



EMPLOYMENT TRIBUNALS

Claimant: Mr Joseph Broun

Respondent: TapFuse Limited

Heard at: London South (Croydon)

On: 14 & 28 February 2017

Before: Employment Judge John Crosfill

Representation

Claimant: Mr D Crowley of Counsel (Direct Access)

Respondent: Mr P Fortune of Counsel instructed by Mergul Law

RESERVED JUDGMENT

1. The Claimant's claim for wrongful dismissal brought under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 succeeds.
2. The Claimant's claim for commission payments brought under the Employment Tribunal Extension of Jurisdiction (England and Wales) Order 1994 succeeds.
3. The Respondent is ordered to pay the Claimant:
 - a. The sum of £4728.72 in respect of damages for failing to give contractual notice; and
 - b. The sum of £972.50 in respect of sums due in commission under the Claimant's contract of employment with the Respondent.

REASONS

1. The Respondent is a company in the IT sector. Between 1 May 2015 and 21 February 2017, the Claimant was employed by the Respondent as an Account Manager. On 21 February 2017 he was dismissed by the Respondent without notice or pay in lieu of notice following the discovery of the fact that he had sent a document ('the investor pitch') to himself by e-mail. By an ET1 presented to the Employment Tribunal on 17 May 2017 the Claimant brought complaints under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order claiming damages in respect of what he said was a wrongful dismissal and a failure to pay him commission that he said was due to him.
2. The matter had been listed for 1 day on 14 February 2018. The parties had been in dispute about the documents that should be contained in the trial bundle and I was presented with 4 large lever arch files (poorly indexed), several smaller files and (by the conclusion of the hearing) 2 witness statements from the Claimant and 2 Witness statements from Mr Gordon Sivak (the CEO of the Respondent) and a statement from Mr James Kerr Reid (formerly a Commercial Director of the Respondent). The witness statements of the parties were full of argument rather than concentrating upon the facts. Each party had sought to introduce additional documents alongside supplementary statements.
3. In addition to the vast amount of paper documents, it was suggested that I should view digital documentation. I declined to insert a memory stick in my computer and at various times I was shown documents on one or other of the parties' laptops. In all, there was a vast amount of documentation presented with little or no regard to the convention of having documents in chronological or other sensible order. In the event I was referred to a very small proportion of those documents. It has taken some time to prepare this judgment in what is, at its heart, a very simple case indeed. The delay has been substantially caused by the haphazard preparation of the case by the parties. I should say in fairness that nothing done by the two advocates deserves any criticism.
4. At the outset of the hearing I was asked to resolve various disputes about what documents should, or should not, be considered. In particular, the Claimant was concerned about the inclusion of various e-mails sent on behalf of the Respondent to Google asking about the mechanisms whereby files might be downloaded from a cloud based server. I considered that the documents were relevant, although plainly hearsay, and I considered them in the course of the hearing. Any prejudice to the Claimant was resolved by the fact that an adjournment proved necessary by reason of the case over-spilling its time estimate.
5. The issues in the case were briefly discussed and were of very narrow compass. In respect of the claim for wrongful dismissal the Respondent admitted that it had dismissed the Claimant summarily but said that it was

contractually entitled to do so as the Claimant was guilty of gross misconduct. The Claimant was claiming commission in accordance with the terms of the written contract of employment under which he worked. The principle issue was whether the terms had been varied. An alternative case was presented that the express terms were subject to various implied terms that negated the right to any payment. Finally, there were disputes as to the amount payable.

6. As the Respondent bore the burden of proof in establishing a contractual right to dismiss the Claimant I directed that the Respondent should call its evidence first. Concerned about the time estimate I had originally proposed a timetable on the parties. It became quickly apparent that the case was not going to be completed in the time allocated. As a consequence, I relaxed the timetable and the matter was relisted for a further day's hearing. At the conclusion of the first day I gave the Claimant permission to file an additional statement dealing with the evidence given in Mr Sivak's second statement relating to an issue of whether files might have been backed up to the Claimant's computer without any input from him.
7. In this judgment I deal only with what I consider are the important parts of the evidence. I shall not attempt to summarise all of the evidence I heard nor deal individually with the thousands of pages of documents I have been provided with.
8. At the conclusion of the hearing both Counsel made submissions and I am grateful for their assistance. There was no dispute between them as to the law to be applied (other than a small issue relating to quantum, ultimately conceded). I shall not set out their submissions on the facts but have had regard to them in reaching my conclusions below.

Assessment of the witnesses

9. The decision-making process in this case was made much harder by the fact that the witnesses allowed their personal animosity to spill over into their evidence. Both the Claimant and Mr Sivak were prone to arguing their case from the witness box. The Claimant's witness statement in particular is highly argumentative. Mr Sivak was occasionally prepared to make sensible concessions (for example he was prepared to concede the possibility that he might have discussed parts of the investor pitch with the Claimant on 23 January 2017) but on other occasions was not (for example he was I find unfairly dismissive of the Claimant's abilities). He was not prepared to contemplate any innocent explanation put forward by the Claimant. The Claimant's account of why he had e-mailed the investor pitch to himself waived under cross-examination adding in a suggestion that he might have wished to read it on the tube. This was not a markedly different account to one given previously but it appeared to me that the Claimant was unable at times to differentiate between fact and argument.

