

IN THE INDUSTRIAL TRIBUNAL OF GIBRALTAR

IND TRI. 29 OF 2011

BETWEEN:

ROBERT HOLMES

Complainant

-and-

KNIGHTS ("A FIRM")

Respondent

DECISION

The Respondent

1. The Respondent, a firm of chartered accountants and registered auditors, was established on 7th October 1993. Its partners at inception were Mr Steven Knight ("Mr Knight") and Mr. William Blackett Caldwell ("Mr Caldwell"). It prepared the accounts for the Castle Trust Group, a conglomerate of some 20 companies. The Castle Trust Group and the Respondent shared the same offices but the clientele were that of the Castle Trust Group. The Respondent was the employer of those persons employed to provide services to the clientele of the Castle Trust Group. Mr Knight was at all material times the Chairman of the Castle Trust Group, and his family its majority shareholders.
2. The Complainant was employed by the Respondent as an office manager in 1996, and shortly after was also appointed as a director of the Castle Trust Group in that same year. When the Complainant resigned as a director of a number of companies in the Castle Trust Group on 24th August 2011, but not from his employ with the Respondent, the Respondent maintained in essence, that a resignation from one was a resignation from both and that having accepted that resignation on 24th August 2011 it could not be unilaterally withdrawn by the Complainant. There was no dismissal by the Respondent for the purposes of the Employment Act, and the claim for unfair dismissal therefore failed. The Complainant maintains that he only resigned as a director, and that he was subsequently dismissed by the Respondent unfairly. I will first set out the background to this employment, and the directorships, before addressing the main issues arising in this claim for unfair dismissal.

Employment with the Respondent

3. On 15th October 1996 the Respondent's agent, one Mr F.D.J. White of White & Co, placed a job advert in the Gibraltar Chronicle for the position of a "*Trust 7 Company Manager*" and "*Reporting to the directors, the applicant will ideally possess a professional accounting, legal or banking qualification and have several years in the sector. To be responsible for the day to day smooth operation of the business, which include dealing directly with clients, coordination between various Group companies and all management accounting functions*". The Complainant,

with at least 20 years banking experience at the material time, applied for this position and was interviewed for it by Mr Knight, and was successful.

4. On 8th November 1996, the Complainant signed a "Consulting and Employment Agreement" (*"the Employment Contract"*) with the Respondent, the relevant terms of which provided for the Complainant:-
 - a. In the recitals, to provide *"administrative, organisational and managerial advice and assistance in respect of (Knights) financial business and Holmes agreed to provide such services for the consideration and upon the terms and conditions contained below"*, *"to assist and manage such operation,"* being specialists in *"financial services and consulting"*.
 - b. To provide *"administrative and management consulting services...to oversee all operations of (the) Company's business subject always to the direction and control of the Company's board of directors"*;
 - c. To be paid an annual salary of £15,000.00 for working a 37.5 hour week;
 - d. A commencement date of 1st November 1996;
 - e. A salary increase before Easter 1997;
 - f. Any expenses were to be cleared in advance by a director of the Company.
5. When the Complainant subsequently realised that the statutory requirements for filling this vacancy and registering this employment had not been adhered to by the Respondent, this was done retrospectively by him completing an ETB Notification of Vacancy form with the job title of "Office Manager", an annual salary of £15,000.00, but a start date of 1st January 1997 to take into account the failure to meet these requirements previously. The necessary qualifications and experience for the position were stated to be *"Banking qualification, knowledge of sage accounting, experience in off shore companies/trust and client relations."* Mr Knight signed this form on 1st December 1996 on behalf of the employer, the Respondent. An ETB Notice of Terms of Engagement was also prepared and signed by the Complainant and Mr Knight on 4th December 1996, and registered with the ETB on 31st December 1996. It confirmed the employer to be the Respondent, the job title to be that of *"Office Manager"*, at an annual salary of £15,000 and, again, starting on 1st January 1997 to ensure it did not fall foul of the statutory requirements.

Appointment to directorships

6. Four weeks after the actual commencement of his employment with the Respondent-and there is no issue between the parties that it actually commenced with effect from 1st November 1996, even if the need to comply with the statutory formalities postponed the official commencement date to 1st January 1997- the Complainant was appointed a director of Castle Trust Management Services Limited (CTMS), a regulated and licensed financial services company providing company administration and professional trustee services, Castle Secretaries Limited and Castle Nominees Limited on 1st December 1996 (and subsequently for Castle Trust Administrators Limited on 29th May 2007 following its incorporation on 29th May 2007)(*"the Castle Trust Group directorships"*).
7. Before dealing with the Complainant's appointment to the Castle Trust Group directorships, I should mention that on 18th December 1997 Mr Knight wrote to

the Complainant at Castle Management Services (Jersey) Limited, St Helier, Jersey ("the Jersey Bonus Letter") stating (my emphasis added):-

"Dear Robert,

ANNUAL BONUS SCHEME

*As you know our group is operational in the financial services sector. This market is very volatile and profitability can vary significantly comparing one year to another. However in the longer term sound financial management coupled with an appropriately executed marketing campaign will produce a respectable return. Your long term contribution to the group is valued. In recognisance of this the group wishes to offer you involvement in the **group executive bonus scheme. This is based upon the performance of the group as a whole as measured by the audited accounts** (emphasis added). The level of bonus payable will be calculated at the following rate:-*

<i>Level of Turnover</i>	<i>% rate payable</i>
<i>96%-105% of P.Year</i>	<i>1%</i>
<i>106%-115% of P.Year</i>	<i>1.5%</i>
<i>116%-125% of P.Year</i>	<i>2%</i>
<i>Excess over 125%</i>	<i>2.5%</i>

*Payment will be made in two parts, one in December in the year of the bonus financial year at the rate of one third of the anticipated bonus or £2,000, whichever is the highest, with the balance being paid in the month after the audited accounts are signed by the Auditors, which will usually be the November following the bonus financial year. The initial payment is treated as a payment on account which is not refundable upon the group not making the required profit. A proportion to be agreed will be paid via a Gibraltar company which will reflect the bonuses paid to other staff members located in Gibraltar. This agreement is contractual and will cease upon you leaving the company. It is also strictly confidential and will cease if disclosed to any unauthorised third party. No party is authorised unless in writing by the undersigned. **You are responsible for your own taxation and other amounts that may fall due from the payment.** The commencing base figure for the year ended 31 July 1998 is £450,000. I trust the above is clear. Please sign the enclosed letter as your agreement to the above which commenced for profits arising in the year from 1 August 1997. I trust the above will amply reward you for your dedication and hard work.*

Yours sincerely,

STEVEN A. KNIGHT"

8. The parties accounts differ materially as to how the Complainant came to be a director of the Castle Trust Group. The Complainant's evidence is that he did not join the Respondent to become a director of the Castle Trust Group, was not interviewed for those positions, and there was no discussion of the directorships during the interview, or even when he signed the Employment Contract. He was interviewed only for the position of office manager to run the Respondent's office. It was only a few weeks after his interview, and when he had already started his employment for the Respondent, that Mr Knight mentioned that it would be good if he was also a director of the Castle Trust Group to provide additional director cover as Mr Knight travelled a lot to the United Kingdom on alternate weeks.

