EMPLOYMENT TRIBUNALS

Claimants: (1) Mrs D Taylor
(2) Miss S Starrs

Respondent: Excell for Training Limited

Heard at: Nottingham Employment Tribunal **On:** 13 – 15 March 2017

Before: Employment Judge Dyal

Representation

Claimant: Mr Clay, Solicitor
Respondent: Mr Smith, Counsel

JUDGMENT

1. The Claimants were both unfairly dismissed.
2. A *Polkey* reduction of 100% is made.
3. It is just and equitable to reduce each Claimant's:
   a. basic award to nil pursuant to s.122(2) Employment Rights Act 1996
   b. compensatory award to nil pursuant to s.123(6) Employment Rights Act 1996
4. By consent, Mrs Taylor's claims for holiday pay and notice pay are dismissed upon withdrawal.

REASONS

Introduction

1. At the outset of the hearing, the issues were identified with the help of the advocates. Each Claimant complains of unfair dismissal contrary to Section 98 Employment Rights Act 1996. The issues arising are these:

   1.1. What was the reason for the dismissal? The Respondent relies on conduct in each case.
   1.2. If there was a potentially fair reason, were the dismissals fair in all the circumstances according to Section 98(4) ERA 1996?

1.3. If the dismissals were unfair, should a ***Polkey*** reduction be made?
1.4. Should the Claimants' basic award and/or compensatory award be reduced on account of their conduct?

2. Mrs Taylor's Claim Form also identified a claim for holiday pay and notice pay. These claims were withdrawn and by consent dismissed upon withdrawal.

The hearing

3. The tribunal was presented with an agreed bundle of documents running to two lever arch files. It took time to read the key documents as identified by the parties before hearing the evidence and considered such further documents as reference was made to in the course of the hearing. The tribunal heard from the following witnesses. The Claimants each gave evidence. For the Respondent, Mr Steven Boyd; Mr David Linley, Mr Jack Boyd, Mr Ross Simmonite and Ms Rachel Priest. All further references to Mr Boyd are references to Steven Boyd unless otherwise stated.

The concessions

4. In the course of the hearing, Mr Clay formally conceded that the Claimants had each been guilty of gross misconduct and that their gross misconduct was in each case the reason for dismissal. In more detail Mr Clay conceded that:

4.1. The Claimants were taking active steps to compete with the Respondent whilst still employed by the Respondent.
4.2. They did this by establishing a limited company, Arrow Training Limited, of which they were both directors and shareholders, on 23 October 2015 with a view to competing with the Respondent;
4.3. Mrs Taylor met with and had discussions with the Derbyshire Network, a major client of the Respondent's, whilst employed by the Respondent. She did this with a view to securing the Derbyshire Network's business which would have involved diverting business opportunities from the Respondent to Arrow.

Findings of fact

5. The Respondent is a small company in the business of providing the training and assessment aspects of apprenticeships, among other forms of training and assessment. Its key client at the relevant time was the Derbyshire Network, a consortium which contracts with the Respondent and similar businesses to provide training to apprentices and other learners.

6. Until August 2015, the Respondent had two Directors, Mr Boyd and Mrs Taylor. Mr Boyd held a 95% shareholding; Mrs Taylor held a 5% shareholding. Mrs Taylor was additionally employed pursuant to a contract of employment. Beneath Mr Boyd and Mrs Taylor there was a layer of management comprising Mrs Sheldon, Quality Assurance Manager (she was also Mrs Taylor's niece), David Linley, Finance Manager, Mr Simmonite,

Business Administration Manager, and Ms Starrs. There were no other management level employees of relevance.

7. It was an express term of each Claimant's contract of employment that:

> "*You should not directly or indirectly engage in or have any interest financially or otherwise in any other business enterprise which interferes or is likely to interfere with your independent exercise of judgment in Excell for Training's best interest*."

