EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Iturralde	**- V -**	Ruby Labs Ltd

Heard at: London Central **On**: 7 - 11 November 2022

Before: Employment Judge Baty
Ms D Keyms
Mr F Benson

Representation:

For the Claimant: In person
For the Respondent: Ms G Leadbetter (counsel)

JUDGMENT

1. The claimant was neither an employee nor a worker of the respondent. The tribunal does not, therefore, have jurisdiction to hear any of the complaints which he has brought (of unfair dismissal, of automatically unfair dismissal (protected disclosures), of being subjected to a detriment (protected disclosures), of breach of contract/wrongful dismissal, for unpaid holiday pay, for unlawful deduction from wages, and for a failure to allow the claimant to be accompanied). All those complaints are therefore dismissed.

2. If the tribunal had had jurisdiction to hear those complaints, all those complaints would have failed.

REASONS

The Complaints

1. By a claim form presented to the employment tribunal on 17 September 2021, the claimant brought complaints of unfair dismissal, of automatically unfair dismissal (protected disclosures), of being subjected to a detriment (protected

disclosures), of breach of contract/wrongful dismissal, for unpaid holiday pay, for unlawful deduction from wages, and for a failure to allow the claimant to be accompanied. The respondent defended the complaints.

The Issues

2. The issues of the claim were initially agreed at a case management hearing before Employment Judge Heath on 17 March 2022 and were recorded in EJ Heath's summary of that hearing. There was then subsequent correspondence between the parties and the tribunal regarding some minor adjustments to that list of issues. The amended list of issues, approved by EJ Heath, is set out in the schedule to these reasons. At the start of this hearing, the parties confirmed that that remained the agreed list of issues.

3. It was agreed at the preliminary hearing that this hearing would be listed for liability only, although (unless we should decide otherwise) it would cover issues of the likelihood of a fair dismissal if any dismissal was found to be procedurally unfair (under the principles in Polkey v AE Dayton [1987] IRLR 503 HL ("Polkey")), contributory fault and a failure to follow the ACAS Code (but not the percentage uplift applied).

4. The judge discussed this with the parties at the start of the hearing and, for the claimant's benefit, went through in summary what the legal provisions relating to Polkey, contributory fault and the ACAS Code meant. It was agreed that, as the findings of fact on these issues naturally flowed from the evidence on liability, that the tribunal would consider and determine these issues at the liability stage. It was therefore agreed that the issues in the list of issues at 3.1.4, 3.1.5, 3.1.6, 3.1.7, 3.1.9, 3.1.10 and 3.3 would be determined and, by extension, the issues at 7.7, 7.8, 7.10 and 7.11.

The Evidence

5. Witness evidence was heard from the following:

For the claimant:

The claimant himself.

For the respondent:

Mr Roman Taranov, one of the two co-founders and the Chief Executive Officer of the respondent; and

Mr Artem Ageyev, the other of the co-founders of the respondent.

6. An agreed bundle, numbered pages 1-647, was produced to the hearing. In addition, the claimant produced a further bundle, numbered pages 1-476, which was the subject of the applications below.

7. Both parties produced their own cast lists and chronologies. They also produced their own suggested reading lists, which were almost identical.

8. Ms Leadbetter also produced an opening note.

The claimant's bundle

9. On 1 November 2022 (six days before the first day of the hearing), the claimant for the first time provided to the respondent an extended bundle of documents which were not included in the agreed bundle. He had, however, previously repeatedly referred to his intention to file such a bundle and had included page references to it in his witness statement which had been provided on 25 October 2022 to the respondent. He subsequently provided to the respondent at close of business on Friday, 4 November 2022 (i.e. around close of business on the working day before the hearing commenced) what he referred to as an "improved" version of this bundle (and which we refer to as the "claimant's bundle"). He duly provided copies of the claimant's bundle to the tribunal at the start of the hearing.

10. The respondent objected to the admission of the claimant's bundle, essentially on three grounds: first, that it contained a document that was without prejudice, secondly that it included documentation in Spanish, much of which was not accompanied by a translation, and thirdly that it was produced so late that the respondent had not had the opportunity properly and fully to familiarise itself with it and was therefore greatly prejudiced. In conjunction with this, the respondent had redacted a sentence in the copy of the claimant's witness statement which it provided to the tribunal on the basis that it referred to the document in the claimant's bundle which the respondent stated was without prejudice.

11. The claimant wanted to adduce the whole of the claimant's bundle. He had also provided a letter on 2 November 2022 to the respondent and the tribunal setting out areas of the respondent's witness statements which he said were not true and making reference to documents, predominantly in the claimant's bundle, as being what he saw as evidence as to why those statements in the respondent's witness statements were untrue.

12. The tribunal had a discussion with the parties about this to try and agree a practical way forward.

13. After discussion with the tribunal, the claimant accepted that the documents in Spanish would, if they were to be admitted, need to be translated, which would inevitably involve an adjournment of the hearing. He said that he did not want an adjournment of the hearing and he therefore accepted that those documents should not be admitted.

14. As to the allegedly without prejudice document, the claimant insisted that there were parts of it which were not without prejudice albeit he accepted that some of it was. The tribunal heard submissions from both parties regarding this document. Ms Leadbetter said that she was prepared for the tribunal to look at

the document and take a view as to whether or not it considered that it was without prejudice, relying on the fact that, if the tribunal did consider it was without prejudice, it could put its contents out of its mind when it came to determining the case. The claimant was happy with this approach. The tribunal therefore looked at copies of the allegedly without prejudice document and the redacted sentence in the claimant's witness statement. Both parties made brief submissions. The tribunal adjourned. When the hearing reconvened, the tribunal gave the parties its decision. The document was clearly without prejudice. It was essentially a long conversation about settlement and there were references to settlement throughout it. It was impossible to redact it in such a way that removed any references to any discussions about settlement and yet retained any meaning. The document was not, therefore, admitted and the tribunal determined that the redaction in the claimant's witness statement should remain in place.

15. As to the remainder of the claimant's bundle, the judge explained to the claimant the prejudice to the respondent of allowing a 476 page bundle which had been submitted at the eleventh hour to be adduced as evidence. However, he asked the claimant, in the light of his letter of 2 November 2022, whether he would in principle be content to rely only on those documents in the claimant's bundle which he had referenced in that letter. The claimant said that he would. Ms Leadbetter agreed that she was prepared not to oppose the application to adduce documents on the basis that the documents adduced were limited to those relied on in the letter of 2 November 2022 and those documents in the claimant's bundle which were already referenced in the claimant's witness statement. It was, therefore, agreed that matters would proceed on that basis.

16. Whilst the tribunal was doing its reading, the claimant marked up his letter of 2 November 2022 with clear references to the documents in the claimant's bundle which he was referring to so that there was no room for ambiguity and provided copies of that letter to the tribunal on the second morning of the hearing. Although the tribunal had done its reading on the remainder of the first day of the hearing, on discussion with the parties, the tribunal decided that it would specifically read all the documents referenced in the amended letter of 2 November 2022 before hearing the oral evidence. The hearing therefore adjourned for half an hour for the tribunal to do so prior to the start of hearing the claimant's evidence.

17. Despite this, the claimant on occasion sought in his cross-examination of Mr Taranov to question him on documents in the claimant's bundle which were not admissible as agreed above. In these instances, the tribunal reminded the claimant that the documents were not admissible, and he moved on from those questions.

18. As indicated, the tribunal had already on the first day of the hearing read in advance the witness statements and the documents referred to in the witness statements, together with any documents on the parties' lists of suggested reading, as well as Ms Leadbetter's opening note.

Timetable

19. At the start of the hearing, the tribunal agreed a provisional timetable for the hearing with the parties.

20. Whilst Ms Leadbetter had said that she hoped to complete the claimant's cross-examination in half a day, she in the event needed a full day to do so. This was because the claimant persistently failed to answer the questions asked of him, even very simple questions, and tended to go off on tangents not relevant to the question and to make statements which he clearly wanted to make but which were not an answer to the question. It was therefore entirely reasonable that Ms Leadbetter needed more time to complete the cross-examination of the claimant.

21. Otherwise, matters were completed within the provisionally agreed timetable.

Management of the hearing

22. In his cross-examination of the respondent's witnesses, the claimant frequently asked questions on matters which were not relevant to the issues in the list of issues. Whilst the tribunal gave him quite a lot of latitude in this respect, particularly earlier on, it intervened later on when this became persistent and on several occasions asked him to move on from passages of cross-examination which were not relevant to the issues. In conjunction with this, the judge several times explained to the claimant what the issues were and what aspects were therefore relevant and explained why the lines of questioning which he was pursuing were not relevant to those issues.

23. Furthermore, throughout his cross-examination of the respondent's witnesses, the claimant frequently asked questions which were unclear and difficult to follow. This is not a criticism, as English is not the claimant's first language. However, that is the reason why the tribunal had to and did interject on numerous occasions throughout the cross-examination to ask the claimant to rephrase his question or clarify it or decided to rephrase the question itself so that the witnesses could properly understand what was being asked of them.

Submissions/judgment

24. Both parties provided written submissions, which the tribunal read in advance of the parties giving oral submissions.

25. During his oral submissions, the claimant sought to adduce further evidence. The judge explained that this was not permissible.

26. The tribunal adjourned to consider its decision. It then gave its decision with reasons orally at the hearing.

27. Ms Leadbetter then requested written reasons.

Findings of Fact

28. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

Overview

29. The respondent, Ruby Labs Ltd, is a company which develops and sells mobile applications. It was co-founded by Mr Taranov and Mr Ageyev. It was incorporated on 25 May 2018.

30. The claimant started providing services to the respondent on 15 August 2018. He continued to do so until 9 April 2021, at which point his contract with the respondent was terminated by the respondent with immediate effect.

31. The respondent maintains that the claimant was engaged to provide services as an independent consultant. The claimant maintains that he was in fact both an employee and a worker of the respondent throughout.

32. The respondent terminated the claimant's contract following two meetings which the claimant had with Mr Agevev on 8 and 9 April 2021 respectively. In summary, it is the claimant's case that at the meeting of 8 April 2021, he made certain protected disclosures and was dismissed because of them. By contrast, it is the respondent's case that, at these meetings, the claimant sought to blackmail the respondent into making him substantial exit payments and that it was for this reason that the respondent terminated his contract.

33. At the point at which the claimant's contract was terminated, Mr Taranov was 26 years old and Mr Ageyev was 28 years old; the claimant was around 50 years old. The claimant had by then had many years of experience in providing accounting and finance support services, including in relation to tax matters. During the course of that he had advised in relation to and built up a knowledge of matters such as the distinction between employment agreements and agreements involving independent consultants.

Respective reliability of witness evidence

34. A lot of the evidence in this case is not disputed, in particular the contents of the transcripts of the two key meetings of 8 and 9 April 2021, which we refer to later. However, before going on to make our more detailed findings of fact, we make some findings of fact on the reliability of the evidence of the claimant and of the respondent's witnesses. We do so because that is relevant to whose evidence we tend to prefer when assessing conflicting evidence in determining our findings of fact below.

35. The claimant is an intelligent individual. As noted, he has many years' experience in providing accounting and finance support services, including in relation to tax matters. As already noted, it took twice as long as anticipated for

Ms Leadbetter to complete her cross-examination of the claimant. This was because, during his evidence, the claimant persistently failed to answer the questions which were put to him. Instead, he was evasive in the answers he gave; he sought frequently to introduce things that he clearly wanted to say but which were not relevant to the question; and he often went off on tangents. His answers in cross-examination and his evidence generally were on numerous occasions inconsistent with the contemporaneous documents and indeed inconsistent with his own evidence. His evidence changed in many respects. Furthermore, he failed to answer even simple questions where the answer was obvious. He refused to acknowledge the obvious, for example that the language that he used to Ms YL was extremely rude and offensive or, indeed, that he was doing anything beyond what was normal in his meetings with Mr Ageyev on 8 and 9 April 2021, when he was blatantly attempting to blackmail the respondent into providing him with a large termination payment. He made unsustainable assertions which, given his intelligence and experience, he cannot himself have believed. One example is his insistence that he told Mr Taranov about alleged illegality in the respondent's tax affairs prior to April 2021; when asked when and how he did so, he referred to a 2019 document from external advisors PWC (which in any case certainly did not make any such allegation) and insisted that this was equivalent to him having told Mr Taranov about the alleged illegality. In short, the claimant was not merely someone who's evidence was unreliable; it is impossible to place reliance on any of the evidence which he gave except where it is backed up by contemporaneous documentation.

36. By contrast, both Mr Taranov and Mr Ageyev were straightforward in the answers they gave. They did their best to answer the questions, despite many of the claimant's questions to them being unclear and difficult to follow. The answers they gave were in all material respects consistent with their written witness statements and with the contemporaneous documents in the bundle. We have no reason to doubt the honesty of their answers.

37. In summary, therefore, where there is a conflict of evidence without any contemporaneous documentation, we prefer the evidence of the respondent's witnesses to that of the claimant.

Background

38. Mr Taranov was originally the founder of RGK Mobile Ltd ("RGK"), a global provider of mobile e-commerce solutions. Mr Taranov is no longer involved with RGK. However, it was at RGK that he first met the claimant, as the claimant provided financial and accounting services to RGK on a consultancy basis. The claimant was also a director of RGK and its Chief Financial Officer. The claimant lived in Barcelona, Spain (both then and now).

39. As noted, Mr Taranov co-founded the respondent with Mr Ageyev and it was incorporated on 25 May 2018. The respondent is a UK registered company.

40. The new business needed someone who could provide accounting and finance support services. The claimant had told Mr Taranov that he was a finance and accounting expert who had provided services to a number of

companies in both the UK and Spain and Mr Taranov understood from conversations with him that the claimant was at the time providing services to other companies as well as to RGK. Mr Taranov had worked with him at RGK and trusted him. He therefore asked the claimant if he could provide financial consultancy services to the respondent on a part-time consultancy basis alongside the services that he was providing to RGK and his other clients at the time. The claimant agreed to be engaged on this basis.

41. Despite being successful at a very young age, Mr Taranov was still in the process of learning many aspects of business. He was not a finance or accounting expert. He did not at the time have a great understanding of or appreciate the distinctions between employment and consultancy work, an area in which the claimant had a much greater knowledge. Mr Taranov trusted and relied on the claimant in relation to these areas.

