



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Ms Yvette Morgan

v

(1) Lactodorum Contracts Limited;  
(2) Sheena Brown; and  
(3) Stephen Brown

## Heard at:

Cambridge

## On:

9, 10 and 11 May 2022  
28 and 29 July 2022

## In Chambers Discussion:

4 August 2022

## Members:

Ms B von Maydell-Koch and Mr C Grant

## Before:

Employment Judge Tynan

## Appearances

### For the Claimant:

Ms M Sharp, Counsel

### For the Respondents:

Mr S Brown, Director and Third Respondent

## RESERVED JUDGMENT

1. The Claimant's complaints that she was:
  - (a) subjected to detriments on the grounds that; and
  - (b) automatically unfairly dismissed by reason thatshe made a protected disclosure are not well founded and are dismissed.
2. The Claimant's complaint that she was unfairly dismissed by the Respondent in contravention of s.98 of the Employment Rights Act 1996, succeeds.
3. The Respondent dismissed the Claimant in breach of contract by failing to give her 12 weeks' notice terminating her employment or to pay her in lieu thereof.
4. The Tribunal declares that the Respondent made an unlawful deduction from the Claimant's wages and Orders the First Respondent to pay the sum of £835 to the Claimant in respect of that deduction.

5. The First Respondent's claim against the Claimant for damages for breach of contract (the "Employer's Contract Claim") is not well founded and is dismissed.

## REASONS

1. By a claim form presented to the Employment Tribunals on 23 October 2020, following ACAS Early Conciliation (in the case of the First Respondent, between 15 July and 5 August 2020 and in the case of the Second and Third Respondents, between 12 and 22 October 2020) the Claimant pursues complaints: against the First Respondent that she was unfairly dismissed (pursuant to §.98 and 103A of the Employment Rights Act 1996 ("ERA")), wrongfully dismissed, that the First Respondent made unlawful deductions from her wages; and, as against all three Respondents, that she was subjected to detriments on the grounds that she made a protected disclosure. The complaints are denied in their entirety by the Respondents.
2. The First Respondent pursues an Employer's Contract Claim against the Claimant to recover what it asserts were unauthorised payments and expenses claims by her in the course of her employment. The Employer's Contract Claim originally comprised 74 items with a total value of £15,107.95, but after they were reviewed by the Respondents on the first day of the Final Hearing they were narrowed to 25 items with a total value of £12,452.83.
3. It is not necessary to recite the history to the proceedings, save to note that the issues in the case were finalised at a Case Management Preliminary Hearing on 28 May 2021. The record of that Hearing is at pages 180 – 187 of the Hearing Bundle.
4. The Claimant made a detailed written statement and also gave evidence at Tribunal. On behalf of the Respondents there were written statements from the Second and Third Respondents as well as a written statement from Mr Ian Chown who for many years looked after the Respondent's interests whilst at Azets Accountants and Business Advisors ("Azets"). All three gave evidence at Tribunal.
5. There was a single agreed Hearing Bundle running to some 1,063 numbered pages, though this was supplemented in the course of the Hearing, including when the Hearing resumed part-heard on 28 July 2022.
6. Ms Sharp submitted detailed written closing submissions, whereas Mr Brown made a relatively short oral statement in closing, on behalf of himself and the other Respondents. In coming to this Judgment we have been able to re-read our notes of the evidence, have reviewed documents contained in the Hearing Bundle and have also been able to consider Ms

Sharp's written submissions at greater length. Given the length of her submissions we do not reiterate them in this Judgment, though refer to them briefly below.

**Did the Claimant make a protected disclosure?**

7. In order for the Claimant's complaints under §.47B and 103A ERA 1996 to succeed, the Claimant must first establish, on the balance of probabilities, that she made a protected disclosure. For the reasons we set out below, we have concluded that the Claimant did not make a protected disclosure and accordingly, that her §.47B and 103A complaints cannot succeed. We have limited and focused our findings and conclusions below accordingly.
8. The Claimant asserts that she made a protected disclosure to the Third Respondent on 19 May 2020 following a meeting the same day with Mark Bradshaw of Azets. The Respondents deny that the Claimant and the Third Respondent met on 19 May 2020. Whilst we find that they did meet that day and further, that the Claimant relayed certain matters to the Third Respondent, for the reasons below, we conclude that the Claimant did not believe the information being disclosed by her was disclosed in the public interest. In order for a disclosure to qualify for protection under s.43B ERA 1996, an employee must believe (on reasonable grounds) that any disclosure of information by them is made in the public interest. In arriving at this conclusion we have been assisted by Ms Sharp's written submissions, particularly at paragraph 77 onwards, and have had regard to the decision of the Court of Appeal in Chesteron Global Ltd (t/a Chestertons) and Anor v Nurmohamed (Public Concern at Work Intervening) [2018] ICR 731, CA, including its indication as to the factors that may be particularly relevant in deciding whether a disclosure has been made in the public interest. It is necessarily a fact sensitive exercise.
9. In the findings that follow, we deal with certain matters during the Claimant's employment with the First Respondent which we consider touch upon and provide relevant context for the disclosures she made to the Third Respondent on 19 May 2020. Naturally, we have had specific regard to the Claimant's evidence both in her witness statement and at Tribunal as to what she believed on 19 May 2020, including how she now views her actions on that date.

**Findings of Fact**

10. The Claimant commenced employment with the First Respondent on 4 November 2003 and was summarily dismissed on 9 July 2020. She was initially employed as a Business Manager, though relatively early in her employment she took on additional responsibilities as the Third Respondent's PA, for which she received a not insignificant increase in her salary. The role of PA required the Claimant to be available out of hours, including at weekends, to deal with a range of issues. One of the key issues in dispute between the parties is whether or not the Claimant was entitled to a monthly cash payment of £400 in addition to her basic salary

and other benefits. The Claimant asserts that this payment was agreed to by the Third Respondent in 2017 in lieu of ongoing indexation of her pension and, also, in recognition of the extent to which she was working evenings and at weekends and generally going above and beyond what had been expected of her when she took on the role of the Respondent's PA. We return to this.