8. During the course of 2015, the Respondent experienced some cash flow problems. This was part of a wider problem affecting businesses in the sector. It was caused by a serious IT failure experienced by an important third party which meant that certificates of completion could not be issued. In turn this meant that final payments to the Respondent could not be made for the services it had provided to learners. Cash flow was one thing, profitability was another: the business was doing well from a profitability perspective.

9. In August 2015, Mr Boyd needed to extend the Respondent's overdraft facility because of the cash flow problems. The bank (Santander) required both Directors of the business to give a personal guarantee for the loan. Mr Boyd therefore asked Mrs Taylor if she would, with him, guarantee the overdraft but she declined. As a result, in order to obtain the overdraft, Mrs Taylor was asked to and did resign as a Director of the Respondent. She remained an employee and her job title remained Director. Relations between her and Mr Boyd began to deteriorate from there.

10. In early October 2015, there were some contractual negotiations between Mr Boyd and Mrs Taylor, as a result of which Mrs Taylor's pay was reduced. She resolved in her own mind to leave the business at around this point. She also told Ms Starrs that she was unhappy and thinking of leaving. So began discussions between her and Ms Starrs about setting up a training business of their own with Mr Shutler (Ms Starrs's partner) providing the investment.

11. These discussions gathered momentum and started to take shape over the course of October 2015. On 23 October 2015, Arrow Training Ltd was incorporated and Mr Shutler, Ms Starrs and Mrs Taylor were its Directors and shareholders. There is no doubt that it was intended that Arrow would be a competitor of the Respondent.

12. The tribunal is satisfied that Ms Starrs and Mrs Taylor began planning how to get Arrow up and running, how to staff it and generally how to get business for it. They decided to approach Mr Linley to see if he would be interested in joining in with the venture. One or both of them must have approached Mrs Sheldon who also came on board.

13. Mr Linley was invited to a meeting at Mrs Taylor's house, to take place on 31 October 2015, to talk about the business venture. He was asked to bring some rough figures setting out business costs and the like so that a rough business plan could be sketched. He did attend the meeting and he did put together some figures. Mr Linley did not know exactly what was involved in advance of the meeting but shortly after the meeting he got cold feet. He was no longer prepared to go along with the plan, at least not unless he was given

a 10% shareholding in Arrow. He raised this matter after the meeting on 31 October with Mr Shutler. Mr Shutler declined to offer him a shareholding.

14. On 5 November 2015, Mr Linley blew the whistle on the plan. He told Mr Boyd all about it and he produced a detailed written statement that now appears at pages 210 to 212 of the bundle. At this point, the Claimants and Ms Sheldon were on annual leave. On their return from annual leave, they were all suspended, that is on 16 November 2015. A few words need to be said about that day.

15. Mr Boyd approached Mrs Taylor and Ms Sheldon in the office, told them that they were suspended and handed them a letter setting out disciplinary allegations arising out of Mr Linley's statement: that they were in breach of the duty of good faith and fidelity to the Company and that they were acting in conflict with the Respondent's interests. He enclosed Mr Linley's statement and invited them to an investigatory hearing the following day. The letter said that a disciplinary hearing may follow immediately on from the investigatory hearing.

16. There followed an ugly scene which was uncivilized and unnecessary. Ms Sheldon was verbally abusive towards Mr Boyd. Mrs Taylor did not act graciously either, although she stopped short of conducting herself as Ms Sheldon had. Ms Sheldon resigned on the spot. There is some controversy about this in that Mrs Taylor does not recollect Ms Sheldon doing so but the tribunal is satisfied on the basis of the Respondent's witness evidence that she probably did.

17. Mrs Taylor was asked for the password to her company laptop. She eventually gave it, the delay being caused by the fact that the password was also used for online banking so there was some reluctance to hand it over and the tribunal has some sympathy with that.

18. Ms Starrs was not in the office at this point. She came in a short while later having heard what had happened. She did conduct herself graciously and there was no repetition of the ugly scene of earlier. She said that she had a USB stick with some of the Respondent's documents on. She was asked to bring it to her investigation meeting the following day and she did.

