EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr C Wilfert		(1) Everycs Limited (in administration) (2) Makersite GmBH

Heard at: London Central Employment Tribunal

On: 9, 10, 11, 15, 16 September 2020 (17, 18 Sept in chambers)

Before: Employment Judge Adkin
Ms Z Darmas
Mr D Carter

Representations

For the Claimant: Ms L Robinson, Counsel
For the Respondent: Mr T Cordrey, Counsel

JUDGMENT

(1) The claim of failure to inform and consult under TUPE 2006 (Transfer of Undertakings (Protection of Employment) Regulations 2006) succeeds against both the First Respondent and Second Respondent.

(2) The following claims succeed against the First Respondent:

a. The claim of unlawful deduction from wages in relation to the Claimant's salary in the period 1 – 28 August 2018.

b. The claim of failure to provide a statement of his particulars of employment.

(3) The remaining claims are dismissed:

a. The claim of automatic unfair dismissal (reg. 7(1) of TUPE 2006) fails for lack of jurisdiction.

b. The claim of unfair dismissal under section 98(4) of the Employment Rights Act 1996 fails for lack of jurisdiction.

c. The claim of wrongful dismissal is not well founded.

d. The claim for holiday pay under regulation 14 & 16 of the Working Time Regulations 1998 is not proven.

REASONS

Procedural matters

1. This hearing was a "hybrid" in the sense that the Tribunal members were present physically in the Tribunal building throughout the hearing and the Claimant and witness for the Second Respondent Mr Neil D'Souza attended each day of the hearing remotely using video (CVP) technology.

2. Legal representatives attended on the first three days of the hearing physically in the Victory House. Following the announcement that there had been at least one positive Covid case in the administration staff in the Tribunal building, by agreement the legal representatives attended by CVP on 15 and 16 September 2020. This meant that cross examination of the Claimant was concluded using CVP. It was envisaged from the outset of the hearing that submissions would be by CVP in any event. On 14 September 2020 the Judge heard another matter and representatives used this as a submissions preparation day.

3. The CVP system is not designed for a hybrid hearing. Both Counsel and the Tribunal improvised using speakers and muting microphones for non-speakers to avoid feedback. We are grateful to all participants for their forbearance in making this work. Other than a some minutes which were lost, particularly on the last two days, in the main the system worked reasonably well and it was possible to hear evidence with clarity from both witnesses and submissions from both Counsel, and also see faces clearly.

4. The requirement for open justice was satisfied by the provision of a screen in the Tribunal hearing room showing witnesses and representatives and loudspeakers which conveyed sound. The Tribunal building was open throughout the hearing. Only one observer attended the hearing, who was doing judicial marshalling (a kind of work experience), who confirmed that she was able to see and hear proceedings.

The Claim

5. The Claimant presented his claim on 29 November 2018.

6. An agreed list of issues is attached as an appendix to this claim.

Findings of fact

7. We are grateful to both Counsel who produced a consolidated (although not agreed) chronology, containing the salient dates as each representative saw it.

Background

8. We heard evidence from the two main protagonists, the Claimant Mr Wilfert and Mr Neil D'Souza for the Second Respondent. The two were known to one another from previous employment at Thinkstep AG.

9. The Claimant describes himself as an entrepreneurial executive with broad experience in industry and information technology. He has had management positions in a variety of technology businesses.

10. Mr D'Souza has experience in product management and software development. His skills were in the development of the technology.

11. On 31 August 2015 the Claimant ceased to be an executive board member of his previous employer Thinkstep AG but continued to be employed for a number of months, on garden leave.

12. In December 2015 the Claimant and Mr D'Souza had discussions about the possibility of going into business with each other and with Fabian Hassel, another former colleague. Mr Hassel did not become involved beyond the initial stages. The basis for the idea was "Makersite", software which is designed to help manufacturing companies analyse and improve their products to make them more cost efficient, safer, compliant and environmentally friendly.

2016

13. On 18 February 2016 the First Respondent company was incorporated in England and Wales with a registered office in Weybridge, Surrey. The Claimant lives in Weybridge. At all material times Mr D'Souza lived in Germany.

14. Although the Claimant and Mr D'Souza were equal shareholders and Directors of equal status, the roles that they adopted within the new business were as Chief Executive Officer (CEO) and Chief Technology Officer (CTO), respectively. Mr D'Souza's role was to provide technical skills and oversee software development and data integration. The Claimant's role was to deal with the other parts of running the business, namely sales, marketing, administration and finance. He actively sought and succeeded in attracting investment in the company.

15. In February 2016 Mr D'Souza, the Claimant and Mr Hassel were in discussions about an appropriate equity split for the new venture. On 16 February 2016 Mr D'Souza sent over different proposed equity split using several different online tools to propose various equity proportions. This email set out that both Mr D'Souza and the Claimant were committing "100%

commitment for a minimum of 6 months. Critical milestones: customer validation, angel funding." By contrast Mr Hassel was only to contribute 50% (specifically four hours per day). Already by 16 February Mr D'Souza estimated that the Claimant had spent 200 hours working on the project. Mr D'Souza also as part of this exercise worked on an assumption that the Claimant should be paid at an hourly rate which is twice his own.

16. We find that from around this time and certainly by March 2016, the Claimant fully devoted his working time to trying to get the new venture running, through a combination of meeting with prospective clients and investors as well as the other matters required to get a new technology business off the ground. We have seen the Claimant's diary entries and email communications and some (but not all) of various social media communications around this time. We do not accept the Second Respondent's characterisation that it was at this stage little more than a hobby and the Claimant did not really invest a great deal of time in it. Our finding is that he was working hard during the course of 2016.

17. On 14 March 2016 the Claimant and Mr D'Souza become Directors and shareholders in the First Respondent with a 50:50 allocation of shares. Mr Hassel's involvement ceased.

18. On 4 June 2016 three interns began working at the First Respondent.

Communication

19. The Claimant and Mr D'Souza worked on the First Respondent business in separate countries, with only very occasional physical meetings. In the early stages they used an application called Asana which was a way of coordinating and assigning tasks. It seems clear from the evidence we've received that the Claimant was more keen on this application than Mr D'Souza, who only used it to a fairly limited extent. In fact, perhaps due to Mr D'Souza's lack of enthusiasm, the use of Asana waned. At a later stage a different collaborative tool, Jira was used by the two of them and members of the First Respondent's wider team.

20. We accept the Claimant's evidence that during 2016 he and Mr D'Souza communicated regularly on a variety of different platforms, including WhatsApp, Asana, Slack (another business collaborative tool) and email as well as speaking regularly on the telephone.

21. On 7 July 2016 Mr D'Souza assigned the Claimant the task in Asana of determining "walk away criteria". This was an exercise of evaluating critically whether the First Respondent business was likely to be successful and worth pursuing.

22. During 2016 software developers based in India were developing on the First Respondent's software.

23. In 2016 the Claimant told us that business expenses were divided between the two men. Expenses were paid by one of them one month and the other would pay the following month. This evidence was not challenged.

24. In June 2016, according to the Claimant he lent £10,000 to Mr D'Souza. Again this evidence was not challenged.

25. On 7 June 2016 the Claimant made an application for unemployment benefit to the relevant government agency 'Bundesagentur fur Arbeit' in Stuttgart Germany. This application was not progressed due to the absence of certain documents including a certificate of employment from Thinkstep for the period from 1 September 2013 – 30 April 2016. It seems from this that the Claimant's garden leave ended in around April 2016.

26. It is clear that in June the Claimant was actively considering other possible job opportunities as well as investigating the possibility of his entitlement to unemployment benefit. In an email to the Stuttgart agency he mentioned that he had looked at the job opportunities but not found anything that really fitted.

27. On 13 July 2016 in an email from the Claimant to the agency with reference to the First Respondent "The ink is not completely dry, but I think it will work out", which suggested a degree of uncertainty but increasing confidence in the future of the venture.

28. Mr D'Souza was claiming unemployment benefit in Germany and also was attending job interviews from time to time. One specific job interview that he attended was with Palantir Technologies. This required him to fly from Germany to London. This point was dismissed by the Claimant as simply being corporate espionage for the benefit of the First Respondent. He says the plan was that Mr D'Souza would find out about another technology through a job interview. Whether or not this was a secondary benefit of Mr D'Souza attending this job interview, the Tribunal finds that both men were during the course of 2016 prudently considering other employment options, bearing in mind the possibility that the shared venture might fail.