9. Mr Knight's evidence is that the Claimant's appointment as director was contemporaneous with the commencement of his employment for the Respondent; that the Complainant was paid a single amount by CTMS for these roles; they both met a couple of times in late October/mid-November 1996, both before and after the Complainant's employment began, to discuss this; that it was made clear to the Complainant by Mr Knight from the outset that he was required to take up a key director's role, as he was to head up the company management role, which included being a director; that a business of the size of the Respondent had no separate role for an office manager without assuming the duties of a director of the Castle Trust Group; that the Complainant was to replace Mr Caldwell as a director [there was no evidence that he was ever a director of the Castle Trust Group]; was expected to be Mr Knight's No. 2, and having previously worked for Natwest, had experience in dealing with international business, interacting with business clients and was financially savvy and would inter alia direct and control operations and client matters, including daily reviews of banking transactions, managing staff issues, maintaining relationships with clients of the Castle Trust Group, signing off trust resolutions and company minutes, reviewing fiduciary relationships and compliance records, be one of the "four eyes" to ensure the business ran in a compliant manner, a signatory to bank accounts, complete bank reconciliations, as well as his general office duties. That was Mr Knight's explanation.
10. I find that the Complainant's appointment to the Castle Trust Group directorships was an after-thought on the part of Mr Knight, even if the Complainant readily assumed these duties, and that the discussions that took place between them in this respect followed the execution of the Employment Contract on 8th November 1996. My reasons for so finding are:-
- a. Generally, the Complainant's evidence in this respect and as a whole is more consistent than Mr Knight, and with the facts. It is consistent with the fact that the appointment to the Castle Trust Group directorships on 1st December 1996 was not contemporaneous with the execution of the Employment Contract on 8th November 1996. It occurred 3 weeks later, and probably 4 weeks after the successful interview on or about 1st November 1996;
 - b. The job advert, Employment Contract and other employment documentation show that the Complainant was employed by the Respondent as its office manager. They make no reference to the Castle Trust Group directorships. The job advert specifically provided for the successful applicant to "*Report to directors*", indicating a role for someone below director. I am not persuaded by Mr Knight's various explanations for these omissions to be because the Respondent was only responsible for the payroll; that the Complainant could not be appointed a director of the Respondent as the Respondent was a firm, and not a limited company, and it was not possible to record with the ETB that the Complainant was also a director; that the Employment Contract was a "standard client contract", not reflective of the actual duties the Complainant had been engaged to do, namely to be a co-director of key companies in the Castle Trust Group, and with it to take on senior responsibilities within the Group. Not only did the Complainant not accept that it was a standard contract, but I find it very difficult to believe that Mr Knight, an experienced businessman and accountant, and Mr White, a qualified accountant, would both have failed to notice the most material omission of the role in both the advert and Employment Contract, namely the need to be suitable for, and to accept the responsibilities of being, a director of various companies,

if that had actually been the intention at the outset. They then failed to make any provision for this in the Employment Contract;

- c. Despite the need to retrospectively rectify the Respondent's failure to meet statutory requirements in the Complainant's employment by filing a ETB Notification of Vacancy and ETB Notice of Terms, the Complainant was actually employed with effect from 1st November 1996, presumably because he was interviewed on that date or sometime between the advert appearing on 15th October 1996 and 1st November 1996, so that the Respondent felt morally obliged to effect payment of his salary with effect from that date even if the paperwork, the Employment Contract, was signed a week later. The Respondent was appointed director almost a month after this, consistent with the Complainant's account of events;
- d. Mr Knight says the Complainant took over from Mr. Caldwell's role both as office manager and as a director, showing that there was no room for such the role of office manager without it being coupled with the Castle Trust Group directorships. That would have carried little weight in my mind even if it had been correct, given that Mr Caldwell was also a partner of Mr Knight's in the Respondent. However, the fact is that he never appeared as a director of the Castle Trust Group in the particulars filed at Companies House;
- e. There was a suggestion on cross-examination of the Complainant, that as the Complainant's responsibilities increased over the years, so did his salary from the Respondent correspondingly increase, which the Complainant denied, to reflect those increased duties. The documentary evidence of increases shows regular and consistent increases in salary over the 14 year period of employment with the Respondent, but no indication that such increases were due to increased directorial or other responsibilities as the Respondent submitted should be inferred. The salary increase letters adduced in evidence referred to the Complainant's "positive input and contribution" on 15th December 2004, (£31,000), "good performance" on 7th December 2006 (£34,000); "good performance" on 9th December 2008 (£39,500) and "good performance" on 6th December 2010 (£41,000). The tax assessments for the years commencing 1st July 1999 (£19,127.00), 1st July 2000 (£22,395.00) 1st July 2001 (£24,500.00) 1st July 2002 (£25,500.00) 1st July 2003 (£27,500.00) 1st July 2004 (£30,000) 1st July 2005 (£32,000) 1st July 2006 (£33,500.00) all show a consistent and regular increase in salary. The P7 Certificates of Pay for the tax year 2007/2008 (1st July 2007 to 30th June 2008) show his salary as £35,749.98 and for the period 1st July 2008 to 30th June 2009 as £38,499.96. There is nothing to suggest that these increases were anything other than normal annual increases, even if more generous than RPI;
- f. All P7 (certificate of pay, tax, deducted and social insurance contributions) were signed by the Respondent, and related to the annual salary paid by the Respondent with deductions for tax;
- g. The Complainant believed that the payments effected under the Jersey Bonus Letter related to his directorship duties, but not for work done in Gibraltar. They were not included as part of his claim against the Respondent for compensation, as he had resigned as a director of the Castle Trust Group to which the Jersey Bonus Letter payments related. Mr Knight maintained that they were not paid in respect of his directorial duties, but based on a percentage of turnover. The Respondent's counsel

sought to explain that there was nothing in the Jersey Bonus Letter to suggest that it related to the Castle Trust Group directorships. There was no assistance on what it did relate to. If it did not relate to those directorships, what else could it have related to? I am satisfied it related to the Castle Trust Group Directorships for these reasons. Firstly, it was stipulated to be a "group executive bonus scheme". Secondly, it was paid gross. If it related to his employment with the Respondent, tax would have been deducted by the Respondent, and paid in Gibraltar, as it was in the case of his basic salary. It was not. Thirdly, there is no evidence that other staff of the Respondent, were paid this. Fourthly, it was not paid by his employer, the Respondent, but by an offshore jersey company, which was the majority shareholder and holding company of the Castle Trust Group, namely Castle Marketing Services (Jersey) Limited ("the Holding Company"). Fifthly, Mr Knight's explanation for this bonus payment was in itself contradictory. His account is that when he employed the Complainant, he informed him that he would put together a bonus scheme which would be based on the turnover of the Gibraltar entities of the Castle Trust Group; be specific to the Complainant, and to recognise his contribution to the Castle Trust Group but not because he was a director; and that it was customary for the Holding Company to pay this via an "Employee Benefit Trust". Whilst Mr. Knight's account was confusing, what is clear is that this payment was not effected by the Respondent under the Employment Contract, and the only other reason it could have been paid, had to relate to the Castle Trust Group directorships, in the absence of any other plausible explanation.

Duties since 1996

11. There was a considerable amount of evidence as to what precisely the Complainant did, and for whom. The Complainant's evidence is that as the Respondent's Office Manager he managed its basic human resources and administrative issues including preparation of employment contracts, recruitment, calculation and payment of salaries, payment of tax and social insurance and the preparation of annual returns for the Income Tax Office; compliance issues; preparing the corporate accounts for the Respondent on Sage accounting platforms for the Castle Trust Group. The Complainant, in his capacity as Compliance Director, completed a Compliance Report in 2009 for CTMS and its associated companies in which he described his responsibilities:-

"The directors' responsibilities are:

- *Managing Director – Product Development, Marketing, International Tax Planning advice, Pension Trust planning*
- *Compliance Director – Day-to-day management of operations, banking, client liaison, compliance and staff matters. Other than for holidays, he is permanently in the office and involves himself closely with all functions of the business.*
- *Director Company Administration – Company formation and administration including compiling Due Diligence information for new incorporations and changes in ownership. Client liaison.*

Senior Managements Responsibilities and the Role of the MLRO R2 – 11

Our small size with presently ten members of staff including the messenger and secretary means that it is not practical to assign the total responsibility for AML/CFT systems to one individual, although the role of MLRO has been assigned to someone with previous experience of what is required.

The Compliance Director is also the Office Manager and as a result is totally involved in the day-to-day management of the operation, which includes monitoring of bank transactions via the NatWest eQ system on a realtime basis, daily review of bank statements, review of all incoming emails and allocation of work. The vetting of new clients is also part of his role in conjunction with the MLRO who undertakes the more in-depth research via the Internet and C6. He is also responsible for arranging in-house and external training. Information is shared with the other Directors and members of staff at meetings held at least bi-weekly.

The Compliance Director is an "A" signatory to the bank accounts (two signatures, two "A" or one "A" and one "B", are required for all payments from client accounts) and authorises all cheque and electronic payments. He is therefore aware of all significant transactions on a real time basis."

12. On 25th August 2011(10.21a.m.) the Complainant sent an e-mail to Mr Trevor Nichols (to which I will refer below and the context in which it was sent) in which he explained his role both as office manager of the Respondent and his separate duties as director of the Castle Trust Group:-

"I understand that you have completed your review and are now ready to prepare your report.

Other than our conversation on 10th I have not been asked to give a detailed explanation of my role which I think may be important for you in coming to your conclusions. As such I have set out below a summary of my responsibilities.

In addition to being director of CTMS, Castle Nominees, Castle Secretaries and Castle Fund Administrators, I also act as Compliance Director and Office Manager. In the last role I manage the office in Steven's frequent absences from Gibraltar ensuring that the office runs smoothly and that any queries from Clients etc are dealt with quickly and efficiently giving guidance where necessary.

