Case No. 1400458/2017

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

Wayne Dean -v- John Reid & Sons (Strucsteel) Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Southampton **ON** 13-14 November 2017

EMPLOYMENT JUDGE P S L Housego

Representation

For the Claimant: In person

For the Respondent: Mr G Self, of Counsel, instructed by Preston Redman, Solicitors

JUDGMENT

The judgment of the Tribunal is that the claimant was unfairly dismissed by the respondent. The case will be re listed for hearing.

REASONS

Introduction and evidence

1. In this case the claimant Mr Dean claims that he has been unfairly dismissed. The respondent contends that the reason for the dismissal was gross misconduct, and that the dismissal was fair.

2. I have heard from the claimant. For the respondent I heard Simon Boyd, managing director, who suspended the claimant, from Timothy Cook, a director, who took the decision to dismiss, and from John Sinkinson, company secretary, who took the appeal against dismissal. An agreed bundle of documents was before me, with the contract of

employment, the CV of the claimant, and extracts from the website of the respondent, as well as documents relating to the dismissal procedure.

3. Most of the facts were not in dispute. There was a degree of conflict on the evidence about those that were not agreed. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proved on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

4. The respondent is a largely family owned company which is specialist contractor in the design, sale and construction of steel framed buildings. It markets itself as having the whole world as its home market. It has sold to 140 countries in the 3 generations since it was founded. The claimant is a project manager. He has much international experience. He was working in Turkmenistan when recruited by the respondent in 2014, and he had a Skype interview. He is a fluent French speaker and had worked in Francophone Africa. This made him an attractive candidate and useful employee, as a family member, Rollo Reid, a director who was to retire (and now has), had fulfilled the role to which, in effect, the claimant was recruited.

5. The claimant started work in July 2014. He was good at his job. In his last appraisal he scored 88%, which was as good as anyone gets, give or take, and the points he did not get the best marks on were not the important parts of his role.

6. The claimant was to seek out new opportunities, and travelled the world to do so. While in the EU there is transparency in tendering, in other parts of the world business is often obtained by informal tender, through relationships with agents and others, as well as attending at trade fairs or seminars. There is some UK government funding for these, and sometimes the cost is shared with a local business partner or subcontractor or agent. The claimant would often attend trade conferences and the like to raise the profile of the company. The company was also active through chambers of commerce in various countries, and through British official channels abroad. There is a degree of publicity to these events, locally, but a degree of reticence in the respondent which does not go out of its way to publicise what those in the role of the claimant do. The publicity comes after the job is won and after it is completed rather than at the stage when it is sought. Then all the details of who did what, complete with contact details, is made freely available by the respondent as marketing information designed to demonstrate global reach.

7. While happy in his job, the claimant placed his CV with a company called *"CV Library"*. He was not actively seeking a job (although he did apply for one), but headhunters keep an eye on likely candidates, and thus career progression is assisted for those who remain visible to headhunters.

8. The respondent was looking to recruit more people to fulfil the role occupied by the claimant. The company has eight such people, all based in the UK but all working around the world, to try to increase turnover by gaining new projects.

9. To assist in this process the company engaged the services of a headhunter. This headhunter had a subscription with CV Library to assist him in finding suitable candidates. In the course of his researches he came across the claimant's CV. CVs are submitted to CV Library on terms of strict confidentiality, with the express condition that they are shown to subscribers but not to be released to the employer of a candidate, or to anyone else, without the candidate's express permission.

10. The head hunter did not respect that confidentiality, and inevitably will have breached the terms of his own subscription membership to CV Library. Mr Boyd declined to name the head hunter (somewhat confusingly on the basis that he owed a duty of confidentiality to the head hunter, whom in his oral evidence he accepted had breached his own duty of confidentiality to the claimant).

11. On 17 October 2016 the head hunter emailed Simon Boyd headed *"Subject Reid CV!"*, stating *"FYI just came across this guy…"*. Simon Boyd responded immediately, either by phone or email and three minutes later came another email from the head hunter *"Subject: FW: Reid CV!"* With the text *"Simon confidentially – this guy has put his CV out there."*. The CV of the claimant was attached.

