explanation and details pertaining to the alleged unauthorised access is already evident in email correspondence. However, if you feel there is any pertinent information to add against this point please provide these to me as soon as possible by no later than 5.30pm on Friday, 8 April 2016.

71. I found it surprising that Eve Clennell considered that she did not need to ask the Claimant any questions in relation to the Incero incident as part of her investigation. It was far from a straightforward matter involving some knowledge and understanding of IT issues, and if, it was indeed the case, as Eve Clennell maintained, her role was that of a wholly independent investigator, in my judgment a reasonable enquiry would have involved an investigatory meeting with the Claimant.

72. In addition, Eve Clennell's reference to witnesses with numerous questions asked of them appeared to me inconsistent with the two simple questions sent to the three employees on 7 March 2016, pages 53a-53c which asked them to share concerns they had surrounding the Claimant's performance as Head of SCO and whether they had any evidence to support their assertions. In my judgment a relevant question for Eve Clennell would have involved investigating the Claimant's motive behind his attempt to transfer the social crawlytics account with Incero to his personal account.

73. On 20 March 2016 Sam Garrity emailed the Claimant, pages 132-133 stating that he was concerned because it was clear to him that the Claimant was trying to change the email address on the Rocketmill account to his personal one. Sam Garrity's email included the transcript of the Skype communication which the Claimant had had with Incero and stated, understandably, that he was alarmed and that he had copied in Eve Clennell.

74. The Claimant replied on 21 March 2016, page 131. The Claimant's email is set out in full:

I would be surprised if you were genuinely concerned about this. It seems more likely to me that you are seizing upon something which you know to be innocuous, in the small hope that it may add something to the already trumped up disciplinary allegations you have personally invested so much in. If you were to see it in terms of not wanting to 'make a big deal of this' you would surely have sought my explanation as a business partner first rather than amusedly escalating to Eve.

> **For the record and as you know, this concerns a software tool that I personally created for which I am the administrator and sole contact point in the company. Indeed I am the only person in the business who even understands how it operates. As the sole point of contact I had received notification, by Twitter on 17 March at 6.20 that the service was down. Service outage uses issues affect both the company's and my reputation as well as the reputation of product. It is essential that the service is restored properly.**
>
> **I quickly sought to rectify the problem with a reboot but was unable to log into my account. As per the transcription below, it was only during my contact with support that it occurred to me that I may be attempting to log in with the wrong account details. You should also note that we have unmanaged dedicated servers which means that Incero has no obligation to reboot/fix the server therefore server management responsibilities have always sat with myself. My request to switch email accounts was borne simply out of pragmatism given that I am the only person in a position to maintain the product and so as to ensure that I can continue to do so without delay should further problems occur. Again the transcript clearly demonstrates that I was thinking on my feet over the course of a matter of minutes.**
>
> **It did not occur to me to seek your permission over something so trivial and you will know that I maintain that my suspension is unlawful in any event. Furthermore my interest in protecting the business transcends my employment given that I am a Director and a Partner in the business.**

75. On 11 April 2016 the Claimant emailed Eve Clennell asking for a copy of the questions she had submitted to witnesses and any responses received. The Claimant's email stated he was concerned to ensure that witnesses were not being led whether consciously or otherwise and/or put under pressure to support an agenda against him, page 137. Eve Clennell did not reply to the Claimant's email.

76. On 23 April 2016 Eve Clennell sent her investigation report to Sam Garrity, page 140L. In her accompanying email Eve Clennell stated that her personal opinion was that the Claimant's actions trying to take control of the server personally was a far more serious *(and has a much clearer evidence trail)* than the others. In the context of a suspension for allegations of gross negligence, before the Incero incident, the reference to the Incero incident being far more serious appeared to me inconsistent with the Respondent's case that the alleged performance issues were so serious as to involve gross misconduct justifying suspension.

77. The investigation report dated 27 April 2016, pages 202-242a included quotes from those employees to the questions she had asked including questions to both Sam and Ben Garrity. In relation to the Incero incident the report referred to a number of relevant emails which had passed

involving the Claimant, Gordon Page at Incero. However the Claimant's email providing his explanation for the incident, to Sam Garrity of 21 March 2016, page 131, was not included in the investigation report.

