Case No: 1403097/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Flemming**

Respondent: **21 Six Limited**

Heard at: **Bristol (By video)** **On: 23 and 24 May 2024**
Writing: 18 July 2024 and 26 August 2024

Before: Employment Judge Midgley

Representation
Claimant: Miss K Anderson (Counsel)
Respondent: Mr S Wyeth (Counsel)

RESERVED JUDGMENT

The claims for unfair dismissal and breach of contract in respect of notice pay are well founded and succeed.

REASONS

Claims and Parties

1. By a claim form presented on 23 September 2022, the claimant brought claims for unfair dismissal, notice pay and other payments. The claim form also indicated a claim for disability discrimination but that was subsequent dismissed on its withdrawal by the claimant.

2. The respondent is a company which carries on business as a design and media agency which operates from premises in Fair Oak, Hampshire. The claimant was an employee and a director of the respondent, although he was not a Director registered with Companies House. He held shares in the respondent as detailed in the background below.

3. Mr Richard Ankers owned the respondent and was the managing director. He was the Director of the respondent registered with Companies House. He was the majority shareholder. Mr Bradley Eynon was a childhood friend of the claimant, and was an employee and director of the respondent, who also held

shares in the respondent.

4. The claims arise from the circumstances in which the claimant's employment with the respondent ended. The claimant argues that he was dismissed at a meeting on 28 April 2023 or by communication from Mr Ankers on 6 May 2023. He alleges that the dismissal was unfair because Mr Ankers told him that he had was no longer wanted in the business.

5. The respondent's primary case is that there was no dismissal within the meaning of s.95 ERA 1996, but instead there was a termination by mutual consent. Alternatively, if there were a dismissal on 28 April 2023, it avers that the reason for dismissal was some other substantial reason because the respondent genuinely believed that there was a mutual agreement to end the claimant's employment and it was therefore acting on the basis of a mutual mistake.

Procedure, Hearing and Evidence

6. The hearing was conducted by video. The parties had agreed a bundle of documents (248 pages). I was also provided with the following witness statements:

   6.1. For the claimant: the statements of the claimant (18 pages), Mrs Jessica Flemming, the claimant's wife and a former employee of the respondent 9 (4 pages) and the statement of Mr Matthew Taylor (3 pages). All gave evidence.

   6.2. For the respondent: the statements of Mr Rick Ankers (7 pages) and Mr Bradley Eynon (6 pages). Both gave evidence.

7. Additional documents were provided by the parties during the hearing as follows:

   7.1. Copies of pages from Mr Eynon's notebook in which had made notes for what he wanted to say at the meeting on 28 April 2023 (3 pages)

   7.2. The claimant's P45

   7.3. A one-page printout from the respondent's bright HR system detailing documents which had been placed on the system in respect of the claimant.

8. Although the issues had been identified by EJ Frazer on 17 May 2023, the respondent's Counsel, Mr Wyeth, had prepared a list of issues which was not agreed by the claimant. Miss Anderson argued that if the respondent sought to rely on mutual mistake, it required permission to amend its response, which the claimant would object to. I therefore clarified the issues with the parties; the following matters arose:

   8.1. Miss Anderson confirmed that the claimant was not running an argument that he was constructively dismissed (as an alternative to a claim that he was dismissed); she clarified that the claimant's case was that he was dismissed either on:

8.1.1. 28 April 2023, when he told that he was no longer wanted in the business by Mr Ankers

8.1.2. or on 6 May 2023 when Mr Ankers told him that his position was untenable, that his shares were worth 'fuck all' and that if he did not accept the respondent's proposed terms for his shares and termination, Mr Ankers would 'go nuclear'; or

8.1.3. On an uncertain date in May/June 2023 when the respondent terminated the claimant's access to its computer systems and email server.

8.2. Mr Wyeth confirmed that he was not proposing to call any additional evidence in relation to the argument that there was mutual mistake (which he relied upon to establish a potentially fair reason for dismissal, namely some other substantial reason ("SOSR")) and would only make submissions on the law. He further confirmed that the respondent was not pursuing any argument that there was a break down of trust and confidence as an alternative ground for SOSR.

8.3. On that basis, Miss Anderson withdrew her objection to that issue being added to the list of issues.

9. The parties' representatives had not discussed the timetable for evidence and argument before the hearing; which is a regrettably common occurrence. The consequence was similarly regrettably predictable: there was insufficient time for deliberation and for a judgment to be handed down in the listing. That was because, when I raised timetabling, Mr Wyeth indicated that he would require 2.5 hours to cross examine the claimant, and limited time to question the claimant's supporting witnesses, and Miss Anderson indicated that she would require 2.5 hours to cross examine each of the respondent's witnesses. Both Counsel indicated that they expected that they would require an hour each for closing submissions. In the event, the parties' closing arguments concluded at just after 5pm on the final day.

10. Given the fundamental disputes of fact as to the discussion on 28 April 2023, I directed that I would hear evidence from the claimant, Mr Ankers, and Mr Eynon in chief and in isolation from the other witnesses as to the discussion at the meeting, before the witnesses gave evidence and were cross examined. Counsel consented to that course.

11. Having heard the evidence of the witnesses in chief as detailed above, the witnesses were then cross examined in respect of their statements. I then heard oral submissions from Counsel. Neither had prepared anything in writing, and their submissions on the law were extensive.

12. In consequence the entirety of the two days was taken with evidence and argument. I directed that the parties' counsel should produce a bundle of relevant authorities (as none had been provided in advance) and that I would then produce a reserved Judgment.

13. I was provided with a six-page helpful summary of the law by Miss Anderson on 3 June 2024, and a bundle of authorities which had been agreed by Mr Wyeth (113 pages).

Factual Background

14. I make the following findings of fact on the balance of probabilities in light of the evidence I heard and read.

15. The claimant and Mr Brad Eynon were school friends.

16. In 2012 the claimant set up a company, 'SF Creative Design' (SF Creative"). The claimant suggests that although that business had no revenue for the first two years of trading, it was sufficiently successful by 2015 that it had a turnover of approximately £100,000 when it was incorporated and registered at Companies House. Whilst it is unnecessary for me to making any finding of fact to that effect, I accept that the business's turnover was growing and becoming profitable.

17. The claimant subsequently outsourced the majority of SF Creative's work to contractors in the Philippines; he sent images and text to them from which they would build the design work for SF Creative's clients. That is corroborated in part by the significant contractors' costs recorded in the company's filed accounts.

18. In 2013 the claimant and Mr Eynon incorporated a company together, Innovate Creative ("Innovate"), and both men became directors. The claimant provided creative input and direction, Mr Eynon the technical expertise. Innovate carried on business as a website design and maintenance company, providing services of professional design for websites, including content, for a monthly fee. Another employee was engaged by Innovate in late 2015, and in late 2016 the claimant's wife, Miss Jessica Flemming, was employed as an accounts manager, maintaining the companies' customer base.