19. Later that day, Mr Boyd telephoned some of the Respondent's business clients because he needed to give some explanation as to why the staff he had suspended would not be attending to their duties. The tribunal considers that in the course of doing so, Mr Boyd made comments to the effect that the allegations against the Claimants were well founded. For instance, he said that Ms Starrs had been suspended because she was untrustworthy and that she had set up another company and taken paperwork. There is some corroboration for this at pages 260 and 261 of the bundle. Whether he actually said that the Claimants had been dismissed is unclear but he did make it clear that in general terms he considered the disciplinary allegations to be well founded.

20. Mr Boyd's evidence to the tribunal was that he considered the case against the Claimants at this stage to be overwhelming. The tribunal finds as a fact that Mr Boyd had, by 16 November, decided that the allegations were

well founded and that the Claimants should and would be dismissed. The principal basis for this finding is not so much the evidence at pages 260/261 (although that does carry some weight) but what Mr Boyd actually said in the meetings on 17 November 2015, which the tribunal considers to be revealing. There is a transcript of the meeting with Ms Starrs because with the consent of the others present, she voice recorded that meeting. The tribunal will come back to what was said at that meeting shortly.

21. On 17 November 2015, there was a meeting with each of the Claimants separately and the meeting in each case was chaired by Mr Boyd. The first part of each meeting was given the label "investigation meeting". The second part of the meeting was given the label "disciplinary hearing". In reality, there was one meeting per Claimant which is best described as a disciplinary hearing. The first part of the disciplinary hearing involved a discussion of the allegations. The second part, which followed a short adjournment of a matter of minutes, involved the promulgation of Mr Boyd's decision. In each case, the decision was that the Claimant was summarily dismissed.

22. A bizarre feature of the disciplinary hearings was that Mr Linley was in attendance at each of them throughout. That is to say he attended the discursive part of the hearing but he remained in the room with Mr Boyd during the adjournment and remained in the room during the promulgation of Mr Boyd's decision. Indeed, in the case of Mrs Taylor's disciplinary hearing, the notes record that it was Mr Linley who called the adjournment, after which Mr Boyd promulgated the decision to dismiss.

23. In Ms Starrs hearing, which was voice recorded by consent, Mr Boyd is recorded as saying the following in the first part of the meeting (which the tribunal takes to be powerful evidence that he had already made up his mind):

> p239:
> "*… until the 5th November I had no idea that you were basically trying to wreck my business. Well you see if I'd not found out, at least now I've got an opportunity because that's all it is, it's an opportunity to continue.*"
>
> p242:
> "*You just plot to overthrow the company. … To find out this way I just feel like I've been cheated on that badly, ugh, it makes me …*"

24. After the adjournment (page 244), Mr Boyd came back and is recorded as having said to Ms Starrs:

> "*Unfortunately after, I wouldn't even say much deliberation cause that's just not true and accurate, obviously …I'm going to have to dismiss you for gross misconduct…"*

25. Although the above extracts are all taken from Ms Starrs' disciplinary hearing, it is in this case wholly implausible that Mr Boyd could have made up his mind in relation to Ms Starrs but not Mrs Taylor and the tribunal is sure that Mr Boyd had mind up his mind in relation to both Claimants before their meetings on 17 November 2015.

26. The tribunal therefore finds that Mr Boyd had resolved before the disciplinary hearings that both Claimants were guilty as charged and should be dismissed.

27. The Claimants each appealed. Their appeals were heard and dismissed by Mr Boyd. Mr Boyd considered that there was nobody else within the business who could hear the appeals. The tribunal agrees: there was nobody senior to him nor even anybody anywhere near as senior as him. Mr Boyd considered contracting with an external party to hear the appeals but rejected that idea, both because of the cost (he was told it would cost hundreds of pounds) and because ultimately he would need to either accept or reject the appeal officer's recommendation.