12. The following day, 18 October 2016, Simon Boyd called the claimant to his office (the claimant being away ill on 18 October 2016), and when the claimant arrived Mr Boyd suspended him from work, and followed this up with a letter of the same date (B 40) confirming this fact. In that meeting Mr Boyd stated that he had received the claimant's CV, and because that CV stated that the company was working in certain countries he was in breach of the company's confidentiality arrangements and of his contract of employment. Mr Boyd said that the claimant expressed the sentiment he had been very foolish in doing so. I do not accept that evidence as correct. I preferred the evidence of the claimant in this regard. The note said to evidence this was prepared later and is self serving. I note also that the solicitors to the respondent stated that there was no *"paper trail"* of the provision of the CV to Mr Boyd, and that Mr Boyd accepted that he was the sole source of instruction for those solicitors: a subject access request later produced the (redacted) emails above.

13. Mr Boyd gave the claimant the option of resigning on the spot, or being suspended then and there with a disciplinary procedure being implemented. The claimant said that he had an email he was part way through that was important for the company. Mr Boyd did not ask what it was, but allowed him to go back to his desk to conclude it. Then claimant then left the premises at about 10:15am. In the meeting the claimant told Mr Boyd that he regularly updated his CV to keep it current. He wanted to keep abreast of developments in the industry but was happy working for the respondent.

14. The suspension letter was hand-delivered to his house at about 3:15 pm on the same day. It stated that *"We write to confirm our decision to suspend you from work pending the results of an investigation into allegations that you have been publicly putting out a personal CV detailing countries in which we have been working and looking to develop, which if found to be true could be in breach of the company's confidentiality arrangements."*

15. At about 5pm letter on the same day a letter from Mr Cook, also dated 18 October 2016 (B43) was hand delivered to the claimant, convening a disciplinary hearing for Monday, 24 October 2016.

16. This letter stated that investigations into the disciplinary matters resulting in his suspension had been completed (that is they had been dealt with completely in the course of one day). These investigations consisted of Mr Boyd asking human resources to investigate and report. Accordingly, the matter came to the attention of Mr Boyd one afternoon. The next morning he suspended the claimant, and sent the letter of suspension, commissioned and received the investigation report, instructed his co director Tim Cook to deal with the disciplinary hearing, and Mr Cook had the letter convening the disciplinary hearing delivered to the claimant by hand by 5pm on the same day. It is plain that the grass did not grow under the feet of the respondent.

17. The investigation report is at B41 (and is dated 18 October 2016). It states that Simon Boyd, managing director, had asked for an investigation to ascertain if there was *"any substantiation to the following allegations"*. That is, what follows is what Mr Boyd, the managing director, considered to be the allegations he wanted investigated.

18. Two allegations were then set out:

    - *"Wayne Dean has been **actively seeking employment elsewhere whilst our in our employ** by uploading his personal CV to an active job searching website."* [My emphasis.]

    - *"Wayne Dean has been in breach of the company's confidentiality arrangements by disclosing sensitive market areas **where we currently work*** [my emphasis] *and other areas we are actively developing future markets"*.

19. The CV, the confidentiality agreement of 23 June 2014 and the contract of employment of the same date were the evidence considered. The conclusion was of the investigation was *"We believe the that these allegations have substantiation* (sic) *as **the CV website is well known for only taking CV's from people who are actively seeking employment**.* [My emphasis.] *Indeed it is used by most employment agencies as a source of candidates. In addition, the divulgence* (sic) *of company activities in the personal CV conflict particularly with the stand-alone confidentiality agreement as well as the contract of employment in relation to clause 17.1."*

20. The claimant's contract of employment contains no restrictive covenant. It contains a standard confidentiality clause - *"In this clause "Confidential Information" means all confidential information relating to the Employer, finances, processes, specifications, methods, designs, formulae, technology and business activities, of and concerning the Employer and its employees customers and suppliers…"* and the employee agrees that *"Except and authorised or required by his duties, the Employee shall keep secret and shall not use or disclose and shall use their best endeavours to prevent the use or disclosure by or to any person of any of the Employer's Confidential Information which comes to their knowledge during his employment."* (B16)

21. There is a separate confidentiality agreement of the same date as the contract of employment (23 June 2014) (B22). In this document the employee undertakes *"I will not… make use of, for my own or any other person's benefit, or divulge to a person not authorised by the Company to receive it, any information concerning the Company's business which may have been disclosed to me otherwise come into my possession during my employment…"* It then sets out that the breach may be construed as gross misconduct.