42. The claimant started providing services to the respondent on 15 August 2018. At this time, the business was in its very early stages and was a very small company. The services which the claimant provided at this stage were therefore fairly limited and, due to the respondent's resources at the time, Mr Taranov agreed with the claimant that his fees would be capped at €1,500 per month. There was no set time commitment, but he probably provided services for 1 to 2 hours each week.

43. Mr Taranov suggested to the claimant that they should record the terms of his engagement in a written agreement. However, the claimant advised him that this wasn't necessary, so they didn't enter into a written contract at that stage.

44. The services which the claimant was providing started to increase in 2019. He was, however, still very much working on a part-time basis and Mr Taranov understood from what the claimant told him at the time that he was continuing to provide services to RGK and other clients.

45. Mr Taranov was focused on the product side of the business, and he therefore needed the claimant's expertise on financial, accounting and tax matters. He therefore had much more frequent dealings with the claimant. Mr Ageyev, by contrast, was responsible for the development and marketing side of the business. He had little contact with the claimant.

46. As Mr Taranov wanted to grow the business, he thought it made sense for the claimant to take on a bigger role in the business. In September 2019, therefore, Mr Taranov spoke to the claimant about the possibility of him becoming the respondent's Chief Financial Officer. He explained that this would require him to sign an employment contract and relocate to the UK. He sent a message confirming these points and later provided a suggested job description. At this tribunal, the claimant has suggested that these documents (which we have seen in the bundle) did not constitute an offer of employment; however, they clearly do and even specifically use the word "offer" in them.

47. The offer references potential monthly bonuses, stock options, and a potential share of 1% of an M&A deal which might happen in the following months. However, these potential benefits are clearly linked to the claimant accepting employment as CFO in the UK; in other words, they are contingent upon the claimant agreeing to this.

48. Mr Taranov subsequently made a number of attempts to progress the conversation with the claimant, but the claimant repeatedly said that he needed time to consider it and therefore delayed further consideration of the proposal.

49. In a message to the claimant on 13 January 2020, Mr Taranov shared the details of the approach taken to bonuses for senior management and set out his calculation as to what those would be in the claimant's case. He again made clear that this was a proposal contingent on the claimant changing his terms, stating *"the changes will take place from 1st February. We should also sign the standard agreement prior to this term"*. On the same day, there was a further discussion about remuneration and a bonus of €4,126 was discussed on the basis that the claimant would *"sign a standard service agreement by 31 January 2020"*. Mr Taranov also referred to the potential for an option plan: *"option plan will be reviewed and introduced in the next few months and consider previous conversations"*.

50. However, the claimant decided that he did not want to accept the offer of an employment contract and relocation to the UK. Mr Taranov then suggested to the claimant that he should be employed locally in Spain. However, the claimant was clear that he wanted to continue to provide services remotely on a consultancy basis. Mr Taranov emphasised to the claimant that it was important to him that everything was done correctly. The claimant reassured him that he understood this and that he would ensure that the relationship was, in his words, *"not crossing a line"*. As a result of this discussion, Mr Taranov and the claimant agreed that they would document the relationship in a consultancy agreement and the claimant stated that he would arrange this. Again, this was an area in which the claimant had a large degree of knowledge and Mr Taranov did not, and Mr Taranov trusted the claimant in this respect.

51. In his submissions at the tribunal, the claimant picked up on the fact that Mr Taranov in response to a question from the tribunal had said in his evidence that he *"forced"* the claimant to sign the consultancy agreement. In doing so, he took completely out of context the facts and indeed what Mr Taranov said in his evidence. Mr Taranov did not force the claimant to sign a consultancy agreement as opposed to an employment contract. Quite the contrary. What Mr Taranov wanted to do was to ensure that the relationship between the claimant and the respondent was properly documented. He initially hoped that the claimant would sign an employment contract. However, it was at the claimant's own insistence that he remained a consultant. What Mr Taranov was not prepared to do was to allow the arrangement to remain undocumented. He only "forced" the claimant in the sense that he forced him to document the arrangement. This was entirely reasonable; he did so because he specifically wanted everything done properly. However, it was the claimant who decided that the arrangement should remain on a consultancy basis.

The claimant's consultancy agreement

52. The claimant therefore drafted his own consultancy agreement. He used a precedent, which had been drafted by lawyers, but added the particulars himself. The claimant then sent the agreement to Mr Ageyev for his signature. The agreement was dated 31 January 2020 and was stated to take effect from 1 February 2020.

53. The consultancy agreement made clear that the claimant was *"in the business of providing services as a Finance and Accounting Expert"* and that he was an *"independent contractor willing to provide [his services]"* to the respondent on the terms and the conditions of the consultancy agreement.

54. The agreement provided at clause 2 that it could be terminated on 30 days' written notice from either party, although this was subject to summary termination provisions elsewhere in the agreement.

55. Clause 8 of the agreement stated that *"While your method of work is your own, you will comply with the reasonable request of the Company and will work and co-operate with any servant or agent or other consultant of the Company"*.

56. Clause 4.4 provided that the claimant *"may have any interest in or advise or act as a consultant to any business"* provided that, in summary, this did not impact upon his obligations under the consultancy agreement and provided that he did not provide services to a competitor business.

57. The agreement provided standard restrictions prohibiting the claimant from soliciting customers, employees, or suppliers from the respondent, both during the course of his engagement or for a period of time thereafter.

58. Under clause 5 of the agreement, the claimant was to be paid fees in consideration for the services which he provided, on receipt by the respondent of invoices (and the claimant did indeed submit invoices in relation to the services which he provided). The fee structure was set out in a schedule to the agreement.

59. Clause 6 of the agreement provided that: *"You will be responsible for all out-of-pocket expenses and normal overhead expenditure incurred by you in the provision of the Services under this Agreement. For the avoidance of doubt you will not be reimbursed separately for these expenses."* This general provision was, however, amended by one particular provision in the fees schedule relating to expenses which stated that: *"The company agrees to pay the travel expenses which it judges necessary for the provision of the Services provided that they are agreed by the Company in advance."* In other words, reimbursement of expenses was limited to travel expenses only and, even then, those travel expenses where the respondent judged they were necessary and had agreed them with the claimant in advance of them being incurred.

60. Clause 7 of the agreement provided that: *"You will be responsible for, and will account to the appropriate authorities for, all income tax liabilities and national insurance or similar contributions payable in respect of the payments made to you under this Agreement."*. In conjunction with this, at clause 7.3, the claimant then gave the respondent an indemnity in relation to tax.

61. Clause 8.1 of the agreement provided that: *"Whilst acting as a consultant for the Company under this Agreement you will be an independent contractor and as such will not be entitled to any pension, holiday, sickness or other fringe benefits from the Company. Nothing in the terms of this Agreement will render you an agent, officer or employee, worker or partner of the Company and you will not hold yourself out as such."*.

62. Clause 14 of the agreement was headed *"Tax Evasion Facilitation Prevention"*. It referred to various statutes in relation to matters including tax evasion and then provided at clause 14.2 that: *"You will ensure that you will not by any act or omission commit, or cause, facilitate or contribute to the commission by any person including the Company, of a Corporate Failure to Prevent Offence; an UK Tax Evasion Offence; or a Foreign Tax Evasion Offence"*. It further provided at clause 14.6: *"You must immediately notify the Company as soon as you become aware of any allegation, investigation, evidence or report relating to a breach or possible breach of any of the requirements in this clause 14."*.

63. Clause 15.2 of the agreement provided that: *"The company will supply you free of charge with such materials, instruments or equipment as the company deems necessary for you to provide the services."*.

64. Clause 17 of the agreement provided that, notwithstanding the normal 30 day written notice provision, *"the Company may terminate this Agreement with immediate effect and with no further obligation to make any further payment to you (other than in respect of amounts accrued prior to the Termination Date) by written notice to you if, at any time:*

17.1.1 you commit any serious or repeated breach or non-observance of any of the terms or conditions of this Agreement; or

17.1.2 you are unable to provide the Services in a proper and efficient manner or are in the reasonable opinion of the Board grossly negligent or incompetent in the performance of the Services; or

17.1.3 you commit any act of fraud or dishonesty or a breach of a fiduciary duty whether relating to the company or otherwise or act in a manner which in the reasonable opinion of the board brings or is likely to bring you or the Company into disrepute and/or is materially adverse to the interests of the Company…"

65. Clause 18 of the agreement provided that the claimant would immediately on termination of the agreement return to the respondent any property belonging to the respondent.

66. Clause 21 of the agreement provided as follows:

"This Agreement constitutes the entire and only legally binding agreement between the parties relating to the Engagement and supersedes any previous understandings, arrangements, representations, negotiations or agreements between the parties and neither party has made any statement, representation or warranty concerning the subject matter of this agreement and neither party has any liability arising from reliance on any information supplied by one party to the other, except where it is in contained in this Agreement, provided that nothing in this Clause 21 will have effect to exclude the liability of either party for fraud or fraudulent misrepresentation."

67. The Schedule to the agreement set out a description of the services to be provided. In it, it states "*Services shall mean the provision by you of your services as a Chief Financial Officer"*. This was the claimant's description of himself and, as noted, he inserted the personal details into this agreement. Neither Mr Taranov nor Mr Ageyev were aware that there was any significance in the use of this term and did not think anything of this reference. Given their lack of knowledge, it did not imply to them that there was any suggestion that he might be an employee. Indeed, the agreement was specific that he was not an employee, and he was not described by them as an employee.

68. The claimant had described himself as "CFO" at RGK. Given their lack of knowledge, Mr Taranov and Mr Ageyev did not think anything of it when the claimant described himself at the respondent as CFO and, indeed, manually set his email signature as such. Furthermore, Mr Taranov referred to the claimant as such and did so as it was a quick way to let others know that he was a senior individual advising on the financial side of the business.

69. Similarly, given the claimant's experience, Mr Taranov did occasionally refer to him as a "senior executive" or holding a "senior position". By that, he meant that the services that he was providing were specialised services which required an advanced understanding of tax and accountancy. He did not mean to suggest that the claimant was an employee.

70. As to the financial terms in the Schedule, it stated that: *"We will pay you a Fee of 73.35 EUR per hour, so we estimate you would provide the Services for 125 hours per month and would then receive a total Fee of 9,170 EUR per calendar month."*. The claimant did indeed submit invoices for €9,170 each month on an ongoing basis following entering into the agreement until the termination of his engagement. In fact, however, he was working much less than this, as we will come back to below.

71. Finally, the Schedule to the agreement stated: *"The company may pay a Success Fee in respect of Services related to milestones if determined and agreed between You and the Company."*. The "success fees" were not fixed sums but were dependent on the services the claimant provided and whether agreed milestones had been met. Such payments were sometimes therefore made but not always; it depended on the circumstances.

72. The agreement does not contain any provisions for payment of bonuses, stock options, or any entitlement to a percentage of the proceeds of any sale of an app.

The claimant's services

73. The claimant was free to decide when, how and where he would carry out his services. Mr Taranov did not monitor his hours and so did not know exactly how many hours he provided services for. However, in any event, he could not invoice for more than 125 hours per month. Although, contrary to what he had always told Mr Taranov, the claimant stated at this tribunal that he was not working for anyone apart from the respondent and RGK, he told Mr Ageyev at the meeting on 9 April 2021 that *"I am working 15 hours a day you know so you know so I am doing two hours for Ruby Labs and then"*. That is, in his own words, an account of how much work he was doing for the respondent as well as an acknowledgement that, of the time that he was working, 2 of his 15 hours were work for the respondent with the other 13 spent on other work. We do not, therefore, accept that the claimant was not working for other people apart from the respondent and RGK.

74. Furthermore, even if one is charitable and one assumes that the claimant (who maintained at this tribunal that he worked seven days a week for the respondent) was doing 2 hours for the respondent seven days a week, then he would be working no more than 60 hours a month for the respondent; that is far less than the 125 hours for which he was billing the respondent. When it was put to Mr Taranov, he explained that the work which the claimant did varied depending on the projects which were happening but accepted that on average over a period of say 18 months, the claimant probably was working about two hours a day for the respondent. As to the invoices, however, Mr Taranov was far more focused on the services which he needed to be done by the claimant rather than the amount of time taken to do them and, so long as the work was done, he didn't question the claimant and did not pay any attention to any such discrepancy in the hours worked.

75. Mr Taranov does not recall the respondent providing the claimant with a laptop. However, the claimant clearly did obtain a laptop at the respondent which was purchased through the respondent. The claimant arranged this himself. Interestingly, the claimant has not yet returned that laptop to the respondent, notwithstanding that his consultancy agreement provides at clause 18 that he is obliged to return any company property on termination of that agreement and that, in the letter of 9 April 2021 terminating his engagement, he was specifically asked immediately to return any company property which he may have in his possesion, including computers.

76. As to whether the claimant was authorised to purchase this laptop through the respondent, Mr Taranov candidly said that, whilst he could not remember, he may have agreed to such a request from the claimant, but it was not something that was of great importance to him. Had Mr Taranov authorised the claimant to buy a computer through the respondent, this was in any case in accordance with the provisions of 15.2 of the consultancy agreement set out above, which states that the respondent will supply the claimant free of charge with such materials, instruments or equipment as it deems necessary for him to provide his services.

77. Mr Taranov and the claimant often arranged remote meetings, sometimes on a weekly basis, at a time convenient to the claimant, to discuss project deliverables and deadlines and he would then leave the claimant to deliver the project. The claimant sometimes worked out of RGK's office in Barcelona but he had complete autonomy to decide how he delivered his services. Mr Taranov did not expect the claimant to keep him regularly updated on what he was doing or always to be online during Mr Taranov's usual working hours and the claimant's schedule was his own. Mr Taranov assumed, based on what the claimant had told him, that the claimant was also carrying out his work for RGK and other clients during these hours.

78. The claimant frequently liaised with other employees and consultants of the respondent. However, contrary to what he has suggested, he did not have any management responsibilities for them.