28. The backdrop to the appeals is also important; money was tight in the business at this stage, it had lost key staff and was already losing learners to Arrow Training. The business was under an existential threat.

Additional findings relevant to contribution

29. Mr Clay sensibly conceded on the Claimants' part that they did set up a business (Arrow Training) in competition with the Respondent and that Mrs Taylor had met with Derbyshire Network with a view to diverting business to Arrow from the Respondent. The meeting happened during Mrs Taylor's employment with the Respondent. The tribunal is satisfied and finds that Ms Starrs was equally implicated. Although she was not at the meeting that took place with Derbyshire Network, she must have been aware of it and it was part of a general plan that she, the Claimant and Mr Shutler had to get Arrow up and running, to start operating and become a profitable business. This meeting with Derbyshire Network was an essential part of that plan.

30. The tribunal also finds that Mrs Taylor and Ms Starrs did try to entice Mr Linley to leave the Respondent's business and to join Arrow. This is obvious from the fact that they asked him to attend a meeting on 31 October 2015 and that they were on any view in discussions or negotiations with him pursuant to which they sought to persuade him to join them in their new business venture. There was no way in which Mr Linley could have continued to work for the Respondent if he had joined Arrow Training. They were competing businesses and he was the financial officer of the Respondent and proposed financial officer of Arrow.

31. The Respondent alleges that Ms Starrs copied all the Company's policies and procedures onto a USB stick in order to use them in future competitive employment with the Respondent. The main evidential basis for this is three-fold. Firstly, the passage of Mr Linley's statement at page 211 in which he reports that this is what Ms Starrs said she had done in the meeting of 31 October 2015. Secondly, a number of the Respondent's witnesses say in their statements to the tribunal that on 16 November 2016, when Ms Starrs came into the office, she openly admitted that she had all of the policies and procedures on the USB stick and according to Mr S Boyd: "…*she admitted that she had the whole complement of company policies copied on a USB stick …"*. Thirdly, Ms Starrs handed back the USB stick on 17 November 2015. The Respondent has replicated in bundle 2 a copy of all the documents it says it found were on the USB stick. Ms Starrs denies these allegations.

32. The tribunal found this to be a difficult issue. Ms Starrs' clear evidence to the tribunal was that she did have a USB stick with company documents on but these documents were simply the documents she needed on a day to day basis in order to do her job. She found it convenient to have them on a USB stick so that she did not need to always take her laptop around with her. The documents were not, on her evidence, put on the USB stick with a view to competing with the Respondent, but rather, for the quite legitimate purpose of carrying out her ordinary work duties.

Generally, the tribunal observes that it found Ms Starrs to be a straightforward and satisfactory witness. It was impressed by the fact that on various occasions she made candid concessions against herself without any hesitation. A witness who was not being straightforward may well have avoided making such concessions or making them so readily.

33. Further, in the course of her evidence, Ms Starrs volunteered that she had secretly recorded the events of 16 November 2015. This was in fact news to everyone including Mr Clay. Over the course of lunch, Mr Clay and Mr Smith had the opportunity to consider this issue and to listen to the recording. I gave (with Mr Smith's blessing) permission to Mr Clay to talk to Ms Starrs about this single issue, notwithstanding that she was part way through her evidence. We all agreed this was the only sensible way of dealing with the matter.

34. After the lunch interval, the advocates came back and told the tribunal that it was their shared position, having listened to the recording themselves, that Ms Starrs was recorded as saying something to the effect that such documents as she had were on the USB stick but that she had not said or admitted that she had copied the *whole complement* of the Respondent's company policies. The advocates considered that there was no need for the tribunal to listen to the recording and given the agreed account of what had been said, the tribunal was content with that.

