Case No: 2404980/2017

EMPLOYMENT TRIBUNALS

Claimant: Mr M Swinnerton

Respondent: Bluestones Medical Recruitment Limited

Heard at: Liverpool **On:** 16 January, 2 and 7 March 2018

Before: Employment Judge Wardle

Representation
Claimant: In person
Respondent: Mr M Budworth - Counsel

RESERVED JUDGMENT

The claimant's complaint of unfair dismissal is not well-founded but his complaint of an unlawful deduction from wages in respect of underpaid commission is well-founded and he is awarded the sum of £4687.87.

REASONS

1. By his claim form the claimant complains that he was unfairly dismissed contending that his dismissal was procedurally unfair in that the respondent did not follow the ACAS Code of Practice on Disciplinary and Grievance Procedures and that the process was a sham brought about by the merger of the respondent with another company by the name of PRN People Limited resulting in the respondent no longer having need for two Directors. He also complains that he is owed monies in the form of underpaid commission whilst on suspension.

2. By its response the respondent denies the claim in its entirety. More particularly in relation to the unfair dismissal complaint it denies the allegation that the process was a sham based on the claimant's belief that the respondent wanted to avoid making him a director and shareholder and instead have a single Managing Director in the business and contends that the procedural flaws were in the early stages of the process and were addressed and rectified as a result of which the disciplinary process that led to the claimant's dismissal was procedurally fair and lawful. It further contends that the claimant's summary dismissal was for the potentially fair

reason of conduct having conducted a reasonable and fair investigation and disciplinary procedure leading it to believe on reasonable grounds that he was guilty of gross misconduct and that the decision to dismiss fell within the range of reasonable responses. In the alternative it contends that the dismissal was for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held, although such ground was not advanced at the hearing.

3. The Tribunal heard evidence from the claimant and on behalf of the respondent from Ms Sharon Griffiths, Independent HR Consultant and Mr Steven Pendergast, Chief Executive Officer of Bluestones Investment Group Limited. Each of the witnesses gave their evidence by written statements, which were supplemented by oral responses to questions posed. There was an extensive bundle of documents, which was marked "R1".

4. The parties were informed at the conclusion of the hearing that the Tribunal would be reserving its judgment. Having since had the opportunity to consider the evidence, submissions and the applicable law the Tribunal has been able to reach conclusions on the matters requiring determination by it.

5. Having heard and considered the evidence the Tribunal found the following facts.

Facts

6. The claimant began work for the respondent in February 2014 as a Medical Recruitment Consultant, having transferred there from Bluestones Education where he had previously worked from 8 October 2013 before being promoted in April 2015 to the position of Bluestones Medical Manager, although according to the contract amendment document dated 9 April 2015 at page 47 of the bundle this promotion is stated to have taken effect from 1 April 2014, which was thought to a typographical error. His employment was terminated on 26 May 2017 by reason of his summary dismissal on the grounds of gross misconduct.

7. The respondent is part of Bluestones Investment Group Limited (the "Group"), which is an investment company that invests in recruitment companies and staffing solution companies. According to the respondent's ET3 the Group was a majority shareholder of Bluestones Medical Theatre Limited (BMT) and PRN People Limited (PRN) which merged to become the respondent company on 1 November 2016, although issue was taken with the accuracy of this contention by the claimant in his witness statement in which he claims that there has never been any business by the name of Bluestones Medical Theatre Limited and that Bluestones Medical Recruitment Limited was incorporated on 12 October 2011. It is also claimed in the ET3 that this merger was part of a significant restructure which started in October or November 2016 involving the creation of four divisional companies focusing on four different sectors namely logistics, support services, technical and specialist and professional, in the last of which sectors the respondent sat. It was further claimed that with PRN specialising in medical recruitment in the area of nursing and BMT in the recruitment of temporary staff for operating

theatres the intention was that they would remain separate operations with separate managing directors in the future.

8. In this latter connection it is acknowledged by the respondent that discussions had taken place between the claimant and Mr Steve Conway, the respondent company's former Managing Director, in 2015 in relation to the claimant becoming a director and being gifted some shares in the company subject to his meeting certain milestones, which remained the intention even after Mr Conway was no longer participating in the business from July 2016 onwards. On the claimant's evidence a deal was agreed in principle starting at 15% equity and increasing to 25% if financial milestones were achieved and that he was told in an email at page 57 from Mr Stuart McBride, Group Managing Director, dated 2 October 2016 that he believed everything was now done and agreed and that he expected everything to be completed that week. That having been said as evidenced by an email exchange between Mr McBride and Ms Trish Stratford, Chief Executive Officer for the Professional Services Division, at page 58 discussions were still ongoing as at 14 December 2016 as to what would be an appropriate basic annual salary for the claimant.

9. Slightly in advance of this the claimant had on 30 September 2016 received notification that the respondent had successfully tendered to supply staff into the NHS through a government approved framework known as Health Trust Europe (HTE). On the same day he had learned that PRN had been unsuccessful with their bid, which on his evidence resulted in a very difficult trading future for them due to new government stipulations around non-framework supply into the NHS. Shortly after this on the claimant's evidence Ms Trish Stratford, who had joined the Group in July 2016 acting as a liaison between the Group and the joint venture companies in its Professional Services division of which the respondent was one such company and who had become the claimant's manager, informed him that a decision had been taken to merge PRN with the respondent which saw them starting to supply their staff through the respondent on its timesheets in order that they had framework status.

10. The respondent's explanation as given by Mr Pendergast for why the claimant's equity was delayed was because the restructure of the Group was more complex than had been anticipated pointing to the fact that when Ms Stratford joined the Group it was through a joint venture, which deal involving a cooling off period meant that it did not formally conclude until November 2016 and that although the divisional companies had been set up and directors appointed the shareholdings could not be transferred from the Group to the divisional companies until after this point.