I deal with all Personnel issues including preparation of Employment contracts, sifting CVs, interviewing all but the most senior candidates in which case these are conducted jointly with Steven, submission of returns, Terms of Engagement, Termination Notices to the Employment Service. The calculation and payment of salaries, payment of tax and Social Insurance and the Annual Return to the Tax Office.

I do all the Sage accounting for CTMS and the production of management figures and draft accounts for the auditors. I am the point of contact for Deloitte when they undertake the audit. I initiate sending out annual invoices and ensure debtor collection. I pay our creditors monthly.

I reconcile Client accounts and review the eQ banking and Barclays Internet Banking daily from a compliance point of view and review statements as they are received. I administer both systems and am an "A" authoriser for payments.

I am the main point of contact with the FSC and am responsible for the submission of the SOC and Return of Companies and Trusts Under Management, which is prepared by the Company Manager in conjunction with Deloitte, and any other matters which require attention.

I have relationship responsibility for a significant number of our clients and in the main deal personally with their needs.

Generally I am here to ensure that the high level of service we strive to provide is maintained. As I said to you we receive very few complaints from clients and I cannot remember an occasion where we have lost a client because of poor service.

I hope that this is helpful and look forward to reading your report.

Finally, I feel you should be aware that I have advised Steven of my intention to resign as a director of CTMS, CSL, CNL and Castle Fund Administrators. He has asked me to delay that until he returns to Gibraltar in view of the problems which would arise with no director in the Office which I have agreed to do. However, I do not envisage any reason for delaying or changing that decision after his return."

13. The Complainant accepts that the Employment Contract did not specify all his duties for the Respondent, as such duties developed from 1996. He explained in evidence that whilst he referred to himself as being a compliance officer, the duties he had listed were the administrative duties of an office manager, that the majority of these duties were that of an office manager and he did not need to be a director to fulfil these. For example, the sage accounting system required the inputting of all information for the accounts to be completed for the Castle Trust Group and he was the point of contact for the auditors as a director, but this amounted to no more than 20 minutes daily, as opposed to the 3 to 4 hours he spent daily dealing with clients in his role as office manager; he was the point of contact for the FSC as the main director, Mr Knight, was rarely there, but this was not a compliance issue, and occurred 3 to 4 times per year; the only other duties he carried out as director were the signing of trust resolutions twice a month; the "four eyes principle" took up very little of his time and being one of the "four eyes" did not require him to be a director. He estimated that in a 7 hour day, he would spend only 1 hour dealing with director's duties. Whilst these duties were important by their very nature, the majority of his time was spent managing the office and client care. Mr Knight described this allocation of one hour per day as a fallacy, as a compliance director had to have day to day control of the operation.
14. I find that the Complainant was undertaking two distinct roles for two separate legal entities in August 2011, even if there was some degree of overlap between the two, especially with respect to compliance duties:-
 - a. As office manager of the Respondent, to ensure that the office ran properly, addressing staff issues (there were between 10 to 11 in August 2011), accounting and banking, compliance, answering client queries, and generally in light of Mr Knight's frequent absences on business trips, client care and management. These constituted the majority of his duties and which evolved and developed over the 15 years he was employed;
 - b. As the co-director of the Castle Trust Group, discharging various directors duties for those entities including signing the Financial Statements.

General deterioration in the relationship

15. Until 2006, the relationship with Mr Knight was good, and the business grew healthily, reflected in annual turnover and more employees were taken on by as a consequence. However, in 2006 the Complainant became concerned with a number of issues, and wrote to Mr Knight on 18th December 2006 highlighting these. The issues generally were:

- a. The integrity of some of the people that Mr Knight was starting to deal with, which had led to the Complainant's refusing to accept some as clients in discharge of his compliance duties. On cross examination, Mr Knight accepted that such compliance issues had arisen and that whilst he valued the Complainant's opinion and it was important to have an independent check, there was still a need for a discussion in an entity that had 350 clients when the Compliance Director did not like a client;
 - b. The ability of CTMS to cope with the large amounts of money Mr Knight was withdrawing from it in advance of the annual accounts being prepared, to fund his lifestyle, and in particular to subsidise interest payments on an interest only mortgage for a €1,800,000 loan Mr Knight had obtained to purchase a luxury home in La Quinta, Spain. The Complainant was told by Mr Knight to mind his own business in this respect;
 - c. When the Complainant expressed concern at the amounts being spent on the Respondent's American Express account, which was being debited to the CTMS business account, Mr Knight refused to let the Complainant have copies of statements recording such payments being made. Mr Knight's recollection is that the meeting in which the Complainant raised such concerns was not particularly pleasant, that he did reduce his drawings, that the share capital of CTMS was increased to £200,000 and the Castle Trust Group always had sufficient funds to pay all expenses and outgoings.
16. The Complainant's evidence is that after he raised these concerns, Mr Knight became increasingly elusive about how he conducted his affairs. Firstly, by keeping business matters concerning CTMS from the Complainant and during his regular trips to the UK on business the Complainant was not always informed who Mr Knight was seeing and for what purpose. The Complainant believed that as co-director of CTMS, Mr Knight should have sought his input and kept him abreast of developments concerning CTMS, but he became increasingly isolated from the decision-making process. Secondly, by Mr Knight conducting his CTMS business from his own personal laptop and using his own personal e-mail address, to ensure that such e-mail traffic did not come through CTMS servers. Despite being the Compliance Director, and expected to review all e-mails via the main office server, the Complainant was being prevented from discharging this role, as not all e-mails were going through the office's main server. Thirdly, by refusing to tell the Complainant where he was going on his two usual annual holidays (usually at Christmas and Easter) and being told that he would not be contactable and denying his Personal Assistant access to his British Airways account and handled the on-line check-in himself so as not to be traced.
17. From 2006 to around 2010 the Complainant continued to voice these concerns with little effect, and believed that Mr Knight became increasingly frustrated with him and gradually sought, in the Complainant's mind, to isolate him completely from any input as regards the direction CTMS was taking.
18. By 2011 there had been a marked deterioration in the relationship between the Complainant and Mr Knight, with Mr Knight saying that the Complainant was increasingly unhappy with his role and becoming more difficult to get along with, and the Complainant feeling he was a director in name only, and becoming concerned at having these duties and the responsibilities these entailed. This deterioration in the relationship is relevant to how events subsequently unfolded with respect to the Complainant's dismissal, even though, as Mr Knight correctly stressed, the Complainant had continued working for a further 5 years after the concerns expressed in 2006.

Background to the resignation/dismissal

19. Towards the end of July 2011, Mr Kevin Bastone and the Complainant had both prepared a business plan ("the Business Plan") at Mr Knight's request. They met with Mr Knight to discuss it briefly prior to Mr Knight departing for a week's holiday. It was agreed that on Mr Knight's return the three of them would sit down to discuss the Business Plan more fully. Mr Knight's evidence was that he was very disappointed with the Business Plan, as it was very lightweight, lacked detail for a 2 month review, focused too much on his personal drawings of £45,000 per month, and included a request for the Complainant and Mr Bastone to receive 10% of the profit/equity share of the business without paying for it. He had lost faith in the Complainant's ability to manage and run a compliant trust and management business. He did not communicate these misgivings to the Complainant or Mr Bastone at that meeting.
20. When all three met again to discuss the Business Plan further on 10th August 2011, Mr Knight informed the Complainant and Mr Bastone that he had engaged Mr Trevor Nichols of Global Advisory Services Limited to carry out an independent restructure review of the business, including a review of procedures and systems, because he was unhappy with the Business Plan, and wanted a business plan which addressed future growth. He also informed them that he would not change the way he did business, and would not reduce his drawings. Shortly after telling them this, Mr Nichols joined the meeting.
21. Mr Knight explained in evidence that his decision to have the Business Plan independently reviewed by a third party without any prior notice, consultation or discussion with the authors of the Business Plan, one of whom was his co-director, was taken in his capacity as a shareholder and that there was therefore no need to notify or consult his co-director of this in advance. That would have been small comfort to the Complainant and Mr Bastone, even if it had been communicated to them at the time. There is no evidence that it was. The Complainant intimated to Mr Knight at that meeting, not surprisingly, that he was seriously considering his resignation as a director. Mr Knight was therefore aware of what might be coming a full 14 days before the next important meeting of 24th August 2011.