35. There may have been something dishonourable about making a clandestine recording but it was made and it does undermine the Respondent's evidence about what Ms Starrs said on 16 November 2015. She did not, as it turns out, admit to having the whole complement of the Respondent's company policies on the USB stick and in fact the account of the recording I was given suggests that the admission she made on 16 November was along the lines of her evidence to the tribunal.

36. Turning to the documents the Respondent says it discovered on the USB stick and replicated in bundle 2, on balance the tribunal does not think it can rely on these as an accurate account of what was on the USB stick. That is because one of the documents said to have been on the USB stick and now replicated in bundle 2 is dated 19 March 2016 (page 445). This postdates the date Ms Starrs delivered up the USB stick. She delivered up the USB stick on 17 November 2015. This would be a very strange anomaly were the Respondent's case correct. Absent some cogent explanation as to why a document that apparently postdates the date of delivery up, there must be grave doubt that the documents in bundle 2 that are said to reflect the content of the USB stick in fact do so. There has been no such cogent explanation and indeed no explanation at all of the document dated 19 March 2016 at page 445. The tribunal has therefore decided that the documents in bundle 2 cannot be taken as a reliable reflection of what was on the USB stick.

37. This leaves Mr Linley's account of the meeting on 31 October 2015 which was made within a couple of days of the event. There is no suggestion that Mr Linley has deliberately fabricated his account. However, it is possible that Mr Linley misunderstood what Ms Starrs said at the meeting and she may have said that she had some policies and procedures on the USB stick, rather than all of them on the USB stick and if so, that was true. It is also possible that Ms Starrs said what Mr Linley records her as having said but that she misspoke or even lied at the meeting, i.e. she said that she had all the policies and procedures on the USB stick but in fact did not. This is a distinct possibility because the tribunal considers that there was a significant amount of excitement, even euphoria, at the meeting on 31 October 2015. That is excitement or euphoria about the prospect of a new business venture which in turn could easily have led Ms Starrs to exaggerate what she had.

38. Undoubtedly there is a degree of speculation in that possible account of the meeting of 31 October 2015. But the important point is that overall, the tribunal is not

satisfied on the balance of probabilities that Ms Starrs did copy all of the Respondent's policies and procedures, or other documentation with a view to using them competitively with the Respondent. It is more likely that she did not do so and that her account of events is truthful.

39. Finally, it is true that the Claimants took the benefit of certain training at the Respondent's expense and had their DBS certificates renewed, all probably after the moment in time that they had decided to leave and to work for Arrow Training. The tribunal is not satisfied that this was done with a conscious or cynical motivation to incur these costs while at Excell so as to avoid incurring them once at Arrow. There is little to suggest that. The tribunal considers that without such a motivation, these matters are essentially benign.

The law

40. By Section 94 Employment Rights Act 1996, there is a right not to be unfairly dismissed. It is for the employer to show the reason for the dismissal and that the reason was a potentially fair one. If a potentially fair reason is shown, the fairness of the dismissal turns on the test identified at section 98(4), in relation to which the burden of proof is neutral.

41. In *BHS -v- Burchell* [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

42. The *Burchell* guidance is not comprehensive, however, and there are wider considerations to have regard to in many cases. For instance, the severity of the sanction in light of the offence; mitigation; the ways in which other employees have been treated and procedural fairness are important considerations.

43. In *Iceland Frozen Foods -v- Jones* [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

44. The range of reasonable responses test applies to all aspects of dismissal. In *Sainsbury's -v- Hitt* [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that applies to all aspects of dismissal, including the procedure adopted.

45. The basic and compensatory award can each be reduced on account of a claimant's conduct according to the different statutory tests at Section 122(2), Section 123(6) of the Employment Rights Act. The impugned conduct need not be unlawful so as to justify a reduction but it must be blameworthy. In the case of Section 123(6), the blameworthy conduct must also cause, or partly cause, the dismissal. See further *Nelson -v- British Broadcasting Corporation (No. 2)* [1980] ICR 110.

46. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

> "*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of*

uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ..."

