EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100451/2019

Held in Glasgow on 1,2,3 and 8 May 2019

Employment Judge: M Sutherland

George Miller	**Claimant** **Represented by:** **Mr R Watson, Friend**
Lagan Operations and Maintenance Ltd	**Respondent** **Represented by:** **Ms R Mellor, Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is the Claimant was unfairly dismissed and the Respondent is ordered to pay the Claimant the sum of **Eighteen Thousand, One Hundred and Eighty Pounds (£18,180)** by way of compensation (consisting of a basic award in sum of **Two Thousand, Two Hundred and Eighty Six Pounds (£2,286)** and a compensatory award in sum of **Fifteen Thousand, Nine Hundred and Eighty Four Pounds (£15,984)**).

REASONS

Introduction

1. This is a claim of unfair dismissal.

2. The Claimant was represented by a friend, Mr Watson, who is not legally qualified. The Respondent was represented by counsel, Ms Mellor, Barrister.

3. The Respondent led evidence from Sinead Curran (Head of HR), Sean

Laughlin (Operations & Maintenance Director), Gerard O'Callaghan (Chief Financial Officer), and Nick Fletcher (Chief Operations Officer). The Claimant then gave evidence on his own behalf.

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4. The parties lodged an agreed set of documents. Additional documents were lodged at the start of the hearing.

5. The Claimant confirmed that he sought compensation as a remedy and did not seek re-instatement or re-engagement.

6. The parties made closing submissions.

7. The following initials are used as abbreviations in the findings of fact–

Initials	**Name**	**Title**
GO, CFO	Gerard O'Callaghan	Chief Financial Officer **(Dismissing Officer)**
NF, COO	Nick Fletcher	Chief Operations Officer **(Investigating Officer)**
SC, HHR	Sinead Curran	Head of HR
SL, OMD	Sean Loughlin	Operations & Maintenance Director **(Line Manager)**

Issues

8. The issues to be determined by the Tribunal at this final hearing were confirmed with the parties at the start of the hearing to be as follows –

(i) What was the reason (or, if more than one reason, the principal reason) for the Claimant's dismissal?

(ii) Was the reason for dismissal potentially fair within the meaning of Section 98 (1) or (2) of the Employment Rights Act 1996?

(iii) Was the dismissal fair having regard to Section 98(4) of the Employment Rights Act 1996 including whether in the circumstances the Respondent acted reasonably in treating it as a

sufficient reason for dismissing the Claimant? Did the decision to dismiss (and the procedure adopted) fall within the 'range of reasonable responses' open to a reasonable employer? *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17

(iv) If the reason for dismissal relates to the conduct of the Claimant –

1. Did the Respondent have a genuine belief in the Claimant's guilt?

2. Did the Respondent have reasonable grounds for that belief?

3. Had the Respondent conducted a reasonable investigation into that conduct?

British Home Stores Ltd v Burchell [1978] IRLR 379, [1980] ICR 303

(v) Did the Respondent adopt a reasonable procedure? Was there any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures? Did any procedural irregularities affect the overall fairness of the process having regard to the reason for dismissal?

(vi) If the Respondent did not adopt a reasonable procedure, was there a chance the Claimant would have been dismissed in any event? *Polkey v AE Dayton Services Ltd* 1987 3 All ER 974.

(vii) To what basic award is the Claimant entitled? Did the Claimant engage in conduct which would justify a reduction to the basic award?

(viii) What loss has the Claimant suffered inconsequence of the dismissal? What compensatory award would be just and equitable?

Did the Claimant contribute to his dismissal? Has the Claimant taken reasonable steps to mitigate his loses?

Findings in fact

9. The Tribunal makes the following findings in fact:

10. The Claimant was employed by the Respondent as an Area Manager at its Scottish depot from 5 January 2015 until 24 October 2018.

11. The Claimant was initially employed by Lagan Construction Group Holdings Ltd. In terms of his contract with them the Claimant was "required to devote your full time attention and abilities to your duties during working hours and to act in the best interest of the Company at all times…[and] may not, without the prior written consent of the Company, be in any way directly or indirectly engaged or concerned in any other business or undertaking where there is or is likely to be conflict with the interests of the Company; the Company being the sole arbiter as to whether such conflict exists". On 6 April 2015 16 his employment transferred to the Respondent under 'TUPE'.

12. The Respondent's Code of Conduct provides that: an employee should not engage in activities which would involve a material conflict of interest; "If a conflict of interest or potential conflict of interest arise, immediate full disclosure shall be made to the CEO who shall manage the conflict;" and "In the event that the employee has an interest in any company organisation, which deals or competes with or is likely to deal or compete with the Company, the employee shall declare such interest to the Chairman, CEO or Company Secretary, in order that the Company may take steps to ensure that there is no conflict of interest"; "disclosure of any personal situation or transaction which may be in conflict with the intent of this Code shall be made promptly and in writing to the employee's immediate manager. The manager shall determine what action, if any, the manager should take and what action the employee should take and shall recommend that action in writing for approval by the next higher level of management. If a conflict exists, and there is no failure of good faith on the part of the employee, it will be the Company's policy to allow a reasonable amount of time for the employee to correct the

situation in order to prevent undue hardship of loss. Decisions in this regard shall, however, be within the sole discretion of the Company's management, whose first concern must be in the interest of the Company".

13. The Claimant asserted that a colleague Ian Griffin did not have a noncompetition clause in his contract of employment. Ian Griffin was a consultant rather than an employee.

14. The Respondent's Code of Conduct also provides under the heading "Confidentiality" that "employees shall not, unless authorised to do so, reveal to any person or company any information concerning the Company which is not already in the public domain." The Respondent's Code of Conduct further provides that "Employees shall not make improper use of knowledge, information, documents or other Company resources…No employee shall use confidential information or information about the Company that is not publicly available for their own private gain, or that of others".

15. The Respondent provides operations and maintenance services including traffic management ('TM'). It operates in Northern Ireland, Republic of Ireland and, prior to closure, Scotland. The Respondent is a wholly owned subsidiary undertaking and is part of the Lagan Specialist Contracting Group Holdings Ltd ('the Group'). The Group operates in the UK, Ireland and internationally, employs around 500 staff and has a dedicated HR function based in Belfast to which the Respondent has access. The Group Board has strategic oversight and control of all the subsidiary undertakings including the Respondent.

