EMPLOYMENT TRIBUNALS

Claimant: Mr J Pike

Respondent: MYPINPAD Ltd

HELD AT: Cardiff **DATE:** 16, 17, 18 and 27 January 2023

BEFORE: Employment Judge Moore

REPRESENTATION:

Claimant: Mr J Allsop, Counsel
Respondent: Mr A Roberts, Counsel

JUDGMENT having been sent to the parties on 31 January 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Introduction

1. The claim was presented on 9 November 2021. The claimant brought claims of ordinary unfair dismissal, S47B detriment claims and S103A automatic unfair dismissal. The protected disclosure claims were dismissed on withdrawal in a Judgment dated 4 April 2022 leaving the ordinary unfair dismissal claim.

2. A preliminary hearing took place before Judge Sharp on 4 April 2022. A further private preliminary hearing was listed on 12 July 2022 to determine admissibility of evidence. That hearing was postponed as Judge MM Thomas, having regard to **Basra v BJSS Ltd 2018 ICR 793,** decided that the Tribunal could not determine admissibility of evidence as the effective date of termination was in dispute. As such, the preliminary hearing was relisted before me on the above dates. The issues for determination were:

a) The effective date of termination
b) The without prejudice / protected conversations and interparty correspondence.

3. It was common ground that if I determined the effective date of termination was 5 July 2021, the remaining issue (without prejudice / protected conversation dispute) fell away for the purpose of the preliminary hearing.

4. The hearing took place in person on the above dates save for 27 January 2023 which was submissions by video hearing. The Tribunal had an agreed preliminary hearing bundle which consisted of 203 pages. The Tribunal heard evidence from the following people:

For the claimant:

- The claimant;
- Mr Allan Syms, founding member and former Commercial Director for the respondent;
- Mr David Watts, former Chief Technology Officer for the respondent;

For the respondent:

- Mr Richard Forlee, Chairman and acting CEO;
- Mr David Ackerman, Head of Finance;
- Ms Sally Withers, Head of HR

Dispute over Exhibit to Mr Watt's statement

5. Mr Watt's witness statement had an exhibit attached which had been referenced but not attached when statements were exchanged on 7 November 2022. This was said to be a transcript of a record of conversation he had with Mr Forlee on 6 July 2021. The respondent's representative raised this with the claimant's representative who explained on 17 November 2022 that the omission was an oversight and it was duly provided. The respondent objected to the inclusion of the exhibit as it had not been disclosed in accordance with the previous orders for disclosure. There were two additional documents showing the meta data for the exhibit. The exhibit was a transcript of a telephone call between Mr Watts and Mr Forlee the day after the claimant says he was dismissed where it is alleged that this was discussed. Applying **CIBC v Beck [2009] IRLR 740** the evidence was plainly relevant and goes to the heart of the issue in dispute regarding the effective date of termination. The evidence between the claimant and Mr Forlee was at complete odds and it was necessary to make findings of fact based on their conversation and other corroborating witness evidence and documents. As such I concluded that the exhibit and the meta data was of such relevance that disclosure was necessary for the fair

disposal of the proceedings. There was no discernible prejudice to the respondent who had been in possession of the exhibit since November 2022 and if they required further time to address the evidence after cross examination they were offered such time. As it transpired none was needed.

6. Also during cross examination the claimant told the Tribunal that he had taken notes during his conversation other than the note he had passed to his solicitor. These had not been disclosed. The claimant undertook a search for the notes that evening and was unable to locate them and surmised they were no longer in existence. As such no order for disclosure was pursued and Mr Roberts asserted he would address this issue in submissions.

7. On 17 January 2023 during the claimant's cross examination, Mr Roberts raised that he wanted to ask questions of the claimant about a mortgage application that would require the claimant to be given a warning about self incrimination. I asked Mr Roberts to explain to me why the claimant's mortgage application was relevant to the issues to be determined at this preliminary hearing. A break was taken for Counsel to discuss this matter and it was agreed the warning would be given and questions permitted on the basis they were relevant to the issues.

8. At the start of Mr Watt's cross examination Mr Roberts asserted that paragraph 6 of the witness statement meant the witness had not been asked closed questions which meant the witness statement was prepared in breach of CPR Rules. The relevant sentence was "Regarding the present issue, I was asked to comment on whether I believe Mr Pike had been dismissed by the Respondent, and if so, when."

9. Mr Allsop objected on the basis Mr Roberts was attempting to ask questions about the preparation of his witness statement which was prohibited under litigation privilege. Mr Roberts submitted that the witness had waived privilege by the inclusion of the sentence I have quoted above. This had not been raised with Mr Allsop. I therefore adjourned and directed if this point was pursued I wanted full submissions from Mr Roberts as to how this sentence in the witness statement waived privilege and breached CPR Rules. After the adjournment whilst the position was maintained by Mr Roberts it was agreed this would be dealt with in submissions and he would not pursue questions on that basis in any event. Mr Roberts later confirmed he was not pursuing this point.

10. At 14.50 pm on 18 January 2023 I asked Mr Forlee a question as to whether he had taken any advice from HR about having a protected conversation. Mr Roberts objected to the question on basis of litigation privilege and I withdrew the question before any answer was given.