19. In 2017 the claimant set up a property business with a friend, Mr Matthew Taylor, called the 'TF Property Group' ("TF Property"), which bought and renovated properties to sell or rent. I accept the evidence of Mr Taylor and the claimant that as they continued to hold full time jobs, their work for TF Property was predominantly conducted in the evenings and in their spare time and at weekends, although I suspect (but making no finding, as it is an ancillary matter) that it was for more than the three or four hours a week the claimant suggested. They viewed properties once a month until 2020, after that point, because of the issues caused by Covid and the lockdowns and restrictions, they used a sales agent to provide details of properties to them.

20. TF Property purchased its first property in November 2018; at the time of the hearing it had a portfolio of 14 properties. Although the value of the properties it owns exceeds £4 million, the business carries a year-on-year loss given the costs drawn from the business, including Directors' loans/salary, and the mortgage and bank charges of approximately £3 million levied on the properties.

<u>The recruitment of the claimant and Mr Eynon to the respondent</u>

21. In 2018 Mr Ankers approached the claimant and Mr Eynon and expressed an interest in buying Innovate, employing the claimant and Mr Eynon and offering them shares in the respondent as consideration. Mr Ankers then had other business (Jellyfish Solutions Ltd, a print management business, and White

Communications, a design agency for healthcare clients), which he wished to partner with the respondent to provide a comprehensive package of services to clients.

22. The benefit for the claimant and Mr Eynon in the sale of Innovate was therefore the potential value of their shares in the resulting company as they helped to grow it and the group companies. No agreement was reached at that stage, however, in part because Mr Ankers did not wish to take on one of Innovate's employees.

23. In approximately October 2019 that employee left, and Mr Ankers made a further approach to the claimant and Mr Eynon. At that time Mr Ankers had bought a further company, Fruit Studios, a digital agency, which he intended should purchase Innovate for the respondent's group of companies (but he did not disclose that detail to the two men). It was then agreed that the claimant and Mr Eynon would each be employed by the respondent on a salary of £4,000 net a month and each would receive 24.9% of the shares in the respondent, but they would also undertake work to assist the group companies, particularly Fruit Studios. They were to be paid a nominal purchase fee of £5,000 each for Innovate (however, it was not paid until June 2022.)

24. That agreement was reached in principle in December 2019. At that time, Innovate's gross turnover was approximately £20,000 a month. The claimant and Mr Eynon were to be employed as directors and were to have responsibility for the day to day running of the respondent; the claimant leading on creative output and Mr Eynon on digital delivery. The respondent then had approximately eleven staff working from offices in Fair Oak, although three were based overseas. The 21 Six group of companies employed approximately 40 staff.

25. However, the agreement was not reflected in any correspondence or in any written agreement, whether a contract for sale, memorandum of sale or a share purchase agreement.

26. Mr Ankers was aware at the time of the agreement that the claimant owned and ran both SF Creative and TF Property and he consented to the claimant continuing his work for each. Mr Eynon was obviously aware of the claimant's work in that regard and helped the claimant from time to time with work for SF Creative.

27. There is a dispute as to whether the claimant was issued with an employment contract or written particulars of the details of his employment when his employment with the respondent started or later. The claimant asserts that he was not, the respondent that he was, relying on a contract which was contained in the bundle. The claimant avers that contract was manufactured for the purpose of these proceedings and he had never seen it prior to its disclosure in these proceedings. I resolve that dispute in my conclusions below.

28. Mr Ankers and Mr Eynon assert that the claimant, Mr Eynon and Mrs Flemming moved to the payroll of Fruit Studios in approximately February 2020 but it was not until May 2021 that the respondent, rather than Fruit Studios, purchased Innovate. Again, it is unnecessary to determine the precise date of either incident, rather each is an example of the parties' failure to create a clear

contractual or other documentary record of either agreement, for there was no contractual document produced recording the date or terms of the purchase. Indeed, the relevant share-holding documentation was not prepared until July 2021.

29. The parties' intention was that the respondent would be developed and built to become a full-service design and media agency. The claimant offered creative and design experience and skills and would be involved in marketing and sales. Mr Eynon the technical knowledge, experience, and skills to build the digital aspects of the business. Mrs Flemming was also employed.

30. In practice, in early 2020 through to 2021, decisions at group level which effected the respondent were made solely by Mr Ankers, often with little or no consultation with the claimant or Mr Eynon. Whilst that was consistent with his role as owner of the group of business and the respondent, and as Managing Director of the respondent's group of companies, it surprised the claimant and Mr Eynon, who had understood that they would have input into decisions affecting the operation of the respondent.

31. In 2020 and thereafter for the duration of the incidence of Covid-19 pandemic and the national lockdowns, the parties and the respondent's staff worked from home. Mr Ankers determined that the respondent's offices should be downsized and relocated to premises in Curdidge. Much of the respondent's day to day business operations were therefore migrated from in person meetings in the office to online meetings, which were conducted from the workers' homes.

The claimant's absence from the respondent's business

32. In August 2020 the claimant's younger brother was diagnosed with stage 4 bowel cancer; the claimant informed Mr Ankers of his condition. The claimant was very close to his brother and his brother's diagnosis had a profound affect on him.

33. In April 2021, the claimant asked his brother to move in with him and his family so that he could help to care for him and spend time with him. He began regularly to miss weekly online team meetings and rarely attended the office.

34. Subsequently, on 29 July 2021 Mr Ankers told the claimant that he should take the time he needed to be with his brother; Mr Ankers and Mr Eynon having agreed that such leave would be at full pay and would in principle be for August and potentially all of September.

35. The claimant returned to work on 4 October 2021 after a period of compassionate leave in September.

36. In the period of his compassionate leave, Mr Ankers and Mr Eynon both noticed that TF Property was actively posting on Linkedin, showing the claimant at various events or locations. Both men were galled and frustrated in equal measure by what they perceived to be the claimant's focus on his businesses at a time when he was on compassionate leave on full pay from the respondent.

The claimant's return to work and the stresses in the business relationships

37. During the period between October 2021 and his brother's death in February 2022, the claimant took his brother to all his medical and other appointments, and, initially, he worked from home as much as possible to ensure he was with him and could help him. However, towards the end of his brother's life, in January and February 2022, the challenges of his brother's condition and the attritional nature of it on the claimant led him to return to the office with greater frequency, to afford him breaks from his brother's situation and to allow him to be distracted by the normality of work.

38. In the period between his return to work and the end of 2021, the claimant experienced a growing sense that he was not actively being involved in the management and strategy of the respondent and he became increasingly concerned and anxious about it.