16. The Claimant reported to SL, OMD as his line manager. SL, OMD was based in Belfast and would visit the Scottish depot once every few months.

17. On 27 June 2018 SL, OMD had a meeting with the Claimant. He advised the Claimant that the Respondent was closing the business in Scotland, that they were not taking on anymore more work, and they had to get out of the M8 and Amey contracts, and that he was being kept on for 3 – 6 months for the M8 adjudication process. The Claimant was directed to service existing work but not take on any new work.

18. The Respondent were contracted to provide TM services to the M8 motorway improvement project. At the time of the redundancy consultations the main works had completed and the Respondent was only involved because of 'snagging' issues. There was an ongoing adjudication process on the M8 contract. The Respondent also had a TM contract with Amey.

19. On 28 June 2018 the Claimant incorporated Signsafe Ltd. Using the Standard Industrial Classification of Economic Activities (SIC) the company's business was described on Companies House as that of "construction of roads and motorways". The Claimant did not advise the Respondent that he had incorporated a limited company. The Claimant has had previous traffic management businesses offering training and consultancy services.

20. In June 2018 HR in Belfast prepared a 'Redundancy Process Document' and an 'At Risk Letter' to be issued to staff in Scotland both of which stated that "the Company [Respondent] will be closing its Operations based in the Scottish Region over the next several months." On 1 July 2018 the Process Document and At Risk Letter were provided to the Claimant for immediate issue to his staff. All employees based at the Scottish depot were advised that they were at risk of redundancy but that the Respondent was exploring options for alternative employment within the Group (either in Northern Ireland or the Republic of Ireland). It was anticipated that staff then contacted other TM businesses in the Scottish region looking for alternative employment. Neither the Process Document nor the At Risk Letter advised staff that the decision to close was confidential. It was therefore likely that competitors were aware that the Respondent was closing its operations in Scotland.

21. On 2 July 2018 the At Risk Letter and Process Document were formally issued to the Claimant as an at risk employee.

22. On 3 July 2018 SL, OMD held a formal redundancy consultation meeting with the Claimant by telephone where he was advised that the Respondent was to close its operations in Scotland but they would need his services for a further 3 to 6 months. The Claimant was advised that he was entitled to a

redundancy payment in sum of £2,286; if not required to work his notice, a payment in lieu of £5151.98 plus car allowance of £473.08 and pension of £257.60; and, with a view to retaining his services prior to termination within the next 3 to 6 months, an incentive bonus of £7,500 conditional upon being a good leaver at date of dismissal and an adjudication bonus of £7,500 conditional upon a positive outcome of the 'M8 adjudication'. Had the Claimant been dismissed by reason of redundancy rather than gross misconduct he would have received payment of the incentive bonus and the adjudication bonus.

23. On 8 July 2018 the Claimant emailed SL, OMD to advise that: he was concerned that if the Respondent put staff on notice they would leave to work elsewhere and there would be no-one to service the M8 contract; he's at risk of being given 3 weeks' notice at anytime during the 3 – 6 month period; "I hope I have a solution that will suit all parties and allow the business to close in as painless a way as possible. I would like to take over the business in Scotland and re-employ the operative and staff". He advised he was 'looking to buy the business' – he would buy the assets, transfer the staff to the new company and take over the M8 and Amey contracts. SL, OMD asked the Claimant to 'put some flesh on the bones' of his proposal which he did on 17 July 2018.

24. On 9 July 2018 the Claimant had a meeting with Amey with a view to Signsafe being considered for undertaking works for them. On 10 July 2018 Amey contacted the Claimant using his work email advising him that Signsafe would first need to go through their formal approval process. (The Claimant was concerned that it would take time to get approved and in the circumstances approval took 5 months.) Whilst at work the Claimant replied to the email asking future related correspondence to be directed to his personal address and he also forwarded the email to his personal address.

25. In July 2018 HR in Belfast prepared a letter which the Claimant issued to his staff on 17 July 2018 stating that "the Company will be closing its Operations based in the Scottish Region over the next several months. The Company is therefore proposing that, unfortunately, [the Respondent] employees

currently based in Scotland will no longer be required following the operational closure of this region".

26. On 17 July 2018 the Claimant emailed SL, OMD noting that: "The key matter in closing Scotland is getting out of the M8 contract, until then we need the depot [staff and assets] … to run the contract; "in the meantime it would be my intention to start a new TM company and take over the customer base…Martin [Scrimgeour] will run the new business while I am currently employed with [the Respondent], I am very aware that this adjudication could have a while to go and can assure you that I am fully committed to seeing this through to conclusion. The new business will utilise the part time workers initially to carry out any works that we pick up…I intend contacting Amey to get the contract moved over to the new business if possible, are you okay with this?...If the new business has any peaks in workload, could I use the full time operatives and [the Respondent] can re-charge back to the new business [to fulfil their minimum hours]...Once [the Respondent] is finished on the M8 contract the new business would seek to buy the asset and take over the lease of the depot, I have checked and there is funding available…With regards to timescales, I am hoping to get tis started in the next 3 to 4 weeks". The Respondent did not respond to this email.

27. On 26 July 2018 the Respondent was advised by an anonymous party that the Claimant was openly approaching suppliers to open accounts in the name of a new TM business that will take over from the Respondent.

28. In late July the Respondent established that they couldn't readily get out of their existing contractual commitments in Scotland and therefore decided to seek new work from existing contracts.

29. On 2 August 2018 the Claimant emailed SC (HR) stating: "Following my recent redundancy consultation due to the closure of the business in Scotland I have been looking at all options regarding my future. Once of these options is to start a new business working with the existing client base in Scotland once [the Respondent] have stopped working for those clients. I have been asked by one of the funders about restrictive covenants that are in my contract

and how these are affected by my redundancy. Can you confirm that any restrictive covenants in my contract would not apply for the new business as I would not be in competition with [the Respondent] once they have closed the Scottish business." SC (HR) forwarded this to SL, OMD asking if he had support for this in principle and suggesting how this might work. On 3 August SL, OMD replied to SC (HR) stating "We have not agreed any such thing with [the Claimant]. He proposed something and we asked for more information. No body agreed he could go away and tell clients he was starting his own [sic] or taking over our clients. If you recall our discussion last week we were talking bout keeping Scotland going." The Claimant was advised by SC (HR) that this was to be discussed further with SL, OMD but the Claimant did not receive any substantive response from the Respondent. SL, OMD did not respond because he was distracted by the whistleblowing email received on 6 August 2018.