11. Evidence was heard regarding the departure of two former CEO's of the respondent. Neither were witnesses at the hearing and have not had the opportunity to comment on the evidence regarding the circumstances of their departures. I have decided it is not necessary to directly name those individuals and shall refer to them as CEO A and CEO B respectively. Their actual identify is not relevant to the issues in this claim.

Findings of Fact

12. I made the following findings of fact.

13. The claimant commenced employment with the respondent on 24 August 2012 under a Service Agreement. He was the Chief Technology Officer at that time and the founder of the respondent company which offers software payment solutions. With effect from 14 January 2021 the claimant's job title changed to Chairman and Chief Innovation Officer, and that had been with effect from November the previous year.

14. Throughout this Judgment I shall refer to the lead shareholders[1], by which I mean the following individuals:

    - Mr Jamie Taylor
    - Mr Kemper Shaw
    - Mr Kristian Blaszczynski

15. The lead shareholders held or represented companies who held a significant controlling interest in the respondent's parent company, Licentia Group Limited, who were and are still the largest shareholders of the respondent.

16. In March 2020 Mr Forlee joined the respondent as Head of Corporate Development at the request of the lead shareholders and at the time Mr [CEO A] was the CEO. He was exited from the business in October 2020 and I will return to this below. At that time Mr Forlee became Acting CEO.

17. Mr Forlee proposed to the lead shareholders that the claimant be made Chairman as Mr Forlee believed the claimant would find it difficult to report to Mr Forlee. He convinced the lead shareholders to allow the claimant to be Chairman on that basis and also that a disgruntled claimant might be disruptive.

18. On 25 June 2021 there was an email sent by Mr Forlee to the claimant. Mr Forlee raised concerns with the claimant about a blurring of the responsibilities between himself and the claimant and that the claimant was overstepping into executive functions in his role of chairman. The significant and relevant part of that email insofar as the matters in this preliminary hearing was that the claimant stated in a reply to part of the email as follows:

[1] These were referred to as lead shareholders during the hearing however the response describes them as lead investors.

" For my part Richard I will never not want to be involved in the business and if Jamie and Kemper expect that ever to be the case then I would rather see the company buried in the garden. If they have issues with me that you feel I should discuss with them then I am more than happy to".

19. Under cross examination Mr Forlee stated that he did not disagree that the "buried in the garden" comments had to be seen in the context of the entire email. It was put to Mr Forlee that when read in the context of the whole email this should not have been seen as a threat, to which Mr Forlee said that he was not sure he could say one way or the other. He also agreed that the claimant's response was generally conciliatory as his approach had been also. The claimant's explanation for the use of this expression was that it was one he had used frequently and had adopted it after hearing it being used by a former business partner.

20. I find that Mr Forlee was not overly concerned at the point of that email about the "buried in the garden" comment, albeit I agree that it had the potential to be seen as threatening depending on the context in which it was made.

21. Ms Sally Withers is Head of HR for the respondent. Also on 25 June 2021 she had sent an email to Mr Forlee and the claimant, which gave them both feedback about how their working relationship was adversely impacting on the company employees. She referred to there being *"chaos"* and a *"perceived lack of alignment*" between them and that they were *"incubating quite a toxic culture."*

22. Following these email exchanges Mr Forlee forwarded his email and the claimant's responses of 25 June 2021 to the lead shareholders on 29 June 2021. The sequence of emails was as follows:

    - Someone called Mr Clough (I have not been sure who Mr Clough was but he had the same email address as one of the other lead shareholders) emailed a reply to all and quoted the "buried in the garden" comment, saying *"have I read this wrong?"*.

    - Mr Blaszczynski replied with the word *"wow"*.

23. Mr Forlee also commented on the email where he stated that the claimant's responses *"encapsulated the inability to understand the notion of ownership, fiduciary duty, professionalism, separation of personal interests in business".* Mr Forlee also pointed out some of the positive points that the claimant had stated in that email, namely that he would only ever work for the good of the business, whoever was running it, and he had referred to it as his *"baby"* and he would never see it fail.

24. There were two handwritten notes by Mr Forlee around this time. In his witness statement Mr Forlee had explained the notes as follows. He said that there had been two conversations with the lead shareholders around this time. He said that he discussed these issues with the lead shareholders a few days later, that is after the email exchange with the claimant, and the lead shareholders told Mr Forlee they had lost confidence in him and did not want him acting as a

figurehead, and he referenced the notes in the bundle where the word "figurehead" is noted. He then forwarded the entire email exchange and there was a further call with them on 2 July 2021. Mr Forlee in his oral evidence thought that he might have got those notes the wrong way around, referring to the note that is titled "Shareholder Call 2/7/21 08:00" as more of an agenda to himself and as such was not a note of the actual call. This note stated as follows:

"Proposal – revert to JP[2] *that role is to be chairman with no exec functions. If not acceptable JP will resign. If acceptable JP remains as chairman and Board member.*

KB feedback in call with Phil D. Understands, seen it before had experience with founder of [word indecipherable]".

25. I find that the reference to "KB" was a reference to Mr Blaszczynski and the reference to "Phil D" was a reference to Mr Phil Dunkelberger who is a director of the respondent.

