EMPLOYMENT TRIBUNALS

Claimant: **Mr S Le Mezec**

Respondent: **Matcon Limited**

Heard at: **Birmingham** **On: 21-22 August, 23-25 October 2017 & 21 February 2018 (tribunal only)**

Before: **Employment Judge Cocks**

Representation
Claimant: Mr Northall Counsel
Respondent: Mr Cooksey Counsel

RESERVED JUDGMENT

The judgment of the Tribunal, on liability only, is:

1. **The claimant was unfairly dismissed;**
2. **The claim for wrongful dismissal succeeds;**
3. **A remedy hearing will be listed.**

REASONS

1. The Claims are for unfair dismissal and breach of contract (notice pay). The delay in giving this judgment is due to the postponement of a hearing on 2 January 2018, at which judgment with oral reasons was to be given, followed by a remedy hearing if appropriate. The earliest a reconvened hearing could be held was May 2018. Accordingly, it was agreed that a reserved judgment would be given.

2. The Tribunal heard evidence from Steven Ball (Managing Director), Michael Allsopp (HR Business Partner and investigating officer), Robert Reynolds (joint dismissing manager and HR Director - now retired) and Paul Cuttell (appeal manager and Business Director for Wrightflow Business

Technologies Ltd).

3 For the Claimant, I heard from the Claimant himself, Ed Piepereit (current employee of the respondent), David Bowles (Business Line Leader) and Charles Lee (former Managing Director of the Respondent)

4 There was an agreed bundle of documents with additions marked C1 and R1.

5 This has been a strongly fought case on both sides; it would not normally be the case to have so many witnesses in an unfair/wrongful dismissal claim. The reason for hearing from so many is twofold. First, the Claimant disputes the real reason for his dismissal was misconduct. Secondly, in respect of both wrongful dismissal and (if I find unfair dismissal) contributory fault, the test as to whether the Claimant was wrongfully dismissed or contributed to his dismissal because of blameworthy conduct rests with me. It is for those reasons I have allowed the parties to call so many witnesses.

The Issues

6 The parties have agreed a list of issues, it is not necessary for me to reproduce it in this Judgment, but I make reference to it in my conclusions.

Findings of Fact

Background

7 The Claimant had continuous service with the Respondent from 6 December 1993 until his dismissal on 19 September 2016. He is a French National. His role at the time he was dismissed was Business Line Leader/Global Sales Director. He had worked in France, the US and the UK in several roles before this. He had good service up until events in Autumn 2016.

8 Matcon Ltd was acquired by IDEX in 2012. IIDEX is an American Group. Matcon itself employs around 90 employees and produces industrial production equipment. There are several other companies in the IDEX Group in the UK, for instance, Mr Cuttell works for Wrightflow Technologies Ltd. Although Matcon Limited is not a large company, it is part of a multi-national organisation.

9 It is clear from the evidence, the Claimant's witnesses in particular, that the Respondent's employees formed a close-knit team. The nature of the workforce is illustrated by the petition after the Claimant's dismissal and the strength of feeling which his and Mr Newbould's dismissal gave rise to. There is also no doubt that the Claimant was a highly regarded senior employee, promoted to his current role by Mr Lee in 2013. The Claimant had built up a strong relationship between Nestle and Matcon which resulted in the generation of orders in the region of £30 million over ten years.

10 It is not necessary to go into the bonus issue. The Respondent accepts that what happened at the end of the August 2016 did not personally benefit the Claimant, other than in a putative reputational sense.

11 Mr Le Mezec's contract of employment is pages 51 to 61. It is dated 20 December 2013. Of note, paragraph 17 makes clear the contract may be

terminated without notice or pay in lieu of notice, in the following circumstances:-

a. "If the employee shall at any time be guilty of dishonesty, or other gross misconduct or wilful neglect of duty or commits any other serious breach of this agreement, or
b. Act in any manner (whether in the course of his duties or otherwise) which is likely to bring him, the Company or any associated Company into disrepute, or prejudice the interests of the Company or any associated Company ….."

12 There are two other important relevant documents. The Disciplinary Policy and Procedure is at pages 181 – 189. From this document, the following extracts are pertinent:-

- "Potential gross misconduct - the following are examples of conduct falling with the definition of gross misconduct and which entitled the company to dismiss without notice or pay in lieu of notice;

  Breach of trust and confidence …….

  Theft, fraud, falsification of company records……

  Bringing the company into disrepute.

  Gross incompetence or failure to apply sound professional judgment …"

  "If the Company is satisfied following investigation and a Disciplinary Hearing that the Employee has committed gross misconduct, the Company will normally dismiss the employee without notice or pay in lieu of notice. In some circumstances, demotion or suspension without pay may be used as alternative sanctions". (184-185).

- The purpose of the Appeal is to ensure that the decision made at the original hearing was reasonable in light of the evidence available at that time. It is not a re-hearing". (189)

13 The other document is the IDEX Code of Business Conduct and Ethics (83-100). This is not a policy which exists on paper only. It is clear from both parties evidence that 'the Code' is at the heart of how Matcon does business and all employees are trained in ethical business conduct on a very regular basis. As was Mr Le Mezec (page 336).

Of particular note from this Code, are the following extracts:-

- "Consistent high standards of conduct are essential to meeting and exceeding the expectations of our customers, suppliers, employees and shareholders….."
- The foundation of the IDEX Code of Business Conduct and Ethics is that we act in every instance with honesty, fairness and integrity.
- In the final analysis, each individual must exercise his or her own best judgment to determine what is required to comply with high ethical standards.
- IDEX is very serious about compliance with its Code of Business Conduct

and Ethics. Anyone who disregards the Code in any way, will not only be subject to dismissal, but may also face civil or criminal penalties.

- You are expected to carefully read and fully understand and comply with both the letter and the spirit of the Code. IDEX is an international organization and its Code of Business Conduct and Ethics applies to all of its Employees, Officers and Directors worldwide" (83).

14 On page 84, with reference to affirmative responsibilities:

- IDEX Employees, Officers and Directors are expected to raise ethical concerns and report any actual or suspected illegal or unethical conduct in accordance with the procedures described below under the caption "Reporting Procedures".
- Honesty also requires that Employees, Officers and Directors refuse to participate either actively or passively in any cover up of illegal or unethical conduct.
- IDEX Employees, Officers and Directors are responsible for ensuing the accuracy and reliability of IDEX's accounts. Fictitious, improper, deceptive, undisclosed or unrecorded accounts of funds or assets are a serious ethical violation….. It is IDEX's policy that all books and records conform to generally accepted accounting principles and all applicable laws.

- All transactions must be accurately documented and accounted for in the books and records of IDEX. All entries must contain appropriate descriptions of the underlying transactions and no false or deceptive entries may be made.

- No Employee, Officer or Director may enter into any transaction with the knowledge that it is other than as is described in the supporting documentation. Furthermore, no Employee, Officer or Director may participate in obtaining or creating false invoices, payroll records or other misleading documentation….. (93)

15 On page 96, the company reiterates the importance of its employees being familiar with the Code and applying it at all times in the performance of their responsibilities. It repeats that Employees who fail to comply with the Code are subject to disciplinary action up to and including immediate termination. It goes on to state:-

- IDEX Supervisors are responsible for ensuring compliance with this code by monitoring and enforcing this code within their area of responsibility.

On the same page, under the heading of "Asking questions and voicing concerns", it states:

- If any aspect of this code is unclear, or if an Employee, Officer or a Director should have any questions or face dilemmas or problems with respect of this code they should be brought to IDEX's attention in accordance with the applicable reporting procedures. (96)

16 These documents informed the respondent's managers involved in the

disciplinary process, when reaching the decision they did to dismiss and uphold the dismissal. As stated, the Code in particular is a cornerstone of the respondent's business operations.

17 Mr Ball became Managing Director at the end of 2015, when Mr Lee left. He was the Claimants Line Manager, together with two other direct reports, the other Business Line Leaders: Mr Baker (pharmaceuticals) and Mr Bowles (after-market).

