EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs M Mackenzie	and	Lloyds Davies Surveyors and Valuers Guildford Limited

Hearing held at Reading on 24 May 2018

Representation **Claimant:** Mr W Mackenzie, husband
Respondent: Mr R Morton, solicitor

Employment Judge Mr S G Vowles (sitting alone)

JUDGMENT having been sent to the parties on **6 June 2018** and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

SUBMISSIONS

Claimant

1. On 11 November 2017 the Claimant presented complaints of unfair dismissal, wrongful dismissal and unpaid holiday pay to the Tribunal. The holiday pay claim was withdrawn during the course of this hearing.

Respondent

2. On 19 December 2017 the Respondent presented a response and the complaints were resisted. The Respondent claimed that the Claimant had been fairly and lawfully dismissed on 3 November 2017 by reason of gross misconduct.

EVIDENCE

3. The Tribunal heard evidence on oath from the Claimant, Mrs Mary-Anne Mackenzie (former secretary) and also evidence on oath on behalf of the

Respondent from Mr James Flynn (Director).

4. The Tribunal also read witness statements on behalf of the Respondent from Ms Gerry Ellis, Ms Wendy McDonald and Ms Elizabeth Pointer who did not attend the hearing, although their evidence did not add anything significant to the evidence given by Mr Flynn.

5. The Tribunal also read documents in a bundle provided by the parties.

FINDINGS OF FACT

Background

6. The Respondent is a small business employing a maximum of 3 to 4 people at the relevant time. The Claimant was employed as a part-time secretary from 23 July 2001 alongside another part-time secretary Ms Gerry Ellis, and they worked on different days of the week.

13 – 26 October 2017

7. In October 2017 the firm was in financial difficulties and Mr Flynn was considering making one of the secretaries redundant. On 13 October 2017 he spoke privately to the Claimant about this and his record of the discussion which was made five days later, but not significantly challenged by way of content by the Claimant, was as follows:

"Conversation with Mary-Anne on 13 October 2017

I said that I had reviewed the last year's figures, that turnover was down and that I had to cut costs. I said that I had spoken to Trevor on the second floor and agreed in principle that we would move up to the rear room on the second floor to save costs because rent and rates would be halved. I said that this would not make the business profitable, that with Brexit I did not see that things would improve in 2018 and that I would have to make someone redundant. I said that this would be her or Gerry and my usual policy is last in, first out. I said that I was telling her about this to avoid the distress should I send redundancy notices to them without prior warning. I said that I would have the same conversation with Gerry the following week. I could not speak to them at the same time because they worked different days. I said that she should not speak to Gerry or anyone else about this because I needed to speak to Gerry first."

8. The Claimant's account of the meeting is consistent with that record because in her ET1, she said: *"He told me not to tell her"* and in her witness statement, she said that he said: *"Keep it to yourself as I will be speaking to her next week".*

9. Mr Flynn said that the Claimant agreed not to inform anyone else about

the conversation they had had and the Claimant did not dispute that she had agreed not to do so. However, almost immediately following the discussion with Mr Flynn, the Claimant phoned Gerry Ellis and asked to meet her for lunch and at lunch told her what Mr Flynn had told her about her possibly being made redundant. Also, on the afternoon of the same day, the Claimant told Wendy McDonald, the Respondent's book-keeper, what Mr Flynn had told her.

10. This came to Mr Flynn's attention some 5 days later on 18 October 2017 when he had a meeting with Gerry Ellis to inform her of the possible redundancy as he had done with the Claimant. However, it became clear to him that Ms Ellis already knew everything he said to her and Mr Flynn realised this could only have come from the Claimant because she was the only person he had spoken to about it.

11. On 25 October 2017 Mr Flynn again spoke to Ms Ellis and she told him that it was the Claimant who had told her about the possible redundancy in advance of their meeting. Mr Flynn confronted the Claimant on 26 October 2017 and she admitted that she had told Gerry Ellis because, she said, on a similar occasion in the past she had known someone who was going to be made redundant but had not told her about it and almost lost a friend and, in this case, Gerry Ellis was her friend.

Letter 30 October 2017

12. Mr Flynn thereupon suspended the Claimant from work for a week. He made enquiries of Gerry Ellis and Wendy McDonald and others and on 30 October 2017 he sent an email to the Claimant which included the following:

"Disciplinary Procedure

I suspended you on full pay for one week on 26 October 2017 and asked you to return to the office at 11.00 am on 2 November 2017 for a disciplinary meeting. This relates to your gross misconduct and serious insubordination. I have investigated the matter and the facts are as follows…".

13. He then referred to the content of his meeting with the Claimant on 13 October 2017 and went on to say that he had told her that what he was going to say was confidential, and again at the end of the conversation he told her that the conversation was confidential and that she should not speak about it to Gerry or anyone else and that she had said she would not. He went on to say that even without him mentioning this she would already be aware that confidential information should be kept confidential. He then said:

"On 18 October, I had a similar conversation with Gerry. It was clear that

she already knew what I was going to say and the only person that I had spoken to was you so it was clear that you had not kept our conversation confidential."

