EMPLOYMENT TRIBUNALS

Claimant: Mr A Javed

Respondent: Optimal Strategix Group Ltd

HELD AT: Manchester **ON:** 22 February 2017

BEFORE: Employment Judge Tom Ryan

Appearances:
Claimant: Mr G Tobin, Solicitor
Respondent: Mr M Difelice, Solicitor

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The complaint of unfair dismissal is well-founded.

2. The compensation to be awarded to the claimant will be determined at a hearing unless resolved between the parties beforehand.

REASONS

1. By a claim presented to the tribunal on 31 October 2016 the claimant alleged that he had been unfairly dismissed from his employment as chief executive officer ("CEO") of the respondent on 30 September 2016.

2. The respondent admitted dismissing the claimant and stated that it had paid him in lieu of notice. The respondent pleaded and argued the case that the reason for the dismissal fell within the category provided for by section 98(1)(b) of the Employment Rights Act 1996 as "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" ("SOSR"). The respondent also accepted that it had taken the decision to dismiss the claimant and had called him to a meeting to notify him of that decision.

3. The respondent's case was that there had been a fundamental breakdown in the employment relationship, that no further steps could be taken to resolve the situation and for that reason any such steps, including an appeal, would have been futile.

4. The respondent contended that it acted reasonably. It denied that the ACAS Code of Practice ("the Code") applied or that it was in breach of the Code. The respondent submitted that any compensation awarded to the claimant should be reduced relying on the principle in the case of Polkey v AE Dayton Services Ltd [1987] ICR 142 HL and further or in the alternative that compensation should be reduced on the grounds of the claimant's contributory conduct.

5. I heard evidence from Dr Ramamirtham Sukumar, the CEO of Optimal Strategix Group Inc ("OSG)" the respondent's United States based parent company and Mr Carl Aloi, OSG's Chief Financial Officer ("CFO") who gave evidence on behalf of the respondent. The claimant give evidence himself. I read witness statements from all three. I was provided with a bundle of documents to which I refer by page number and a list of issues prepared by the respondent.

Findings of fact

6. OSG is a corporation registered in the United States and is principally based in Pennsylvania. It is a market research company. It has two subsidiaries, one based in India and the respondent based in the United Kingdom. It had a turnover in the last financial year of over £10 million and the respondent of about £862,000.

7. The claimant was appointed CEO of the respondent on 3 May 2013. He was to be paid a basic salary of £205,000, a pension contribution of up to 10% and significant bonuses. Dr Sukumar agreed that the claimant had not received bonuses in accordance with the agreement in that they were paid late and that some element at least of the guaranteed bonus of 2013 was not paid until 2016.

8. In May 2016 Dr Sukumar and the claimant discuss bonuses prior to going to a meeting with a company called Boehringer Ingelheim ("BI") . The claimant sought bonuses £196,000 for performance. Dr Sukumar disagreed that his performance justified this. The claimant then asked for bonus of £125,000. Eventually they agreed that the bonus would be £85,000. The first instalment of that bonus, £30,000, was paid on 10 August 2016.

9. Up until this point the respondent had a director of finance, Ed Dalesandro, who, when payments of this sort were due, would set up the payment, obtain authority from Dr Sukumar and the payment would then be made out of the respondent's UK account in respect of which the claimant and Dr Sukumar had authority to make transactions with the bank.

10. Mr Aloi was appointed CFO on 29 August 2016. Mr Dalesandro then reported to him.

11. Dr Sukumar's evidence was that the actual payment of bonuses was linked to the receipt by OSG of payments from its clients and that bonus would be paid as and when funds were received. The fact that the claimant had granted the respondent considerable forbearance in payment of bonuses in the past and in particular the guaranteed bonus due to be paid in the 1st year of his employment support, in my judgment, Dr Sukumar's evidence that the claimant was aware of OSG's tight cash situation and that the extent of his performance in bringing in revenue would to some extent contribute to that.