39. It is clear that during late 2021 and early 2022 there was some discussion between Mr Eynon and the claimant about their roles respective in the business, in particular about Mr Eynon's title changing to Managing Director and that of the claimant to Commercial Director. Mr Ankers suggests that was consequent to the awaited and proposed purchase of Innovate by the respondent. Again, it is unnecessary to determine whether that is correct. In any event, at or about that time, a Head of Operations was appointed on a significant salary without discussion with the claimant, which only added to his sense of isolation.

40. In January 2022 the claimant continued to work for the respondent but also undertook approximately 20 hours work on various tasks for SF Creative in the month. On 5 January he sent Mr Eynon a 90-day business plan for work on the respondent covering the period to the end of March 2022, writing "*At the moment with everything going on at home, I need to be busy and focused[,] at the moment I don't feel we are working on the business and have a plan."* In early January the claimant arranged a workshop with an external tutor for the wider 21 Six group employees. It was a success and well received by all.

41. At or about the same time, the claimant began attending a private members club at the Old Bond Store in Southampton once a month, in the evening, to seek out opportunities to advance TF Property. Both Mr Eynon and, consequently, Mr Ankers became aware, the former having friends who were also members, one of whom contacted Mr Eynon asking whether he would also be interested in joining. The knowledge that the claimant appeared to be actively pursuing his other business interests at a time when he was noticeably absent from the respondent's offices further increased Mr Eynon's and Mr Ankers' frustrations with the claimant.

42. On 20 January 2022 the claimant emailed Mr Eynon to raise the concerns that since his return to work in October 2021, he believed that Mr Eynon had not included him in the management and direction of the respondent and its team of employees. He noted that the projects he had been working on before his compassionate leave were managed and run by other employees and Mr Eynon, and that it appeared his work was always being checked by Mr Eynon before being sent to clients. Lastly, he referenced the discussions the two men had had in relation their potential roles and job titles, and that job specifications had been prepared which he had considered.

43. Mr Eynon replied noting that he had concerns about the claimant's contribution to the respondent's business, writing,

> *I feel the effort we both put into the business is not balanced… I was planning on chatting to you about this to see how you were feeling.*
>
> *Your property business is doing so well (which is great) and it feels like that is where your true focus is. I was going to ask you if the [respondent] is actually a burden on how you really want to spend your time.*

44. He proposed meeting to discuss the issue, which he said he had felt for some time but had not wished to raise, given the health of the claimant's brother.

45. The claimant replied, acknowledging that the roles were not balanced, but implying that may be because he was being excluded from projects and there was no clear plan for involving him. He wrote,

> *Property is 100% my end goal and the legacy for my kids and my family to live off. However I see a massive opportunity with [the respondent] to grow something special.*
>
> *…. I'm 100% in on this and am willing to get my teeth stuck into building it.*

46. He repeated his view that clear roles and tasks that would enable him to more readily contribute to the respondent's business, and requested that they should work on that.

47. The two met for a clear the air meeting on 24 January, which had been largely orchestrated by Mr Ankers, who also attended. The claimant stated that he wanted to be more involved in the business, but repeated his concern that that he felt he was being under utilised as he had no clear role and was largely isolated from decisions, and therefore felt lost and demotivated. The meeting was positive, and the parties agreed to move forward constructively, the claimant was allocated a specific project developing a new website for the respondent, and devising a marketing plan and strategy, and the claimant and Mr Eynon agreed to provide each other with a daily update detailing the work that they were undertaking and planning.

48. On 25 January there was a whole team meeting. The claimant attended and both Mr Eynon and Mr Ankers were enthused by how engaged and motivated the claimant appeared.

49. The claimant's brother sadly died on 17 February 2022. The claimant took a short period of time off before returning to work in late February.

50. The claimant continued to undertake work for the respondent between late February and April 2022; however, the claimant was, I find, more frequently working from home at that time, and his visits to the office were more infrequent and less regular. I reject his evidence that he was attending the office 3 times a week from 24 January 2022; it is simply inconsistent with his own accounts in messages to Mr Eynon which are detailed below.

51. At the same time the claimant continued to undertake work for TF Property. Mrs Flemming undertook the marketing work for that company, releasing

scheduled posts of content on Linkedin and other social media platforms, often using family photos, with redactions, to create the impression that the claimant and the company was continually actively. I accept her evidence and that of the claimant that the posts were scheduled rather than contemporaneous. They are not, in my judgement, evidence that the claimant was doing what was shown in the posts on the date of each post.

52. To the extent that Mr Ankers or Mr Eynon were aware of the posts at the time, the posts added to their sense that the claimant's focus was on his other businesses at the expense of his work for the respondent.

April 2022

53. On 22 April Mr Eynon received an alert from the Google admin account used by SF Creative that a staff member from the respondent was seeking to access documents held on it. Mr Eynon's subsequent investigations revealed that the claimant had asked a staff member to undertake some work for him, but he had not raised that with Mr Eynon in advance. He reported that to Mr Ankers.

54. On 25 April the claimant engaged a WhatsApp exchange with Mr Eynon in which he queried whether Mr Eynon thought that the claimant was (in his words) 'doing fuck all' for the respondent. Mr Eynon replied in the following terms,

> *The relationship between us feels more distant than ever. There's zero collaboration and it doesn't feel like a partnership anymore.*

55. He complained that he had no idea what the claimant was doing each week, although he praised one piece of work which he was aware the claimant had produced, but noted that the claimant had asked an employee to undertake some work for SF Creative, which he observed he would have accepted and been 'cool with' but felt that the claimant should have informed him at the very least.

56. The claimant responded, suggesting that he was able to provide a list of the work he had been doing, but noted that from his perspective there was no collaboration, referencing the fact that the Head of Operations had been appointed without any consultation with him. He suggested that the work he had asked to be done for his company was a 5-minute printing job, although he accepted that he should have asked Mr Eynon for his agreement before instructing the member of staff to undertake the work. He proposed that he could come into the office a couple of times a week and sent Mr Eynon documents detailing the work he had done and was proposing to do to demonstrate that he was actively involved in his work for the respondent.

57. Mr Eynon replied proposing a meeting to discuss their mutual concerns, reporting that he had discussed the issue with Mr Ankers moments before replying to the claimant, and Mr Ankers had recognised that there were issues between the two friends and suggested they should all meet to air and resolve them.

58. The claimant was wary of a meeting with Mr Ankers, and replied to Mr Eynon that he did not feel he was 'neutral' as he had barely seen him in weeks and was aware that Mr Eynon and he had regular discussions. Mr Eynon replied

that that was part of the issue; he was in the office and therefore saw Mr Ankers regularly, but the claimant was 'not about.'

59. During that week, Mrs Flemming had resigned from her role with the respondent and was working her three months' notice period.

The meeting of 28 April 2022

60. A finance meeting had previously been scheduled for 28 April 2022 for the claimant, Mr Eynon and Mr Ankers.

61. Some time prior to the meeting, in the week before it, Mr Ankers had determined that the only solution was for the claimant to leave the respondent.