11. The Claimant was never issued with a contract of employment or written particulars of employment throughout the duration of her employment with the First Respondent. Likewise, she was never issued with a job description, person specification or any written employment policies, so that any relevant boundaries and expectations were never formally defined, nor indeed, we find, communicated by any other means.
12. The lack of clear boundaries and defined expectations reflects, for example, in the fact that the Respondents were, we find, content for the Claimant to purchase magazines and newspapers, lottery tickets and coffees from Costa from time to time as part of her daily 'lunch' allowance. Similarly, no upper monetary limit was placed by the Respondents on the cost of a lunch or other guidelines issued, even informally, as to what qualified as a lunch. It seems to us that the matter was essentially left to the Claimant's discretion and common sense.
13. When the Claimant commenced employment with the First Respondent it employed a Bookkeeper. She left the First Respondent's employment during the Claimant's early years with the company. Thereafter the Claimant took on responsibility for certain basic book keeping tasks, including in particular inputting data regarding the First Respondent's financial transactions, as well as drawings by the Second and Third Respondents against their respective Director's Loan Accounts. The Claimant also attended quarterly meetings with Mr Chown and, in due course, his colleague Mr Bradshaw. Notwithstanding the Hearing Bundle includes a CV prepared by the Claimant since leaving the First Respondent's employment in which she seeks to highlight her experience of SAGE accounting software, the reality is that when the Claimant joined the First Respondent she had no meaningful experience of SAGE, nor did she receive any formal training on SAGE either before or after the Bookkeeper left. Instead, the Claimant is largely self-taught, albeit she understood throughout her employment with the First Respondent that Azets were on hand to support her as necessary. We find that she sought their support and feedback on a regular basis, particularly in the period after she first took on responsibility for certain bookkeeping tasks. The risk, of course, that the Respondents took in failing to arrange for the Claimant to be trained on SAGE and effectively leaving her to her own devices was that poor practices may not have been recognised as such, on the contrary that they may have become the established and accepted way of doing things.
14. Section C of the Hearing Bundle comprises the First Respondent's financial documents, including its SAGE account records, SAGE account

transactions and SAGE accounts for the period 2014 to 2019. There are significant gaps in the details of the documented payments and activities, references are missing and the detailed descriptions are not always consistent. The overall firm impression is that they are not the work of a qualified or experienced Bookkeeper. A clear example of this is the way that entries are recorded in relation to the Second and Third Respondents' drawings. For example they were recorded by the Claimant on SAGE as: "*Steve and Sheena*"; "*what Sheena*"; "*Steve and Sheena's*"; "*Sheena Loaned*"; "*what Steve loaned*"; "*what Sheena loaned to the company*"; "*what the company*"; etc. Whilst we think the great majority of companies might regard these as an unconventional, indeed an inadequate, record of Directors' drawings, the Second and Third Respondents were evidently unconcerned, as this was how their drawings were documented over a period of many years. Ultimately, the Second and Third Respondents had statutory and fiduciary responsibilities in the matter as Directors of the First Respondent. They were each responsible for providing oversight and ensuring that adequate and accurate records were kept as well as ensuring that the Claimant was trained and competent to undertake her responsibilities.

15. Instead, we find, they essentially left the Claimant to muddle through as best she could. In any event, neither of them had any particular experience or ability themselves in terms of bookkeeping. The Second Respondent's role was to look after the sub-contractor plumbers and to help out with other miscellaneous issues from time to time. She combined this role with bringing up two children. For his part, the Third Respondent had a more client facing role, sourcing new business and dealing with the First Respondent's clients and suppliers, including overseeing its contracts with them.
16. Whilst the parties would each say that, until June 2020 they enjoyed a good working relationship, we find that they did not always communicate sufficiently clearly with one another, we find that, through familiarity, assumptions were made on all sides. Throughout the Final Hearing we observed that the Third Respondent came across as confident, outgoing and affable, in marked contrast to the Claimant who was quietly spoken, reserved and far from confident in her communications. What was particularly notable when the Claimant was cross examined by the Third Respondent was his persistent failure to listen to what she had to say or to afford her the space to finish (or even sometimes to begin) to answer his questions. It was not done aggressively on his part. Instead it was apparent to the Tribunal early on that he was unaware of what he was doing, notwithstanding the Tribunal's repeated requests that he afford the Claimant an opportunity to answer his questions. We conclude that it is representative of the Claimant's and the Third Respondent's working relationship, namely that the Third Respondent did not always listen to the Claimant and that she had difficulty in expressing herself, getting her point of view across to the Third Respondent and ensuring her voice was heard. We think this was compounded by the Third Respondent's way of doing business and running his company; he is not someone who documents

things in writing or has much interest in or understanding of spreadsheets and accounts. He rarely uses email, his text messages are perfunctory and he much prefers cash to debit cards or smartphone payments. All the evidence points to someone who conducts his business at a very personal level and who has an instinctive sense as to how the company is performing. In that regard, he and the Claimant had contrasting styles. Whereas the Claimant had immediate access to, and kept a constant eye on, the First Respondent's accounts and records, including largely up to the minute information as to the cash in hand at the bank and monies outstanding to the company's suppliers, the Third Respondent's assessment of how the business was performing was informed by his sense of what jobs and opportunities were in the pipeline and when these might be coming in, as well as when he was expecting to be paid on jobs and also how long he calculated he might be able to keep suppliers waiting for payment. This was information he largely carried around in his head. If the Claimant raised questions or even expressed concerns as to the company's trading position, based on the hard financial data available to her, we find that the Third Respondent was prone to brush these aside on the basis that everything would be fine.

17. In her witness statement, the Claimant sets out the background to what she claims was her protected disclosure. She paints a picture of extensive cash withdrawals and cash transactions by the Third Respondent, questionable or inexplicable dealings with third party suppliers and others, inconsistent and inaccurate invoices and statements, cash flow issues, envelopes containing cash and personal stress, anxiety and sleepless nights caused by how she perceived the business was being run. At paragraphs 35 – 42 of her witness statement, the Claimant touches upon her interactions with Azets and suggests that when she raised concerns these were effectively brushed aside by Mr Chown. He gave evidence at Tribunal. We found him to be an articulate, consistent and credible witness, and have no reservations whatever as to his integrity and professionalism or the integrity and professionalism of his former firm. He stated that whilst Azets had not audited the First Respondent's accounts (and were not required to do so given its level of turnover), nevertheless he had a good understanding of the First Respondent's business, having been engaged by it over many years before handing over day-to-day issues to Mr Bradshaw. However, even then he continued to be involved in finalisation of the First Respondent's year end accounts. Even if it could be said that the Second and Third Respondents' drawings as Directors are slightly unconventional, in the sense that there is no pattern to these and the sums vary markedly from time to time, Mr Chown was satisfied, and in turn satisfied us, that there was nothing improper or irregular about them or the Respondents' financial affairs more generally. Amongst other things, the Second and Third Respondents had enjoyed a healthy level of drawings because they had sold their business interests to the First Respondent when it was established but left the proceeds in the business, effectively as working capital which they had then drawn down over time. The fact that the Third Respondent prefers cash to electronic forms of

payment is not evidence in itself of any wrongdoing on his or the company's part.

