Case Number: 3329021/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J McCambridge	**v**	**Jagex Ltd**

Heard at: Bury St Edmunds **On:** 14 March 2018

Before: Employment Judge S King

Appearances
For the Claimant: In person
For the Respondent: Mr D Dyal (Counsel).

RESERVED JUDGMENT

1. The claimant was unfairly dismissed.

2. The claimant was wrongfully dismissed.

RESERVED REASONS

1. The claimant was unrepresented. The respondent was represented by Mr Dyal (counsel). I heard evidence from the claimant. I heard evidence from Mr David Osborne and Mr Conor Crowley on behalf of the respondent. The claimant and respondent exchanged witness statements in advance, and prepared an agreed bundle of documents which ran from pages 1 to 208.

2. At the outset the claims were identified as unfair dismissal and wrongful dismissal. The claimant confirmed that his ticking of the boxes related to arrears of pay, other payments and other claims merely related to the claims of unfair dismissal and wrongful dismissal. The hearing therefore proceeded to deal solely with these two claims.

3. The claimant being an employee with the requisite service to bring a claim. The issues as to liability were identified at the outset of the hearing as follows:

Unfair dismissal

3.1 What was the reason for dismissal? The respondent alleges conduct.

3.2 Did the respondent hold a genuine belief in the claimant's misconduct?

3.3 Did the respondent hold that belief in the claimant's misconduct on reasonable grounds? The claimant's challenges to unfair dismissal are; excessive response to the conduct, circumstances of disclosure, no one else faced disciplinary action, the policy is now changed and mitigation was not considered.

3.4 Was the decision to dismiss a fair sanction i.e. within the range of reasonable responses for a reasonable employer?

3.5 If the dismissal was unfair, did the claimant contribute by culpable conduct which requires the respondent to prove that the claimant committed an act of gross misconduct alleged?

3.6 Does the respondent show that if there had been a fair procedure then he would have been dismissed in any event, and if so, what was the % chance or when?

Wrongful dismissal

3.7 Did the claimant commit an act of gross misconduct?

3.8 If not, is there a breach of contract by the employer in failing to pay notice?

3.9 Has the claimant suffered a loss as a result?

The Law

Unfair dismissal

4. Dismissal under s.95 of the Employment Right Act 1996 not being in dispute, the claimant has the right not to be unfairly dismissed by the respondent under s.94 of the Employment Rights Act 1996.

5. S.98 of the Employment Rights Act 1996 states that:

> **"98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) is that the employee was redundant, or
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
>
> (3) ….
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.
>
> (5) ….
>
> (6) …."

6. In conduct cases one must have regard to the case of British Homes Stores Ltd v Burchell [1980] ICR 303 which set out a three-step test where the respondent must hold a reasonable belief, formed on reasonable grounds and following a reasonable investigation. Regard must also be had to the ACAS Code of Practice on Discipline and Grievance (COT1).

7. In addition, the respondent's representative drew my attention to a number of authorities as follows:

   Hadjioannou v Coral Casinos Ltd [1981] IRLR 352;
   Securicor Ltd v Smith [1989] IRLR 356;
   Paul v East Surrey District Health Authority [1995] IRLR 305; and
   Taylor v OCS Group Ltd [2006] IRLR 613.

8. I have had regard to these cases. I have also had regard to the authorities of Bowater Northwest Hospitals NHS Trust [2011] IRLR 331 and Newbound v Thames Water Utilities Ltd [2015] IRLR 734.

Wrongful dismissal

9. The claimant has the right to minimum notice under s.86 of the Employment Rights Act 1996 save that s.86(6) states that:

> "(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party."

Findings of Fact

10. The claimant was employed by the respondent from 13 June 2011 as a concept artist. In January 2016, the claimant was promoted to lead concept artist. The claimant managed a team of four people. He made recommendations with regards to their pay but was not the ultimate decision maker in that regard.

11. The respondent is a developer and publisher of online browser-based computer games and employs around 320 people. The respondent's main computer game is said to be the world's most popular free multi player online game with monthly players running to millions world-wide. The claimant was involved in this project.

12. On Thursday 24 August 2017 the claimant went to work early as usual. At around 7am he printed some documents. In order to print documents using the respondent's system one was required to send them electronically to the printer. Then when you arrived at the printer you had to use either your password or swipe your identity card at the printer in order to allow the printer to print. As the claimant lifted his printing, he found a document printed by a Mr Hamza Muddasir which was not provided in redacted form for the purposes of this hearing. The claimant concluded that this had been left at the printer from the previous day given the time the claimant found the document.