14. He then went on to say that he had spoken to others and that Wendy McDonald had told him that the Claimant had spoken to her late in the afternoon of 13 October 2017. He then said:

"In your two roles of secretary and office administrator, you are privy to confidential information. You have a duty to maintain confidentiality. I am often out of the office and rely on you to maintain confidentiality. It is essential that I am able to trust you to maintain that confidentiality. You are fully aware of your duty to maintain confidentiality. You breached that duty by informing Gerry of our confidential conversation within a few hours, probably within a matter of minutes after telling me that our conversation would be kept confidential. You further breached that duty by informing Wendy McDonald of our confidential conversation within a few hours of telling me that our conversation would be kept confidential and between 13 and 26 October, you kept your breach of confidentiality secret and failed to inform me. When I asked you about this on 26 October, you admitted it and said that 1) you had worked with someone in the past who had been made redundant, that you were aware that she was going to be made redundant but did not inform her and almost lost a friend; and 2) that you wanted to warn Gerry."

15. He then set out what he said were the consequences of this breach of confidentiality:

"Gerry suffered anguish and worry between 13 October when I spoke with you and 18 October when I spoke with her.

Any redundancy procedure that I might have instigated would be compromised because you informed Gerry that she had been preselected for redundancy. That is incorrect. …

That Elizabeth Pointer, Jane Blackmore and Sue Howard, although working for a separate surveying practice, were worried about their futures and that they may be made redundant.

I have unnecessarily wasted a lot of time investigating your misconduct.

I have lost trust in you to maintain confidentiality. This goes to the essence of your job."

16. He then went on to say that at the meeting on 2 November 2017 the Claimant could ask questions, present her case, including any evidence and relevant information, and that she may be accompanied by another person who may present her case, ask questions and present evidence on

her behalf.

Disciplinary Meeting 2 November 2017

17. The Claimant attended the meeting with Mr Flynn on 2 November accompanied by her husband, William Mackenzie (who has represented the Claimant at this Tribunal hearing). The meeting was recorded by both parties and a transcript was included in the bundle before the Tribunal.

18. At the start of the meeting Mr Mackenzie agreed that it was a disciplinary meeting. He commented on the short notice but agreed that he was prepared for the meeting. The meeting was lengthy, over one hour, and Mr Mackenzie did not challenge what the Claimant had done but what he did challenge was whether it was a breach of confidentiality. He asserted that even if it was a breach, it was not serious and could not amount to gross misconduct. There were numerous exchanges during the course of the meeting between Mr Mackenzie and Mr Flynn on this subject. For example, at page 65, Mr Mackenzie said: *"What I'm saying is that it doesn't amount to gross misconduct"* and Mr Flynn said: *"So you are saying that the reason it is not gross misconduct is your case. The reason that this is not gross misconduct is that breach of confidence was insignificant. That's what you are saying",* and Mr Mackenzie said: *"To be honest, I'm not even sure it is a breach of confidence but if it is and you do want to say it is a breach of confidence, it is so insignificant as to be of no consequence."*

Dismissal Letter 3 November 2017

19. The outcome of the meeting was included in a letter dated 3 November 2017 from Mr Flynn which included the following:

"Disciplinary Procedure

This letter is to inform you of my decision following the disciplinary meeting yesterday. The meeting related to your action in passing confidential information to another employee despite being directly instructed not to and despite saying that you would not. You were suspended from your job on full pay so that I could investigate gross misconduct fully. …

Your case is:
(1) That there has been on breach of confidence; and
(2) If there had been a breach of confidence, then it was insignificant.
…

I have concluded that:

"1. Your actions were a breach of confidence and were both gross misconduct and serious insubordination;

2. The breach is significant because it related to an important redundancy procedure;
3. The breach was a deliberate and wilful breach of trust of the contract of employment;
4. The reasons given for the breach are unacceptable to the company;
5. The breach is significant because it relates to your specific roles where you are privy to confidential business and client information.
6. It is essential that I have trust in you to keep such information confidential;
7. It is essential that I have trust in you to do what you are instructed to do and do what you say you will do;
8. It is essential that I trust you not to conceal any important matter relating to the business from me; and
9. I have lost trust in you to maintain confidentiality.

Consequently, the company has no alternative but to dismiss you from employment on the grounds of gross misconduct and serious insubordination without further notice."

20. It then offered an appeal against the decision. In an email dated 6 November 2017 Mr Mackenzie expressed an intention to appeal but no appeal was presented.

RELEVANT LAW

Employment Rights Act 1996

1. *Section 98. General*

(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, …

(3) 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.

2. Under section 94 of the Employment Rights Act 1996 an employee has the right not to be unfairly dismissed by her employer.

3. The Respondent claimed that the Claimant was dismissed by reason of misconduct.

4. For cases involving misconduct, the relevant law is set out in section 98 of the Act and in the well-known case law regarding this section, including British Home Stores v Burchell [1978] IRLR 379, Post Office v Foley [2000] IRLR 827, and Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23. From these authorities, the issues for the Tribunal to determine were as follows.

5. Firstly, whether there was a potentially fair reason for the dismissal under section 98(2) and did the employer have a genuine belief in the misconduct alleged. The burden of showing a potentially fair reason rests with the employer.