29. In 27 July 2016 the Claimant signed a contract with a client ACC for $24k.

30. The Claimant took responsibility for drafting various agreements, for example on 15 August 2016 he drew up an advisory agreement with Fabian Hassell and on 10 October 2016 similarly an agreement with Bastian Laubner.

31. In the later part of 2016 SAFE (Simple Agreement for Future Equity) agreements were signed with various investors. A total of £210,000 was raised in this way.

2017

32. In a tax return to HMRC (the UK tax authority), the Claimant gave the commencement of his employment as 1 January 2017. This ties in with the beginning of his paid employment on a salary. On 31 January 2017 the Claimant received remuneration from the First Respondent for the first time, a monthly salary of £12,000 gross for January, resulting in a net payment of £7,582.88. This was equivalent to a gross salary of £144,000 p.a.

33. Mr D'Souza also began receiving a salary from January 2017 onwards. On 9 January 2017 he signed contract of employment with the First Respondent. This contract indicated that his employment had commenced on 9 January 2016. The typed contract in German suggests that the Claimant indicated his agreement on 15 December 2015 and Mr D'Souza on 20 December 2015. By contrast the digital signature is clearly dated over a year later on 9 January 2017. We find that this is the date that the digital signature was attached to the contract, whatever date it was previously drawn up. The Tribunal heard hotly contested evidence in which it was alleged that the Claimant had falsely represented the date that this contract was signed or drawn up and also about the reasons for the particular date that was chosen for the commencement of the employment. Ultimately the Tribunal did not find that we needed to resolve these points of dispute. The date on which Mr D'Souza actually signed his contract of employment is tangential relevance to the question of the Claimant's employment status, which we approached primarily by looking at evidence of direct relevance to his own employee status.

34. The Claimant explained to us that although he accepted it was his responsibility to draw up contracts of employment, he did not enter into one himself because he did not believe he needed to do so under UK law, given that he was already a Director and shareholder. By contrast the Respondent maintains that this was a deliberate decision by the Claimant which enabled him to enjoy the independence of a Director who was not an employee.

First salary increase

35. On 26 January 2017 the Claimant sent the following email to Mr D'Souza:

> "Fyi, we're setting up payroll run in the next 3 working dates. I put in annualized Eur75 for you and 120GBP for me, based on HH expense levels. Let's see what drops out Net, and see how things work out."

36. Mr D'Souza confirmed his agreement a few minutes later. In his oral evidence the Tribunal the Claimant confirmed that he knew he needed Mr D'Souza's agreement to increase salary.

37. Five days later on 31 January 2017 the Claimant's payslip shows that he is paid on the basis of £12,000 gross monthly salary. This is equivalent to

an annual salary of £144,000, which is already £24,000 more than he had agreed a few days earlier with Mr D'Souza.

38. On 23 – 24 February 2017 the Claimant had an exchange with Mr Jacob Chegwidden at iHorizon, an external agency being used by the First Respondent to process payroll. Mr Chegwidden confirmed to the Claimant that the February 2017 payroll would result in a net payment to the latter of £7,582.88.

39. The Claimant replied "Thanks. Can't really go below 9k though. By how much would we need to increase gross."

40. Mr Chegwidden explained "To get a net pay of £9,000, the gross pay would have to be £14,540.48 Let me know if you would like to action this."

41. The Claimant replied "Yes please, sadly!".

42. Two minutes later he wrote to Mr D'Souza "F***, the [sic] assume a certain tax rate, still it a lot of cash. Regrettably I have no alternative at this point. Need to hit that number".

43. A little over one hour later Mr D'Souza replied "That's fine". He then enquired about Bastian (another employee) and himself getting German equivalent payroll documentation. The gross monthly salary approved is equivalent to £174,485 per annum, an increase of over £54,000 the salary figure which had been agreed four weeks earlier.

44. In his witness statement at paragraph 69 the Claimant represented that on the basis of his agreement with Mr D'Souza he replied to the accountants to increase the gross figure. This materially misrepresents the sequence of events. In fact the email exchange clearly shows that the accountant was instructed first and agreement with Mr D'Souza came afterward.

45. On April 2017 there was a further SAFE agreement, this time with Matthias Hiebeler for an investment of £100k. Dr Hiebeler was a business associate and acquaintance of the Claimant known to him for something in the region of 15 years.

46. In April 2017 the First Respondent's website went live.

47. On 10 May 2017 a further contract was signed by the Claimant with ACC for the sum of $51,600.

Second salary increase

48. On 26 September 2017 the Claimant had a further exchange with a member of the payroll agency iHorizon, Linton Singarayer. The latter pointed out to the Claimant "since your tax code has changed this month, your net pay isn't £9,000 any more. Let me know if the new net wage is okay with you otherwise I can increase your gross wage so that it reflects the £9,000 net wage."

49. The Claimant replied "Ouch, yes, need to get back to 9k please". This request was implemented by iHorizon. In order to maintain the net £9,000 payment the gross pay was increased from £14,987.47 to £15,424.60, an increase in gross monthly pay of £437.13 (an increase in annual gross salary in excess of £5,000).

50. The Claimant did not take any step to draw this to the attention of Mr D'Souza, nor did he seek his authorisation. The Claimant's case is that the email exchange in February 2017 amounted to an agreement that he should be maintained on a net monthly salary of £9,000. Mr D'Souza disputes this interpretation.

51. On October 2017 there was a further SAFE agreement with Dr Hiebeler resulting in a further investment of Euro 200,000.

Deterioration in relations

52. From the later part of 2017 onward working relations between the Claimant and Mr D'Souza deteriorated.

53. In a Skype text exchange in June 2017 at 434a-b, Mr D'Souza raised concerns about the "burn rate" (i.e. the rate at which the business costs were burning through the investment). Mr D'Souza wrote:

> "hate to sound like a broken record, but when we discussed salaries I went down from 135K to 75K while you stayed at your original salary we had in the plan. You asked for the lowest low (which I did by reducing my mortgage payments, cutting our savings payments to 0, getting flora to work more, radically cutting household expenses etc) and I said that this needs to be compensated somehow. I proposed that we do this in stock which you dismissed – so in effect im down 5k a month"

54. Later on Mr D'Souza wrote:

> "initial version, your salary: 180 K, mine 135. Second version: you put yours down to 130, and mine to something like that. Final version you kept 180, mine 75. I have no issues with you during that salary. You need it and that's that. That doesn't take away the fact that I took a cut and you did not. My savings are also down to 0 by the way. The point is I not that I am asking for more money, which I am not. It's that you don't even remember we have this as an issue, worse now, you don't even see it as an issue now"

55. Mr D'Souza's evidence, which we accept, is that these figures are gross salary figures, denominated in Euros rather than pounds.

56. On 30 September 2017 Mr D'Souza wrote a lengthy email to the Claimant setting out some of his frustrations about working relations on a variety of topics. The second paragraph of this email reads

> "Your salary is the biggest cost driver in our business today. 3x my time, and I am not happy with the corresponding output when it comes to the website."

57. It is clear that this disparity in their salaries, among a number of things, was becoming a source of significant resentment.

58. On 16 October 2017 there was a web conference between the Claimant and Mr D'Souza during which Mr D'Souza outlined six areas in which he considered that the Claimant's performance needed to improve. This is documented by a table headed "Hard Talk 1". The specific concerns raised by Mr D'Souza were:

58.1. Investment had been made by developing features which were not thought out and did not match customer demand which therefore ended in failure;

58.2. Asserting opinions in areas where he was unqualified to do so;

58.3. Team meetings without agendas or "takeaways" [i.e. documents] leading to unproductive repetitive meetings that confused employees and wasted time;

58.4. No transparency on marketing, sales or administration, no plan or adherence to what has been agreed;

58.5. Interference in resolving technical problems;

58.6. Continuous shifting of product requirements to create a "bigger story" for sales.

59. It seems clear that by this stage Mr D'Souza was disappointed with the Claimant's performance, particularly in view of his salary.

Third salary increase

60. In 14 September 2017 the Claimant shared a financial plan for the First Respondent business, by email to Mr D'Souza described as v2.2. Mr D'Souza wrote back on the same day:

> "I get nervous every time we fill out this sheet cos things are often very wrong. Let me go through the whole thing this weekend pls."

61. This financial plan, which has been described as a document for investors, contained a panel on the left hand side with assumptions. These assumptions show a salary of £160,000 for the Claimant and £65,000 for Mr D'Souza. The right-hand side of the plan contains monthly outgoings, starting from January 2017. This shows the monthly cost of the Claimant to be £16,000, leading to a total for 2017 of £192,000. The monthly cost of Mr D'Souza's £6,500, leading to a total cost for 2017 of £78,000.