12. On 23 August 2016 the claimant sent an email to Mr Dalesandro and Dr Sukumar requesting that the remaining balance of the £85,000 bonus i.e £55,000 be wired to his account before the end of the month (111).

13. Dr Sukumar replied the same day saying that it would only happen "sometime Sep 15" as "we are waiting for BI funds to arrive in UK." He also said that OSG was "maxed out on payments". Although neither party addressed what was meant by "Sep 15" in evidence, the gist of the evidence was that this was a reference to September 2016. I suspect that "15" was a typographical error.

14. On 26 August 2016 the claimant emailed again asking for the bonus to be paid before the month end or by 2 September at the very latest because of his own financial commitments. He asserted that the money had been outstanding for 18 months. He explained that he had been indulgent with the company in the past. Significantly he said, "I sincerely hope you can help me out" and that he looked "forward to a positive response from you in giving me the help I need."

15. Dr Sukumar applied the same day explaining that he had to manage cash flows and was waiting for funds to come in. He said that if they came in that day he would make the payment that month.

16. On 13 September 2016 the claimant emailed Dr Sukumar (109) saying, "good news the PI funds have come in 300k GBP … I have let Ed know he needs to put 29k GBP on the system (the net amount…), please get him to do this today".

17. Dr Sukumar replied the same day saying that "Carl and Ed are reviewing and will be discussing details with Beevers". That is a reference to the respondent's UK accountants who managed its payroll and who would be able to provide the appropriate net amount which ultimately turned out to be £29,816.92 (121). Dr Sukumar also said that he did not believe the payment would happen on that day because of discussions with the accountants.

18. On 15 September 2016 Mr Aloi wrote to the claimant saying, "I'm working with Beevers on some open issues and am committing to getting your bonus paid at the current pay period at the end of September. If there's anything else you need, please let me know." (126)

19. The claimant replied saying that the amount was from 2014, that it should have been higher and was "interest free". He said that Dr Sukumar had promised "it would be paid on completion of the financing, then he said as soon as the BI

money comes in - I actually have to make a payment which is why needed it paying." He said the calculation was correct and asked why there was a delay.

20. Mr Aloi replied saying that he was not aware of the history but needed to resolve issues with Beevers to ensure they were in compliance. He said the payment would occur in the current pay cycle. It is common ground both of them understood this meant that Mr Aloi was saying the money would be paid in the monthly payroll at the end of the month. He offered to speak to the claimant after a meeting. Mr Aloi's evidence was that he did speak to the claimant and reiterated his commitment to pay at the end of the month. From that conversation he was in no doubt that the claimant knew that the payment could not be made until Mr Aloi had given it the "go ahead".

21. At 5:40 pm Mr Aloi email saying, "given the time in the UK, this will not happen today. Even if I can reconcile with Beevers, I need to get standardized process in place and eliminate one-off transactions. That being stated, I stand by my commitment to get you paid in this cycle. It will not go beyond that."

22. The following morning the claimant instructed the bank to pay the net sum to him reflecting the balance of the bonus directly to him. When Mr Dalesandro logged in and noted the activity on the account he reported this to Mr Aloi who instructed him to contact the bank and report fraudulent activity on the account.

23. Mr Aloi gave evidence that he did this in order to escalate in the bank the speed with which it might conduct an enquiry into the circumstances of the payment. This led the bank to report that Mr Javed was both the authoriser and the payee. Mr Aloi reported it to Dr Sukumar.

24. The claimant wrote an email that day (127) to Mr Aloi timed 10.58 am. He said, "I got this paid out - this was very old f [sic] with a long history we don't need to go into - going forward will be more organised - all the information on HMRC liabilities for this payment was correct, if you need any help with it let me know".

25. Mr Aloi replied at 4:01 pm, "You were not authorized to do this. Personally, I view this as theft and will proceed accordingly."