79. Given the claimant's experience in financial and accounting matters, Mr Taranov relied on his expertise in those areas. There are numerous examples of this in the bundle. This includes individuals at the respondent seeking the claimant's advice on matters to do with tax. The claimant also held himself out as someone who is experienced in dealing with contracts and lawyers so, as part of his services, he liaised with lawyers and advised prospective staff on the terms of contracts. He also had authority to and did sign some agreements on behalf of the respondent.

Tax matters

80. The claimant took responsibility for obtaining and considering professional advice regarding the tax affairs of the respondent. In March 2019, he also took specific advice from PWC on the co-founders' personal income tax situations.

81. In the course of his extensive involvement in the respondent's tax affairs, the claimant did not raise any concerns that the respondent or its owners were acting unlawfully in relation to tax residency. He did not make the allegations he later made in April 2021 that the respondent and RGK should have been registered in Spain and paying Spanish taxes. However, the claimant maintained at this tribunal that he had raised these concerns earlier. When repeatedly asked in the course of this hearing where he had raised such concerns, the claimant pointed to advice from PWC in 2019 and an email from Deel, a service provider dealing with payroll. Neither shows anything of the sort. These documents do not include any statements of there being tax irregularities, let alone that the claimant made any such statements. We accept Ms Leadbetter's submission that, had the claimant considered that the respondent was acting unlawfully, he would have been obliged to raise this, not least under clause 14 of the consultancy agreement (tax evasion facilitation prevention); and that, furthermore, if he had made a disclosure of this significance, he would remember having done so and would have been able to provide evidence of it to the tribunal.

82. To the contrary, the claimant personally warranted that the respondent was tax resident in the UK. On 4 February 2019, he completed a tax residency short self-certification form for Lloyds Bank on behalf of the respondent. He answered the question *"are you solely tax resident in the UK"* by checking the box marked *"yes"* and signed to declare that *"all statements made in this declaration are, to the best of my knowledge and belief, true and correct"*. During the rest of his engagement, he continued liaising with lawyers and financial institutions on behalf of the respondent and at no point did he suggest that in his professional opinion the respondent was acting unlawfully in relation to its tax affairs.

83. We therefore have no hesitation in finding that the claimant, despite his assertions at this tribunal, did not raise any such concerns prior to the meeting of 8 April 2021 with Mr Ageyev.

84. Furthermore, at this tribunal, the claimant developed a line of argument that he was aware of tax irregularities as were Mr Taranov and Mr Ageyev but they did not do anything about it. That argument was never raised prior to his evidence and, if it had been true, then the claimant would have raised it at an earlier stage and certainly in his claim form. Furthermore, the respondent is audited by respected professional auditors such as BDO and they have never raised any concerns about tax irregularities. We do not, therefore, find that, as the claimant suggested at this tribunal, he was aware of tax irregularities as were Mr Taranov and Mr Ageyev. Rather, this was another example of the claimant's evidence developing, unreliably and in a self-serving manner, as he went along.

Performance concerns

85. Towards the end of 2020, Mr Taranov was becoming increasingly frustrated with the services which the claimant was providing as he was continually delaying projects and missing deadlines. It was also around this time that the claimant, as he admitted in cross-examination, had (unknown to the respondent) started seeking legal advice regarding his arrangements with the respondent. By this stage, the respondent had started to become extremely profitable, resulting in large profits for its two co-founders. As we shall see, the claimant had started to become extremely dissatisfied with what he was being paid for his services in comparison with what he felt he "deserved".

Holiday policy

86. In late 2020, the claimant had drafted a holiday policy for the respondent, which he drafted to apply to both employees and consultants. Mr Taranov, relying on and trusting the claimant, adopted the policy.

87. Prior to this, the claimant had never asked Mr Taranov whether he could take holiday nor did the respondent keep track of the claimant in this respect. The claimant was not entitled to holiday under the consultancy agreement. Mr Taranov's only concern was that, when there were services which needed providing, that the claimant would make himself available, in the manner he sought fit, properly to provide those services.

88. However, for the first time, on 6 December 2020, shortly after the policy had been introduced, the claimant emailed Mr Taranov stating that he needed to take Monday to Wednesday off. As he didn't usually seek such permission from Mr Taranov, Mr Taranov saw the email as an indirect way of telling him that the claimant was not going to deliver on a particular project within the timings that he had promised, which frustrated him.

89. Although he was frustrated, Mr Taranov thought the claimant would take that time off anyway. He therefore replied, stating that the claimant's request was not in line with the policy and that, especially as a senior executive, he thought that it was very important to respect what they had established. He said he would approve the request as an exception, but that he would not do that again later. He said that there were a few ongoing things that the respondent was expecting from the claimant and asked him to co-ordinate his days off for the team to make sure that his urgent holidays were not disruptive to everyone's progress.

90. However, the claimant continued to miss deadlines, whilst invoicing the company for the same amount. Mr Taranov flagged his concerns to the claimant, but these were not well received, and their relationship started to become more difficult. The claimant told him that he was ungrateful and that it was normal for deadlines to be continuously delayed, both of which Mr Taranov felt were very unprofessional comments. The claimant was not receiving any success fees during this period as he wasn't meeting the necessary milestones. The claimant's performance did not improve throughout early 2021.

<u>The claimant's conduct to Ms YL</u>

91. On 6 April 2021, Ms YL, the respondent's Head of People and Talent, emailed Mr Taranov setting out her frustrations with the claimant asking to reschedule meetings at the last minute and not showing up for a meeting with her.

92. On 7 April 2021 Ms YL contacted the claimant to ask: *"is there any particular reason you are not at our rescheduled meeting?"*. The claimant replied stating "*Hi [Y], thank you for hanging up on me… I guess this will be the last time you need to do it because it is the last time you and me are going to talk. Hope this is clear enough"*. He followed up shortly thereafter with a message stating *"I just can not believe how stupid someone can be… I mean it about you, of course"*.

93. Later that day Mr Taranov, who had seen these messages, contacted the claimant clearly informing him that *"this is not right"* and that *"I expect that you'd be professional with [Ms YL] or anyone else because calling someone stupid is not a solution. Whatever is going on, you're a mature man, and you cannot emotionally poison a colleague bc she's angry with you for rescheduling the calls"*. Ms YL had, as noted, informed Mr Taranov of the numerous occasions upon which the claimant had either asked to reschedule a meeting with her at the last minute or failed to attend entirely, and Mr Taranov set these occasions out to

the claimant. The claimant responded making no apology for his conduct and instead making further derogatory comments about Ms YL including that she *"acted as a child putting you in copy"*, *"knows nothing of HR or People… neither about Talent"*, *"she has not appreciation for anything at all"* and *"she is not a head or director or even a normal human being"*. He stated that he would not have any further contact with her *"I do not want and I do not need to have a single contact with [Y]"*. The claimant copied Ms YL into this message *"so she understands 100%"*.

94. On the same day, the claimant made a request for time off. He did not usually take and was not required to take this step in order to take leave given his consultant status, and as is apparent on the face of the request appears to have actually intended to work during the days in question. The superfluous request was made because the claimant knew it would be processed by Ms YL and wished further to insult her. He stated in the 'description' field for the holiday request *"want to take these two days as holiday, actually I will do some work that I have but want and need to be offline after the stupid conversation with stupid [Y]"*.

95. Later that day the claimant was in touch with Mr Ageyev saying he was *"not sure what the hell is going on"* and would like to talk to Mr Ageyev. When asked what had happened the claimant stated "*sorry, I need to take sometime off… will never talk again with incompetent [Y]. I can not believe how stupid someone could be"*. Mr Ageyev invited the claimant to meet the following day.

96. The (unsurprising) evidence of Mr Taranov, which we accept, is that he was very concerned about the claimant's behaviour and whether the respondent should continue working with him in these circumstances. He had raised his concerns with Mr Ageyev who told him he was meeting the claimant the following day. Mr Taranov considers that if events had not been overtaken by the claimant's subsequent blackmail attempt, *"I would probably have ended up terminating Jose's engagement anyway as a result of this incident unless he had provided a sincere apology to [Y] and evidenced a significant change in his behaviour (which I suspect he wouldn't have done).".*

97. The claimant has been unrepentant in relation to his conduct towards Ms YL. He appears to see the issue as primarily about rescheduling, which he does not see as problematic. He seems not to recognise that his repeatedly going out of his way to insult his colleague was of itself deeply concerning. In his evidence before this tribunal the claimant still offered no apology or remorse, simply stating in his witness statement *"of course, the Claimant could have been a bit more polite"* and reiterating that *"he was totally fed up and decided he would not accept such a reaction and would not consider working with her anymore or again"*. He again needlessly insulted Ms YL in his witness statement, referring to her *"incompetency"*. Even in his written submissions at the tribunal, after being questioned in cross-examination about the inappropriateness of his behaviour to Ms YL, he still talked about the incident as effectively amounting to her overreacting to minor scheduling issues and blaming her for sending an email to Mr Taranov about it. We therefore have no hesitation in making the two following findings. First, even if the subsequent blackmail events had not taken place, the

claimant would not have shown any remorse or made any sincere apology to Ms YL, with the result that Mr Taranov would have terminated his engagement for that reason anyway. Secondly, even if the claimant had been subject to a disciplinary hearing in relation to this conduct, he plainly would not have reacted to this with the degree of remorse, apology and self-reflection that could have created a (remote) chance of avoiding dismissal.

98. Mr Taranov had already flagged to Mr Ageyev his concerns about the claimant missing deadlines and not providing his services to the expected standard. He also flagged his concerns about the claimant's conduct towards Ms YL to Mr Ageyev, who informed him that the claimant had messaged him and that they had agreed to meet for coffee the following day.

99. That is the background to the two meetings on 8 and 9 April 2021 between the claimant and Mr Ageyev.

100. There is a transcript of the 8 April 2021 meeting between the claimant and Mr Ageyev, because both participants recorded that meeting. Furthermore, there is also a transcript of the subsequent meeting of 9 April 2021, because both participants recorded that meeting. All parties agree that the contents of those transcripts are accurate. Both meetings are lengthy, and a full reading of the transcripts gives a very clear view of exactly what is going on and exactly what the claimant is doing. Whilst it is not necessary or proportionate to repeat the entirety of these conversations here, the summary below brings out the salient points. Both meetings took place in coffee shops.

Meeting on 8 April 2021

101. At the 8 April 2021 meeting, it soon became clear that the claimant had issues with the respondent. He was very angry and frustrated and was complaining about everything and everyone. He called Mr Taranov a *"bastard"*, *"such a fucking asshole"* and *"so stupid"* and said that *"he's mean with everyone"* and *"wants all the fucking money for him"* and he described Ms YL as *"stupid"* and *"incompetent"*. He also insulted the business, stating that Mr Taranov and Mr Ageyev *"will never be able to build anything, you are just copying things"* and that *"there is nothing behind this"*.

102. He then began threatening Mr Ageyev and the respondent stating *"now he and you are going to pay me a lot of money because I'm going to leave the company OK and I know a lot of things about you both"* and *"you know I'm going leave and I'm going to leave with the money that I deserve because otherwise you are going to end up with no bank accounts, with no lawyers, with no fucking company, because I can close you up, everything, sending an email to HSBC because I have been helping you to clean your face and you don't appreciate anything"*. Mr Ageyev was completely taken aback by this. The way in which the claimant was speaking to Mr Ageyev and talking about Mr Taranov and Ms YL was clearly completely inappropriate but, even worse than that, the claimant was explicitly trying to blackmail and extort money out of the respondent. Mr Ageyev frankly had no idea why the claimant thought he could close the respondent's bank accounts and stop its lawyers advising it (and he has since spoken to the

respondent's banks who have confirmed that there were and are no grounds to close the respondent's accounts).

103. The claimant, who as the person involved in the respondent's finances would have seen the dividends that had been paid to its co-founders, expressed his jealousy about Mr Taranov and Mr Ageyev and their respective incomes. He said *"four fucking thousand euros, you took 9 million"* and when Mr Ageyev suggested that the respondent had been paying him well he responded *"it's shit, shit, shit"*.

104. The conversation again came back to the claimant wanting to leave and wanting to be paid a lot for doing so. He said: *"I want to leave yeah?.....I think I deserve a lot, yeah? So I will write to Roman and say, look Roman, I want to leave. You know and the conditions and everything, I want to talk to a partner, not to you"*. He also threatened Mr Ageyev personally saying: *"You know I think I deserve a lot, I could, you know, I talked to my lawyers his morning. You know I hate to make your life shit yeah, I could make you go back to Kazakhstan and you know" "I could do that yeah" "I could do that to Roman"*. (Mr Ageyev is originally from Kazakhstan.)

105. At the end of the meeting (after he had already made the blackmail attempt) the claimant stated *"you know that if I went to the lawyers in London, you know, Ruby Labs will have to pay £0.5m for the last three years for my salary for not deducting my taxes"*. This was a further threat in an attempt to blackmail the respondent.

106. Mr Ageyev then needed to go to another appointment but agreed to meet the claimant the following day.

Email of 8 April 2021 to Mr Taranov

107. The claimant then sent an email that day to Mr Taranov (copied to Mr Ageyev), which we set out in full below:

"I guess it is a bit sad but really need to be very clear with you,

As you might know I met Artem today for a quick coffee and told him pretty much this too. Knowing how things are arranged at Ruby and how you have been constantly behaving and treating people I got prepared for this possibility not only mentally but legally too. My intention is not to activate any legal actions but I want to bet I will not accept anything different to what I will explain in the next few sentences.

From this email forward I do not want to deal with you but to Artem, my job as CFO was never to work for you really but for the stakeholders of the company. The shareholders, employees, suppliers, etc much more than anything else. As Artem is the director of Ruby Labs Ltd and the other UBO I will discuss matters with him only from this point.

As you are still the other shareholder / UBO in the group and director of RLabs Holdings and RLabs Europe for which I act as CFO too, I want you to know the following;

- Ruby Labs Ltd has been paying me net amounts as a consultant when I should have been considered a regular employee for the last three years. In principle, the same will be considered or included with RGK as you were the UBO in both entities. This means that both companies

should have been registered in Spain and deducted taxes, social security and income tax. Therefore, my income will be considered to be net and so would need to be grossed either if you consider it in the UK or Spain. The rough cost of adjusting this in either country has already been calculated and will be around 600k GBP.