Background factual matters

10. The Respondent company is a small business which provides IT solutions to customers organising conferences or events. The business was founded in April 2013 by 4 individuals. It outsources the technical side of its business to individuals working in Thailand. When configuring its software for a particular client the Respondent might use the trademarks, logos or images and imbed them in the software supplied. The company remains small. At present there are some 4 employees in addition to the owners and 4 freelancers.

11. In October 2014 the Claimant was working at an event in Peru for Global Financial Conference, a client of the Respondent. The Claimant met with Mr Sivak and during that meeting Mr Sivak raised the possibility of the Claimant coming to work for the Respondent in a sales capacity. The Claimant had a well-paid job at the time and politely declined. On 27 March 2015 Mr Sivak sent the Claimant an e-mail in which he made a proposal under which the Claimant would start working for the Respondent. He attached to that e-mail two documents including a document referred to as “the investor pitch”. The Claimant decided to take up Mr Sivak’s offer of employment.

12. The Respondent has at all material times used a cloud based storage system for its documents. That system was provided by Google. An administrator could grant access rights to an employee or third party by reference to an e-mail address. That access could be across the board or limited to certain files and folders. It was possible to print a report which would show the files downloaded by each user in the previous 6 months.

13. Mr Sivak organised for the Claimant to have access to the Respondent’s cloud computing using his own personal e-mail address after an agreement had been reached, but in advance of him signing a contract and starting work.

14. On 1 May 2015 the Claimant attended the offices of the Respondent where he was presented with a service agreement under which he was to be appointed as a “Business Development Manager”. On 8 May 2015 the Claimant and Mr Sivak signed the contract signifying their consent to its terms. The contract contained the following material terms:
 - 14.1. At Clause 3.1 the contract provided that after a 6-month probation period the contract could be terminated by either party upon 3 month’s notice in writing.

 - 14.2. Clause 6 dealt with remuneration. Clause 6.1 provided “*The Employee shall be paid the sum of £24,000 per annum*”. Then under a heading “Commission” went on to say “*5% payable quarterly on booked revenue for TapFuse brought in exclusively by you or with the executive*”. The phrase “executive” is not defined within the agreement.

- 14.3. Clause 14 contains provisions restricting the use of the Respondent's confidential information including provisions preventing the disclosure or use of that information.
- 14.4. Clause 16 of the contract provides that the Respondent may terminate the agreement with or without notice in certain circumstances including clause 16.1(b)(i) which provides that the Claimant could be summarily dismissed if he had "*committed any serious breach or repeated of continued (after warning) any material breach of his obligations...*"
15. The contractual document was perhaps more suitable for a large established company than for what was a small start up IT company. Whilst reference was made in the contract to the existence of things like a company handbook in fact none existed at that stage. It seems unlikely that any of the parties gave a great deal of thought as to whether a 3 month notice period was a good idea. Rather that they were content to adopt what both regarded as the sort of terms one might expect to find in a standard precedent.
16. After a short period, the Claimant was allocated a work e-mail address and was given permission rights to access many, but not all, of the Respondent's files stored on the google cloud drive.
17. At the time the Claimant started work the Respondent did not own sufficient computers in its offices to be able to supply one to the claimant. The Claimant agreed to bring in an iMac that he owned and to use that at work. When he did so he used that computer to give him access to the Respondent's files. In order to do so he had to install a google application. He used that computer until about August 2015 when, at the same time as an office move, he was provided with a laptop. At that point he took his iMac home.
18. The Claimant initially used his personal telephone both to use as a contact for customers but also it was configured to receive and send work e-mails. This was done with the full knowledge of Mr Sivak as the number was shown on the Respondent's website.
19. After the Claimant was provided with a laptop it was his practice to leave the laptop at the office in the evenings rather than take it home. Insofar as the Claimant accessed files on the Respondent's Google Server from home he did so using his iMac.
20. Mr Sivak in his witness statement suggests that the Claimant's performance fell below the standard's expected. This is relevant only to the issue of whether some variation to the commission clause was agreed. I accept Mr Sivak's evidence that he was very particular about the style and content of documents sent out in the name of the Respondent. I also accept that the Claimant did not always match those standards. That said, I was not provided with any documents that would suggest that any formal process was instigated by the

Respondent but it is common ground that the Claimant was deemed to have completed his probationary period after it was extended on one occasion.

21. The Claimant enjoyed cold calling potential customers whereas Mr Sivak did not. During the earlier period of the Claimant's employment he would tend to make the initial contact with potential customers with Mr Sivak becoming involved in the later stages of the transactions. It is not disputed by the Respondent that the Claimant had some involvement in several sales that generated revenue for the Respondent. At no time during his employment did the Claimant press for payment of any commission. He says that he did not do so because he intended to build up a war chest in order to purchase shares in the Respondent, a possibility that had been mooted when he accepted the job. I accept that evidence in part but also find that the Claimant was not fully aware of what he might be entitled to as he was not familiar with the terms of his contract.