30. On 3 August 2018 the Adjudication process was concluded, and the outcome was favourable to the Respondent.

31. On 6 August 2018 the Respondent received an anonymous email to their 'whistleblower' account advising that the Claimant has set up his own company called Signsafe; he is using the Respondent assets and staff; he is working on the new company on Respondent premises and in company time; the police should be called in to investigate this criminal activity.

32. On 7 August 2018 the Respondent appointed NF, COO to conduct an investigation. NF sought to meet with the whistleblower. The whistleblower refused but provided additional information and a copy of a Signsafe compliments slip with the Respondent address and telephone numbers. In early August a law firm was appointed to lead the investigation. A private investigator was also appointed to track the Claimant and his team's actions. The Claimant was not advised of the investigation until the meeting of 3 October 2018.

33. In mid-August the Claimant telephoned SC (HR) looking for a substantive response to his email of 2 August 2018. She directed him to contact SL, OMD. In late August the Claimant chased again for a response.

34. On 30 August 2018 Signsafe agreed a Floating Charge as security for third party financing of the new business.

35. HR in Belfast prepared a letter which the Claimant issued to his staff on 19 September 2018 which stated that "The Company is considering closing its Operations based in the Scottish Region over the next several months…The Company [Respondent] is still making every effort to retain the overall Operations based in the Scottish Region however it has reached a position in respect of your role. The Company proposes that your role is terminated by reasons of redundancy based on the ongoing reduction in workload and turnover and the associated requirement to reduce costs". Second redundancy consultations were held with the Claimant's staff on 25 September 2019. The Claimant did not draw any inference from change of tone from "will be closing" to "considering closing".

36. On 3 October 2018 NF, COO held an investigation meeting with the Claimant. The Claimant had no prior warning of the meeting or an ongoing investigation. The Claimant cooperated fully and the meeting was amicable. The meeting was attended by the Respondent's lawyer who took 8 pages of typed notes. The Claimant advised: that he set up Signsafe at the end of June to carry out Road Traffic Management work; that they have supplied a Shift Traffic and Touchstone Traffic with labour and vehicles but operations have not really started (these were not customers of the Respondent and the work was not in competition); that he and Martin Scrimgeour are the employees and shareholders; that they have registered for VAT and have insurance; and that they have had a nearby base for 3 – 4 weeks; he denied using Respondent staff and equipment to work on Signsafe contracts explaining that they have their own; that they have agreed with the landlord that they are taking over the depot when Respondent leaves; that he has been open, honest and clear with the Respondent about setting up this business having told he was at risk of being dismissed by reason of redundancy on 3 weeks' notice; he had

hoped he could work with the Respondent to make the transition; he has not worked in competition with the Respondent and has not approached the M8/ Amey projects; he has been advised that the Respondent does not want other work in Scotland and that he can only do Amey/ M8 work; that he wanted on the Amey approved lists to get Amey work after the Respondent leaves Scotland. The Claimant was advised by NF, COO that "You can set up another company with permission. If you do not have permission, then you cannot".

37. At the investigation meeting NF, COO advised the Claimant that his investigations and recommend would be passed to his line manager, SL, OMD for him to take appropriate action.

38. On 3 October 2018, immediately after the investigation meeting, the Claimant was suspended by SL, OMD and he was advised by letter of 3 October 2018 that he was being investigation for "[1.] alleged breach of the non-competition clause in your contract of employment; [2.] alleged theft of company property; [3.] alleged mis-use of company resources and property; [4.] and alleged inappropriate behavior towards colleagues."

39. On 3 October 2018 NF, COO held an investigation meeting with David Cunningham ('DC'). DC advised that he did not have much involvement with Signsafe Ltd other than getting drawings prepared and that they have van which has been branded up recently. NF concluded that DC's involvement was minor.

40. On 5 October 2018 NF, COO held a very brief and informal investigation meeting with SL, OMD in a car journey in which SL, OMD denied giving the Claimant permission to set up a TM company in Scotland in competition; stated that he only found out about the company from the whistleblower email; and denied approving the contact with Amey or other potential customers.

41. On 8 October 2018 the Claimant was signed off with an acute reaction to stress and remained off sick until his dismissal.

42. On 9 October 2018 NF, COO prepared a brief handwritten note of his investigation which concluded that the Claimant should have sought

permission to set up a company in competition and that the Claimant has set up a company in competition but does not have consent. NF regarded the main focus of the investigation was the Claimant setting up a company in competition without consent. Of the original four allegations (1. breach of noncompete; 2. theft; 3. misuse of property; 4. inappropriate behavior) he considered that only allegation 1 was to proceed to a disciplinary hearing.

43. In terms of the Respondent's Disciplinary Guidance Note the letter notifying of a disciplinary hearing must contain "details of the issues/ allegations" and "details of the specific issues".

44. On 11 October 2018 the Claimant received notification from GO, CFO to attend a disciplinary hearing which he was to chair on 17 October 2018 in respect of "anti-competitive behavior breaching the Company's code of conduct, breach of your terms and conditions of employment and breach of confidence and trust. (GO, CFO is a member of the Board of the Respondent and also of the Group.) These allegations relate to the establishment of a Company 'Signsafe' by you during the course of your employment with [the Respondent] and without you obtaining the required prior written consent of the Company". The Claimant was provided with an 'investigation pack' which comprised: a copy of his contract; notes of the investigation meetings; Signsafe Companies House profile; redundancy consultation notes of 3 July; correspondence with Amey on 10 July; his email to SC (HR) of 3 August; Signsafe compliments slip; NF investigation note of 9 October; and disciplinary management standard and code of conduct policy. The Claimant was warned of the risk of dismissal and was advised of the right to be accompanied. In addition to the investigation pack GO, CFO was also provided with the private investigator's report regarding the alleged theft which left him with a negative impression of the Claimant and coloured his judgment of him.

45. The Respondent elected to proceed with a disciplinary hearing regarding the "alleged breach of the non-competition clause in your contract of employment" and to put the remaining allegations on hold pending the outcome of that hearing.

46. In the disciplinary hearing notification of 11 October 2018 the Claimant was also advised that a referral would be made to occupational health to provide an opinion on whether he was fit to attend and that if he was unable to attend the disciplinary meeting within a reasonable time frame it would proceed without him. An occupational health appointment was arranged but was held after the disciplinary hearing.