11. In regard to the matters that gave rise to the claimant's dismissal it is the respondent's case that in early 2017 Ms Stratford unearthed concerns about Disclosure Barring Service (DBS) payments, in respect of which it was the respondent's practice to pay DBS for searches relating to workers it was seeking to place and for it subsequently to request reimbursement of the fee by invoicing the worker concerned. In this regard it was discovered that the workers were making the payments but that there was no record of these payments being received by the respondent. She raised the issue with Mr McBride, who being unable to identify where the money had gone, contacted Mr Conway, the company's former Managing

Director, who could not explain it. Mr McBride then raised it with the claimant shortly after at the next board meeting but he could not explain it either, which was seen as a concern because he had been running the business since July 2016 and had been responsible for the Profit and Loss (P&L) accounts. The following day Mr Conway called Mr Pendergast and asked to meet with him. When they met up he told him that he had stolen the money and on 26 February 2017 he sent an emailed confession, which was not in the bundle, explaining that he had set up a PayPal account, which is an online payments system that supports online money transfers and serves as an alternative to traditional paper methods but had been taking the money out for personal use.

12. On 28 February 2017 the claimant was informed that he was to be suspended pending investigation of a number of issues that had recently come to light regarding dishonest and fraudulent activity by ex-employees in respect of theft and misuse of company funds, one of which related to the misuse of the company's PayPal account, although in point of fact the only issue at the time related to Mr Conway's behaviour in respect of this account. He was subsequently invited by a letter dated 3 March 2017 to an investigation meeting to be conducted by Ms Stratford on 7 March 2017 and informed that the areas of focus would be (i) the fraudulent use of the PayPal account (ii) the payment from candidates for DBS checks whilst PayPal was in operation (iii) the discovery following the audit of DBS checks and payments that non-compliant workers are operating across the business and (iv) overall compliance and instructions to brand staff on how to operate across HTE.

13. The notes of the meeting taken by Ms Tasmin Withey, HR Manager, which give its date as 8 March 2017 are at pages 81-83. In answer to what he knew about the fraud on the PayPal account the claimant stated that all he knew was that the account had been set up and that invoices were sent out through compliance and he presumed that the money came through head office. He added that PayPal and Dropbox (a file hosting service) had stopped working and that he had spoken to someone (the name of whom is redacted in the minutes) and that he was told that Lez Finlay had done a global reset on everything. He also stated that he had contacted Barclays about a PDQ machine (a device which interfaces with payment cards to make electronic funds transfers) which he obtained around September/October. Asked if he ever queried where the money was going for Criminal Records Bureau (CRB) checks the claimant stated that he assumed that it was going through to head office and that it would be on the P&L account but that he did not know where they would show.

14. In regard to item (iii) of the areas of concern relating to non-compliant workers operating in the business i.e. without CRB checks it was put to him that an audit of the last three months had found 56 workers non-compliant, to which the claimant responded that the respondent had passed every external audit aside from the Medacs one recently where Carol Gibbons had sent it off before it was completed. He also stated in response to the suggestion that he was responsible for the team and for ensuring that workers were compliant that he felt that he had had a lack of training in compliance.

15. In regard to item (iv) relating to overall compliance and instructions to brand staff in respect of the HTE framework it was put to him that Jaki Lee had initially informed Tracey Lumb, Compliance Manager, that he had told her that face to face interviews were not necessary but that she should mark the files to say that they had been done, in response to which he denied ever having said this to Ms Lee and demanded to see the statement she had made. Matters concluded with the claimant suggesting that the process felt like a conspiracy to him and that it had been planned to coincide with the merging of the respondent with PRN and that the outcome was already clear to him as the business did not need two managing directors, which was refuted by Ms Stratford who stated that the only reason they had started the investigation was because of the fraudulent use of the PayPal account in relation to CRB payments.

16. On 14 March 2017 the claimant was emailed requiring him to attend a disciplinary hearing on 16 March 2017 to consider an issue of potential gross misconduct involving the four above-mentioned issues, which was to be conducted by Ms Stratford in the company of Ms Withey. The claimant responded to say that he was unable to attend such meeting as he was under medication to deal with panic attacks and severe anxiety brought on by the allegations and his suspension and that he was away on annual leave from the 17th to the 28th March 2017, after which he expected to be available health permitting. The meeting was subsequently re-arranged to take place on 31 March 2017, at which the claimant was accompanied by Paul O'Keefe, a trade union representative. The notes of the meeting at pages 95-96 record that the claimant provided a written statement in response to the allegations at pages 95-101 and reveal that Mr O'Keefe objected to Ms Stratford, as the Investigating Officer, conducting the disciplinary hearing and that following a short adjournment she advised that she was removing herself from the process and that Mr McBride would hold the hearing on Monday 3 April 2017. In the event this date was unsuitable from the point of view of the claimant arranging trade union representation and it was subsequently arranged for 12 April 2017.

17. In advance of this the claimant lodged a grievance dated 6 April 2017 addressed to Mr Pendergast at pages 117-121 and on 7 April 2017 at pages 123-124 made a data subject access request in respect of information held about him by named individuals in the form of email communication and texts between any employee where he was the subject of that communication and copies of any electronic communication between the Group and its subsidiaries with external suppliers, customers or clients and advisory services. In his grievance the claimant had, inter alia, referred to Mr McBride giving his assurance that he would personally push through his directorship deal to have it finalised before 1 April 2017 and suggested that the fact that this had not taken place showed that the outcome of the sham investigation and subsequent disciplinary process was a foregone conclusion with the decision to remove him from post having already been decided. In the light of this Mr McBride advised the claimant on 7 April 2017 that he had decided that it would not be appropriate for him to hold the disciplinary hearing and that it would be conducted by Sharon Griffiths, Principal Consultant at Watchman Consulting. In regard to the grievance itself he further advised that having reviewed it he felt that it was clearly related to the disciplinary case and that it was therefore appropriate to deal with many of the issues

concurrently but to the extent that there were separate matters a further meeting would be held following the disciplinary hearing to investigate them.