18 David Newbould was the Trade Compliance Manager. He was known as the "go to man" for compliance issues. His reputation for attention to detail led to him being lightheartedly referred to in the Sales Team as 'the Order Prevention Department'. He was clearly held in high regard and was trusted to give the correct advice on acting within the Respondent's policies.

19 Mr Le Mezec's year end review for 2015 took place with Mr Ball on the 25 February 2016, he received the lowest ratings. Whilst Mr Le Mezec accepted the C rating for results (2015 had not been a good sales year), he complained about the C he received for behaviour and performance. At an intermediate review on the 24 August 2016, Mr Ball had revised his view (page 77), presumably because of the good sales figures during 2016, however nothing much turns on these appraisals other than perhaps to show that whilst the Claimant has given evidence about the pressures Mr Ball put him under in August 2016, he himself was determined to prove to Mr Ball that he could perform well and this must have resulted in some self-imposed pressure as well.

Events leading to dismissal

20 Of relevance is what Mr Allsopp put in his investigation report, as it forms the basis of what Mr Reynolds and Mr Ghulam knew, prior to the Disciplinary Hearing with Mr Le Mezec on the 09 September 2016, and what Mr Cuttell knew when he upheld the decision to dismiss Mr Le Mezec. It is very much the case that I must look at what was known at the time that these Managers made their decisions. Hindsight and subsequently discovered matters are not relevant to the fairness or otherwise of Mr Le Mezec's dismissal. I have therefore examined and set out in my findings what was known about what had happened at the end of August through the prism of the investigation and disciplinary process, to do otherwise would risk falling into the substitution mindset.

21 In the disciplinary process, Mr Le Mezec described the pressure he had been under in the last week of August, culminating in the telephone call with Mr Ming Zhao. He has described the pressure he felt under to me as well, but as I say, it was what was known at the time which is important.

22 In August 2016, Mr Ball had been on holiday for two weeks, the Claimant for three. At a daily management meeting on the 22 August, the Claimant found that the sales figure had been set higher than he was expecting and much higher than his forecast for Mr Jamil and Mr Ball had been at the end of July. Added to this a contract for £100,000.00 had been cancelled. The order intake was clearly not where it was expected to be and as the Claimant puts it: "there was a long way to go to achieve target." At the daily management meeting, Mr Ball stated that it was critical "to land a seven digit order intake" to enable a meeting with Idex Senior Managers over from the US in early September to run smoothly.

23 In his second interview with Mr Allsopp (166), the Claimant described the pressure to Mr Allsopp. He does not ascribe all the pressure as coming from Mr Ball, but as one of three sources of pressure. At page 177 there is a document prepared by Mr Le Mezec where he sets out in more details the pressures he felt under at the time (178). This document was not given to Mr Reynolds but was referred to by the Claimant at the Disciplinary Hearing. Mr Le Mezec described the pressure around orders to Mr Reynolds and Mr Ghulam at the Disciplinary Hearing (195).

24 The Claimant explained to them that there was a further meeting on the 22 August to discuss the Order situation which he says was unprecedented. Mr Mezec told the Disciplinary Hearing when he returned from holiday on the 22 August, the order actual was nil compared to an intake target of £3.8 million which had been set by Mr Ball. He took the Managers through how the targets had come about.

25 Mr Le Mezec took issue with what had been stated by Mr Ball in the statement he had provided to Mr Allsopp (197). Mr Ball's statement is at page 163. Pertinent to the pressure issue, is that Mr Ball says that he had told Mr Le Mezec that the 'Shuangying' order was looking more like a September order. Mr Le Mezec challenged that this had ever been said by Mr Ball. He pointed out that if he had been told so, he would not have taken the steps that he did at the end of August to ensure that the Shuangying order went into the August figures. There are points to be made about Mr Ball's statement. It was self-generated, rather than being given in an interview with Mr Allsopp. The email at page 147 suggests that Mr Ball, whose statement is dated the 2 September 2016, received the statements for Mr Le Mezec and Mr Newbould before he wrote his own statement.

26 In evidence, Mr Ball told me that he had not read their statements before doing his own. I do not find this evidence particularly credible, the wording of Mr Allsopp's email implies that Mr Ball had asked for the statements, he was not interviewed by Mr Allsopp, as would be normal in such an investigation, and it is noticeable that Mr Ball deals very specifically with the point Mr Le Mezec makes (161) that the aim was to get everything completed by the 31 August and a reference that if the contract was signed and dated as at the 1 September 2016, it would have to be posted as a September order. It is more likely than not that Mr Ball had knowledge of the other two interviews when he wrote his own statement.

27 The events between 25 August and 1 September are not, in essence, greatly disputed, but do need to be set out.

28 I have seen a number of emails between these dates, I am not proposing to reproduce what is in them except to say that they show the lengths to which the Claimant and his colleagues were going to try and get the Shuangying order into August's sales figures.

29 The first problem which needed to be overcome was that an intermediary was needed as Shuangying did not have a licence to import. This meant either using an agent, whereby commission would be payable, or using ITS (Matcon China) as the importer. This meant that ITS became the purchaser from Matcon and the seller on to Shuangying. ITS is the Chinese arm of IDEX.

30 There has been a considerable amount of evidence about how Mr Ming Zhao, General Manager in China, fitted into the line management structure. The Claimants position is that he evaluated and managed Mr Zhao in terms of sales performance but was not his line manager overall. The documents at R1 consistently show Mr Zhao as being managed by Andre Goodson. The Respondent says that Mr Zhao was subordinate to Mr Le Mezec. Mr Le Mezec says not - Mr Zhao was General Manager of Matcon China, not a member of the sales team. Mr Zhao was involved in the passing on advice from Mr Newbould and Mr Le Mezec, via Robin Zhang, to the customer at Shuangying about signing and dating the contract.

31 On balance, I accept the Claimant's evidence that he did not have direct management responsibility for Ming Zhao, but only supervised him in relation to commercial sales matters. However, I am not sure where this takes me. Mr Reynolds and Mr Cuttell were not the managers who took disciplinary action against the Chinese employees, nor decided the outcome. Mr Reynolds was aware of the outcomes though and had liaised with Ms Chen about the disciplinary action.

32 On the 29 August, as the Claimant told Mr Allsopp (167), he received text messages on a Bank Holiday from Mr Ball asking for an update on the August orders and Shuangying in particular. Mr Le Mezec considered this to be undue pressure, especially since nothing could happen in China overnight (123-127). The urgency in Mr Ball's text is apparent. Although he says it was simply so he could report to IDEX the next day (it not being a Bank Holiday in the US) the text suggests otherwise, especially when read in conjunction with the email at page 127. Despite his position to the Tribunal that there was no pressure from IDEX in relation to the order situation for August, that email says otherwise. It is unsurprising that the Claimant felt under the pressure he did and reported that pressure in the disciplinary process.

33 There are also emails (for example 119) on the 30 August chasing China and stating "this order is critical for China and us this month" from Mr Le Mezec. Mr Ball had been copied into all of the emails (110, 117) including the later ones (114) where the subject header on the emails reads: "we absolutely need this contract booked in August". It is hardly likely to have stated this if Mr Ball had told Mr Le Mezec the order could go into September. Mr Ball says that he did not see this header. I find that evidence difficult to accept. Even if he did not read the header, the tone of the emails and the speed with which work was being done, would have alerted him to the urgency felt by the whole team to bring the Shuangying contract in by the end of August.

34 I do not find Mr Ball's evidence that he was not putting Mr Le Mezec under pressure to get this contact into August, prior to the management meeting with IDEX in September, credible; particularly in light of the specific nature of his text messages on the 29 September and his email at 127. It did not amount to all of the pressure, some was undoubtedly coming from the Claimant himself, but the pressure on him at the end of August for a number of reasons was immense. More pertinently, he was telling both Mr Allsopp and the Disciplinary and Appeal Hearings about it.

35 With Mr Ball's assistance, the decision was taken that the order would go through ITS in China to get around the import licence difficulty. This made the contractual position difficult as to two contracts would be needed: Matcon to ITS

and ITS to Shuangying. Mr Lee was responsible for the preparation and approval of the contracts and gave me evidence about this.