78. The emails which Eve Clennell did include in her investigation report, namely the emails between Sam Garrity and Eve Clennell appeared to have reached the conclusion that the motive for the Claimant's conduct was to secure ownership "of the social crawlytic tool" for his own use.

79. Eve Clennell was cross-examined why she had not included the Claimant's email to Sam Garrity of 21 March 2016 which provided his explanation for his involvement in the Incero incident. The following exchange took place during Eve Clennell's cross-examination:

> ***Q: Page 231. This email was not included in your report. It is the Claimant's long email. Why not include it in the chain of evidence?***
>
> ***A: I put the evidence in I thought was relevant.***

80. In circumstances where Eve Clennell had failed to include interviewing the Claimant in her investigation, with the justification that the emails spoke for themselves, there was In my judgment no justification for the exclusion of the Claimant's email to Sam Garrity of 21 March 2016. The email provided the Claimant's explanation for his involvement for his involvement in the Incero incident, an explanation that a reasonable employer should have considered before either accepting or rejecting it. It was the Claimant's case that its non-inclusion was because it might have been considered as potential evidence assisting the Claimant.

81. The investigation report concluded that there was a case to answer. On 27 April 2016 Eve Clennell wrote to the Claimant informing him that he was required to attend a disciplinary hearing on 6 May 2016 to consider the following allegations:

- **Gross negligence in your duties in the form of both mismanagement of staff and of SCO projects and that this negligence has caused a loss of business and revenue to the company.**

- **A breach of trust and confidence which goes to the heart of the employment relationship. A number of senior managers have expressed serious concerns about your performance in your job role and have highlighted these concerns for the Directors.**

- **On 18 March 2016 you attempted to take personal control of company hosted server. The event also took place whilst you were suspended from work.**

The letter also informed the Claimant of the following:

If the sanction of gross misconduct is awarded to any allegations, should they be upheld, then it will result in summary dismissal without notice or payment from notice."

82. On 25 May 2016 the Claimant wrote to Ben and Sam Garrity raising a formal grievance in respect of the manner in which he alleged he had been treated by the company, pages 271-321. At the beginning of his letter the Claimant summarised his allegations as the following:

a) I have been subjected to an extended campaign of bullying and harassment by my business partners, culminating in my ongoing and unlawful exclusion from the office on trumped up disciplinary charges;

b) The bullying and harassment has had a significant adverse impact on my health;

c) I believe that you have manufactured allegations against me in the hope of forcing me out of the business as a bad leaver so that you can recover my shares in the business at par value.

83. On the same day, 25 March 2016, the Claimant sent a response to the disciplinary allegations, pages 322-348. In his response, the Claimant referred to a number of accounts which the Respondent alleged he had lost. By way of example in relation to the Calabash Account the Claimant alleged that the Respondent had applied the "working smart" approach. The accounts the Claimant referred to in detail involved Vision Direct, Prestige Flowers, Floosave, Eventa, Caring Homes, Calabash, Neilson Financial Services and he also referred to a collection of smaller clients.

84. The Claimant's response also contained a detailed analysis of why the Claimant alleged that his role of Head of SCO was temporary.

85. The Claimant also included the following, pages 322-323:

The hearing manager should have in mind the following when considering the allegations and the evidence presented by the brothers;

- **The business by any evaluation must be worth at least £5m.**
- **My share in the business is accordingly worth circa £500,000.**
- **If the brothers can dismiss me for gross misconduct, they can force me to sell the shares to them for £10.**
- **In addition, I am entitled to 25% dividend, which Sam has previously expressed frustration over. This equates to circa £70k to £80k per annum.**

- **Accordingly, they have a substantial vested interest in procuring a gross misconduct dismissal.**

The hearing manager may find that the above explains the bizarre approach adopted by the company of suspending a senior, executive figure for many months on allegations of gross misconduct, which are clearly performance concerns at best.