13. The document was a Word type document in a letter format. It was a non-work-related document linked to a visa application for Mr Muddasir's mother-in-law and contained details of Mr Muddasir's salary.

14. Mr Muddasir was a senior member of the respondent. He was not a statutory director or on the board. He was not the claimant's line manager.

15. The respondent carried out quarterly reviews amongst its staff (glint reviews) and pay was a feature of dissatisfaction. There also existed within the respondent at the time a culture of them and us with regard to the executives. There was a level of disquiet about the level of pay received by the developers compared to the executives. It was not common knowledge as to the salary of the executives. The claimant was aware that pay was concern for staff. There were no contractual provisions that prevented discussions on pay.

16. The claimant left the document on the printer and continued to focus on his work. The claimant assumed that Mr Muddasir would collect it later that day and left it on top of the flat confidential recycling bin where occasionally abandoned prints are left and returned to his desk.

17. Another individual, Matt Heath who was an events executive for the respondent and more senior than the claimant noticed the same document at the printer at around 8am on Thursday 24 August 2017, and Matt Heath left the document there as the claimant had done.

18. Later that morning when the claimant was next at the printer he noticed the document was still there. At that point a colleague Stuart Murray was walking past. The claimant pointed out the document to Stuart Murray and the two of them then proceeded to the kitchen. They discussed the salary and in the claimant's words "gossiped" about the same.

19. The same day unbeknown to the claimant a team of nine employees of the respondent were at a work event off site. The senior lead on the day was a Joe Redstall. He received a text from Alan who was a junior member of staff with details of the salary of Mr Muddasir. The respondent does not appear to have spoken to Alan as to how he came by the information. Mr Redstall was subsequently interviewed and he said he believed Alan had had the information from someone finding it at the printer and that someone was the claimant. The claimant did not expressly tell Alan.

20. Joe Redstall discussed the matter with Matt Heath as he was sitting next to him at the time the text came though and he thought he already knew about it. Alex Rouges saw the text message also. There then ensued a discussion about the level of the salary. Mr Redstall then engaged in what is described as a bidding game with other members of the team, with them guessing the salary and him responding "higher" or "lower". This took place at a work event off site in a public place.

21. Upon his return to the office Mr Redstall raised this with Dave Osborne as he felt it affect morale of his team. Mr Redstall stated in his investigatory meeting that he was not aware of the fact that it was confidential and did not strike him until later but he was more concerned about the morale in

the team. Matt Heath also reported the matter to John Wilcox a more senior manager within the business upon his return that day. Neither employee went into full details concerning the bidding game that had taken place. The bidding game came to light in other investigation minutes from those present at the restaurant that day. The claimant was unware of these events.

22. The following morning, Friday 25 August 2017 the claimant attended work early as usual. On passing the printer he saw that the document was still there. Thinking that Mr Muddasir was not going to retrieve it anymore the claimant put it in a confidential waste recycling bin rather than leaving it around any longer. On his return to his desk he chatted to colleagues Mark Montague and Neil Richards, one of whom was a direct report of his. He mentioned the salary in relation to the difference between their salaries and management's salaries. At this point the claimant was aware that he had told three people about the level of the salary contained in the document. The claimant was not aware if Mr Muddasir knew that the document had been seen by others or indeed that his salary was being discussed.

23. On Friday 25 August 2017 at approximately 10am the claimant was asked to speak to David Osborne in the presence of Alice Usher of HR. He was told that it was an investigation for a potential disciplinary matter relating to disclosure of information about an executive member and David Osborne was investigating the matter. The claimant accepted he had seen the document and that he had mentioned it to Stuart Murray. He also advised that on that morning he had mentioned it to Mark Montague and Neil Richards. The notes of the investigation meeting were only seen by the claimant in the process of disclosure for this hearing. The meeting notes state the claimant was recorded as saying he knew the document was confidential and that is why he binned it. In the course of this hearing the claimant stated that he knew it was private to Mr Muddasir and confidential to him. The claimant did not accept that he had said it was a confidential document. Since the respondent did not send the minutes to the claimant for approval after the meeting and they are unsigned this remains a factual dispute between the parties. Given his evidence on the issue I accept the claimant's recollection on this issue. Mr Osborne considered the claimant in this meeting to be "somewhat bemused and gave the impression that he could not really see what all the fuss was about".