22. The 3 witnesses for the respondent agreed that the (only) words in the CV that they considered breached the contract and the confidentiality agreement and which were gross misconduct were these:

    "Establishing new contacts in new markets throughout the world, such as Slovakia, Oman, Kazakhstan, Ivory Coast, Iran, Uzbekistan and Turkmenistan."

23. They said that they considered that this revealed what the company considered the *"hot markets"* for the company, and that this was valuable to competitors, and so breached the contractual obligations of the claimant in a way that was gross misconduct.

24. The claimant wanted to have as his representative first Tim Reid, a director and member of the family whose company it was, and when that was refused, Rollo Reid, another member of the family whose company it had been, and Tim Cook vetoed both of those

without asking either of them, as the choice of the claimant was, in his view *"inappropriate"*. The claimant had not asked either of them if they were willing to act as his companion, and was content with the companion who did accompany him.

25. None of the 3 witnesses for the respondent knew to which countries the claimant had been on company business in the last 12 months, or at all. Their knowledge that it was gross misconduct was based on facts that they said were within their general knowledge, but nothing specific to the claimant.

26. Mr Cook decided that the charge of applying for other employment as gross misconduct was not proved but dismissed the claimant on the allegation of a breach of confidence. His letter of dismissal (B88-90) characterises the claimant as *"deliberately awkward"*, as *"obstructive"* and states *"You have shown in our disciplinary hearing that you have little hesitation in lying to the company and acting dishonestly. I found you obstructive throughout the hearing and you did not show any remorse for your actions."*

27. Mr Sinkinson upheld that decision on appeal.

28. In between, the claimant's grievance against the way Mr Boyd had handled his suspension was dismissed by Tim Reid (whom the claimant had wanted as his companion in the disciplinary process), and his appeal against that decision was dismissed by Mr Cook.

Submissions

29. Mr Self submitted that it was not disputed that the dismissing individual and the person taking the appeal each had a genuine belief in misconduct. There was a good prior relationship so that this was not a *"hidden agenda"* case. The claimant had admitted in cross examination that he was in breach of his obligations of confidentiality, and so the issue was of S98(4) fairness. It was trite law that the Tribunal judged the employer's decision and did not substitute its own view. There was genuine belief, and the reasonable grounds were the CV itself, and the contract of employment and the standalone confidentiality agreement. As to investigation, there was little to investigate, as all was on the CV and in the contract documentation.

30. A person marketing himself could legitimately show what he had achieved in terms of obtaining work but this was to set out where work was sought, and that was a breach of confidence. While the claimant might be seen at trade fairs, or in attendant publicity, that was in the act of seeking the work and inevitable. It was not the same as giving the information to competitors on a plate.

31. This was within the range of reasonable responses of the employer. If there were any procedural errors then they made no difference and did not impact on fairness. The Acas procedure had been followed and while that went to uplift, or absence of it, if a claimant was successful, that the procedure was fair was evidence that the dismissal itself was fair.

32. If there was any unfairness found the admissions of the claimant meant that there had to contributory conduct.

33. The claimant provided written submissions, to which he spoke. There was no breach of the confidentiality agreement or contract. The information in the CV was in the public domain. The interpretation of the contractual documents extended beyond what was necessary to protect the respondent's interests. The clauses, interpreted as the respondent did, unfairly restricted his ability to seek new employment.

34. The whole procedure was biased against him. It was a foregone conclusion when Simon Boyd got the CV, which should never have been sent to him, and sent for the claimant. He had not raised matters such as the objection to the document being sent to Mr Boyd as he was dumbfounded by the whole thing. He had not been obstructive as he had thought he was not allowed to contact anyone while suspended. Mr Sinkinson had not bothered to read the papers before the appeal hearing. Simon Boyd just raced the matter through a disciplinary process which could have only one outcome.

35. The respondent failed to take account of the fact that he was marketing his skill in developing new business, and to say so was not to breach their confidence. No harm and come to the respondent.

Law

36. Having established the above facts, I now apply the law. No sophisticated legal analysis is required. Was there a breach of contract by the claimant? If so was it so serious as to warrant the designation as gross misconduct, and if yes was dismissal within the range of reasonable responses of the employer? If not gross misconduct, was it misconduct (a potentially fair reason for dismissal) such that dismissal was within the range of reasonable responses of the employer? Alternatively was the matter such that it is *"some other substantial reason"* ("SOSR") within the meaning of the Employment Rights Act 1996?