86. The Claimant also referred in his response to the disciplinary allegation to a number of procedural concerns, including the fact that Eve Clennell had ignored his request that he interview "objective witnesses" and he pointed out that the explanation for not interviewing witnesses identified by him was that they had left the company, but that such witnesses had only very recently departed the company.

87. I noted that Eve Clennell had been contacted as early as 8 January 2016 to review and instigate a potentially disciplinary matter in relation to the Claimant, which was some time before Christopher Hutty and Krystian Szastok had left the Respondent company in February 2016. Both witnesses at the Tribunal Hearing gave favourable evidence about the Claimant's performance, and in my judgment a reasonable investigation should have taken steps to interview them, particularly as their evidence was wholly relevant to the issue of the Claimant's performance.

88. The disciplinary hearing took place on 27 May 2016 and the Claimant attended accompanied by a colleague, Adam Craddock. The hearing was conducted by Kevin Porter, an independent HR consultant. In his oral evidence to the Tribunal Kevin Porter stated that Eve Clennell had contacted him by telephone in relation to the disciplinary hearing and he met her at a service station on the A3 when she gave him the documents.

89. I was troubled by the fact that at paragraph 5 of his witness statement Kevin Porter stated that during his review of the papers he had called Eve Clennell on 9 May 2016 to enquire as to whether the Claimant had attempted to access any other servers belonging to the Respondent following his suspension. Kevin Porter had been appointed to chair the disciplinary hearing and not as investigatory officer. Eve Clennell sent him two emails at pages 249-250.

90. At the outset of the hearing Kevin Porter informed the Claimant that the hearing would only consider allegation three, namely the Incero allegation in circumstances where the Claimant's grievance letter had referred to the first two allegations involving gross negligence and a breach of trust and confidence.

91. The Claimant objected to this proposal and pointed out that in relation to the first and second allegations the Respondent had unlawfully suspended him because of such allegations, at page 348f of the transcript the Claimant said the following:

> **This is, yes, this is where I'm sure we will get into it, but this is where I have a fundamental disagreement with this process. Particularly because I think that the background information that the grievance reveals has absolutely critical relevance to every single one of these allegations and to find out today that this has not been taken into account and fundamentally a decision is going to be made, I think this is, in my view, without any experience in a trial I think is a fundamentally unfair procedure.**

92. Kevin Porter did not ask the Claimant any questions about his motive in relation to the Incero incident, namely whether there was an intention to undermine the Respondent company in some way in circumstances where the Claimant clearly felt he had been wrongly suspended, or whether there was some motive other than the Claimant's own explanation that his involvement was to get social crawlytics up and running.

93. The Claimant also raised the issue of malicious intent or bad faith and pointed out that he had the master SSH key to the entire service which provided him with a higher level of privilege to the server than Incero so that if he had had bad motives he could have exercised them without any involvement of Incero. The meeting was adjourned at 12.22 and at 13.46 Kevin Porter informed the Claimant that he was summarily dismissed, pages 348at to 348au. Unhelpfully the documentation is dated 19 May 2016. Kevin Porter read from a prepared script informing the Claimant of his dismissal and pointing out that the Claimant had the right of appeal.

94. On 7 June 2016 Kevin Porter wrote to the Claimant confirming his dismissal and his letter included the following:

> **Upon consideration of the evidence it is evident that on 18 March 2016 you attempted to take personal control of a company hosted server. The event also took place whilst you were suspended from work. You have admitted yourself that you contacted Incero whilst on suspension from work and you understood what the term "suspension from work duties" means. You stated that you have signed into the right server having initially thought you could not and you then rebooted the server – therefore taking control.**
>
> **You took these actions in breach of your suspension letter dated 24 February 2016 which states 'while suspended from duty … must not contact any member of staff, its agents or customers without express permission from Eve Clennell or myself (Sam Garrity).**
>
> **Having considered all the information, I have been provided with, for the disciplinary investigatory process, the responses to the questions posed and the additional information you have provided for me; I have concluded that on the balance of probability your actions amount to an act of gross misconduct.**