36 By 12.24 pm on the 31 August (134A) Mr Lee was happy with the contracts and about half an hour later, Mr Ball signaled his approval in an email (134A). It is obvious that a number of people were involved in getting the documentation ready as quickly as possible, the aim being to get it signed on the 31 August so it would meet the August orders deadline. As Mr Le Mezec wrote on the 30 August (134L), "we absolutely need the contract signed tomorrow otherwise we would not be able to meet the deadline".

37 A further idea which the Claimant came up with, was that a purchase order could be raised by ITS to Matcon before receiving the signed contract from Shuangying. Mr Ball told Mr Le Mezec that this was not to be done. Although Mr Allsopp's investigation report says that Mr Ball told Mr Le Mezec that this was an unethical issue, this is not reflected in Mr Ball's statement. It was described to me as more of a financial risk, not an ethical issue. It would have placed the Respondent at financial risk if it had a purchase order from ITS without a corresponding contract from Shuangying to ITS. In the event, this did not happen. Again it is an indication of the pressure Mr Le Mezec felt under that he was coming up with such ideas - as he put it himself at the Disciplinary Hearing: it was a crazy idea (196).

38 Although there has been some evidence about the 'contract effective date', being an argument put forward by Mr Le Mezec at the Appeal stage, it is clear that the contract was actually signed by the customer on the 1 September 2016. Robin Zhang told the Claimant in an email at 7.05 am (UK time – China being seven hours ahead) that he now had the signed contract from the client and that it had recently been signed. Mr Le Mezec then sent it on the Mr Newbould with: "here you go" (135A). The signed contract itself is at pages 128 – 131, it is hand-signed and dated by the customer giving the date as 31 August 2016; thus enabling it to be put into the August sales figures.

39 One matter which became an issue in the Disciplinary process was the practice, unique to Matcon in the IDEX group, of including contracts which came in up to 12 noon on the following date (eg: the first of the month) to be included in the previous month's figures. However they still needed to be signed and dated in the previous month. This was to allow for time differences, it is a practice which was brought to an end soon after Mr Newbould and Mr Le Mezec's dismissal. I deal with this at the Appeal stage.

40. After Mr Ball had vetoed the idea that ITS raised the purchase order to Matcon, the Claimant told Mr Zhao that ITS needed the contractual documents from Shuangying. The contract heading stated contract effective 31 August 2016 (128). It was sent to the China team to send on to the customer. They issued the documents to Shuangying.

41. Later on Mr Newbould and the Claimant called Mr Zhao to see if Shuangying had signed the contract documents. They were told that the signatory had gone home and was not contactable. The Claimant and Mr Newbould told Mr Zhao to get the signatory to sign but not to date the contract and that if the signatory insisted on dating it, he should put the effective date on it, namely the 31 August 2016 even if he signed the document on the 1 September. Thereby backdating the contract signature from the date it was

actually signed on.

42. On the 31 August, Mr Ball was told by Mr Yu that there was an issue with the Shuangying contract which had been identified by Maggie Pan in China. Mr Ball instructed further enquiries to be made into what looked like a date being changed. Translated emails (136-138) were sent to him. Mr Ball was told by Mr Yu that Mr Zhang had instructed ITS to request that the Claimant date the contract the 31 August 2016 even if it was signed on the 1 September. As 138 shows, this had been on the basis of a suggestion from the UK.

43 Once he had received the translated emails, Mr Ball identified that the matter needed to be investigated. Mr Allsopp was appointed by Mr Ball to investigate on the 1 September, and he was shown the email from Mr Yu to Mr Ball soon after. Mr Allsopp interviewed the Claimant and Mr Newbould that day.

44 Their interviews are at pages 161 and 162. In his initial interview, which the Claimant was not informed could be of a disciplinary nature, the Claimant explained what happened. There is little in dispute about what Mr Zhao was told to tell the customer, namely to leave the date blank or date it as the 31 August, even if it was signed on the 1 September. Initially, Mr Le Mezec said that Mr Newbould had not been involved. He also said that this had happened on another contract, the 'Harrison' one. Although the Claimant recognises now that this was different. That contract had been signed on the 30 June but received later by Matcon and booked into June rather than July. Mr Newbould said that he had advised Mr Le Mezec to say that it was ok to sign the contract on 1 September, but date it 31 August in order to get it into the August order intake. He confirmed that this was the advice he had given.

45 As stated earlier, Mr Newbould and Mr Le Mezec's interview notes were sent to Mr Ball and Mr Allsopp saw nothing wrong in doing so. He was of the view that Mr Ball had asked him to conduct the investigation and he was reporting back. The fact that Mr Ball could be another witness and how what was in the statements might influence Mr Ball's statement, appears not to have occurred to him. When he was asked about this, Mr Allsopp said that he thought Mr Ball would have integrity and would act correctly, he had told Mr Allsopp he had not read them and that Mr Allsopp was not aware Mr Ball would be a witness. I found this difficult to understand from a HR professional, such a practice can hardly be described as a good one. The Claimant took issue with Mr Ball's statement during the Disciplinary Hearing, in particular that it made no mention of the intense pressure he and the others were put under in relation to the August target, that Mr Ball had not told them it could go into September order s or that Mr Le Mezec had questioned the August sales figures.

46 Mr Allsopp's investigation report which accompanied the interview notes and relevant emails is at pages157-159. It is not dated but was done on 7 September. He refers to the time pressures to get the order in for August. There has been some dispute over whether the instruction came from Mr Le Mezec or Mr Newbould to backdate the signature. Mr Allsopp's report reflects what is in the statements from Mr Newbould, namely that he gave the advice to Mr Le Mezec and Mr Zhao during a telephone meeting on the 31 August 2016 (158).

47 Mr Allsopp identified that such advice was wrong and went against the company business ethics. His conclusion was that as a senior person at the meeting, Mr Le Mezec should have disregarded that advice and not allowed to be

acted on and given to ITS or the customer. His view was that both Mr Le Mezec and Mr Newbould showed a failure to apply sound professional judgment, may have brought the company into disrepute and may also have broken trust and confidence between themselves and the company (159).

48 A Disciplinary Hearing was convened and the Claimant suspended on the 7 September (174). By letter dated the 7 September the Claimant was informed of the disciplinary allegations (175) namely:-

- Falsification of company records
- A failure to apply sound professional judgment
- Bringing the company into disrepute
- A resultant breakdown in trust and confidence between yourself and the company.

The letter goes on to state that if the allegations were proven, it could result in his dismissal without notice. Mr Le Mezec received the Disciplinary Pack with this letter together with a copy of the Disciplinary Policy.

49 The Disciplinary Hearing took place on the 9 September 2016, conducted by Mr Reynolds and Mr Ghulam.

50 Before going on to make findings about that meeting, it is pertinent and relevant to set out findings about the emails on pages 148-156. On the 6 September, Mr Reynolds (before the Disciplinary Investigation was completed) set out the Respondent's position in an email to Jane Chen in Shanghai (153-156). In a further email to her dated 7 September (151-153), he refers to sending additional interview statements from Mr Le Mezec and Mr Newbould. Jane Chen was to carry out an investigation in China as Ming Zhao and Robin Zhang were known to have been involved (page 154). His second email reiterates what needs to be done in China and giving guidance on how to do it. Kelvin Ko carried out the investigation in China.

51 On 7 September, Mr Reynolds had written to Mike Fortier, Mr Ball and Mr Allsopp about having a telephone call later that morning, The reply from Mr Fortier (150-151) shows that a telephone meeting would take place at 10.am. Mr Reynolds confirmed it took place, but he explained that it was to discuss the Chinese situation and to keep Mr Fortier informed of progress. He denied in cross-examination discussing what should be done in terms of sanction for the claimant. What has not been satisfactorily explained is Mr Ball's involvement in these discussions, particularly as he was a witness to events.

52 On the 10 September, Mr Reynolds wrote to Mike Fortier at IDEX (in the USA), reporting on what was happening. On page 149, Mr Reynolds writes "nothing new or unexpected came up with Sylvain, he admitted he had directly or indirectly changed the date on the order by deed or action to try to get it into the August orders, he gave some mitigation around pressure, nothing new. The issue for Isra and I, is whether this, as a first offence in 23 years service, constitutes enough for a legally fair type dismissal in our company in the UK, I think it may, but I'd like this guidance".