26. The other note was titled "Shareholder Discussion". Mr Forlee told the Tribunal in his evidence that that was the note of the actual call with the shareholders. It stated as follows:

"Guys not interested even in him acting as a figurehead.

Get copy of JP's contract.

RF to call Phil and Ashley to let them know that shareholders/other directors are not happy.

Search for any other patents that JP may own.

Access to emails when news delivered."

27. Mr Forlee told the Tribunal that the shareholders had informed him that they had lost confidence in the claimant. Rather than go down the formal process Mr Forlee volunteered to the shareholders that he would have a conversation with the claimant about the loss of confidence and invite him to discuss shareholders' potential terms with the shareholders under which employment would end. The rationale for this approach was that Mr Forlee felt it would be more dignified given the claimant's status as a founder of the company.

28. Mr Forlee told the Tribunal he did not have authority from the lead shareholders to dismiss the claimant and that he had not been told to dismiss the claimant by the lead shareholders.

29. The note titled "Shareholder Discussion" recorded that Mr Forlee would call the independent directors and inform them the other shareholder / directors were not happy. This then changed, presumably during a further call as it was agreed that Mr Forlee should not be the one to inform the independent directors (Mr

[2] JP was a reference to the claimant

Head and Mr Phil Dunkelberger) about the loss of confidence in the claimant and that Mr Blaszczynski[3] would call Mr Dunkelberger and Mr Taylor would call Mr Head. Mr Forlee was subsequently informed that both the independent directors were supportive for the discussion with the claimant to go ahead.

30. Following those telephone calls with the lead shareholders Mr Forlee then spoke to the Chief Operations Officer, Mr Brickell, who advised Mr Forlee to check domain, registrations and patents to make sure they were held in the respondent's name in the event the claimant resigned or reacted badly to the discussion. The Teams message in the bundle between Mr Brickell and Mr Forlee stated that Mr Forlee should make sure that domains and patents were assigned to the respondent and/or Group companies and that a check should be made at Companies House as regards director registration etc., as to whether or not the claimant could effectively commit the respondent commercially if he was not removed.

31. I find that there were two calls with the lead shareholders prior to the conversation with the claimant on 5 July 2021. The first must have been the call as recorded in the note "Shareholder Call 2/7/21 08:00". The second was the call noted "Shareholder discussion". This is because it can be seen from the notes that initial position (that the claimant would remain as a chairman) had shifted to where the lead shareholders were not interested in him *"even acting as a figurehead."* Further, in the second note it is recorded that KB (Mr Blaszczynski) had fed back about a call with Mr Dunkelberger his understanding of the situation having "been there before", and this must have been in reference to the agreement that the shareholders would call the directors and tell them about the situation before the call between Mr Forlee and the claimant took place.

32. Looking at the evidence overall, I find that as of 5 July 2021 there was an agreement to dismiss the claimant for the following reasons:

    a) None of the emails or notes before me say anything about there being an agreement that the discussion would be limited to conveying a loss of confidence and an invitation to speak to the lead shareholders.

    b) There was an initial proposal to keep the claimant on as Chairman (see paragraph 24), this then changed to the lead shareholders not being interested in the claimant even acting as a figurehead (see paragraph 26). The lead shareholders spoke to the directors and informed them they had lost confidence in the claimant. They sought agreement to their proposal, as evidenced by Mr Forlee's two handwritten notes. Whilst there may not have been a Board meeting and a formal resolution, I find that the directors were fully on board with the agreement to dismiss the claimant. Mr Forlee specifically noted that Mr Dunkelberger understood the situation comparing it to another occasion he had experienced with another company founder.

    c) I find that it was understood there would need to be formalities after the discussion but this was for the purpose of trying to agree a settlement rather

[3] This was referenced in the note titled "Shareholder Call 2/7/21" see paragraph 24.

than there being a different outcome, or a dismissal at a later date. I was invited to find on the basis of the conversation set out at paragraph 59[4] that there cannot have been a dismissal on 5 July 2021, as otherwise why would Mr Taylor have asked Mr Forlee if the claimant could be dismissed on basis of his behaviour during the second call. I do not accept this contention as I find that the comments about dismissing the claimant were about an enquiry as to whether he could be dismissed without a settlement, based on his behaviour rather than corroborating a position that he had not been dismissed at all.

d) If there was only ever an intention that the claimant would be invited to have a discussion with the lead shareholders, why would Mr Forlee have spoken to HR and Legal (see paragraph 62) and why would HR and Legal advised following a formal process with warnings and letters? I find it is inherently implausible that HR and Legal would want to follow a formal process referencing warnings and letters merely to enable the claimant to have a discussion with the lead shareholders. It is far more plausible, and I find as fact, that HR and Legal wanted to follow a formal process of warnings and letters as they knew there was a plan to dismiss the claimant.

e) All of the documents before the discussion on 5 July 2021 point towards an action plan to dismiss the claimant. Mr Forlee was advised to check domains, patents and registrations (paragraph 30). He was advised to obtain the claimant's contract, search for patents and access to emails when "news delivered" (paragraph 26).

33. I turn now to the call on 5 July 2021. This was a call that took place on Teams between Mr Forlee and the claimant. The Tribunal had two different accounts before it of the discussion and both witnesses (Mr Forlee and the claimant) were the subject of detailed and skilful cross examination by counsel for the claimant and the respondent. It was of course a crucial discussion. The claimant says he was dismissed by Mr Forlee during this call, and this is denied by the respondent. The respondent also maintained the conversation was a protected conversation.