> **Further to this your actions created a further breach of trust and confidence which goes to the heart of the employment relationship. I therefore issue a sanction of summary dismissal against this allegation."**

95. The Claimant appealed against his dismissal in an email sent to Kevin Porter dated 15 June 2016 pages 354-355. The Claimant pointed out that he had always believed that the disciplinary process was a foregone conclusion and the first ground of his appeal involved the following:

> **My extended suspension from work was a breach of contract by the company, which had no contractual authority to suspend me. It is therefore wholly unreasonable to dismiss me for breach of an unlawful suspension, particularly where the breach is technical and trivial at best.**

96. The Claimant also pointed out that his grievance had addressed in some detail, the details for the broken relationship which he alleged his business partners were predominantly responsible for. The Claimant's appeal against his dismissal was conducted by Claire Rutland, Senior HR Advisor who undertook work as an HR consultant for Eve Clennell's firm, Eden HR Consulting Limited as and when required.

97. The Claimant's appeal was conducted by way of a review which she considered on the papers at the Claimant's request. Claire Rutland did not uphold the Claimant's appeal and on 11 July 2016 she sent her conclusions to the Claimant in a lengthy letter, pages 359-364 in which she addressed all the points of appeal raised by the Claimant.

98. In relation to the Claimant's ground of appeal that key evidence within the possession of the investigator was excluded from the investigation report, Claire Rutland in her appeal letter stated that this email was presented within the investigation report and that the hearing manager had proceeded to discuss this evidence with him.

99. In cross-examination when the following was put to her, namely that she was not interested in supporting the appeal and that she wanted to support the decision to dismiss, Claire Rutland replied *"I reviewed all the evidence"*. When it was pointed out that the Claimant's email of 21 March 2016 in which he set out his explanation for his involvement in the Incero incident to Sam Garrity had not been included in the investigation report Claire Rutland stated *"I must have been mistaken"* and she agreed that she had not looked into the exclusion of evidence aspect of the Claimant's appeal.

100. On 10 August 2016 Eve Clennell wrote to the Claimant informing him of the following:

> **I write to you following your dismissal from the organisation on 7 June 2016 and your subsequent appeal to the dismissal, which was rejected. As you were aware, there were there allegations levelled against you; you were dismissed against**

allegation three, allegations one and two were put on hold pending the hearing of a grievance you raised which was only partially upheld.

The company has decided not to pursue any further action with respect to allegations one and two as you have already been dismissed against allegation three and therefore any further action will be superfluous.

101. There was no documentation in the Tribunal bundle relating to any grievance process, and the grievance process was not referred to in the witness statements. In his witness statement Sam Garrity stated that he had passed the issue to Eden HR who took the decision to respond as they saw fit and that he did not interfere. In her witness statement Eve Clennell made no reference to the Claimant's grievance. Apart from the reference in Eve Clennell's letter to the Claimant informing him that the Respondent would not be pursuing allegations one and two, there was no evidence at the Tribunal Hearing, which I was able to identify, about any grievance process.

Submissions

102. I had submissions from Ms Russell on behalf of the Respondent and from Mr Adjei, on behalf of the Claimant. Both Counsel supplemented their oral submissions with written submissions. The parties' submissions are not repeated in these Reasons.

The Law

103. The Claimant's Tribunal complaints involved unfair dismissal and wrongful dismissal.

104. The Claimant was dismissed for reasons of gross misconduct, and conduct is a potentially fair reason for dismissal. The Tribunal has to remind itself that it is not its role to substitute its own view for that of the Respondent employer at the material time and decide what it would have done or may have done had it been the employer of the employee concerned. The role of the Tribunal in cases of unfair dismissal is to review the entire process undertaken by the Respondent employer and to determine whether at each state of the process the employer acted reasonably, or in other words whether each stage of the process fell within the range of reasonable responses available to a reasonable employer. In relation to the sanction of dismissal, the Tribunal must again consider whether such a sanction amounted to a reasonable sanction in all the circumstances and it does not follow that a harsh decision is necessarily an unreasonable one, if it amounted to a sanction that a reasonable employer could have adopted.