53 On 13 September (148), Mr Reynolds, by now having taken legal advice, states that he and Mr Ghulam had discussed the potential penalties for Mr Le Mezec with an employment lawyer: "the nub of this is that Sylvain has committed

an act of gross misconduct and dismissal is a reasonable course of action". It has been put to me that this showed pre-judgment. In fact it was after the claimant's disciplinary hearing. On 14 September, Mr Fortier informed Mr Reynolds, Mr Allsopp and Mr Ball that legal advice in China was recommending a verbal warning for Robin and a written warning for Ming (148).

54 The Disciplinary Hearing – 9 September 2016

The notes are at pages 194-199. Of relevance from the notes are the following points: Mr Le Mezec explained in some detail about the seven digit figure being required in the August orders; the IDEX visit in September; the size of the target for August and the actual orders being nil on his return from holiday. He sets out how critical it was to get the Shuangying order in August. He accepted that the purchase order from ITS idea had been a "crazy idea" and Mr Ball had been right to say no to it.

55 At page 196, Mr Le Mezec described what happened in the telephone call with Ming Zhao:

"We asked MZ to ask the client to sign the order, but not to date it and a contract was prepared with a typed date on of 31/08.16. The instruction to MZ was to get the contracts signed by the Client (SFH) and either to leave the date blank or if the Claimant dated it, it needed to be dated the 31/8/16 even if the Client signed it on 1/9/16. SLM did ask for this and give this instruction, so if this is the charge, then SLM admitted he did say it."

Mr Goolam asked: "do you think this is unethical and can bring Matcon/IDEX into disrepute with the client?", Mr Le Mezec's reply was: "this is borderline, it wasn't changing anything for the Client, there was a discount payable to the client if he signed it by the 31 August 2016". He went on to say: "I think now it was a crazy idea to what I instructed" (197).

Whatever was said to Mr Allsopp, or indeed now to me, about who actually gave the instruction, Mr Le Mezec was clearly saying at the disciplinary hearing he had given it to Ming Zhao.

56 Mr Le Mezec explained that his motivation was to make the numbers look better to help the meeting with IDEX (197). When he was asked by Mr Ghulam: "should you not have lead by example", Mr Le Mezec's reply was: " I understand I could have, on reflection of course".

57 In relation to pressure, Mr Le Mezec explained that he can take pressure, but "this one was an over inflation and things burst as a result. I went beyond where I should have been". On page 198, he repeated: "if changing the date is the charge then I did do that". In explaining why Mr Newbould, a person who was so rule bound had broken the rules, the Claimant responded that it was the pressure to get sales orders in and his desire the help. Further on (199) the Claimant stated: "my head was down, I was chasing the order, I guess I didn't see what I was doing was incorrect, I should have been more cautious".

58 The meeting was adjourned, reconvened and Mr Le Mezec was told the decision would be communicated to him, not that day and probably not personally. The outcome letter is on pages 200-202 and is dated the 20 September. This was after Mr Newbould's disciplinary hearing. The Claimant was

dismissed without notice for gross misconduct.

59 The dismissal letter sets out that the misconduct was potentially an act of gross misconduct and the band of outcomes range from 'no action' through to summary dismissal. The Dismissing Officers stated that they heard mitigation and considered it in conjunction with the written statements and other documents. Whilst recognizing the Claimant's honesty in accepting that he had made the instruction to Mr Zhao to request a customer to sign and date an order as if it was being completed on the 31 August when it was known that the customer would not do so until the 1 September, Mr Le Mezec had a number of opportunities to prevent this action being taken or to stop it progressing, but had not done so.

60 They found that the charge of falsifying a company record and failing to apply sound professional judgment had occurred. They did not find that the Company had been brought into disrepute, but that this could be of future consequence. The fourth allegation, the resultant breakdown in trust and confidence was a consequence of the action that Mr Le Mezec had taken and how the managers judged the ability of the employment contract to continue.

61 The letter went on to state how important compliance was considered to be in the company. Indeed, the letter set out: "compliance is of the utmost importance, something that is reinforced by the regular training that is a required element of your role". What also played a part in the decision making was: " As a senior leader, upholding the standards is a fundamental matter; one is expected to be a leader of good practice and a role model for others". Taking all of these points into account, the Managers decided that the above allegations amounted to gross misconduct (201).

62 Whilst noting in mitigation that the Claimant had felt under considerable pressure their view was in light of his role and level of experience it was not sufficient to mitigate against what he had done. Having decided that there was insufficient mitigation, the letter states "we have decided that dismissal does fall within the reasonable band of responses for the offences" and it was their decision to summarily dismiss him from the company. This was rather a strange sentence to in a letter of dismissal. It is not usually for the Manager who makes the decision to dismiss to assess their own actions against the band of reasonable responses, but one open to the Tribunal to apply.

63 The dismissal letter concluded that Mr Le Mezec: "did make an instruction to Ming Zhao to request a customer to sign and date in order as if it were being completed on 31 August 2016 in the full knowledge that the customer could not do so until the following day on 1 September 2016". This was found to be sufficient to uphold the charge of falsifying a company record and failing to apply sound professional judgment.

64 This letter has been challenged on the basis that it had not been Mr Le Mezec who gave the instruction. He now says that what he admitted to was that he was accountable for the advice given by Mr Newbould (199). That is not reflected in the disciplinary hearing notes where he clearly admits giving the instruction himself. Mr Allsopp's investigation report did not find that the Claimant himself had given the instruction, what the report found was that the instruction had come from Mr Newbould and that the Claimant did not disagree or stop the advice being carried out. The conclusion that the Claimant had made the

instruction is not supported by the evidence from the investigation but from what Mr Le Mezec said at the hearing.

65 The letter failed to deal, in any meaningful way, with the points that Mr Le Mezec was making about the intense pressure he had been put under by Mr Ball. This view is reflected in Mr Reynold's email of 10 September to Mr Fortier – "he gave some mitigation around pressure, nothing new."

The Appeal

66 In his letter of appeal (203 – 205), the Claimant sought to make the point that what the Claimant had been seeking to do, as the effective date of the contract was the 31 August 2016, was to give effect to what had been agreed with the customer on the 31 August. He pointed out that there had been no intention on his part to mislead, act fraudulently or to falsify records and he did not accept he had done so. He reiterated that he believed what he had done was to ask the customer to reflect the true contractual position. He repeated the enormous pressure he had been under from Mr Ball and set out details of it again in his appeal letter. Mr Le Mezec also pointed out that whilst the main focus of the investigation into the allegations related to the code of conduct and business ethics, that at no point had the company set out what the relevant rules and breaches of that code of conduct were.

67 Whilst not accepting that he had failed to apply sound professional judgment, Mr Le Mezec states that even if he had not applied sound professional judgment, this would not constitute gross misconduct justifying summary dismissal. He stated that he did the best that he could in the circumstances making what he felt to be the right decision at the time. Mr Le Mezec set out further points in mitigation, his length of good service, bringing in the Nestle orders, his moves on behalf of the company and relocating to the UK and the US and that he had always been honest and upfront in his decisions and actions.

68 The appeal was heard by Mr Mike Buxton and Mr Cuttell. I have heard evidence from Mr Cuttell. They met with the Claimant on 6 October 2016, the notes of that meeting are at pages 207-212.

69 Mr Le Mezec explained to the two Managers the order book situation at the time, that the IDEX visitors were due in September, that there was no personal benefit to him and that Mr Ball needed the figures. When Mr Le Mezec was asked why there was a recommendation to sign/ date differently, his reply was that he sought guidance from Dave Newbould. Further on in the appeal (210) Mr Le Mezec explained again the pressures he felt he had been put under. When questioned, Mr Le Mezec accepted that with the benefit of hindsight, he had reconsidered and perhaps would view the position differently. As he stated: the order should have been booked into September (213).