34. I first of all deal with the recording that the claimant had claimed to have of the conversation. The reference to this recording formally appeared in the claimant's grounds of complaint attached to the ET1, and there was some reference to it in a discussion that the claimant had had with Sally Withers on 9 July 2021. It was not referenced in the pre litigation correspondence but in the ET1 it set out that the meeting had been recorded by the claimant and that would be made available to the Tribunal. It should be noted that the ET1 was presented on 9 November 2021.

35. At a preliminary hearing on 4 April 2022 the respondent had made an application for early disclosure of the recording and a transcript. Mr Allsop is recorded in the order as explaining that his instructions were that the account which recorded the meeting had seen its data wiped. It was paid for by credit

[4] I deal with this AND PARA (D) out of turn as I want to set out my findings of fact about what had been agreed prior to the call, in this order.

card of the respondent and he was instructed the claimant no longer had access to the recording and could not obtain it, believing it was on a seven day loop so long deleted. Judge Sharp asked therefore why the grounds of complaint had said that there was a recording, and in summary the claimant was directed to provide a witness statement to explain what had happened. I have considered this witness statement of the claimant (which was dated 27 April 2022). The claimant explained he had had a security system at his home which records both video and audio of anything that happens in his home office where he had been based when the discussion with Mr Forlee took place on 5 July 2021. He said he notified his solicitors the recording was available as he genuinely believed it remained stored in the Cloud and in that sense was available to him. When he subsequently attempted to obtain the recording from the service provider it became apparent the account was linked to his work email address, and when that had been suspended this led him to have been unable to access the Cloud based recording. (He had not been suspended formally but it was common ground that the access to his emails was withdrawn for reasons that I will address below).

36. The claimant was asked about all of this in cross examination and the claimant accepted by 20 September 2021 he knew there was no backup of the recording. It was put to the claimant that he was being untruthful when he had stated in his witness statement and in the pleadings (which were of course lodged later in November 2021) about genuinely thinking the recordings were available. The claimant accepted he knew this and when it was put to him that it was a lie he said, “it looks that way, yes”. He also accepted he should not have told Ms Withers that his lawyers had seen a copy of the recording as this was also untrue and he described that as “bravado”.

37. In terms of how I have approached the evidence and how this particular matter affected credibility of the claimant, I took into account both that the claimant acknowledged he had not been truthful with Ms Withers and that he had not been truthful about the account of the recording being available in the pleaded claim.

38. I have balanced this when assessing credibility against the claimant's testimony about the conversation on 5 July 2021, and I have taken this into account as a factor in assessing credibility, but I have found the contemporaneous documents to be of greater assistance in reaching my conclusions.

<u>The evidence of the claimant of the conversation on 5 July 2021</u>

39. The claimant told the Tribunal that during the meeting Mr Forlee had informed him that due to slow revenue the Board had decided to dismiss him and the claimant asked if he could speak to the lead shareholders to see if they would reconsider but was told that he could not.

40. It was common ground that the claimant made a comment about asking for another chance to go off and “grow the travel vertical”. The call ended (according to the claimant) on the understanding that he had been fired with immediate effect. Mr Forlee had apologised but said the decision had been made. The claimant sent an email to his solicitor on 20 July 2021. This note

was plainly not a verbatim transcript or record of the entire conversation. The conversation lasted ten minutes whereas the note was very short and could not have captured everything that was said. The contents of the note were as follows:

"Chris it was a very quick meeting. Richard has asked for a meeting with me on Monday the 5th at 3.30pm as he has something that he wanted to discuss, i asked him to meet earlier as i was not go to be available so we had a teams call at 12.37pm.

Richard: ' i am sorry justin but i have to have a conversation that i never thought i would need to have'

Justin: 'your asking me to leave'

Richard: 'i have been told to do just that '

Justin: 'your sacking me, your kidding me'

Richard: 'no i'm afraid im not'

Justin: 'richard that will kill me, what have i done'

Richard: 'im sorry justin'

Justin: 'at least let me speak to jamie and kemper'

Richard: 'im sorry justin the decision has already been made by the board'

Justin: 'on what grounds, what have i done wrong'

Richard: 'they are unhappy with the slow revenue and hadn't planned on putting more money in again'

Justin: 'cant i at least go off and grow the travel vertical as you know i can get investment and customers there'

Richard: 'im sorry justin but no. I am sorry'

End of call.

The call is ingrained in my memory."

41. It was put to the claimant that the note does not say anywhere he had been sacked immediately or with notice. The claimant agreed there was nothing in that conversation specifically that talked about timing, but he came off the call with a very clear impression he had been sacked.

42. The claimant told the Tribunal that Mr Forlee had history in relation to how other people had been dismissed and referred to Mr [CEO A] and Mr [CEO B] (another former CEO) who had been exited in the same manner. The claimant accepted he had made some assumptions based on his past experiences and also due to the demeanour of Mr Forlee. The claimant said he was 100% convinced he had been dismissed with immediate effect.