The resignation/dismissal

22. After that meeting, the Complainant considered his position as director of the Castle Trust Group. He had been unhappy since 2006 at the way the business was being managed, and felt he was being excluded from the decision-making. He decided he would follow up on his intimation of 10th August 2011 to resign from the Castle Trust Group directorships, and the responsibilities these entailed.
23. On 24th August 2011 the Complainant met with Mr Knight, armed with a letter dated 23rd August 2011 tendering his resignation with immediate effect as director of the Castle Trust Group directorships ("*the Resignation Letter*") and addressed to Mr Knight as managing director of the Castle Trust Group of Companies. The Resignation Letter stated (emphasis added):-

"At our meeting on 10th August I advised you that I was seriously considering whether I felt able to continue as a director of the various Group companies. This was precipitated by your announcement that you had commissioned Trevor Nicholls of Global Advisory Services Limited to carry out a Restructure Review of Castle Trust. This was without any prior discussion with Kevin Bastone and me and Trevor arrived in the office immediately after that announcement to commence the review.

As any decision I was to take would have an impact on any recommendations that Trevor makes, I have been giving very serious thought to my next course of action.

For some time, I have felt that you have been excluding me from operational decisions concerning the Group and the way that this matter was handled only reinforced that view. As you know, over the past three years, I have been voicing my concerns at the very serious pressures on the business as a result of the significant demands that you make to service your lifestyle. To the extent that for the year ending 31st July 2011, the business made a loss for the first time in its history and the reserves were reduced by around £190,000.

Despite my voicing these concerns on numerous occasions, you have made it abundantly clear that you have no intention of altering your lifestyle and with it your drawings to reduce the pressure on the business. I am firmly of the opinion that unless we see a very significant increase in business over the next year the position in twelve month's time will put in question the very viability of the business.

I have therefore decided to tender my resignation as a director of Castle Trust & Management Services Limited and its associated Companies with immediate effect. A formal letter of resignation is enclosed. I will, however, continue to honour my contract dated 8th November 1996 to provide consultancy and administrative services and to undertake whatever role is decided by Trevor following his review.

I am naturally disappointed that I have been compelled to take this action but in all the circumstances I feel that I have no choice."

24. At the meeting, he was informed by Mr Knight that Mr Bastone had already resigned. The evidence of both Mr Knight and the Complainant is confusing and contradictory as to what transpired at this important meeting, and which will have an important bearing on my findings. I will therefore deal with their evidence of this meeting separately:-
- a. The Complainant's First Witness Statement states that he sent the Resignation Letter on 23rd August 2011 and was asked by Mr Knight in an e-mail of 25th August 2011 to defer this until mid-September 2011 and which he agreed to do. This sequence of events is confirmed in his Second Witness Statement. One could readily assume from this that there was no meeting between Mr Knight and the Complainant before the Resignation Letter was sent. The Complainant's oral evidence was that he informed Mr Knight at a meeting on 24th August 2011 that he no longer wanted to be a director, but that he would continue as office manager of the Respondent, and continue to honour his contract dated 8th November 1996. He gave Mr Knight the Resignation Letter, and which Mr Knight read, but did not leave it with him. The Complainant's oral account was confirmed by Mr Knight. The Complainant thought this might bring about a discussion concerning a pay reduction, a role change or even a redundancy/retirement from his employment with the Respondent. Instead, the only discussion they had was Mr Knight's request for him to defer his resignation until mid-September 2011 because Mr Knight would be away from Gibraltar and wanted him to delay his resignation until he returned. The Complainant agreed to do this, and, consequently, did not leave the Resignation Letter with him because it constituted a resignation "with immediate effect", which they had agreed to defer. The Complainant

was never informed at that meeting that he only had one role, and there was no such discussion;

- b. Mr Knight's evidence of what transpired at this meeting and immediately after is materially inconsistent and contradictory, and where material, denied by the Complainant. Mr Knight stated in paragraph 11 of his First Witness Statement (emphasis added):-

*"Before the review was finalised Mr Holmes decided to resign but only from the role of director of the Castle Group Companies. I was surprised by this action as I expected him to be fully involved in the future of our business. **Mr Holmes told me of his wish to resign initially on 23rd August 2011 but undertook to remain with the Company until later to facilitate a handover. At this stage I was unaware that Mr Holmes was intending to resign from only a part of his daily role.** He later reneged on this agreement sending me an e-mail late on Bank Holiday Monday stating that he would be resigning with effect from the middle of September. I therefore had no option but to travel back to Gibraltar urgently, meeting with the FSC to update them as they had requested, and take on a temporary basis the roles that Mr Holmes had now informed me he was to vacate earlier than promised".*

On cross examination, Mr Knight said (emphasis added):-

*"I told him that it was a complete nonsense to separate the two roles, and that his failings are a contributory factor to this which he (the Complainant) has not mentioned. **I told him this when he handed me the letter. I said that's impossible, there is just one job you are fulfilling and you have just resigned from it. For 15 years he had never mentioned he was the office manager** (this was not mentioned in paragraph 11 of his First Witness Statement). **I said to him that that was a nonsense, he showed me the letter, withdrew it, and then sent it to me. The witness statement is a summary only of what happened. I was very surprised at his resignation...I said "it was a nonsense and I accepted your resignation". I said there is only one role, you've resigned and I accept your resignation.**"*

Mr Knight was then asked why in the letter of 30th August 2011 he addressed to the Complainant, which was the last letter between the parties, he did not simply mention that there were no separate roles and that the Complainant had resigned. His replied:-

*"Why should I? He resigned as a director. If he was serious, he should have said need to reapply for office manager but he could not unilaterally vary his agreement. **He could not pick and choose what he did. That was nonsensical. I did not tell him this on 24th August 2011 as I felt he was attempting to renegotiate his role unilaterally with which I did not agree.** He had been a director since 1996, in one position and could not maintain he had two positions".*

*"I did receive the e-mail of 25th August 2011 (10:21) to Mr Nichol from the Complainant. **When he handed me the letter of resignation on 24th August 2011 I told him it was not divisible.**"*

When asked why he did not correct the Complainant on 25th August 2011 and inform him that there was only one position which there was no hint of in the Complainant's e-mail, Mr Knight answered:-

"He cannot unilaterally change his contract of employment. I made this clear to him on 24th August 2011".

When asked why there was no reference to that aspect of the conversation of 24th August 2011 in the e-mail of 25th August 2011 Mr Knight replied:-

*"I was thinking of clients and administering their assets, and was flying off the next day, Friday 26th August 2011. I spoke to Trevor Nichols and Mr Gibbs prior to leaving because it was a developing situation. I had been discussing matters with Trevor Nichols for the whole of August. Colin Gibbs was coming in at the end 31st August 2011 so I was telling all clients as soon as possible and it had to be addressed quickly. **In my letter of 30th August 2011 I did not go into detail because the purpose of the letter was to explain that Mr Holmes had left the office and that I would be in touch and not a reply to his e-mail of 25th August 2011".***

In paragraph 12 of Mr Knight's First Witness Statement he stated:

"The decision to try and resign from part of his role was untenable as there never were two distinct roles that Mr Holmes fulfilled. He was an employee with day to day management responsibilities and an integral and fundamental part of his role was to be director of the Castle group companies. This role he had fulfilled from the start of his employment. By his resignation of his essential directorial duties he had made it clear that he was resigning from his employment as there would no longer be a role for him to continue to fulfil. It would have been impossible to recruit a replacement for part of his role. Mr Holmes was not carrying out the duties of 2 full time staff members. The role of director of a regulated entity carries great legal and regulatory responsibilities and it not one that is carried out as a minor matter".

On cross-examination Mr Knight stated:-

"I asked him to stay on until mid-September and he agreed to this and I would pay him his garden leave of 3 months. He reneged on this on 30th August 2011 and I accepted his resignation"

Mr Knight was asked whether this was inconsistent with what he had said earlier namely that the Complainant had changed his mind and left earlier:-

*"Originally we said the end of September when we first discussed it then we agreed, I accepted his resignation, then he said and we agreed mid-September which he reneged on, on 30th August 2011. **I asked him to leave the office but did not dismiss him. He was simply not to attend the office, he was required to remain away from the office because this best served me but he was still employed for 3 months. I paid him the agreed sum monthly in lieu of notice but not by way of lump sum.** The amounts referred in paragraph 13 of the Termination of Employment Form signed on 11th January 2012 show the amounts paid in lieu of notice."*

He was asked that if he agreed to pay these amounts in lieu of notice, then Mr Knight had terminated the Employment Contract even though the Complainant had only resigned as a director of the Castle Trust Group.