24. Mr Osborne spoke to the claimant again in a further investigatory meeting on 25 August 2017 i.e. later that same day. "Mr Osborne found the claimant to be relatively "relaxed and open" but still "somewhat bemused."

25. By letter dated 31 August 2017 the claimant was invited to a disciplinary hearing to discuss alleged gross misconduct. The meeting was to take place on Thursday 7 September 2017 with Mr Dave Osborne and Alice Usher from HR. Both had previously been involved in all of the investigations against the claimant and Joe Redstall, and conducted all the

investigatory meetings. Mr Osborne also made the recommendation that the matter proceed to a disciplinary hearing. This was contrary to the ACAS COP1 and the respondent's own disciplinary policy.

26. The allegation facing the claimant was gross misconduct in accordance with the disciplinary policy on "unauthorised disclosure or misuse of confidential information". This was said to be in relation to him finding a piece of paper with confidential information regarding another member of staff on top of the printer and disclosing the content with numerous colleagues. He was advised that he had the opportunity to view any investigation documents that will be discussed in the hearing prior to the meeting should he wish to do so.

27. At this point, the claimant was unaware that others beyond the three people he had spoken had any knowledge of the matter. The claimant did not request copies of the documents. The claimant was not told what documents existed. The claimant was not provided with a copy of the disciplinary policy or his contract of employment. The claimant was not provided with a copy of the investigatory notes to agree as to their accuracy. The claimant was not provided with copies of the investigatory notes of others following the investigations conducted. At no point was the claimant suspended and he continued to attend work as normal during this period.

28. The claimant's contract of employment was signed by the claimant in February 2016. This contained a number of clauses concerning confidentiality and company property. The relevant clauses are as follows:

    28.1 Clause 14.1 states: (emphasis my own as the respondent relies on this part of the clause)

    > "You must not during your employment (other than in the proper performance of your duties) or at any time thereafter use for your own purposes or <u>disclose to any third party any Confidential Material and you must use your best endeavours to prevent such disclosure by third parties.</u>"

    28.2 Clause 14.2 states: (emphasis my own as the respondent relies on this part of the clause)

    > "All Confidential Material and all other documents, papers and property on whatever media and wherever located which may have been made or prepared by you, or at your request <u>or have come into your possession or under your control in the course of your employment or which relate in any way to our business</u> (including prospective business) or our affairs or those of any customer, supplier, agent, distributor or sub-contractor of ours are, as between us deemed to be our property. You must deliver up all such documents and other property, including all copies, to us immediately upon the Termination Date (or at any earlier time on demand). Further you must irretrievably delete any information relating to the business of the Company or any Group Company stored on any magnetic or optical disk or memory and all matter derived from such sources which is in your possession or under your control outside the premises of the Company."

28.3 Clause 14.3 states:

"You must immediately inform us if you become aware of the possession, use or knowledge of any of the Confidential Material by any person not authorised to possess, use or have knowledge of the Confidential Material, whether during your employment or thereafter and you must at our request provide such reasonable assistance as is required to deal with such event."

28.4 Clause 14.4 states:

"The provisions or this Clause do not apply to any Confidential Material which:

(a) is in or enters the public domain other than by breach of this Contract; or

(b) is obtained from a third party who is lawfully authorised to disclose such information; or

(c) is authorised for release by the prior written consent of the board of directors; or

(d) is a protected disclosure as defined by and made in accordance with Part IVA Employment Rights Act 1996."

28.5 Clause 14.5 states:

"Nothing in this Clause will prevent you from disclosing Confidential Material where it is required to be disclosed by judicial, administrative, governmental or regulatory process in connection with any action, suit, proceeding or claim or otherwise by applicable law."

28.6 Clause 14.6 states:

"Failure by you to comply with this Clause shall represent gross misconduct entitling us to terminate your employment with immediate effect."

28.7 Clause 14.7 and clause 14.8 deal with the return of company property upon termination or earlier at the employer's request so are not relevant for the purposes of this claim.