18. With his email dated 7 April 2017 Mr McBride provided the spot check audit of 54 contractors who had worked for them in the previous 4 weeks, of whom 31 had no CRB/practical training and unspecified copies of various emails and statements in relation to the allegations and a copy of the HTE Audit Criteria. He also set out the allegations, which were to be discussed at the hearing, which were now phrased as follows (i) that he was negligent and incompetent in that he was aware of the personal PayPal account being used by Steve Conway to receive DBS fees from candidates and he did not report this conduct as suspicious (ii) that he was negligent and incompetent in that he ought to have been aware that the conduct of Steve Conway in relation to the PayPal account was dishonest (including a failure to recognise the misappropriation of funds by him) (iii) that he had failed to ensure that workers placed by the company had relevant DBS checks in place; the company's DBS audit showed in red the individuals in relation to whom there had been a failure to comply with the requirements for a DBS check (for example DBS checks not being undertaken at all or relying on another agency's DBS checks). This conduct could place the company's HTE Framework Agreement at risk of termination and (iv) he had told colleagues not to conduct face to face interviews with candidates in material breach of the company's obligations under the HTE Framework Agreement. Alternatively he had known that colleagues were not conducting face to face interviews and had done nothing about this breach of the HTE Agreement, or that he had not realised and had been negligent in failing to monitor this. This conduct places the company's HTE Framework Agreement at risk of termination.

19. The notes of the disciplinary hearing at pages 133-157 begin to address the first allegation at page 140. Asked by Ms Griffiths to talk her through the method the company uses for invoicing and collecting payments from workers in respect of the fees for their DBS check the claimant explained that it used to be through a PayPal account, which was already in place when he joined the business and that a member of his compliance team would send the candidate an invoice for £54.00, to which he added that some of the certificates are portable, which means that they could accept a DBS certificate obtained by another agency provided that it had been issued within the last three years and the candidate had signed up to the DBS update service. He also referred to an email dated 16 August 2016 to Mr Finlay asking if he knew of any direct debits or PayPal standing orders having been cancelled as a message had been received that the company's Dropbox payment had failed. It was then put to the claimant that it had come to light that the monies from workers paid into the PayPal account, set up by Mr Conway to reimburse the company, were then transferred out into his personal bank account, which he has since admitted and was asked to confirm if this was an accurate summary, to which he responded that he was not aware that this account was aligned to Mr Conway's personal account and that he would like to know what evidence there was that he knew the PayPal account was a personal one.

20. Further in relation to this allegation the claimant was asked how many new workers are registered each month with the company, to which he

replied around 80 to 100 over the course of a year with monthly fluctuations and that not everyone needs a new DBS check adding that between 70 and 80% of new workers registering would already have a valid DBS certificate and that many continue to be registered with other agencies as well. He was also asked if the fees charged by CRB UK, who administer the checks on behalf of the company would be listed in the monthly P&L account to which the claimant responded that the invoiced amounts should be on the P&L account but they did not always show. The claimant had previously in an email dated 12 March 2017 at pages 85-86 sent to Ms Stratford following the investigatory hearing on 8 March 2017 mentioned that it was known that staff including himself experienced significant difficulties with the P&L accounts due to inaccuracies and costs being allocated to different lines on different months, which he suggested would make the negligible and infrequent sums going through the PayPal account very difficult to keep track of. In this regard he was asked when he first flagged up the difficulties he was having with the P&L account to which he answered that Mr McBride had flagged it up with him 12 months ago and that it had been highlighted at nearly every monthly board review since. By way of conclusion the claimant was asked to summarise why he failed to spot the ongoing irregularity in the P&L account as regards the DBS checks i.e. that the monthly invoiced amounts from CRB UK were not being balanced by a corresponding revenue from the PayPal account, to which he responded that there were two things - first of all that if the money which Mr Conway had misappropriated since 2012 is around £2000 that equated to an average of £41.00 per month amongst overheads of £40,000 per month, which represents 0.1% of this figure and secondly the accuracy of the P&L accounts when for example a £10,000 charge was assigned to the wrong P&L account (which it was understood related to the respondent company's P&L account having allocated to it this sum for the PRN People rebrand according to the claimant's email to Ms Stratford on 12 March 2017 referred to above).

21. In regard to the second allegation that the claimant ought to have been aware that the conduct of Mr Conway in relation to the PayPal account was dishonest Ms Griffiths indicated that she thought that all the relevant points of this had already been covered but asked if there was anything not discussed that he thought it was important for her to know, to which he responded that he did not know upon what evidence this allegation was based.

22. In regard to the third allegation that the claimant had failed to ensure that workers placed by the company had relevant DBS checks in place Ms Griffiths began by outlining her understanding of the company's relationship with Health Trust Europe (HTE), which she described as a sort of purchasing platform or portal which gives its members access to a large number of hospitals (both NHS and private) to offer their services that meant for the respondent that it could place its temporary workers with the increasing number of hospitals that insist on 'on-framework' supplier arrangements. The claimant confirmed this was the case and explained that following the respondent being accepted onto the framework in October 2016 they had been working speculatively from what they anticipated its requirements would be until they received the final audit specification on 23 February 2017. Asked by his representative, Mr O'Keefe, if the snapshot audit carried out by Ms Lumb on or around 1

March 2017 was a true reflection of what has been happening over the last three years the claimant stated that it was not, which led Mr O'Keefe to state that they did not believe that the audit reflected the contractual complexities over a 12 month to 3 year period and that what they were saying was that the contractual requirements with each hospital vary with private hospitals generally having lower requirements than the NHS for example. This prompted Ms Griffiths to ask would it not make business sense for the claimant to ensure that he met the highest standard of compliance for all candidates so as to remove any risk of being non-compliant, to which Mr O'Keefe responded affirmatively before adding that they would like it noted that this was an aspirational standard that the company and Mark have been aiming for. Asked too by Mr O'Keefe what support the claimant had been looking for as regards ensuring compliance he stated that he had asked Ms Stratford for specialist compliance training for him and the team and that he had also been looking at software that would allow the business to keep much better track of when DBS certificates expire and need to be renewed etc. In relation to the snapshot audit he stated that it the company was going to rely on this he would want Ms Lumb to provide more information as her audit did not take into account all the different contracts and considerations of each hospital and it does not state which hospital the worker was supplied to at the time.