"I expected that after final payment on 7th October 2011 that would be it. I asked him not to be in the office but to be available. I did not consult him as he had resigned by that stage even though I said I would need to contact him. He had resigned and I had found an enormous black hole with compliance issues".

25. The number of material inconsistencies/contradictions in Mr Knight's is evidenced by these extracts of his evidence. The Complainant's evidence is more consistent than Mr Knight's, and in particular with respect to this meeting and its aftermath, despite some of the inconsistencies in his own account. However, those inconsistencies are corroborated by Mr Knight's own account, namely with respect to the Resignation Letter having been handed, but not left, with Mr Knight at this meeting. I am satisfied that at this meeting, and leaving aside minor discrepancies with dates ie reference to the meeting being on the date of the letter namely 23rd August 2011 when it was in fact on the 24th August 2011, the following occurred:-

- a. The Complainant intending handing in the Resignation Letter and resigning from the Castle Group Trust directorships "*with immediate effect*", being 24th August 2011. Both parties agree that the Resignation Letter was shown to Mr Knight but not left with him;
- b. Mr Knight was not surprised at the Complainant's decision to follow up, 14 days later, on his intimation of 10th August 2011 to resign from the Castle Trust Group directorships, and did not try to talk the Complainant out of this. He would have realised that his decision to have the Business Plan reviewed in the manner he did would undermine trust and confidence, and only have accelerated the deterioration in the relationship between him and the Complainant. Moreover, Mr Bastone had already resigned as a consequence of that prior to this meeting, and he had been the co-author of the Business Plan;
- c. Mr Knight read the Resignation Letter, and understood that the Complainant was resigning only from the Castle Trust Group directorships. He would have realised the distinction being made, but not necessarily have anticipated this. He would need to consider this. The difficulties this presented for him are highlighted 6 days later in his subsequent letter to the Complainant of 30th August 2011 (paragraph 30 below) when he acknowledges that "*This matter is not straightforward and the company's lawyer is on holiday until Monday 5th September*";
- d. There was no discussion other than the request by Mr Knight for the Complainant to defer his resignation as a director until Mr Knight's return from the UK. Such a reaction was consistent with Mr Knight anticipating this resignation, and having no issue with it other than the timing, as Mr Knight was about to fly out. I do not accept that Mr Knight informed the Complainant at this meeting that the distinction he made between the Castle Trust Group directorships and his employment for the Respondent was a nonsense. There is nothing in the material written exchanges of late August 2011 to suggest that this happened, and there was an opportunity for Mr Knight to have said this before 1st September 2011. It is only on 17th April 2013, almost 20 months later, that Mr Knight e-mailed Colin Gibbs, one of the individuals who effectively replaced the Complainant concerning the e-mail of the 25 August 2011 (see paragraph 12) from the Complainant to Mr Nichols stating "*It is important to understand when I am away from the office the role of office manager is primarily fulfilling the role of Director of CTMS. There was never two full time jobs, only one which covered all the tasks*". This is the first time Mr Knight explains this in writing. The Complainant's evidence was that he was never told by Mr Knight on the 24th August 2011 that the role was not divisible, and that he could not separate his two roles. I accept that evidence. For Mr Knight to have believed the resignation to be from all roles, he could not have read the Resignation Letter on 24th August 2011, because what it

said was clear to read. Mr Knight's account in his First Witness Statement is to the effect that he did not read the Resignation Letter on 24th August 2011 and therefore did not realise the distinction being made. If he had not read it, then he could not have told the Complainant at that meeting that he believed the distinction to be a nonsense as he stated for the first time at the hearing;

- e. On 25th August 2011(10.21a.m.) the Complainant sent Mr Nichols the e-mail referred to in paragraph 12 of this Decision, copied to Mr Knight, in which he explained his duties as office manager of the Respondent and his separate duties as director of the Castle Trust Group, and of his resignation from the latter only. The Complainant's sequence of events became confused in paragraphs 17-19 of his First Witness Statement, but I am satisfied from the evidence and actual timings of the e-mails that followed the meeting of the 24th August 2011, that the Complainant, in the belief that he would be continuing in his role as office manager of the Respondent, sent this e-mail. There is nothing to suggest otherwise. On cross-examination, the Complainant stated that he did so because even though Mr Nichols had been in the office since 23rd August 2011 conducting a review which he believed to be almost completed, Mr Nichols had not yet spoken to the Complainant despite speaking to almost everyone else and had no job description for the Complainant other than the Employment Contract. The Complainant thought that any review should involve a discussion with the office manager and a director. Whilst the Complainant stated in his First Witness Statement that he hoped his e-mail would assist Mr Nichols with his review, on cross-examination he admitted that he thought Mr Knight had instructed Mr Nichols to produce a damning report with which to begin a process for his dismissal because of the questions he had been raising about how Mr Knight was managing the Castle Trust Group. The Complainant felt no need to mention the Employment Contract because it was vague, and covered a wide range of duties. The Respondent's counsel submitted on closing that this e-mail did not suggest the Complainant was employed in two separate capacities, nor that he could following those resignations, still honour the Employment Contract. In my view what the Complainant said in this email was clear. The relevant part states (emphasis added):-

".....In addition to being director of CTMS, Castle Nominees, Castle Secretaries and Castle Fund Administrators, I also act as Compliance Director and Office Manager. In the last role I manage the office in Steven's frequent absences from Gibraltar ensuring that the office runs smoothly and that any queries from Clients etc are dealt with quickly and efficiently giving guidance where necessary.

*Finally, I feel you should be aware that I have advised Steven of my intention to **resign as a director** of CTMS, CSL, CNL and Castle Fund Administrators. **He has asked me to delay that until he returns to Gibraltar in view of the problems which would arise with no director in the Office which I have agreed to do. However, I do not envisage any reason for delaying or changing that decision after his return....."***

- f. On re-examination, Mr Knight sought to explain that he had only scanned through the Complainant's e-mail of 25th August 2011 to Mr Nichols, and could not recall reading the last paragraph of that e-mail. Given the seriousness of the situation, the loss of his co-director of 15 years, and his initial request of the 24th August 2011 for the Complainant to defer his resignation until mid-September 2011 because he was going away, I cannot accept that Mr Knight did not read this e-mail other than carefully, because he himself viewed the situation very seriously given the potential negative impact on the clientele of

the business of not managing this resignation of a director of 14 years standing properly. The fact that he would suggest this, leads me to the conclusion that he was not being candid with his account of what actually occurred on 24th August 2011, thereafter and prior to that date;

g. The Complainant agreed with the Respondent not to resign on 24th August 2011, whilst Mr Knight was in the UK, and agreed to defer his resignation to mid-September. The Resignation Letter was taken back from Mr Knight as a consequence.

26. On 25th August 2011 (10:48) Mr Nicholls replied to the Complainant's e-mail referred to in paragraph 12 above:-

"Thank you for your e-mail and I note your comments. I was planning to speak with you after I have had the opportunity of reviewing our notes. However the attached notes will assist in our deliberations".

27. On 25th August 2011 (15:46) Mr Knight sent an e-mail to Mr Kevin Bastone accepting his resignation and stating:-

"Robert has also informed me he wishes to resign, which I have accepted but request that he defers this until the latest mid-September".

28. On Thursday 25th August 2011 (19:56) Mr Knight e-mailed the Complainant and requested that the Complainant defer his resignation until mid-September at the latest. The e-mail stated (emphasis added):-

*"Many thanks for copying me in. **As I said yesterday when I accepted your resignation I requested you defer this until mid-September at the latest.** In the meantime I should be grateful if you refrain from discussing this with clients and others until we have agreed a wording. Many thanks for your understanding".*

When asked what "wording" needed to be agreed, the Complainant's understanding was that because as director he was the clients main point of contact, and he would still be there dealing with clients but not in the same capacity following his resignation of the Castle Trust Group directorships, this needed to be explained to them. He had already agreed at the meeting on 24th August 2011 not to do anything with his resignation as a director until mid-September, and this e-mail from Mr Knight was in line with that request.

29. Having subsequently seen Mr Knight's e-mail to Mr Bastone, the Complainant e-mailed Mr Knight on Monday 29th August 2011 (22:47) stating (emphasis added):

"Your email to Kevin on Friday has been forwarded to me. I must say I am absolutely astounded at the contents.

In view of the action you have taken I feel it essential to place on record the agreement we came to last Wednesday 24th August.