37. I have considered section 98 (4) of the Act which provides *".... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case"*. There is no burden of proof, for it is an assessment of the fairness of the actions of the employer. It is not for the Tribunal to substitute its own view for that of the employer.

38. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").

39. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: *"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."*

40. The compensatory award is dealt with in section 123. Under section 123(1) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

41. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: *"where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."*

42. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sarkar v West London Mental Health NHS Trust [2010] IRLR 508 CA; , Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Sheffield Health and Social Care NHS Foundation Trust v Crabtree UKEAT/0331/09; Bowater v North West London Hospitals NHS Trust [2011] IRLR 331 CA; London Borough of Brent v Fuller [2011] ICR 806 CA; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The range of responses of the employer is not infinitely wide but is subject to S98(4): Newbound v Thames water Utilities [2015] EWCA Civ 677, paragraph 61.

43. The reason given was misconduct (or SOSR) which are potentially fair reasons for dismissal. It was the reason - there is no ulterior motive asserted in this case.

44. The starting point should always be the words of section 98(4) themselves. In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

45. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

Discussion and conclusion

46. In this case the claimant left his (updated) cv with a recruitment agency, to see what might come up. He was content with his employment, but few (sensible) employees regard a job as a job for life, and the claimant wanted to keep himself visible to the market so as to retain his marketability, and to see if there was any other offer that might be worth considering. He was reasonably well paid, but he is a skilful project manager with much experience and language skills as well. Another reputable employer might reward him better, or give him room to negotiate a better package with the respondent.

47. The respondent regarded this as if it were an act of betrayal. The first allegation put by Simon Boyd reveals this. Human resources reported accordingly.

48. While the decision maker found this allegation not proved, if is significant that it was proceeded with at all. Employers do not own their staff. It is not misconduct to look for another job. Any sensible employer who finds that a valuable member of staff is footloose (and LinkedIn and social media often reveal this) will try to find out what is motivating the

member of staff and then see if the itch can be scratched. To use the nuclear option of dismissing a member of staff for looking for another job cannot be not a fair dismissal.

49. This was an allegation that Mr Cook found not proved. The respondent says it was not the reason for dismissal. It was. It was the primary objection of Simon Boyd who suspended the claimant. The hierarchy of decision making was inverted. The MD suspended. A director dismissed. The company secretary and accountant dismissed the appeal. There was no realistic chance that either was going to go against the MD.

50. The respondent says that where work is to be found is valuable commercial information. If competitors know where they are seeking work, others will fish in the same pool. That is why, they say, the comments in the CV are gross misconduct.

51. The states listed are in Africa, the middle east, and in central Asia. The claimant has in his work history work in Francophone Africa, including Côte d'Ivoire, and he was working *"in one of the stans"* (meaning Turkmenistan, Uzbekistan or another country ending …stan according to Mr Boyd - it was Turkmenistan), before he came to the respondent. This is just what he has spent his working life doing. The CV does not say that the claimant is in effect selling the address book that the respondent has paid him to assemble. It sets out that this is a man who knows his way around some countries where employers might want to use business. No one has suggested (and I accept the claimant's denial) that the claimant would take specific business opportunities which he was attempting to garner for the respondent and divert them to a new employer. He asserted convincingly that his obligations of integrity and confidentiality would not permit that. If he did do so it would be a clear breach of his obligation of confidentiality.

52. No one suggested that he had imparted any concrete information about any project, person or contact. All they said he had done was that they thought his CV to indicate certain entire countries that the respondent thought might be fruitful markets. For the reasons given I do not find that made out, nor that the CV was any breach of any obligation owed to the respondent.

53. That the respondent has contracts in all these countries is highly visible from the websites produced by the claimant. The respondent that this is to use past work as a marketing opportunity for new work, or to make a business decision to allow business partners in other countries to use their association with them to their advantage so as to cement their relationship with then, and they take the commercial risk that it may be of interest to rivals because they think that is less than the advantage they obtain from the higher profile they have by reason of the publicity.

54. The claimant's response is that he has a proven track record of getting work in often challenging markets. This is correct, and he is also correct in stating that this does not constitute a breach of confidence. It is hard to see that naming an entire country as somewhere the respondent is looking for work is a high level commercial secret. How they do so, and who they approach are plainly such. Given the other items of publicity available this is evidence any determined competitor would be likely to be able to find out from publicly available information.