105. The guidelines of the EAT in ***British Home Stores Limited v Burchell 1980 ICR 303*** are relevant, namely the employer must show that it held a reasonable belief on reasonable grounds that the employee concerned was guilty of the conduct alleged, that it had undertaken a reasonable

investigation into the allegation and that the sanction of dismissal was a reasonable one in all the circumstances.

106. The statutory framework is set out in Section 98(4) of the Employment Rights Act 1996 which provides:

(4 … 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.

Wrongful Dismissal

107. The Claimant also contended that he had been wrongfully summarily dismissed in breach of the notice conditions of his contract of employment. In order to justify a summary dismissal, the employer has to show on the balance of probabilities that the employee concerned was guilty or responsible for gross misconduct, in other words conduct which so undermined the employment relationship between the parties that the employer was entitled to treat the contract as discharged by the employee's conduct thereby justifying the employee's summary dismissal.

Conclusions

108. I reached my conclusions having regard to the evidence, to the submissions of Counsel on behalf of the parties they represented, and to the relevant law.

109. Although I found that there were genuine performance concerns involving the Claimant, I considered that a reasonable employer would have taken steps to endeavour to achieve an improvement in the Claimant's performance, particularly when I found that there were serious issues about whether the loss of the accounts could reasonably be attributed to the Claimant's own performance. I was not impressed by the evidence of Ben Garrity whose evidence was significantly undermined by the fact that he denied the existence of the working smart policy, a policy, which I found had been created by the Garritys involving little or no work being undertaken on certain accounts when clients were still charged for work allegedly undertaken.

110. I found that although accounts were lost, there were serious issues about the chain of responsibility for the lost accounts, which was never reasonably considered or investigated prior to the Claimant's suspension.

111. At its highest there were genuine issues involving the loss of accounts and

loss of income, but having regard to the level of investigation undertaken, which was never tested at a disciplinary hearing, I concluded that on the basis of the information available to the Garritys, there was no justification in attributing the entire blame or responsibility to the Claimant.

112. I raised at the hearing on a number of occasions why it was necessary for the Garritys to involve an outside party, namely Eden HR in the person of Eve Clennell to undertake an investigation into alleged performance issues. The explanation that the Garritys required someone independent to undertake the investigation I considered was stretching credibility.

113. Performance issues, in my judgment, primarily involve matters for the employer who would have the required knowledge in relation to performance and the demands and the responsibilities of the particular job role involved. The Claimant's job role involved technical issues in addition to organisational responsibilities, and I concluded that the involvement of Eve Clennell was to place some distance between the Garrittys and the disciplinary process which was intended, as I found, to achieve the dismissal of the Claimant. I was unable to accept the explanation that the Garritys felt that they should distance themselves for reasons of independence.

114. I was driven to the conclusion that it was the intention of the Respondent to secure the dismissal of the Claimant, and that was the real reason for the involvement of Eve Clennell. I did not find Eve Clennell a reliable witness, she prevaricated over the issue when Sam Garrity had brought to her attention the "good" or "bad leaver" provisions and the impact of the shareholders' agreement, and I noted that as early as 20 January 2016 the first bullet point in Eve Clennell's email to Sam Garrity referred to the fact that under the Claimant's service agreement it clearly allowed the organisation to terminate without notice for acts of gross misconduct (18.1c).

115. I found that Eve Clennell had been referred to the Claimant service agreement, and her answer in cross-examination that she couldn't remember whether the good or bad leave provisions had been brought to her attention I considered was wholly unconvincing. Again, as was put to Eve Clennell in cross-examination what was the relevance of good or bad leaver to issues of performance, unless she had been asked about the ramifications of dismissing the Claimant.

116. I noted that my own note of the evidence documented Eve Clennell's prevarication in her evidence over the first bullet point item in her email of 20 January 2016 relating to the fact that the Respondent could terminate without notice for acts of gross misconduct and at 12.40 at the Hearing of 31 July 2017, I suggested that the witness should read the entire document.