70. Having spoken to Mr Le Mezec, Mr Buxton and Mr Cuttell met with Mr Ghulam (215-216). Mr Ghulam set out his view of the situation. He indicated that it came down to compliance, and knowing and understanding the rules about the Order. He considered that 'SLM' was essentially looking to 'DN' to tell him what to do in order to make this go through. He held the view that the Claimant had pressurized Mr Newbould into giving the advice he had. When Mr Buxton raised with Mr Ghulam about how much the compliance process was "dug into", Mr Goolam said: "there was nothing specific". That is in marked contrast to the

amount of reference made by the Respondent in this hearing about the IDEX Code. It appears that at the Disciplinary Hearing and in the investigation, the same level of scrutiny and reference was not made by the investigating or dismissing officers. Mr Ghulam is also recorded as having said he "believed the culture was different prior to the IDEX acquisition (may have been acceptable)".

71 The interview between the Appeal Officers and Mr Reynolds took place on the 11 October 2016 (217-219).

Mr Reynolds made the following pertinent points:

"The pressure during the month did not appear to be any different than other months".

Mr Reynolds confirmed that legal advice had been sought and that it came down to misconduct:

"It was clear that SLM gave instruction to change the date to the customer and to the team. RR believed that SLM was intent on finding a way around the rules. Dave was complicit and gave the advice on what to do to SLM" (217)

72 It seems that Mr Reynolds was giving advice to Mr Buxton and Mr Cuttell – the notes record him saying: "may not change the outcome (PC – in terms of the discipline approach), but maybe the punishment may be different. Consideration needs to be about setting an example for all". Mr Reynolds goes on read extracts of the legal advice that had been sought. There is then a discussion with Mr Reynolds about an alternative punishment, where Mr Reynolds confirmed that a final written warning may not be enough (219). What should have been an enquiry by the Appeal Officers into the decision making by the dismissing officers (as it had been with Mr Ghulam) when Mr Reynolds was interviewed, it became him giving them advice about what they could or could not do. Indeed, it was Mr Reynolds who suggested to Mr Cuttell and Mr Buxton that they interview Mr Ball in the light of the Claimant's challenges to Mr Ball's evidence. This had not been done in the Disciplinary Hearing stage.

73 The Appeal Officers themselves did not speak to Mr Ball about pressure. They commissioned Anita Soghi to investigate the Claimant's allegations about pressure and a copy of her investigation appears at pages 224-225. The conclusion of that investigation was that there was little untoward pressure applied by the Respondent on the Claimant and it appeared most of the pressure came from the Claimant himself. The curious thing about the report and investigation by Miss Soghi is that it went beyond what the Claimant was alleging. His complaint was specifically about pressure from Mr Ball at the end of August 2016. It also reached conclusions which simply confirmed the Respondent's position rather than investigating what the Claimant had been complaining about. There was a telephone call with Mr Ball, what is not known is what he specifically told Miss Soghi.

74. As Mr Cuttell accepted in evidence, the investigation was about general pressure only. It did not look into what Mr Le Mezec was complaining about in respect of the specific pressure he was put under by Mr Ball. The inevitable finding about Miss Soghi's investigation is that it was not even-handed and supported the Respondent's position at the Appeal stage. The other point that should be made about Miss Soghi's investigation is that while it fed into Mr Cuttell's view that the Claimant had not been put under undue pressure, Mr Le

Mezec was not provided with a copy of this Report.

75. The Appeal outcome letter is at pages (226-228) and is dated the 28 October 2016. Mr Cuttell and Mr Buxton upheld the decision to dismiss. In this letter (page 226), the panel found: "moreover if the Order had been allowed to go through as an August Order, the customer would have gained with a discount of 7% of the order value, a sum of £21,000.00 which was a clear material deception." Mr Cuttell accepted it was unfair to make such a finding without having put it to Mr Le Mezec at the Appeal Hearing. Furthermore, it had not been a finding made by the dismissing managers.

76 The panel found that the Claimant had changed his explanation in respect of falsifying company records from that which he had said in the Disciplinary Hearing. It seems the panel was not impressed with what they saw as a new explanation - namely that instructing the customer to backdate the signature was not done to mislead but to reflect the effective date of the contract. It is clear from the evidence of Mr Cuttell that the Claimant's change in his explanation at the Appeal was seen as a lack of recognition of wrongdoing at that stage (when compared with what had been said at the Disciplinary stage) added to the break down in trust and confidence. This was in fact inaccurate and did not represent the Claimant's position at the Appeal, where Mr Le Mezec explained that Mr Newbould confirmed that if a date was applied to the signature, then it should match the effective date.

77 The Appeal panel concluded that there was nothing unsound in respect of the Disciplinary Panel's conclusion that the Claimant had failed to apply sound professional judgment. On confirmation that the Claimant had asked the customer to change the date of the signing of the contract, taking into account the Claimants senior position of responsibility, the Appeal Panel agreed with the Disciplinary Panel that there had been a failure to apply sound professional judgment. Mr Cuttell and Mr Buxton then go on to consider the resultant breakdown in trust and confidence between Mr Le Mezec and the company. The Appeal Panel did not interfere with the decision that this was a consequence of the action the Claimant had taken and how the Respondent judged that to affect the ability of the employment contract to continue. In fact, they considered it was contributed to by what was viewed as the claimant's new explanation.

78 The outcome letter dealt with two other matters raised by the Claimant. One is referred to as a further point - being the considerable pressure from Steven Ball at the time - but in fact the Claimant had raised this early on. The Appeal letter deals with the investigation by Anita Soghi, but concludes that the pressure the Claimant experienced could not excuse the decisions he took, or provide sufficient mitigation to change the decision. It stated that the conclusions of the investigation were that there was not an environment of undue pressure. To repeat myself, that missed the point the Claimant was making.

79 The other matter was the Claimant's contention that other contracts had been handled in the same way in the past at Matcon. In respect of the other contracts, the Respondent investigated each one and found no evidence to suggest any of these contracts were handled incorrectly. Indeed, this was recognised by the Claimant, in the course of cross-examination, that the circumstances in respect of the other contracts were not comparable to this. The argument has not been pursued by the Claimant in submissions.

80. The Tribunal has heard evidence, particularly from Mr Piepereit about subsequent meetings during October 2016 - following the Claimant and Mr Newbould's dismissals. I make no findings about these meetings. Mr Piepereit accepted in cross-examination that if he had had any initial worries about predetermination, these were allayed by later meetings on 23 September and 5 October. There was a later meeting on 31 October. I understand I was provided with the evidence of Mr Piepereit for the Claimant to challenge the reason for dismissal. It was put that Mr Ball had said that Mr Newbould and Mr Le Mezec were not coming back and this indicated a pre-determined position. In the event, the Claimant's arguments on predetermination are not put in relation to events or comments made after the Appeal outcome and I make no findings of fact about these matters.

81 The final matter I need to make findings about, which the Claimant contends, should go to the fairness of the sanction is around the treatment of the Chinese employees. The Claimant relies upon the differential treatment between himself and Ming Zhao. Ming Zhao was the senior manager in China and passed on the instruction given by Mr Newbould to Robin Zhang, who in turn passed it on to the customer. Mr Zhao received a written warning. He was not dismissed. The explanation for the differential treatment given by the Respondent is that the Claimant had been the more senior manager and that Mr Zhao was a Chinese employee subject to Chinese employment law. It is to be noted however that he was equally bound by the ethics Code, which is stated to apply globally.

The Law and submissions

<u>The unfair dismissal claim</u>

82 The relevant provisions, in relation to the fairness of any dismissal, arise out of s. 98 of the Employment Rights Act 1996 (ERA) and are as follows:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
…….
(b) relates to the conduct of the employee,
…….

(4) In any other case where the employer has fulfilled the requirements of subsection (1), 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.

83 There is an initial burden of proof upon the respondent to establish a potentially fair reason for dismissal pursuant to s.98 (1) and (2). Conduct is a potentially fair reason. Should the respondent establish a potentially fair reason, then the test on overall fairness is a neutral one; there is no burden of proof on either side. Fairness is determined in accordance with the requirements of s.98(4). This covers the tribunal examining the investigation, disciplinary and appeal processes.