26. The claimant replied at 16.02 saying, "I am - I am the CEO of the company this money was well due to me - I am an authorised signatory and have made payments on my own before."

27. The claimant's evidence to me was that he informed the respondent that he had caused the payment to be made as soon as he had done so. Mr Aloi did not accept that. Because of the 5 hour time difference between the UK and the East coast of the USA the apparent discrepancy in the timings of the emails can be explained. In my judgment they support the respondent's evidence that this transaction took place in the morning of 16 September that the 2 emails apparently timed at 1601 and 1602 occurred in the minutes immediately following Mr Aloi's email at 1058 US time. For that reason I reject the claimant's evidence that he notified the respondent as soon as the transaction had taken place.

28. In evidence before me the claimant maintained that he had authorised payments out of the UK account without reference to the finance director or Dr Sukumar previously. Be that as it may, his evidence did not support the suggestion that he had authorised payments to himself or at very least of such very significant funds.

29. In my judgment, the contents of the earlier correspondence which I have quoted all support the respondent's contention that whilst the claimant as a signatory of the account may have had authority to carry into effect transactions in the UK he did not have authority to pay himself a bonus payment. The fact that he was consistently seeking Dr Sukumar's consent to the payment over the preceding month and had discussed it with Mr Aloi on 15 September 2016 all support that conclusion. I infer that he had become frustrated at the delays in payment of bonus and because of his own financial position decided to take matters into his own hands rather than wait the 2 weeks or so until the end of the month.

30. The claimant's account of this period was brief and general. It is set out in paragraph 16 of his witness statement. His justification for making the payment was that he believed it had been agreed to pay him in early September at the latest. He then said, "Because the company had the money (a large payment from [BI] had come in) and in order to avoid the ongoing breach of employment contract, I paid my outstanding bonus on 16 September 2016. The money was owed, it was appropriate that I paid it and I was acting within my duties. I believe that this was in accordance with my email exchange with Sukumar that culminated on 30 August 2016."

31. I regret to say that I consider the reasoning of the claimant on this point to be disingenuous. In evidence he suggested that as CEO of the respondent he was senior in the organisation to Mr Aloi and for that reason did not need his permission to make the payment. Whilst there is no doubt that the claimant was owed the money, and that he thought that it was appropriate that he be paid it, in my judgment he did not believe nor could he really believe that it was within his duties to do so. The terms or circumstances of payment of remuneration of himself as CEO of a subsidiary company was not something that he could set without reference to the senior management of the parent company. All the email exchanges leading up to the claimant authorising the payment into his own account bear this out. I make no conclusion as to whether the claimant's assertion that there was an ongoing breach of contract on this issue. It is not necessary for me to do so. I observe only that it seems to be likely that the claimant had agreed to payment being made by early September 2016 and that there was no agreement thereafter as to the precise date of payment.

32. Dr Sukumar's evidence was that he considered that the claimant had knowingly gone beyond his authority and had acted in bad faith and that this was potentially a matter of serious misconduct. Dr Sukumar and Mr Aloi were not only concerned about the claimant's decision to authorise the payment but the fact that he did not appear to consider there was anything wrong with doing so. They decided to fly to the United Kingdom to meet the claimant.

33. Dr Sukumar also wished to raise the issues of the claimant's performance. In preparation for the meeting that took place with the claimant on 27 September 2016 he therefore prepared two letters in advance.

34. In respect of performance he prepared the letter (129) dated 27 September 2016. He pointed out that the claimant's results for 2015 fell short of target by about US$2 million. The letter records a target to be set of US$1.35 million up to 30 December 2016. He said that he would keep the claimant's progress under review and that "it is critical that a substantial improvement has taken place in terms of your level of job performance, and that any improvement is maintained. Given the size of our European operations and your senior and critical role in it, I consider the period which I have allowed you for improvement is both fair and reasonable." He stated that a failure to achieve and maintain the improvements, is "likely to lead to the termination of your employment." He said the letter would be placed on the claimant's file but be disregarded for capability and disciplinary purposes after 12 months provided the improvements were achieved and maintained throughout that period.