Evidence of Mr Forlee

43. Mr Forlee's evidence was that he started the call by telling the claimant the lead shareholders had lost confidence in him and that they thought it was time to part ways. Mr Forlee disputed that he said the claimant was being asked to leave and he did not say or agree with the claimant that he was being sacked. He recalls the claimant was shocked and stated he would be financially ruined, saying "it's the end for me". Mr Forlee says he tried to reassure the claimant that the lead shareholders wanted to discuss a financial arrangement with him on separation and suggested he speak to the lead shareholders. Mr Forlee also disputed the claimant's account that the decision had already been made by the Board, offering the explanation there had been no Board resolution or decision to dismiss him at that point.

44. Mr Forlee agreed that he experienced some personal discomfort during this call and that he was often apologetic. It was put to him that he had said, "I'm sorry Justin, the decision has already been taken", to which Mr Forlee said he did not remember saying that but accepted it was possible he said it.

45. In response to the contention that was put to him that the claimant had said "you are sacking me" Mr Forlee said, "I find it difficult to say, I do not recall him saying that I genuinely cannot remember rather than disagree", but he did not accept he had replied, "I'm afraid not" in response to "you are kidding me".

46. Mr Forlee made a very short handwritten note of the discussion which was limited to (after noting the claimant's name and time and date of call) "it's the end for me".

47. Thereafter Mr Forlee sent a message to Ms Withers at 13:01. This is the closest contemporaneous note before me as to the discussion that had just taken place. It stated as follows:

5/07/2021 13:01

Hi Sally. I had my call with Justin at 12:45. It came as a shock to him as was to be expected. He did not shout or rant, which made it even worse. I did not discuss next steps because it just didn't feel appropriate. He asked what reasons there might be for the decision and I said that it would be best to have a call with the shareholders to discuss the reasons, but at a high level, it came down to underperformance of the business and that he was held partly accountable notwithstanding that [CEO B] and [CEO A] were involved. Let's leave a day before you call Justin for next steps. Lets talk later. Regards, Richard

48. Mr Forlee also then sent a WhatsApp message to Mr Taylor after the call with Mr Pike on 5 July 2021. He told Mr Taylor that the claimant had been:

"shocked by what I told him which was that the key shareholders feel it's time to sever ties between him and the business. He asked why and I said that for reasons he should best speak to you as key shareholders. I did offer my high level insight that' as shareholders you have been unhappy with performance for some time and that he is accountable for a large part of that even though [CEO B] and [CEO A] were in place. He said that he was "finished" financially. I said that his shares have value today and there was an agreement to be reached on separation. In short he was more shocked than angry. Let's talk tomorrow morning."

49. I find the reference to reaching an agreement on separation to be about the claimant's position as a shareholder rather than an employee.

50. I prefer the claimant's account of the conversation on 5 July 2021 as was set out in his note to his solicitor on 20 July 2021. The note was sent soon after the conversation and is the only near contemporaneous account of the discussion. The respondent has no note other than Mr Forlee's note where he records the claimant says, "*It's the end for me".* Further, Mr Forlee was unable to remember whether he had made some of the comments attributed to him whereas the claimant was very clear in his understanding of what had been communicated to him. Some parts of the claimants note are also corroborated by other evidence namely:

a) The board had already taken the decision to dismiss the claimant (see paragraphs 2 – 32);

b) Mr Forlee told Ms Withers just after the call that when the claimant asked for **reasons** (my emphasis), he told him it came down to underperformance;

c) Mr Forlee told Mr Taylor in a what's app message that he had told the claimant the key shareholders felt it was time to "sever ties" between him and the business".

d) It was agreed the claimant had asked if he could "grown the travel vertical".

51. At 13:30 also on 5 July 2021 Mr Forlee met with Kathryn Beater, who is the respondent's legal counsel. His note about this was that he had asked Ms Beater to meet up with the respondent's patent attorney "as soon as" so that next steps could be discussed.

52. I now turn to some messages that the claimant was sent by Ms Beater and Ms Withers later that day. Ms Beater says that she had just had a call l from Mr Forlee and that she was "**speechless but just wanted you to know that I'm here if you need a friend".** At 20.37pm Ms Withers sent the following message in What's App:

"Hi, I'm aware of your discussion with Richard earlier today. I can't imagine how you must be feeling. I have been asked to speak to you tomorrow so wanted to check what times work for you. I have a 10am that will likely be a long one. Other than that no major meetings. I'm thinking of you. Sal"

53. There was a second call between Mr Forlee and the claimant on 5 July 2021. This was late at night and the claimant accepted he had been drinking and that he was extremely angry and upset. Mr Forlee made much more detailed notes about this discussion. The relevant parts are that Mr Forlee recorded that the claimant said that he had been dismissed without HR and he also made a number of threatening comments. He repeated the threat to bury the respondent in the garden. He also said he was going to be a "nightmare" and said that he would take key employees and set up in competition. Mr Forlee noted the claimant said he had been "dismissed without HR".

54. The Tribunal heard from Mr Alan Syms who was also a founding member of the respondent and the respondent's Commercial Director. Mr Syms told the Tribunal he had received a call from the claimant on 5 July 2021 in which he told him he had been fired, to which Mr Syms said, "*you're crazy, you are the chairman"* and that he was truly shocked. Mr Syms said some days later (he could not recall exactly when) Mr Forlee had called Mr Syms and told Mr Syms the claimant had left the company and led Mr Syms to believe that the decision had been made by the Board. Mr Syms offered to mediate between the respondent and the claimant. Mr Syms was very clear when pressed under cross examination that there was no room for him to be mistaken.