84 The tribunal has to determine whether the claimant was fairly dismissed, in all the circumstances, by reason of his conduct, taking into account the size and administrative resources of the respondent. Guidance on the statutory test as to whether a dismissal for misconduct is fair, or not, is contained in a number of cases and in particular:

(i) British Home Stores v Burchell [1978] IRLR 379

(ii) Iceland Frozen Foods v Jones [1982] IRLR 439

(iii) Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23

In summary, the test to be applied is:

(i) Did the respondent (through the dismissing managers and appeal managers) genuinely believe in the facts found and that these facts amounted to misconduct by the claimant?

(ii) Did the respondent (through those managers) have reasonable grounds upon which to sustain that belief?

(iii) Had the respondent carried out a reasonable investigation giving rise to those reasonable grounds and belief, at the stage upon which the belief was formed?

(iv) Thereafter, was the decision to dismiss within the band of reasonable responses open to the respondent, in all the circumstances of the case?

This test is reflected in the list of agreed issues, which I largely follow in reaching my conclusions.

85 In respect of contributory conduct, the ERA sets out the law in relation to the basic award at sections 118 to 122, and the compensatory award at sections 123 and 124. Both awards can be reduced because of contributory conduct. The basic award includes, at s.122(2):

"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 that amount accordingly."

And s.123(6):

"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."

86 If I conclude the dismissal to be unfair, I should consider whether or not the claimant contributed to his dismissal and if so to what extent. The case of Nelson v BBC (No.2) [1979] IRLR 346 sets out the test for me to apply. The following factors must be satisfied if I am to find contributory conduct:

1 The relevant action must be culpable or blameworthy.

2 It must have actually caused or contributed to the dismissal.

3 It must be just and equitable to reduce the award by the proportion specified.

Culpable or blameworthy conduct could include conduct which was "perverse or foolish", "bloody-minded" or merely "unreasonable in all the circumstances". This has to be dependent upon the facts of the case.

87 Also, the principle arising out of the case of Polkey v AE Dayton Services Ltd [1988] ICR 142, HL may fall to be considered. If the dismissal is found to have been procedurally unfair, I may go on to decide what would have happened if a fair procedure had been followed, make a percentage assessment of any chance that the claimant would have lost his employment, and make a reduction in the amount of any compensation awarded.

Breach of contract claim.

88 The contractual jurisdiction of the Employment Tribunal is set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The claimant is entitled to bring a claim for damages for breach of contract over the respondent's failure to give notice or payment in lieu thereof.

89 The test for the tribunal in determining this claim is different to that applied in the unfair dismissal claim. It is open to the tribunal to form its own view of whether the claimant's conduct was so serious as to amount to a repudiatory breach of the contract of employment.

90 It is relevant to this claim to consider the definition of gross misconduct as set out in Burdett v Aviva Employment Services Ltd [2014] UK EAT 0439. It is also relevant in relation to the unfair dismissal claim. This case is particularly pertinent to this claim. Burdett sets out a discussion of previous case law and a helpful analysis for the tribunal to follow in relation to misconduct dismissals, and particularly misconduct categorised by the respondent as gross misconduct. Of relevance are the following paragraphs:

> "29. What is meant by "*gross misconduct*" – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the Supreme Court in Chhabra v West London Mental Health NHS Trust [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment, see Wilson v Racher [1974] ICR 428, CA and Neary v Dean of Westminster [1999] IRLR 288, approved by the Court of Appeal in Dunn v AAH Ltd [2010]

IRLR 709, CA). In Chhabra, it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is common ground before me that the conduct in issue would need to amount to either deliberate wrongdoing or gross negligence (see Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09/LA).

30. The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by Mummery LJ in London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see Eastland Homes Partnership Ltd v Cunningham UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.

31. The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken. Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterised as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the Tribunal will thus still need to consider whether there were reasonable grounds for concluding that she had done so wilfully or in a grossly negligent way.

32. Even if the Employment Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The Tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be assumed. The Tribunal's task in this regard was considered by a different division of this Court (Langstaff P presiding) in **Brito-Babapulle v Ealing NHS Trust** UKEAT0358/12/1406, as follows:

> *"38. The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. […]*
>
> *39. […] What is set out at paragraph 13 ["Once gross misconduct is found, dismissal must always fall within the range of reasonable responses …"] is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not a contractual test but is dependent upon the separate consideration which is called for under s.98 of the Employment Rights Act 1996.*
>
> *40. It is not sufficient to point to the fact that the employer considered the mitigation and rejected it […], because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. […]"* "

Submissions

91 I have had full written submissions from both parties, with briefer oral submissions. I have considered those submissions in reaching my conclusions, and refer to them where appropriate. I am not reproducing them in detail.

92 In summary, Mr Northall for the claimant, relies on Burdett and submits that the existence of gross misconduct is not determined simply by considering the reasonableness of the respondent's belief that it existed. The existence of it is a matter of fact and law for the tribunal. The issue of whether there had been gross misconduct is not solely down to how the respondent classifies it. If the tribunal concludes the employee did not commit an act of gross misconduct and the employer dismisses for a first offence, the dismissal will be unfair.

93 He challenges the respondent's reason for dismissal and sets out a number of evidential points, in paragraph 8, which he says undermine the respondent's ability to prove that it had a potentially fair reason for dismissal.

94 In respect of the respondent having reasonable grounds and the standard of investigation, the claimant's position is that the respondent must have reasonable grounds to conclude that the claimant had committed an act of gross misconduct. He says that, during the disciplinary process (as opposed to the case presented in cross examination of the claimant), the respondent did not identify how the claimant's conduct amounted to gross misconduct as defined in its own policies. He points out that the allegation of falsification of company records must be read in the context of page 184 and must refer to an act which is both deliberate and dishonest. Likewise, a "failure to apply sound professional judgment" should be seen in the context of gross incompetence and would not amount to gross misconduct if it is a "mere lapse of judgment".

95 He is critical of the dismissal and appeal letters as being flawed in their reasoning; they drew unsupported conclusions and did not identify what aspects of the claimant's conduct could be characterised as gross misconduct. He sets out detailed reasons in paragraphs 14 – 25.

96 In relation to the investigation, it is submitted that it began with an presumption that Mr Le Mezec's conduct did involve a transgression of the Code of Conduct and Business Ethics and company policy (158). Other failings were to not investigate the claimant's contention that he had been subjected to undue pressure by Mr Ball, despite the claimant raising the allegation on a number of occasions; and that Mr Ball's own involvement in events was not investigated. Mr Northall points out that when faced with alleged deficiencies in the investigation, Mr Reynolds in giving oral evidence sought to suggest that he carried out a second investigation of his own. He then sets out reasons why this lacked credibility (paragraph 35).

97 With regard to the sanction, Mr Northall contends that, without falling into the substitution mindset, a tribunal can set the upper and lower limits of the range of reasonable responses and if the dismissal falls outside of those limits, it will be an unfair one. Further if the tribunal decides the conduct as found was not gross misconduct, namely there was no deliberate wrongdoing, the employer has no justification to dismiss. Further, he submits that the respondent failed to consider

whether the conduct was capable of correction or likely to be repeated. He then sets out a number of further reasons why the dismissal fell outside the band of reasonable responses (paragraph 46).

98 Mr Cooksey, for the respondent, provided me with a document setting out the relevant law which should be read alongside the respondent's submissions. It is a full but general exposition of the law relating to pertinent aspects of the issues in this case.

99 The respondent's position is that the contract in question was actually signed on 1 September 2016 but backdated/processed as 31 August 2106 and that this was done on the claimant's instruction so that he could include the contract in August's sales figures (paragraph 7).

100 By way of background, it is stressed that ethical conduct was a key value to IDEX and all employees were aware of this and given regular training. Mr Cooksey sets out in detail relevant aspects of the Code and the importance of it to the respondent and its employees. Accordingly, when Mr Ball became aware of what had happened, action needed to be taken. There was a conduct issue which needed to be investigated. The backdating of the contract was contrary to the letter and spirit of the Code. It is submitted that the claimant knew that the backdating was unethical, lacked integrity, was not factual and accurate and there had been concealment of wrongdoing. That last point does not seem to me to have been a finding made by the respondent in the disciplinary process. He says that the claimant was fully aware of the importance of the Code and ethical conduct and that a failure to act in accordance with the Code would be gross misconduct. He sets out the training the claimant had received in such matters.