22. Mr Sivak says that towards the end of 2016 he met with the Claimant to discuss his performance at a Café Nero near the Respondent's offices. It is said that he did so to discuss the fact that the Claimant was not entitled to payment of any commission. The Claimant was provided with a draft contract and a more comprehensive commission plan that was said to be effective from 15 February 2017. In fact, no agreement was ever reached in accordance with that plan. I note that the new agreement provided for the payment of commission for sales introduced by the Claimant. There is no requirement that he conduct each sale to its conclusion. As such it differs little from the previous terms.

23. I found neither of the two main witnesses to be entirely satisfactory. On this point I accept that a new commission scheme was discussed but reject the suggestion that there was any agreement as to the entitlement to commission already due. I cannot accept that the Claimant, on a modest (for London) wage of £24,000, was motivated entirely by considerations of buying shares at some unknown point in the future. I consider it more likely that he had not understood exactly what he might be entitled to and has only given it thought when preparing these proceedings. Of course, the fact that he might not have known what the contractual position was does not affect any entitlement he had. I reject the suggestion that there was any express agreement to waive any commission.

24. On 23 January 2017 in the afternoon the Claimant accessed the most recent version of the investor pitch which was dated June 2016. It is his case that he did so having been sent a link by Mr Sivak. The fact that the Claimant accessed the document is evidenced by a google analytical report generated by the Respondent. That shows that he previewed the document twice shortly before 3pm. Then at 3.06pm the Claimant downloaded the document, attached to an e-mail sent from his work e-mail address and sent it to his personal e-mail address. He then deleted the e-mail. Mr Sivak was asked in cross examination whether he accepted discussing the document with the Claimant on 23 January 2017. He said that he had no recollection of doing so but was prepared to accept that it was a possibility. The Claimant said that he worked close to Mr Sivak and that Mr Sivak would often use him as a sounding board. I consider that it is more likely than not that Mr Sivak was prepared to discuss the investor

pitch with the Claimant. That is consistent with the tone of the e-mail correspondence in advance of the employment in which Mr Syvak was prepared to share an investor pitch and discuss the direction the very small business was taking. As such I find that the reason that the Claimant accessed the investor pitch, whether by following a link or by going to look for it on the drive, was because it had been discussed with him by Mr Sivak.

25. On 14 February 2017 Mr Sivak carried out a search of the Claimant's e-mail account. He says that this was simply routine. Whilst that seems unlikely I need not make any finding upon it. Mr Sivak discovered that the Claimant had e-mailed the investor pitch to himself and that he had deleted the e-mail. On 15 February 2017 the Claimant was asked to attend a meeting that took place in Mr Sivak's flat. That initial meeting was attended by the Claimant, Mr Sivak, James Ker-Reid and Angela Argenziano (a designer). Both the Claimant and Mr Sivak have suggested that this meeting took place on 14 February 2014 but that is inconsistent with what is said by James Ker-Reid.
26. I accept the Claimant's account that at the end of an ordinary staff meeting he was "confronted" by Mr Sivak about having sent the investor pitch to his private e-mail address. That is consistent with the evidence of James Ker-Reid who uses the word "confronted" in his witness statement. I consider it typical of this micro-business that it was thought appropriate to act in this manner in the informal setting of Mr Sivak's flat. James Ker-Reid took some spartan notes of the meeting. Other than giving me some indication of what topics were raised they are so thin as to be of little evidential value. I am satisfied that Mr Sivak suggested that the Claimant had e-mailed the investor pitch to himself, that he readily accepted that he had and that he said he had read it. It is common ground that the Claimant said words to the effect that he had acted 'honestly'.
27. It seems that Mr Sivaks and James Ker-Reid took some advice from ACAS. James Ker-Reid made some notes which would indicate that there were discussions about whether an instant dismissal or a dismissal following a suspension and further meeting would be appropriate. I find that whilst Mr Sivak elected to follow the latter course he considered that dismissal was inevitable. Later that day but in the office premises Mr Sivak suspended the Claimant from work rescinded the access that the Claimant had to the company's servers. He did not at that time remember that the Claimant had also been given access via his personal e-mail address and access remained possible using that address. The Claimant was instructed to delete all company documentation from his personal iMac.
28. Later on, the same day the Claimant sent an e-mail to Mr Sivak at 16:39 in which he said: *"I have deleted all of the documents I could find in my files. There was a lot of information on my home computer from when I used it before my laptop. If at any stage you wanted to come around to my flat and see it for your own eyes you are welcome anytime, just give me the heads up. Check the photos below, there is no real diagnostic that I can run that says "all TapFuse data cleared" but it's been moved to thrash and deleted on entry"*. I find that the offer to permit Mr Syvak to inspect his computer was a genuine one made by the Claimant who I find was prepared to disclose that he had retained company

documents on his home computer and was confident that he had done what he had been instructed to do.