35. In a second letter of the same date (130) described as a "Letter of Concern" he addressed the question of the payment of bonus. He referred to the claimant's unilateral decision to disregard the commitment Mr Aloi had made to pay the bonus in the current pay cycle and said, "While you have general authority to make payments from the OSG Ltd account you clearly do not have the authority to make any payments which were specifically not authorized." The letter continued, "Further, your actions in total were NOT consistent with the Chief Executive Offficer, Europe and breached the fiduciary duty and duty of loyalty and good faith that you owed to the Company. Accordingly, I am expressing my disapproval of your behaviour by way of this Letter of Concern."

36. Dr Sukumar said that he had given serious consideration to formal disciplinary process which he considered would have been justified and appropriate. He said that he had decided to adopt a lenient approach and deal with it by way of the letter which would be placed on the claimant's file. He said the claimant should not interpret that as detracting from the gravity of the situation. He said, "A repeat of the same or similar behavior in the future, while it will always be considered on its own facts, is very likely to be addressed through a formal disciplinary process."

37. According to Dr Sukumar and Mr Aloi the letter of concern was given to the claimant first at the meeting. Both gave evidence to the effect that the claimant did not think he did anything wrong or that what he did was serious. Mr Aloi's evidence was that when the letter of performance was handed over, the claimant's reaction was that he blamed Dr Sukumar for the fact that one of his sales team had left and thus affected the performance. He disagreed with parts of how Dr Sukumar was managing OSG. Mr Aloi described the claimant's behaviour as curt and abrupt and at one point the claimant the suggested that Dr Sukumar was either "a liar" or had not told the truth.

38. Dr Sukumar in addition to those matters described the claimant's attitude as "incredibly arrogant" and that at one point the claimant described him as an idiot or used a term to that effect. Although the claimant disputed the

respondent's witnesses account of the meeting he did not dispute that the possibility of him leaving the respondent was raised. It is common ground that the claimant was not due in work the following day. Dr Sukumar suggested the claimant take an additional day away from the office to consider his position. The claimant did not wish to take another day but agreed to do so reluctantly.

39. It is common ground that after the meeting Mr Aloi went to speak to the claimant alone. According to Mr Aloi, he volunteered to try and mediate between the claimant Dr Sukumar. Mr Aloi had only recently joined OSG and prior to this trip to the UK had only met the claimant once before. He thought things are broken down between Dr Sukumar and the claimant that he was offering to help. According to Mr Aloi the claimant said this was a good idea and accepted that he had made a mistake in transferring the bonus money and that he regretted doing so. In evidence the claimant denied that he had said he such thing or that any conversation like that had occurred. He was not able to give me any clear evidence as to what in fact had been discussed. I prefer Mr Aloi's evidence on this. As a senior member of the organisation who had little history with the claimant it is likely that he would have had just such a conversation.

40. On 28 September 2016 Dr Sukumar received by email a letter (131) from solicitors, HMA Law, acting on behalf the claimant. The letter intimates a claim that Dr Sukumar made false representations about the assets of OSG and the companies it comprised and, in particular, the value of an equity stake that the claimant was offered and accepted at the time he joined the respondent. I was informed by the parties that this dispute was ongoing and I make no further finding about the subject matter of that dispute. What is material in respect of this complaint is that it is alleged that Dr Sukumar made representations which according to the letter before action he "knew to be false and misleading". The claim, of fraudulent misrepresentation, is intimated against both the respondent and Dr Sukumar personally and damages are claimed in a figure which is said to be equivalent to £151,000 together with costs.

41. The evidence of Mr Aloi was that in the evening of 28 September 2016 when he and Dr Sukumar were still in the UK he received a copy of the letter by it being forwarded by Dr Sukumar.