62. On or about 25 April Mr Eynon and Mr Ankers had met to discuss a solution. During the meeting, the two men agreed that they did not want the claimant to continue in the business as they did not believe his heart was in it, and Mr Ankers told Mr Eynon that he would propose buying the claimant's shares, but he did not share the proposal to pay the claimant the equivalent of a years' salary for those shares.

63. The following matters are not in dispute in relation to the meeting that subsequently occurred:

63.1. Mr Ankers told the claimant that he was sorry, but they had come to the end of the road and needed to find a way to part company amicably;

63.2. Mr Eynon said that he felt things had gone on too long, that they needed to find an amicable way forward as things were not working and the efforts he and the claimant put in were unbalanced.

63.3. At that stage the claimant became angry, and Mr Ankers threatened to close the meeting, and the claimant calmed down.

63.4. Mr Ankers proposed that the respondent would seek to find a way to buy the claimant's shares and that the respondent would pay a value for the shares in 12 monthly instalments as a means of making the payment as take efficient for the claimant as possible and to ensure that the offer was financially achievable to the respondent.

63.5. Mr Ankers proposed a year's gross salary, paid net, in equal monthly installments.

63.6. However, the parties did not reach an agreement as to the figure for the claimant's shares at the meeting, because the claimant did not accept the offer but asked for a lump sum.

63.7. Mr Ankers told the claimant that he could leave that day.

63.8. The claimant asked about his pay, and Mr Ankers told him that he would be paid to the end of the month.

64. There is a dispute as to whether Mr Ankers told the claimant that he did not trust him, that he was not wanted in the business and responded to the

claimant's request for his shares to be valued by telling him to 'fuck off.' The claimant relies upon those matters as grounds for alleging that he was dismissed. The respondent denies they occurred.

65. The claimant left the meeting, returned to his home and told his wife "that's it; it's done." He then contacted his Uncle, who owned a large company, to ask him for advice as to what he should do. He was advised to obtain up-to-date figures for the respondent's cashflow put three options for a buy out to the respondent.

66. On 29 April the claimant emailed Mr Eynon, advising him that he had received some work and would review it.

67. On 3 May the claimant emailed Mr Eynon asking for the final months to be added to management accounts so that he could review them. He wished to review them to determine what offer to make to the respondent for his shares.

68. On that same day, Mr Ankers emailed the claimant and Mr Eynon advising them that he had asked for the final figures for the severance agreement and they could be discussed when he received them. He proposed a meeting later that week to discuss them before writing,

> *It's occurred to me that although we have agreed that we are parting ways and you are leaving the business, we need to think through any potential interim period and what that looks like and indeed if there is one!*

69. The claimant sought advice on the proposed settlement from his uncle, who had experience in such areas, and then emailed Mr Ankers and Mr Eynon on 4 May 2022 with three options for a severance payment and buy out of his shares, which were as follows:

    69.1. a £70,000 lump sum and £70,000 in 12 equal payments paid monthly; or

    69.2. £70,000 in 12 equal payments paid monthly with a lump sum of £30,000 and 5% shares in the company; or

    69.3. A lump sum of £125,000

70. On 5 May Mr Ankers sent a WhatsApp message to the claimant, suggesting that they had a telephone call to discuss the options. The claimant replied, to say that he was reluctant to speak with Mr Ankers until he had received a written response to his emailed offers. Mr Ankers responded (still on 5 May) as follows,

> *I think at the very least we need to have a call … there's an easy way to sort this together or a more difficult one and I am very keen to take the easy one…*
>
> *At the very least, an open conversation on the phone to discuss the exact position, I think would be useful..*
>
> *I'm very keen to sort amicably..*

To be clear, none of your options on the email would work

71. The claimant responded by WhatsApp on 5 May at 19:44 to say that if the options were not workable, there was no need for a call, he would stay in his role and try to make the situation work.

The discussion of 6 May

72. On 6 May Mr Ankers called the claimant whilst he was at home; the claimant took the call using earbuds connected to his phone. Mrs Fleming was present and asked the claimant to pass her one of his earbuds so that she could listen in. There is a fundamental dispute as to the content of that conversation:

    72.1. The claimant alleges that Mr Ankers was furious and in an expletive laden outburst told him that his position at the respondent was untenable, that his shares were worth nothing and that when Mr Ankers bought SF Creative it was worth 'fuck all' and that if the claimant did not accept his offer he would 'go nuclear' on him, before saying he was a bad leaver and would get pennies for his shares.

    72.2. Mr Ankers accepts that the conversation became heated, but it resolved to become amicable and a figure of £61,000 was agreed for the claimant's shares.

73. I resolve that dispute in my conclusions below.

74. On 7 May the claimant tried to access his documents in the respondent's Google workspace drive. Mr Eynon emailed him to check whether he had tried to access the drive and the claimant replied to confirm that he had. He then left for a family holiday during which he and the family spread his brother ashes.

Settlement discussions

75. On 9 May Mr Ankers emailed the claimant formally rejecting each of the offers in the claimant's email of 4 May, but restated the offer he had made on 28 April of £70,000 gross (£55,000 net) paid in 12 equal monthly installments.

76. The claimant replied on 16 May purporting to accept the offer, although he was in fact making a counter offer, proposing the £55,000 paid in 12 equal monthly payments and adding a further payment of £5,000 for Innovate, and 50% of the crypto funds held by Innovate. He raised the fact that the respondent had failed to follow any due process or procedure in respect of his dismissal, but indicated that he was not seeking to pursue that complaint.

77. Mr Ankers responded on 17 May, indicating that he was willing to include a payment of £1000 for 50% of the crypto currency held by Innovate which would be paid on the last working day of May and £5000 for innovate, which would be paid in addition to the offer for the shares in 12 monthly equal payments.

78. The claimant accepted that offer in principle, indicating that he believed, he would need to pay a small amount of tax in respect of the share payments and asked for the respondent to draw an agreement for him to approve. The agreement was therefore subject to the agreement of written terms.

79. On 19 May Mr Ankers emailed the claimant and indicated that he would ask his lawyers to draw up an agreement and confirmed that the claimant would be paid £61,000 in 12 equal monthly payments, that the claimant would be responsible for any tax, and that his employment would end on 30 April 2022. Mr Ankers followed that with an email on 24 May which was copied to the respondent's solicitor, confirming that a settlement agreement and a P45 would be sent to the claimant as soon as possible.

80. The respondent made the first payment in accordance with the agreement on 1 June and, on 3 June, sent the claimant the draft settlement agreement for his signature.

81. The claimant sought legal advice and advised Mr Ankers of that fact when he contacted him on 20 June, chasing the signed agreement.