117. Eve Clennell was not provided with the Claimant's job description and Sam Garrity himself accepted in cross-examination that none of the witnesses interviewed were in the SCO team. I considered that a genuine and reasonable enquiry by an independent investigator, who had never worked

as part of the Respondent organisation, would as a matter of course have reviewed the Claimant's job description in order to obtain some insight into the Claimant's role.

118. I have commented upon the failure to interview witnesses who were part of the SEO team. Eve Clennell had been involved as early as January 2016 and Christopher Hutty and Krystian Szastok remained in the Respondent's employment until February 2016 and could have been interviewed, if indeed there had been any genuine concerns about the involvement of the Claimant in conduct allegedly involving gross misconduct particularly, when he was not in fact suspended until 24 February 2016.

119. The questions put to the individuals selected by the Respondent to be interviewed in the investigatory process, clearly, in my judgment were loaded questions, namely asking them to share concerns they had surrounding the Claimant's performance as Head of SCO. I considered there was significant force in Mr Adjei's submission on behalf of the Claimant that the only explanation for the questions being framed in such a way by an individual of Eve Clennell's HR experience was that she was following an instruction to secure the Claimant's dismissal.

120. Again, I found that there was no justifiable reason for Eve Clennell's failure, a failure I found inexplicable, to have included the Claimant's email of 21 March 2016 to Sam Garrity which provided his account of his involvement in the Incero incident, in her investigation report. I accepted the submission of Mr Adjei on behalf of the Claimant, that the Respondent was only seeking to find what it considered amounted to inculpatory evidence against the Claimant.

121. Having regard to the seriousness in the way in which the Respondent alleged it had treated the Incero incident, I also concluded that a reasonable employer, undertaking a reasonable investigatory process, would have interviewed the Claimant or asked for an explanation before levelling a charge of gross misconduct in relation to such incident.

122. I concluded that the entire investigatory process did not reflect a genuine or reasonable approach on the part of the Respondent and that the intention was to secure the Claimant's dismissal.

123. I concluded that there was no justification for either the Claimant's suspension and to the terms on which he was suspended. The Respondent's disciplinary procedure provided the following under the heading 'Suspension':

> **A period of suspension of the employee concerned (on full pay) may be necessary in certain circumstances e.g. potential cases of potential gross misconduct or facilitate an unhindered investigation, but this should not be regarded as a disciplinary sanction. Less serious misconduct should not normally require paid suspension. Any suspension decision must be confirmed in writing quickly. Suspension on reduced or no pay should not be used. The period of suspension**

> **should be kept under review and not used for any considerable period of time. During the suspension the employee should be kept regularly informed of the progress of the case. No suspension should take place without prior consultation with the HR Manager.**

124. It was the Respondent's own case that the Claimant had been suspended for performance issues. I did not accept the Respondent's explanation in Eve Clennell's witness statement, an explanation that was not provided to the Claimant at the material time, that given the Claimant's role and seniority in the organisation, the fact that he held dual roles as an employee and director/shareholder, Eve Clennell had felt as the investigating officer, that it was appropriate to suspend the Claimant whilst the investigation took place.

125. The Respondent alleged that it was undertaking an investigation into performance. A reasonable employer at the first stage of any reasonable process, would have involved a formal meeting with the relevant employee, pointing out the concerns about the performance and providing the employee concerned with an opportunity to improve. The Respondent had clearly contemplated such an approach with another employer, Gary Elliott.

126. There were a number of steps that the Respondent, as a reasonable employer, might have considered taking such as removing from the Claimant the responsibility of the Head of SCO role, monitoring his performance. I noted in an email from Sam Garrity to the Claimant on 5 February 2016, page 441, some weeks after Eve Clennell had been contacted, it was clear that the Claimant had been trusted sufficiently to have been involved in sensitive discussions with the Garritys regarding Gary Elliott's future.

127. I concluded that there was no justification for the Claimant's suspension. I concluded that the Claimant's suspension for reasons of gross misconduct, amounted to a breach of breach of the term of trust and confidence implied into the Claimant's contract of employment. Again I concluded that the restrictions on the Claimant such as contacting members of staff, its agents or customers without express permission from Eve Clennell or from Sam Garrity to be unjustified.