62. Mr D'Souza did not dispute the £16,000 per month plan for the Claimant, however his understanding was that this was the full cost to the First Respondent, not a gross salary. The employers' National Insurance contribution would need to be paid out of the £16,000. The Claimant accepts that this is right, this was the basis of the agreement and he was "mistaken" to pay himself £16,000 gross salary per month. He says that he only realised that this was his mistake when the matter was being treated as a disciplinary matter in a disciplinary hearing in August 2018.

63. On 22 November 2017 the Claimant wrote to Mr Patel at iHorizon

> "what is a gross salary of 16k GBP/month in net payout? We're assuming 160k gross salary and 20% Payroll taxes & benefits as cost for the business".

64. Two days later Mr Patel replied

> "Net pay for a 16k gross salary will be roughly £9,305 per month. Over 12 months (year) it'd be £192k right, not £160k?"

65. It is difficult to see, given this clear query from the payroll agent, how the Claimant could have authorised monthly payments equivalent to £192,000 inadvertently or by mistake.

66. On 29 November 2017 the Claimant wrote to Mr D'Souza in an email headed "nov pay":

> Hey, I ended up paying your salary as per last month. Plan assumption was a bit of a raise, but if you take amount that's in the plan, GBP75k yearly (plan) – net pay would be roughly £3832 per month or 4392EUR. Now that UK net has taxes deducted your current German pay has not. Haven't done that part of the mouth but probably a wash, i.e. if you take taxes of your current £5500 payout, you prob end up in the same ballpark, maybe even less than you make today. Irrespective of plan the assumption was a slight raise. I suggest we raise your gross EUR500.

67. There is some further discussion about the detail of the gross and net effects and conversion from pounds to euros, but it appears that Mr D'Souza is in agreement with the treatment of his own pay.

68. The Claimant suggests that this was an agreed raise for both employees. The email exchange however is specifically about Mr D'Souza's pay. There was no discussion, nor any authorisation about a raise to £192,000 gross pay.

2018

69. Relations between the two men continued to deteriorate going into 2018. It is clear that the frustration and increasing antipathy went both ways.

70. On 5 March 2018 Mr D'Souza sent a draft resignation letter to the Claimant, which was to be addressed to key investors. In this draft letter he raised a number of complaints about the Claimant. Specifically: the Claimant exposing the business to a substantial loss due to a misunderstanding of the royalty model, spending money on unbudgeted marketing activities without any plan or discussion, requesting the product team changing the product when Mr D'Souza's view was the focus should be on sales, and that there was a lack of sales strategy. He was proposing to suggest that stress or "burnout" might be a possible cause of the Claimant's behaviour and that that he is given a period to temporarily step back from his duties.

71. On 7 May 2018 Mr D'Souza sets out that there were in his view three options for the business. He set these out in fairly stark terms. First, "mutually agreed management change", with clearer definition of the Claimant's directorial role and responsibilities and execution against an agreed plan. Second, "forced management change" – not his preferred option but with a high chance of failure, resulting in liquidation of the company. Third, the departure of Mr D'Souza, which in his view would precipitate the demise of the enterprise.

Dr Hiebeler's investment

72. In May 2018, Dr Hiebeler agreed to make a large investment of €500,000 in the First Respondent in exchange for two shares. The logic being proposed by the Claimant was this would help break the deadlock caused by the 50:50 share ownership of the Claimant and Mr D'Souza, since Dr Hiebeler would essentially have a 'tiebreaking' vote. It is plain that Mr D'Souza was initially sceptical about this proposal since he considered that Dr Hiebeler was a friend of the Claimant and therefore would have a natural loyalty to him. Following an email exchange (and, we suspect a telephone conversation) between Mr D'Souza and Dr Hiebeler, however the proposed shareholding transfer was agreed between the three men.

73. A business associate of Dr Hiebeler, Mr Thijs Povel also became involved, in the management of the business at a strategic level.

74. Evidently to the Claimant's surprise and disappointment, over the course of the following weeks, Dr Hiebeler and Mr Povel came to the conclusion that it was the Claimant rather than Mr D'Souza who was the greater impediment to achieving a successful and profitable business.

75. On 20 May 2018 the SAFE agreement governing the €500,000 figure was signed.

76. On 22 May 2018 a meeting took place at Stuttgart airport between the Claimant, Mr D'Souza, Dr Hiebeler and Mr Povel.

77. On 14 June 2018 there was a further meeting at Stuttgart airport of the same four.

78. The basis for the investment agreement was that the €500,000 would be paid in periodic payments of €100,000. However on 20 June 2018 Dr Hiebeler only paid half this amount.

79. On 26 June 2018 Dr Hiebeler and Mr Povel conducted a 'Profit and Loss' review of the First Respondent with the Claimant and Mr D'Souza and proposed that the Claimant's salary should be significantly reduced.

80. On 26 June Dr Hiebeler and Mr Povel had an private email exchange in which both men are optimistic about the technology and prospect for attracting clients. In respect of the Claimant, Dr Hiebeler wrote:

> Have been waiting to receive a call from Chris [i.e. the Claimant]. Nothing has happened yet. If he doesn't get back to me by tomorrow morning I will call him and pull the plug.

81. In an email sent later that evening the Claimant acknowledged that the pay gap between the two founders was "highly unusual" and needed to be addressed. He wrote "it is clear that this looks really out of whack and I should have addressed this earlier".

82. On 27 June 2018 Mr D'Souza wrote an email to the Claimant, copying Dr Hiebeler and Mr Povel in which he refers to the Claimant being paid €245,000 and made the comment:

> "This is astonishing, since I don't know how the additional 40k€ p.a got added to your salary. Certainly not by discussing it with me.

83. On 27 June 2018 Dr Hiebeler had a conversation with the Claimant. The Claimant says that Dr Hiebeler told him that he would cut the Claimant's salary cost and finance the venture all of the way.

84. On 28 June 2018 Dr Hiebeler had a telephone call with the Claimant where he told him in blunt terms that the Claimant's departure was "the only way forward".

85. In an email on 29 June 2018 the Claimant submitted a business plan to Mr D'Souza, which appears to have been forwarded privately to Dr Hiebeler and Mr Povel. In the new plan it appears that the Claimant proposed to increase his salary to £18,000 or even £22,000 salary per month. It is clear from the subsequent email exchange that the three of them are completely incredulous. Mr Povel replied:

> "Maybe calling the shareholder meeting in the official way with the appropriate topics (his dismissal) is the only way to get through to him and give him a strict two-week deadline?"

86. Mr D'Souza replied:

> "Either he is trying to make a case for unfair dismissal, or he just doesn't get it and asking him to step back was not a request"

Removal as director

87. On 2 July 2018 Mr D'Souza sent an email to the Claimant giving him special notice to remove him as director and notice of a shareholders meeting on 19 July 2018 to vote on his dismissal. That evening the Claimant wrote to Dr Hiebeler by email proposing a pay cut to £100,000 plus a 10% variable element.

88. In a separate email exchange on 2 July 2018 Dr Hiebeler wrote to Mr Povel and Mr D'Souza stating "we must trigger the formal procedure to get rid of him". Mr D'Souza responded the next day with some information about how to agree matters with regard to shares under the Companies Act 2006. With regard to dismissal he wrote:

> If that doesn't work, we proceed to dismiss him on grounds of negligence and/or misconduct. This would prevent his recourse to the statute above but has serious consequences for him going forward as this goes on record. Thijs [Povel] capped off is currently checking with legal counsel to make sure that we have enough to make the case using the FF:
>
> 1.misconduct:
>
> a. In violation of shareholder agreement, clause 36biii) unilaterally, and without informing anyone, gave himself a raise. We only found out about this now since he opened the books
>
> b. In violation of the shareholder agreement clause 16, spent an >GBP25k on marketing despite rejection of these expenses by the other director. Our expenditure limit is GBP500
>
> 2. Negligence: issues like
>
> a. Employment contracts have no "contract terms" despite explicit discussion and agreement to do this exposing us to confidentiality issues etc
>
> b. Customer contracts sent out a contract despite red-flagging, that e.g. exposed us to 100k+ in potential loss

89. Mr D'Souza wrote to the Claimant on 6 July 2018 proposing that the Claimant resign but keep 10 shares in the company and remain as an external adviser, +20% of first-year billings in any sale. The alternative put forward is that "we will proceed with the vote on your dismissal and/or look at liquidation proceedings".

90. On 9 July 2018 the Claimant called an impromptu "board meeting" and proposed that the SAFE agreement should be rescinded and Dr Hiebeler's shareholding removed. Mr D'Souza opposed this proposal and the vote was lost.