82. On 28 June 2022 the claimant emailed Mr Ankers advising him that following discussion with his solicitor, during which the solicitor raised concerns about the circumstances in which his employment was ended and the value of his shares, he had been advised to obtain an independent valuation of the shares. He wrote,

> *As it stands, I am happy to leave the business as both you and Brad have made it clear that there is no role me – as you previously mentioned my role is untenable, however I don't feel the overall package is a fair reflection of [Innovate, the respondent] or my employment notice*

83. Mr Ankers replied on 29 June, expressing his dismay as he believed an agreement had been reached on 16 and/or 18 May. He asserted that the parties had mutually agreed (on 28 April) that the claimant's employment would end at the end of the April "rather than go down a disciplinary route with regard to your various breaches of your employment contracts." That last reference was simply false, there was no discussion of potential disciplinary charges or of any disciplinary process on 28 April or at any point prior to Mr Ankers' email on 29 June.

84. The claimant replied on 30 June asserting that he was still an employee and that failing to pay him would amount to a breach of contract. He asked for his salary to be paid.

85. Mr Ankers replied on 6 July again asserting that there was a termination by mutual agreement on 28 April with effect from 30 April. The claimant replied that day disputing Mr Ankers account, asserting that his agreement to leave was always contingent on being paid a reasonable sum for his shares.

86. On 15 July Mr Ankers emailed the claimant asserting the respondent's position. In relation to 28 April Mr Ankers wrote

> *…your employment terminated by agreement on 30 April 2022. In support of this position the Company relies on the following: 1. Your emails of 16 and 18 May 2022 excepting the Company's proposal for your employment to end on 30 April 2. You did not raise any objection to my open emails of 19 and 24 May-both of which made express to your employment ending on 30 April 2022.*

87. On 20 July the claimant initiated early conciliation with ACAS.

88. On 28 July, the claimant responded to Mr Anker's email of 15 July. In relation to 28 April the claimant wrote

> *Quite obviously I was under duress and not in the right mindset when I indicated agreement to your proposal. I was scared and broken.*
>
> *Anyway, the agreement was always subject to settlement terms…*

89. In relation to 6 May the claimant wrote

> *You called me … and were quite angry, you stated that my position was "untenable", my shares were "worth nothing" and that my business… Was "worth fuck all" and that when you bought it for me "it was fucked". You said that you were "helping me out with this offer" as you "could just fire me." I asked you on what grounds you would fire me, and you threatened that if I didn't accept what you offered then you'd "go nuclear" on me.*

90. The claimant issued the claim on 23 September.

The Issues

91. The issues are set out in the case management orders of EJ Frazer dated 17 May 2023 (with the exception of the claims under the Equality Act which were withdrawn, and the question of continuity of employment for the purposes of section 108 ERA 1996 which had fallen aware given the respondent accepted that the claimant had been employed since February 2020). The ground of the SOSR relied upon were clarified to be mutual mistake.

The Relevant Law

Unfair dismissal s.98 ERA 1996

Resignation or dismissal ?

92. The test was helpfully articulated in Glynwed Distribution Ltd [1983] ICR 511 by Sir John Donaldson at 519G:

> "Whatever the respective actions of the employer and employee at the time the contract is terminated, at the end of the day the question always remains the same, "Who really ended the contract of employment?"

93. In Matthew Riley v Direct Line Insurance Group Plc [2023] EAT 118 HHJ Shanks reviewed the authorities addressing that issue (at [22]-[23]), noting:

> 22. In order to bring a claim for unfair dismissal there must be a "dismissal" for the purposes of section 95 of the Employment Rights Act 1996. The relevant provision in this case is section 95(1)(a) which provides that there is a dismissal if "... the contract under which [the employee] is employed is terminated by the employer (whether with or without notice)".
>
> The authorities establish the following relevant propositions of law:

(1) Whatever the respective actions of the employer and employee at the time when the contract is terminated, at the end of the day the question always remains the same: "Who really terminated the contract?" (see: Sir John Donaldson MR in Martin v MBS Fastenings [1983] IRLR 198). The issue is one of causation.

(2) Termination of the contract of employment by the freely given mutual consent of both the employer and the employee is not a dismissal under section 95(1)(a) (see: Birch v University of Liverpool [1985] IRLR 165).

(3) The question how the contract was terminated is ultimately one of fact and degree and the tribunal must look at the realities rather than the form of the relevant transactions.

(4) Because of the consequences for the employee that flow from a finding of consensual termination the tribunal must be astute to find clear evidence that a termination was indeed free and consensual. Such a conclusion cannot apply if there is deceit, coercion or undue pressure, in particular if the employee is under direct threat of dismissal by the employer. Conversely, where there has been negotiation and discussion and an opportunity for the employee to seek legal advice, a consensual termination may properly be inferred.

(5) There is a distinction between an employee consenting to the termination of his employment and consenting to being dismissed by his employer. The latter analysis has often been considered appropriate in cases where employees volunteer for redundancy (probably as a matter of fairness because entitlement to a statutory redundancy payment itself requires a "dismissal") but the existence or non-existence of a redundancy situation is not determinative."

94. Where the language by the parties relating to the termination is ambiguous, the tribunal must ask how a reasonable listener would have construed the words in all the circumstances of the case: (see Omar v Epping Forest District Citizens Advice) [2024] ICR 301 at [97].

95. An agreement between two parties to enter into an agreement to which some critical part of the contract matter is to be left to be determined at a later point is no contract at all; it is not open to people to agree that they will in the future agree on a matter which, vital to the arrangement between them, has not yet been determined: see May and Butcher Ltd v The King [1929] All ER Rep 679 at 683.

96. Once the Tribunal is satisfied that the contract was terminated, it should determine whether there has been a resignation, a dismissal or a forced resignation, amounting to a dismissal within the meaning of s.95 ERA 1996. In Jones v Mid-Glamorgan County Council [1997] EWCA Civ 1680 gave the following guidance in relation to that assessment:

"A. Courts and tribunals have been willing, from the earliest days of the unfair dismissal jurisdiction, to look, when presented with an apparent resignation, at the substance of the termination for the purpose of inquiring whether the degree of pressure placed on the employee by the employer to retire amounted in reality to a dismissal. …. It is a principle of the utmost

flexibility which is willing in all instances of apparent voluntary retirement to recognise a dismissal when it sees it, but is by no means prepared to assume that every resignation influenced by pressure or inducement on the part of the employer falls to be so treated. At one end of the scale is the blatant instance of a resignation preceded by the employer's ultimatum: "Retire on my terms or be fired" - where it would not be surprising to find the Industrial Tribunal drawing the inference that what had occurred was a dismissal. At the other extreme is the instance of the long-serving employee who is attracted to early retirement by benevolent terms of severance offered by grateful employers as a reward for loyalty - where one would expect the Industrial Tribunal to draw the contrary inference of termination by mutual agreement. Between those two extremes there are bound to lie much more debatable cases to which, according to their particular circumstances, the Industrial Tribunals are required to apply their expertise in determining whether the border line has been crossed between a resignation that is truly voluntary and a retirement unwillingly made in response to a threat. I doubt myself whether, given the infinite variety of circumstance, there can be much scope for assistance from authority in discharging that task: indeed attempts to draw analogies from other cases may provide more confusion than guidance. In cases where precedent is nevertheless thought to be of value, the authority that will no doubt continue to be cited is Sheffield v Oxford Controls Co Ltd [1979] ICR 396."