29. By an e-mail sent on 17 February 2017 the Claimant was invited to a disciplinary meeting. That meeting took place on 21 February 2017. Once again it was conducted by Mr Syvak with James Ker-Reid in attendance. Once again, a very sketchy note was taken of what occurred. Mr Syvak said in his witness statement that the Claimant was asked why he had sent the investor pitch to himself and responded that he wanted to read it on the way home (the Claimant has said the same himself at times). He was asked if he had done the same with any other documents and acknowledged that he might have done. The Claimant says, and I accept, that in addition he stressed that he had not acted dishonestly in any way.
30. At the end of the questioning Mr Syvak asked to look at the Claimant's company laptop and to log into the server using his personal e-mail address. When he did so all of the files to which access had been granted became visible. Mr Syvak says that he subsequently revoked access to that server. I find that whatever steps Mr Syvak did, or thought he had done, he failed at that stage to effectively remove the Claimant's access to the server.
31. Following the meeting Mr Syvak wrote to the Claimant dismissing him without notice or any payment in lieu of notice. That gave rise to correspondence between the Claimant the Respondent and eventually its solicitors. On 3 March 2017 the Claimant wrote to Mr Syvak essentially protesting at the failure to give him notice. I note that the Claimant referred to 1 months' notice which reinforces and informs my view that the Claimant was unaware of the extent of his rights under the contract. The Claimant made reference to taking a complaint to the 'workplace ombusman' a feature of employment law in Australia. He then went on to point out that he had discovered that his personal e-mail address still permitted access to the Respondent's server. Mr Syvak has, incorrectly in my view, categorised that as blackmail. In fact, the Claimant threatens nothing at all other than intimating that he might bring proceedings. Furthermore, Mr Syvak suggests that this means that the Claimant was dishonest when he said that he had deleted any documents. I find that this was not the case. Having access to documents on the server and having them on the computer are two different things. I am confident that the Claimant would not have offered to permit Mr Syvak to inspect his computer unless he had honestly believed he had deleted the Respondent's documents. It is not to Mr Syvak's credit that he describes this e-mail in his witness statement as 'blatant extortion'.

Events subsequent to dismissal

32. On 16 March 2017, a point in time where litigation was plainly contemplated, Mr Syvak discovered that it was possible to use the software controlling the use of the cloud server to produce a report which would list all of the actions of any user. In particular, it could show whether a file was viewed, moved or downloaded. The report could only easily be produced covering the previous 6 months. Mr Syvak produced such a report both in a printed format and, in the course of the hearing, I was shown the report in a native electronic format. The

Claimant had in the run up to the hearing protested that the documents relied upon by the Respondent were in a new format and could therefore have been altered by the Respondent. I consider that this is an example of the Claimant taking bad points just as the Respondent had done. The fact that Mr Syvaks describes this in his witness statement as a 'preposterous suggestion' is symptomatic of the level of acrimony in this case.

33. What the report shows is that during the 6-month period of the report the Claimant's login (e-mail address) has been used to access the server. It is clear that across the 6-month period the Claimant's login has been used to download some 35,822 files from the Respondent's server. The following matters are also clear from the report:

33.1. That there are relatively few occasions when individual files were downloaded. A letter from the Respondent's solicitor details 29 individual files and that appears to correlate with the report.

33.2. There are at least 6 occasions where a number of files are downloaded one after the other. The Respondent's solicitor's analysis records this took place on 27 September 2016 (352 files), 1 November 2016 (761 files), 7 December 2016 (65 files), 10 December 2016 (5068 files), 11 December 2017 (4332 files) and 25 January 2017 (6118 files). In the documents there appears to be at least one further occasion (8 December 2016) when files are downloaded in bulk.

33.3. Where files were downloaded in large numbers the downloads stream continuously with no gaps in between. For example, downloading of files stated at 5:38pm on 10 December 2016 and finished at 8:22pm. That is a rate of 25 files per minute.

33.4. The largest proportion of the files downloaded in bulk were image files some plainly generic and others more tailored to companies of products.

33.5. Prior to the significant downloads there is no discernible pattern showing that the Claimant viewed or pre-viewed any documents. On most occasions it is quite clear that he did not.

34. The Respondent has, in response to a request by the Claimant, obtained reports for a number of other employees or officers. Given the limitation of a 6 month time limit on obtaining such reports the reports do not cover the same time period as the report that concerns the Claimant. It is clear that most of the other employees download very few documents. Mr Sivak downloaded some 15,877 documents in a 6 month period (15808 according to the Claimant's evidence but it makes no difference). Having viewed that report I find that:

34.1. There are a number of instances where there is a bulk download of files (4 June 2017 for example)

- 34.2. The files are downloaded at speed seconds apart.
- 34.3. Where files are downloaded in this manner a large proportion are image files.
35. Mr Syvac assumed, and has remained convinced, that the only reason that these downloads might have taken place is that the Claimant use the information for his own purposes, implicitly, to the detriment of the Respondent. He says in his witness statement that he believes that the Claimant has spent months planning a systematic looting of the Respondent's confidential information. The Respondent's solicitor sent an e-mail to the Claimant intimating criminal and civil proceedings. No such proceedings have been commenced.
36. In correspondence between the parties the Claimant has insisted that he never knowingly downloaded such quantities of the Respondent's documents. The Claimant said in his witness statement that Mr Syvak had instructed him to load a program onto his iMac called 'Drive for Desktops' when he had initially started working for the Respondent. In his witness statement he suggested that a possible explanation was that the downloads were explicable by files being 'synced' between the server and his home computer. In support of that he refers to an e-mail sent to Google support where 'Joan' advised him that *"There is a large possibility that the term 'downloaded an item' is pertaining to a file being synced from your google drive on the web to the Google Drive folder on your computer"*. This assertion in the Claimant's witness statement caused the Respondent to make its own enquiries of the Google help desk.
37. The manner in which both parties sought to rely upon e-mails from the Google helpdesk has not greatly assisted the Tribunal. I was invited to place reliance on what individuals identified only by their first name, plainly writing in a second language, with unknown qualifications (other than they worked on the helpdesk). Mr Syvak's first e-mail to somebody called 'Anderson' sent on 31 January 2018 is very far from being a neutral attempt to solicit information and in part suggests the content for a witness statement. In fairness to the Respondent it later forwarded questions posed by the Claimant about the functionality of the software.
38. Mr Syvak's enquiries of the Google helpdesk revealed that the Claimant was wrong in his suggestion that he had been asked to install "Drive for Desktops". That, as the Claimant later accepted is correct. The software was relaunched from 12 July 2017 with a change of name from 'Google Drive' to 'Drive for Desktops'. Insofar as he had relied upon a description of the capabilities of Drive for Desktops and in particular its 'Backup and Sync' functionality the Claimant was incorrect. Typical of this dispute Mr Syvak suggests that the allegations are 'false'.
39. A person identified as Jose responded to Mr Syvak's e-mail on 31 January 2018. He confirmed the change in the software. It is acknowledged that the previous version of the software had a similar sync function to the newer

software. He stated that the only way that a file could be downloaded was to go to the cloud drive and to manually select a file or files. He further stated that files downloaded by 'Drive sync' would not show up on any report. He provided links to on-line documents he said that supported that contention and quoted a section that stated that Google Drive sync clients were not logged. I am not told whether that document was current or whether any changes were made to the software.

40. The Claimant was given an opportunity to ask 'Jose' questions about his response. Following the first day of the hearing I ordered full disclosure of all correspondence and the Claimant provided his second witness statement. In response to questions from the Claimant 'Jose' had suggested that the only ways in which the audit report would show an item as downloaded were:

40.1. If the file was manually downloaded; and

40.2. If a third party source had downloaded the files

40.3. If the account had been 'hijacked' and it was downloaded from somebody else; or

40.4. A bug in the audit report software.

41. The Claimant suggests that the evidence from 'Jose' contradicts that from 'Joan'. The question I need to resolve is not whether there was a sync function by which updated files would be transferred. It seems to me quite clear that that was the case. The issue is whether that would be shown on an audit report as a downloaded item. Despite the poor presentation of the evidence I am persuaded that it is more likely than not that this was not the case and that a synced item would not be recorded as a downloaded item.

42. One of the matters relied upon by the Respondent to suggest that the Claimant had behaved improperly was its discovery, on its server, of what Mr Sivak suggests was a hidden folder containing business plans. The Claimant says that the fact that the file was on the Respondent's server was inadvertence and I accept that was the case. It seems to me odd to suggest that the Claimant would hide a file on his employer's server. I find that the business plans are not and could never have been thought to be competitive with the Respondent. They include an idea to produce a brand of Gin. I consider that they are the pipe dreams of a young man thinking up ideas for the future. None of the plans suggest that the Claimant is considering any competitive activity.

43. The Claimant says, and I accept, that having been dismissed he initially applied for and accepted a role in the media industry. Only when this fell through did he consider working for a software company. He has disclosed correspondence with a recruitment agent dated 7 March 2017 which he says, and I accept led to his introduction to eTouches. I consider it unsurprising that a recruitment consultant would endeavour to place the Claimant in a similar business. The

Claimant has suggested that eTouches could not be seen as a competitor of the Respondent. I do not accept that. Whilst eTouches is a bigger and more established company it is broadly in the same business of providing software for events.

44. Other than any inferences that might be drawn from the matters set out above, which I deal with below, there was no direct evidence that the Claimant has disclosed any information to eTouches or any other competitor of the Respondent.

The relevant law

45. An employee is wrongfully dismissed when the employer terminates the contract of employment in a manner which amounts to a breach of its terms. Contracts of employment generally, and in this case do, provide that either party may terminate the contract upon notice. Section 86 of the Employment Rights Act 1996 provides for minimum periods of notice in certain circumstances.
46. In addition to any right to give notice a contract of employment, in common with any other contract, may be terminated by the “innocent party” if the “guilty party” acts in a manner which amounts to a serious or repudiatory breach of contract. In the employment context this is usually referred to as “gross misconduct”.
47. It is open to the parties to agree and include in their contract what circumstances will entitle either party to terminate the contract without notice. Where that is not done but the contract contains other express terms the question of whether a breach of those express terms entitles the other party to terminate the contract turns on whether the breach is sufficiently serious as to be considered fundamental or serious.
48. Implied into a contract of employment is a term that requires the employee, during the currency of his or her employment to be loyal to the employer. This includes an obligation not to engage in any competitive activity or to take any steps, beyond those which are merely preparatory, to do so in the future ***Robb v Green* [1895] 2 QB 315** and ***Helmet Integrated Systems v Tunnard* [2007] IRLR 126 (CA)** amongst many other authorities.
49. In ***Mahmood v BCCI* 1997 ICR 607** it was confirmed that every contract of employment contains an implied term that the employer shall not, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee. It is implicit in the case of ***Mahmood v BCCI*** that any breach of the implied term will be sufficiently important to entitle the employee to treat himself as dismissed and the reason for that it is necessary do serious damage to the employment relationship. That position was expressly confirmed in ***Morrow v Safeway Stores Ltd* 2002 IRLR 9**. In the context of a claim for wrongful dismissal, in ***Neary v Dean of Westminster***