- The company has not been paying me any bonuses in the last three quarters without giving any chance to discuss this properly so net would be 12k EUR, grossed will be around 25 to 30k EUR.

- From day one we discussed about stock options which we were not put in paper, however, I have some indications of such discussions. This could be challenging in court not having signed documents but not always needed to be considered as an agreement. Also, given comparable scenarios in startups when someone with my seniority was getting involved from the beginning and being paid so little, 1k or 1.5k the expectation would be to get options for at least 10%. Given the profits and dividends distributed, you can do the numbers.

- Also, I have written from you that you were offering in addition 1% of the selling of the company when we started working with Enter Capital. That contract is still active and you decided not to cancelled months ago when I mentioned to you. Even if you have canceled it without my knowledge you should have informed me as this bonus was related to such contract.

In my opinion, this is all quite tricky and my advice would be not to trigger any legal action from your side. Basically because this will destroy not only any capability of the company but you personally and even more importantly of Artem to operate and live in Europe, including the UK, the US and many other places where you both might have interests. Potentially your bank accounts, company or companies included could be closed overnight, jobs lots and who knows even Hint's fans sad because not being able to access their favorite app.

My intention is to make this as easy as possible but get things right and really hope in my heart that you being so young still might have a chance to think about it and one day you might even thank me for this. I am very much hopeful of this but for now I really feel that we should stop communicating with each other.

I will meet Artem for a coffee tomorrow and hope we can get things organized and so this does not mean there any disruption at Ruby. The numbers might be scary but I not greedy so leave it to Artem, I am sure he will keep you informed.

No need to say that all relevant information has been already shared with my lawyers so this will be kept under proper NDA arrangements unless anything strange happened to me. Just in case.

Hope you all the best."

Each of the alleged misdoings which the claimant sets out in this email has a price next to it.

108. Mr Taranov shared this email with Ms YL in her capacity as the respondent's HR advisor to get her views. Further to that discussion, he decided that they needed to terminate the claimant's engagement as he was trying to blackmail the company. Both he and Mr Ageyev agreed that they needed to terminate the engagement. However, as Mr Ageyev had already agreed with the claimant to meet again the following day, they decided to wait until that meeting before doing so.

9 April 2021 meeting

109. At the meeting of 9 April 2021, the claimant turned the conversation to the subject of money. He made allegations about the company set up and Mr Ageyev's personal tax affairs and again threatened him personally stating *"talk to*

a lawyer. You will go to jail". He also alleged that *"the tax authorities will say that you have to pay 5 million in Spain in taxes…because the company in London should have been in Spain"*. Mr Ageyev knew that the claimant and Mr Taranov had been taking advice on the company set up from lawyers and accountants so he didn't think the claimant genuinely believed this and he was becoming frustrated with his threats. He told the claimant that they could respond to the emails the claimant had threatened to send to Apple, Google and the respondent's lawyers stating *"this guy was working with us for 3 years for very good remuneration because at the end of day he tried to fuck us for the money, because he saw how much we owed (sic) and he decided to like, fuck us. I mean, as I said, Jose, it does not work this way"*. He tried to explain to the claimant that *"we didn't make money because of you, you understand"* and the claimant responded *"you think, you only make money because of you"*. The claimant then made a further threat stating *"it's okay take the money, I will send the emails and we can see. If this is… I have, you know… a different proposal"*.

110. Eventually, the claimant made a demand for *"500k for an exit"* and *"250 as a loan to invest"*. Given how he was behaving, Mr Ageyev wasn't particularly surprised by the amounts he was asking for. However, Mr Ageyev told him *"I feel that what you are like doing now it's a fucking crime…. trying to fuck the company, it's a crime in the UK right"*.

111. Whilst Mr Ageyev was in the meeting, Ms YL had drafted a termination letter in relation to the claimant. Shortly after the meeting, Mr Taranov, Mr Ageyev and Ms YL had a call in which Mr Ageyev summarised the claimant's actions at the meeting and they agreed that due to his behaviour and attempts to blackmail the respondent they needed to terminate his engagement immediately. Mr Ageyev subsequently signed the termination letter and Mr Taranov sent it to the claimant later that day. The termination letter referenced the termination provisions in the claimant's consultancy agreement and also referenced *"your threats, discriminatory statements, attempted blackmail and extortion…"*.

112. The claimant subsequently contacted Mr Ageyev and there was an exchange between them in a succession of Telegram messages over the period of 9-11 April 2021. In those messages, Mr Ageyev made clear to the claimant that the respondent had terminated his engagement because of his attempts to blackmail it.

113. In cross-examination, the claimant eventually accepted that what he had been doing in these meetings was making threats. However, he attempted to characterise his conduct at the meeting as *"planning to help"* and making a *"perfectly normal proposal"*. As Ms Leadbetter submits, this description has no basis in reality.

114. As noted in the transcripts of the meetings and the 8 April 2021 email set out above, the claimant did make allegations of wrongdoing. However, he quite clearly did not make those allegations in order to permit the respondent the opportunity to address them, for example to urge the respondent to take further tax advice. He considered that he could raise serious allegations against the owners, whom he knew to be less experienced in financial and tax matters than

him, and use them to intimidate them. He presented the respondent with two options only: either pay the claimant a vast sum of money or face the destruction of the respondent and the deportation of Mr Taranov and Mr Ageyev. This is a clear case of attempted blackmail or extortion.

115. Furthermore, other evidence consistently bears out that Mr Taranov and Mr Ageyev regarded this as a case of blackmail or extortion. In Mr Taranov's mark-up of the claimant's email of 8 April 2021, he noted *"so he's trying to blackmail us with a consultancy agreement that he set up for everyone"*. In the meeting of 9 April 2021 Mr Ageyev told the claimant *"I feel that what you are like doing now it's a fucking crime"*. The Termination Notice signed by Mr Ageyev cited *"your threats, discriminatory statements, attempted blackmail and extortion"*. In a Telegram message of 9 April 2021 Mr Ageyev stated *"Hi Jose, yes I signed the letter because you told me that you want to resign and basically trying to blackmail us, it's just dangerous to give you access"*. In a Telegram message of 11 April 2021 Mr Ageyev stated *"Jose, you blackmail us, of course we restrict your access and we no longer need your help"*.

Letter from the respondent's solicitors

116. The claimant instructed UK solicitors, who wrote to the respondent making various allegations, some of which are the subject of this claim.

117. On 11 June 2021, the respondent's solicitors, Wiggin, wrote a detailed letter refuting the claims. In it, they referenced *"your client's blatant attempt to extort money from our client during the meeting on 8 April 2021"*. Towards the end of the letter, they point out that they are reviewing with the respondent whether the threats made by the claimant during the meeting on 8 April 2021 amounted to attempted blackmail contrary to the criminal statutes in the UK and Spain and that *"In the meantime, we reserve our client's right to refer the evidence in its possession including the audio recording taken by Mr Ageyev to the relevant authorities in the UK and Spain for the purposes of conducting a criminal investigation and prosecution"*.

Concluding facts

118. In conclusion, we accept as a fact and for the reasons above Ms Leadbetter's assertion that the claimant fundamentally breached the trust which Mr Taranov and Mr Ageyev had in him. As the business became extremely profitable, the claimant resented the success of these two young men and tried to obtain some of their wealth for himself by foul means. He did so by attempting to blackmail them and the respondent. The claimant could have participated in a share of that profitability had he accepted the offer of employment which was made to him with the associated benefits; however, he turned that offer down.

The Law

Employment/worker status

119. For the tribunal to have jurisdiction to hear the following claims, the claimant needs to prove that he was an employee of the respondent: unfair dismissal; automatically unfair dismissal (protected disclosures); and breach of contract/wrongful dismissal.

120. For the tribunal to have jurisdiction to hear the following claims, the claimant needs to prove that he was a worker in relation to the respondent: being subjected to a detriment (protected disclosures); unpaid holiday pay; unlawful deduction from wages; and failure to allow the claimant to be accompanied.

121. By section 230(1) of the Employment Rights Act 1996 (("ERA"), an employee is defined as *"an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment"*.

122. By section 230(3) of the same act a worker:

"means an individual who has entered into or works under (or, where the employment has ceased, worked under)

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual".

123. Under section 43K of the ERA, the definition of worker is extended further to cover certain other categories of relationship for the purposes of complaints of being subject to a detriment (protected disclosures). However, none of those wider categories are relevant to this claim.

124. Furthermore, for the complaint of a failure to allow a companion, the definition of worker is extended by section 13 of the Employment Relations Act 1999. However, none of the extended categories are engaged in this case.

125. Therefore, for all the complaints for which worker status needs to be proved, the definition of worker set out three paragraphs above is the applicable definition.

Employee

126. In the lead case of Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 1 All ER 433, QBD, Mr Justice McKenna set out the three stage test of whether there is an employment relationship, namely that there must be mutuality of obligation, a sufficient degree of control and that the other provisions of the contract must not be inconsistent with it being a contract of employment.

127. Personal service is of the essence of a contract of employment. A right of substitution is incompatible with a contract of employment (see Ready Mixed Concrete).

128. Without mutuality of obligation there can be no contract at all so the requirement for mutuality of obligation is a required element of both a contract of employment and of the wider definition of a worker.

129. There must be a sufficient degree of control for a person to be an employee. The extent to which orders and instructions are taken is a good indication of control exerted by an employer over an employee, as is application of disciplinary proceedings.

130. The final component of this test is important. The courts have since reiterated on numerous occasions that an overly simplistic checklist approach is inappropriate. The task of the tribunal is to consider whether the provisions of the contract as a whole are consistent with it being a contract of service (rather than a contract for services).

131. Another test is to consider whether the claimant is part of the employer's organisation or a separate entity merely providing external assistance, or whether the claimant is in reality in business on his own account.

132. The parties' own characterisation or label is not conclusive. The employment tribunal should look to the reality of the arrangements as above but in a borderline case the label they have mutually agreed to adopt may indicate their clear mutual intention as to what the arrangement was. In Consistent Group Limited v Kalwak [2008], the Court of Appeal held that it was not the function of the employment tribunal to re-cast the parties' bargain. If a term solemnly agreed in writing is to be rejected in favour of a different one, it can only be done by a clear finding that the real agreement was to a different effect and that the term in the contract was included by them so as to present a misleadingly different impression.

133. Finding that the contract is in part a sham was considered in the Employment Appeal Tribunal's decision in Redrow Homes (Yorkshire) Limited v Buckborough [2009]. In that case the Employment Appeal Tribunal distinguished the decision of the Court of Appeal in Consistent Group and said that the authorities demonstrate that there are two different contexts in which the words "sham" may legitimately be used in respect of a contract or contractual provision. After describing the situation in Consistent Group itself, the Employment Appeal Tribunal went on to say that it is clear that there is another context in which a court may find that the contract or contractual provision is a sham, that is where in reality neither party intends the contract or the relevant provision of it to be effective or to constitute an effective obligation between them. It would be open to the tribunal in such a case to ask whether the reality of the situation was one in which the express provision under examination provided for unrealistic possibilities on the one hand, or genuinely reflected what might realistically be expected to happen on the other. The answer to that question was one of fact for the tribunal.

134. The decision of the Supreme Court in Autoclenz Limited v Belcher [2011] went further than this and made clear that, where one party was relying on the genuineness of an express term and the other party was disputing it, there was no need to show that there had been a common intention to mislead. This was particularly so in the employment field where it was not uncommon to find that there was inequality in bargaining power and that the "employer" was in a position to dictate the written terms and the other party was obliged to sign the document or not get the work. In such a case, there was no need to show an intention to mislead anyone; it was enough that the written term did not represent the intentions or expectations of the parties.

135. Autoclenz was a case where the claimants were valets and there was considerable inequality in bargaining power between them and the respondent. The current case, where the claimant had the expertise in the area, drafted the contract himself and presented it to the respondent for signature, is at the opposite end of the spectrum. In this case the label which the parties (and the claimant in particular) put on the arrangement, is of great significance.

136. In this respect, the case of Uber BV and ors v Aslam and ors [2021] ICR 657, referred to below in connection with worker status, is also relevant in consideration of employment status.

Worker

137. Personal service is also a required element of the definition of a worker (see section 230(3) which includes employees but also those who otherwise undertake to do or perform work personally).

138. In the recent case on worker status of Uber BV and ors v Aslam and ors [2021] ICR 657, the Supreme Court held that *"it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a 'worker'"* (para 76). The reason for this approach was described as follows (para 76):

"To do so would reinstate the mischief which the legislation was enacted to prevent. It is the very fact that an employer is often in a position to dictate such contract terms and that the individual performing the work has little or no ability to influence those terms that gives rise to the need for statutory protection in the first place. The efficacy of such protection would be seriously undermined if the putative employer could by the way in which the relationship is characterised in the written contract determine, even prima facie, whether or not the other party is to be classified as a worker. Laws such as the National Minimum Wage Act were manifestly enacted to protect those whom Parliament considers to be in need of protection and not just those who are designated by their employer as qualifying for it."

139. The Supreme Court had in mind a situation which is commonplace, of which the facts in Uber itself were a potent example, in which the contractual agreement is dictated by the company and agreed to by an individual who has *"no practical possibility of negotiating any different terms"* (para 77). The mischief in such a situation is obvious.

140. This is far from the present case. The claimant and respondent interacted with each other as senior professional and client. The claimant chose to be engaged on consultancy terms rather than an employment contract and arranged for the drafting of those terms himself, presenting them to the respondent for signature.

141. In such a scenario, Uber requires that the written contract be afforded appropriate weight as a genuine record of the parties' intentions (para 85, emphasis added):

"This does not mean that the terms of any written agreement should be ignored. The conduct of the parties and other evidence may show that the written terms were in fact understood and agreed to be a record, possibly an exclusive record, of the parties' rights and obligations towards each other."