55. Nor does the CV indicate that the claimant was revealing an industrial secret of the *"hot spots"* for the respondent. The respondent had 8 such people each with different parts of the globe to target. The whole marketing strategy of the respondent is that the whole world is their home market. If one such person - the claimant - was targeting the middle east and the oil rich former Soviet republics then the other 7 would be targeting somewhere else.

56. The very breadth of the claimant's stated countries (which is largely all parts of the world omitting the Americas, Europe and Australasia) gives no focus to a rival to the respondent. It is not as if the claimant had said that he had particular detailed and close relationships with movers and shakers and decision makers in (name country of choice). Any examination of publicly available materials, such as the British Chambers of Commerce website for Slovakia (B166) or was attending an SME forum there (B168), or that the respondent was exhibiting at a trade fair in Kazakstan (the 22nd Kazakhstan International Building and Interiors Exhibition – Kazbuild 2015 2–5 September 2015 at Almaty B169)), and that the claimant was in published photographs of a trade fair in Oman (B155). Nor is the detail of local agents a trade secret. The company choses to publish such information in publicity material. The respondent states that this is their choice, as it is. The point is that the information itself is not inherently secret.

57. There is another point. The terms on which the CV was provided to CV Library were that it was not to be provided to any prospective employer without the consent of the claimant. That the person who sent it to Mr Boyd breached this confidentiality is not to the point at all. The only way that the information could get to a rival of the respondent was if he expressly agreed that they should have it. There is no evidence that he had ever done so. The only time he used that CV was to seek to obtain a job with a house builder. The respondent did not have any evidence that any competitor had seen, or would ever see, that CV. They all jumped to the conclusion that it was a breach of confidentiality. The appellant was highly regarded and had been a valued member of the company. From his evidence he would have regarded telling a new and rival employer of the target markets of the respondent as a breach of trust that he would not have entertained. It was assumed by the respondent that rival companies would see the CV, when there is no evidence that they would. Head hunters might view it and pass the information on, perhaps, but it is reasonable for the claimant not to anticipate a head hunter mining the CVs of job applicants.

58. The contract of employment has a circular definition of *"confidential information"*, as it is defined by the use of the same phrase. *"Confidential information means all confidential information relating to the employer… and business activities of and concerning the employer…"* It is all encompassing. The obligation to keep things secret has to be read in this light. It cannot include matter already in the public domain, which includes information about attendance at trade fairs. This is not something kept under wraps, as the whole point of attending is to be noticed (even if primarily in the country where the trade fair is held). Something in the public domain cannot be confidential.

59. The confidentiality agreement (B22) covers *"any information concerning the company's business"* which may come into his possession. If disclosed the company has the right to treat that disclosure as gross misconduct. This requires some analysis in any given situation. Not every disclosure would be gross misconduct. To take the example to an extreme, to say that the company bought its canteen supplies from Tesco would be a technical breach of this obligation unlikely to be considered gross misconduct.

60. The respondent asserts that the claimant was obstructive in his conduct of the disciplinary procedure. It was the respondent that rushed this matter through, and the claimant rightly and early saw that the MD had decided that he was to be dismissed for what was seen by him as the disloyalty of seeing whether there was any other job that might suit him better than the one he had, or even to give him information that might make it possible for him to improve his remuneration package with the respondent. The use of words such as dishonesty about the claimant in the dismissal letter, when he was no such thing, indicates that the claimant had no chance of keeping his job.

61. While the company were not happy with the statement of country names, I find that the reason for the dismissal was that the claimant put his CV with a recruitment agent, that

an unscrupulous head hunter saw it and breached his own duty of confidentiality and told the respondent of this, and the respondent then dismissed the claimant for perceived disloyalty, no more, and no less. That is why the first allegation is that of seeking employment. That the allegation was not upheld was simply a realisation that it would not do as a reason for dismissal. The all enveloping confidential information provisions were a preferable route for the respondent.

62. The claimant's CV was not a breach of confidence by the claimant (other than perhaps technically given the terminology of the documents) and there was not misconduct by him. It follows that there cannot be a fair dismissal, unless there was genuine belief on reasonable grounds after proper investigation. The claimant accepted that there was a genuine believe in misconduct.