*I have attached a letter which I intended giving to you which confirmed that I wish to tender my resignation **as a director of Castle Trust & Management Services Limited.** However, I will continue to honour my contract to **provide Consultancy and Administration Services until further notice.***

As you had already committed to return to the UK at the Weekend and was not intending to be in the Office on the 25th and 26th August and thereafter would be

in the UK until, I believe 12th September, I agreed that I would delay my formal resignation until your return. This was to ensure the smooth running of the business bearing in mind that Kevin had tendered his resignation on 24th and it would have caused serious problems for the business if I resigned immediately.

I repeat, I am only resigning as a director. My contract which is not conditional upon me undertaking that role will continue.

I look forward to receiving your confirmation that this is also your understanding of our agreement."

30. This was the reaction of someone who felt he had been deliberately misled. On Tuesday 30th August 2011, and despite the agreement that a final decision on the timing of the Complainant's resignation would be delayed until mid-September 2011, Mr Knight entered the office whilst the Complainant was working and handed the Complainant a CTMS letter signed by him addressed to the Complainant marked "*Without Prejudice all rights reserved*". The Complainant's evidence is that he was handed the letter, asked to leave the office with immediate effect and the Complainant believed he was being summarily dismissed by the Respondent. The letter stated (emphasis added):-

"This matter is not straightforward and the company's lawyer is on holiday until Monday 5th September. In the circumstances I request you do not attend the offices anymore and give me back your keys and other company property.

I will be in touch once I have received legal input

In the meantime I would emphasise the necessity to observe the confidentiality undertaking in your contract and the importance of agreeing a wording to properly communicate with clients. In the meantime I am still asking you do not disclose any further details at this stage.

I trust you will appreciate I am trying to deal with this matter as soon as possible to ensure we all reach a satisfactory conclusion".

By 30th August 2011, Mr Knight did not want the Complainant involved with client matters and had changed his mind about him remaining until mid-September because he was going back to the UK, and had decided on receipt of the Complainant's e-mail to Mr Nichols that he would come back to sort out the situation, and which he did.

31. On the 31st August 2011, and despite the Respondent's suggestion that they agree a wording to be communicated to clients, a letter had already been prepared and sent by CTMS to its clients and signed by Mr Knight advising clients that , for all intents and purposes, he was no longer working for the organisation (emphasis added):-

"I am writing to advise you of the appointment of Colin Gibbs, the former Head of Operations of Barclays Wealth Management, Gibraltar. Colin has a broad range of financial experience at the highest level and will be a valuable addition to our team.

Robert Holmes, who has worked for the Company for many years, is no longer in the office. We are grateful for his input over the years and we

wish him every success in the future. Robert's role is being distributed amongst the existing Castle Trust Group personnel.

We will be contacting you within the next few days to advise you of the staff member who will be looking after your affairs going forward. I am still in overall charge and if there are any points you wish to discuss going forward, please contact me."

32. On 31st August 2011 the Complainant, realising that the agreement to defer his resignation of the Castle Trust Group directorships was not being adhered to by Mr Knight, sent a letter to Mr Knight as managing director of CTMS stating:-

"Further to my letter dated 24th August I confirm my resignation as director of the under-mentioned companies with immediate effect, namely CTMS, Castle Nominees Limited, Castle Secretaries Limited, CFA, Castle Management Services (Jersey) Limited and HFT Capital PCC Limited as EIF Director."

33. So by Wednesday 31st August 2011, following the August bank holiday weekend, Mr Knight had acted decisively having confirmed that the Complainant's role was to be "distributed amongst existing Castle Trust group personnel". According to Mr Knight, Mr Gibbs took over as managing director to address 20 areas of failure to comply with compliance issues, with his responsibility being compliance. He became the Compliance Director, and the managing director, which Mr Knight said the Complainant was not. He would be the liaison point for all but the largest clients, who Mr Knight would deal with. The Complainant believed when he signed his first witness statement that Mr Gibbs had replaced him as senior manager of the Respondent. Mr Gibbs was appointed to the Castle Trust Group directorships on 17th October 2011. Global took over the payroll duties because Mr Knight alleged the Complainant had been doing it wrongly, and Mr Gibbs had to catch up with a backlog of compliance issues which the Complainant had failed to do. Mr Nichols was appointed to the Castle Trust Group directorships on 27th October 2011.

34. On 2nd December 2011 the Complainant filed a complaint with the Ministry of Employment stating:-

"I was employed by Knights Chartered Accountants as Office Manager from 1.1.1997 and my employment in that capacity was registered with the Employment Service on 4.12.1996. Although it was not a condition of my employment as Office Manager of Knights, I was appointed director of Castle Trust & Management Services Limited and its associated companies on 1.12.1996. My duties in relation to such appointments were carried out entirely separately from my employment with Knights. Throughout the period of my employment I received a salary paid monthly and subject to the deduction at source of tax (PAYE) and Social Insurance.

On 23 August 2011, I wrote to Steven Knight, Managing Director of Castle Trust & Management Services Limited advising him of my decision to resign as director of Castle Trust & Management Services Limited and its associated companies. I made it clear that I wished to continue to work as Office Manager of Knights Chartered Accountants. On 30th August 2011, Mr Knight forwarded me a letter on Castle Trust & Management Services Limited headed paper, requesting me to "not attend the offices anymore and give me back your keys and other Company property". I left the office immediately and have not attended the office since. I have received my salary in September and October but not in November. I have not received a copy of the Employment Service Termination of Employment notification or a P7A".

35. It was only after this complaint that Mr Knight as Chairman of CTMS wrote to the ETB on 19th January 2012 to confirm that the Complainant and Mr Bastone had "resigned on 24th August 2011 and they have departed from the office and will not be returning. They are unable and unavailable to sign the termination of employment form as enclosed herewith". The Complainant had not departed. He had been asked by Mr Knight to leave the office. The Termination of Employment form filed by the Respondent with the ETB on 23rd January 2012, and signed by Mr Knight as the Respondent's principal on 11th January 2012, stated the date of notice of termination given by the Complainant to be 23rd August 2011, the date of termination to be 24th September 2011 and the reason for termination to be resignation on the part of the Complainant. It stipulated that payments that had been made on termination were 31st August 2011 (£3906), 30th September 2011 (£2807) and 31st October 2011 (£2807). An earlier but unfiled Notice of Termination of Employment form, signed by Mr Gibbs in his capacity as senior manager of the Respondent dated 3rd November 2011, and disclosed on disclosure by the Respondent, stated the date of notice of termination to be 24th November 2011, and the reason for termination as being resignation. This was Mr Gibb's understanding of the matter. The Form P7A Part 2 containing "Details of Employee leaving work" dated 20th January 2012 showed the termination date to be 24th September 2012 and was signed by the Respondent with a termination date of 24th September 2011.
36. On questions I posed at the end of his re-examination, Mr Knight confirmed that whilst he understood the Complainant had to give 1 month's notice of resignation so as to terminate his employment on 24th September 2011, the Respondent paid the Complainant a further 2 months on an ex gratia basis and put him on garden leave, having spoken to lawyers.

Did the Complainant resign from the employ of the Respondent

37. That is the background and events. The Complainant must first prove that he was dismissed by the Respondent within the meaning of s. 64(2)(a) of the Employment Act, namely that " *the contract under which he is employed by the employer is terminated by the employer, whether it is so terminated by notice or without notice*". Otherwise, the claim fails.
38. The Respondent alleges that the Complainant resigned from his employment with the Respondent on 24th August 2011, which Mr Knight accepted on that date and which could not be unilaterally withdrawn after such acceptance. There was only ever one role, not two, and that the Complainant had resigned from that single role by reason of the Resignation Letter so that there was no dismissal by the Respondent and the claim fails. The Complainant had not resigned from the employ of the Respondent for the following reasons:-
- a. Those set out in this Decision, and in particular paragraphs 14 and 25 above;
 - b. So even if Mr Knight accepted that resignation on 24th August 2011, which is in itself arguable, that acceptance did not relate to the Employment Contract with the Respondent. The words used by the Complainant in the Resignation Letter were clear and unambiguous, and should have their plain meaning applied. Mr Knight, a successful and experienced businessman, read that letter on 24th August 2011 when it was shown to him. He also knew from the meeting of the 10th August 2011, that the Complainant was contemplating his resignation. There was no suggestion in the Resignation Letter that the Complainant was resigning from his employment with the Respondent and wished to bring that employment to an end;

- c. The Complainant was employed by the Respondent as its office manager. He was not employed by the Respondent to be a director of the Castle Trust Group. The Castle Trust Group directorships were separate from his employment with the Respondent even if the inter-relationship between the Respondent and the Castle Trust Group meant there was some overlap between some of the duties, including compliance, but almost invariably he did not need to be an office manager to carry out his director duties, and vice versa;
- d. There was no express term in the Employment Contract or otherwise specifying that the Complainant's employment with the Respondent was conditional on his accepting or remaining a director of the Castle Trust Group, or that he could be summarily dismissed by the Respondent if he resigned from the Castle Trust Group directorships. Nor has it been argued that there was any implied term to this effect. Nor do I find that in 1996 this would have been the parties intention, bearing in mind the circumstances at the time the Employment Contract was entered into, and my findings in paragraph 10 above that the appointment to the Castle Trust Group directorships post-dated the Employment Contract.