18. Putting aside whether or not the Claimant's perception as to the Respondents' business and accounting practices was well founded, we accept that the anxieties and concerns referred to in paragraphs 20 – 34 of the Claimant's witness statement, were genuinely felt. They partly resulted from misunderstandings and poor communications between the parties. The Claimant was particularly uncomfortable about being asked by the Third Respondent to carry large sums in cash on a few occasions. At paragraph 29 of her witness statement she describes not sleeping well when she had cash at her home overnight, and refers to the personal consequences for her if there had been a fire or she had been burgled. She states in her witness statement, and reiterated at Tribunal, that her husband was unhappy about this and also with her carrying a large sum of cash about her person. We find that her overriding concern was not that the First Respondent, through the Third Respondent, was (legitimately) conducting transactions in cash, rather that the Claimant was made to feel anxious and vulnerable when carrying or otherwise responsible for large cash sums. This was about her own situation rather than reflective of concerns as to the First Respondent's business and accounting practices.
19. At paragraphs 43 – 55 of her witness statement, the Claimant refers to events towards the end of 2019, including the Third Respondent's trip to Australia. She makes unsubstantiated allegations regarding an employee of Persimmon Homes and also suggests or infers some impropriety in terms of how the Australia trip was funded. The available evidence does not support the picture she has sought to paint or hint at. On the contrary, the available evidence in the Hearing Bundle is that the full costs of the trip were allocated to the Third Respondent's Director's Loan Account; as was the case with any other personal expenditure of his. However, we do accept the Claimant's evidence that the Australia trip coincided with cashflow issues at the First Respondent and that on the day before the Third Respondent was due to leave for Australia, she spoke to him regarding the First Respondent's financial situation. We accept the Claimant's evidence that the Third Respondent effectively brushed aside her concerns and told her to "*just deal with it*". It is clear to the Tribunal that the Claimant felt let down and unsupported in having to take responsibility for a challenging situation that she regarded as being of the Third Respondent's making insofar as she believed he was drawing excessive amounts on his Director's Loan Account at a time when the First Respondent's trading situation did not permit this. Whilst the Third Respondent was in Australia, the Claimant was in the unenviable position of having to manage difficult communications from HMRC and from the company's suppliers, including Plumbco who claimed that the First Respondent owed it £258,000 and was pressing for payment. The Claimant felt particularly aggrieved to receive a text message from the Second Respondent informing her that the Third Respondent was running short of cash whilst in Australia and asking that she arrange a transfer of funds. Whilst it was understood between the parties that the Second and

Third Respondents were generally not contactable whilst on holiday, on this occasion the Claimant took the unusual step of contacting the Third Respondent whilst in Australia. He told her that everything was under control and that he would sort matters out when he returned from Australia. It seems that the First Respondent traded its way out of the situation, but that does not alter the fact that the Claimant was left in an invidious position whilst the Third Respondent was away and, not unreasonably, felt unsupported as an employee.

20. The Coronavirus pandemic provides the context within which the Claimant's employment was terminated. In March 2020, as the pandemic began, the Claimant had a conversation with the Third Respondent about acquiring a laptop so that she could work from home. He denies any such discussion, or that he gave his permission to her to purchase a laptop. We accept the Claimant's evidence that he told her to get whatever she needed to be able to work from home. We conclude that this is an example of the Third Respondent not really listening to what he was being asked by the Claimant and, as a result, later being unable to recall that there had been any discussion about the matter. One particular exchange between the Claimant and the Third Respondent on this issue during the Hearing stood out: in answer to a question by the Third Respondent about the laptop, the Claimant referred to the fact that the Third Respondent had not listened to her and at the precise moment she gave that evidence, the Third Respondent intervened and talked over her. We find that the Third Respondent authorised the purchase of a laptop and delegated to the Claimant full discretion as to what equipment she might require in order to set herself up to work from home. In the event she purchased a laptop for the relatively modest sum of £720 inclusive of VAT from the First Respondent's established providers, Amos Business Computers. She acted entirely transparently in the matter, even if she recorded the transaction incorrectly on SAGE as a repair and renewal rather than office equipment (further confirmation that she was largely self-taught on SAGE). Whilst we regard the Claimant's evidence as conclusive on the issue, we note that in his letter dated 9 July 2020, requesting the Claimant's resignation (page 220 of the Hearing Bundle), although the Third Respondent made reference to the Claimant having used the laptop to delete data held on the First Respondent's IT systems, he made no mention that the laptop had been purchased without authority.
21. When it became apparent a few weeks into the national lockdown that business activity at the First Respondent was being severely impacted, the company sought to furlough the Claimant. An email exchange with an individual called Paul Shovlin, at page 149 of the Hearing Bundle, confirms that the Claimant was evidently unhappy at being furloughed. However, whatever her reservations and unhappiness, we find that she consented to being furloughed. Her signature on the furlough letter of 5 June 2020, at pages 142 – 144 of the Hearing Bundle, evidences to us that she gave her informed consent in the matter. We do not accept her evidence that the Third Respondent pressured or even bullied her into signing the letter.



22. A few weeks earlier, on 19 May 2020, the Claimant had met with Mr Bradshaw at the First Respondent's offices for one of their regular quarterly meetings. The Third Respondent did not always attend such meetings and when he did he would often join towards the end of the meeting to deal with any outstanding issues. On this occasion, we find that the Third Respondent did not attend the meeting in order to minimise the risk of Covid infection. Whilst photographs kept on the Third Respondent's phone evidence that he spent the morning with his horses a few miles away and that he was also with the horses towards the end of the day, we find that he called into the First Respondent's premises at some point early in the afternoon when he and the Claimant discussed the matters arising out of the quarterly meeting with Mr Bradshaw. We do not consider the Third Respondent to be lying or seeking to mislead the Tribunal in so far as he disputes that any such meeting took place. Instead, we conclude that he has simply forgotten that they met on 19 May 2020 and that this at least partly reflects the fact that the matters discussed were, from his perspective, unexceptional. It was only when the Respondents received a letter from the Claimant's Solicitors dated 10 October 2020 that he became aware that the Claimant was claiming to have made a protected disclosure on 19 May 2020. By then, nearly five months had elapsed and the Third Respondent had no recollection of the matter. We find that his lack of recollection in the matter, together with the photographs on his phone, have led him to become convinced that no meeting or discussion took place on 19 May 2020. However, we find he is mistaken in that regard.
23. In terms of the matters that arose from the Claimant's meeting with Mr Bradshaw, these are summarised at paragraphs 61, 70, 74 and 75 of the Claimant's witness statement. We have looked in particular at what was said, or reported by the Claimant to have been said, by Mr Bradshaw as distinct from the additional narrative that has been provided in each case, recognising that the additional narrative is intended to provide both context and the Claimant's explanation as to why she says she reasonably believed that she was making a relevant disclosure. Nevertheless, we think it is important that we first identify what matters were raised by Mr Bradshaw with the Claimant since these provide a starting point in terms of identifying what information the Claimant is likely, on the balance of probabilities, to have provided to the Third Respondent later the same day. They are as follows:
- 25.1 Removal of cash from the business – the Claimant alleges that Mr Bradshaw told her that substantial amounts of cash had been removed from the business by the Second and Third Respondents over the course of 2019 / 2020 and that personal income tax was owing on those sums. She states that Mr Bradshaw told her these sums could not be treated as a dividend payment or a Director's Loan. The Second and Third Respondent would have been required to file their personal tax returns by no later than 31 January 2021. The Claimant does not say or suggest that Mr Bradshaw told her that these sums had not been documented in the company's

records or that they had been accounted for incorrectly, nor that the Second and Third Respondents were seeking to avoid income tax. According to her witness statement, Mr Bradshaw was saying no more than the drawings might not be capable of being treated in a particular way.