55. I found Mr Syms to be a plain speaking credible witness who answered questions in a direct manner and I accepted his evidence. His explanation as to why he could not have been mistaken was highly plausible, and it was that he would not have been mistaken about something of such high importance as being told that a fellow founder of the business and a shareholder (referring to the claimant) had been dismissed. In short there was just no room for error for him misunderstanding either conversation, with the claimant or with Mr Forlee. This understanding was corroborated by a note that Mr Syms sent Mr Forlee on 7 July 2021 about an event where the claimant was due to be a key speaker, and it is clear from that email that Mr Syms understood the claimant would not be attending that event and speaking on behalf of the respondent. That was also followed by a discussion about needing to focus on external messaging about meetings the claimant was due to attend and that he would not be attending.

56. The Tribunal also heard from Mr Watts who at the time was the Chief Technology Officer and who had a close working relationship with the claimant.

57. On 5 July 2021 the claimant also contacted Mr Watts and told him he had been dismissed. Mr Watts described his reaction as being shocked and immediately worried about his own position. Mr Watts then received a telephone call from Mr Forlee on 6 July 2021 and decided to record the conversation after a few minutes. That recording was not available to the Tribunal. This was subject to detailed cross examination. I accepted Mr Watts' account of why the recording was not available and how the written record had come about, and I also accept that his record was an accurate record of that discussion. Mr Watts had inadvertently filed that record in the wrong place, effectively, in personal medical records on his laptop and had come across it much later. There was no contemporaneous record from the respondent of that call. I do not consider the fact that Mr Watts had told Mr Forlee he had not spoken to the claimant (which was untrue) to undermine his credibility to the extent that I would prefer to not accept a record that was made at the time over no record at all. This was that Mr Forlee told Mr Watts that the claimant had been removed from the business.

58. Mr Watts subsequently received an invitation on 7 July 2021 to discuss the dissemination of his team which would be taken on 9 July 2021. Mr Watts was so concerned about events that he resigned on 8 July 2021.

59. I turn now to some WhatsApp messages on 6 July 2021 that the respondent relied upon as evidence that Mr Forlee could not have dismissed the claimant on 5 July 2021. These were between Mr Taylor and Mr Forlee about the late night telephone call from the claimant later on 5 July 2021. Mr Forlee relayed the unpleasantness of the call and the comments, to which Mr Taylor replied *"have you looked at his contract, could we dismiss him for this behaviour?",* to which Mr Forlee said he had spoken to every team leader other than Dave Watts at that stage and "*all appear happy with the decision",* again a reference to a decision, and *"even Alan Syms said he is sad but understands the decision".* Mr Forlee, in response to what Mr Taylor had asked about whether they could dismiss the claimant for his behaviour on 5 July in the second conversation, said that a lot of what he said "*is probably with him being under the influence of alcohol and contradictory"* and he wants to go through a formal HR process and get a warning. He then says, *"he's done and will never return".*

60. The reference *"could we dismiss him for this behaviour?"* by Mr Taylor suggests that Mr Taylor did not believe that the claimant had already been dismissed. I find that Mr Taylor said this in the context that there would be ongoing discussions with the claimant about his exit. I return to this below under my conclusions.

61. On 6 July 2021 a decision was taken to revoke the claimant's access to company systems and emails. This was taken in conjunction with a discussion with the respondent's Head of Security.

62. On 7 July 2021 there was an exchange of messages in Teams between Mr Ackerman (Head of Finance) and Mr Forlee. Mr Ackerman had been contacted by a marketing consultant who had been contracted by the claimant, describing her as "a little panicky about her position". Mr Ackerman stated as follows:

"One thing I did think was whether we need him to resign from the board and on companies house now, although it is then public".

63. Mr Forlee's reply stated:

07/07/2021 00:38

The approach taken with Justin was to have a person to person discussion with him. I would have loved it if I could just have sent him an email because i was not looking forward to speaking to him. The face to face is the same approach adopted with [CEO A]. Legal and HR wanted a formal process with warnings and letters etc, but I said that it was a whole lot more dignified to speak to. I told [CEO A] this and he appreciated the approach. With Justin, he said he is going to be an "HR nightmare". This means he may want the formal process and the lack of dignity that goes with it. To get rid of him as a director will require a shareholder resolution. On the HR front we will dismiss him and he can then argue for unfair dismissal, which I am told is not clearcut for very senior roles and a one-year notice period. So finally to your point. We need to hear from Justin. If he refuses to engage, then we are forced into the formal processes. Regards, Richard

64. I do not consider that Mr Forlee saying "on the HR front we will dismiss him" as meaning the claimant had not been dismissed already. I find it is more plausible that Mr Forlee at that time did not understand that his words to the claimant had amounted to a dismissal and that there was a deal to be done and if it could not be done, he would be dismissed. Mr Forlee was of the view he could still allow

the claimant to "craft the narrative", that was to present to the outside world he had chosen to go. This was telling where he commented the respondent "could have come out and said so and so was fired".