23. Referring to the HTE Framework Agreement and its rigorous list of compliance matters Ms Griffiths asked the claimant to what extent he had been involved in the negotiations and then putting in place all the necessary procedures and administrative arrangements, to which he responded that he wrote the bid sheet and case studies and negotiated on pricing and subsequently that they were working to an anticipated set of criteria but were guesstimating to some extent adding that he knew that they required training and that though he had a general knowledge of compliance he was no expert and that having no confidence in Ms Lumb's knowledge to train the team in a business with an annual turnover of £10 million he wanted to bring in someone externally ideally an external auditor who knew the full requirements. He was also asked to describe his understanding of the compliance requirements relating to DBS checks and the procedure his staff had used both prior to working with HTE and since, in response to which he stated that they need to see physically the original of the DBS document before adding that this could have been obtained by another agency, which was acceptable as long as it was issued in the last three years and the worker has signed up to the update service. He then confirmed that nothing had changed as regards DBS checks after the business had signed up to the Framework Agreement. He also confirmed when asked about the business' arrangement with Medacs that their compliance requirements did not differ from HTE's and that for the last 18 months they have, in effect, been working to HTE standards.

24. In regard to the fourth allegation that he had told colleagues not to conduct face to face interviews with candidates in material breach of the company's obligations under the HTE Framework Agreement this was based on an assertion by Ms Lee, which had been denied by the claimant in the investigation hearing, he was asked if this remained his position which he confirmed stating that he would like her re-interviewed as he had already requested. He was further asked if he agreed that the email sent by Ms Lee to the team on 28 February 2017 in which she stated that we

are no longer allowed to conduct phone interviews confirmed that up until that point, irrespective of whether or not they were acting on his instructions, his team had not been carrying out all interviews on a face to face basis to which he replied affirmatively adding that there will be a lot of candidates where this is the case estimating that probably 100 plus of the candidates Ms Lee has interviewed did not need a face to face interview. However in so far as workers being placed via HTE were concerned he gave a 100% guarantee that no-one had without a face to face interview.

25. Following the disciplinary hearing arrangements were made to hear the claimant's grievance on 27 April 2017, at which Ms Griffiths was again accompanied by Ms Withey and the claimant by Mr O'Keefe. The notes are at pages 172 -191. They record at the outset that Ms Griffiths apologised for the fact that it was going to take longer than originally envisaged to conclude the disciplinary process in light of the need for a further investigation and for the claimant to then respond to any new evidence and for her then to review all of the evidence and come to a decision regarding the outcome. They also show the claimant raising the subject of the two recent external audits by de Poel and Neuven on behalf of HTE, which the company had passed with a 90% plus mark and asking why there was still a need for further investigation when these results gave a clear indication that his management of the compliance requirements was sound, to which Ms Griffiths responded that she would consider these results alongside all the other evidence but that in the meantime there were other matters he had asked her to investigate and that in any event two of the disciplinary charges relating to the PayPal account were unrelated to the compliance audits. In so far as the points of grievance were concerned, of which the claimant had raised fifteen in his letter to Mr Pendergast dated 6 April 2017, the notes show that each of these was gone into in turn, albeit briefly in respect of those matters which it was believed had already been covered in the disciplinary hearing with the claimant being offered the opportunity to add anything else that he considered relevant, which saw him confirming at the hearing's conclusion that he had been given the opportunity to discuss his grievance in full.

26. Subsequent to the grievance hearing the claimant emailed Ms Griffiths on 1 May 2017 at pages 193 -195 expressing concern about the need for a further investigation whilst pointing to the fact that the process was now in its ninth week; the fact that the company had passed two fully independent audits and yet this had not been raised to clear him of any wrongdoing in respect of the compliance allegations and the impartiality of Lynda Kenyon, Support Services Director, who was to carry out some of the further investigation on the basis of her having close working ties to Ms Stratford. Ms Griffiths responded on 4 May 2017 at pages 196-198 rejecting the suggestion that the process was too long given the complexity and the delays at the start arising in part from the claimant's requests for postponements and his objection to Ms Stratford acting as the disciplinary officer and confirming that she would treat the two audit results as further points of defence. In relation to Ms Kenyon she explained that although she did have a working relationship with Ms Stratford, the number of people who could do this work was limited and she had had no prior involvement in the claimant's case.

27. Ms Griffiths had previously met with Ms Kenyon on 2 May 2017 to discuss the investigation and the specific matters that needed to be followed up with each witness. In order to assist with this she drafted questions to be put to the witnesses with the caveat that she might need to expand on them depending on the interviewees' responses. The witnesses involved were Ms Lee, Mr McBride, Ms Lumb, Ms Harrison and Ms Stratford. The interview with Ms Lee was held on 4 May 2017, the notes of which are at pages 199-200. During the initial investigation she had evidently given Ms Stratford to understand that the claimant had instructed her not to face to face interview candidates for the HTE framework roles on the basis no one would know which was in breach of the requirements. In the re-interview Ms Lee amended her statement to say that she had been told to face to face interview (candidates) if we could get them to come into the office and if not to telephone interview them and post the form for them to sign. The interview with Ms Lumb was held on or about 5 May 2017, the notes of which are at pages 213ai-213al and in an amended version at pages 213am -213ap signed by her on 12 May 2017. In this she was asked if the claimant had said or suggested that they could dispense with face to face interviews for all candidates because no-one would ever know, to which she replied affirmatively stating that she raised (it) with him in one of the compliance meetings and he said 'who would know?' and adding that she felt that she had raised it direct with him and that it was his responsibility to ensure that all workers are compliant. The interviews with Mr McBride and Ms Stratford were held on 3 and 4 May 2017 respectively with the notes at pages 213j-213k and 213l -213s and with Ms Harrison on 8 May 2017 the notes of which are at pages 213x-213y.