39. Where there is no ambiguity in the language used by the employee resigning or where it is plain how the employer understood them, one does not need to consider the objective test as to how a reasonable employer would, in all the circumstances, have objectively understood the words to mean the employee had resigned: **BG Gale Limited v Gilbert (1978) IRLR 453**. Let us assume for a moment that there was such ambiguity, or that Mr Knight understood the Resignation Letter to be a resignation from his employment with the Respondent. I have no hesitation in accepting that the objective listener would have understood the distinction being made in the Resignation Letter, and that the Complainant was not resigning from the Respondent. If there had been any doubt, there would have been a discussion about the distinction being made as I have already addressed in paragraph 25 of this Decision. This Mr Knight implicitly concedes when he alleges in his subsequent account of the events that he told the Complainant on 24th August 2011 that this distinction was a nonsense. However, my finding is that no such discussion took place, because Mr Knight understood precisely what the Resignation Letter said, as its terms were plain and unambiguous. He had not anticipated the distinction that would be made by the Respondent and which made the departure "*not straightforward*", in Mr Knight's own words in his letter of 30th August 2011 to the Complainant, but that is a different issue.

40. I am satisfied on the evidence that the Complainant did not terminate his employment with the Respondent by reason of him resigning from the Castle Trust Group directorships.

Dismissal by the Respondent.

41. So who really terminated the contract of employment? By virtue of section 64(2)(a) of the Employment Act there is a dismissal where "*the contract under which he (the Employee) is employed by the employer is terminated by notice or without notice*". The letter dated 30th August 2011 from Mr Knight to the Complainant was in effect the dismissal of the Complainant from his employment with the Respondent, when the Complainant was told to leave the office by Mr Knight and never returned. It was understood by the Complainant to be a dismissal and it was entirely reasonable for the Complainant to so construe it in all the surrounding circumstances, and would have been so construed by any reasonable and honest listener in light of those surrounding circumstances. It was

also the intention of Mr Knight that he would cease working for the Respondent on that date. If I am wrong to have arrived at this conclusion, then the Complainant would still be an employee of the Respondent. My reasons for finding that this constituted the dismissal of the Complainant by the Respondent are the following:-

- a. The e-mail of Mr Knight to Mr Bastone of 25th August 2011 stated, without qualification, that the Complainant had resigned. The Complainant understood Mr Knight to be saying that he had resigned from all roles hence his e-mail of 29th August 2011;
- b. That was the Complainant's understanding and interpretation of his conversation with Mr Knight on 30th August 2011, namely that he was being dismissed;
- c. The letter to clients one day later on 31st August 2011 confirmed that the Complainant had ceased working for the Respondent and that his duties had been redistributed amongst existing staff. It thanked him and wished him the best in the future, that is, elsewhere;
- d. The reference to an alleged ex gratia payment of 3 months' pay in lieu of notice, is strongly indicative of the Respondent being advised to terminate the Employment Contract pursuant to section 54 of the Employment Act by giving the Complainant, an employee of over 10 years service, the minimum statutory notice of termination of 3 months' notice to which he was entitled, even if this was never paid in full and not followed through in a proper manner;
- e. Even if one allowed Mr Knight the benefit of the doubt at the stage he read the Resignation Letter on 24th August 2011, which I do not, by the time of the Complainant's e-mail of 25th August 2011(10.21a.m.) to Mr Nichols, copied to Mr Knight, he would have been fully aware that the Complainant was only resigning the directorships of the Castle Trust Group and not from his employment with the Respondent. I do not accept that Mr Knight only scanned that e-mail and could not recall reading its last paragraph. The resignation of the co-director of the Castle Trust Group was not a minor issue, but very important especially with respect to its clientele, who Mr Knight was so anxious to reassure. Mr Knight moved very fast precisely because of the importance of his co-director resigning. It is simply not credible that in such circumstances he would misread/not have properly read any communications from his co-director, who had intimated his intention to resign;
- f. Knowing of the distinction being made, Mr Knight hands the Complainant the letter dated Tuesday 30th August 2011. Mr Colin Gibbs had already been identified as his replacement, and clients notified of this a day later, on 31st August 2011, and that the Complainant was no longer in the office and that his duties would be redistributed amongst existing staff. Mr Knight had moved very quickly to protect and reassure his clientele. Mr Knight's letter of 31st August 2011 to clients is confirmation that the employment had been terminated, and that the Complainant would not be returning to work for the Respondent.

Was there a potentially fair reason for the Respondent to dismiss the Complainant.

42. The Respondent must show a potentially fair reason to dismiss the Complainant under section 65(1) of the Employment Act, otherwise the dismissal will be held to be automatically unfair. The Respondent is unable to discharge the burden of establishing that the principal reason for the dismissal was that there was only ever one role, not two, and that the Complainant had resigned from that single role on 24th August 2011. I have found this to be incorrect and mistaken as the Complainant had not resigned from the employ of the Respondent.

43. In the alternative, the Respondent contends that even if it was so mistaken, it dismissed the Complainant because of facts it genuinely believed to be true and which would, if true, be capable of constituting a potentially fair reason for dismissal by virtue of section 65(1)(b) of the Employment Act *being "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held"* as confirmed by the Court of Appeal in *Klusova v London Borough of Hounslow (2008) ICR 396*. That is a correct proposition of the law. In the case of *Harper v National Coal Board [1980] IRLR 260*, Lord McDonald explained this:-

"Obviously an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no person of ordinary sense would entertain. But if the employer can show that he had a fair reason in his mind at the time when he decided on dismissal and that he genuinely believed it to be fair this would bring the case within the category of another substantial reason. Where the belief is one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation (Saunders v Scottish National Camps Association Ltd [1980] IRLR 174)".

44. In *Ely v YKK Fasteners Limited (1994) ICR 164* an employee indicated that he was intending to resign and move to a job in Australia. Subsequently, and without even formally having resigned, he changed his mind. The employers still treated the employment as at an end. The Court of Appeal held that the reason why the employer's treated the employment as at an end should be deemed to be the reason for a dismissal (notwithstanding that the employer was denying that there had been any dismissal at all) and that in the circumstances the belief that the employee had resigned constituted a substantial reason for the dismissal. If the Respondent had a genuine but mistaken belief that the Complainant had resigned from his employ with the Respondent, the burden of proof to establish a potentially fair reason would have been discharged by it.

45. Did the Respondent have a genuine belief, albeit mistaken, that the Complainant had resigned from its employ? I do not believe there was any such genuine belief for the following reasons:-

- a. The distinction between employment with the Respondent and the Castle Trust Group directorships was made very clear in the Resignation Letter and that the Complainant was only resigning from the Castle Group Trust directorships and not from his employment with the Respondent. That was evident from the Resignation Letter, and subsequent correspondence;
- b. Mr Knight is an experienced and successful businessman. He would know what the Resignation Letter was saying. Mr Knight materially contradicted what he said in his First Witness Statement namely that he was unaware at the meeting on 24th August 2011 that the Complainant was only resigning from the Castle Trust Group directorships. For Mr Knight to have genuinely believed the resignation to be from all roles, he could not have read the

Resignation Letter, which was clear and unambiguous. This is what he was effectively stating in his First Witness Statement. However, in his evidence he materially contradicted this, by admitting to having read it;