6. Secondly, whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the employee under section 98(4). In particular, did the employer have in mind reasonable grounds upon which to sustain a belief in the misconduct and, at the stage at which the employer formed that belief on those grounds, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. Did the investigation and the dismissal fall within the range of reasonable responses.

7. Thirdly, the Tribunal must not substitute its own view for that of the employer, but must assess the actions of the employer against the range of reasonable responses test. That test applies to all stages in the procedure followed by the employer, including the investigation, the dismissal and the appeal.

8. The ACAS Code of Practice on Disciplinary and Grievance Procedures sets out the steps which employers must normally follow in such cases. That is, establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action and provide the employee with an opportunity to appeal.

DECISION

Unfair Dismissal

21. The complaint of unfair dismissal was summarised by Mr Mackenzie in his closing statement. He said that the dismissal was not fair. He said that the ACAS Code of Practice had not been complied with. He said that the investigation and the process overall was sham. He said the real reason for dismissal was about redundancy, that is, getting rid of an employee at minimum cost and to avoid a redundancy payment. He said that dismissal for gross misconduct was not reasonable in this case.

22. The Tribunal found that the genuine reason for the dismissal was misconduct. There was no evidence of a sham process or of any motive on the part of Mr Flynn to dismiss the Claimant to avoid a redundancy payment. As pointed out by Mr Flynn at the meeting on 13 October 2017, he had a 'last in, first out' policy. He said that the Claimant would know that she had 16 years' service compared to Gerry Ellis's 5 years, and if he had followed through his policy, and there had not been a breach of confidentiality by the Claimant, then it was likely that Gerry Ellis would have been made redundant and the Claimant would have remained in employment.

23. There was clear, well-documented evidence of the breach of confidence. From the outset, the Claimant accepted that she was told by Mr Flynn not to tell Gerry Ellis about their conversation on 13 October 2017, that she agreed not to tell her, but she then almost immediately on the same day phoned Gerry Ellis to arrange to meet and told her about the conversation. She also accepted that on the same day she told Wendy McDonald about it.

24. Mr Flynn carried out a reasonable investigation. He spoke to the Claimant, to Gerry Ellis, to Wendy McDonald and to others to whom Gerry Ellis had spoken and he made records of what they had said. He then put the allegations of the breach of confidentiality into a detailed email to the Claimant on 30 October 2017 which is quoted above. He set out the results of the investigations he had carried out and made clear what allegations he was making regarding the Claimant's conduct.

25. The investigations set out in the email of 30 October 2017 and the content of the disciplinary meeting on 2 November 2017 provided Mr Flynn with sufficient and reasonable grounds for the dismissal which was set out again in some detail in the dismissal letter dated 3 November 2017 also quoted above.

26. The Claimant says that the dismissal was an unreasonable and unwarranted sanction and believes that the sanction was too harsh. However, the Tribunal may not substitute her view or indeed its own view

for that of the employer. The Tribunal must apply the law as it stands to the facts found.

27. The Tribunal found that the dismissal was within the range of reasonable responses in the circumstances of this case. The misconduct involved an admitted and deliberate disobedience by the Claimant to her manager's instructions and a breach of confidentiality which, as Mr Flynn set out in writing, had serious consequences for him, for the company, and for Gerry Ellis. He considered, reasonably, that it amounted to a breach of trust and confidence by the Claimant which was a fundamental breach of contract. It was reasonably categorised by him as gross misconduct. The Respondent was entitled to take a serious view of that conduct and to dismiss the Claimant. It cannot be said in those circumstances that dismissal was an unreasonable sanction.

28. The Tribunal was satisfied that there was no procedural unfairness and that the procedure followed by Mr Flynn complied with the basic requirements of fairness in the ACAS Code of Practice. The process was well documented and transparently conducted.

29. Looking at the procedure as a whole, that is the investigation and the dismissal, it was a fair procedure. There was a reasonable investigation which provided sufficient reliable evidence for the Respondent to reasonably conclude that the Claimant was guilty of a breach of confidentiality and trust and confidence. This fell within the scope of misconduct and the dismissal was within the range of reasonable responses. It was not unfair.

Wrongful Dismissal

30. The test for wrongful dismissal is different to the test for unfair dismissal. In the former, the reasonableness or otherwise of the employer's actions is not relevant. The question is whether in Tribunal's view the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

31. Looking objectively at the evidence placed before the Tribunal, there was evidence of gross misconduct such as to justify summary dismissal. The Claimant accepted what she had done and there was no serious dispute between the parties on the facts of the case.

32. What is in dispute is whether the Claimant's conduct amounted to gross misconduct. The Tribunal found that it did.

33. There was evidence of breach of confidentiality and breach of trust and confidence involving an element of deceit. This fell within the scope of gross misconduct amounting to a repudiatory breach of contract entitling

the employer to treat the contract as terminable without notice by reason of the conduct of the employee.

34. The dismissal was not wrongful.

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Employment Judge Vowles

Date: ……2/8…….. 2018

Reasons sent to the parties on

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For the Tribunal office