28. In addition to these further disciplinary investigation meetings Ms Griffiths conducted separate grievance investigation interviews with Mr McBride on 10 May 2017 and with Ms Stratford on 15 May 2017, the notes of which are at pages 203-213 and 214-227 respectively. By her evidence she stated that the primary purpose of her interview with Mr McBride was to establish if the process was a sham to prevent the claimant from acquiring a director's role and/or to replace him with Elizabeth Pringle (nee Harrison), the Managing Director of PRN. In this regard Mr McBride denied the claimant's suggestion put to him by Ms Griffiths that a key driver behind his disciplinary proceedings was the merger between BMT and PRN and his belief that the Group no longer needed or wanted two Managing Directors stating that it had never been the business' intention to appoint just one Managing Director and that the merger was taken as a commercial decision only in order to allow PRN to benefit from the HTE Framework. Further in response to the suggestion that the proceedings had been brought to avoid the claimant's promotion to Managing Director and making him a shareholder Mr McBride denied too that this was the case stating that he had worked in recruitment for 30 years and had operated at board level in four of the UK's largest recruitment companies and would not do anything daft like that adding that he had always had responsibility for HR, training and the back office and that he knew how to deal with dismissals. He concluded by saying that if he had wanted to get rid of the claimant then he would have made his position redundant. Finally in response to the claimant's suggestion that Ms Stratford had a personal vested interest in keeping him from acquiring shares in BMT as it would have the effect of diluting her shareholding and thus reduce her

dividend income etc. he denied also that the claimant's proposed shareholding would impact on her stating that the way in which the Group and the shareholdings are structured meant that the claimant's shares would be in a different entity to Ms Stratford's explaining that her shareholding was in the Group's Professional Staffing Division and that if the claimant were to be dismissed, the shares that would have been given to him would go to whoever came in as Managing Director of BMT. In regard to the claimant's directorship deal clarification was also sought as to whether this had to be finalised before 1 April 2017 which saw Mr McBride explain that because the claimant had been paid a loan instead of dividends in the tax year ending on 5 April 2017 in order to maintain the tax advantage of payment in dividends things would need to be sorted by this date - the intention being that as soon as he was made a director he would receive a dividend payment from which to repay the loan. He further explained that the delay in the claimant receiving the documentation relating to his shares and directorship was because there were currently six people across five brands, of whom the claimant was one, who were for various reasons on non-standard deals with the Group, which typically has meant that to give them shares would create a benefit in kind tax liability for them which has resulted in the business having to get advice from a team of lawyers, tax advisors and auditors regarding all the documentation, which is complex and ongoing.

29. On 12 May 2017 Ms Griffiths emailed the claimant with the notes of the investigation interviews conducted by Ms Kenyon with Ms Lee, Ms Lumb, Mr McBride and Ms Harrison and stating that the notes of Ms Stratford's interview would follow on Monday 15 May 2017 together with the final agreed notes from the disciplinary hearing for signing and return. In so far as Ms Stratford's notes are concerned an unsigned version was sent on 15 May 2017 and a signed copy the following day. She advised that if there were any representations that he had over and above those he had already submitted he was to provide them by no later than 9.00 a.m. on 18 May 2017.

30. On 16 May 2017 the claimant emailed Ms Griffiths asking if he could be supplied with the signed statements from colleagues obtained during the initial investigation carried out by Ms Stratford, which he confirmed as having been made by Ashley Griffiths, Niall Peaker and Jaki Lee to which request Ms Griffiths responded the same day.

31. On 18 May 2017 the claimant supplied Ms Griffiths with his feedback on the interview notes taken during the further investigation carried out by Ms Kenyon under Ms Griffith's direction, which are at pages 167-167k. During a subsequent email exchange arising from Ms Griffiths stating that she was perturbed that he had presented such a detailed submission at the eleventh hour the claimant pointed out that his submission was made within her requested timescale and that it was only on 16 May 2017 that he had received Ms Stratford's interview notes as signed by her which were dated 5 May 2017, which prompted him to ask if there was a reason for this significant delay and which was subsequently addressed by Ms Griffiths in her response to the claimant's grievance.

32. In regard to the claimant's feedback on the interview notes Ms Griffiths prepared further questions to be put by Ms Kenyon to Ms Stratford and Mr

McBride. In the case of the former a further investigation interview was held on 19 May 2017, the notes of which are a pages 231-234 and a second one on 23 May 2017 at pages 235-236 after the claimant had provided clarification of a couple of points in his feedback relating (i) to an audit that he had asked Matthew Rush to complete for the period August 2016 to February 2017 of the candidates who had paid for a new DBS check and the payment method used, which Ms Griffiths had interpreted as his asserting that the audit had been carried out at his instigation - in response to which he clarified that he aimed to assert nothing bar to highlight the small numbers involved i.e. four DBS checks processed per month in circumstances where Ms Stratford continues to assert that the business was making these transactions with a large number of candidates and (ii) his asking about an online payment portal to the company's Barclays account - in response to which he clarified that he engaged with Barclays to provide a solution after PayPal was not accessible, at which time via Gerard Thornton/Niall Kenyon he was told that PRN were using a card machine to take payments and that the monthly contract amount for the PDQ machine was well within his sign off limit and that he received no feedback from Ms Stratford or Charlotte Pendergast who signed off the contract for him. In the case of Mr McBride he responded by email on 24 May 2017 at pages 251-253 in response to the claimant's assertions that numerous nominal costs were not discussed in the monthly board meetings and that he had raised concerns over the quality of the data on the P&L account.

33. Following this on 26 May 2017 Ms Griffiths wrote to the claimant by post and email with the outcome of the disciplinary hearing held on 12 April 2017 at pages 258-260 informing him that she was completely satisfied that there was evidence to substantiate each of the disciplinary charges and that she believed that they amounted to gross negligence/incompetence on his part and that accordingly it was her finding that there were grounds to dismiss him summarily. The letter went on to provide that the dismissal decision would be deemed to have been served that day, which would be his date of leaving and that he had the right of appeal against her decision, which he could exercise by setting out his grounds in writing to Mr Pendergast. In terms of the timescale for this she advised that as his related grievance outcome was still awaited he would have seven calendar days from its receipt to submit it.