42. Both Mr Aloi and Dr Sukumar gave evidence that they considered the relationship between the respondent and the claimant had irreparably broken down. Mr Aloi said this in paragraph 29 of his witness statement, "We, as a company and individuals, had lost confidence in Asif to run the UK operations and to act in accordance with the authority conferred upon him. Asif, had also evidently lost all confidence in Dr Sukumar if he thought that he was capable of fraudulent misrepresentation. The Letter before Action makes reference to Asif making secret recordings of discussions he had with Dr Sukumar."

43. Dr Sukumar's evidence was that he was completely shocked to receive the letter before action. He was angry and said he felt that the claimant was trying to back into a corner. He said that it felt like a personal attack. The length of the letter suggested to him that clearly the claimant had been preparing to send it to him for some time.

44. The claimant's evidence on this was that he had instructed solicitors some weeks earlier. He had been asked to give instructions during the preparation of the letter. He had approved the draft of the letter on 26 September 2016. He said that he was unaware when the solicitors were going to send it to Dr Sukumar.

45. Dr Sukumar said that he felt was by the letter and that the claimant had asked his lawyers to send it to him at the time they did so that he might gain some perceived tactical advantage. He said he found the allegation of acting fraudulently as "hurtful and offensive in the extreme." He said this in paragraph 29 of his statement, "The culmination of the hurtful and offensive allegations contained in the letter before action; the unauthorised payment of the bonus and, to a lesser extent, Asif's poor performance and poor behaviour convinced me that the employment relationship had completely broken down. The letter from Asif's lawyers in particular felt like the final straw. Carl and I frankly did not trust Asif to run OSG's European operations and he evidently did not trust either myself or the company to act properly towards him."

46. Mr Aloi and Dr Sukumar discussed the letter at breakfast the next morning. Dr Sukumar drafted a letter to the claimant. They took legal advice from solicitors in the UK. The letter was redrafted. They were due to return to the United States on 30 September 2016 so they decided to meet the claimant the following morning in order to give him the letter.

47. In the meantime on 29 September 2016 at 11.48 pm the claimant sent an email to Dr Sukumar (137). On the subject of the letter of concern the claimant foreshadowed what is set out in his witness statement as the reasons for the decision to arrange the payment of the bonus which I have recorded in paragraph 30 above. He described the letter of concern as "outrageous". He described it as "effectively imposing a disciplinary warning without pursuing a disciplinary procedure." He described the performance warning as being placed upon his file without "proper process and principles of natural justice". He invited Dr Sukumar to withdraw the letter or he would instigate a formal grievance. He informed Dr Sukumar that he would attend the office the next day so they could talk.

48. At 9 am on the morning of 30 September 2016 Dr Sukumar handed the claimant a letter terminating his employment (141) and informed him of that fact. Dr Sukumar's letter referred to an erosion of the relationship between them having gone on for some time. He referred to the letter of concern and described the claimant's reaction to that letter being issued as, "inappropriate and at times bordering on aggressive" and that the claimant was "wholly and entirely unrepentant". He said the claimant had accused him at one point of lying and that his attitude was "inflammatory." He referred to the discussion that the claimant had had with Mr Aloi that the claimant had recognised what he had done was wrong and that he regretted it. He pointed out that that was not expressed to him in the meeting. He referred to concerns about comments and feedback he received from employees in the Manchester office.

49. Dr Sukumar described matters as having been brought to a head by the letter from HMA Law. In paragraphs on the second page (142) he described that

letter as "the final straw which has irreparably destroyed the employment relationship, as well as your personal relationship with me which is already fractured." He referred to the need to have absolute trust and confidence in the person occupying the claimant's position particularly because the company was based in the USA. He said this:

> "Given the latest chain of events, the attitude which you have displayed to me personally at the unfounded allegations which you have now made against me personally, I simply do not have that trust or confidence in you in any way. I consider that the relationship between us is broken down to a point that is beyond any prospect of repair. In the circumstances, I find it impossible to entertain a situation in which Carl and I would return to the US on Saturday with you remaining in employment and in the role of Head of our European Operations.
>
> In the circumstances, I decided that the appropriate course of action for the business is that your employment should be terminated with immediate effect."