63. The next question was whether there were reasonable grounds. The appellant stated that *"hot spots"* were a matter of commercial sensitivity. Mr Boyd had set out an allegation that the claimant had named places were the company was working. This was not said at the hearing or in the disciplinary process to be a breach of confidentiality (and nor could it be so since the respondent itself made the distinction between work sought and wok obtained, and could hardly do otherwise given the information obtained by the claimant. It was posited that this was for competitors a signpost to where to go and seek work, because that was where the respondent thought it worth looking. Any serious competitor would take the very simple step of making some internet enquiries about trade shows or fairs, about British Chambers of Commerce activities, and about seminars and such events at which people from the respondent made presentations, and be able to find that out. Also the claimant would have had to agree to this going to a competitor of the respondent. The skills of the claimant are not industry specific. There is every reason to put in the areas of the world where you have contacts if you are seeking an international job. There were not reasonable grounds for believing in misconduct.

64. Nor was there proper investigation. If there had been there would have been no charge of seeking new employment. The investigation did not take seriously the points put forward by the claimant. It was clear that this was a one way street, right from the very first meeting. It was a prejudgment by Mr Boyd, and while Mr Cook and Mr Sinkinson said they approached the matter with an open mind and came to their own decisions, there was no reasonable likelihood that they would go against the wish of the managing director. Mr Sinkinson had not troubled to read all the information (which was not excessive) provided by the claimant. Both of them knew of the ultimatum of resign or face a disciplinary process. In this context that was resign or be dismissed, and they fulfilled the latter function. This is not to say that Mr Boyd was (as Counsel put it) a puppet master. It was just that they well knew what was expected that they would do.

65. If there was genuine belief in misconduct on reasonable grounds after proper investigation (and I note that while the submissions of the claimant were that he had not done anything wrong, in his cross examination stated that this was a breach of the confidentiality agreement) dismissal was outside the range of reasonable responses of the respondent. I do not substitute my view for that of the employer. The reasons I so find are:

    65.(1) The CV should not have been released to anyone without the consent of the claimant. There might be companies interested in working in those countries who were in other fields, and there is no reason to think that the claimant would have authorised release of the CV or given information to any competitor of the respondent.

    65.(2) The fact that there is a disparate range of states for many of whom there was much information that the respondent had chosen to put in the public

domain. It was said that just one would be enough - (I do not name it as the respondent says it is commercially sensitive) - where there were said to be high level matters that were not in the public domain. It is possible that this might comprise a breach of a duty of confidentiality, but there is no concrete evidence before me (as opposed to assertion) from which I might conclude that it is any different to the other states.

65.(3) The definition of confidential information is too wide to be a basis for dismissal without consideration of the facts of the case.

65.(4) The *"resign or face dismissal"* meeting where there was (I have found) no constructive engagement or enquiry from Mr Boyd.

65.(5) The fact that the primary allegation put was of seeking new employment, and that human resources said that it was substantiated instead of saying that this is a basic human right. The second allegation put by Mr Boyd, of putting in country names were they had worked (despite it being on the respondent's publicity material) indicated also a degree of unreasonableness on his part.

65.(6) The speed of the whole process - from being called to a meeting, being suspended, an investigation commissioned and completed, a decision maker appointed and that decision maker convening a hearing all on one day indicates not efficiency but prejudgment, done swiftly because the claimant had not resigned as requested.

65.(7) The text of the letter of dismissal referring to the claimant as lying and being dishonest in the process, when he was fully entitled to defend himself. An example is that the claimant did not categorically accept in the meeting that it was a copy of his contract of employment and that was said to be obstructive. He said he did not have his copy as it was in France, and the pages were not initialled, but the signature was his and he thought it was. That is not obstructive. He had not shown remorse and contrition as he had not taken down the CV. He thought he was going to be dismissed, although he did not want to give in and resign, and he did not think he had done anything wrong. This is no more than the claimant not agreeing with the respondent.

65.(8) The real reason, I find, was that the claimant was considered to be looking for another job: the human resources report stresses this. The second allegation was only an afterthought *"In addition…"*. That inevitably reflects the instructions given to them by Mr Boyd earlier that day.

66. There was compliance, even if in name only, with the ACAS procedures.

67. There is a full schedule of loss, and this decision deals with everything needed to deal with remedy save the period of loss, matters of recoupment and arithmetic. For the avoidance of doubt, remedy is on the basis of full compensation for unfair dismissal, without uplift, and without any deduction for contribution. If the parties are unable to agree remedy the matter will be re listed for a remedy hearing.

Employment Judge PSL Housego
Dated 14 November 2017

Judgment sent to Parties on
21 November 2017