[1999] IRLR 288, it was held that to amount to “gross misconduct” the conduct must be such that it 'must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment'.

50. The question of whether there was or was not any conduct that could be categorised as “gross-misconduct” is an objective one for the employment tribunal which must make its own findings of fact and is not bound by any conclusion or belief of the employer.
51. An employer defending a claim of wrongful dismissal is not limited to the matters known and the reasons given at the time of the dismissal. It is open to an employer to rely upon subsequently discovered matters provided that they, or they together with the matters known, justify the dismissal - ***Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 ChD 339**.

Discussions and conclusions

Wrongful dismissal

52. There was no dispute before me that the Claimant was dismissed. Neither party sought to suggest that the terms of the written contract of employment dealing with termination did not reflect their true agreement. Clause 16(1)(a) of that contract provides that the contract could be terminated by giving 3 months' notice in writing. It was not disputed that the Respondent had not given the Claimant 3 months' notice. Clause 16.1(b)(ii) reflects or incorporates the common law position and provides that the contract may be terminated summarily where the employee is guilty of any serious breach or repeated or continued (after warning) any material breach of his/her obligations under the agreement. There was no suggestion before me that there had been any warnings and so, the question was whether there was any serious breach of contract.
53. In its ET3 the Respondent argued that any breach, no matter how slight, of the contractual terms as to confidentiality contained at Clause 14 of the written contract would amount to a serious breach entitling it to dismiss the Claimant. I cannot accept that the parties could ever have intended that to be the case. The definition of confidential information includes “details of employees”. An employee who used another's employees contact details learned through work to arrange an after work drink would be in breach of the terms if taken literally. A breach of the contractual terms as to confidential information could have consequences or potential consequences ranging from trivial to extremely serious. In those circumstances I do not accept that the terms amounted to a condition of the contract whereby any breach would permit the employer to dismiss the employee without notice. Mr Fortune did not spend much time trying to persuade me to the contrary.

54. I would accept that there are many circumstances where it could be said that a breach of the contractual provisions at Clause 14 would amount to a serious breach of contract. In particular, if I were to accept that the Claimant had taken confidential information for the purposes of competing with the Respondent or allowing somebody else to do so I would accept that this would almost always be a serious breach of contract.
55. The Respondent has been able to show that the Claimant sent a copy of the investor pitch to himself. It had also shown that the Claimant downloaded a very large number of files onto his home computer. The Respondent invites me to find that this shows the Claimant acting for his own purposes and the suggestion is forcefully made that he was to use that information for the purposes of competing with the Respondent.
56. My findings above include the fact that Mr Syvak was prepared to share an earlier draft of the investor pitch with the Claimant before he started his employment. I have also accepted the Claimant's evidence that on the afternoon of 23 January 2017 Mr Sivak was working on and discussed the investor pitch with the Claimant. As such he was prepared to share at least some of the contents with the Claimant. This is unsurprising because in a small start up company where the staff are working in close proximity it is very likely that the future of the business would be a frequent topic of conversation. I have read the investor pitch. Many parts of it contain information about the product and the potential clientele. As one of the main salesmen much of the detail would be well known to the Claimant. Much of the document is aspirational. I was not directed to any key part of the document where it was suggested that the information would be of significant use to a competitor. I would accept that any competitor would be assisted by learning of the general business strategy.
57. The Respondent places store on two particular matters (and the wider issue of the downloads). Firstly, it says that the Claimant had no explanation why he had e-mailed the investor pitch to himself. Secondly, they say that the Claimant had tried to cover his tracks by deleting the e-mail that he had sent to his personal address. I shall deal with each in turn.
58. I do not accept that the Claimant gave no explanation of why he had sent the investor pitch to himself. He said that he did so in order to read it. Having accepted that the document had been discussed with him on the day that he sent it I do not consider that to be surprising. The sparse notes of the meeting do record the Claimant as insisting that he had done nothing dishonest. If the only explanation the Claimant could give was that he wanted to read the document, then it is unfair to suggest that he has failed to explain himself. I bear in mind when looking at this point that the allegation was sprung upon the Claimant some weeks after he had looked at the document. I would accept that the Claimant's explanation really amounted to nothing more than curiosity.
59. The suggestion that the Claimant had deliberately attempted to conceal the fact that he had sent the investor pitch to himself by deleting the e-mail he sent from his sent box would be a matter of some weight if it had been demonstrated that deletion of e-mails either sent or received was unusual. Some people might

obsessively 'tidy' their inbox and outbox whereas others leave all e-mails in place. The Claimant gave evidence that he would simply have tidied away the sent e-mail. I have to assess that assertion against the other evidence.