50. Dr Sukumar continued by saying he was aware that under "UK legal jurisdiction" employers were expected to go through processes as a matter of fairness but said, "I cannot see given the situation which I am facing with you that going through those types of processes would lead to any different at outcome." He acknowledged that normally a right of appeal would be offered but said that given the fact that he was Global CEO he did not see this to be a case in which an appeal would serve any useful or meaningful purpose." He continued:

> "Had I sensed that there was any desire on your part to rebuild the fractured relationship between us, then I may well have adopted a different course of action. However, I have at no point been given the impression that that is your position, quite the opposite in fact. Given therefore the fundamental and irretrievably [sic] breakdown in the employment relationship as I see it, I have decided to act now."

51. The letter terminated the contract as at that date. The claimant was said to be entitled to 30 days' notice and that he would be paid in lieu together with accrued holiday pay.

Submissions

52. Both parties made submissions orally.

53. Although the respondent submitted that this was an SOSR dismissal, it accepted that the British Home Stores v Burchell approach was appropriate.

54. The respondent submitted that the claimant's actions in arranging for the payment of his own bonus was outwith the scope of his authority. It submitted that the claimant's pattern of communications with his employer was consistent with that understanding. It submitted that this was a factor supporting a finding that trust and confidence had broken down but it was not the main reason.

55. The respondent invited me to accept the evidence of Dr Sukumar and Mr Aloi in respect of the claimant's behaviour at the meeting on 27 September 2016. It was submitted that this too was deeply unhelpful and that the claimant's failure to recognise his error and his attitude was not conciliatory.

56. The principal reason for the finding that the respondent asked me to make was the letter before action. It was submitted that this was an attack on the integrity and honesty of the chief executive of the group at the highest level, that an allegation of fraud is an allegation of deliberate dishonesty and that it was a personal attack and deeply offensive. The letter before action revealed that the claimant had made 4 or 5 covert recordings of his communications with Dr Sukumar and this itself raised a fundamental issue of trust and confidence. It was submitted that this was indicative of a relationship in a terminal state.

57. It was submitted that the contents of the letter before action showed that the employment was broken beyond prospect of repair and that it was reasonable for the respondent to come to that conclusion.

58. The respondent submitted that, whilst the tribunal would expect that the ordinary steps of informing an employee of the possibility of dismissal and giving them an opportunity to respond would be taken, this was not an absolute but was a gloss on the test in section 98(4). It was submitted that, as Dr Sukumar and the claimant were the most senior employees of the respondent, the prospect of others disagreeing with Dr Sukumar's view was fanciful. It was submitted that I should find that the dismissal was not unfair.

59. The respondent referred me to a decision of the Employment Appeal Tribunal in the case of Phoenix House Ltd v Stockman & Lambis UKEAT/0264/15 as authority for the proposition that the Code did not apply to dismissals for some other substantial reason.

60. The respondent submitted that if I did find the dismissal was unfair I should find that the same result would have pertained had the respondent carried out a fair procedure and that the claimant should be awarded something in the order of 2 weeks' compensation to reflect the period during which that process would have been completed.

61. The respondent also submitted that I should find that the claimant was responsible for culpable conduct which caused or contributed to the dismissal and that it would be just and equitable to reduce both basic and compensatory awards for that reason. It was submitted that if I were to find that it was only the payment of bonus that amounted to such conduct a reduction of 30% should be made but if I were to find that, in addition, the sending of the letter before action amounted to culpable conduct then a reduction of 100% should be made.