47. On 15 October 2018 GO wrote to the Claimant to advise that in view of his failure to respond to the letter of 11 October and in view of the seriousness of the allegations they were unwilling to delay the disciplinary hearing until he was fit to return to work and asking him to either attend the hearing on 17 October or offering to delay the meeting for a reasonable period. On 16 October 2018 the Claimant advised that he was unfit to attend, that he was willing to attend occupational health, and he offered to explain his position in writing. On 16 October 2017 GO, CFO wrote to the Claimant to advise that the disciplinary hearing had been postponed until the 22 October 2018.

48. On 19 October 2018 the Claimant provided a written submission to be considered at the disciplinary hearing. He explained that he had decided to incorporate Signsafe having been advised that the Respondent was closing in Scotland within the next 3 to 6 months; he understood he could be out of job on 3 weeks' notice; there were not a lot of job opportunities in Scotland for senior managers to TM companies; he decided to start his own business again but had not fully decided if this would be as a consultant, trainer, labour supplier or contractor; he knew it would take time to get the company set up; he had been told by SL, OMD that they were not to take any new orders except for the M8 contract; he had a meeting with Amey in second week of July 2018 with a view to Signsafe being considered for undertaking works for them once the Respondent ceased trading; in late July SL, OMD advised the Claimant that they were now to take new works from Amey and the Claimant advised Amey accordingly; Amey continued to order work until the start of September; Signsafe have never carried out work for Amey; that he was open

about his plans and has kept SL informed of his plans; that SL made a business proposal of which SL sought more detail; that SL provided more

detail but that SL never responded; that he sought confirmation that he was not acting in conflict and/or release from the restrictive covenants but that the Respondent never responded; that it appears that he has been set up in order to have him dismissed as a bad leaver once he was no longer required for the adjudication; he sought clarification as to whether the board were advised of his plans given the need for board approval; he sought confirmation as to whether a deal has been reached regarding the M8 contract; that if SL or the Respondent had responded to his correspondence regarding his plans any issue could have been resolved; and that he was willing to provide any further information that may be required.

49. On 22 October 2018 a meeting was held between GO, CFO and SC, HHR to discuss the disciplinary allegations. GO, CFO noted that: whilst the Claimant was at risk of redundancy he was not under notice of termination; the Signsafe business was operational as a TM business and had two clients; the Claimant had advised Amey that the Respondent would be closing in Scotland; the Claimant had spoken to Amey regarding his personal business intentions during the course of his employment; the Claimant was in correspondence with Amey regarding a personal business proposition with them during working hours using the Respondent email; the Claimant had sought permission to transition activities to Signsafe and that as discipling officer he had not been provided with that information; the Claimant had not been given permission; the Claimant had been operating his own TM company during his employment; that the Respondent is sole arbiter of whether a conflict exists; and that he sought permission but it was not granted.

50. On 22 October 2018 GO, CFO emailed SL, NF and SC seeking further information relevant to the disciplinary allegations. In response on 23 October 2018 SL, OMD advised in writing that: the Claimant was never told he would have 3 weeks' notice and be made redundant – he was told he would have 3 – 6 months' work; SL became aware of the incorporation of Signsafe on 26 July 2018; he believed the Claimant was using Signsafe to take Respondent work for gain and was using Respondent resources to deliver the work; in response to questions regarding the email of 17 July 2018, SC advised that

he spoke to the Claimant a week or so after the email asking for more information and he was not given permission to go after our clients; he had advised the CEO of the Claimant's request for permission; and that the Claimant's email of mid-July was answered verbally by him and at least two discussions took place around it.

51. On 23 October 2018, in response to GO's request for further information, SL, OMD advised in writing that: the Claimant telephoned her on 2 August 2018 seeking an exemption to his restrictive covenant post termination of his employment; that in late August the Claimant chased her regarding a response to his email of 5 August and she suggested that he make contract with directly.

52. On 23 October 2018, in response to GO's request for further information, NF advised in writing that: the investigation into the theft of company equipment was ongoing; that there was evidence that company equipment was stored off site and that they should consider including these allegations in the disciplinary; the Scottish business has been losing money since April 2018 and "this is at best incompetence of GM and at worst [Respondent] labour and equipment being use do to do work for clients with Signsafe being paid"; there was no written response to the email of 17 July.

53. In response to GO, CFO's request for further information he was also provided with the email of 17 July 2018 from the Claimant to SL, OMD. He was never provided with the email of 8 July 2018 from the Claimant to SL, OMD.

54. In terms of the Respondent's Disciplinary Guidance Note "If the disciplinary manager considers that further investigations are appropriate, they should reconvene the meeting to advise the employee of this. Once further investigation has been undertaken, the meeting must be reconvened to give the employee an opportunity to respond to the findings before a decision is reached". The Claimant was not provided with a copy of the request for further information on 22 October or the written responses on 23 October and was

not given an opportunity to respond to the findings before a decision was reached.

55. On 24 October 2018 GO, CFO wrote to the Claimant with the outcome of the disciplinary hearing. He advised the Claimant that: he was summarily dismissed; GO, CFO had sought additional clarification after the meeting from NF, SL and SC; GO, CFO had reviewed the email of 17 July 2018; the Claimant was not under notice of termination but rather at risk of redundancy; this uncertainty did not provide reasonable grounds for him to incorporate his new company and to commence trading as a TM business whilst he was still employed within a TM business with the Respondent; he was in correspondence with a customer about his future personal business plans during normal working hours and using company systems; he did not receive a formal response to his business proposal and request for release from the covenants; a failure to respond could not in any way infer or imply agreement; SL, OMD is a member of the Respondent board; his at risk status, his notification of his plans and the absence of response, did not amount to mitigation of his breach of his obligations; he was dismissed because his establishment of Signsafe Ltd and its live operations had created a likely conflict of interest; he did not make immediate full disclosure to the Respondent; he did not disclose the incorporation or his directorship of Signsafe Ltd; he revealed commercially sensitive information with Amey regarding the business closure for his own benefit; Signsafe Ltd is an operational traffic management company with at least two clients; he was targeting at least one customer of the Respondent, Amey, during working hours and using company resources to do so; he had not therefore devoted his full time and attention and abilities to his duties during working hours and had not acted in the best interest of the company at all times; whilst he had sought consent it had not been provided and the lack of response could not reasonably have been interpreted as implied consent; he disclosed confidential information to Amey in breach of trust and confidence; Signsafe

Ltd is trading from the Respondent offices. The Claimant had a clean disciplinary record prior to his dismissal.