Allegations of misconduct regarding salary drawings

91. On 18 July 2018 the Keystone Law, a firm of solicitors instructed by Dr Hiebeler wrote the Claimant a pre-action letter, with the ultimate goal of seeking the Claimant's removal as Director of the First Respondent. This letter included the following allegations among others:

> "5. We are instructed that in your capacity as a director of the Company you were authorised on 24 February 2017 to draw a salary of £14,540.48 per month gross, with the intention that your net monthly salary would amount to £9,000.
>
> 6. At no time have you had any authority unilaterally to increase your salary or other drawings from the Company.
>
> 7. Notwithstanding this, in late June 2018 it was discovered that while in March 2017 you drew the net sum equivalent to £14,540.48 gross as salary (in other words, the correct amount), in each of the following months you drew a net sum equivalent to the following gross amount:
>
> a. In each of April 2 August 2017 £14,987.01 gross,
>
> b. In each of September and October 2017 £15,424.60 gross,
>
> c. In each of November and December 2017 £16,000 gross.
>
> d. In January 2018 £16,204 gross
>
> e. In February 2018 £16,132.60 gross
>
> f. In March 2018 you drew £16,000 gross, and
>
> g. In April 2018 you drew £16,102 gross.
>
> ..
>
> 9. The total amount of your over-drawings of gross salary known to our client is £13,329.56.
>
> …
>
> 11. Under a Shareholders Agreement dated 14 March 2016, to which you are a party, by clause 57s any increase (or agreement to increase) the yearly salary or pay of a director, employee, consultant or agent of the Company by more than £10 requires the consent of all the Shareholders…"

92. The Tribunal cannot reconcile the figures given above for January, February and April 2018 with the payslips provided at page 502a and 535 of the agreed bundle which show gross pay of £16,000.

93. Mr D'Souza cancelled an original shareholders' meeting set for 19 July 2018 on the basis that the Claimant had been given insufficient notice for the proposed removal as a director. Mr D'Souza gave notice of shareholders' meeting on 13 August 2018 meeting to appoint Mr Povel as a statutory director.

94. Mr D'Souza gave notice of shareholders' meeting on 20 August 2018 to remove the Claimant as a statutory director.

95. On 25 July 2018 Dr Hiebeler transferred £60,000 to the First Respondent's HSBC bank account. He wrote to Mr D'Souza (copying Mr Povel):

> "as soon as we have dismissed Chris as a director and an employee we have to clean up the setup rigorously and concentrate on building new clients without this nonsense lead generation machine".

96. On 26 July 2018 Mr Povel spoke to the Claimant telling him that it was inevitable that he would be dismissed. The Claimant criticised Mr Povel for taking sides. Mr Povel responded that they had come to their own conclusion given that there were no sales after two years. Mr Povel wrote to Dr Heber and Mr D'Souza

> My conclusion of the conversation is that Chris is not backing down and is not resigning, discussing and offer all going to accept his dismissal
>
> …
>
> I therefore think we should be careful not to give him any additional ammunition while we wait to dismiss him and then we should make sure that we do a proper dismissal as soon as possible. If there are still grounds for him to be able to fight against his dismissal then I think it would be better to either go through bankruptcy or by the company with another business, or another option, whatever will cost us less money/time.

97. On 13 August 2018 Mr Povel was appointed as a director of the First Respondent.

98. On 14 August 2018 the Claimant discovered that his access to the First Respondent's bank account had been blocked.

Potential insolvency

99. On 16 August 2018 Mr Povel contacted Begbies Traynor, insolvency practitioners, by telephone to discuss possibility of insolvency of the First

Respondent. The following day Mr Povel attended a meeting at Begbies Traynor's office in Paddington.

100. Mr Neil Allen, a Senior Insolvency Manager at Begbies Traynor wrote to Mr Povel in an email on 19 August

> "As discussed, the company is reliant upon funding from Mathias who is no longer willing to support it financially.
>
> However, the underlying business and assets do have value, more so on a going concern basis rather than break up.
>
> Therefore, in order to preserve the value of the business and assets, and ensure customer service is not disrupted, administration appears the best option for the company. Furthermore, it would be better still for a pre-packaged sale of the business and assets of the business to be completed via administration.
>
> Essentially the plan is to remove Christoph as director/employee and file a notice of intention to appoint administrators, putting the interim – moratorium in place. This gives us 10 days to market the business and assets with best and final offers by day 5, with the final 5 days being used to draw up the sale agreement."

101. The Tribunal accepted Mr D'Souza's evidence that he had never come across the pre-pack administration process before receiving Begbies Traynor advice. We note and accept his evidence that he had limited prior experience of insolvency procedures in the UK.

102. On 20 August 2018 Dr Hiebeler paid only £60k of the £100k due under the agreement.

103. On 20 August 2018 at a shareholders' meeting the Claimant was removed as statutory director.

104. On 21 August 2018 Begbies Traynor were appointed as administrators of the First Respondent.

105. On 22 August 2018 Neil Allen of Begbies Traynor set out a timetable which included dismissing the Claimant the next day. He suggested that legal advice was required on the following matter:

> "1) How should the dismissal of Christoph be handled and on what grounds can he be immediately dismissed as an employee? What are the risks in dismissing him; will he simply have a claim for damages against OldCo or will he be reinstated as an employee? What are the risks for NewCo in purchasing the business and assets, will Christoph attached to them under TUPE? Does a longer period between dismissal and the eventual sale of business/assets mitigate this risk?"

106. Later on the same day Mr Allen wrote:

> "Before sending the dismissal letter and dismissing Christoph I would recommend you instruct a solicitor personally to advise. You will need advice on to aspects: the first being the dismissal and how to approach this under the circumstances, the second being the risk of a TUPE transfer should there be a subsequent purchase of the business/assets and how best to mitigate that risk.
>
> I think this is definitely worth doing now as your original position was to go through administration and deal with Christoph in the NewCo. If the grounds for dismissal exist there's no need to burden NewCo (if successful in purchasing the business/assets) with that issue. Worst case Christoph is transferred to NewCo under TUPE and new grounds for dismissal would need to be found.
>
> My understanding is that if the dismissal is made now for grounds not related to the pre-pack and sale of business/assets than TUPE will not apply."

107. Mr Allen advised on 23 August 2018 that the plan was to appoint Begbies Traynor as joint administrators to complete the pre-pack purchase on either 3 or 4 September in order that staff would paid in a timely manner.

108. On 28 August 2018 Mr Andrew Hook of Begbies Traynor wrote in the absence of Mr Allen to confirm that the First Respondent would enter into administration early next week. He reminded Mr D'Souza in this email that employees would automatically transfer to the new company by operation of TUPE.

Disciplinary proceedings

109. The Claimant was invited to a disciplinary hearing to be held on 23 August 2018, in a letter dated 20 August 2018. The basis for disciplinary action was:

> "This letter relates to your alleged misconduct and, in particular, the allegation that you unilaterally increased your salary (from £14,540.48 per month gross to upwards of £16,000 per month gross) using your bank mandate authority and have taken that increased salary for the months September 2017 and thereafter such that you have taken a total of £13,329.56 until April 2018 from the Company without authority.

110. Additionally, although this was expressed to be "not relevant to the disciplinary meeting", the letter made reference to a history of conduct and performance matters being raised for 10 months. An attached summary contained the "Hard Talk 1" containing six performance concerned (set out above), and also in a similar vein a "Hard Talk 2" document dated March

2018 and details of shareholder meetings in May and June 2018 at which "performance" concerns were raised.

111. On 23 August 2018 Mr D'Souza wrote a further letter to the Claimant inviting him to a disciplinary meeting on a rescheduled date of 28 August. In this letter he added an additional allegation regarding withholding access to the bank account.

Disciplinary hearing

112. On 28 August 2018 the disciplinary hearing took place (by way of video conference) with the Claimant, Mr D'Souza and Mr Povel present. At the Claimant's request the hearing was recorded.

113. The hearing was structured by Mr D'Souza by reference to a PowerPoint presentation of 9 pages, which contained evidence that he had pasted into it which he believed pointed to guilt on behalf of the Claimant. This document was not provided to the Claimant before the meeting.

114. During the course of this meeting Mr D'Souza referred somewhat cryptically to "delaying next steps". The Claimant asks what these next steps are. Mr D'Souza says "That's not the conversation for today." This reference to next steps was plainly a reference to the planned insolvency and pre-pack purchase by the Second Respondent, which had been deliberately concealed from the Claimant. In summary the Claimant maintained that his various pay rises had been authorised by Mr D'Souza and that the nature of the difficulty if there was one was simply a misunderstanding.