62. The claimant's submissions were at opposition to those of the respondent at each point.

63. It was submitted that this was a conduct dismissal dressed up as a breakdown of trust and confidence. Mr Tobin emphasised the degree to which the claimant

had been reasonable and shown trust and confidence by making allowances in respect of the payment of bonuses contractually due. He referred to the claimant saying at the last stage that he needed to get back to work after the meeting of 27 September 2016. He submitted that the claimant was more senior than the CFO and it was within his authority to authorise the bank transfer. He submitted that I should prefer the claimant's account of his conduct of that meeting. He submitted that in this day and age the recording of conversations was not unusual. He submitted that is small businesses there were frequent share disputes which did not usually result in a breakdown in the relationship of trust and confidence.

64. Mr Tobin submitted that if I accepted the respondent's argument that the circumstances amounted to some other substantial reason for a dismissal it would mean that any CEO would be deprived of their employment rights. He submitted that the reason the dismissal was conduct at that it was a fit of pique leading to a capricious dismissal.

65. On the procedural aspects he described the respondent as getting it about as wrong as you could get it. He submitted that this procedure or lack of it was entirely outwith the range of reasonable responses.

66. Since the parties did not have a copy of the report in the Phoenix House case, I procured copies for them.

67. At paragraph 19 Mitting J quotes a passage from the judgment of Laing J in the case of Hussain v Juries Inns Group Ltd UKEAT/0283/15 in which she expressed the provisional view that the Code did apply to such cases. He disagreed on the basis that clear words in the Code would be required to give effect to the sanction contained in section 207A of TULRCA 1992. Employers should not be at risk of a punitive element of compensation unless they had clearly been forewarned that that would be the effect of the Code.

68. Mr Tobin submitted that this was a dismissal for the reason of conduct and thus the Code did apply and any award should be subject to the uplift provided by section 207A.

69. Mr Tobin submitted that no deduction should be made under the Polkey principle since the respondent had adduced no evidence of what it might have done but had deliberately decided not to go through an appeal.

70. As to contributory conduct he submitted that the letter before action did not warrant any disciplinary action and was not culpable conduct nor because there was a dispute would it be just and equitable to make such a reduction. He submitted that the letter before actin was simply escalating the claimant's pre-existing concerns.

Conclusions

71. I came to the following conclusions.

72. I remind myself that the tribunal must be alert not to permit employers to label conduct reasons as amounting to a breach of trust and confidence and thus some other substantial reason in order to avoid the obligation to go through appropriate processes and the consequences of not doing so. It is also likely to be the case that serious conduct for which an employer might reasonably dismiss will in many cases result in a breakdown of the relationship of trust and confidence.

73. Since this is a reserved judgment I have had the opportunity to reflect upon the competing arguments as to the reason for dismissal at greater length than would normally be the case. Having done so I have reached the conclusion that the respondent's argument is to be preferred.

74. I find that this was, properly so described, a dismissal for some other substantial reason of a kind such as to justify the dismissal of this employee. I reach that conclusion for the following reasons.

75. The claimant's conduct in respect of the payment of his bonus was, in my judgment, clearly a matter in respect of which the employer could have contemplated disciplining him. Notwithstanding the bonus was payable and the sum certain, for the reasons I have given I am satisfied that the employer could reasonably have concluded that the claimant had deliberately flouted or circumvented proper process. The respondent could have disciplined him formally but, in effect, chose not to do so and issued the letter of concern.

76. Thus, after the meeting of 27 September 2016, although the claimant might have faced capability issues later in respect of his performance or if there had been any other disciplinary problem, his continued employment was not at immediate risk. Clearly he was a valued employee. He was very highly paid and had significant responsibilities.

77. The single event that caused that position to change was the receipt by Dr Sukumar of the letter before action. It was common ground that no attempt was made by the claimant to forewarn the respondent that he was contemplating legal proceedings about the share issue. The respondent could not in my judgment be said to have unreasonably concluded that the letter was sent on 28 September 2016 in response to what had occurred the day before. But of much greater significance to the respondent was the very serious personal attack upon the integrity of Dr Sukumar.