101 It is submitted that the reason for dismissal was conduct and it is put that the claimant's case on this is that the sanction of summary dismissal was harsh and unfair, so the dismissal must have been for another reason. He says that this is undermined by the claimant accepting that he would have accepted a written warning for his conduct. In respect of there being another reason, he points out that all the claimant would say was that he did not believe there was another reason he could prove. He submits this was a proper concession, albeit with a "shady slant".

102 Bearing in mind the respondent's policy/code and admissions made in the investigation by the claimant, taking the matter down a disciplinary route was justified and the reason for the action taken and the dismissal was the clearly the claimant's conduct. He says there is no cogent evidence of another reason and deals with why Mr Piepereit's evidence should not be relied on.

103 The respondent's position on the genuineness of the respondent's belief in the misconduct of the claimant is based on the investigation and the claimant and Mr Newbould's admissions during it. In respect of the investigation, the respondent says it fell within the band of reasonable responses. It is contended by the respondent that the claimant made a number of admissions and concessions in the interviews with Mr Allsopp. Namely that the claimant agreed with the advice given by Mr Newbould, that it was given with the intention of getting the order into August's figures, and he was accountable for the advice given. The claimant had said he would not repeat the advice, and that it could possibly be seen as unethical. He said he would expect IDEX to say don't do it. It is put that the claimant accepted what was done was a breach of the Code. That

is said to be an acknowledgment from the claimant that the respondent was entitled to consider it unethical.

104 The respondent accepts that there was no investigation into the pressure the claimant referred to, but says it was not necessary as the claimant had stated he was robust under pressure, this type of pressure was not new to him and that his point at the time about this was that orders were falling away and there being nothing in the bank. Furthermore, the respondent concluded that any pressure would not justify his actions and it was insufficient to mitigate what was viewed as gross misconduct.

105 The respondent submits that the finding of gross misconduct was within the band of reasonable responses and that there was sufficient material before the decision makers to so find. Mr Cooksey then sets out in considerable detail the evidence which he says supports the decision that the claimant had committed gross misconduct (paragraphs 106-130).

106 In relation to the sanction imposed, the respondent says that the admitted allegations are specified as gross misconduct under the disciplinary policy and the default position is summary dismissal. This is also the case under the Ethics Code. Mitigation was considered by the dismissing panel and on appeal but did not mitigate against the action taken by the claimant. That was a reasonable conclusion in light of the backdating which was clearly wrong and a deception.

107 On the question of disparity of treatment, the respondent contends that Mr Zhao's situation is not parallel to that of the claimant, sets out how they differ (paragraphs 161- 167), and that Mr Zhao was disciplined in line with local laws. In those circumstances, the difference in sanction does not result in unfairness in the claimant's case.

Conclusions

108 In reaching my conclusions, I have applied the relevant law to the facts I have found. I largely follow the list of agreed issues. It has been put to me that this is a nuanced case. I do not disagree with that, but consider that much of the nuance arises from two able representatives presenting their respective cases in considerable detail. For example, Mr Cooksey has taken the tribunal, and the claimant, through the Code and the respondent's policies far more thoroughly than was actually done in the disciplinary process and confirmed by Mr Ghulam.

109 Whilst there may be some dispute over whether Mr Lemezec himself gave the instruction to Mr Zhao, or whether he was complicit in and did not countermand advice given by Mr Newbould, the fact is that an instruction was given to backdate a contract so it would appear to have been signed earlier than it actually was. This has never been disputed by the claimant, nor has he denied his responsibility as a senior manager for that instruction. His position has been that it could not reasonably be considered to be gross misconduct, mitigation was not properly investigated or considered and so the sanction of dismissal was unfair.

What was the reason for the claimant's dismissal?

110 The reason for the claimant's dismissal was his conduct on 31 August 2016. Whilst accepting it is not for him to prove the respondent had an ulterior reason for dismissal, he has done no more than state he believes there may have been another reason which he cannot prove. I am not prepared to draw the inferences suggested by his counsel from purported failings in the investigation; that Mr Ball was insulated from any criticism or investigation of his involvement; there was no investigation of the pressure the claimant was under; that HR was inappropriately involved in the decision making process; and Mr Ball's own involvement in the investigation. These are matters I consider further on, but they are not sufficient for me to say that the claimant's conduct was not the reason for his dismissal. I accept Mr Cooksey's submission about this that even if the claimant only stated he would have accepted a written warning in order to draw a line, the claimant did in effect accept in evidence that conduct was the reason for his dismissal. In any event, whether what he did amounted to gross misconduct or not, the claimant made admissions in the disciplinary process which indicate that he accepted what he had done was not the correct thing to do. To the tribunal, Mr Le Mezec accepted he had made an error of judgment.

111 However it is put, it is clear that the respondent was entitled to investigate alleged misconduct, and take action under the disciplinary policy on the basis of what he had admitted and from the investigation results. This is not a case where sham disciplinary action is taken with no basis for it. The claimant had taken an action which could be, and was, reasonably treated as a misconduct matter. Thus, the respondent has shown that the reason for dismissal was the claimant's conduct.

Was the reason a potentially fair reason for the claimant's dismissal falling within s98(2) ERA?

112 This links in with the first issue. Having concluded the respondent has shown that conduct was the reason for dismissal, under s98(2), a reason is a potentially fair one if it "relates to the conduct of the employee".

Did the respondent act reasonably in treating that reason as sufficient for dismissal? In particular:

Did the respondent have a genuine belief in the claimant's alleged misconduct?

113 Although the claimant has challenged that conduct has not been shown by the respondent as being the reason for dismissal, the claimant has not said that the dismissing and appeal managers did not hold a genuine belief that he had committed an act of misconduct. That is a different issue to the reasonableness of their belief and would essentially be an allegation that they had not acted in good faith. On the basis that the claimant admitted the instruction had been given to Mr Zhao and that he was responsible for it, such an allegation would be unsustainable in any event.

Was that belief held on reasonable grounds?

114 This would be better put as - did the respondent have reasonable grounds for concluding that the claimant had committed an act of gross misconduct? It is the conclusion that what was done amounted to gross misconduct which resulted

in his dismissal. There was clearly a breach of the Code of Conduct and Business Ethics. Even without reliance on that Code, it cannot be proper business conduct to instruct, or for a senior employee to knowingly allow such an instruction to be given, that a contract signature should be backdated. I conclude that such conduct, particularly as it clearly breached the respondent's Code, was capable of amounting to misconduct. What is not so clearcut is whether it was gross misconduct.

115 As Mr Northall reminds me, it should be an issue determined on what was in the minds of the decision makers at the time, rather than the case presented in cross examination now. The belief that the claimant had committed an act of misconduct was a reasonable one for the managers to hold. He was a senior employee, had been trained on and was fully aware of the Code of Conduct and its importance to the respondent, he had made several admissions during the investigation and at the disciplinary hearing, for example: that the instruction had been given and that it was borderline unethical; he did not see what he was doing was incorrect at the time; it was not the right thing to do; he went beyond where he should have been; and it had been a crazy idea. The conclusion that the claimant knew backdating the signature was unethical was an entirely reasonable one for the respondent's managers to hold.

116 The respondent's managers' belief that the claimant had committed such misconduct is a reasonable one. However, drawing from the case law set out above, the character of that misconduct is not confined to the respondent's own analysis, subject only to reasonableness. Gross misconduct can be deliberate wrongdoing or gross negligence. I have to consider the character of the conduct and whether the respondent was reasonable in regarding it as gross misconduct on the facts before it at the time.