34. As regards the specific grounds for the summary dismissal she set these out fairly briefly in the dismissal letter as follows : (1) in relation to the first two allegations concerning the PayPal account she stated that she accepted that the claimant may not have had cause, in the first instance, to believe that the account set up by Mr Conway to receive DBS fees from candidates was irregular but that she found at some point over the 20 months or so since he took over the management of the company from Mr Conway it would or should have become apparent that his conduct of the account was, on any objective view, highly suspicious and potentially dishonest and that further, since May 2015 when Mr Conway moved away from the brand he failed to take any reasonable measures to monitor or to manage the income from the account, including his failing to investigate the missing monies once he became aware that the account had been closed and no monies had been remitted back to the company (2) in relation to the third allegation relating to DBS checks for candidates she

stated that he had been grossly negligent in failing to ensure that workers placed by the company had relevant DBS certificates in place, which represented a critical fail which placed the company's HTE Framework Agreement at risk of termination and (3) in relation to the third allegation relating to face to face interviews of candidates she stated that he had been grossly negligent in knowingly allowing his team to place workers under the HTE Framework without there first having been such an interview in each case, which was in material breach of the company's obligations under HTE and which represented a critical fail and placed the company's agreement at risk of termination.

35. However, additionally Ms Griffiths provided the claimant with an addendum setting out these grounds in considerably more detail at pages 261-277.

36. On 1 June 2017 the claimant wrote by email to Mr Pendergast expressing concern that he had yet to hear anything back from his formal grievance submitted on 6 April 2017 and its hearing on 27 April 2017 and stating his belief that after 5 weeks and before being summarily dismissed there ought to have been some response, which could have ultimately altered the course of the disciplinary action against him, which he felt to be grossly unfair.

37. In her evidence Ms Griffiths stated that she could not recall whether she had sight of the email on the day but that, in any event, and completely independent of it, she sent the grievance outcome to him hours later. The letter in question is at pages 281-283, which like the disciplinary outcome letter was accompanied by an addendum at 284-294. Whilst upholding some of the claimant's points of grievance relating to procedural fairness relating to the non-provision of written evidence at the outset of the investigation begun by Ms Stratford and to her initially assuming the role of disciplinary officer despite having conducted the investigation Ms Griffiths advised the claimant that she was completely satisfied that these elements had not in fact had any detrimental effect, if any effect at all, on the disciplinary proceedings and/or his ability to defend himself against the disciplinary charges. As with the disciplinary outcome the claimant was also advised of his right of appeal, which again was exercisable in writing within seven calendar days.

38. On 9 June 2017 the claimant emailed Mr Pendergast attaching a letter of appeal against his dismissal at pages 326-332. In his email he made him aware that he received his grievance outcome by post on 7 June 2017 and that he would be making representations on this by close of business on 14 June 2017. His letter was acknowledged by Ms Withey on 16 June 2017 stating that Mr Pendergast was on annual leave from 20 June 2017 but had asked her to inform him that he would be willing to meet the day before, although it was appreciated that this might be short notice. In the alternative they would like to propose 6 July 2017. She wrote further on 18 June 2017 after the claimant had asked if the meeting on 19 June 2017 would be his appeal hearing or a chance to have an informal conversation seeking to clarify what she had meant by the offer of 19 June 2017, which she confirmed would have been to hear his appeal but that 6 July 2017 was still proposed. In this second letter she advised that the meeting would take the form of a review.

39. On 22 June 2017 the claimant's solicitors wrote to the respondent's solicitors in relation, inter alia, to the termination of his employment stating that in their opinion he had a claim for unfair dismissal. Seemingly, according to Mr Pendergast, despite this letter being between the parties' legal representatives and making no reference to the appeal process Ms Witney thought it appropriate to write to the claimant to respond to his grounds of appeal on 4 July 2017 at pages 342-353.

40. The appeal hearing went ahead on 6 July 2017 conducted by Mr Pendergast in the company of Ms Witney. The claimant was accompanied by Mr O'Keefe. The notes of the hearing at pages 354-365 essentially repeat Ms Witney's responses to the claimant's grounds of appeal as provided in her letter of 4 July 2017 to him. In this connection the claimant emailed Mr Pendergast on 10 July 2017 raising issues surrounding the appeals process referring first of all to the letter from Ms Witney ahead of their meeting stating the company's position on his points of appeal and suggesting that the company seemed to have reached decisions on them before they had had the oppportunity to meet and discuss them and secondly to evidence that his position had been given to Hayley Parry on the Wednesday before their meeting suggesting that this made clear that the proceedings were pre-determined and that the appeal process had only been followed to give the impression of a fair process.

41. He wrote further on 28 July 2017 making the same points but also attaching an email that he said had been sent to him between Ms Witney and Mr McBride dated 17 March 2017 in which she had stated that ' I have a full understanding of the situation with Chantelle (Conway), Steve (Mr Conway) and Mark Swinnerton (the claimant). It sounds like we are in a very strong position and it's up to us how sever (sic) we want to be with them and ' I will touch base with Trish (Ms Stratford) at some point to discuss the ethical dilemia (sic) we have around Mark Swinnerton (the claimant)' and 'I will also find out what payment were (sic) made from him being paid commission through PAYE to loan payments between April and December' and ' I have attached the commission letter Steve (Mr Conway) provided Mark (the claimant) with on his promotion' in relation to which he posed the questions as to why if this was a fair and unbiased process this would be stated as it implied a wish to impose some sort of negative outcome only two weeks into his three month suspension and again if it was a fair and unbiased process why would Ms Witney and Ms Stratford want to discuss the ethical dilemma they had with him adding that it was key to note Ms Stratford's heavy involvement in the process and why his remuneration package was being discussed at that point.

42. On the same day Mr Pendergast emailed the claimant with an appeal outcome letter at pages 375-389, which saw him upholding his dismissal for gross misconduct. In terms of reasoning the letter added very little to the points that Ms Witney had made in advance of the hearing, which were largely repeated.

43. There was no reference made in the letter to the matters raised by the claimant subsequent to the hearing nor, according to the bundle, was any response provided after it, although it was Mr Pendergast's written evidence that he reviewed the email (from Ms Witney to Mr Mc Bride) and

was satisfied after speaking to them that the comment relating to the ethical dilemma around the claimant related to the dividend and loan payment issue.