47. The tribunal had regard to the ACAS *Code of Practice 1: Disciplinary & Grievance Procedures* which it considered in full, particularly paragraphs 5, 6 and 7.

Discussion and conclusions

The reason for the dismissals

48. Each Claimant was dismissed by reason of her misconduct. Specifically, Mr Boyd dismissed because he held the beliefs that:

    48.1. The Claimants formed Arrow Training and were directors and shareholders of the same at a time when they were employed by the Respondent.
    48.2. That Arrow Training was proposed to be direct competitor business of the Respondent.
    48.3. That the Claimants had sought, during their employment, to divert business from the Respondent to Arrow and that they had sought to entice Mr Linley to join the competitive venture.
    48.4. In the course of her employment Ms Starrs had copied business information onto a USB stick with a view to using it competitively.

49. There was a reasonable basis for all of this. Essentially Mr Linley's account of the meeting on 31 October 2015, together with the responses of the Claimants whereby they admitted much of what was alleged at the disciplinary hearings, although not all of it.

50. The decision to dismiss was not based on a reasonable investigation because Mr Boyd made his mind up before the hearing on 17 November 2015. The reason the tribunal draws that conclusion is set out in the findings of fact above. The dismissal was therefore unfair.

51. The tribunal largely rejects the other complaints about the investigation the Claimants have made:

    51.1. This was a case in which all that was really required was to put Mr Linley's account of the meeting on 31 October 2015 to the Claimants; to allege misconduct in particular respects and to give them a fair chance to respond before making a decision. The letters of 16 November 2015 recorded that the Claimants had been suspended and set out the disciplinary allegations and included Mr Linley's statement as an attachment. A meeting was convened to hear the Claimants' response to the allegations. The tribunal concludes that in effect the investigatory and disciplinary hearing were rolled into one but in this case that was of itself an acceptable way to proceed. The matter required urgent resolution and was not particularly complicated. It was apt to be dealt with by giving the Claimants the key evidence in advance of the meeting and hearing their response to it at the meeting; there did not need to be two meetings.

    51.2. The tribunal rejects the suggestion that fairness required anything materially more by way of investigation than in fact happened beyond of course hearing from the Claimants before making a decision. In particular, the tribunal

rejects Mr Clay's suggestion in closing submissions that the only reasonable thing to do would have been to interview other staff and to interview the Respondent's clients. The other staff were not at the meeting on 31 October 2015 and there was no reason to anticipate that interviewing them would have had any probative value. Further, interviewing clients about an internal disciplinary issue would have been an odd course to take and the tribunal is not remotely critical of the Respondent for not taking that course.

51.3. The tribunal considers it bizarre that Mr Linley stayed in the room throughout the meetings on 17 November 2015, including during the adjournment and including during promulgation of the decision. Indeed, it was also bizarre in Mrs Taylor's hearing that Mr Linley called the adjournment. These were procedural irregularities, although they were not ones which in fact made any difference. That can be said with confidence because Mr Boyd's decision had already been taken before those meetings and in any event, the tribunal is satisfied that Mr Boyd reached the decision he did on his own and that it was truly his decision.

51.4. The appeals were heard by Mr Boyd. It would normally be unfair for the dismissing officer and appeal officer to be the self-same person. However, that is not so in this case. The tribunal is entirely satisfied that there was nobody else internally who could hear the appeals. It is also satisfied that there was nobody else internally who could have been the disciplinary officer so as to leave Mr Boyd free to hear the appeal. There just were no other people who were sufficiently senior in the business. A decision was made not to get an external person to hear the appeals. That was within the band of reasonable responses given the cost of doing so and the existential threat that the business was under at this time. The size of the employer and its administrative resources are highly relevant in all of this. The Respondent is and was a very small employer with hardly any administrative resources. It had been seriously depleted by the exit of the Claimants and Mr Sheldon and was already, by the time of the appeals, leaking business to Arrow Training. It faced an existential threat to its ongoing ability to trade and to its solvency. All in all, the tribunal considers that quite exceptionally it was not outside the band for Mr Boyd to hear the appeal against his own decision. It did mean that the appeal lacked the quality of independence that an appeal would ordinarily need to have but ultimately that was inherent in the circumstances.