60. The Respondent then urges me to place considerable weight on the fact that the Claimant had downloaded 35,000 documents. I am invited to conclude that this could only be for improper purposes. I have set out above findings about how it could be that this number of documents were downloaded. I have found that the Claimant's theory that the reason so many documents are shown in the audit report was related to a sync function is unlikely. It is understandable why he might believe that this was the case. I have accepted that there was a sync function but accept that that would not have been reflected in the reports. That leaves as a possibility third party actions, hijacking or manual downloading.
61. What is absolutely clear is that the Claimant did not manually download each file by clicking on it and then selecting download. The timing of the downloads rules that out completely. Quite simply that would have been physically impossible. He could have selected multiple files and downloaded them or, as suggested by Mr Syvak, it is a possibility that he downloaded a folder containing numerous files.
62. The question I have to answer is whether the fact that these files were downloaded would support an inference that they were downloaded for a nefarious purpose. There is no suggestion that the Claimant should not have been accessing the server from home provided that he did so in the performance of his duties.
63. I accept that a large download of documents gives a reason to suspect wrongdoing. However, taking all of the evidence into account I am not prepared to accept that there was any deliberate downloading of documents and such downloading that occurred was not for any improper purpose. I have had regard to the following matters in addition to my findings relating to the investor pitch:
- 63.1. There are several downloads including files downloaded repeatedly. If the Claimant was selecting material he need not have done this.
- 63.2. The audit reports do not show the Claimant systematically viewing or pre-viewing documents in advance of any downloads as one might expect if a rogue employee was looking for useful documents. The Claimant could if he had wished accessed important documents without provoking a torrent of practically useless material.
- 63.3. The vast majority of the documents would be of marginal use to a competitor. Further the Respondent did not identify any of the material at all which could be seen as sensitive. Had the Claimant selected customer lists and price lists rather than a random selection of material I may have reached a different conclusion.

- 63.4. I have found that Mr Syvak's audit report shows that on occasions he has downloaded thousands of files in the same way as the Claimant has. If a mass download can be caused by selecting a folder instead of a file then less weight can be placed on the volume of documents downloaded as it could be caused unintentionally in the sense that thousands of documents were downloaded to view just a few. Had documents been selected one by one I would have been more willing to draw the inference invited by the Respondent.
- 63.5. There was no evidence at all that the Claimant had any actual contact with a competitor or that any confidential information has been passed to a competitor. I accept the evidence that the Claimant was introduced to his present employer after his dismissal and through a third party recruitment company.
- 63.6. I note that the Respondent has seen the Claimant's business plans and I have found that they had no connection whatsoever with the Respondent's business.
- 63.7. I have had regard to the Claimant's initial reaction when confronted with his alleged wrongdoing. He immediately stated that he had done nothing dishonest and shortly after that invited Mr Syvak to inspect his computer. That invitation was less likely to be offered if he was guilty of the wrongdoing now suggested.
- 63.8. Finally, there was the evidence of the Claimant himself. He was not the best of witnesses. However, he passionately protested, as he has done all along, that he has done nothing that merited dismissal. Against the background of these other matters I accept his evidence on the crucial point that he never intentionally downloaded the vast number of files relied upon by the Respondent.
64. I cannot be sure why the audit report relating to the Claimant's e-mail address shows the major downloads of documents. I accept that the most likely explanation is selection of a folder rather than a file but a glitch in the report or hijacking of the account are also possibilities. However, there is not any sufficient information before me to find that there was a conscious decision to download all of those files. Even if I am wrong about that I accept the evidence of the Claimant that he did not obtain or download any documents for the purpose of competing with the Respondent.
65. I step back and look at all of the matters in the round and ask whether I could find that the Claimant's actions in e-mailing the investor pitch or downloading documents support an inference that he did so to compete (or assist others) with the Respondent. I find that it is more likely than not that he did not.
66. I have considered whether the Claimant's actions in sending himself the e-mail or as I have found inadvertently downloading files from the Respondent's

server could be a breach of the obligations in respect of confidential information contained in clause 14. I conclude that they were not for the following reasons:

66.1. There is no direct evidence that the Claimant divulged any confidential information to a third party or caused it to be disclosed.

66.2. There is no direct evidence that the Claimant 'used' any confidential information other than for business purposes.

66.3. For the reasons set out above there is insufficient material to support an inference of either improper mode of activity.

67. I would accept that the most likely explanation for the Claimant sending himself the investor pitch was curiosity. The document, or parts of it had been discussed with him. He had seen an earlier draft. The document was available to him by searching the server (even if that had not been the intention). He had not been told that he should not look at it and it was not obvious that he should not. If contrary to my conclusion above, it could be said that an employee satisfying his curiosity about the direction his employer was taking is 'using' confidential information for his own purposes, then I would have found that any such breach of contract was insufficiently serious as to give grounds for a summary dismissal.