23.2 Discrepancies with stock – the Claimant alleges that Mr Bradshaw told her there were discrepancies between the valuation of the First Respondent’s stock and the available merchant invoices for stock. As described, the Claimant’s evidence indicates no more than a normal accounting query rather than concerns on Mr Bradshaw’s part that a criminal offence was being committed, or that the First Respondent was in breach of its legal obligations, or that the matter was being covered up.

23.3 Repairs to son’s car – The Claimant alleges that Mr Bradshaw raised the fact that the Third Respondent had paid for repairs to his son’s car. It was not in dispute that the Third Respondent’s own vehicle was written off in an accident and that he used his son’s car for a period of time in the course of his work. Mr Bradshaw’s stated concern was not that the First Respondent had paid for repairs to the car, given the Third Respondent had been using it, but that the VAT on the repair invoice had been claimed back by the First Respondent in circumstances where the services in question could not be said to have been provided to the First Respondent. Once again, as described by the Claimant, Mr Bradshaw was raising the issue as an accounting query rather than suggesting that a criminal offence was being committed, that the First Respondent was in breach of its legal obligations, or that the matter were being covered up.

23.4 Alex Hales Racing – the Claimant alleges that Mr Bradshaw also raised the issue of the First Respondent’s sponsorship of Alex Hales Racing. Whilst the Claimant states that it was her understanding that the sponsorship did not have anything to do with the First Respondent’s business, according to her witness statement, the issue from Mr Bradshaw’s perspective was whether or not VAT on the sponsorship arrangement could be claimed back by the First Respondent. As above, it seems to us to have been an accounting query, rather than a case of Mr Bradshaw highlighting concerns that a criminal offence was being committed, that the First Respondent was in breach of its legal obligations, or that the matter was being covered up.

24. We find that had Mr Bradshaw’s queries been other than normal accounting queries, he would have escalated these matters to Mr Chown and that Azets would have documented any concerns in writing, even if only by way of an email. They did not do so. Though not strictly relevant, some months later, on 1 December 2020, Azets issued a letter addressed, “*to whom it may concern*” addressing each of the four matters and

indicating no specific concerns. It is perhaps unfortunate that Mr Bradshaw did not make a statement in these proceedings or attend Tribunal to give evidence, a point the Claimant makes at paragraph 88 of her witness statement. Nevertheless, even without the benefit of hearing Mr Bradshaw's account as to what was discussed on 19 May 2020, we do have the Claimant's account of what she says he told her; as described by her it does not indicate significant concerns on his part. Of course, that is not determinative of the question whether the Claimant subsequently made a protected disclosure to the Third Respondent. Nevertheless, on her own evidence,

*"I relayed everything Mr Bradshaw told me to the Third Respondent".*

25. We accept the Claimant's evidence that she discussed a further matter with Mr Bradshaw, namely her concerns that the First Respondent's sub-contractors were working for the company on a full time basis on flat day rates, rather than on a price per job, and by inference that this potentially called into question their status as sub-contractors. She alleges that she told Mr Bradshaw that the Third Respondent had recently asked the sub-contractors to change their invoices and also instructed her that all invoices before 1 May 2020 should be destroyed. She alleges that Mr Bradshaw shared her concerns, telling her that there could be an investigation, financial penalties, income tax and national insurance owed or other serious sanctions. The further context here is that the First Respondent's sub-contractor arrangements had been reviewed by HMRC some years earlier when clearance was given in relation to them. We accept the Claimant's evidence that she raised this issue with the Third Respondent on 19 May 2020. In her witness statement she says,

*"I told him that I was now very concerned about HMRC auditing the Respondents and finding that the Respondents had committed tax evasion, or even fraud".*

She alleges that following this meeting with the Third Respondent, the atmosphere and her working relationship with the Third Respondent changed irrevocably.

26. In our judgement, the Claimant did not believe that her disclosures to the Third Respondent on 19 May 2020 were in the public interest. Whilst it is entirely possible for a worker to disclose information both in pursuance of their personal interests and in the public interest, we conclude that the Claimant's sole interest and concern when she spoke with the Third Respondent on 19 May 2020 was her own and, to a lesser extent, the Second and Third Respondent's private interests in these various matters. We find that she was primarily concerned about her own position given her involvement in the First Respondent's bookkeeping activities, though given her long service and ongoing loyalty to the Second and Third Respondents that she additionally had concerns that they and the First Respondent should not be exposed to the risk of an investigation by HMRC which

could give rise to financial penalties or, in the worst case, criminal sanctions, and which might also jeopardise her employment. Whether or not well founded, by 2020 the Claimant perceived the Respondent's business and accounting practices to be falling short of accepted standards, something that caused her considerable stress and eventually led her to becoming socially withdrawn. She states at paragraph 43 of her witness statement that she was at her wits' end by the end of 2019. We conclude that she relayed Mr Bradshaw's comments to the Third Respondent as she always would do following such meetings in the performance of her duties, but also because she was at her wits' end and hoped the Third Respondent might finally take steps to alleviate the stress she was under.

27. We think it relevant in this regard to deal here with the disputed £400 payments. The Employer's Contract Claim concerns twelve cheque payments that were made to the Claimant in the final year or so of her employment. The First Respondent claims £4,800 against the Claimant in respect these payments, covering the period 1 July 2019 to 30 June 2020. The Claimant's evidence is that the £400 payments in fact pre-date 1 July 2019, and that this was simply the date on which payments began to be made by cheque. She claims that in 2017 the Third Respondent told her that he was going to change her pension, so that it would no longer be index linked, and to compensate her for this and also in recognition of the fact that she was effectively on call seven days per week, he would pay her an additional £400 per month. Her evidence is that until July 2019 she received these payments in cash. The Tribunal has not found it a straightforward issue to determine. That is partly because the Claimant was never issued with written particulars of employment or any other documentation regarding her terms and conditions or benefits of employment. Against that background, it is perhaps unsurprising that the alleged arrangements are undocumented. On the other hand, it is curious that the Claimant did not identify the £400 payment as salary or a benefit of employment when she completed Form ET1, though equally we note that she failed to identify at least two other undisputed benefits provided to her during her employment, namely the cost of a lunch each day and her private mileage costs when using her company car.
28. There are three text messages at pages 252, 253 and 254 of the Hearing Bundle in which the Claimant asks the Third Respondent to get cash. On each occasion she does not mention a specific amount, though in the February 2019 text message she refers to "my cash". A message dated 10 April 2018 reads most naturally that she is asking for cash for herself, since she goes on to refer in the message to "Vicky" and "Plumbco" by name as also needing to be paid cash that week; had the other cash she was asking for been for someone other than herself, she might have identified them. Moreover, she said she didn't like asking for the cash, which we think additionally points to the cash being for herself. When she asked for "my cash" in February the following year, she similarly said she didn't like to ask for it.