The sanction

52. The tribunal is wholly satisfied that the sanction of dismissal was within the band of reasonable responses and indeed considers that any other response would have been very surprising. The Claimants admit that what they did was gross misconduct. There is of course complicated case law about whether or not steps taken in preparation for competition do or do no breach the duty of good faith and fidelity. That issue does not arise given the admission of gross misconduct.

53. The conduct that Mr Boyd found the Claimants guilty of was misconduct of a particularly serious kind. A particular feature of the facts of this case that made any response other than dismissal a very difficult one to envisage is was that Claimants did not at any time recant their intention to leave and compete with the Respondent in competition. Indeed, there was no suggestion whatsoever that the Claimants had recanted from their desire to compete with the Respondent, although each says to the tribunal that they envisaged coming back to work for the Respondent for a matter of weeks whilst serving out a notice period, at the end of which they would have gone off to work for Arrow. This struck the tribunal as a truly preposterous and totally unworkable idea. Arrow was competitive with the Respondent. There was obvious scope for deep conflict of interest between the Claimants' fiduciary duties as

directors owed to Arrow and their duty of fidelity in contract owed to the Respondent given that there was every likelihood of business opportunities arising that were of interest to both Arrow and the Respondent.

54. The tribunal considers that there was very little, if any, mitigation. The most that can really be said is that the Claimants were trying to better themselves and that they both had some concerns about the ongoing viability of the Respondent and therefore about their own future financial positions. They also both had a few years of service and clean disciplinary records. However, none of that could come anywhere near pushing the dismissal outside of the band as a sanction.

55. Finally, the tribunal rejects the argument that the dismissals were unfair by reference to the fact that Mr Linley did not receive any disciplinary sanction. It is true that he did not receive any disciplinary sanction but his circumstances were so very different that no relevant comparison can be made. There are many factors that distinguish him, but it will suffice to give the two most important ones. Firstly, Mr Linley blew the whistle on the plan to set up in competition with the Respondent. That was an immense benefit to the Respondent and Mr Boyd rationally considered that finding out about the plan at an early stage gave him a fighting chance of salvaging some of his business, a chance he would not have had but for Mr Linley. It was entirely rational then to look more favourably on Mr Linley. Secondly, Mr Linley considered joining in with the plan but in fact did not do so. Having considered the matter he resolved on reflection not to join in with it.

56. For these reasons, the tribunal considers that the dismissals were unfair but only on the narrow basis identified, namely, that the decision to dismiss was predetermined in advance of the disciplinary hearings.

Polkey

57. The tribunal is absolutely certain that had a fair procedure been followed, the Claimants would have been dismissed in any event. In particular, if Mr Boyd had kept an open mind and deliberated with an open mind on the disciplinary allegations, there is no doubt whatsoever that he would have concluded that the Claimants were guilty of gross misconduct and that he would have dismissed them. He would have accepted Mr Linley's account of the meeting on 31 October 2015. It would have been entirely reasonable for him to do so. Much of what Mr Linley said was admitted anyway. He would have considered summary dismissal to be the only appropriate sanction. If he had considered such mitigation as there was, and it was paltry, and if he had considered whether a sanction short of dismissal was enough, he would have concluded that only summary dismissal would do.

58. It bears repeating that the Claimants admit gross misconduct and there is no suggestion whatsoever that they ever recanted their plan to set up in competition and certainly did not suggest to Mr Boyd that they had changed their minds. There is also no reason to think that the dismissals would have been delayed had a fair procedure been followed. The timescales were short but the Company faced an existential threat such that it was reasonable to suspend the Claimants one day and have the disciplinary hearing on and decided the next. The matters were not overly complicated and all that was needed was a chance to respond to the allegations in Mr Linley's statement. That could be done in the timeframe that there in fact was.