68. I therefore conclude that the Claimant was wrongfully dismissed. The Respondent has not satisfied me that the Claimant has failed to mitigate his loss. The Claimant found new employment but it started shortly after the expiry of what would have been the period of lawful notice.

69. The Claimant will not pay tax on any sum he is awarded in respect of his dismissal because the first £30,000 of any sum will be free of income tax – see S403 ITEPA 2003. As such what the Claimant has lost equates to 3 months net pay. Mr Crowley told me, and was not contradicted by Mr Fortune, that that is $£1,576.24 \times 3 = £4728.72$ and I award that sum in damages.

Commission payments

70. The contract of employment is quite clear as to the entitlement to commission payments. It is clearly stated that commission is due on revenue booked whether as a result of the Claimant's sole efforts or "with the executive". Whilst the expression 'the executive' is not defined it must be taken to include Mr Syvak. Any reasonable construction of the provision would require the Claimant to have made some effort into securing the revenue albeit he would not lose out on the commission if he was assisted at any stage by Mr Syvak.

71. The Respondent's case is that the Claimant would only be entitled to commission where he saw a sale through from start to finish. Mr Syvak says at paragraph 16 of his witness statement that that was what was explained to the

Claimant before he started. I do not accept that evidence. I consider that the nature of the business meant that it was inevitable that others would become involved in the sales process at some point. It is also inconsistent with the express terms of the agreement which have been 'personalised' to include the right to commission and contradict the suggestion that the Claimant must carry out the entire sale himself.

72. I further reject the Respondent's suggestion that there was any variation to the written terms of the agreement. The best Mr Syvak can say is that towards the end of 2016 he told the Claimant that he would not be paid commission for sales arising from his first year's work. On this point I prefer the evidence of the Claimant and I do not accept that such a conversation ever took place. I would have expected such a clear departure from the express terms of the contract to have been supported by some documentation. Here there was nothing. Even if I am wrong about that such a proposal could only take effect as an offer and unless accepted would not vary the existing arrangements. An offer might be accepted by conduct but I would need to be able to infer that the conduct supported the inference that the Claimant was prepared to accept the varied terms. The fact that the Claimant continued to work for a number of months is insufficient by itself to support any inference that he accepted that he would not be paid his commission. Accordingly, I reject the suggestion that there was any departure from the written terms of the contract.

73. In its ET3 the Respondent sought to say that the express terms were subject to a number of implied terms. Some of the suggestions were extravagant including a suggestion that the clear contractual terms were subject to an implied discretion reserved to the board. Mr Fortune, wisely in my view, did not seek to persuade me that any of the implied terms could be shown to be necessary to ensure that the contract fulfilled its purposes. I would accept that the express words of the contract should be taken to include (1) a requirement that the Claimant made a material contribution to the sale and (2) a requirement that a contract has been concluded but beyond that I reject any further implied right to withhold commission. In particular I decline to imply any term that commission is payable only if the sale monies are received in the currency of the agreement.

74. In Mr Syvak's witness statement he acknowledges the Claimant's involvement in each transaction. I consider that even on Mr Syvak's account the Claimant is entitled to commission in respect of any transaction where the contract was concluded before the termination of the Claimant's employment.

75. The Claimant has calculated 'revenue' as being the sum inclusive of VAT. I do not consider that the collection of VAT on behalf of HMRC could sensibly be regarded as revenue.

76. I reach the following conclusions in respect of each claim:

76.1. ACCA (Claimant para 34). The Claimant had a material part in securing this business and the contract was signed on 12 January 2017 before the

contract terminated. The revenue was £2500 and hence the commission is £125.00

76.2. ACI (Claimant para 35). The Claimant had a material part in securing this business and the contract was signed on 8 June 2016 before the contract terminated. The revenue was £1500 and hence the commission is £75.

76.3. Capacity Media (Claimant para 36). The Claimant had a material part in securing this business and the first contract was signed on 5 October 2016 before the contract terminated. The revenue was £3800 and hence the commission is £190.00. The second contract was not signed before the Claimant left and I do not consider that that could be counted as 'booked revenue'.

76.4. Civil Society Media (Claimant 37). The Claimant had a material part in securing this business and the initial contract was signed on 17 June 2016 before the contract terminated. A further contract was agreed in the currency of the agreement. The revenue was £2000 then £3650 and hence the commission is £282.50.

76.5. GovNet (Claimant para 38). The Claimant had a material part in securing this business and the contract was signed on 24 September 2016 before the contract terminated. The revenue was £6000 and hence the commission is £300.

76.6. IOM3 (Claimant para 39). The Claimant had a material part in securing this business but the contract was finally signed on 21 March 2017 after the contract terminated. I do not regard that as booked revenue.

76.7. Mark Allen Group (Claimant para 40). The Claimant had a material part in securing this business but the contract was finally signed on 21 March 2017 after the contract terminated. I do not regard that as booked revenue.

77. The total commission due is therefore £972.50 and that is the sum I award. Note that as this sum is payable under a contract of employment whilst I order that the sum is paid gross that does not relieve the Respondent of its obligations to make any PAYE deductions from that gross sum.

78. In the circumstances the Claimant's claims succeed to the extent I have set out above.

Employment Judge John Crosfill

Date 25 June 2018