- c. As a consequence of this material change in his evidence, he then materially changed his evidence on cross examination by stating that he had not only read it, but actually told the Complainant at that same meeting that he believed the distinction the Complainant was making to be a complete nonsense. The Complainant denied this was ever said. That, of course, would have been a mistaken view, but at least there would have been a discussion about this, and which would have reflected the spontaneity of Mr Knight's reaction, and supported the contention that it was a genuinely held view, even if mistaken. There never was such a discussion;
 - d. These material discrepancies in Mr Knight's account would not have occurred if a genuine mistake had arisen at the time Mr Knight read the Resignation Letter on 24th August 2011. Whilst I have found there was no such discussion on 24th August 2011 with Mr Knight describing the distinction as a nonsense, why allege this subsequently, if not because it would have been the obvious reaction on reading the Resignation Letter if Mr Knight had genuinely believed this distinction to be flawed and a nonsense. If he remained silent having read the letter, and there was no such discussion, it would indicate that he understood it to say what anyone reading it would assume it to have said;
 - e. The first time this belief was mentioned in writing was in the e-mail from Mr Knight to Mr Nichols of 17th April 2013. This further indicates that he never genuinely believed this to be the case at the time of the dismissal and why he did not consider this to be a "straightforward matter" when he wrote to the Complainant on 30th August 2011. The relationship had deteriorated beyond repair in Mr Knight's mind, and he wished it to be a resignation, but wilful blindness to the facts does not amount to a genuine belief, however much one wishes to believe it to be true.
46. The Respondent has therefore failed to show a potentially fair reason to dismiss the Complainant under section 65(1) of the Employment Act, and is unable to discharge the burden of establishing the principal reason for the dismissal in accordance with section 65(1) of the Employment Act. In the absence of a potentially fair reason for the dismissal, there is no requirement to consider the fairness or otherwise of the reason for that dismissal pursuant to section 65(6) of the Employment Act: *Post Office Counters v Heavey (1990 ICR 1, 6B)*. The dismissal is unfair. The Respondent may have decided to dismiss the Complainant because he could not discharge his duties properly without having the Castle Trust Group directorships, because he was dissatisfied with his performance, and/or that the relationship between him and Mr Knight had broken down irretrievably, all of which may have constituted potentially fair reasons for dismissal. However, these were not the principal reasons alleged by the Respondent for the dismissal.

Re-engagement

47. I am first required to consider whether I should make a recommendation for re-engagement on such terms as I might consider reasonable. The Complainant confirmed he would not want such a recommendation. The evidence of Mr Knight at the hearing was that he attributed many problems in the Castle Trust Group uncovered during the Global review -to which I will refer in more detail below- to the Complainant. Almost 3 ½ years after the dismissal, it would not be practical to make such a recommendation where the relationship between Mr Knight and

the Complainant is non-existent, and it would be wholly impractical having heard their evidence for such a recommendation to be made in a small office such as the Respondent's.

Basic Award

48. The amount of the basic award on a finding of unfair dismissal is to be not less than £2,200, or such higher amount as the Tribunal, in its discretion, shall determine. It is not capped by any ceiling.
49. There is no statutory framework for how the Tribunal should exercise its discretion on calculating the basic award, but in my view the Tribunal should bear in mind the following when exercising the discretion to award a sum higher than £2,200:-
- a. The Tribunal should give effect to the ordinary words of "basic" in the general context of the relevant statutory provisions, even if it is uncapped. The general scheme of the Act is to provide for the compensatory award in section 71(1) to compensate for the financial "loss" actually suffered. The basic award is to provide for what it says, a basic amount of compensation ie a "base" sum, with the proviso that it cannot be less than £2,200;
 - b. No deductions can be made from the minimum basic award of £2,200.00 for failure to mitigate one's loss, contributing to or causing one's own dismissal, the amount of any payments made by an employer at the time of dismissal or for an employee refusing to accept an order for re-engagement;
 - c. It is otherwise an unfettered discretion but like any discretion should not be exercised arbitrarily/capriciously or at a whim.
50. I am not prepared to make a basic award on the basis of the statutory redundancy compensation payable under the Employment (Redundancy Pay) Order in the sum of £43,346.24 as claimed by the Complainant for a number of reasons. Firstly, this was not a dismissal by reason of redundancy. Secondly, the statutory basis for calculating the basic award in England & Wales is akin to calculating a statutory compensation payment, but those provisions do not apply in Gibraltar. Thirdly, whilst I am not required to consider whether the dismissal was fair or unfair, I can take into account what might have happened had the Complainant remained in employment. There was a real prospect, if not inevitability, that the Respondent would have been dismissed for performance related reasons or because the relationship between him and Mr Knight had broken down irretrievably, fairly or unfairly. Even the Complainant foresaw this possibility as I mention in paragraph 24 (a) of this Decision, including a reduction in pay. I do not accept that the Restructure Review had been completed by 31st August 2011 as the only copy furnished in evidence was dated August 2011 and Mr Knight acknowledged that it was not the final version. In the absence of the original final signed report, or Mr Nichols being called to give evidence, little weight can be given to it. Nor is it possible for me to determine whether any later dismissal would have been fair if a different reason had been put forward. I am also aware of how easy it is to allege that any such failings were solely the fault of the Complainant, when these issues were never the central issue of this current claim. Mr Knight went as far as to allege that the Complainant had withheld these compliance failings from Mr Knight, and that when this was discovered, he resigned. I do not accept that, and that is to ignore both what brought about that resignation as a director, and the fact that the Complainant had not resigned from his employ with the Respondent. On cross examination Mr Knight alleged that the Global report found several black holes in compliance and

compliance failings on the part of the Complainant which Mr Gibbs had to resolve by reassigning employees to address these issues. These failings had to be resolved with FSC approval before the plan to expand the business could move ahead. £57,000 was paid to Global to prepare the review, and a further £37,000 in assisting on the specific review requested by the FSC to deficiencies in compliance procedures. It took 2 years to sort these issues out. I make no comment on these allegations, other than to highlight what might have transpired-fairly or unfairly, I would stress.

51. Taking into account these factors, I award a basic award of £5,000.00 in my discretion, and to take into account the Complainant's long record of service for the Respondent.

Compensatory Award

52. The current maximum upper limit that can be awarded on a finding of unfair dismissal is the lesser of £49,888.80 or 2 years' salary of the Complainant at the time of the dismissal. The lesser in this case is £49,888.80.
53. It is for the Complainant to establish his loss. I have calculated the compensatory award from the Complainant's amended schedule of loss, and which was not subject to any specific challenge other than the fact that it was for the Complainant to prove his loss, and on the following basis. Firstly, the total loss of earnings which the Complainant has sustained in consequence of the dismissal in so far as this is attributable to action taken by the Respondent, is awarded from the date of dismissal to the date of the hearing. This amounts to £81,517.92, for the period 30th August 2011 to 14th March 2014 (132 weeks) at £617.56 p.w. Given the Complainant's age at the time of his dismissal, he would have found it difficult finding alternative employment. Secondly, the sum of £100 for loss of statutory rights. Thirdly, the estimated future loss of earnings consequent on the dismissal after the 14th March 2014 I am not prepared to award as there were too many contingencies involved with what might have transpired for me to accept any longer period and a cut-off date of 14th March 2014 is a reasonable date up to which to attribute loss. I have taken the view that but for the unfair dismissal, the Complainant would not have continued in employment indefinitely, but for a limited period. If the Complainant had been dismissed, it could still have been fair or unfair and that, again, is a consideration I take into account in arriving at this cut-off date. Fourthly, I have deducted from these sums the sums paid by the Respondent namely £5,626.53, and the sums earned by mitigation amounting to £41,377.20 up to 14th March 2014. It is for the Respondent to show that the Complainant did not mitigate his loss, and it has not done so. The Complainant stated that he had made significant efforts to mitigate the loss and had received £1,500 per month from January 2012 to March 2013 for services rendered to the Mayfair Group, and £6,696.78 in community care payments up to the end of March 2013. He did not register with the ETB, which was an omission, but he made several contacts, and frequently sent out his CV. Fifthly, he did not cause or contribute to his own dismissal and I make no deductions in this respect. Sixthly, in calculating the Compensatory Award I am directed by the Employment Act to ignore any Basic Award made.
54. The sum I have calculated of £34,614.19 is not in excess of the statutory 'cap'. However, the statutory scheme provides in section 71(1) of the Act for the Compensatory Award to compensate for the financial loss actually suffered, with certain limits and deductions and to be :-

"...such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the aggrieved party in



consequence of the matters to which the complaint relates, in so far as that loss is attributable to action taken by or on behalf of the party in default".

The overriding duty on the Tribunal is to award what is "just and equitable" in the circumstances, and not just the loss. What is it "just and equitable" to award should be applied to the final figure that I have determined namely the sum of £34,614.19. So at this stage I should consider whether I should reduce the compensatory award. I see no need to do so as I am satisfied this award is just and equitable.

The total award to be paid in compensation for this unfair dismissal by the Respondent to the Complainant is £39,614.19.



Mark W. Isola QC
Chairman
8th May 2015