44. This outcome concluded the internal disciplinary process.

45. Turning to the claimant's complaint that he is owed money by the respondent in the form of unpaid commission while on suspension his contract of employment dated 24 February 2014 when he was recruited to the position of Business Development Consultant provided for a non-contractual discretionary bonus. However, it is the case that the claimant was from the outset of his employment paid bonus out of a shared 10% pot based on monthly gross margin and from the point when he was promoted to the position of General Manager the respondent through Mr Conway agreed to pay him 6.5% of net profit or business operating profit, payment of which was made quarterly. The claimant's pay advices for April and May 2017 made no provision for bonus payments despite the business showing an operating profit of £68,248 for April and £22,035 for May. It was understood that the quarter upon which the claimant's bonus would be calculated would, in addition to these two months, have included June but the documentary evidence before the Tribunal as regards business operating profit only went as far as May 2017. In terms of how this bonus was paid to the claimant it was the respondent's case that his bonuses had been paid to him in the form of repayable loans, which would be repaid by him from dividends received on his becoming a director and shareholder, which never happened. In the Tribunal's view the manner in which this money was to be paid to him did not, however, impact upon his entitlement by virtue of custom and practice to receive 6.5% of business operating profit for the period from 1 April 2017 until 26 May 2017 when his employment was terminated. Applying 6.5% to the profit for April gave a figure of £4436.12 and for May a figure of £1432.27, which latter figure the Tribunal adjusted to £1245.45 by applying a percentage reduction of 13% in acknowledgment of the fact that upon the claimant's dismissal there were still three working days left in that month giving a combined figure of £5681.57 subject to deductions for tax and National Insurance.

46. The claimant presented his claim to the Employment Tribunals on 10 September 2017, which was responded to by the respondent within the prescribed time-frame on 10 October 2017.

Law

47. The relevant law in relation to the complaint of unfair dismissal is contained in the Employment Rights Act 1996 (ERA). Section 94(1) provides that an employee has the right not to be unfairly dismissed by his employer.

48. Section 98(1) provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal and, if more than one, the principal one and that it is a reason falling within section 98(2) or some other reason of a kind to justify the dismissal of an employee holding the position which the employee held. The reasons contained in section 98(2) include the conduct of the employee. Section 98(4) provides that where the employer has fulfilled the

requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 this shall be determined in accordance with equity and the substantial merits of the case.

49. The Tribunal also had regard to the principles laid down in British Home Stores v Burchell [1978] IRLR 379 and Polkey v AE Dayton Service Limited [1988] ICR 142 HL. In the Burchell case the EAT set out a three stage test in cases of dismissal for misconduct. The employer must show that he had a reasonable belief based on reasonable grounds after reasonable investigation that the employee was guilty of misconduct. He need not have conclusive proof of the employee's misconduct only a genuine and reasonable belief, reasonably tested. For a dismissal to be procedurally fair in cases of misconduct it was said in Polkey that the procedural steps necessary in the great majority of cases of misconduct is a full investigation of the conduct and a fair hearing to hear what the employee wants to say in explanation or mitigation.

50. In relation to the unauthorised deduction complaint section 13(3) ERA provides an explanation of what is meant by a deduction stating that 'where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated... as a deduction made by the employer from the worker's wages on that occasion.'

Conclusions

51. Applying the law to the facts as found the Tribunal reached the following conclusions. It considered first of all if the respondent had demonstrated a potentially fair reason for the dismissal of the claimant. The reason relied upon by it was conduct namely that he had been grossly negligent (i) in failing to recognise that Mr Conway's conduct in relation to the PayPal account was highly suspicious and potentially dishonest and (ii) in failing to take any reasonable measures to monitor or to manage the income from the account, including not investigating the missing monies once he became aware the account had been closed and no monies were remitted back to the company (iii) in failing to ensure workers placed by the company had relevant DBS certificates in place and (iv) in knowingly allowing his team to place workers under the HTE Framework without their having been face to face interviewed in each and every case.

52. The question for the Tribunal was therefore whether Ms Griffiths, who had taken the decision on behalf of the respondent to dismiss the claimant, entertained a reasonable suspicion amounting to a belief that the claimant by his acts or omissions was guilty of the matters of which he was accused.

53. Moving on to apply the Burchell three stage test the Tribunal considered first of all whether Ms Griffiths did genuinely believe that the claimant had committed the misconduct of which he was accused. Taking the

allegations in turn the Tribunal struggled with the sustainability of her findings in respect of the claimant's failings in respect of the first and second allegations relating to the PayPal account. In this regard the account had been set up by the respondent's Managing Director, Mr Conway, long before the claimant joined the company and was one that Mr Pendergast admitted awareness of, albeit that he maintained that he was not aware that it was being used to raise invoices for DBS checks but never queried its purpose. Yet, despite the respondent's imputed knowledge of the account's existence Mr Conway's fraudulent use of it went undetected even though it must have been apparent to those keeping and auditing the company's accounts that monies were going out of the business to pay for DBS checks for candidates but that there were no corresponding payments by way of recovered income. If it was the company's practice to seek reimbursement of these fees from the candidates one would have expected professional accounting personnel, who had full access to the business' bank account, unlike the claimant, to have raised questions about the whereabouts of the recovered income. In addition neither Ms Griffiths nor Mr Pendergast could say with any certainty where in the P&L accounts, which were effectively the claimant's sole monitor of the company's finances, the costs for DBS checks could be found. As such it was difficult to see how in Ms Griffiths' extended grounds for her decision at page 265 she could have been completely satisfied that the entries in respect of the charges from CRB UK (who carried out the checks for the respondent) were clearly itemised and visible. Furthermore it was not clear to the Tribunal how the claimant, having no access to the PayPal account or the business' bank account and hence no means of reconciling charges against money recovered, could reasonably have been expected to know that monies were missing at the time that the PayPal account was closed by Mr Conway in August 2016 or that no monies had been remitted back to the business at that point in time.