29. We remind ourselves that the First Respondent has the burden of establishing its claim to these monies, on the balance of probabilities. The Third Respondent asserts that the payments were not authorised. He has consistently asserted this since at least 14 July 2020 when he emailed Barclays Bank requesting that they look into the cheques as a matter of urgency. We have additionally weighed in the balance that the cheque counterfoils were not completed by the Claimant in contrast to other cheques written by her and that, in contrast for example to the Second and Third Respondent's drawings, the payments were not narrated on SAGE as being salary payments to her. On the other hand, they were entered on SAGE even if there was no narrative to accompany the payments; as noted already, a significant number of SAGE entries lacked any narrative detail. Furthermore, the Claimant kept her personal bank statements, which evidenced the cheque payments, in her desk at work. In which case, there is no obvious evidence of the Claimant seeking to conceal the payments from the Respondents or Azets. Bearing in mind that the cheque payments commenced on 1 July 2019, there is no evidence before the Tribunal that Mr Bradshaw questioned them with the Claimant or the Third Respondent during their subsequent quarterly meetings. Yet, during this period, he was looking at the First Respondent's transactions sufficiently closely that he queried the VAT on a £255.51 repair to a car.
30. The First Respondent has failed to satisfy us that the £400 payments were unauthorised. We find that the Third Respondent agreed to them at some point in 2017 and that from 1 July 2019 they were paid by cheque to avoid the Claimant having to chase him for the cash. We have come to the conclusion that narrative entries were not posted on SAGE and the cheque counterfoils were left blank in a crude attempt by the Claimant to avoid leaving an audit trail of cash payments that were not being declared to HMRC but which she understood ought to have been taxed through PAYE. In similar vein, the Claimant received various health benefits over a number of years, which we find she also appreciated were not being declared to HMRC and taxed as they should be. We find, on the balance of probabilities, that at some point the Claimant also came to understand that the various perks she enjoyed by way of lunches, the occasional newspaper, magazine and lottery ticket, as well as regular coffees at Costa were potentially taxable benefits of employment.
31. The Claimant might have been proactive in the matter if she had concerns that she was receiving undeclared income and benefits, and that HMRC was being deprived of tax revenues. We conclude that instead she perceived the Respondents to be transacting some of their business in cash and in the circumstances came to the view that likewise, the full extent of her income and benefits need not be declared. It is in this context that we have come to the conclusion that whatever concerns the Claimant had during her employment with the First Respondent about how its business was being conducted, these were not that HMRC (and by extension, the tax paying public) was being deprived of income tax, National Insurance, corporation tax or VAT receipts, rather that she and the Respondents should not be exposed to the risk of an unwelcome

investigation by HMRC, whether into any of the matters raised by Mr Bradshaw on 19 May 2020 or more generally. She briefly asserts at paragraph 82 of her witness statement that she was also concerned for everyone with whom the First Respondent did business, including its sub-contractors. That explanation is belatedly advanced by her and we do not attach credence to it. In her Appeal against dismissal dated 11 July 2020 (pages 167 and 168) the Claimant did not assert her status as a whistleblower. We recognise that she was not being legally advised at this time. Nevertheless, within that letter the Claimant refers to the Respondents' "*conduct within the last year of my employment*" and their approach towards financial matters as having caused her numerous sleepless nights and her health to suffer. In that moment and over the preceding months, we conclude that her primary concern was for herself. She indicated no concerns in that letter for the First Respondent's clients or sub-contractors or any other section of the public. In so far as she was concerned for the Respondents we do not consider that any additional concerns she may have had for them meets the requirement that she acted in the public interest. In the circumstances, her §.47B and 103A complaints do not succeed since she did not, in our judgement, make a "qualifying disclosure" within the meaning in section 43B of the Employment Rights Act 1996.

### **The Claimant's Remaining Claims**

32. Whilst that disposes of the Claimant's whistle blowing claims, the Tribunal must still make findings and come to a Judgment in respect of her remaining complaints of ordinary unfair dismissal, wrongful dismissal and unlawful deductions of wages, and also in respect of the Employer's Contract claim.
33. Whilst furloughed, it is apparent that the Claimant became concerned as to whether her employment with the First Respondent was likely to continue. It is possible that her concerns in this regard were sown as a result of comments in the letter dated 5 June 2020 which she had signed, agreeing to be placed on furlough leave. Whilst we find that the Third Respondent had sought to reassure her in that letter, namely that the company hoped to be in a position where she could return to work, he also noted that if this was not possible the company would consult with her at the relevant time.
34. On 26 June 2020, the Second Respondent texted the Claimant to let her know that Mr Chown would be coming to see herself and the Third Respondent on 2 July 2020 and that he would require the passwords for the Claimant's PC and for SAGE. The Claimant responded the same day stating that she would make sure this information was forwarded on to Mr Chown. A short time earlier, the Claimant had used her email account with the First Respondent to deal with a personal matter, informing the recipient that she had established a new email address for herself; previously she had conducted her personal affairs using her email account with the First Respondent. On 1 July 2020 she seemingly notified Standard Life of a change to her email address for correspondence. We

find that her actions evidence her own uncertainty and worry as to her long term job security.

35. Towards the end of the day on 1 July 2020, the Second Respondent chased the Claimant for the passwords. The Claimant responded promptly early in the evening with the passwords that had been requested. We accept the Claimant's evidence that, when the Second Respondent had texted her on 26 June 2020, she had not appreciated that there was any urgency in the matter. However, it seems that this very short delay on the Claimant's part made the Second Respondent suspicious.
36. In a separate email to Mr Chown dated 1 July 2020, the Claimant apologised for the slight delay in providing the passwords and for her failure to appreciate that they were required immediately. Her email concluded,

*"I am assuming that Tuesday will be the day that my position will be decided".*

She evidently believed that at least one of the reasons why the Second and Third Respondents were meeting with Mr Chown was to discuss the Claimant's continued employment. However, there is no evidence that this was in fact intended to be a matter for discussion between them.

37. When she accessed the First Respondent's IT system on 6 July 2020, the Second Respondent noticed that a large number of documents / files / photographs had been moved by the Claimant to the recycling bin for deletion. This added to the Second Respondent's suspicions and caused her and the Third Respondent to begin to examine the Claimant's actions and conduct.
38. On 9 July 2020, the Third Respondent wrote to the Claimant as follows,

*"I wish to inform you that following inspection on 7 July 2020 of Lactodorum's computer (based at 84B Watling Court, Towcester), it has been decided to request the resignation of yourself from the position of Business Manager with immediate effect.*

*This decision has been made due to the enormous amount of data, photographs, documents, statements, etc. entered into the computer by yourself that are of a personal nature and have no relation or reference to business carried out by Lactodorum. Yesterday it also became apparent that an attempt to delete this data was made during your period of furlough and by using a remote laptop that you had delivered to your own address.*

*I consider these acts to be a case of gross misconduct by yourself and therefore request your resignation as above. Please note that if your letter of resignation is not received by email by midnight on*

*10 July 2020, your employment with Lactodorum will be terminated with immediate effect.”*