56. At the time of the disciplinary hearing GO, CFO regarded the incorporation of a company intended to engage in traffic management activities as setting up in competition. At the time of the disciplinary hearing, GO, CFO had not appreciated that the Claimant had been told that the Scottish Operation was closing – he had understood it was simply a proposal at that stage. He had not appreciated that the setting up of Signsafe was tied to the closure of the Scottish operation. He had not appreciated that the Claimant had been advised that in late June and in early July that the Respondent would only need his services for a further 3 to 6 months – he had focused on the fact that formal notice of termination had not yet been issued. GO, CFO stated that had he appreciated this at the time of the disciplinary hearing he would not have regarded the Claimant's conduct as gross misconduct and he would not have dismissed him. He accepted that the emails of 8 and 17 July 2018 showed that the Claimant acted in good faith.

57. The Claimant was advised of his right of appeal but the Claimant did not appeal.

58. The Claimant was 48 years old as at the date of termination.

59. The Claimant's net monthly income from the Respondent at termination was £4,832.56; his car allowance was £648 a month.

60. The Claimant did not apply for alternative employment after termination but instead sought to advance his Signsafe business. On 29 November 2018 the Respondent's lawyers wrote to actual and potential customers of Signsafe Limited advising that it was set up in direct competition with the Respondent in breach of his contract; that he was been dismissed; and that his conduct has been reported to the police following his admissions to taking and using Respondent property for the Signsafe business. These letters were likely to have had an impact on his ability to advance that business. The Signsafe business failed to make any profit in the first 6 months and no dividends, drawings or salaries were paid.

61. The Claimant has not been in receipt of any benefits since the termination of his employment.

62. On 21 December 2018 the Respondent closed their operations Scotland other than in relation to remedial works. All remaining employees of the Scottish depot were dismissed by reason of redundancy.

Observations on the evidence

63. Both the Claimant and the Dismissing Officer gave their evidence in a measured and consistent manner and there was no reasonable basis upon which to doubt the credibility and reliability of their testimony. They answered the questions in full, without material hesitation and in a manner consistent with the other evidence. Under cross examination the Dismissing Officer accepted that had he properly appreciated all the material facts at the time of the disciplinary hearing he would not have taken the decision to dismiss.

64. The standard of proof is on balance of probabilities, which means that if the Tribunal considers that, on the evidence, the occurrence of an event was more likely than not, then the Tribunal is satisfied that the event did occur.

65. SL, OMD asserts that in late August 2018 he advised the Claimant that they were no longer closing their Scottish operations and that he should start to look for new work from new clients once they had established themselves. The Claimant categorically denies this. SL, OMD was vague about how and when the Claimant was so advised. SL, OMD was vague about whether this was by phone or in person and about the date. The Respondent's focus was upon the whistleblowing email received on 6 August 2018. Unlike other staff the Claimant did not receive a second consultation letter advising him that they were no longer closing their Scottish Operations. Unlike other staff the Claimant was not invited to a second consultation meeting. The Respondent closed their Scottish operations in December 2018. In the circumstances it is considered unlikely that the Claimant was advised by SL, OMD that there were no longer closing their Scottish operations.

Relevant Law

66. Section 94 of Employment Rights Act 1996 ('ERA 1996') provides the Claimant with the right not be unfairly dismissed by the Respondent.

67. It is for the Respondent to prove the reason for his dismissal and that the reason is a potentially fair reason in terms of Section 98 ERA 1996. At this first stage of enquiry the Respondent does not have to prove that the reason did justify the dismissal merely that it was capable of doing so.

68. If the reason for his dismissal is potentially fair, the Tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair under Section 98(4) ERA 1996. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant. At this second stage of enquiry the onus of proof is neutral.

69. If the reason for the Claimant's dismissal relates to his conduct, the Tribunal must determine that at the time of dismissal the Respondent had a genuine belief in the misconduct and that the belief was based upon reasonable grounds having carried out a reasonable investigation in the circumstances (*British Home Stores Ltd v Burchell [1978] IRLR 379*, *[1980] ICR 303*).

70. In determining whether the Respondent acted reasonably or unreasonably the Tribunal must not substitute its own view as to what it would have done in the circumstances. Instead the Tribunal must determine the range of reasonable responses open to an employer acting reasonably in those circumstances and determine whether the Respondent's response fell within that range. The Respondent's response can only be considered unreasonable if the decision to dismiss fell out with that range. The range of reasonable responses test applies both to the procedure adopted by the Respondent and the fairness of their decision to dismiss (*Iceland Frozen Foods Ltd v Jones [1983] ICR 17 (EAT))*.

71. In determining whether the Respondent adopted a reasonable procedure the Tribunal should consider whether there was any unreasonable failure to comply with their own disciplinary procedure and the ACAS Code of Practice on Disciplinary and Grievance Procedures. The Tribunal then should consider whether any procedural irregularities identified affected the overall fairness of the whole process in the circumstances having regard to the reason for dismissal.

72. Any provision of a relevant ACAS Code of Practice which appears to the Tribunal may be relevant to any question arising in the proceedings shall be taken into account in determining that question (Section 207, Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code of Practice on Disciplinary and Grievance Procedures provides in summary that –

    (i) Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.

    (ii) Employers and employees should act consistently

    (iii) Employers should carry out any necessary investigations, to establish the facts of the case.

    (iv) Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.

    (v) Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.

    (vi) Employers should allow an employee to appeal against any formal decision made

73. Compensation is made up of a basic award and a compensatory award. A basic award, based on age, length of service and gross weekly wage, can be reduced in certain circumstances.

74. Section 123 (1) of ERA provides that the compensatory award is such amount as the Tribunal considers just and equitable having regard to the loss sustained by the Claimant in consequence of dismissal in so far as that loss is attributable to action taken by the employer.