65. I now deal with evidence before the Tribunal about the exit from the respondent of two previous CEOs, CEO A and CEO B.

66. The claimant told the Tribunal that in respect of the departure of Mr [CEO A] it had been agreed that he would be told the lead shareholders had lost confidence in him and he would be invited to resign, as was Mr [CEO B].

67. In an earlier witness statement Mr Forlee described how Mr [CEO A] and Mr [CEO B] departed from the respondent. He stated as follows:

"By October 2020 the Claimant (among other members of the senior management team) had formed the belief that the CEO, Mr [CEO A] [CEO A], was not the right person to lead the Respondent. The Claimant at some point made representations to the Lead Shareholders about Mr [CEO A]'s performance and that Mr [CEO A] should be dismissed. Discussions were had between the Claimant me and the Lead Shareholders which resulted in a decision to let Mr [CEO A] know that he had lost the confidence of the Lead Shareholders. Mr [CEO A] had under 2 years' service but I proposed that I have a conversation with Mr [CEO A] to let him know he had lost the confidence of the Lead Shareholders so that he could consider his position and agree to resign and avoid the indignity of a dismissal. Upon delivering the message in a meeting between him and I, [CEO A] resigned the very next day. In January 2020 the Claimant made similar representations to the Lead Shareholders about the then Chairman, [CEO B]'s poor performance and recommended that his contract be terminated. [CEO B] ended up resigning sometime in April or May 2020."

68. Mr Forlee accepted that the respondent had stepped outside their normal performance and conduct procedures, and he told the Tribunal "we've done this before with Mr [CEO A]" and the claimant had been involved.

69. The claimant's evidence was that that Mr Forlee was telling clients as early as 10 July 2021 that he had been dismissed. The client referenced was a client in Sweden, Mr Lindfeldt of Surfboard Payments. The claimant says that he spoke to Mr Lindfeldt on 10 July 2021 and he had told the claimant he had spoken to Mr Forlee and was aware of the claimant's departure. Mr Forlee was asked about this in cross examination and accepted that there had been a discussion with Mr Lindfeldt about the claimant, but Mr Forlee's recollection was that Mr Lindfeldt had in fact raised it with him having been told by the claimant.

70. Therefore as of 10 July 2021 the respondent must have known from both the claimant and a client that the claimant considered he had been dismissed by the respondent, which can be no more telling than Mr Forlee having been told as such by a client of the business. The respondent did not seek to disabuse the claimant of that impression until 30 July 2021 when the respondent wrote to the claimant purporting to dismiss him and sent a separate letter via their solicitors denying that he had been dismissed on 5 July 2021. This was after a letter sent by the claimant's solicitors on 21 July 2021 in which they asserted the claimant had been summarily dismissed by Mr Forlee on 5 July 2021.

71. On 12 July 2021 the claimant messaged Ms Withers complaining that someone called Jason "keeps telling people why I left which is horseshit.." to which Ms Withers said she would speak to him and "no-none should be saying anything".

Ms Withers did not say anything `to dispute that the claimant had asserted he had "left".

72. On 13 July 2021 Ms Withers sent an email to the senior management team stating *"as you are all aware Justin is currently on leave. As yet no formal decision surrounding Justin leaving the company has been agreed. Therefore at present we are unable to send out any formal communication to staff until we have agreed and concluded exit details."*

73. The claimant was not on leave in the usual sense. He was not on annual leave nor had he been placed on garden leave. At this time there were discussions ongoing regarding a settlement agreement.

The Law

74. Sections 95 and 97 Employment Rights Act 1996 set out the circumstances in which an employee is dismissed and the effective date of termination.

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

(2) An employee shall be taken to be dismissed by his employer for the purposes of this Part if—

(a) the employer gives notice to the employee to terminate his contract of employment, and

(b) at a time within the period of that notice the employee gives notice to the employer to terminate the contract of employment on a date earlier than the date on which the employer's notice is due to expire;

and the reason for the dismissal is to be taken to be the reason for which the employer's notice is given.

97 Effective date of termination

(1) Subject to the following provisions of this section, in this Part "the effective date of termination"—

(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and

[(c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect].

71. Whether the communication amounts to a dismissal is a question of fact for the Tribunal to determine.

72. **Chapman v Letheby and Christopher Ltd [1981] IRLR 440** was a case about the effective date of termination. The EAT held that this depended on the construction of the letter in question. The construction should not be a technical one but should reflect what an ordinary reasonable employee would understand by the words used. In **Stapp v The Shaftesbury Society [1982] IRLR 326,** the Court of Appeal held that a letter as[CEO B] the employee to "relinquish his duties with effect from today" amounted to a letter of summary dismissal. Further that where there is ambiguity about a notice to terminate it must be construed in favour of the employee.

Conclusions

75. I find that the claimant was summarily dismissed during the first conversation by Mr Forlee on 5 July 2021 for the following reasons.

76. There was an agreed plan to dismiss the claimant prior to the conversation between Mr Forlee and the claimant on 5 July 2021 (see paragraphs 24-32).

77. Having made findings of fact about the first conversation on 5 July 2021 in which I preferred the claimant's account of the conversation, I now discuss the contents of that discussion as well as the surrounding circumstances in order to consider what an ordinary reasonable employee would have understood the position to be.