128. The Claimant had himself raised the "lawfulness" of his suspension, but this was never addressed by the Respondent. In my judgment it was a significant issue because the Respondent relied upon the Claimant's approach to Incero during his suspension as a relevant issue justifying his dismissal, but never endeavoured to address the Claimant's contentions that his suspension had been unlawful, in breach of contract, and thereby unjustified.

129. The Incero incident involved technical issues involving servers, but I concluded that there had been no adequate or reasonable investigation into the issues involved particularly to check whether in fact the server had been down as the Claimant consistently contended. However I

considered that a reasonable investigation ought to have taken steps to establish if, in the event that the server was down when it went down and came back and how it was it came back.

130. It may well have been the case that Eve Clennell herself had some misgivings about the alleged performance issues, because following the Incero incident she emailed Sam Garrity on 23 April 2016 stating the following:

> **My personal opinion is that his actions trying to take control of the server personally is a far more serious (and has a much clearer evidence trail) than the others, however this is for the hearing manager to decide.**

131. It was never put to the Claimant at the disciplinary hearing that his motive for taking control or possession of the server was malicious or was in some way designed to undermine the Respondent. I accept the submission of the Claimant that in the absence of such a motive, the evidence, including the Claimant's own evidence, is consistent with a motive designed to reboot the server to retrieve the restoration of the social crawlytic's tool, which would benefit the Respondent. I found that the Claimant was the only individual within the Respondent organisation who managed the server when it went down and that had he intended to damage the Respondent in some way, he already had the means of doing so with the SSH key which would have enabled the Claimant to have taken control if it had been the case that his motive was dishonest or otherwise in bad faith.

132. Further the taped transcript of the discussion that the Claimant had with Incero revealed that the Claimant at an early stage said he did not have access to his Rocketmill account any longer. He gave his address and further on pointed out that he no longer worked there. As Mr Adjei pointed out in his submissions, the Claimant was clearly aware of the bad and good leaver provisions and why would he jeopardise his potential entitlements, if his motive was otherwise than genuine in an attempt to reboot the server. Had the Claimant acted otherwise, it would have afforded potentially reasonable grounds for his dismissal and thereby the bad leaver provisions would have applied.

133. Kevin Porter's dismissal letter to the Claimant did not refer to any malicious motive on the part of the Claimant but pointed out that he had been in breach of his suspension letter by contacting Incero, an agent of the Respondent, and that he concluded that the Claimant's actions amounted to an act of gross misconduct. I was troubled by Kevin Porter's reference in his letter when he stated that the Claimant's actions had created a further breach of trust and confidence which went to the heart of the employment relationship. Allegation two involved a breach of trust and confidence which was identified by a number of senior managers having expressed serious concerns about the Claimant's performance in his job role, but this allegation was not proceeded with at the disciplinary hearing.

134. It appeared that Kevin Porter had taken such matters into account by his

reference to a further breach of trust and confidence. In any event I considered there was no justification in Kevin Porter's decision to exclude the allegations relevant to the performance issues at the disciplinary hearing because they provided background to the Claimant's contention that his suspension had been unlawful and that it was the Garritys' motive to secure his dismissal.

135. I have previously referred to the fact in these Reasons that I found both the suspension and its terms unreasonable, and accordingly I concluded that no reasonable employer would have justified a breach of the Claimant's suspension as an issue of gross misconduct.

136. Against the background of my findings, the Respondent's approach to the investigation and the entire disciplinary process which I found lamentably deficient in the steps and the approach adopted by a reasonable employer. I concluded that the entire process from the involvement of Eve Clennell in January 2016 leading to the Claimant's dismissal and his subsequent appeal, which ignored the Claimant's contention that his dismissal was unlawful and in breach of contract, had been motivated throughout by an intention to secure the Claimant's dismissal.

137. Having regard to my findings in relation to the process adopted by the Respondent, I am not persuaded that this is a case which provides any scope for a finding that the Claimant caused or contributed to his dismissal, having regard to Section 123(6) of the Employment Rights Act 1996.