75. Where, in terms of Section 123(6) of ERA, the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, then the Tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

76. An employer may be found to have acted unreasonably under Section 98(4) of ERA on account of an unfair procedure alone. If the dismissal is found to be unfair on procedural grounds, any award of compensation may be reduced by an appropriate percentage if the Tribunal considers there was a chance that had a fair procedure been followed that a fair dismissal would still have occurred (Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL)). In this event, the Tribunal requires to assess the percentage chance or risk of the Claimant being dismissed in any event, and this approach can involve the Tribunal in a degree of speculation.

77. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA") provides that if, in the case of proceedings to which the section applies, it appears to the Tribunal that the claim concerns a matter to which a relevant Code of Practice applies, and the employer or the employee has unreasonably failed to comply with the Code in relation to that matter, then the Tribunal may, if it considers it just and equitable in all the circumstances, increase or decrease the compensatory award it makes to the employee by no more than 25%. The ACAS Code of Practice on Disciplinary & Grievance Procedures is a relevant Code of Practice.

Respondent's submissions

78. The Respondent's oral submissions were in summary as follows: - 79.

The reason for dismissal was not challenged as a sham or disingenuous.

80. The reason for dismissal was conduct which is potentially fair. There was no evidence that his belief in misconduct was not genuine.

81. In determining whether the employer acted reasonably the Tribunal should not substitute its own views for that of the employer

82. In assessing the reasonableness of a disciplinary process it is necessary to look at the procedure as a whole

83. The reason for dismissal was setting up a company in competition without permission, failing to make full and immediate disclosure of his company's activities, giving confidential information to Amey and using company property to progress his business. This amounted to a fundamental breach of contract. This was a traffic management business and whilst these were not customers of the Respondent they might have been.

84. The Claimant failed to intimate the name of the company and the fact it had been incorporated. It was an act of bad faith to incorporate a traffic management company before the closure of the Respondent's Scottish operations.

85. It was initially a proposal to close Scotland rather than a decision.

86. The absence of any reply to either the Claimant's proposal or the request regarding the restrictive covenant did not imply acquiescence or consent.

87. The information which came to light during the supplementary investigation conducted by the Dismissing Officer (and not shared with the Claimant) was not of material relevance and therefore made no difference.

88. The Claimant contributed to his dismissal by 25% by not seeking the additional information.

89. By failing to appeal the Claimant failed to comply with the ACAS Code and any compensatory award should be reduced by 25%.

90. The Claimant would have been dismissed in any event by reason of redundancy on 21 December 2018.

Claimant's Submissions

91. The Claimant's written submissions were in summary as follows: -

92. The Claimant informed the Respondent of his intention to start a new business within 3 to 4 weeks and to take over the Respondent's business in Scotland following the closure of its operations there. The Respondent failed to properly consider the context which was a proposal to release them from their obligations in Scotland. The Respondent had already intimated that they were doing everything that they could to get out of the Amey and M8 contracts and had told the Claimant not to accept any new work.

93. Signsafe did not trade immediately. It was unclear whether Signsafe would offer training, consultancy, design or contracting. When Signsafe did start to trade it was not operating in competition with the Respondent – it was not undertaking the same type of work. The Claimant had been instructed not to take on any new work for the Respondent.

94. There are no emails, minutes or other evidence that the Claimant had been advised of a change of plan to keep Scotland open (apart from the testimony of SO, OMD). The communication with his staff did not advise that Scotland was no longer to close but to remain open as a depot.

95. Disclosures of a conflict interest should be made promptly in writing to a line manager and the Claimant complied with this requirement

96. There was no failure of good faith and the Respondent failed to allow the Claimant a reasonable time to correct the situation in compliance with the Code of Conduct. This was not considered by the Dismissing Officer.

97. The Claimant / Signsafe has never contacted Amey on the South East Unit to solicit work from them. The contact with Amey was with a view to becoming an approved supplier on a centralized approvals system.

98. Spending 20 seconds reading and sending a personal email did not amount to a failure to devote his full time, attention and abilities to his duties during working hours

99. The Claimant was not told to advise all staff who were at risk of redundancy that closure of the Scottish operations was confidential. Such employees would have looked for alternative employment under explanation that the Respondent was closing its Scottish operations. Further the Claimant required to explain to Amey why the Respondent couldn't accept additional orders.

100. The Respondent failed to raise with the Claimant that there was an issue with his business proposal. Following his supplementary investigations, the Dismissing Officer was under the impression that SL, OMD was waiting further information from the Claimant – if the claimant had been provided with the supplementary investigation he could have corrected this false impression.

101. The letter head / compliments slip was a draft for use upon closure of the Scotland depot which the Claimant had arranged to lease.

102. The investigating officer failed to properly interview SL, OMD either properly, thoroughly or in a balanced manner.

103. The investigation officer failed to produce an investigation report setting out his inferences and recommendations.

104. The investigation officer was biased against the Claimant when in the supplementary investigation he describes the Claimant as either incompetent or fraudulent in Respondent equipment being used to undertake Signsafe work.

105. SC, HR advised the Dismissing Officer that OH had stated that the Claimant was fit to attend the hearing. This gave a misleading impression of the Claimant who was not in fact seen by OH until after the disciplinary hearing.

106. The Dismissing Officer was not impartial and had an unfavourable impression of the Claimant from the whistleblowing email and from the private investigators report.

107. The Claimant was denied the opportunity to consider and respond to the supplementary investigation. The supplementary investigation contained

false information namely that “a request was made by [SL, OMD] for [the Claimant’s] plans. No response has been seen”

108. The dismissing officer readily accepted that had he known the context he would not have dismissed.

109. The Claimant seeks compensation for damage to his business reputation in light of the letters sent to possible clients on 29 November 2018

Decision

110. The Claimant was dismissed by the Respondent on the grounds: that he had incorporated Signsafe Ltd and become a director thereof without immediate and full disclosure to the Respondent and without their prior written consent; that Signsafe had commenced trading as a traffic management business whilst he was still employed in a traffic management business with the Respondent and that this amounted to a conflict of interest which he had failed to disclose; that he had informed a customer, Amey of the business closure in Scotland and had thereby revealed commercially sensitive confidential information for his own benefit; that he was in email correspondence with a customer, Amey about his personal business plans during normal working hours and had therefore used company resources in furtherance of his own interests and contrary to the best interests of the company.

111. There was no evidence that the dismissing officer had another reason in mind when he made the decision to dismiss. The Tribunal therefore concludes that the reason for dismissal was the stated ground. This reason related to his conduct and that is a potentially fair reason within the meaning of Section 98(1) of the ERA 1996.