115. Mr D'Souza raised with the Claimant that the latter had deleted files. Between 6:17 – 6:19 p.m. on 18 July 2018 the Claimant deleted from dropbox seven Excel spreadsheets with the heading financial plan from versions 1.0 through to version 1.6. The significance of 18 July 2018 is that this was the date on which the Claimant received the pre-action letter from Dr Hiebeler's solicitor which first made the allegations of dishonesty. It seems that the allegation about deleting files was raised with the Claimant for the first time in this disciplinary hearing. Mr D'Souza explained during the disciplinary hearing that this was not a further example of misconduct, but rather evidence that he considered supported the existing allegations about taking a salary in excess of what he had been authorised to do.

116. The Claimant dismissed this allegation saying that he deletes files all the time. His oral evidence to the Tribunal was that this was merely "archiving" and Mr D'Souza would know how to get these documents back.

Dismissal

117. The Claimant's employment was summarily dismissed by a letter dated 28 August 2018. The letter was signed by Mr D'Souza and Mr Povel.

118. The charge set out in the invitation letter dated 20 August was made out, namely that the Claimant had taken an excess of £13,329.56 in salary.

Mr D'Souza found that the explanation that it had been agreed that there was a monthly salary of £9000 was not credible, particularly in circumstances where the Claimant had deleted the financial plans of the First Respondent which he had alleged supported his explanation.

119. The Claimant was informed of his right of appeal and find that he would receive a final salary payment for the period up to 28 August 2018.

Appointment of administrators & pre-pack sale to the Second Respondent

120. On 29 August 2018 Dr Hiebeler informed Mr D'Souza that he would make no further payments to the First Respondent.

121. On 29 August 2018 Mr D'Souza signed a letter (dated 21 August 2018) appointing Begbies Traynor as administrators.

122. On 2 September 2018 Mr D'Souza sent an email to Dr Hiebeler and Mr Povel in the following terms:

> "We should have the company by cob [i.e. close of business] tomorrow.
>
> …
>
> We will delay telling the employees until tomorrow afternoon but not sure this won't get to Chris [i.e. the Claimant] soon after."

123. On 4 September 2018 the First Respondent's business, now in administration was sold to the Second Respondent via a pre-pack sale.

Appeal from decision to dismiss

124. On 3 September 2018 the Claimant appealed his dismissal.

125. Mr D'Souza told the Tribunal that he was unaware as to whether this appeal was dealt with. We accept the submission put forward on behalf of the Claimant that this was a disingenuous position since it seems fairly clear that no appeal took place.

Subsequent events

126. By correspondence dated 31 October 2018 and 30 November 2018, the Administrator acting in the administration of the First Respondent gave consent to the continuation of these proceedings.

127. In a letter dated 29 January 2019 the Tribunal administration notified the Claimant's solicitor that the claimant was stayed given that it had been brought against a company in administration.

128. By a letter dated 4 February 2019 the Tribunal notified the parties that the stay had been lifted.

129. On 6 February 2019 the Tribunal received a letter dated 1 February 2019 from the solicitor acting for the joint administrators of the First Respondent. By this letter they indicated that they did not intend to play an active role in these proceedings and remained neutral on the claims.

LAW

130. We are grateful to both Counsel for their full written submissions on the law.

Employment Status

131. It does not necessarily follow that a director or shareholder of a business is an employee.

132. Regarding the definition of employment status MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515 said as follows:

> "A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service."

133. On the more complicated position of company directors asserting employee status, the Employment Appeal Tribunal gave the following guidance in the case of *Clark v Clark Construction Initiatives Ltd* [2008] ICR 635 EAT:

> How should a tribunal approach the task of determining whether the contract of employment should be given effect or not? We would suggest that a consideration of the following factors, whilst not exhaustive, may be of assistance:
>
> (1) Where there is a contract ostensibly in place, the onus is on the party seeking to deny its effect to satisfy the court that it is not what it appears to be. This is particularly so where the individual has paid tax and national insurance as an employee; he has on the face of it earned the right to take advantage of the benefits which employees may derive from such payments.
>
> (2) The mere fact that the individual has a controlling shareholding does not of itself prevent a contract of employment arising. Nor does the fact that he in practice is able to exercise real or sole control over what the company does (Lee).

(3) Similarly, the fact that he is an entrepreneur, or has built the company up, or will profit from its success, will not be factors militating against a finding that there is a contract in place. Indeed, any controlling shareholder will inevitably benefit from the company's success, as will many employees with share option schemes (Arenascene).

(4) If the conduct of the parties is in accordance with the contract that would be a strong pointer towards the contract being valid and binding. For example, this would be so if the individual works the hours stipulated or does not take more than the stipulated holidays.

(5) Conversely, if the conduct of the parties is either inconsistent with the contract (in the sense described in para.96) or in certain key areas where one might expect it to be governed by the contract is in fact not so governed, that would be a factor, and potentially a very important one, militating against a finding that the controlling shareholder is in reality an employee.

(6) In that context, the assertion that there is a genuine contract will be undermined if the terms have not been identified or reduced into writing (Fleming). **This will be powerful evidence that the contract was not really intended to regulate the relationship in any way**.

(7) The fact that the individual takes loans from the company or guarantees its debts could exceptionally have some relevance in analysing the true nature of the relationship, but in most cases such factors are unlikely to carry any weight. There is nothing intrinsically inconsistent in a person who is an employee doing these things. Indeed, in many small companies it will be necessary for the controlling shareholder personally to have to give bank guarantees precisely because the company assets are small and no funding will be forthcoming without them. It would wholly undermine the Lee approach if this were to be sufficient to deny the controlling shareholder the right to enter into a contract of employment.

(8) Although the courts have said that the fact of there being a controlling shareholding is always relevant and may be decisive, that does not mean that the fact alone will ever justify a tribunal in finding that there was no contract in place. That would be to apply the Buchan test which has been decisively rejected. The fact that there is a controlling shareholding is what may raise doubts as to whether that individual is truly an employee, but of itself that fact alone does not resolve those doubts one way or another.

[**emphasis added**]

134. Guidance was given by the Court of Appeal in the *Secretary of State for Business, Enterprise and Regulatory Reform v* ***Neufeld****; Same v Howe* [2009] EWCA Civ 280; [2009] ICR 1183, which somewhat moderated the strength of the conclusion above at point (6) in Clark:

> 55 …. Where, however, the contract is not in writing, it will of course need to be proved by other means, and, given the greater informality likely to obtain in one-man companies, the fact and extent of the alleged employee's control of the company may be a factor for consideration.
>
> 61 … If, however, the contract was not in writing, or was expressed only in short form, so that it is necessary to examine the conduct of the parties in order to deduce the content of the contract, the position of the individual and manner in which the company's affairs were conducted provide the factual setting for the inquiry.

135. The Editors of 'IDS Brief' suggest that a failure to agree on the amount of salary or wages to be paid will normally indicate that a contract of employment has yet to be formed. Notwithstanding this general position, and the clear definition provided in *Ready Mixed Concrete*, an absence of an agreement as to pay for work done is not fatal to the existence of a contract of employment. Where there is an agreement that the individual will work for the company and had in fact done so there may be an implied term for remuneration: *Stack v Ajar-Tec* [2015] EWCA Civ 46, [2015] IRLR 474.

136. Mr Stack was one of three shareholders and directors. Despite working for 80% of his time on the business, he did not receive a salary, in contrast to another director Mr Martin who received a salary from the date he joined. Mr Stack never sought any payment. He never received any payment. There was no provision in the company accounts reflecting a liability to pay him. After four years Mr Stack was removed as director at an EGM. The second tribunal to consider the matter found that it was an implied term that he would have been paid a reasonable amount for what he did with payment starting at a reasonable starting date. The Court of Appeal held that the Employment Judge was entitled to find that there was an implied term that Mr Stack would receive remuneration for the work that he did. The Employment Judge was entitled to find that Mr Stack was an employee.

<u>TUPE – transfer of liabilities & automatic unfair dismissal</u>

137. TUPE 2006 regulations 4 and 7 provide:

> Effect of relevant transfer on contracts of employment
>
> 4.—(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be

terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

...