59. Finally, for the avoidance of doubt, the tribunal does consider that there was a reasonable basis - provided by Mr Linley's statement - for Mr Boyd to conclude that Ms Starrs had copied information onto a USB stick with a view to using it competitively in the future, albeit that is not the tribunal's own finding of fact. This is true even if the content of the memory stick that Ms Starrs delivered up did not bear out what Mr Linley suggested might be on that memory stick. That is because there

was an obvious possibility that was handed back was not everything that was taken.

60. For the further avoidance of doubt, even if the specific issue in respect of the USB stick had not arisen, the tribunal is sure that Ms Starrs would have been dismissed because of the other issues which were admitted and are gross misconduct and that her dismissal would have been fair.

61. All things considered a 100% *Polkey* reduction should be made.

Contribution

62. The Claimants admit setting up Arrow Training and becoming Directors and shareholders of the same whilst employed by the Respondent. They admit that that was gross misconduct. It is also admitted that Mrs Taylor was seeking to divert business opportunities from Derbyshire Network from the Respondent to Arrow. The tribunal has found as a fact that although Mrs Taylor was the only one at the meeting with Derbyshire Network, Ms Starrs was equally implicated as she is likely to have known of and approved of the meeting which, moreover, was simply a part of a wider shared plan to set up in competition with the Respondent.

63. The tribunal further found that the Claimants sought to entice Mr Linley away. Mr Clay accepted realistically that if the tribunal made that finding of fact, that it would amount to a further breach of the duty of fidelity implied into all contracts of employment.

64. By these actions, the Claimants took steps which created an existential threat to the Respondent. Its client base was targeted (Derbyshire Network) and its staff base was targeted (Mr Linley) and that was aggravated by what would have been the simultaneous departure of four employees acting in concert (the Claimants, Ms Sheldon and Mr Linley).

65. The Claimants' actions in this regard undoubtedly contributed to, and indeed essentially were, the reasons for their respective dismissals. There is no doubt that this conduct meets the test of being blameworthy. There was also little mitigation for the blameworthy conduct.

66. On the other hand, the dismissals were unfair in a certain narrow respect but they were unfair. However, this unfairness in the tribunal's view is significantly mitigated. The case against the Claimants was prima facie very strong since there was no apparent reason at all why Mr Linley would lie. Mr Boyd should have kept an open mind and failed to do so but the tribunal considers in mitigation of that failure, that the right thing to do was a very difficult thing to do.

67. In all the circumstances, the tribunal has little hesitation in concluding that the justice and equity of the matter is to reduce both the basic award and the compensatory award (if there were any) by 100% to nil. The tribunal appreciates that this is an exceptional finding but considers that the circumstances are such that it is the right one. The misconduct was egregious and if unchecked may well have destroyed the business altogether; on the other hand the unfairness was limited and mitigated by the very difficult circumstances.

68. Dealing with a number of other matters that Mr Smith submitted should lead to a reduction of compensation:

    68.1. The tribunal is not persuaded on the balance of probabilities that Ms Starrs in fact copied confidential information onto a USB stick with competitive intent and so that deals with that matter.
    68.2. The tribunal is not persuaded that the benefits of training and DBS checks referred to above were taken cynically in order to transfer the cost of the same

to the Respondent.

68.3. Finally, in terms of poaching the Respondent's learners, on the evidence, this occurred (if at all) after the termination of employment and as such is not material here.

Conclusion

69. By way of conclusion, the Claimants were unfairly dismissed but a 100% *Polkey* reduction is made and 100% reductions of the basic and compensatory awards are also made.

_____

Employment Judge Dyal

Date: 18.04.2017

REASONS SENT TO THE PARTIES ON
25.04.17
.....

.....
FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.