112. In terms of his contract the Claimant was required to devote his full time and attention to his duties during working hours and to act in the best interests of the Company at all times; and not, without prior written consent, be in any

way directly or indirectly engaged or concerned in any other business or undertaking where there is or is likely to be conflict with the interests of the

Company; the Company being the sole arbiter as to whether such conflict exists.

113. There were potential issues with the enforceability of the covenant. It was concerned with the interests of Lagan Construction Group Holdings Ltd and would remain restricted to those business interests on transfer under TUPE. It also applied to any conflict of interest however small and indirect. Nevertheless, the Respondent's Code of Conduct prohibits a material conflict of interest and requires immediate full disclosure to the Respondent (the Code is inconsistent about whether disclosure is made to the CEO or to an employee's line manager who should consult with their line manager).

114. The Respondent's Code of Conduct also provides that employees shall not, unless authorized to do so, reveal any confidential information concerning the Company which is not already in the public domain and further that employees shall not make improper use of company resources.

115. The investigating officer interviewed the Claimant, SL (OMD), and DC.

116. The Claimant did not receive any invitation or prior warning of the investigation meeting. The interview with the Claimant was formal (in that it was attended by the Respondent's lawyer who took 8 pages of typed notes). In his investigation interview the Claimant was open about the incorporation of Signsafe; the nature of its trading (with Shift Traffic and Touchstone); that he was told the Respondent was closing operations in Scotland; that he was getting made redundant; that he had been clear about setting up a business; that he is not working in competition – he was told by the Respondent that they can only work for Amey and the M8 contract; that he wanted to work with existing clients once the Respondent had ceased its Scottish operations.

117. By contrast the investigating officer's interview with SL, OMD as his line manager was highly informal and incredibly brief. It did not adequately explore: what SL, OMD had advised the Claimant regarding the closure of Scottish operations and the restricted trading; nor the whether the closure or restricted trading meant the Claimant's new business was not likely to be in competition/ conflict; nor what SL, OMD knew about the setting up of the

Claimant's new business; nor whether the alleged confidential information was already in the public domain. SL, OMD simply said he hadn't given permission to set up a company in competition; he found out about the company from the whilstleblower investigation; and he did not give approval to contact Amey.

118. The invite to the disciplinary hearing warned of the risk of dismissal and the Claimant was advised of his right to be accompanied. The Claimant was advised that the allegations "relate to the establishment of a Company 'Signsafe' by you during the course of your employment with [the Respondent] and without you obtaining the required prior written consent of the Company". The Claimant was provided with the Investigation Officers Note of the Investigation which focused entirely on the establishment of Signsafe without consent. Neither the invite nor the note advised of allegations regarding disclosure of commercially sensitive information or the use of company resources during working hours.

119. An investigation pack of papers was provided to the Claimant and the dismissing officer. In addition to the investigation pack the dismissing officer was also provided with the private investigator's report regarding the alleged theft (which was never provided to the Claimant for comment). The dismissing officer said this report left him with a negative impression of the Claimant and coloured his judgment of him.

120. The Claimant was also advised that a referral would be made to occupational health to provide an opinion on whether he was fit to attend the disciplinary hearing, but the occupational health appointment was not held until after the disciplinary hearing.

121. The Claimant provided a written submission to be considered at the disciplinary hearing. From the information contained in the investigation pack and the Claimant's disciplinary submission it was apparent that: the Claimant had been advised that the Respondent was closing its operations in Scotland within the next 3 to 6 months; in the meantime he was not to take any new orders except for the M8 contract; within 3 months he was at risk of being made redundant on 3 weeks' notice; he decided to start his own business

again potentially as a consultant, trainer, labour supplier or contractor; he had incorporated Signsafe to enable the new business to be set up; he advised SL, OMD that he was proposing to buy the Scottish business and take over the staff, assets and the M8 and Amey contracts; he had a meeting with Amey in second week of July 2018 with a view to Signsafe being considered for undertaking works for them once the Respondent ceased operations in Scotland; whilst at work on 10 July he had received and briefly replied to an email from Amey regarding the approval process for the new business which he directed to his personal email address; on 17 July he advised SL, OMD that he intended start a new TM company before the Respondent closed their Scottish operations and ultimately take over the Respondent customers; he wanted to transfer assets and staff upon closure and he wanted to contact Amey to get their contract moved over to the new business; with regards to timescales he hoped to get started in the next 3 to 4 weeks; the Respondent did not respond to this email; in late July SL, OMD advised the Claimant that they were now to take new works from Amey; Signsafe have never carried out work for Amey; and in August the Claimant had sought confirmation that he was not acting in conflict and/or release from the restrictive covenants but that the Respondent never responded.

122. The dismissing officer conducted a supplementary investigation. During the course of that investigation SL, OMD stated that he believed the Claimant was using Signsafe to take the Respondent work for gain and was using Respondent resources to deliver the work; in response to questions regarding the email of 17 July 2018, SC advised that he sought more information and he was not given permission to go after our clients and that the Claimant's email of mid-July was answered verbally by him and at least two discussions took place around it. This version of events was at best misleading and at worst inaccurate. The supplementary investigation was not shared with the Claimant and he had no opportunity to deny that version of events.

123. During the course of the supplementary investigation, the investigation officer advised the dismissing officer that the investigation into the theft of company equipment is ongoing; that there is evidence that company equipment was

stored off site and that they should consider including these allegations in the disciplinary; the Scottish business has been losing money since April 2018 and "this is at best incompetence of GM and at worst [Respondent] labour and equipment being use do to do work for clients with Signsafe being paid". The supplementary investigation was not shared with the Claimant and created an unfavourable impression of him on which the Claimant had no opportunity to comment.

124. At the time of his dismissal, the dismissing officer believed that the Claimant had incorporated Signsafe Ltd and became a director thereof without immediate and full disclosure to the Respondent and without their prior written consent; that Signsafe had commenced trading as a traffic management business whilst the Claimant was still employed in a TM business with the Respondent and that this amounted to a conflict of interest which he had failed to disclose; that he had informed a customer, Amey of the business closure in Scotland and had thereby revealed commercially sensitive confidential information for his own benefit; that he was in email correspondence with a customer, Amey about his personal business plans during normal working hours and had therefore used company resources in furtherance of his own interests and contrary to the best interests of the company. There was not however a reasonable basis for the Dismissing

Officer's belief that the Claimant had done so having regard to the evidence available to him. Furthermore there was not a reasonable basis for that belief based upon a reasonable investigation.