39. Both the Second and Third Respondent elaborate upon the matter in their witness statements. Whilst this was not indicated in the Third Respondent’s letter, we accept their evidence that their decision to invite the Claimant to resign her employment (we further accept that they were acting jointly in the matter) was informed by their belief that the Claimant had ordered and paid for the laptop without the company’s knowledge and also by what they regarded as suspicious activity on the company’s Barclays Bank account. We refer in this regard to paragraphs 10 – 15 of the Second Respondent’s witness statement and paragraphs 12 – 21 of the Third Respondent’s statement. We have set out already why we conclude that the laptop was purchased with the Third Respondent’s knowledge and approval, even if he cannot now recall discussing this with the Claimant.
40. It is not clear to what extent these matters were investigated before the Third Respondent wrote to the Claimant on 9 July 2020. The Third Respondent refers to having discussed the matter,

*“...at great lengths between ourselves, accountant and Barclays’ representative...”*

The one person with whom there was no discussion was the Claimant, who was unaware of the Respondents’ concerns prior to receiving the Third Respondent’s letter. As at 9 July 2020, the information available to the Respondents was that the Claimant’s personal data had been stored on its IT system, that she may have raised one or more invoices in connection with a personal business interest of hers (262 Limited) during her working hours for the First Respondent, that she had acquired and used a laptop for work related matters, that Tuckley Chester Design, who rented an office from the First Respondent, may not have been issued with rent receipts since January 2018, that cheques for £400 had been issued to the Claimant for a number of months and that one or more cheques may be missing from the company’s cheque book.

41. At page 169 of the Hearing Bundle there is a copy of an email from the Third Respondent to Barclays in which he referred to a three and a half hour telephone conversation with the Barclays Business Team. However, notwithstanding the length of that call, it seems that no specific conclusions were reached, merely that the Team would look into the Respondents’ communicated concerns. When the Third Respondent contacted Barclays again on 13 July 2020, he understood that no further action had been taken by them in relation to the matter, which he described as *“very disappointing and concerning”*.
42. The Claimant did not receive the Third Respondent’s letter dated 9 July 2020 until 11 July 2020 when it was delivered by Royal Mail Special Delivery. Since the Third Respondent’s letter had stated that her



employment would be terminated with immediate effect in the event a letter of resignation was not forthcoming by midnight on 10 July 2020, the Claimant not unreasonably assumed that she had been dismissed. Neither party has argued before the Tribunal that this date or indeed 11 July 2020 should be treated as the effective date of termination of employment.

43. On 11 July 2020 the Claimant wrote a letter to the Respondent addressed to the Third Respondent, appealing against her dismissal. She had not in fact been offered any right of appeal since her dismissal had not been confirmed in writing. We are satisfied that the letter of 11 July 2020 was written and sent by the Claimant, though the Respondents deny receiving it. In her Appeal letter the Claimant did not assert that she was a whistleblower, rather she identified her belief that she had been dismissed by the First Respondent in order to avoid making her redundant and having to pay her the redundancy pay associated with her 17 years' employment. When she wrote that letter, the Claimant was unaware that the Respondents' concerns extended beyond the matters referred to in the Third Respondent's letter of 9 July 2020. Inevitably, therefore, her Appeal letter addressed the relatively limited matters referred to in the letter of 9 July 2020 that were said to warrant dismissal. She referred to the fact that she had not been issued with a contract of employment or an IT acceptable usage policy such that she could be said to be in breach of her employment obligations by having stored her personal data on the First Respondent's IT system, or by her actions in deleting that data. She also referred to the requirements of the ACAS Code of Practice on Disciplinary and Grievance Procedures.
44. When the Claimant contacted Mr Chown by email on 21 July 2020 to ask for her wage slip and also when her P45 might be available, Mr Chown responded to say that he had spoken with the Third Respondent who believed the position to be that the Claimant had resigned her employment on 10 July 2020, but asking whether in fact this was correct and also asking how many days' holiday she believed she was owed. A short while later the Claimant emailed Mr Chown to confirm that she had not resigned her employment on 10 July 2020, rather her employment had been terminated by the First Respondent. There was no further challenge to this by the Respondents or Mr Chown on their behalf.

## **Law and Conclusions**

### Unfair Dismissal

45. Subject to any relevant qualifying period of employment, an employee has the right not to be unfairly dismissed by his employer – section 94 of the Employment Rights Act 1996 (“ERA” 1996). It is not in dispute that the Claimant qualified for that right.
46. S.98 ERA 1996 provides:

98 General

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show–
    - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
    - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
  - (2) A reason falls within this subsection if it–
    - (a) ...
    - (b) relates to the conduct of the employee,
    - (c) ...
    - (d) ...
  - (3) ...
  - (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
    - (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
    - (b) shall be determined in accordance with equity and the substantial merits of the case.
47. Where this is in dispute, an employer bears the burden of establishing that it had a potentially fair reason for dismissing its employee.
48. Where the reason for dismissal is misconduct, Tribunals should have regard to the long standing principles in British Home Stores v Burchell [1978] ICR 303 and Iceland Frozen Foods Ltd v Jones [1982] IRLR 439. We have not felt it necessary to include the often cited passage from Arnold J’s Judgment in Burchell. Jones is similarly long-standing authority that reminds Tribunals that their function is to decide whether in the particular circumstances the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. In Sainsburys Supermarket Ltd v Hitt [2003] IRLR 23 CA, the Court of Appeal confirmed that the band of reasonable responses applies to both the procedures adopted by the employer as well as the dismissal. Burchell and countless decisions since have served as a

reminder that a Tribunal should be careful not to substitute its own view for that of the employer.

49. In our judgement the First Respondent has discharged the burden upon it of establishing that its reasons for dismissing the Claimant were potentially fair. It has satisfied us that, acting through the Second and Third Respondents, it genuinely believed the Claimant to be guilty of misconduct. However, in our judgement the First Respondent did not have reasonable grounds for that belief. The Third Respondent forgot that he authorised the Claimant to purchase a laptop. Likewise, we are satisfied that the Second and Third Respondents were aware but never raised any concerns or objections to the Claimant storing personal data on the First Respondent's IT system. We further conclude, on the balance of probabilities, that the Third Respondent was aware that the Claimant undertook some limited duties for 262 Limited, including generating invoices using the First Respondent's IT equipment. In any event, even had this not been done with the Respondent's knowledge and implicit consent, the First Respondent did not have reasonable grounds to believe that any work undertaken by the Claimant for 262 Limited was undertaken by her during her contracted hours for the First Respondent, as opposed to during her lunch break or at other times outside her contractual working hours or that the amount of time spent on the matter by the Claimant constituted gross misconduct.
50. We have set out in our findings above why we conclude that the Third Respondent agreed to an additional monthly payment to the Claimant of £400. In dismissing the Claimant, the First Respondent acted throughout by the Third Respondent (and to a lesser extent the Second Respondent). Given that the Third Respondent either knew or ought reasonably to have known and remembered that he had agreed to these financial arrangements with the Claimant, the First Respondent did not have reasonable grounds for its belief that the Claimant was guilty of financial misconduct. Insofar as it had concerns regarding cheques that may have been torn out of the company cheque book, it would have been a simple matter for the First Respondent to ask the Claimant to provide an explanation in this regard (the Claimant's evidence at Tribunal was that at least one cheque had been removed in order to generate a replacement chequebook). It did not do so and having not done so, in our judgement, it did not have reasonable grounds for its belief in the Claimant's guilt on this aspect.
51. As to the investigation and disciplinary process itself, this fell far short of what might reasonably have been expected in the circumstances. The Respondent's suspicions in the matter were just that, namely suspicions that essentially remained untested or unexamined at the point at which the Claimant's employment was terminated.
52. The First Respondent had not seen fit to issue the Claimant with a contract of employment or written particulars of employment during her 17 years of employment. It was a relationship characterised until July 2020 by the