78. The claimant made no plausible attack upon the credibility of Dr Sukumar and perhaps more particularly Mr Aloi in cross-examination to suggest that they really considered that this was a misconduct issue rather than a breakdown of trust and confidence.

79. In my view, the respondent's witnesses genuinely believed on reasonable grounds that given the background that they described, the sending of the letter before action did break the relationship of trust and confidence irreparably. In my judgment the suggestion by Mr Tobin that this was simply the escalation of a commercial dispute and irrelevant to the employment relationship simply cannot be sustained.

80. Given the nature of the reason for dismissal the remaining question is one concerning the total absence of a procedure.

81. In my judgment the claimant's case is on much stronger ground here. With respect to the argument advanced on behalf of the respondent, I consider that the argument falls into the trap which the House of Lords in Polkey ultimately closed of saying that because it would make no difference it is not unfair for an employer not to follow a fair procedure.

82. For that reason I consider that the dismissal of the claimant was, having regard to section 98(4), unfair.

83. As to the application of Polkey to the question of compensation I reject Mr Tobin's submission that this task amounts merely to speculation. The tribunal is required to do the best it can based upon the evidence to make a proper assessment of what would have happened if the respondent had not acted unfairly in this way. It is clear that the respondent had received legal advice before deciding to dismiss. It is equally clear that it had the financial resources, had it thought it proper to do so, to engage outside consultants to undertake an appeal process at least. Notwithstanding that this was a dismissal by the senior member of the organisation of a direct report it is not unknown for small businesses to enlist such assistance in seeking to achieve a fair process. Moreover, had there been a period of cooling off with the opportunity for both sides to take advice, Dr Sukumar could himself have invited the claimant to make further representations.

84. What then do I consider would have happened if the respondent had undertaken a fair procedure? In my judgment, given the seriousness of the position that then existed and the claimant's apparent insistence, even before me, that he was justified in what he did and that he did nothing wrong, it is all but inevitable that he would have been fairly dismissed at the conclusion of a fair procedure.

85. However, I also accept that that would not have occurred immediately. The respondent contended that I should allow a two-week period. In my judgment this is unrealistic. Either the respondent would have to come back to the UK to resolve the matter or the claimant would have to go to the United States. Even with appropriate diligence I consider that a period of one month would be the likely length of time for the matter to be resolved.

86. I turn finally to the question of contributory contact. On this I accept the respondent's argument that the claimant was guilty of contributory conduct which caused in part the dismissal in relation to bonus. Having regard to my findings as to what he knew about the limits of his authority, it is just and equitable that there should be a reduction by reason of that.

87. I have found the question of the letter before action less clear-cut on this issue. In my judgment it is incumbent upon the respondent to prove that the claimant was guilty of culpable conduct. If the subject matter of the dispute set out in the letter before action is ultimately resolved in the claimant's favour then the respondent cannot do so. It is not culpable to allege fraud and to prove it. If,

on the other hand, the allegations of fraudulent misrepresentation fail then I can see little reason not to consider that to be culpable conduct, wholly causative of the dismissal, which would merit a reduction in the awards to the extent of 100%.

88. I am not required to decide the merits of that underlying dispute. There is no basis upon which I can do so, even if it were appropriate for me to try.

89. In the circumstances I say that on the present state of the conclusions I am able to draw I would reduce the basic and compensatory awards by 30% as submitted by the respondent which I consider to be a reasonable proportion.

90. For the reasons given by the Employment Appeal Tribunal in the Phoenix House case, I hold that no uplift can apply this case for failure to comply with the provisions of the ACAS Code of Practice.

Employment Judge Tom Ryan 1 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

06 March 2017

FOR THE TRIBUNAL OFFICE