Protected Disclosures

142. The principal relevant law is set out in Parts IVA and X of the ERA.

143. For the detriment and dismissal complaints relating to protected disclosures, colloquially referred to as "whistle blowing", an employee must first prove on the balance of probabilities that he or she made a protected disclosure. To do this the employee must first prove that he or she made a qualifying disclosure under s.43B of the ERA. A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of six categories set out at s.43B (a-f). The categories relevant to this case are:

(a) That a criminal offence has been committed, is being committed or is likely to be committed; and

(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

(f) That information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

144. The case of Cavendish Munro Professional Risks Services Ltd v Geduld [2010] IRLR 38 EAT indicates that there is a distinction between "information" and an "allegation". The ordinary meaning of "information" is "conveying facts" and that is what is required to fall within s.43B. A mere allegation will not suffice. However, the two are not mutually exclusive; a protected disclosure may contain both information and allegation (see Kilraine v London Borough of Wandsworth [2016] IRLR 422, EAT).

145. Crucially, it is not the happening of a matter within one of the above categories which is relevant to the establishment of the qualifying disclosure but merely whether the employee has a reasonable belief in its having happened, happening or the likelihood of its happening. A belief may still be objectively reasonable even where the belief is wrong or does not on its facts fall within one of the categories outlined about.

146. The same reasonable belief test applies to the public interest test incorporated into s.43B ERA and referred to above (see Chesterton Global Ltd and another v Nurmohamed [2015] UK EAT/0335/14). Nurmohamed established that the test is whether an individual has a reasonable belief that the disclosure is in the public interest. Further, on the facts in Nurmohamed, the EAT upheld a finding that the protected disclosures, which concerned the manipulation of the employer's accounts such as to affect adversely 100 senior managers, were in the public interest. The sole purpose of the amendment to section 43B(1) introducing the "public interest" test was to reverse the effect of Parkins v Sodexho Ltd [2002] IRLR 109. The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. In Nurmohamed, the breach affected other people as well as the claimant.

147. In Norbrook Laboratories v Shaw [2014] ICR 540, the EAT held that more than one communication could be read together to amount to a qualifying disclosure when, taking the communications separately, each would not in itself be a disclosure.

148. If the employee establishes that he or she made a qualifying disclosure, he or she must then prove that it was a protected disclosure. This can be done in a number of ways in accordance with s.43C-43H of the ERA. A disclosure made to an employer, as set out in s.43C, is one such way in which a qualifying disclosure can be a protected disclosure as well. There is no dispute in this case that, to the extent that any qualifying disclosure was made, it would fall within s.43C and therefore be a protected disclosure.

149. If the above is established, the employee has made a protected disclosure.

150. S.47B(1) ERA provides that:

"A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure".

151. Following the case of NHS Manchester v Fecitt and others [2011] EWCA Civ 1190, it is established that in terms of causation the disclosure must be a material influence (in the sense of being more than a trivial influence) in the employer's subjecting the claimant to a detriment. Under s.48(2) ERA, it is for the employer to prove on the balance of probabilities the ground on which the act, or deliberate failure, complained of was done.

152. For the automatically unfair dismissal claim under s.103A to succeed, the protected disclosure must be the sole or principal reason for dismissal. It is for the employer to show the reason or principal reason for the dismissal. However, where a tribunal has rejected the reason put forward by the employer, it is not bound to accept the reason put forward by the claimant and it is open to the tribunal, on the evidence, to conclude that the true reason is one not advanced by either party (Kuzel v Roche Products Ltd [2008] ICR 799, CA).

Time limits

153. For the purposes of the protected disclosure detriment complaints, the tribunal will not have jurisdiction to consider those complaints unless they were presented before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them; or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

154. The period of three months is adjusted as a result of time spent on ACAS Early Conciliation. In this case, as ACAS Early Conciliation commenced on 7 July 2021, any detriment complaints where the act or failure to act to which the complaint relates took place prior to 8 April 2021 are prima facie out of time. In relation to such complaints, therefore, the tribunal would need to consider whether they are part of a series of similar acts or failures or, if they were not, whether it was reasonably practicable for the complaint to have been presented before the end of the adjusted three-month period and if so, whether they were presented within such further period as was reasonable.

"Ordinary" unfair dismissal

155. The tribunal has to decide whether the employer had a reason for the dismissal which was one of the potentially fair reasons for dismissal within s 98(1) and (2) of the ERA and whether it had a genuine belief in that reason. The burden of proof here rests on the employer who must persuade the tribunal that it had a genuine belief that the employee committed the relevant misconduct, and that belief was the reason for dismissal.

156. In conduct cases, the principles in British Home Stores v Burchell [1978] IRLR 379 apply, namely that, in dismissing the employee, the employer must have a genuine and reasonably held belief that the relevant misconduct took place, following such investigation as was reasonable.

157. The tribunal must then decide whether it is satisfied, in all the circumstances (including the size and administrative resources of the employer), that the employer acted reasonably in treating it as a sufficient reason to dismiss the employee. The tribunal refers itself here to section 98(4) of the ERA and directs itself that the burden of proof in respect of this matter is neutral and that it must determine it in accordance with equity and the substantial merits of the case. It is useful to regard this matter as consisting of two separate issues, namely:

> 1. Whether the employer adopted a fair procedure? This will include a reasonable investigation with, normally, a hearing at which the employee, knowing in advance (so as to be able to come suitably prepared) the charges or problems which are to be dealt with, has the

opportunity to put their case and to answer the evidence obtained by the employer; and

2. Whether dismissal was a reasonable sanction in the circumstances of the case. That is, whether the employer acted within the band of reasonable responses in imposing it. The tribunal is aware of the need to avoid substituting its own opinion as to how a business should be run for that of the employer. However, it sits as an industrial jury to provide, partly from its own knowledge, an objective consideration of what is or is not reasonable in the circumstances, that is, what a reasonable employer could reasonably have done. This is likely to include having regard to matters from the employee's point of view: on the facts of the case, has the employee objectively suffered an injustice?

158. In its consideration of fairness under s.98(4), the tribunal is required to consider whether in all the circumstances of the case the employer acted reasonably in treating the reason they have found as sufficient reason to dismiss. This requires consideration of the reason for dismissal and the procedure followed in conjunction with each other. As observed by Smith LJ in Taylor v OCS Group Ltd [2006] ICR 1602 at para 48, which Ms Leadbetter referred us to:

"The two impact upon each other and the ET's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the dismissal is serious, an ET might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the ET might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee."

159. In respect of these issues, the tribunal must also bear in mind the provisions of the relevant ACAS Code of Practice 2015 on Disciplinary and Grievance Procedures to take into account any relevant provision thereof. Failure to follow any provisions of the Code does not, in itself, render a dismissal unfair, but it is something the tribunal will take into account in respect of both liability and any compensation. If the claimant succeeds, the compensatory award may be increased by 0-25% for any unreasonable failures by the employer or decreased by 0-25% for any unreasonable failures on the claimant's part.

160. Where there is a suggestion that the employee has by his conduct caused or contributed to his dismissal, further and different matters arise for consideration. In particular, the tribunal must be satisfied on the balance of probabilities that the employee did commit the act of misconduct relied upon by the employer. Thereafter issues as to the percentage of such contribution must be determined.

161. Under the case of Polkey v AE Dayton [1987] IRLR 503 HL, where the dismissal is unfair due to for example a procedural reason, but the tribunal considers that an employee would still have been dismissed, even if a fair procedure had been followed, it may reduce the normal amount of compensation

by a percentage representing the chance that the employee would still have lost his employment.

Wrongful dismissal/breach of contract

162. Where the respondent claims that it was entitled to terminate the contract without notice, it is for the respondent to prove on the balance of probabilities that the circumstances existed, for example gross misconduct on the part of the claimant, which entitled it to do so.

Holiday pay

163. The provisions regarding holiday pay are set out in the Working Time Regulations 1998 ("WTR"). It is not necessary to set out the full details of these provisions for these purposes. However, recent case law has established that in certain circumstances where a worker is unable to take holiday in one holiday year, he is entitled to carry that holiday forward to the following leave year. Otherwise, entitlement to any holiday not taken in a particular leave year will be lost.

164. The respondent accepts that, if the claimant establishes that he was a worker, he would be entitled to any accrued but untaken holiday in relation to the leave year in which his engagement terminated (which began on 1 January 2021).

Unlawful deduction from wages

165. The provisions in relation to unlawful deduction from wages are set out in Part 2 ERA. For a claim for unlawful deduction from wages, the claimant must show that the wages in question were "properly payable".

Failure to allow companion

166. Section 10 of the Employment Relations Act 1999 applies where a worker is required or invited by his employer to attend a disciplinary or grievance hearing and reasonably requests to be accompanied at the hearing. In such circumstances, the employer must permit the worker to be accompanied at the hearing by a companion who falls within the description given in that section.

167. However, for the right to apply, the hearing must be a disciplinary or grievance hearing and there must be a request from the worker to be accompanied.

Conclusions on the issues

168. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Employment status

169. As already noted, all of the complaints brought by the claimant are contingent upon him establishing either that he was an employee or a worker in relation to the respondent.

Employment

170. Turning to the test in Ready Mixed Concrete, we find that there was mutuality of obligation, as there was a contract in place between the parties. We also find that, for the purposes of this test, there was a sufficient degree of control. Whilst the claimant had a lot of autonomy in terms of the way he provided his services and when and where he did so, he did take instructions from Mr Taranov and had frequent meetings in relation to projects. We consider that, whilst he clearly had a great deal more latitude than most employees, the degree of control was enough to satisfy the second limb of the test.

171. In terms of the extent to which he was integrated into the organisation, we note that he was at best working only about two hours a day on average and that he did not have any management responsibilities but rather carried out projects requested of him by Mr Taranov. Furthermore, we do not see the fact that he acquired, through his own initiative, a computer from the respondent as a factor which is of any great importance in terms of establishing him as being integrated into the organisation; furthermore, being provided with a computer was consistent with the provisions of the consultancy agreement. We also find that he was not entitled to holiday. Not only is his agreement clear about this but there are only two occasions in the course of the three years when the claimant has suggested that he might have been taking holiday. These are the incident in December 2020 when he, out of the blue, sought to agree time off with Mr Taranov; however, that was, as Mr Taranov thought, and as we accept, more about him providing an excuse to Mr Taranov as to why he would not complete a project which he had been assigned. It does not change the position of the consultancy agreement. Furthermore, the fact that he emailed Ms YL in April 2021 to say that he was taking time off was nothing to do with holiday; it was simply an attempt further to insult her because he knew that she would be processing the request which he made and which contained those insults to her; furthermore, he wasn't taking time off but was working on those days anyway. Finally, we see little significance in the use of the title "CFO". This was something which was very much at the claimant's own initiative.

172. Most importantly, when considering the third limb of the Ready Mixed Concrete test, is the fact that the claimant's working arrangements were not in any way inconsistent with the terms of the consultancy agreement which he signed. Furthermore, this is not a case where there is any inequality of bargaining between the parties. Rather, it was Mr Taranov whose knowledge of contracts of this nature was limited and the claimant who had considerable knowledge in the area. The claimant even produced the agreement himself for signature by the respondent. It was entirely his choice to do so, and he was insistent throughout that he did not want to be an employee and wanted to be engaged on a consultancy basis. Furthermore, he never suggested anything to

the contrary until the point on 8 April 2021, when he did so in the context of blackmailing the respondent for his own purposes and personal gain.

173. His was, therefore, a contract for services. He was not an employee of the respondent. Those complaints which rely on him being an employee of the respondent therefore fail at this stage.

Worker

174. The claimant was required to provide his services personally; there is no suggestion that he was permitted to appoint a substitute; it was his knowledge and expertise which the respondent needed, and he was required to provide it personally.

175. We turn therefore to the second part of the test for a worker, which is whether the respondent's status by virtue of the contract was that of a client or customer of a profession or business undertaking carried on by the claimant.

176. We refer to the extracts from Uber which we have set out in our summary of the law. This is a case where the claimant and the respondent interacted with each other as a senior professional and client. The claimant chose to be engaged on consultancy terms rather than an employment contract and arranged for the drafting of those terms himself, presenting them to the respondent for signature. In that scenario, the terms of the written agreement should not be ignored. They were indeed understood by the parties and agreed to be a record, indeed an exclusive record given the entire agreement clause which the consultancy agreement contains, of the parties' rights and obligations towards each other.

177. The claimant was not, therefore, a worker, but was providing professional services to the respondent, which was his client. This is borne out by the consultancy agreement, which reflected the reality of the parties' arrangements.

178. Those complaints which rely on the claimant being a worker of the respondent therefore fail at this stage.

179. That is, therefore, in fact the end of the matter as the tribunal does not have jurisdiction to hear any of the claimant's complaints. However, for completeness, we address the remaining issues as we would have done had we found that the claimant was an employee and a worker. We have, however, departed from the order set out in the list of issues as it makes more sense to do so.

Protected disclosures

180. It is notable that the claimant did not to any real extent pursue his case that he was dismissed and subjected to detriments because of making protected disclosures. He didn't suggest that in his witness statement; rather, at the end of his witness statement he stated that he can only think that Mr Taranov was *"just*

wanting to dismiss the claimant to save money and shares". He only resiled from this when asked about it in cross-examination and suggested that his dismissal was partly to do with the protected disclosures. However, he never put it to either of the respondent's witnesses that the respondent dismissed him because he made protected disclosures, and it was left to the tribunal to do this.

181. Nonetheless, we analyse first whether or not the claimant actually made any protected disclosures.

182. The alleged protected disclosures are set out in paragraph 5.1.1 of the list of issues and there are six of them in total. In summary, the first three are allegations about tax and the second three are allegations that he should have been provided with various things (bonuses, stock options and 1% of the sale price of an app) which he wasn't.

183. It has been a difficult exercise for us to identify specifically what is relied upon in relation to each of these disclosures because the claimant has given no evidence in his witness statement as to which statements are the disclosures relied upon or what the claimant believed in relation to these disclosures. The list of issues alleges that all the disclosures were made to Mr Ageyev at the meeting of 8 April 2021. Having been through the transcript, that is not the case. However, when that transcript is read in conjunction with the email of 8 April 2021 to Mr Taranov and the subsequent 9 April 2021 meeting, all of these allegations have been made or made in as close enough substance to the way they have been described in the list of issues for us to accept that they have been made. They are all also disclosures of information (albeit the truth of that information is disputed).

184. However, in relation to all of these disclosures, the claimant lacked the requisite reasonable belief that the matters he disclosed tended to show a breach of a legal obligation, commission of a criminal offence or concealment of the same.