125. The Respondent did not comply with the material requirements of their own disciplinary procedure or the ACAS Code of Practice on Disciplinary and Grievance Procedures. There were material facts which no employer acting reasonably in the circumstances would have failed to establish or consider namely: what the Claimant had been advised regarding the closure of Scottish operations and the restricted trading; whether the closure or restricted trading meant the Claimant's new business was not likely to be in competition/ conflict; what his line manager knew about the setting up of the

Claimant's new business; and whether the alleged confidential information was already in the public domain. These material lines of enquiry which were not pursued with materially relevant witnesses. These material issues were not adequately considered. Furthermore the Claimant was not fully informed of the allegations under consideration nor all the evidence being relied upon and the Claimant was therefore denied the opportunity to put his case in response before any decision was made. In addition there was information provided only to the dismissing officer which was not relevant to the allegations but which coloured his judgment of the Claimant.

126. Considering the disciplinary process as a whole, and having regard to the reason for dismissal, the procedure adopted did not fall within the range of reasonable responses open to an employer acting reasonably in the circumstances. No employer acting reasonably in the circumstances would have adopted this approach.

127. At the Tribunal hearing the dismissing officer accepted that had he appreciated that the Claimant had been advised that their Scottish operation was closing, and that his services would only be required for a further 3 – 6 months, he would not have regarded his conduct as gross misconduct and he would not have dismissed him. The dismissing officer also accepted that had he appreciated that his line manager knew about the setting up of the Claimant's new business held would have considered the Claimant to have acted in good faith. Had his judgement not been coloured, the Dismissing Officer would have been aware of this from the Claimant's written submission to the disciplinary hearing (which was not contradicted by the other evidence available at the disciplinary hearing).

128. The Tribunal therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted out with the band of reasonable responses (including the procedure adopted) in treating the reason given as a sufficient reason for dismissing the Claimant in the circumstances (including the size and administrative resources of the Respondent's undertaking).

Basic Award

129. The Claimant is entitled to a basic award of £2,286 (3 weeks x 1.5 x £508).

130. The Claimant contributed to his dismissal by reason of his incorporation of Signsafe and his intention to trade in traffic management, albeit not in competition given the impending closure; although he had given notice of a potential conflict of interest, he had not given prior notice; he had revealed information to Amey although likely to be in the public domain, which may not have been known to them; and he had undertaken personal work during working hours, albeit minimal. This conduct was blameworthy but only to a minor extent. The basic award is the same as the redundancy payment he would have received had he been dismissed by reason of redundancy. The Claimant would have been dismissed by reason of redundancy had he not been unfairly dismissed for gross misconduct by the Respondent. In these circumstances it is considered just and equitable not to make any reduction to the basic award.

Compensatory Award

131. If the Claimant had not been dismissed for gross misconduct he would have been dismissed by reason of redundancy on 21 December 2018. Given that the outcome of the adjudication was known by 3 August 2018, he would have received requisite notice of termination under his contract and would not therefore have received a payment in lieu of notice. He would however have received net earnings (including car allowance) from his dismissal until 21 December 2018 in sum of £8,921.65 (£57,990 a year / 8 weeks). He would also have received net pension losses of £446.08 (5% employer contribution). He would also have received his incentive bonus in sum of £7,500 and his adjudication bonus also in sum of £7,500 (both gross). Applying basic rate tax of 20% and employee NI contribution of 12% provides a net figure of £10,000. Award for loss of statutory rights is £500. His total award before any reductions is therefore £19,867.73.

132. Given the impending closure of Scottish operations and the restricted trading; that his line manager knew about the setting up of the Claimant's new

business which was unlikely to be in competition/ conflict; and that the alleged confidential information was likely to be in the public domain, it cannot be said that a fair procedure would have resulted in his fair dismissal in any event. Accordingly there should be no Polkey deduction.

133. The ACAS Code provides that where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. The Claimant did not appeal and thereby failed to comply with the ACAS Code. The dismissing officer was the Chief Financial Officer who is a member of the board of both the Respondent and the Group. The letter of appeal did not advise that the appeal would be to someone more senior or independent. Whilst the failure to appeal was unreasonable in the circumstances there was not however a wholescale failure to comply with the ACAS Code by the Claimant. Although the Claimant was unfit to attend the disciplinary hearing he did cooperate fully with the investigation and also gave a detailed written account of his version of events to the disciplinary hearing.

134. However the ACAS Code also provides that employers should carry out any necessary investigations, to establish the facts of the case and should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made. The investigation did not establish certain materially relevant facts regarding what the Claimant had been advised about the closure of Scottish operations and the restricted trading; whether the closure or restricted trading meant the Claimant's new business was not likely to be in competition/ conflict; what his line manager knew about the setting up of the Claimant's new business; and whether the alleged confidential information was already in the public domain. Furthermore the notification of the hearing did not inform the employee of the allegations regarding disclosure of commercially sensitive information or the use of company resources during working hours. In addition the Claimant was not given an opportunity to raise points about the information provided by witnesses during the additional investigation. The Respondent therefore

failed to comply with the ACAS Code. Whilst these failures were unreasonable in the circumstances there was not however a wholescale failure to comply with the ACAS Code by the Respondent.

135. In the circumstances it is not considered just and equitable either to increase or reduce the compensatory award because there were failures to comply with the ACAS Code on the part of both the Respondent and the Claimant.

136. The dismissal was contributed to by the Claimant by reason of his incorporation of Signsafe and his intention to trade in traffic management albeit not in competition given the impending closure and restricted trading; although he had given notice of a potential conflict of interest he had not given prior notice; he had revealed information to Amey which may not have been known to them; and he had undertaken personal work during working hours, though minimal. This conduct was blameworthy but only to a minor extent and it would be just and equitable to reduce the compensatory award by 20% to £15,984.18 (£19.867.73 x 80%).

137. The Claimant was not in receipt of benefits and Recoupment Regulations do not therefore apply.

Employment Judge **M Sutherland**

Date of Judgment **31 May 2019**

Date sent to parties **04 June 2019**

I confirm that this is my judgment in the case of Miller v Lagan Operations and Maintenance 4100451/2019 and that I have signed the judgment by electronic signature.