54. Turning to the third allegation relating to the claimant's failure to ensure that workers placed by the company had relevant DBS certificates in place the Tribunal considered that Ms Griffiths' findings in respect of this matter were rather more sustainable having regard to the outcome of the internal audit conducted by Ms Lumb of workers placed by the company over a four week period prior to the claimant's suspension, which showed that out of 54 workers who had worked through de Poel 31 had no CRB certificate/practical training. In this connection it was not in dispute that the lack of a CRB certificate for a worker would constitute a critical fail for the purposes of both the agreements that the company had with de Poel and under the HTE Framework. Such a statistic was a stark one in terms of the claimant's management of the business' compliance function and its validity was not challenged at the time it was made known to the claimant. He has of course since cast doubt on the exercise largely on the back of the audits carried out by de Poel four days later and then by Neuven on behalf of HTE a week later, which were each passed by the respondent on the basis that the company would not have been able to have obtained CRB certificates for workers missing them within the time between the internal audit and the external ones taking place. However, the evidence showed that the respondent took immediate action on discovery of this issue of non-compliance to address it by releasing DBS links for all those that needed CRBs urgently, which lent support to the validity of the audit

carried out by Ms Lumb and in the absence of any detail about the subsequent external audits the Tribunal considered that their results could not safely be relied upon to gainsay it.

55. Dealing finally with the fourth allegation relating to the claimant knowingly allowing his team to place workers under the HTE Framework without their having been face to face interviewed in each and every case the Tribunal also considered that Ms Griffiths findings in respect of this matter were sustainable ones. As with the DBS/CRB certificates both the de Poel and HTE Framework agreements required the workers placed through them to have been interviewed face to face by the agency placing them and again it was not in dispute that a failure to do so would constitute a critical fail for the purposes of each of the agreements. In this regard the evidence showed that Ms Lumb during a review of current practices carried out on 1 March 2017 had seemingly been told by Ms Lee (Nurse Interviewer) that she had been instructed by the claimant not to face to face interview candidates for the HTE Framework roles on the basis that no one would know, which was put to her in an investigation meeting on 2 March 2017 conducted by Ms Stratford. in response to which she did not demur. Whilst she subsequently amended her evidence on re-interview by Ms Kenyon on 4 May 2017 to state that what had been said by the claimant was that we were to face to face interview if we could get them to come into the office (and) if not to telephone interview them and post the form for them to sign, which represented a softening of the position that she had originally outlined the fact remained that the telephoning of candidates to interview them was in breach of the audit criteria for both the de Poel and HTE Framework agreements. Quite simply, even on Ms Lee's more favourable evidence, an approach of 'face to face interviewing if you can' was not good enough and gave rise to another issue of non-compliance, which placed the respondent at real risk of losing these contracts.

56. Having regard to these matters the Tribunal concluded that Ms Griffiths had a genuine belief that the claimant had committed the misconduct of which he was accused and that she had reasonable grounds for her belief, at least in so far as his failings relating to the DBS/CRB checks and face to face interviews were concerned. It also concluded that at the time she formed it there had been carried out a reasonable investigation. It did so because the documents show that following her engagement to conduct the claimant's disciplinary hearing she ensured that all four of the allegations against the claimant were thoroughly examined by means of a careful and comprehensive disciplinary hearing on 12 April 2017, at which he was given the opportunity to be accompanied and to offer up whatever he wanted to say in explanation or mitigation of the charges against him and in response to the defence points made by him she organised further interviews with all relevant personnel in order to enable her fairly to address these in her deliberations before delivering an extraordinarily detailed decision letter He was also afforded the opportunity to appeal his dismissal, the hearing of which was conducted by Mr Pendergast on 6 July 2017.

57. The next question for the Tribunal was whether the respondent was reasonable or unreasonable in treating such misconduct as sufficient to justify the claimant’s dismissal. In answering questions of fairness the Tribunal continued to have regard to the terms of section 98(4) ERA and it

strove not to substitute its judgment for that of the respondent. The issue for it throughout was not whether it would have done as the respondent did but whether its actions fell within the range of options reasonably open to it. Having approached the question in this way the Tribunal concluded that dismissal was a penalty that was reasonably open to the respondent as the retention of its ability to place workers through the HTE Framework and de Poel contracts was essential to the business' viability and the claimant's management of the compliance function in respect of these two critical fail areas of DBS/CRB checks and face to face interviewing of candidates clearly put the respondent at serious risk of losing them given the stringent audit criteria for demonstrating compliance.

58. Accordingly, having concluded that a reasonable investigation had been undertaken and that allowance had been made for the claimant to say what he wanted to say in explanation or mitigation of his actions, the Tribunal was unable to say that the respondent in electing to dismiss the claimant, notwithstanding his hitherto good service and unblemished record, had acted in a way that no reasonable employer would have done.

59. The Tribunal therefore concluded that the claimant's complaint of unfair dismissal is not well-founded, fails and is dismissed.

60. Turning finally to the claimant's complaint of having suffered an unauthorised deduction from his wages in the form of unpaid commission/bonus whilst suspended the Tribunal concluded that this complaint is well-founded as it considered that he had a contractual entitlement to receive 6.5% of business operating profit on the basis of the agreement entered into by the respondent in the form of Mr Conway with him and its custom and practice of paying him this bonus quarterly from his appointment as General Manager in April 2015. Finding therefore that this bonus was properly payable pursuant to section 13(3) ERA the Tribunal calculated that he was owed as a gross figure £5681.57, as explained above, which after deductions for tax and National Insurance it netted to £4687.87 based on the percentage deductions for these as shown in his pay slips for April and May 2017 of 9.87% and 7.69% respectively, which sum the respondent is ordered to pay him.

Employment Judge Wardle

Date 04 April 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11 April 2018

....

....
FOR EMPLOYMENT TRIBUNALS

Case No: 2404980/2017

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2404980/2017

Name of case(s): Mr M Swinnerton v Bluestones Medical Recruitment Limited

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 11 April 2018

"the calculation day" is: **12 April 2018**

"the stipulated rate of interest" is: 8%

MISS L HUNTER
For the Employment Tribunal Office