185. As to the bonuses, stock options and the 1% stake, we do not accept that he genuinely believed that he was contractually entitled to these things. Even if he was, such a belief cannot have been reasonable. He has been unable to point to anything which could have given rise to such a reasonable belief. By contrast, it is quite clear that his legal entitlements were set out in the consultancy agreement and that these other forms of remuneration were on offer in conjunction with a package of employment in the UK which he chose not to take up.

186. As to the tax related disclosures, the claimant cannot, for the purposes of the first one, have genuinely or reasonably believed himself to have been an employee, given the dealings between the parties concerning his consultancy contract. Furthermore, there was no reasonable basis for a belief that the respondent should be registered in Spain. As noted, the evidence that the claimant sought to rely on in revealing wrongdoing simply does nothing of the sort (the PWC meeting note and the Deel document). The PWC meeting note simply shows the respondent responsibly taking advice on its tax affairs.

Furthermore the fact of Mr Taranov and Mr Ageyev spending time in other countries is likewise not, as the claimant seems to suggest, of itself a reasonable basis for accusing them of tax evasion. The claimant was someone with considerable experience in this area. Furthermore, given his role and given the obligations under his consultancy agreement to report any tax evasion, it is inconceivable that, had he genuinely believed that there was tax evasion, he would not have raised it at any stage until the point on 8 April 2021 when he was using the allegation to blackmail the respondent.

187. As the claimant did not have the requisite reasonable belief in relation to any of the alleged protected disclosures, they cannot be protected disclosures.

188. The claimant also lacked the required reasonable belief that his disclosures were in the public interest. Again, he did not address this during the hearing until his oral submissions when he attempted impermissibly to make evidential points on the matter. Many of the disclosures concern, in any case, only the claimant's own, bespoke financial arrangements and are exactly the sort of arrangements which the public interest test was supposed to exclude. The topic of underpayment of taxes is in principle more likely to engage the public interest, but that would only be of relevance if the claimant actually held any belief that the disclosures were in the public interest. However, he did not; he thought only of himself. As is particularly evident from the email of 8 April 2021, the claimant put a price on each allegation.

189. For this reason too, none of the six disclosures were protected disclosures.

190. As there were no protected disclosures, the complaints of unfair dismissal and detriment because of making protected disclosures must fail.

191. For completeness, and although this test is only relevant to remedy, we find that the disclosures were not made in good faith. That is quite clearly the case; they were made to bolster the claimant's attempt to extort money from the respondent.

Automatically unfair dismissal (protected disclosures)

192. The tribunal does not have jurisdiction to hear this complaint because the claimant was not an employee.

193. However, if it did, as noted, for the automatically unfair dismissal complaint to succeed, the reason or the principal reason for the dismissal must be that the employee made a protected disclosure or disclosures. However, the alleged protected disclosures formed no part of the reason for the respondent terminating the claimant's contract. The reason for doing so was because the claimant sought to blackmail the respondent. Although the alleged disclosures were made at the same time and in the context of the claimant blackmailing the respondent, those alleged disclosures are properly separable from the reason why the respondent terminated the claimant's contract. This complaint fails for that reason.

Detriment (protected disclosures)

194. The tribunal does not have jurisdiction to hear these complaints because the claimant was not an employee or a worker.

195. However, if it did, tor the purposes of the protected disclosure detriment complaints, the claimant relies on 10 detriments which are set out at paragraph 6.2.1 – 6.2.10 of the list of issues. For ease of reference, we refer to them below as detriments 1-10.

196. Detriments 2, 3, 4 and 10 are all matters connected with the termination of the claimant's engagement, namely: there was no termination process before he was terminated; there was no investigation; he was not given notice or payment in lieu; and he was not given any right of appeal. The respondent does not dispute that there was no "termination process" save that the claimant was issued with a termination notice on 9 April 2021. However, the reason for this treatment was twofold. First it was the respondent's genuine view that the claimant was engaged on a consultancy basis (which he was) and the respondent's genuine view that the claimant had committed serious breaches of that agreement by attempting to blackmail the respondent (which he had). The claimant was accordingly treated in line with the terms of the consultancy agreement and as a consultant, where there was no requirement for a termination process, investigation, notice or right of appeal. That was the sole reason for treating him this way. The alleged protected disclosures were nothing whatsoever to do with the reason for this treatment. These complaints therefore fail for this reason.

197. Detriment 1 is that the respondent *"sought to intimidate the claimant"* by direct correspondence of 10 April 2021 and by the letter from Wiggin of 11 June 2021.

198. It is not clear what is referred to by the first limb of this, but the respondent understands the reference to be to one of the Telegram messages from Mr Ageyev at page 645 of the bundle (actually on 11 April 2021). However, that message was not one of intimidation; Mr Ageyev simply reiterated the reason for the termination of the claimant's engagement, namely his attempt to blackmail the respondent. Furthermore, the claimant was not intimidated; indeed, in his response he persisted with his attempts to extort money by stating *"you have one hours to say HELLO and this is your last chance not to be as stupid as he is"*. The alleged detrimental treatment is therefore not established. Furthermore, Mr Ageyev did not say this because the claimant made alleged protected disclosures. He simply reiterated the reason for the termination of the claimant's contract. This complaint therefore also fails.

199. As to the Wiggin letter, it was a response to a letter from the claimant's lawyers setting out the respondent's position. In doing so it necessarily set out the respondent's view that the claimant had attempted to extort money from the respondent. It did so in perfectly professional terms and is not intimidating. The detrimental treatment is not therefore made out. Furthermore, it was not done

because the claimant made alleged protected disclosures. This complaint therefore also fails.

200. Finally, the claimant asserted a number of financial detriments (5, 6, 7, 8, and 9) namely: no payment of outstanding bonuses; no payment of expenses; no payment for unused holiday pay; no payment for stock options; and the claimant was not provided with or confirmed he would be provided with 1% of the purchase price from the respondent's sale of the app.

201. We accept Ms Leadbetter's submission that, as the claimant had no entitlement to be paid any of these, he has suffered no detriment. Although the claimant clearly considered that he deserved more than was agreed, the claimant cannot be reasonably aggrieved at not being paid significantly above and beyond what he was due. The complaints fail for that reason alone. Furthermore, even if the respondent had been wrong about the actual legal entitlement, it plainly genuinely believed that there was no entitlement. That, and not any protected disclosures, was the reason for not making these payments, so the complaints also fail on causation grounds.

202. In addition, some of the alleged detriments, notably the non-payment of bonuses, significantly predate the alleged protected disclosures and therefore fail on that ground too; something cannot have been done because of a protected disclosure which has not yet happened.

203. Finally, any detriment complaints which relate to sums allegedly payable prior to 8 April 2021, in particular the bonus complaints, are significantly out of time. There is no argument before us that these acts were part of a series of similar acts or failures. Furthermore, the claimant was consulting with lawyers from late 2020 and so was in a position to bring any complaints he considered he had at that time. It was, therefore, reasonably practicable to have brought such complaints in time. The tribunal does not therefore have jurisdiction to hear any such complaints.

"Ordinary" unfair dismissal

204. The tribunal does not have jurisdiction to hear this complaint because the claimant was not an employee.

205. Had the claimant been an employee, we would have found that he was dismissed for the potentially fair reason of misconduct. For the reasons set out above, the claimant sought to blackmail the respondent. This was "gross misconduct" in any ordinary sense. Furthermore, it was captured by the summary termination provision at clause 17.1.3 of the claimant's contract. As noted, this was the reason why the respondent took the decision to terminate that contract.

206. In terms of the Burchell test, not only did the respondent have a genuine belief that the claimant had sought to blackmail the respondent, but that belief was a reasonably held one for the reasons set out in our findings of fact above; it is quite obvious that the claimant was seeking to blackmail the respondent.

Furthermore, as the evidence of that was clear in the meetings of 8 and 9 April 2021 and the email of 8 April 2021, there was no requirement for any further investigation to establish whether the misconduct had taken place. It clearly had on the face of those documents. The respondent had, therefore, carried out such investigation as was reasonable. The requirements set out in the Burchell test are therefore satisfied.

207. In terms of fairness, we note that the claimant's contract was terminated without, as is usually the case for employees, the holding of a separate disciplinary hearing. However, as set out in our summary of the law, we are required to consider whether in all the circumstances of the case the employer acted reasonably in treating the reason that they had as sufficient to dismiss the claimant. We have been referred by Ms Leadbetter to the case of Taylor, which we have set out in our summary of the law above. That provides that, where the reasons for the dismissal are serious, notwithstanding some procedural imperfections, a tribunal might nonetheless conclude that an employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee.

208. In this case, Mr Ageyev was himself party to the claimant's blackmail attempt. He formed the view that this was extremely serious conduct likely to warrant the termination of the claimant's engagement. Mr Taranov received an email in similar terms and formed a similar view. They nonetheless afforded the claimant the opportunity of another meeting with Mr Ageyev the following day. When after that meeting it was abundantly clear that the claimant was indeed seeking to blackmail the respondent and its owners, they felt that the only option open to them was to end the claimant's engagement with immediate effect.

209. In that scenario, therefore, the respondent had extremely strong grounds to conclude what had been said by the claimant, the seriousness of what had been said and that the claimant was not resiling from but rather persisting with his blackmail attempts, without any further procedure. It was, and we accept Ms Leadbetter's submission in this respect, such an unusually stark case, taking into account equity and the substantial merits of the case, that we consider that the respondent acted reasonably in treating the claimant's conduct as sufficient reason for termination even without further procedure and without holding a separate disciplinary meeting. The decision to dismiss was within the reasonable range of responses.

210. For these reasons, even if the claimant had been an employee, his dismissal was not unfair, and his unfair dismissal complaint would have failed.

Polkey

211. Even if we are wrong about that, and the respondent should have held a disciplinary hearing, that could have been done within a couple of weeks and we have no doubt that the outcome of that hearing would have been that the claimant was summarily dismissed. This is because there can have been no doubt about what the claimant said (as his comments in the meetings were recorded and reiterated in the email of 8 April 2021); his comments are not capable of an innocent interpretation; his attitude was entrenched and he had

already reiterated his blackmail attempts after the initial meeting; and he was a senior individual entrusted with significant responsibility. It is inconceivable that he would not have been dismissed, and fairly dismissed, at such a disciplinary hearing.

212. In addition, we refer to our findings regarding his conduct towards Ms YL and that, even if he had not been dismissed for blackmail, he would have been fairly dismissed as a result of his conduct towards her.

213. Therefore, even if we were wrong and, had the claimant been an employee, there should have been a disciplinary hearing, that would have resulted in a fair dismissal within two weeks of the date on which the claimant's contract was in fact terminated. We would, therefore, have made a reduction in the compensatory award for unfair dismissal under the principles in Polkey to 2 weeks' pay.

Contributory fault

214. Again, we accept Ms Leadbetter's submission that this is a case of striking contributory fault. The claimant sought to take advantage of the respondent and extort money from the respondent for his own benefit by making malicious threats. This is culpable and blameworthy conduct of the worst kind and it contributed entirely to the claimant's dismissal.

215. We would therefore have made a 100% reduction in both the compensatory and basic awards for unfair dismissal had we found that the dismissal was unfair.

ACAS Code

216. Had the claimant been an employee, the ACAS Code would have applied to his dismissal. It was not followed, in particular in that there was no disciplinary hearing. However, an uplift to an award of compensation only becomes a possibility where a failure to follow the Code is unreasonable. Ms Leadbetter has submitted that, given the circumstances of the case, we should consider with care whether the respondent's approach to matters could truly be considered to be unreasonable. The respondent genuinely believed that the claimant was not an employee. It was responding to a vicious attack on its business. It is entirely understandable that the respondent felt it necessary to remove the claimant from the business immediately without further process. For all these reasons, we do not consider that, in the circumstances of this case, a failure to follow the ACAS Code was unreasonable.

217. If the claimant had been successful, therefore, we would not therefore have made any uplift because of an unreasonable failure to follow the ACAS Code.

Wrongful dismissal/breach of contract

218. As noted, the tribunal does not have jurisdiction to hear this complaint because the claimant was not an employee.

219. However, if it did, as we have found, the claimant committed gross misconduct, namely the blackmailing of the respondent (and indeed in acting in an abusive manner to Ms YL). The respondent was therefore entitled to terminate the claimant's contract without notice. There was, therefore, no breach of contract. This complaint therefore fails.

Unauthorised deduction from wages/breach of contract

220. As noted, the tribunal does not have jurisdiction to hear the complaints of unauthorised deduction from wages because the claimant was not a worker and the complaints of breach of contract because the claimant was not an employee.

221. However, if it did, the complaints would all fail for the following reasons.

222. The first of these complaints is for an alleged failure to pay the sum of approximately €400 for expenses the claimant allegedly incurred up to the termination of his contract. Under the consultancy agreement, there was no contractual entitlement to payment of expenses in general and, even in the more limited arena of travel expenses, the only entitlement was to be repaid travel expenses which were agreed in advance. The claimant has not provided any evidence that the expenses which he seeks were preapproved. We therefore find that they were not preapproved. As there were no preapproved expenses, the claimant has no entitlement as a matter of contract and such wages were not "properly payable" for the purposes of the unlawful deduction from wages complaints. These complaints therefore fail.

223. As set out in our findings of fact, there was no entitlement to quarterly bonus payments, which is the second of the allegations under this category. Therefore, there was no breach of contract and there were no "properly payable" unpaid wages. These complaints therefore fail.

224. Furthermore, complaints in respect of the alleged bonuses would be significantly out of time and, for the reasons given above, could have been brought within time, in particular given that the claimant was consulting with solicitors from late 2020. As it was, therefore, reasonably practicable to have brought these complaints within the time limit, the tribunal does not have jurisdiction to hear them.