utmost trust and confidence, and this extended to the Claimant having the keys to the Second and Third Respondents' home and ensuring that essential provisions were bought in for them on their return from holidays. Throughout the relationship the Claimant demonstrated the utmost loyalty to the Respondents, working evenings and weekends and even agreeing on a few occasions to handle large cash sums even though she was concerned that this compromised her personal security. Her sense of loyalty extended to worrying that the Respondents might be the subject of unwanted attention from HMRC, even if her primary concern was her own position in the matter. Within the parameters of such a close and trusting relationship, where there were no written rules or boundaries and no contract, it is entirely unsurprising that the Claimant might have kept personal data on the First Respondent's IT system (and then sought to delete it when she became concerned for her employment prospects) or used its equipment for non-work related matters.

53. Many of the basic requirements of the ACAS Code of Practice were disregarded by the First Respondent:
- 48.1 the necessary investigations were not carried out, let alone an investigatory meeting with the Claimant;
  - 48.2 the Claimant was not notified of the problem(s) or allowed an opportunity to prepare to answer the case at a disciplinary meeting;
  - 48.3 no written evidence was provided to her;
  - 48.4 there was no disciplinary meeting and the Claimant was not afforded her right to be accompanied at any meeting;
  - 48.5 the Claimant was not allowed to set out her case and answer any allegations that had been made;
  - 48.6 the Claimant was not informed in writing that she had been dismissed, nor the date of her dismissal;
  - 48.7 the Claimant was not informed in writing as to the applicable period of notice and her right of appeal; and
  - 48.8 the Claimant was not provided with an opportunity to appeal.
54. On any reasonable view, the Claimant's dismissal was patently unfair. Even allowing for the fact that the First Respondent is owned and managed by the Second and Third Respondents and had no other employees and, specifically, no HR capability, the First Respondent acted unreasonably in treating the Claimant's suspected misconduct as sufficient reason in the circumstances for terminating her employment. The circumstances in this case do not justify the First Respondent, acting as a reasonable employer, proceeding in the manner that it did. To the extent the Respondents had concerns as to the Claimant's intimate knowledge of

its business and access to its IT system, it would have been a very simple matter, indeed the only reasonable course in the circumstances, to have suspended the Claimant pending an investigation and, during that investigation, to have also suspended her access to its IT system, Bank accounts and SAGE.

55. In all the circumstances we conclude that the Claimant was unfairly dismissed.
56. Pursuant to s.123(1) of the Employment Rights Act 1996, where a Tribunal upholds a complaint of unfair dismissal, it may award such compensation as it considers just and equitable in the circumstances having regard to the loss sustained by the Claimant in consequence of the dismissal. In accordance with the well established principles in Polkey v A E Dayton Services Limited, the Tribunal may make a just and equitable reduction in any compensatory award under s.123(1) to reflect the likelihood that the employee's employment would or might still have terminated in any event. The burden of proving that an employee would have been dismissed in any event, rests with the employer, though Tribunals are required to actively consider a Polkey reduction. Tribunals must have regard to all relevant evidence, including any evidence from the employee. The fact that a degree of speculation is involved is not a reason not to have regard to the available evidence, unless the evidence is so inherently unreliable that no sensible prediction can be made. It is not necessarily an all or nothing exercise. Nevertheless, in our judgement, this is a case where no sensible prediction can be made as to what would or might have happened. We regard the First Respondent's investigation to have been significantly lacking. When the Final Hearing commenced in May 2022, the proceedings had been ongoing for over 18 months, yet when the Respondents reviewed the Schedule to Counter Claim on the first morning of the Final Hearing they relatively quickly identified that a significant number of the First Respondent's claims could not be maintained. For the reasons set out below, we have concluded that the First Respondent has no claim against the Claimant in respect of any of the remaining items and no reasonable grounds for believing the Claimant to be guilty of misconduct in that regard. To reiterate, there were no written rules, boundaries or contract that defined the parameters of the relationship or the Respondents' expectations of the Claimant. We cannot sensibly conclude that she might have been dismissed had the Respondents examined her conduct objectively following a reasonable investigation that included hearing what the Claimant had to say.
57. Similarly, in terms of §.122(2) and 123(6) ERA 1996, we cannot identify any conduct of the Claimant before her dismissal that would make it just and equitable to reduce the amount of the basic award or which to any extent caused or contributed to her dismissal such that it would be just and equitable to reduce the amount of the compensatory award. However, we are very firmly of the view, given the Claimant was aware the £400 payments were not declared to HMRC, that it would not be just and

equitable to reflect the loss of those payments in either the basic or compensatory awards.

### Wrongful Dismissal

58. For the reasons summarised in paragraphs 49 and 50 above and set out in detail in paragraphs 57 to 67 below, the First Respondent has failed to establish, on the balance of probabilities, that the Claimant was in breach of contract such as to entitle it to terminate her employment summarily, that is to say without notice or payment in lieu of notice. Her claim that she was wrongfully dismissed, namely dismissed in breach of contract without being given the notice to which she was entitled, therefore succeeds.

### Unlawful Deduction from Wages

59. It is not in dispute that the First Respondent made a deduction of £835 from the Claimant's final wages. Whilst the deduction is said to have been made in respect of the disputed laptop, the cost of the laptop was £720 inclusive of VAT. It was not clarified during the Hearing what the balance of £115 related to. The laptop was returned by the Claimant to the First Respondent and accordingly there is nothing we can identify in respect of which any deduction might have been made. In any event, and for the reasons set out in our findings above, the laptop was acquired with the Third Respondent's knowledge and approval, and the cost was within the ambit of the Claimant's authority in the matter. She did not act unlawfully in the matter. Furthermore, the £835 deduction was made in circumstances where there was no written contract of employment or statement of particulars of employment whereby the Claimant gave her agreement to deductions being made from her wages in respect of the cost of the laptop or otherwise. In the circumstances, the complaint is well founded and the Tribunal will make a declaration to that effect and order the Respondent to pay the sum of £835 to the Claimant.

### **The First Respondent's claims against the Claimant**

60. The First Respondent claims £12,452.83 from the Claimant in respect of the alleged misappropriation and misuse of company funds. As noted already, the sum claimed was originally £15,107.95.

61. The sum claimed relates to the following matters:

#### Payments to the Claimant in the sum of £400 and Purchase of Laptop

62. Our findings and conclusions in this regard are set out at paragraphs 22 and 29 above. The Respondent's claims in relation to these matters accordingly fail.