97. Sandhu v Jan de Rijk Transport Ltd [2007] ICR 1137, CA may be treated as a case which provides an example of a factor which may help to identify when the scales tilt towards a dismissal rather than a resignation. At [36]-[37] the following comments were made:

"What is striking in the authorities, and is amply demonstrated by the cases I have discussed so far, is that in none of the cases in which the employee has been held to resign has the resignation occurred during the same interview/discussion in which the question of dismissal has been raised, and in no case in which the termination of the employee's employment has occurred in a single interview has a resignation been found to have taken place. The reason for this, I venture to think, is not far to seek. Resignation, as the authorities indicate, implies some form of negotiation and discussion; it predicates a result which is a genuine choice on the part of the employee. Plainly, if the employee has had the opportunity to take independent advice and then offers to resign, that fact would be powerful evidence pointing towards resignation rather than dismissal."

98. If there has been a dismissal, the Tribunal must consider whether the dismissal was a fair one. The right not to be unfairly dismissed is governed by section 98 ERA 1996 which provides in so far as is relevant:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

99. The principal reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

100. A reason pleaded on grounds of 'some other substantial reason' must be 'substantial' and thus not frivolous or trivial or based on an inadmissible reason such as race or sex: Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552, CA at [15].

101. In Harper v National Coal Board [1980] IRLR 260, EAT the EAT said that an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no ordinary person would entertain. It stated that where, however, the belief is 'one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation'.

102. To amount to a substantial reason to dismiss, there must be a finding that the reason could - but not necessarily does - justify dismissal: Mercia Rubber Mouldings Ltd v Lingwood [1974] ICR 256, NIRC at [8].

103. Whether the reason, once established, justifies dismissal is to be answered by the tribunal's overall assessment of reasonableness under s. 98(4) ERA 1996: Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552, CA at [15-16]. The starting point should always be the words of section 98(4) themselves. In applying the section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair.

104. In judging the reasonableness of the dismissal, the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

105. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion.

106. The question of the necessary components and appropriate test of gross misconduct was considered in Neary and Neary v Dean of Westminster [1999] IRLR 288 and Sandwell & West Birmingham Hospitals NHS Trust v Westwood [2009] 12 WLUK 559. Neary at paragraph 22 is authority for the proposition that in order to constitute gross misconduct the conduct must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment. In Sandwell at paras 110-113 HHJ Hand QC, applying Wilson v Racher [1974] ICR 428, defined gross misconduct as a "repudiatory breach of the contract justifying summary dismissal" which must include either "a deliberate and wilful contradiction of the contractual terms" or "gross negligence."

107. In Mbubaegbu v Homerton University Hospital NHS foundation Trust [2108] WLUK 02268950 the EAT observed, approving Neary, at paragraphs 32 and 33 that an employer's definition of gross misconduct was not determinative and the key issue was whether the matters relied on cumulatively were of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee; there was no need for there to be a single act amounting to gross misconduct or for each of the series of acts relied to supply the warrant for summary dismissal.

108. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd.

Contributory conduct

109. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides:

> "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

110. The compensatory award is dealt with in section 123. Under section 123(1)

> "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

111. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides:

> "where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

112. A similar power is contained in relation to the basic award in s.122(2) ERA (as quoted above) in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the basic award where it considers that it would be just and equitable (see Optikinetics Ltd v Whooley [1999] ICR 984, EAT).

113. Three factors must be satisfied if the Tribunal is to find contributory conduct (see Nelson v BBC (No.2) 1980 ICR 110, CA):

113.1. the conduct must be culpable or blameworthy

113.2. the conduct must have caused or contributed to the dismissal, and

113.3. it must be just and equitable to reduce the award by the proportion specified

114. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (Audere Medical Services Ltd v Sanderson EAT 0409/12).

115. In determining whether conduct is culpable or blameworthy, the Tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR56, EAT).

Discussion and Conclusions

Disputed facts:

(a) Contract

116. The issue in relation to the contract is not what the terms of the contract were, but rather whether the claimant was provided with a contract for the purposes of section 1 ERA 1996 and the potential of an award under section 38 ERA 1996. The relevance of the terms of the contract are primarily limited to whether they indicate one way or the other that the contract was one that the claimant was likely to have been provided, rather than whether he was in fact given a copy of it. The only other issue in relation to the contract is the question of the notice period.

117. The contract relied upon by the respondent is dated the 1 May 2021, and notes that was the start date of the employment, although the claimant's

continuous employment is said to be 1 February 2020. That latter date accords with the date on which Mr Ankers asserts that the claimant and Mr Eynon were paid by the payroll of Fruit Studios, and the former with the date that Innovate was purchased by the Respondent. Given that the respondent's case is that the claimant and Mr Eynon were employed by Fruit from 1 February 2020, and that the contract in question was produced as a result of the Covid 19 pandemic, those matters are worthy of closer scrutiny.

118. Mr Ankers suggests in his statement that the contract the respondent relies upon followed an earlier version which had been given to Mr Eynon and the claimant in February 2020, when they were said to have been first employed by Fruit. The terms of that contract include a three-month probationary period. That contract was not signed by the claimant either. If Mr Anker's evidence is right, then Mr Eynon and the claimant sold their business to Mr Ankers in principle, without a written contract of sale as protection, and agreed to work under a contract of employment which would permit Mr Ankers to dismiss them within 3 months on the grounds they had not performed satisfactorily during their probationary period, leaving them with no recourse in respect of their business which he then 'owned.'

119. I find it inherently unlikely that Mr Eynon or the claimant would have agreed to such terms. It is noticeable that that contract was not signed by the claimant either, and Mr Ankers has not produced a similar version signed by Mr Eynon. Neither Mr Eynon or Mr Ankers address that contract or the circumstances in which it was signed in detail in their statement. Mr Anker merely references it. That suggests to me that the contract was not seen by either Mr Eynon or the claimant at the time it is alleged to have been signed. That is a fact which weighs in the balance in support of the claimant's case that he was not provided with contract in issue in these proceedings (i.e. there are two contracts the claimant is purported to have been provided with, neither or which he has signed and neither of which Mr Eynon suggested in evidence he had received and had signed).

120. That later contract is again signed by Mr Ankers but not by the Claimant. Its terms suggest that it is a proforma contract and it does not appear to have been tailored to the claimant's role save for in respect of his job title and salary, the remaining terms are in my view default proforma terms (see for example the provisions in relation to training; there was no evidence to suggest that the claimant was ever required to attend or was offered any such training.)