Holiday pay

225. The tribunal does not have jurisdiction to hear these complaints as the claimant was not a worker.

226. If it did, his complaints about unpaid holiday pay which was rolled over from 2019 and 2020 would fail. This is because the basis on which the claimant

maintains that he was entitled to rolled over holiday pay under the WTR from these years was that the effects of coronavirus in Spain meant that it was not reasonably practicable for him to take his full entitlement to annual leave in 2019 and 2020. The respondent's holiday year is the calendar year. Leaving aside the obvious fact that the pandemic did not start until 2020 and this could not therefore have been a reason for not being able to take holiday in 2019, the claimant was asked about this in cross-examination. When asked if the pandemic prevented him from taking holiday, his answers were *"not really"* and *"no I don't think so"*. We therefore accept, based on the claimant's own evidence, that the pandemic did not stop him from taking holiday.

227. That would leave holiday pay for the year in which his engagement terminated, in other words the 2021 calendar year. If he was a worker, he would be entitled to accrued but untaken holiday in respect of the period from 1 January to 9 April 2021. We are in no position to calculate this. We do not know what time during this period the claimant took as holiday. Furthermore, the rate of pay relevant would be based on the amount he worked, which was around two hours a day. The respondent was clear in its ET3 that, if it was found that the claimant was a worker, it would pay whatever amount was due. However, as we have found that the claimant was not a worker and he therefore had no entitlement to holiday pay, there is little point in trying to carry out the hypothetical task of calculating this given the inadequate information that we have.

Failure to allow companion

228. The tribunal does not have jurisdiction to hear this complaint because the claimant was not a worker.

229. However, if it did, it would fail for the following reasons.

230. First, the claimant was not required or invited to attend a disciplinary hearing on 9 April 2021; rather, as the claimant admitted in cross-examination, this was just a meeting in a coffee shop between him and Mr Ageyev.

231. Secondly, he did not make any request to be accompanied.

232. Thirdly, because the claimant did not make any such request, the respondent did not refuse any such request.

233. For all these reasons, this complaint fails.

Summary

234. In summary, therefore, the tribunal does not have jurisdiction to hear any of the claimant's complaints because he was neither an employee nor a worker. However, if it had had jurisdiction to hear those complaints, they would all have failed.

Respondent's costs application

235. Ms Leadbetter then made an application for costs on behalf of the respondent. She explained that the respondent was seeking an order for its costs from the beginning of the proceedings up until now, which totalled £179,658.49.

236. She acknowledged that such an award would require a detailed assessment.

237. She also flagged at the start that it might not be appropriate for the tribunal at this hearing to make any findings about the claimant's financial means and whether or not those should be taken into account in the tribunal's exercise of its discretion to award costs. She explained that this was because there was no documentary evidence about the claimant's means in the bundle and that the tribunal had made findings that the claimant's evidence was highly unreliable. She said that, therefore, to rely on what he might say about his financial means without orders being made for disclosure of further information as to his means may not be appropriate; similarly, she also fairly indicated that simply to ignore anything the claimant might say about his financial means and therefore not to take those means into account might also be unfair. We will return to this later.

Law

238. After Ms Leadbetter had announced her intention to make a costs application, the judge explained the relevant law to the claimant for his benefit.

239. The tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules 2013 at rules 74-84. The test as to whether to award costs comes in two stages.

240. First, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or response have no reasonable prospect of success? If that is the case, the tribunal must consider whether to make a costs order against that party.

241. Secondly, if that is the case, should the tribunal exercise its discretion to award costs against that party? In this respect the tribunal may, but is not obliged to, have regard to that party's ability to pay.

242. The tribunal has the power, without the need for a detailed assessment, to make an order for costs not exceeding £20,000. Where the tribunal proposes to make an order in excess of £20,000, the amount to be paid must be determined by way of a detailed assessment. The judge explained that such a detailed assessment could be carried out by an employment judge at the London Central tribunal who was trained to carry out such detailed assessments. He explained that, as he was not so trained, it would be another judge at another

hearing who would have to carry out such an assessment, if such an assessment was required.

243. It was agreed, however, that the tribunal was in a position to make findings at this hearing about whether the claim had no reasonable prospects of success and whether the bringing of or conduct of the proceedings by the claimant was unreasonable etc. Furthermore, it would hear submissions on the issue of whether it was appropriate to make findings at this stage about the claimant's financial means and whether they should be taken into account in relation to any costs award and would decide what to do in this respect.

Documents

244. The respondent produced to the hearing a summary schedule of their costs, including a breakdown of the total sum claimed; a large amount of without prejudice correspondence between the parties; and the case of Jilley v Birmingham and Solihull Mental Health NHS Trust and Others [2007] UKEAT/0584/06/DA, which Ms Leadbetter in due course referred to in connection with the financial means issue.

245. Both parties then made submissions. The tribunal adjourned to consider the submissions and, when the parties returned, gave its decision.

Decision

No reasonable prospect

246. The tribunal finds that the claimant's complaints had no reasonable prospect of success, first in terms of the jurisdictional issues as to whether the claimant was an employee or worker and secondly (with one partial exemption in relation to the holiday pay complaint) in terms of the substantive merits of the complaints.

247. As to the jurisdictional points, we fully accept that in many cases where an individual asserts that they are an employee or a worker, there is a complex fact pattern to determine, and it is often something that is arguable both ways. This is particularly so in those cases where the documents might say one thing but, because one party to the contract does not have equal bargaining power with the other, the question of whether the tribunal should go behind the written contract can be very arguable. However, the present case does not come into this category. That is evident from the findings that we have made. Specifically, not only were the arrangements consistent with the independent contractor contract which was in place, but it was the claimant who drafted that contract and it was the claimant who insisted on remaining a consultant. In terms of bargaining power, it was the claimant who had knowledge about consultancy/employment arrangements and not Mr Taranov, so the claimant was not at any disadvantage in terms of equality of arms. Furthermore, it was the claimant who decided the nature of the relationship and not the respondent and it was the claimant who drafted the terms of the contract and provided them to the respondent for signature. It was entirely driven by the claimant. In these

circumstances, the argument put forward at this tribunal that the claimant was either an employee and/or a worker of the respondent had no reasonable prospect of success. As all the complaints are contingent on the claimant demonstrating that he was either an employee or a worker of the respondent, that means that the entire claim had no reasonable prospect of success.

248. Secondly, with one limited exception, the substantive merits of the complaints also had no reasonable prospect of success. The limited exception is in relation to the holiday pay complaint for the year in which the claimant's engagement terminated (2021). In relation to that, the respondent accepts that, if the claimant was a worker (which he was not), he would be owed holiday pay for the period from 1 January to 9 April 2021. However, that is a tiny aspect of the lengthy list of issues which was the subject of these proceedings.

249. The remaining complaints had no reasonable prospect of success on their substantive merits. In summary, this is because most of them were predicated on a conflict of evidence about the reason for the termination of the claimant's engagement, namely whether it was terminated because of the claimant attempting to blackmail the company or, as the claimant submitted, for raising protected disclosures. It is absolutely evident, as we have found, on the face of the contemporaneous transcripts, that the claimant was blackmailing the company; he knew this, and he knew this from the start. It is this fact that has been fatal to the substantive merits of: establishing that he made protected disclosures; his automatically unfair dismissal complaint; his protected disclosure detriment complaints; and his breach of contract/wrongful dismissal complaint.

250. This fact has also been fatal to his ordinary unfair dismissal complaint in the sense that it is the seriousness of this behaviour, which he knew about from the start, which meant that, even if he had established that he was an employee, his dismissal was not unfair, notwithstanding that the respondent did not hold a disciplinary hearing. Furthermore, because of this fact, it was evident from the start that the compensatory and basic awards would almost inevitably be reduced by 100% as a result of the contributory conduct of the claimant.

251. Furthermore, the unlawful deduction from wages/breach of contract complaints also had no reasonable prospect of success; it was clear on the documents that the claimant did not have these entitlements and he knew that from the start (however much he might have felt that he "deserved" them).

252. The bulk of his holiday pay complaint was in relation to alleged unpaid holiday for 2019 and 2020; it was predicated on him not having been able to take it because of the pandemic, but he admitted in evidence that in fact the pandemic did not stop him from taking his holiday. He knew that from the start. This complaint therefore had no reasonable prospect of success from the start.

253. Finally, his complaint of failure to allow a companion also had no reasonable prospect of success; the claimant admitted that this was not a disciplinary hearing and he had not made a request to be accompanied, each of which facts was fatal to this complaint; this complaint therefore had no prospect of success whatsoever and the claimant knew this from the start.

254. In summary, therefore, none of the complaints had any reasonable prospect of success from the start and, therefore, the tribunal must consider whether to exercise its discretion to award costs. In relation to this, as the complaints did not have any reasonable prospect of success from the start, we consider that any costs incurred by the respondent from the start would be in scope in the sense that those costs have all been incurred after the point when the claimant knew or ought to have known that the complaints had no reasonable prospect of success.

Acting unreasonably and abusively in bringing the proceedings

255. Similarly, we also find that, right from the start, it was unreasonable for the claimant to have brought the proceedings. That is for similar reasons to those set out in the section above, namely that he knew or ought to have known that the complaints had no reasonable prospect of success. It was therefore unreasonable conduct on his part to bring the proceedings.

256. In addition, we also find that the claimant's purpose in bringing these claims, right from the start, was abusive. Just as the claimant made his "disclosures" on 8 and 9 April 2021 with the purpose of extracting money from the respondent, he also brought these proceedings for the same reason. Given the lack of merits, his previous behaviour, and his ongoing behaviour after the proceedings were initiated (which we reference below in the section on unreasonable conduct of the proceedings), we conclude that the bringing of these proceedings was an ongoing attempt to extract money from the respondent on the basis that the proceedings might, in the claimant's threats, reveal matters to do with tax that were adverse to the respondent, rather than because of any belief in the merits of the complaints brought. That is an improper and indeed abusive ground for bringing employment tribunal proceedings. We therefore find that, from the start, the claimant's bringing of these proceedings was abusive.

257. Again, we are obliged to consider whether to exercise our discretion to award costs under this head as well. Again, because we consider that it was unreasonable and abusive for the claimant to have brought the proceedings right from the start, any costs incurred in defending those proceedings have been incurred as a result of that unreasonable and abusive conduct.

Unreasonable conduct of the proceedings

258. Finally, we consider Ms Leadbetter's submissions that the claimant in various respects conducted the proceedings unreasonably.

259. First, she took us to various passages in the without prejudice correspondence where the claimant, as indicated above, continued his course of action in seeking to extort money (in this case a high settlement) from the respondent by making threats of the kind that he had done on 8 and 9 April 2021. We set out a few examples below.

260. He does so in an email of 21 January 2022 to the respondent's solicitors.

261. He does so again in an email of 28 February 2022 to the respondent's solicitors, where he tries to argue for a higher settlement on the basis that the consequences of the claim being aired in court might be *"very detrimental for your clients if authorities decide that behind all of this there was a significant issue that could be considered tax evasion"*. The claimant is not conducting the litigation appropriately, say for example by suggesting that a settlement offer should be higher because of weaknesses in the respondent's case; rather, he is threatening reputational damage if the matter goes to court.

262. The claimant does so again in an exchange of Telegram messages concerning settlement between himself and Mr Taranov in July 2022. In them, he states: *"Also, you are considering that you will win which is far from realistic. The conversations are irrelevant for much deeper realities like having an employment relationship, the fact that you both were living in Barcelona and therefore the establishment of all companies should be Spain and not the UK or Malta. This would trigger a lot of things related to my employment relationship… And potentially lots of others. Having said this, it was never my idea or desire to go this way."*

263. The examples above are of conduct of the proceedings which is unreasonable and indeed abusive.

264. Finally, we find that the claimant acted unreasonably by refusing to accept various settlement offers made on a *"without prejudice save as to costs"* basis. The chronology in this respect is important and we take a little time to go through that below.

265. We have already referenced the letter of 11 June 2021 from Wiggin, the respondent's solicitors, in which they set out for the benefit of the claimant and his solicitors why they (rightly) considered that the claimant had no claim against the respondent, in particular referencing the consultancy status points and the clear fact that the claimant had sought to extort money from the respondent.

266. Subsequent to that, the respondent on 23 November 2021 made a settlement offer via ACAS of £10,000. The claimant did not accept that and, instead, made a counter offer of £500,000 (a figure strikingly similar to the demand he had made of Mr Ageyev on 9 April 2021). In the light of the merits of the claim (or, more to the point, the lack of them), it was unreasonable for the claimant not to have accepted the offer of £10,000. Any costs incurred after 23 November 2021 therefore similarly flow from the claimant's unreasonable conduct in not accepting that offer.

267. On 8 July 2022, Wiggin sent the claimant a detailed letter which went through each of his complaints and explained why the claimant would not win on those complaints. The letter is written in detail and its tone is entirely professional. The points made bear a striking resemblance to many of the conclusions which we have made above. At the end of the letter, the respondent made an offer of: either $80,000; or $30,000 and share options representing 0.25% of the value of the respondent's total shares. In the light of the merits of

the complaints, that was an extraordinarily generous offer. The letter then went on to explain:

"Each of the above offers are very generous in the circumstances and represent significantly more than we consider you could expect to be awarded at Tribunal should you succeed in your claims (or some of them). For this reason, this offer is made on a *"save as to costs"* basis. As stated above, this means that we reserve the right to refer this to the Tribunal at the appropriate time and to make an application for you to pay all of the Respondent's costs incurred in relation to both the UK and Spanish proceedings should you proceed further with this case and not be awarded such a sum by the Tribunal. You should be aware that we expect such costs to exceed £100,000 and the Tribunal has the power to order a party to pay the other party the whole of their costs in circumstances when a party to proceedings acts unreasonably or their position is misconceived. We would submit to the tribunal that failing to take this offer seriously would constitute unreasonable conduct of this nature."

The letter stated that the offer remained open until 15 July 2022 but went on:

"The deadline has been set as we anticipate being instructed imminently to start work on the Respondent's witness statements and instruct counsel in preparation for the final hearing. As such, should the offer not be accepted within the timescale set out above, it will remain on the table but will decrease automatically by the amount of such legal costs the Respondent incurs following the deadline. Given the work we anticipate carrying out in respect of this case in the coming weeks, we would expect the amount on offer to reduce considerably shortly after the deadline expires."