138. It is the judgment of the Tribunal that the Respondent acted unreasonably in its decision to dismiss the Claimant and that accordingly the Claimant was unfairly dismissed by the Respondent.

Wrongful Dismissal

139. In cases of wrongful dismissal it is for the Respondent to show on the balance of probabilities that there were grounds for summarily dismissing the employee concerned. Issues of fairness or reasonableness play no part in a consideration of the issues involved in a case of wrongful dismissal, and the Tribunal is required to make a finding of fact as to the conduct of the employee concerned and whether it was such conduct that was so serious as to justify the employer in dismissing the employee summarily in breach of the terms of his contractual notice entitlement.

140. In the circumstances of this case I found that the Claimant's involvement in the Incero incident was suspicious and justified the concerns of Gordon Page at Incero which he relayed to both the Claimant and to Sam Garrity. The Claimant himself accepted that his actions could appear suspicious in circumstances where he was seeking to switch email accounts, namely to change the Rocketmill email address to a personal one in order to have control of Rocketmill's account. Ownership of the account remained with the Respondent because the intellectual property in social crawlytics had been transferred to the Respondent.

141. The Claimant himself as pointed out by Ms Russell in her powerful submission was evasive during the course of his cross-examination in the way, as she put it, that he danced around the word 'ownership' before finally conceding that it signified, in this context, taking de facto control. Ms Russell rightfully submitted that this was in much the same way that a thief might take ownership of a stolen car.

142. In the circumstances of the Claimant's suspension and my findings of the Respondent's motives, I concluded that the Respondent's instruction to the Claimant not to contact its agents, had not amounted to a reasonable management instruction.

143. The issue, accordingly, was the Claimant's motive in seeking the transfers of the Rocketmill account into his sole name. I concluded that there could have been only two motives for the Claimant's approach to Incero, namely for a genuine reason that the server was down and that he was the individual responsible for it and was seeking to get it up and running, an alternative motive would have involved a malicious attempt possibly to get back at the Respondent for suspending him.

144. The issue of motive was never explored, as I found, by the Respondent at the material time during the disciplinary process. As the evidence unfolded at the Hearing the servers which supported social crawlytics, namely Incero and Amazon, were already assigned to the Claimant's personal email address, and as pointed out by Mr Adjei in his submissions, the request to transfer from a work email address to the Claimant's private email address could only have affected CRO. Further, I consider that had the Claimant a malicious motive to sabotage the Respondent in some way he already had the means to do so by the SSH key in his possession, and this was not challenged at the Hearing.

145. In addition, in determining whether the Claimant was guilty of gross misconduct I bore in mind the fact that the Claimant did not hide his identity or his address. I had regard to Ms Russell's submission on behalf of the Respondent, that the Claimant had only raised the issue of reboot after he had been 'rumbled' when Gordon Page had enquired whether someone from Rocketmill was able to email confirming that the account should be transferred to the Claimant and stating that Incero *(quite properly)* had to avoid disgruntled ex-employees taking over accounts.

146. However, the fact remains that the Claimant himself had the ability to act in bad faith, if so motivated, without an approach to Incero and he had not hidden his identity or his address. I concluded that although there were grounds for an investigation into the Incero incident, I concluded on the evidence that the Claimant's motive was not malicious. It was accepted by Keith Porter at the disciplinary hearing that the Claimant had rebooted the server and I did not conclude that the evidence, apart from the Claimant's initial approach to Incero, supported a motive of bad faith or of malicious intent on the part of the Claimant. Further, as pointed out by Mr Adjei, it would not have been in his interests to have so acted.

147. I concluded that the conduct of the Claimant involved in the Incero incident

did not amount to gross misconduct thereby justifying the Claimant's summary dismissal. Further, having regard to the circumstances of his suspension I did not conclude that the Claimant's action had breached a reasonable management instruction.

148. In the circumstances, it is the judgment of the Tribunal that the Claimant was wrongfully dismissed by the Respondent.

149. A Remedy Hearing will be listed.

_____ _____
Employment Judge Hall-Smith
Date: 14 November 2017