78. When asked by the claimant if he was being asked to leave and if he was "sacking" the claimant Mr Forlee agreed.

79. The claimant was told the decision had already been made by the board, the grounds were the lead shareholders were unhappy with slow revenue and he would not be permitted to "grown the travel vertical".

80. The claimant knew from his dealings with the previous CEO's that if the lead shareholders said they had lost confidence in them, they ended up exiting the business. The fact that they resigned is in my judgment irrelevant. I am not here to embark on conclusions surrounding their departures however if an employee is told resign or you will be dismissed, this may in certain cases amount to a dismissal in any event. It was quite clear that everyone understood the outcome of such a discussion more so the claimant, having been directly involved in the exit of two former CEO's in similar circumstances. As such, in assessing what an ordinary reasonable employee would have understood the position to be, within the respondent's business, being informed the lead shareholders had lost confidence and wanted a discussion, that understanding would mean that the individual was being dismissed.

81. Mr Forlee in his own words to Ms Withers, just after the call, told her he had told the claimant it was time to "sever ties between the claimant and the business". He also referenced the claimant asking for "reasons for the decision". There were other references by Mr Forlee to "reasons for the decision". In my judgment it cannot sensibly be suggested that the claimant was asking for reasons for a decision to merely to have a conversation with the claimant. It is far more plausible that the reference to the decision was a reference to a decision to dismiss the claimant.

82. Mr Forlee's witness evidence was that he told the claimant the lead shareholders had lost confidence in him and "it was time to part ways". I also find that referencing the call coming as a shock to be more plausible as being shocked at being dismissed rather than being shocked at being asked to have a conversation with the lead shareholders or a loss of confidence.

83. In respect of the conversation on 5 July 2021 I do not consider that Mr Forlee used the direct words "you are dismissed", but I do find that in terms of the language Mr Forlee conveyed to the claimant that he was dismissed with immediate effect, and this is corroborated by the later documentation.

84. Both Ms Beater and Ms Withers (who are likely to have been the HR and Legal personnel who had warned Mr Forlee to follow a process with warnings and letters), understood that the claimant had been dismissed. It is implausible that they would have used the language they used when they later contacted the claimant to denote any other understanding of the situation.

85. Although I accept that the respondent would naturally have had concerns about the second conversation between the claimant and Mr Forlee on 5 July 2021 I find a decision had already been taken to revoke access to his emails prior to this, as recorded in Mr Forlee's note ("access to emails").

86. In my judgment, it is not credible that the language used on 5 July 2021 could be said to refer to anything other than a dismissal.

87. The respondent failed to make proper notes of important discussions. In assessing the credibility of the respondent's evidence I have taken into account that there was no follow-up communications from the respondent to the claimant after the conversation on 5 July 2021 to confirm the remit of the conversation had taken place. The respondent submitted that the conversation was a protected conversation, the purpose of which was to open negotiations and that there would be any further discussions. What was more telling in my judgment was a complete lack of evidence to support this position after 5 July 2021. If this was the plan why was it not followed through? Why was there no invitation saying, "come and have this discussion with the shareholders"? There was absolutely no attempt to follow up with the claimant a discussion with the shareholders. The respondent knew, as the claimant had told Mr Forlee that he considered he had been "dismissed without HR" as early as the second call on 5 July 2021. In my judgment that was because that was not the plan at all. The plan was to have dismissed the claimant and reach a deal thereafter. Further, nobody had sought to disabuse the claimant, Mr Watts, Mr Syms or clients of the business that the claimant had not been dismissed, which one would have thought would have been the natural thing to have done in light of that very clear understanding that the claimant certainly concluded and acted as if he had been dismissed. In my judgment the dismissal letter and the solicitor's letter of 30 July 2021 was the respondent trying to backtrack on the dismissal.

88. Mr Roberts diligently took me through the documents and made submissions about why they could be interpreted in a way that would support the respondent's case. However those documents and the way the language was presented really was about the mechanics of parting ways rather than

undermining any conclusion that I had reached that there had actually been a dismissal. This was supported by what Mr Forlee told Mr Ackerman on 7 July 2021.

89. Mr Watts and Mr Syms both understood the claimant had been dismissed as he told them and Mr Forlee corroborated this directly to Mr Watts and did not disabuse Mr Syms of his understanding. Mr Watts actually resigned on the basis of this. It is implausible he would have left a secure and well paid employment if he had any doubt as to the situation.

90. It was very clear from the contemporaneous documents before me everybody understood the claimant had been dismissed on 5 July 2021 – the claimant, Mr Watts, Mr Syms, Ms Withers, Ms Beater. Even Mr Ackerman discussed removing his details from Companies House but discounted that as then *"it would be public"*.

91. I lastly address Mr Robert's point that there cannot have been a dismissal as no notice was given. I am unable to agree with Mr Roberts as I have concluded there was a very clear summary dismissal. The claimant understood he was dismissed with immediate effect and the respondent's subsequent actions reiterated and confirmed this understanding.

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Employment Judge S Moore

Date: 6 March 2023

REASONS SENT TO THE PARTIES ON 9 March 2023

FOR THE TRIBUNAL OFFICE Mr N Roche