121. By its terms the claimant was entitled to 25 days annual leave in addition to 8 days public/bank holidays. There was no provision for compassionate paid leave, save for bereavement leave for parents in line with the statutory entitlement. The requirement for notice was to 3 months from both parties. That was the same period of notice that Mrs Flemming was required to give and she was not a director. Mr Ankers's evidence was that all the respondent's employees had three-month notice clauses.

122. The terms do not therefore suggest that the contract was specifically tailored to the claimant, beyond the inclusion of his job title and pay, and do not therefore in my view assist the respondent in demonstrating that the contract was provided to him.

123. It was open to the respondent to call the individual who was asserted to have uploaded the contract to the respondent's Bright HR system, to explain the circumstances and the timing of its being saved onto the respondent's system. However, it did not do so. I was not persuaded by the evidence, which was produced very late, consisting of a record the files that were on the system that the file identified by the respondent was in fact the contract in question. When asked about that matter in cross examination, Mr Ankers was only able to say that he would need to ask a member of his IT team to verify the document was a copy of the contract.

124. On balance, therefore, I was not persuaded that the claimant was provided with a copy of an employment contract.

125. The claim under s.1 ERA 1996 for an award under s.38 EA 2002 is therefore well founded and succeeds.

126. I therefore turn to consider the claim for unfair dismissal.

127. It seems to me the essential factual determinations that I must make are as follows:

127.1. When did the contract terminate?

127.2. Who terminated the contract? Was it the respondent or was it the claimant? (That is an issue if causation)

127.2.1. If it were the claimant, did he terminate the contract in response to undue pressure or a threat of dismissal from the respondent, or

127.2.2. Was there a consensual termination on 28 April 2022?

127.3. If there was a dismissal within the meaning of s.95 ERA 1996, was it for some other substantial reason, namely mutual mistake?

(b) 28 April 2022 – the accounts of the witnesses

128. I first consider whether there was a termination by mutual consent on 28 April as the respondent argues.

129. The respondent relies on the evidence of Mr Ankers and Mr Eynon to that effect. The claimant disputes that evidence.

130. I did not find Mr Ankers to be a credible or reliable witness. His evidence was oftentimes inconsistent, and his witness statement created a strong impression that he had included certain events out of context to develop or give force to an argument he was making; I was left with the distinct impression that he was not simply reporting evidence but rather was seeking to argue through it. By way of example, Mr Ankers sought to portray the 'discovery' that the claimant had asked one of the respondent's employees to undertake work for SF Creative as the "tipping point" in the breakdown of his relationship with the claimant that led to the discussion on 28 April. That evidence has to be viewed and weighed against the evidence that Mr Eynon had contemporaneously recorded that he would have had no issue with the instruction, if only he had

been notified in advance. Mr Ankers was forced to accept in cross-examination that it was not such a fundamental tipping point after all, and so altered his account to argue that it contributed to the breakdown, although he did not identify when the breaking point occurred. Additionally, Mr Ankers suggested that that breakdown led him to request a meeting on 28 April 2022, when in fact that was a scheduled finance meeting.

131. The claimant asserted that he had asked for the respondent to be valued, so as to allow for an accurate assessment of shares and that Mr Ankers had told him to "fuck off". Mr Ankers accepted that there was a discussion in which the claimant had asked for the company to be valued, but asserted that that had led to a discussion of how that valuation might be obtained. That was not an account that was contained in his witness statement or in Mr Eynon's. I preferred the claimant's evidence on the point for the reasons given above. It was an account that he repeated under cross examination and did not aver from. On balance I am not however persuaded that Mr Ankers told claimant that he did not trust him as claimant alleges. That is not consistent with the account of Mr Eynon, who largely I found to be a credible witness, or with the general circumstances and context of the discussion.

132. I concluded that insofar as there was a reference made by either Mr Ankers or Mr Eynon to a lack of trust in the claimant, it was in the context of the heated passage of the discussion which flowed from Mr Eynon suggesting there was a lack of balance and saying he did not know what the claimant did, and the claimant making similar complaints and allegations in response. I concluded that the reference was made in the context of the view shared by Mr Ankers and Eynon that they simply did not know what work the claimant was doing and that fact that they felt that they were not able, in the context of their concerns about social media posts and other such matters, to trust the claimant's word that he was committed to the business. I concluded that once that heated moment had passed, there was an amicable discussion of potential severance terms.

133. That, it seemed to me, was consistent with the fact that the claimant was willing to discuss the termination of his employment and the terms on which he was to bought out in largely in amicable terms (with the exception of whether there would be a formal valuation for the purposes of the share purchase), and with the civil tone of the correspondence between the parties after the 28 April. I concluded therefore that although Mr Ankers coarsely refused to have the shares valued, that was because he was set on negotiating a settlement at a level which he believed the respondent could afford.

134. Mr Ankers' conduct, and the references to the lack of trust in the claimant, was not therefore, in my judgment, conduct objectively viewed which amounted to a termination of the claimant's employment by the respondent.

135. I have to consider whether there was instead a mutual termination by which the claimant's conduct came to an end. Here the difficulty for the respondent is that the essential terms of the agreement were not concluded on 28 April. Whilst the claimant agreed in principle that his employment would end, the critical element of the deal for him, the purchase price for his shares in the respondent, was not agreed, rather the parties agreed to work towards an agreement of the figures. As Miss Anderson correctly argues, an agreement

to agree is not an enforceable contract. It cannot bring another contract to an end in consequence.

136. Critically, however, I am not persuaded on the facts that there was an agreement as to a termination date; Mr Ankers suggested that the claimant could go home on 28 April and would not have to continue to work and would be paid to 30 April, but in his message of 3 May he revealed that in his mind there was only an agreement to part ways (not a fixed date for termination) and that there was therefore a need to consider would should be done in the "interim period." On 5 May the claimant indicated that if an agreement as to his shares could not be reached, he was happy to continue in his employment and to try to make the relationship work.

137. In my judgment the effect of the discussions on 28 April was that the parties could not then agree a severance sum, that they agreed to continue to negotiate to achieve a figure acceptable to both parties, and that if agreement could be reached, the claimant was willing to terminate his employment by mutual consent. There was no termination by mutual consent on 28 April 2022.

(c) Discussion on 6 May 2022

138. Again, I concluded that Mr Anker's evidence in relation to the discussion on 6 May was not credible or reliable: his responses in cross-examination were often manufactured on the spot to try to neutralise points that were raised with him. Both the claimant and Mrs Flemming maintained that Mr Ankers was furious, shouting at the claimant and that he was abusive to him. In his statement Mr Ankers wrote:

> "I accept that things did get a bit heated simply because we had a very different view as to what monies should be paid for his shares. "

139. In his evidence to me he sought to explain away the evidence of his shouting by suggesting that he was in a pub when he was called by the claimant, that he had had to step outside onto a crossroads to take the call, and that as a consequence he had to raise his voice to make himself heard. Additionally, he sought to suggest for the first time that his reference to "going nuclear" was a reference to the dispute about the claimant's shares and the complexity of their valuation and not to his own conduct or actions. Not a single aspect of that account was in his statement, despite the claimant's criticism of Mr Anker's conduct on that day being recorded in the claim form. I concluded that Mr Ankers had simply made it up to try to explain away an unattractive and damaging passage of evidence.