Cost of Mammograms

63. We accept the Claimant's evidence that she was encouraged by the Third Respondent to have an annual mammogram at the First Respondent's expense given the Second Respondent's experience of breast cancer. We find that this conversation took place some years ago and that the Third Respondent did not discuss the matter with the Second Respondent at the time, nor have any particular reason to do so. It is understandable, however, that the Second Respondent was somewhat upset to discover in 2020 that the Claimant's mammograms had been funded without her knowledge or approval by the company in which she is a joint shareholder, particularly in circumstances where, by contrast, she had personally met the cost of own mammograms. However, that does not alter the fact, as we find, that the Third Respondent authorised the arrangement, even if he now has no recollection of having done so. That is not surprising given that the arrangement dates back to at least 2014. We do not consider he was dishonest in his evidence to the Tribunal, rather that he genuinely and perhaps understandably has no recollection of the matter.

Medical and other Treatments

64. In similar vein, we find that the Third Respondent agreed to other reasonable health related expenses and that, as with other expenses, these were dealt with on an informal basis whereby the Claimant would use her discretion in the matter. She incurred £100 between 2015 and 2017 in relation to hearing tests. In 2017, perhaps uncertain as to the level of cost involved, the Claimant sought, and secured, the Third Respondent's agreement that the company would meet the cost of glasses when she reported experiencing eye strain from working on the computer.
65. We also accept the Claimant's evidence that the Third Respondent told her to "go and see Liz", a physiotherapist at the gym where the Claimant's son worked, when she was experiencing back and neck issues. The cost in that regard was £45.
66. In each case the sums involved were relatively modest. The fact that they were authorised by the Third Respondent reflect both his concerns for the Claimant's wellbeing but also her perceived importance to the business (he said at Tribunal that she was his left hand, as his wife was his right hand).
67. We accept the Claimant's evidence that £205 incurred on 4 October 2017 was in fact the excess arising when either the Second Respondent or Third Respondent had medical treatment under the company's private medical arrangements. Accordingly, those funds were not misappropriated or misused by the Claimant.

Plumbco Purchases

68. The First Respondent has identified six alleged unauthorised transactions on its account with Plumbco. These cover the period 2014 to 2018. In the context of a business with a seven-figure annual turnover, the sums involved are insignificant and reflect a very small percentage, both in number and value, of the company's annual supplier transactions. We take into account that, having become suspicious in 2020, the Respondent has embarked upon a review of its records and, as a result, that the Claimant has been required to account for relatively insignificant transactions dating back some years. Whilst we consider that the Claimant turned a blind eye in so far as benefits and expenses provided to her were not declared to HMRC, as with the Second and Third Respondents we do not doubt her essential honesty. We find that she was loyal to the Respondents and did not do anything without their knowledge or implicit authority. She has done the best she can in the circumstances to account for these items of expenditure. Although this does not go directly to the six disputed transactions, we accept her evidence regarding a shower door that was ordered for a friend at a discounted price in 2020 and then reimbursed to the First Respondent as cash. It serves to corroborate the Claimant's evidence as to the most likely explanation for the earlier disputed Plumbco transactions. We find that the disputed items were either items delivered for convenience to the Claimant's home for onward delivery to others (including the Third Respondent's friends and industry contacts) or, that where they were for the Claimant herself, she reimbursed the First Respondent for them.

Lunches

69. Similarly, the Claimant has been required to account for two lunches some considerable time after the event. The First Respondent has the burden of proof in the matter. It does not in fact put forward a positive case, rather it infers from the fact the Second and Third Respondents were in Greece on holiday at the time of a lunch in July 2018 that both it and an earlier lunch in August 2014 were unauthorised. That does not logically or necessarily follow. The Claimant's unchallenged evidence was that she had meetings, coffees and at least one other lunch with suppliers and industry contacts on her own without the Third Respondent being present, in which case the disputed lunches on 8 August 2014 and 12 July 2018 are consistent with this. In the case of the 2014 lunch, it is possible that the Claimant had lunch with the Third Respondent or that they entertained a third party. What the First Respondent has not satisfied us, on the balance of probabilities, is that these two lunches, respectively 8 and 4 years ago, reflect misuse of company funds on the part of the Claimant.
70. There are five other disputed items under the heading "Lunches". The Respondents do not dispute that the Claimant was entitled to a lunch each day paid for by the First Respondent. There was no fixed lunch allowance, nor any rules or guidance as to what was permitted. As with the medical and related expenses above, we find that the Claimant was permitted to



use her discretion in the matter. The Third Respondent in particular had something of a laissez faire attitude, which extended to permitting his daughter use of the company card to buy herself and her friends coffees at Costa. We find that, with the Respondents' knowledge, the Claimant would occasionally buy a newspaper or magazine, and even lottery tickets at the company's expense for both her and the Second and Third Respondents. In our judgment, the expenses listed as Items 15, 18, 26 and 28 in the Schedule to Counter Claim were all within the ambit of the Claimant's authority. As regards Item 20, this was evidently personal expenditure, as it was incurred by the Claimant on her way to the airport for a holiday on 24 December 2018. She had paid for drinks and snacks when purchasing fuel, as she was entitled to do, using her company card. We conclude that this was an innocent oversight on her part and accept her evidence that following her return from holiday she raised the matter with the Third Respondent and offered to reimburse the company. Consistent once again with what we find to have been his affable nature, the Third Respondent brushed the matter aside, telling the Claimant not to be silly.

Other miscellaneous expenses

71. There are two further disputed expenses, namely £120.71 in Amazon purchases on 8 January and 23 February 2015, and £171.71 incurred at Kettering Park Hotel on 17 July 2015. As above, we take into account that the Claimant has been required to account for expenses some considerable time after the event. More importantly, we remind ourselves that the First Respondent has the burden of proving, on the balance of probabilities that the expenses were unauthorised. The fact that the Claimant's recollection in relation to these matters is impaired as a result of the significant passage of time does not relieve the First Respondent of its primary burden in the matter. In our judgment it has failed to discharge that burden. The Amazon purchases are simply not referred to in the Second and Third Respondent's witness statements. As regards the Kettering Park Hotel, the Second Respondent states that she contacted the Hotel on 27 August 2021 when it was confirmed that a room had been booked by the Claimant. That does not address the question of who slept in the room and whether the booking was authorised by the Respondents. If the Second and/or Third Respondent stayed at the Hotel or authorised a booking to be made for their children, the Claimant or a third party, it is unsurprising that the Claimant would have made the booking given her role as the Third Respondent's PA. That fact alone does not support a finding that the Claimant stayed at the Hotel and/or booked a room without authority to do so. Nor does the fact that it was not a family room. The Third Respondent does not give direct evidence on the matter. The Second Respondent does not state in terms that she and the Third Respondent did not stay there, rather she infers from the fact the booking was made by the Claimant that she both stayed at the Hotel and that her stay was unauthorised. Neither follows as a matter of course. As we say, the First Respondent has failed to discharge its burden of proof in the matter.

72. The case will be listed for a remedy hearing and case management orders will be issued separately by the Tribunal in respect of the steps to be taken by the parties for that hearing.

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Employment Judge Tynan

Date: 28 September 2022

Sent to the parties on:

29 September 2022

For the Tribunal Office.