7 Dismissal of employee because of relevant transfer

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason

> entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
>
> (3) Where paragraph (2) applies—
>
> (a) paragraph (1) does not apply;
>
> (b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
>
> (i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
>
> (ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.
>
> (3A) In paragraph (2), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).
>
> (4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

138. Where a claimant has produced some evidence in support of their case that the sole or principal reason for the dismissal is the transfer, the burden lies on the respondent to establish that the reason for dismissal was not the transfer (*Marshall v Game Retail Ltd* UKEAT/0276/13 (13 February 2015, unreported).

'Sole or principal reason'

139. The Court of Appeal considered causation in the case of *Hare Wines Ltd v Kaur* [2019] IRLR 555. K was dismissed by the transferor because the transferee had indicated that she had personal difficulties with a person who was to become a director of the transferee and therefore they did not wish to employ her. The Court of Appeal concluded that the Tribunal was entitled to find that the reason for the dismissal was the transfer notwithstanding that the reason was personal to K. Proximity in time between the dismissal and transfer is not conclusive but is often strong evidence in the employee's favour. In K's case the dismissal occurred on the day of the transfer. The Employment Judge in that case had first to decide whether in fact there had been a dismissal. She accepted the claimant's case that there had been a dismissal, that the claimant had been prepared to transfer but was prevented by the transferor who dismissed her. Due to various inconsistencies in the employer's evidence she preferred the claimant's version of events.

140. Bean LJ said:

> "23. Once it was found that Ms Kaur had not objected to the transfer the central question became whether (a) she was dismissed because she got on badly with Mr Chatha (who was about to become a director of the business) and the proximity of the transfer was coincidental, or (b) she was dismissed because the transferee did not want her on the books, the reason for that being that she got on badly with Mr Chatha. Which of these two was the sole or principal reason was a question of fact and the employment judge was entitled to prefer the latter to the former.
>
> …
>
> The judge found that the transferee company anticipated that there would be ongoing difficulties in the working relationship between the Claimant and Mr Chatha. It therefore decided that it did not wish her contract of employment to transfer and communicated that wish to the transferor. That was why she was told that she was not wanted. The reason for the dismissal was the transfer."

141. Underhill LJ said:

> “25.
>
> …
>
> The problems between Ms Kaur and Mr Chatha had been going on for some time, but there was no evidence that until the transfer they were regarded as cause for dismissal. Once the Judge rejected Mr Windsor's evidence as to the reason for the dismissal the only possible inference from her other findings was that he believed (in practice, no doubt, having ascertained Mr Hare's views) that Ms Kaur's problems with Mr Chatha, which had been tolerable pre-transfer, would not be tolerable post-transfer. In my view that means that the transfer was not simply the occasion for her dismissal but was, if not the sole reason, at least the principal reason for it: it was the transfer that made the difference between the problems being treated as a cause for dismissal and not. It does not ultimately matter what it was about the transfer that made that difference, and the Judge makes no explicit finding. I infer that she had in mind the fact, mentioned in para 28 of her Reasons, immediately before the dispositive para 29, that as a consequence of the transfer Mr Chatha would become Ms Kaur's manager; but it could in principle have been simply that Mr Hare, the new sole owner, had a lower tolerance of staff conflict than the previous regime. Either way, it was the transfer which was, within the meaning of the regulation, at least the principal reason for Ms Kaur being dismissed.”

Failure to inform and consult (TUPE)

142. Regulations 13 and 15 of TUPE 2006 provide:

> 13 Duty to inform and consult representatives
>
> (1) In this regulation and regulations [13A] 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.
>
> (2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—
>
> (a) the fact that the transfer is to take place, the date or proposed date of the transfer and the rea-sons for it;
>
> (b) the legal, economic and social implications of the transfer for any affected employees;
>
> (c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
>
> (d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.
>
> (4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).
>
> (9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps to-wards performing that duty as are reasonably practicable in the circumstances.
>
> 15 Failure to inform or consult

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

(c) in the case of failure relating to representatives of a trade union, by the trade union; and

(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those cir-cumstances.

(3) If on a complaint under paragraph (1) a question arises as to whether or not an employee repre-sentative was an appropriate representative for the purposes of regulation 13, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employ-ees [except where the question is whether or not regulation 13A applied].

…

(4) On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

(6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descrip-tions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay ap-propriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

(10) An employee may present a complaint to an employment tribunal on the ground that he is an em-ployee of a description to which an order under paragraph (7) or (8) relates and that—

(a) in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;

(b) in respect of an order under paragraph (8), the transferor or transferee, as applicable, has failed, wholly or in part, to pay him compensation in pursuance of the order.

(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him.

Special circumstances

143. *Harvey on Industrial Relations and Employment Law* gives the following commentary at Division F/2/J/(5) on “special circumstances” within the meaning of regulation 13(9):

> “TUPE 2006 does not define further the meaning of 'special circumstances' but the expression is clearly intended to mean the same as it does in relation to collective redundancies (TULR(C)A 1992 s 188(7)). Case law in relation to that enactment indicates that the employer must be able to show that he was constrained by some event or occurrence beyond, or substantially beyond, his control. The circumstances must be 'special' in the sense of being something unforeseen or unexpected: 'something out of the ordinary run of … commercial or financial events'; there must be reasons which are special to the facts of the particular case (*Bakers' Union v Clarks of Hove Ltd* [1979] 1 All ER 152, [1978] IRLR 366, [1978] ICR 1076, CA).
>
> Thus receivership or liquidation can amount to 'special circumstances' if it is sudden and unexpected; but if the employer should have seen the writing on the wall, then the circumstances are not special (Clarks of Hove, above).
>
> Where it is alleged that the employer should have anticipated the turn of events, the tribunal must decide whether the employer behaved reasonably or not. It is not for the tribunal, with the advantage of hindsight, to substitute his own commercial judgment for that of the employer (*Hamish Armour v Association of Scientific, Technical and Managerial Staff* [1979] IRLR 24, EAT).
>
> It is not enough for the employer to show that there were such special circumstances. He must go further and show that it was not reasonably practicable for him to comply, or comply fully, with his obligations because of those circumstances. That is to be decided by an objective assessment of the situation (*Union of Construction, Allied Trades and Technicians v H Rooke & Son Ltd* [1978] IRLR 204, [1978] ICR 818, EAT).

Wrongful dismissal

144. In respect of the claim of wrongful dismissal, the following principles apply:

144.1. A claim of wrongful dismissal requires the Tribunal to consider whether a claimant was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

144.2. The burden is on the Respondent to show repudiatory breach.

144.3. The underlying legal test to be applied by courts and tribunals is not whether the employee's negligence or misconduct is worthy of the epithet 'gross', but whether it amounts to repudiation of the whole contract.

144.4. A court or tribunal must be satisfied, on the balance of probabilities, that there was an actual repudiation of the contract by the employee. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct.

CONCLUSIONS

Employment Status / continuous employment

145. Was the Claimant an employee of the First Respondent from 28th August 2016 to 28th August 2018 such that he has two years' continuous service with the First Respondent?

146. The position of the Second Respondent regarding employee status has varied over the course of this litigation. Initially the matter was not raised at all. Subsequently a re-amended response dated 1 April 2019 denied that the Claimant was an employee between 18 February 2016 and January 2017 and accordingly lacked the qualifying service. The Claimant was put to proof in respect of his employee status from January 2017.

147. Paragraphs 45-46 of witness statement of Mr D'Souza have the heading "CW & I become employees as R1" and sets out:

> "Around Christmas 2016, we decided that since there would be sufficient funds in the business, we could finally be serious about the venture and CW and I could become employees of R1 and place on the payroll…
>
> I advised that we should sign employment contracts…. Christoph prepared one for me but … refused to sign one himself"

148. Claimant's Counsel read this as an admission. The heading suggests a concession of some sort, but read in the round we do not find it was intended to be. In his written submissions Mr Cordrey conceded (realistically in our view) that the Claimant was an employee by the time of his dismissal in August 2018. In his oral submission he resiled from that position.

149. In submissions for the Second Respondent Mr Cordrey proposed that the approach of the Tribunal should be to consider whether the Claimant was an employee in August 2016. As I explored with him during his submissions this contained a tacit (and again entirely realistic) admission that if the Claimant was already an employee by August 2016, nothing that happened in the following two years would have caused him to lose that status. Two

factors in particular might be thought to have increased the strength of the argument that he was an employee. From January 2017 onward he received a regular monthly salary. From May 2018 his shareholding was diluted with the result that he was no longer a 50% shareholder, leading to a loss of control.

150. We agree with Mr Cordrey's submission that the Tribunal must make its own finding as to employee status and that admissions made by representatives or witnesses in their evidence are not the determining factor.

151. We consider that examination of the Claimant's employee status in August 2016 is a useful approach to consider whether he had employee status for the sufficient period of time.