140. Additionally, the claimant's account was consistent with the background circumstances: Mr Ankers believed that the claimant had agreed to leave, was not willing to have the shares valued to settle a fair severance payment for them, was not willing to accept any of the offers made by the claimant and was only willing to settle on the terms which he had proposed, and with his message of 5 May that there was an 'easy way' and a 'more difficult one' to solve the dispute. The claimant's account was further consistent with a relatively contemporaneous account contained in his email of 28 July in which he reported,

> *You called me … and were quite angry, you stated that my position was*

"untenable", my shares were "worth nothing" and that my business… Was "worth fuck all" and that when you bought it for me "it was fucked". You said that you were "helping me out with this offer" as you "could just fire me." I asked you on what grounds you would fire me, and you threatened that if I didn't accept what you offered then you'd "go nuclear" on me.

141. Even allowing for the fact that such an email might well be self serving, given the dispute between the parties had crystalised at the date it was sent, I note its consistency with other contemporaneous documents, with the background evidence detailed above and with the claimant's account in the ET1.

142. Therefore, where there was a direct dispute between the claimant's evidence (or that of his wife) and Mr Ankers in relation to the call of 6 May, I preferred that of the claimant. I concluded that during the call on the 6 May Mr Ankers told the claimant that his position at the respondent was untenable, that his shares were worth nothing and that when Mr Ankers bought SF Creative it was worth 'fuck all' and that he was helping the claimant out with the offer if the claimant did not accept his offer he would 'go nuclear' on him, and fire him, before saying he was a bad leaver and would get pennies for his shares. I did not accept his evidence, given for the first time in cross-examination, that the reference to going nuclear was a reference to the complexity of share valuations.

143. Any objective listener would have concluded that what Mr Ankers was saying was 'agree to resign on my terms or be dismissed.' That is a dismissal within the meaning of s.95 ERA 1996, not a termination by mutual consent. That Mr Ankers' threat became manifest on 29 June when he referred to possibility of reverting to a disciplinary procedure in relation to matters which he falsely suggested had been raised with the claimant previously, gives support to that interpretation; albeit I stress it is not a factor which I have used to interpret the language on 6 May.

144. In my view, the latter discussions as to the terms of settlement do not alter the status of the discussion as a termination; Mr Ankers had dismissed the claimant and insisted that the severance payment would be in accordance with his offer; the parties then negotiated to finalise the details of that offer for agreement.

The reason for the dismissal

145. Mr Wyeth argues that the respondent believed that what occurred on 28 April was a termination by mutual consent, and that if that belief was mistaken, the respondent can nevertheless rely on that mistake as some other substantial reason for the dismissal, and therefore a potentially fair reason for the dismissal. He relies in support of that argument on Ely v YKK Fasteners (UK) Ltd [1994] ICR 164, where the Court of Appeal held that there is no rule of law that where an employer believes there is a resignation, it cannot rely on that belief as a potential fair reason for the dismissal.

146. At 171D-G the Court concluded:

It would be even more illogical, however, and contrary to the underlying objective of a statute designed to achieve a fair and workable system of industrial practice, to adopt an interpretation … which would result in

dismissals which have occurred through an erroneous insistence on a supposed resignation being placed in a category of their own, in which every such dismissal, regardless of the merits, would be rendered automatically unfair because the employer could not supply a reason for it. To outlaw such dismissals from the ordinary rules as to fairness affecting all other forms of dismissal, including constructive dismissal, would in my view, far from having the advantages contended for…, introduce an unnecessary complication into employment relations which would be more likely to confuse than to clarify resignation procedures in the workplace.

147. The respondent is therefore entitled to argue that its belief in resignation was the reason for termination.

148. However, the difficulty for the respondent with such an argument is twofold: first, the termination did not take place on 28 April but on 6 May. It is therefore the dismissal on 6 May against which the respondent's reason for dismissal falls to be assessed. Whilst that does not preclude the respondent relying on the evidence of its beliefs on 28 April as justification of that dismissal, equally it does not permit it to exclude from consideration relevant evidence of events between 28 April and 6 May. That evidence in my view does not support the respondent's argument that it believed that there was a termination by mutual consent on 28 April – I have already referred to Mr Ankers' email of 3 May, referring to 'we <u>are</u> to be parting ways' and to an 'interim period'. When I asked Mr Ankers to explain why he had written "are" rather than "have" when referring to the parting of ways, and why he referred to an interim period, he could offer no explanation. Similarly, Mr Ankers' threat to 'go nuclear' (which I found to be a threat of dismissal and other action) suggests that the Mr Ankers believed that the claimant's employment was continuing but that he had agreed in principle to leave if the right sum was offered for his shares.

149. Secondly, the reason relied upon by the respondent has to be substantial and not whimsical or capricious. It must be one that could justify dismissal. Here the reason for the dismissal on 6 May was capricious; Mr Ankers wanted the claimant to resign on his terms; his offer on 28 April included no offer to value the shares and the respondent made no offer for notice pay which, on the terms of the contract that is likely to be implied, would have been for 3 months' notice. The offer to pay the claimant to the end of the month, being three days, was not in any way a reasonable or substantial offer. The claimant did not accept that offer and Mr Ankers' realised that he did not, and therefore the claimant had not resigned. Dismissal for refusing to accept proffered settlement terms even if the terms were favourable is not justified and, further, is not a fair dismissal within section 98(4), having regard to the circumstances of the case, including the respondent's size and resources and the equity of the case.

Conclusion

150. The claimant was dismissed by the respondent on 6 May 2022. The respondent has failed to prove a fair reason for that dismissal. The respondent does not seek to argue that the claimant committed gross misconduct justifying summary dismissal. The dismissal was therefore in breach of the claimant's entitlement to notice.

151. The claims for unfair dismissal and breach of contract in respect of notice pay are therefore well founded and succeed.

152. The sums to which the claimant is entitled, including any necessary determination of contributory conduct, will be determined at a remedy hearing, orders in respect of which will be sent to the parties under separate letter, unless the parties can reach agreement as to the sums payable in compensation beforehand.

153. The parties are reminded of the overriding objective, given the sums involved, and the delay and time, cost and use of judicial and Tribunal resources a remedy hearing would necessitate.

_____

Employment Judge Midgley

Date 27 August 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
28 August 2024 By Mr J McCormick

FOR THE TRIBUNAL OFFICE