268. The claimant did not accept this offer. He replied in a letter of 11 July 2022 which, whilst not specifically stating a counter offer, set out a table of sums which came to just over €470,000, a figure that was wholly unrealistic in the context of the merits of his complaints. Given the merits of the case, and the fact that Wiggin could not have been clearer with the claimant about why his claim would not be successful, it was entirely unreasonable for the claimant not to accept this very generous offer.

269. On 13 July 2022, the claimant made a settlement offer of €375,000. This was the lowest offer which he made. Again, given the merits of the claims, it was wholly unrealistic. There was no further substantive negotiation after this.

270. In summary, therefore, it was unreasonable conduct by the claimant in not accepting either the 23 November 2021 offer of £10,000 or the subsequent offer of $80,000 (or an equivalent alternative) made on 8 July 2022.

271. Therefore, we are also obliged to consider whether to exercise our discretion to make an award of costs on the basis of the claimant's unreasonable conduct of the proceedings.

Discretion

272. As will become apparent for the reasons set out below, we do not feel that we can at this stage consider every factor which may be relevant to the exercise of our discretion as to whether to award costs. However, there are certain factors which are of relevance which we are able to make findings about. We note those here.

273. First, the claimant is a litigant in person. However, he is an intelligent professional individual who, whilst not an employment lawyer, has built up a knowledge of legal contracts and of the distinctions between consultancy and employment. He was not, therefore, a litigant in person with no knowledge whatsoever of the law or the subject matter of the proceedings. Furthermore, as he admitted, he had been taking legal advice from at least late 2020 onwards, before he proceeded to attempt to blackmail the respondent. Furthermore, prior to drafting his claim, he instructed UK solicitors who wrote letters to the respondent about his potential claims and who, in due course, drafted and submitted his claim form. In addition, although at some point he ceased instructing those solicitors, he had had the benefit of several letters from Wiggin setting out exactly why his complaints would not succeed which, given his intelligence and experience, he was more than capable of properly analysing. We do not, therefore, consider that the fact that the claimant was a litigant in person at the hearing is a factor which in the circumstances of this case should in any way lead us to refrain from exercising our discretion to make an award of costs.

274. Secondly, it is worth noting that in one set of Telegram messages between the claimant and Mr Taranov in July 2022, when they were discussing a potential settlement, the claimant stated *"I told you we can settle if it happens professionally and by Monday. Otherwise, I will not be open again for any negotiation and will go to court no matter what happens and even at the risk of having to bear all the costs."* The claimant, therefore, appreciated in July 2022 at least that there was a risk that he might have to bear *"all the costs"*. In addition, he had been told by Wiggin in their offer of 8 July 2022 what those costs were and that they were likely to be in six figures. Furthermore, as a professional dealing in financial matters and legal contracts, he cannot have failed, right from the start, to realise the potential costs which the respondent would incur in fighting the litigation. The amount sought in this application by Ms Leadbetter should have come as no surprise to him.

275. There are no other factors beyond those above which we consider relevant to the exercise of our discretion apart from, potentially, the issue of the claimant's means and the issue of whether a detailed assessment will be required.

Claimant's financial means

276. As indicated, Ms Leadbetter raised the issue of whether it was appropriate or reasonably possible for the tribunal at this hearing to consider the issue of what the claimant's financial means were and whether it should take that into account in exercising its discretion. She referred us to the case of Jilley and the following passages of that case:

> 44. "Rule 41(2) gives to the Tribunal a discretion whether to take into account the paying party's ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential.

45. In this case the Tribunal has not provided any such explanation. It has made an order for detailed assessment, knowing that even if the costs are substantially reduced at the detailed assessment they are still likely to be beyond the ability of Ms Jilley to pay them. We do not say the Tribunal is not entitled to take such a course; but reasoning is required if it is to be taken.
46. It occurred to this Appeal Tribunal, in the course of argument, that the Tribunal might have taken the view that, if costs were to be the subject of detailed assessment, it was solely for the County Court to take account of ability to pay. If the Tribunal took that view it was in our judgment wrong. Even if a Tribunal orders detailed assessment it is entitled, in the exercise of its discretion, to make an order for costs which takes account of ability to pay. It can, for example, order that only a specified part of the costs should be payable: see rule 41(1)(c).
47. Moreover rules 41(1) and (2) taken together are wide enough, in our judgment, to allow a Tribunal to take account of ability to pay by placing a cap on an award of costs even where it orders a detailed assessment. Particularly if a Tribunal is satisfied that a paying party has been frank as to his means, it may be positively desirable to do so. It may, for example, render it unnecessary to go through the expense of a detailed assessment, or assist parties to reach terms of payment.

    …

53. The first question is whether to take ability to pay into account. The Tribunal has no absolute duty to do so. As we have seen, if it does not do so, the County Court may do so at a later stage. In many cases it will be desirable to take means into account before making an order; ability to pay may affect the exercise of an overall discretion, and this course will encourage finality and may avoid lengthy enforcement proceedings. But there may be cases where for good reason ability to pay should not be taken into account: for example, if the paying party has not attended or has given unsatisfactory evidence about means.

277. In short, Ms Leadbetter stated there was no documentary evidence about the claimant's means in the bundle and that the tribunal had made findings that the claimant's evidence was highly unreliable. She said that, therefore, to rely on what he might say about his financial means without orders being made for disclosure of further information as to his means may not be appropriate; similarly, she also fairly indicated that simply to ignore anything the claimant might say about his financial means and therefore not to take those means into account might also be unfair.

278. The tribunal did ask the claimant about his financial means. He said that over the last 18 months, he had an income of only around £5,000 - £6,000 and currently had no clients. He said he had no other income and no assets; that he did not own his own home or have any other property; that all he had in the bank was about €700; that he had a few shares but that they were of zero value; that he had no further income; that he had personal debts and liabilities of €100,000 and, of these, about €15,000 were owed to friends who had lent him the money to get through the last few months, with the rest being owed to institutions; and that he had no professional indemnity insurance. In short, what the claimant told us was that he had nothing of value and significant debts.

279. For the moment, we neither accept nor reject this evidence. We consider that we are not in a position at this hearing to evaluate what the claimant's financial means are nor are we in a position to decide fairly whether we should take his financial means or lack of them into account when exercising our discretion in relation to costs. This is because it would be unfair simply to

accept what the claimant has told us without any further documentary evidence given our findings about the lack of reliability of the claimant's evidence in general. Furthermore, we also consider that, without giving the claimant one more chance to furnish the relevant evidence, it would also not be appropriate for us, for example, simply to reject what he has told us on the basis that his evidence is unreliable and to make a decision at this point not to take his financial means into account.

Next steps

280. That leaves the question of how to proceed. The tribunal expressed the view to the parties that it would be preferable for this tribunal to make the findings regarding financial means and whether to take them into account, as it has heard all the evidence of the case so far, as opposed to a judge coming to this fresh at a detailed assessment. Furthermore, if there was a further short hearing before this tribunal to determine that question, it may be, depending on what we decided, that there would be no need for a detailed assessment, with all the associated cost (for example, if the tribunal decided to make an award of £20,000 or less having heard the evidence about the claimant's means). The tribunal therefore proposed to make certain orders for the provision of documents by the claimant relating to his means and to list a hearing before the same tribunal accordingly. The tribunal discussed this approach with the parties and they both agreed to it.

281. The following orders were therefore agreed:

1. By no later than **18 November 2022**, the respondent will send to the claimant and the tribunal a set of draft orders in relation to what the claimant should be required to disclose in relation to his financial means for the purposes of the costs application.

2. By no later than **25 November 2022**, the claimant shall provide any comments which he has on those draft orders to the respondent and the tribunal or, if he simply agrees with the orders in the form drafted by the respondent, he shall confirm that he agrees with them. Thereafter, the judge will decide the form of the orders and will issue them.

3. No later than **13 January 2023**, the claimant will comply with those orders, including providing to the respondent any documents which are the subject of those orders.

282. A costs hearing before the same tribunal is listed for one day on **Friday, 24 February 2023**, beginning at **10 AM** or as soon thereafter as possible. The hearing will take place **in person at London Central**.

283. The claimant explained that it was not a problem for him to attend in person at London Central, notwithstanding that he lived in Barcelona (and, as previously noted, the claimant did not have permission from the Spanish authorities to give evidence/attend an online hearing from Spain).

284. The judge confirmed that these written reasons would be sent to the parties as soon as practically possible.

15 November 2022

_____

Employment Judge Baty

Judgment and Reasons sent to the parties on:

03/02/2023

…….....

For the Tribunal Office

Schedule

Agreed List of Issues

1. Employment status

1.1 Was the claimant an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

1.2 Was the claimant a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996 and Regulation 2 of the Working Time Regulations 1998?

2. Unfair dismissal

2.1 Does the tribunal have jurisdiction to hear a claim for unfair dismissal? The respondent contends that the claimant was not employed under a contract of employment. If he was employed: -

2.2 What was the reason or principal reason for dismissal? The respondent says the reason was conduct and/or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

2.3 Was the reason or principal reason for dismissal that the claimant made a protected disclosure?

If so, the claimant will be regarded as unfairly dismissed.

2.4 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

2.4.1 there were reasonable grounds for that belief;

2.4.2 at the time the belief was formed the respondent had carried out a reasonable investigation;

2.4.3 the respondent otherwise acted in a procedurally fair manner;

2.4.4 dismissal was within the range of reasonable responses.

3. Remedy for unfair dismissal

3.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

3.1.1 What financial losses has the dismissal caused the claimant?

3.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

3.1.3 If not, for what period of loss should the claimant be compensated?

3.1.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

3.1.5 If so, should the claimant's compensation be reduced? By how much?

3.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

3.1.7 Did the respondent or the claimant unreasonably fail to comply with it?

3.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

3.1.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?

3.1.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

3.1.11 Does the statutory cap of fifty-two weeks' pay or the relevant sum apply?

3.2 What basic award is payable to the claimant, if any?

3.3 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

4. Wrongful dismissal / Notice pay

4.1 Does the tribunal have jurisdiction to hear this claim? The respondent contends that the claimant was not employed under a contract of employment. If he was employed: -

4.2 What was the claimant's notice period?

4.3 Was the claimant paid for that notice period?

4.4 If not, was the claimant guilty of gross misconduct or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

5. Protected disclosure

5.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

5.1.1 What did the claimant say or write? When? To whom? The claimant says he made the following disclosures verbally at a meeting on 8 April 2021 to Mr Ageyev:

5.1.1.1 He should have been treated as an employee of the Respondent for the previous 3 years;

5.1.1.2 That employment taxes should have been paid for all staff and should be paid for him in the UK or in Spain;

5.1.1.3 That the Respondent and another company in the Group should be registered in Spain and deduct taxes; and

5.1.1.4 That he should be provided with his bonuses for the last three quarters, he

5.1.1.5 should be provided with his (10% of) stock options in the Respondent and that

5.1.1.6 he should be paid the 1% of the sale price for the sale of one of the Respondent's products which they were preparing to sell (an app called the "Astrology and Palmistry Coach", now being called "Hint" (The "App")), as they had promised.

5.1.2 Did he disclose information?

5.1.3 Did he believe the disclosure of information was made in the public interest?

5.1.4 Was that belief reasonable?

5.1.5 Did he believe it tended to show that:

5.1.5.1 a criminal offence had been, was being or was likely to be committed;

5.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

5.1.5.3 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

5.1.6 Was that belief reasonable?

5.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

6. Detriment (Employment Rights Act 1996 section 48)

6.1 Does the tribunal have the jurisdiction to hear the claimant's claim for unlawful detriment pursuant to section 47B ERA?

6.2 If so, did the respondent do the following things:

6.2.1 The Respondent sought to intimidate the Claimant. He was sent correspondence by the Respondent on 10 April 2021 and subsequently by their lawyers (Wiggins and Co.) in which he was accused of "blackmail" and they threatened to report him to the criminal authorities in the UK and Spain;

6.2.2 There was no termination process before he was terminated

6.2.3 There was no investigation

6.2.4 He was not given any notice of termination or payment in lieu of notice

6.2.5 He has not been paid his outstanding bonuses

6.2.6 He was not paid his expenses

6.2.7 He was not paid for his unused holiday pay

6.2.8 He has not been provided with his stock options

6.2.9 He has not been provided with or confirmed he would be provided with 1% of the purchase price from the Respondent's sale of the App

6.2.10 He was not given any right of appeal

6.3 By doing so, did it subject the claimant to detriment?

6.4 If so, was it done on the ground that he made a protected disclosure?

6.5 Are any of the detriment claims out of time?

6.5.1 If so, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

6.5.2 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

7. Remedy for Protected Disclosure Detriment

7.1 What financial losses has the detrimental treatment caused the claimant?

7.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

7.3 If not, for what period of loss should the claimant be compensated?

7.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

7.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

7.6 Is it just and equitable to award the claimant other compensation?

7.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

7.8 Did the respondent or the claimant unreasonably fail to comply with it?

7.9 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

7.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

7.11 Was the protected disclosure made in good faith?

7.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

8. Holiday Pay (Working Time Regulations 1998)

8.1 Does the Tribunal have jurisdiction to hear the Claimant's claim for unpaid holiday pursuant to the WTR?

8.2 If so:

> 8.2.1 did the effects of coronavirus in Spain mean that it was not reasonably practicable for the Claimant to take his full entitlement to annual leave in 2019 and 2020? If so, how many days did the Claimant carry over to the 2021 holiday year?
>
> 8.2.2 did the Claimant take less than his accrued entitlement from 1 January 2021 to 9 April 2021?

9. Unauthorised deductions/ Breach of Contract

9.1 Does the tribunal have jurisdiction to hear the claimant's claims for breach of contract or unlawful deduction from wages?

9.2 If so, did the respondent act in breach of the claimant's contract and/or make unauthorised deductions from the claimant's wages by

9.2.1 failing to pay the sum of approximately €400 for expenses the Claimant allegedly incurred up to the termination of his contract?

9.2.2 failing to pay three quarterly bonus payments?

10. Failure to allow a companion

10.1 Does the Tribunal have jurisdiction to hear the Claimant's claim for failure to allow a companion pursuant to s10 Employment Relations Act 1999?

10.2 If so, was the Claimant required or invited to attend a disciplinary hearing on 9 April 2021?

10.3 If so, did he make a request to be accompanied?

10.4 If so, did the Respondent refuse such request?