152. The test that the Tribunal must apply is the multifactorial test elucidated in a variety of authorities. We do not consider that any one factor is determinative, but have considered all factors for an overall picture.

Factors relevant to employment status

153. We have concluded as follows:

153.1. *Absence of written contract* – it is significant in this case that there is no written contract for two reasons. First the burden is on the Claimant to prove the terms of the contract said to exist. Given the absence of a written contract or even an alleged oral contract, this must be a contract by implication. We do not consider that the circumstances require the implication of a contract of employment. The Claimant was a 50% shareholder and director. His activity in August 2016 could be explained entirely by reference to that position. Second, it takes on a particular significance given that the Claimant accepts he was the person responsible for drawing up contracts, and chose not to do so. The Claimant is an experienced businessman and entrepreneur. Albeit that he was a joint shareholder the reality was that, as CEO in 2016 he was the dominant influence in the First Respondent business. Mr D'Souza wanted him to enter into contact of employment in January 2017 and he declined. The Claimant's evidence to the Tribunal was that he considered that he did not need one. Ultimately, in the circumstances of this case we consider that the absence of the written contract points away from employee status.

153.2. Had an officious bystander been asked whether it was implied that there was a contract of employment in August 2016, we do not find that the was any such necessary implication. The Claimant and Mr D'Souza were plainly working very hard on this project, but each was considering other options, such as other employment opportunities or in the Claimant's the possibility that unemployment benefit might be required. Mr D'Souza was registered as unemployed and receiving unemployment benefits in 2016. Had they decided that the venture was not working at one of the "walk away" junctures in 2016, it would not have been apt to describe that as a dismissal. It would have been more apt to describe

this as two entrepreneurs concluding that their mutual project was not going to get off the ground and each going their separate ways.

153.3. *Mutuality of obligation* – we do not accept the Second Respondent's position that there was no mutuality of obligation. Both the Claimant and Mr D'Souza had agreed to devote 100% of their time to the venture. We find that there was mutuality of obligation.

153.4. *No salary* - while we recognise that lack of remuneration is not fatal to the Claimant's claim that he was an employee (per *Stack*), we consider that in this case it operates against the Claimant being an employee. Not only was he not receiving a salary, but this was not a situation in which he was working for a deferred salary. We do not find that there was an actual or implied term that he would receive a salary for this work, by contrast with the finding of the second Tribunal in *Stack*. Once the First Respondent was better funded, it made payments by way of monthly salary to both the Claimant and to Mr D'Souza from January 2017 onward. What it did not do was pay anything by way of deferred pay for work carried out in 2016.

153.5. *The parties' conduct* – in fact we find that Claimant was putting in a full working week. We do not find that the amount of work undertaken was very limited as contended by the Second Respondent. It could not be said that this was inconsistent with him being an employee, nor as has been contended, that it was merely a hobby.

153.6. *Control* – the fact of the Claimant's 50% shareholding does not necessarily preclude there being sufficient control for employee status. The arc of the Claimant's involvement in the First Respondent we find is that he was the dominant individual in it in 2016. By 2018, following the investment of Dr Hiebeler he ultimately lost control, as subsequent events clearly demonstrated. It has been observed by appellate authority that it would be odd if the degree of control through shareholding in this way caused employee status or not to vary. In this case, in August 2016, the Claimant had a high degree of control.

153.7. *Obligation to work personally* – in our assessment this operates in the Claimant's favour. There was no suggestion that other individuals were or could provide services on the Claimant's behalf.

153.8. *Other factors* – the Claimant represented to HMRC that his employment commenced on 1 January 2017, the month that his regular salary began. From this point he was paid a salary subject to deductions for income tax and national insurance in the same way that one would expect an employee to.

Conclusion on employee status

154. In our judgment January 2017 did represent a significant change. This was the point at which the First Respondent was in receipt of more substantial investment funding, such that the two founders considered it

appropriate to pay themselves regular monthly salaries, subject to deductions. We also find that from this point on the two were focusing exclusively on the venture rather than considering other options as they had been. Our conclusion is that the Claimant was an employee from January 2017 onwards. Prior to this point he was not.

155. Did the Claimant have two years' continuous service as an employee? Given that the Claimant was only employed between January 2017 and August 2018, he did not have the requisite two years' continuous service to bring claims of unfair dismissal or automatic unfair dismissal.

Worker status

156. Was the Claimant a worker during the period from 18th February 2016 to 28th August 2018?

157. The definition of worker falling under section 230(3)(b) of the Employment Rights Act 1996, is easier for a claimant to satisfy. We find that in this case there was an implied contract whereby the Claimant did undertake personally to do work, in circumstances which was not akin to a client/customer relationship. We find that he did satisfy this definition at the times material to his claims.

Automatically unfair dismissal (reg. 7(1) of TUPE 2006)

158. Unlike some other types of automatic unfair dismissal, a claim brought under regulation 7 of TUPE requires two years' continuous employment service. Given the finding above this claim fails. It is nevertheless necessary to consider the operation of regulation 7(1), for reasons discussed below.

159. The Second Respondent admits that the acquisition of the business and assets of the First Respondent was a relevant transfer within the meaning of reg. 3 of TUPE 2006.

160. In the case of *Kaur* the circumstances are not precisely the same but at core there is a common element, namely the desire of the guiding minds of the businesses to commence a new business free from the difficulties with the employee. It is equally clear from *Kaur* that the question of the sole or principal reason for the dismissal is a finding of fact for the Tribunal. In a similar way to *Kaur* the questions of the transfer and the factual matters leading up to the dismissal in the present case are intertwined.

161. We accept the Second Respondent's argument, and in particular the evidence of Mr D'Souza that plans to dismiss the Claimant were well advanced by the time he became aware of the possibility of a "pre-pack" purchase of the assets of the First Respondent business following insolvency. The Claimant had been notified, in formal terms on 18 July 2018 of the concerns which led to the disciplinary proceedings. It was not until 19 August 2018 that Mr D'Souza became aware of the "pre-pack" possibility.

2.1 Was the sole or principal reason for the dismissal of the Claimant the transfer?

162. We consider that the manner and timing of the decision to dismiss owed something to the advancing plan to take the First Respondent business into administration and for the Second Respondent to purchase the assets that emerged in the later part of August 2018. We accept Ms Robinson's submission that there was something of a rush to get this dismissal completed in order for the pre-pack purchase to take effect and salaries to be paid from the new entity.

163. Considering the question of the "sole or principal reason" for dismissal however, we find that there were multiple reasons. First was Mr D'Souza's belief that the Claimant had unilaterally given himself pay rises without transparency or proper authorisation. Second the level of the Claimant's remuneration more generally, which was problematic for two reasons. The gross disparity between the two founder's pay was a problem. The high level of the Claimant's pay was plainly unsustainable for such a small start-up business. His pay was plainly unpalatable for Dr Hiebeler the principal investor. Thirdly, there had been for some months before August 2018 an irretrievable breakdown in relations between the two founders.

164. While we do find that the transfer was a reason for the dismissal we do not find that the transfer was the sole or principal reason.

2.2 If it was, is there a valid ETO reason? R2 relies on redundancy and/or business reorganisation as the ETO reason.

165. We are not required to deal with this issue, but for the sake of completeness, we do not consider that the Second Respondent has established either redundancy or business reorganisation in the circumstances of this case.

Ordinary unfair dismissal (s. 98(4) of the ERA 1996)

166. The claim of "ordinary" unfair dismissal under section 98 fails for lack of jurisdiction given our finding above about the Claimant's insufficient service. We nevertheless deal with this matter in the alternative, in case we are wrong about that point.

167. Was the reason or principal reason for the dismissal of the Claimant his conduct and / or some other substantial reason ("SOSR") justifying the dismissal of the Claimant? As to SOSR, the Second Respondent relies on a complete breakdown in trust and confidence due to the Claimant's conduct and performance.

168. We find that the principal reason for the dismissal of the Claimant was his conduct.

169. Did the First Respondent act reasonably or unreasonably in treating that reason as sufficient for dismissing the Claimant, having regard to the *British Home Stores v Burchell [1978] IRLR 379* test?

170. Did Mr D'Souza have a belief in his guilt? The Tribunal notes that the primary charge is unilaterally increasing salary without authority. The letter of dismissal concludes that there was a unilateral increase in salary from £14,540 to "upwards of £16,000" per month gross and that the contention of the Claimant that there was an agreement to a monthly net salary of £9,000 was not credible, particularly where the financial plans of the First Respondent had been deleted.