117 The dismissal letter states that it was the claimant who made the instruction to Mr Zhao. That had not been the evidence in the investigation report but the claimant clearly admitted doing so at the disciplinary hearing. The claimant also admitted being accountable for the instruction given by Mr Newbould. Although the claimant was not accused of defrauding or depriving the respondent of revenue, the size of the order and the impact on accounts appear to have been factors in assessing the seriousness of the conduct. They were not reasonable factors to take into account, in the circumstances.

118 I did not hear evidence from Mr Ghulam, but it is likely from his answers to the Appeal panel that he was of the view that Mr Le Mezec had put pressure on Mr Newbould. There was no clear evidence for this belief. It was not put to the claimant at the disciplinary hearing nor was it expressed in the dismissal letter, so that the claimant could have dealt with it in the appeal.

119 In concluding that the claimant's conduct amounted to gross misconduct, the letter of dismissal did not explain the rationale for that conclusion. What it was about the conduct which was deliberate, wilful, dishonest or grossly negligent was not explained. A view appears to have been taken that the act speaks for itself and no further analysis or explanation was needed. It is not set out how what happened breached the Code or fitted with definitions of gross misconduct contained within the disciplinary policy.

120 As my findings of fact show, the appeal outcome went beyond what the disciplinary panel had decided. The discount issue became part of Mr Cuttell's

reasoning as “a material deception”, a poor view was taken of the claimant appearing to change his defence, and there was no proper investigation into Mr Le Mezec’s specific complaints of pressure from Mr Ball.

121 In relation to the Appeal, it is also clear that Mr Reynolds, one of the dismissing managers, was advising them about what would be an appropriate sanction. That must be a procedural failing when a dismissing officer, who is also an HR Director, gives advice in this manner. Such advice, given in the context it was, can only be seen as an attempt to guide, or influence the appeal manager’s decision making.

122 Allied to the decision making, as it should be the basis of it, is the investigation process. Whilst the level of investigation may not need to be high in circumstances where an employee admits the misconduct alleged, any admissions do need to be about the actual allegations. Whilst Mr Le Mezec accepted he had done wrong, given the instruction and gone along with Mr Newbould’s advice, he did not admit to dishonesty or a deliberate and wilful falsification of a document.

123 The main failing in the investigation, at both dismissal and appeal stages, was not to investigate what the claimant was saying about the pressure he was being put under by Mr Ball. Mr Ball’s statement was self generated, and made after he had seen the claimant’s statement; there is no evidence that he was directly asked about what Mr Le Mezec was complaining about in the disciplinary process.

124 That is important, because it does not just go to mitigation but to the claimant’s motivation for acting as he did at the time and whether he was acting in a deliberate, dishonest and wilful manner. It is notable that in making the admissions he did during the disciplinary hearing, he was saying he was not thinking straight at the time, he had crazy ideas and it was only with the benefit of hindsight he could see what he had done was wrong. These are not admissions of a deliberate intention to falsify a document.

125 Which brings me in my analysis to: what was the evidence before the respondent’s managers from which they could reasonably conclude that the claimant’s conduct in giving instruction and going along with, and not countermanding, Mr Newbould’s instruction to Mr Zhao amounted to gross misconduct? The evidence, and admissions, was that he had made the instruction on advice, given by the Compliance manager, at a time when he was saying he was being put under undue pressure by his manager. The instruction, if followed by the customer, would have achieved an outcome which the pressure was demanding, namely a sizeable order in a very low sales figure month. Whilst this was deliberate, in the sense it achieved what the claimant wanted, there is no evidence he did it with a wilful or dishonest intention. He did not think of it himself. He followed wrong advice, and gave an instruction which could lead to a breach of the Code. But it was a means, put forward by someone whom the claimant justifiably relied on for compliance matters, to get the order in. His evidence was that he was not thinking straight and only realized in hindsight it was wrong. This is not evidence of deliberate dishonesty but of someone saying - I acted without thinking whilst I was under immense pressure. There was no gain to the claimant, or loss to the respondent and this was recognized by the dismissing managers. A view appears to have been taken that dismissal must follow if there is any breach of the Ethics Code. As the Code itself suggests (83).

126 Looked at objectively, on the basis of the above, and following the guidance given in Burdett , what the claimant did on the evidence before the managers cannot reasonably be characterised as gross misconduct or gross negligence. I accept Mr Northall's submissions that the definitions of 'falsification of records' and 'failure to apply sound professional judgment' must be interpreted in the context of the definitions of gross misconduct set out on pages 184-185. The latter is linked to gross incompetence; the former to theft, fraud and dishonesty. That sets the level of wrongdoing – it must be very serious. So serious in fact that the employment relationship can no longer continue as the employee is in fundamental breach of the contract of employment. If that was not the case, a minor failure to apply sound professional judgment could be characterised as an act of gross misconduct. As the disciplinary policy makes clear (185), other cases of misconduct will not result in dismissal for a first offence.

127 But that is not the end of my assessment or determination of the agreed issues. Having decided that it was not reasonable of the respondent to characterise the misconduct as gross misconduct on the evidence before it and dismiss, I do not need to go further. However, I am aware that this issue is linked to the question as to whether dismissal fell within the band of reasonable responses. For the sake of completeness, I go on to consider the range of reasonable responses in relation to the sanction of dismissal. It is not an automatic response to a finding of gross misconduct by an employer that dismissal must follow (Brito-Babapulle). Even if the respondent reasonably concluded that the conduct as found amounted to gross misconduct, it is not enough for me to state the employer considered mitigation and rejected it. My assessment must include a consideration of the matters which might have mitigated the sanction imposed. This is certainly not a case where the conduct of the claimant was patently an act of serious misconduct such that dismissal should be an obvious and unquestionable outcome.

128 There is no evidence that the respondent turned its mind to the possibility of warning the claimant, taking corrective steps or considering whether it was likely to happen again. From Mr Reynold's comments to the Appeal managers, a warning would not have been sufficient as a sanction and an example needed to be made. It was as if once it was decided the claimant had done wrong and breached the Code (and that view had been formed by Mr Allsopp in his investigation report - 159), the only outcome could be dismissal.

129 The question of undue pressure was not investigated properly and seems to have been treated as unimportant; as Mr Reynolds reported to Mr Fortier: "He gave some mitigation around pressure, nothing new". It is not the case that the claimant has made more about the pressures at the tribunal hearing than at the time. He was raising it at all stages as part of his explanation for acting as he had.

130 In mitigation, little weight appears to have been given to the fact there was no personal gain or benefit to the claimant and his only motive was to improve the August figures, in the context of considerable pressure on him and his team at the time. There are a number of other mitigating points which could have been taken into account. There was no adverse effect on the customer as the contract effective date was 31 August. This point was made by Mr Le Mezec on appeal but was used against him as it was viewed as a change in his position. There

was no loss to the respondent, although it is not clear that Mr Cuttell took this on board when he talks about 'deception'. Mr Le Mezec had relied on the very person he could trust in these compliance matters. This point was not considered.

131 Mr Le Mezec had 23 years service, with a clean disciplinary record. He was clearly a valued and loyal employee. Whilst the evidence was that these matters were considered, the managers view of the seriousness of the misconduct, the training he had had in compliance matters, that they had found dishonesty, and his seniority they felt outweighed such mitigation. It is perhaps not surprising that once a decision had been made that his conduct was gross misconduct, such mitigation was unlikely to sway the decision away from summary dismissal. This is especially so when the allegation that there had been a breach of mutual trust and confidence was upheld, as a consequence of the serious misconduct as found.

132 For the above reasons, I conclude that the claimant was unfairly dismissed.

133. Given my findings and conclusions that the misconduct committed by the claimant did not amount to gross misconduct, I find that the claimant has established, on the balance of probabilities that the respondent was not entitled to dismiss without notice or pay in lieu of notice. There was no repudiatory conduct by the claimant such as to justify summary dismissal. Accordingly, his wrongful dismissal claim succeeds.

134 Although remedy has yet to be determined and I have not heard submissions, it is clear from my findings that the issue of contributory conduct by the claimant must be considered. If the parties wish me to give a provisional view about this, perhaps to assist them in concluding the case without a further hearing, they should inform the tribunal. In the meantime, the case will be listed for a remedy hearing.

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Employment Judge Cocks

Date 9 March 2018