171. The assessment of the Tribunal is that Mr D'Souza plainly believed that the Claimant had increased his salary without authorisation.

172. Was that belief based on reasonable grounds? Ultimately it is clear from the evidence that at no stage did Mr D'Souza agree to the Claimant being paid a gross salary of £16,000 per month. The figure of £16,000 in the business plan was a full cost to the business including other elements. It was open to Mr D'Souza to make an assessment based on the evidence as to whether this was merely a "misunderstanding" or whether the Claimant had increased his salary himself knowing that it was not had been agreed.

173. Was it based on a reasonable investigation? Mr D'Souza admitted in his oral evidence that he had not ever looked at the Claimant's payslips during the disciplinary investigation. This is somewhat surprising given the importance of this evidence.

174. Was the dismissal procedurally fair?

175. For several reasons the Tribunal has concluded that the procedure adopted fell outside of the range of reasonable responses. First, it is clear from all of the correspondence between Mr D'Souza, Dr Hiebeler and Mr Povel that from some time before the decision to dismissed there was a predetermined plan to dismiss the Claimant. In short there was never going to be any other outcome than dismissal, irrespective of what the Claimant said at the disciplinary meeting. Second, there was no appeal, which is a basic procedural safeguard. Third, in our assessment presenting evidence on the PowerPoint presentation at the video disciplinary hearing for the very first time, was unfair since it did not give the Claimant time to properly consider his position and respond to the content, with other evidence if appropriate.

Contribution

176. Did the Claimant contribute to his dismissal?

177. The Tribunal finds that the circumstances of the Claimant repeatedly increasing his salary without authorisation from his business partner Mr D'Souza amounts to a very high degree of blameworthiness. We consider that the Claimant's exchange with Mr Patel means his argument that this is merely a mistake or misunderstanding is unsustainable.

178. The deletion of Excel files that were plainly relevant to the investigation was a further action which was also blameworthy.

179. We have discussed both of these points further below under "wrongful dismissal", and rely upon that discussion as supporting our finding of contributory fault.

180. In the circumstances we consider that it would be appropriate to make a reduction of 100% from any compensatory award.

Wrongful dismissal

181. As has been set out above, we find that the Claimant was an employee by August 2018. He is therefore entitled to pursue a claim for wrongful dismissal.

182. Was the Claimant in repudiatory breach of contract such that the First Respondent was entitled to dismiss him summarily?

183. A mere misunderstanding or mistake would probably not be sufficient to amount to gross misconduct. We find in this case that there was more than a misunderstanding or mistake and that the Claimant unilaterally and without authorisation increased his salary. We find that this was gross misconduct.

184. We are fortified in this conclusion by the number of occasions that the Claimant caused his pay to be varied above what had been explicitly sanctioned by his business partner Mr D'Souza. We consider it is significant that on each occasion the salary is varied upward. The challenge by email of Mr Patel when the Claimant was increasing his salary from the £160,000 in the business plan to the monthly equivalent of £192,000 per annum, means that we do not consider that the Claimant's contention of mistake is sustainable.

185. Page 1000 in the agreed bundle is evidence that the Claimant deleted a series of financial documents later on 18 July 2018. The Claimant's evidence in cross examination that there had been a number of "iterations" of the business plan, that he was only keeping those that were pertinent. He said that deleting files this was merely "archiving". He said that Mr D'Souza knew how to get this back. This explanation was unconvincing to say the least. The Claimant was perfectly aware that his honesty in respect of what had been agreed and pay rises was being questioned. Any documentation or different versions of business plans would be likely to be relevant to an investigation. A decision to delete documents, in our view suggests a deliberate attempt to conceal evidence that he must have understood would be required as part of any proper disciplinary investigation. We consider that this is evidence of the Claimant's guilt as well as blameworthy conduct.

186. The First Respondent did in fact dismiss the Claimant in response to such repudiatory breach of contract.

187. The repudiatory breach was not waived such that the contract was affirmed.

Breach of the TUPE regulations to inform and consult

188. Did the First Respondent breach its obligations to inform and consult employee representatives or the Claimant directly regarding the transfer under regulation 13 and 13A of TUPE?

189. The Second Respondent states that the Claimant accepted in correspondence that there was no breach of regulation 13A. No disagreement was made by Ms Robinson in her submission. We assume therefore that this is correct.

190. Mr Cordrey submits that given that Mr D'Souza, Dr Hiebeler and Mr Povel had decided that they could not work with the Claimant, he would never have worked in the new Second Respondent business and therefore fell outside of the category of employees by the transfer. It would seem to follow from this proposition that any employer could avoid the need to inform or consult a particular employee by saying that they had always intended to dismiss him or her. We do not think that this can be the law.

191. The category of 'affected employees' who are entitled to be informed or consulted is drawn broadly in the statutory provision: i.e. those "who may be affected by the transfer or may be affected by measures taken in connection with it". The Claimant as an employee and particularly as an employee who was also a shareholder was likely to be affected. The word 'may' means that there was a onus to inform and consult, even if the Claimant's continued employment status was in doubt.

192. *Special circumstances* - can the Respondents rely on 'Special circumstances' *per* regulation 13(9)? We find that the special circumstances defence is not made out. This was a case in which the potential need for insolvency had been known about for months. The pre-pack administration possibility was known about for something in the region of 2 ½ weeks. We do not consider that this was a "sudden disaster" situation as contended for by Mr Cordrey in his written submissions. We conclude that, in the terms of Mr Cordrey's submissions, the First Respondent *could* see the "writing on the wall". It is also a relevant consideration that Dr Hiebeler as an investor was cooperating with the First Respondent and the process of planning for a pre-pack purchase following administration. This was not analogous to a disaster situation over which the First Respondent had no control.

193. We find that there was a failure to inform and consult the Claimant and accordingly he is entitled to a protective award under Regulation 15. By operation of regulation 15(9) liability to pay such an award is joint and several with regard to both Respondents.

Unlawful deduction from wages (s. 13 ERA 1996)

194. The Claimant claims his salary between 1 – 28 August 2018. The Second Respondent admits that this was an unlawful deduction by the First Respondent.

195. A full week elapsed between the termination of the Claimant's employment and the transfer between the First and Second Respondents. Given the Tribunal's finding that the Claimant was not unfairly dismissed by operation of regulation 7(1) TUPE, regulation 4(3) is not engaged so as to transfer liabilities under a contract of employment from a transferor to a transferee on a TUPE transfer by operation of regulation 4(2)(a).

196. It follows in respect of this head of claim that liability for the unlawful deduction is established against the First Respondent but does not transfer.

Holiday pay (regs 14 and 16 of WTR)

197. Has the First Respondent failed to pay the Claimant the whole or any part of any amount due to him under regulation 14(2) or 16(1) of the WTR?

198. Alternatively, is the failure to pay the Claimant holiday pay an unlawful deduction from wages under s. 13 ERA 1996?

199. The Claimant's evidence on holiday pay is confined to the content of his supplementary witness statement on quantum. He says that he accrued 18.5 days between 1 January 2018 and the date of termination. He says that he took UK bank holidays and in addition over Easter four working days. He claims 8.5 days. There is no other evidence to corroborate this claim.

200. The burden is on the Claimant to prove a claim of holiday pay. It ought to have been possible to evidence this claim. We are not satisfied on the balance of probabilities that this claim has been proven.

Breach of the right to receive written employment particulars

201. Did the First Respondent fail to give the Claimant an itemised statement of his particulars of employment as required by s1 of ERA 1996?

202. It is not disputed that the Claimant did not receive an itemised initial statement of his particulars of employment as was his statutory right under section 1.

203. Is the Claimant entitled to an award under section 38 of EA 2002?

204. This type of claim only succeeds where a claim in Schedule 5 of the Employment Act 2002 is successful. There is a claim of claim of unauthorised deductions within the meaning of section 23 of the Employment Rights Act 1996 which is contained within Schedule 5.

205. This claim succeeds.

206. If there is any liability under this head, does it pass to the Second Respondent? For the reasons given above, under unlawful deductions, liability does not pass.

Remedy Hearing

207. A one day remedy hearing has been listed on **2 November 2020** to deal with the successful claim under TUPE regulations 13 & 15 (failure to inform and consult), the unlawful deduction claim and the failure to provide written employment particulars.

208. The parties are ordered to exchange and send to the Tribunal any written submissions on which they rely by **28 October 2020**.

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Employment Judge - Adkin

Date 7th Oct 2020

WRITTEN REASONS SENT TO THE PARTIES ON

07/10/2020

FOR THE TRIBUNAL OFFICE

Notes

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