28.8 Clause 14.9 states: (emphasis my own as the respondent relies on this part of the clause)

"Confidential Information" means:

(a) any trade secret, customer information, trading detail or other information relating to the Company's business; goodwill, secrets or personnel, Intellectual Property Rights of the Company or any Group Company, which is not publicly available, including but not limited to business methods, corporate plans, management systems, finances, new business opportunities, research and development projects, marketing or sales of any past, present or future product or services, secret formulae, processes, tools and library development, inventions, designs, know-how discoveries, technical specifications and other technical information

relating to the creation, production or supply of any past, present or future product or service of the Company or Group Company and lists or details of clients, potential clients or suppliers of the Company or any Group Company;

(b) any version of any code, algorithm, program or similar item capable of being recorded, copied or transmitted, which has been originated, developed or modified by the Company or any Group Company;

(c) any information specifically designated by the Company, any other Group Company, or any customer as confidential;

(d) Any information supplied by the Company or any Group Company by a third party in relation to which a duty of confidentiality is owed or arises;

(e) Any information required to be treated as confidential by any legislation or professional or regulatory rule or requirement;

(f) Any information or item, which should otherwise be reasonably regarded as possessing a quality of confidence;

(g) Any information having commercial value or use in relation to the business activities of the Company or any Group Company, including any such information introduced by you into any computer or other electronic system or storage method owned or operated by the Company or any other Group Company; and

(h) Any information or item obtained, derived or compiled from any of the above."

29. There is no definition of the defined term "Confidential Material" within the contract of employment. Clause 14.9 refers to "Confidential Information" instead which I presume is an error but nevertheless relevant as the clauses are comprehensive with regard to the typical expectations of confidential information they are aimed to protect in this case the Company's intellectual property from which it derives its business in particular.

30. Under the respondent's employee handbook gross misconduct includes but is not limited to "unauthorised disclosure or misuse of confidential information".

31. This handbook also contains the company's disciplinary procedure. This states that an investigation by an employee, supervisor or manager will promptly and thoroughly investigate any matter that is reasonably suspected or believed to contravene any of the Company policies or rules and may otherwise be a disciplinary matter. The employee will be informed as soon as possible as to the fact of an investigation and when it has been concluded.

> "Depending on the circumstances of the case, the employee may be invited to attend an investigatory interview. If such an interview is held prior to a disciplinary hearing, the employee will be informed at the outset that the interview is an investigatory interview. There is no right for employees to be

> accompanied at a formal investigatory interview. The Company reserves the right to dispense with an investigatory interview and to proceed directly to a formal disciplinary hearing."

32. Under the heading 'Procedure' it states:

> "Where, upon completion of an investigation, there are reasonable grounds to believe that an employee has committed an act of misconduct, the employee will be invited to attend a disciplinary hearing with the employee's manager/departmental manager or manager of a similar level."

In the event of a disciplinary hearing the Company's policy states that the company will:

> "(e) provide to the employee all relevant information (which should include statements taken from any fellow employees or other persons that the Company intends to reply upon against the employee) not less than two working days in advance of the hearing."

The policy also states that:

> "A disciplinary hearing will normally be conducted by the employee's manager/departmental manager together with a representative of HR (the panel). Where practicable, any member of the management responsible for the investigation of the disciplinary offence(s) shall not be a member of the panel, although such managers may present any supporting facts and material to the disciplinary hearing."

33. The policy also provides that where the company establishes that an employee has committed an act of gross misconduct the employee may be summarily dismissed.

34. At the relevant time the company had in place an information security book. This had a number of sections in it. This stated that any paper documents, electronic files or electronic media within the company must be suitably marked with a classification order that protection would be provided for their storage and processing. Internal documents labelled personal or addressee only (consisted of information that could cause embarrassment to the respondent or a member of staff if disclosed, examples include HR related information such as pay slips, salary communication, benefits or disciplinary action). The document in question was not marked in this manner.

35. Under the section concerning clear desk and clear screen procedures employees were responsible for not leaving anything lying around which could be mislaid or read by somebody else not authorised to see it. This policy was updated in October 2017. Again, this document defines third party as contractors or consultants.

36. The claimant attended the disciplinary hearing on 7 September 2017 with Mr Osborne and Alice Usher of HR. The claimant was accompanied by Matthew Newstead. The claimant's witness brought up that it was a

shared printer and that the document was not marked private and confidential. He stated that it was documented in the Information Security Handbook that it was actually the person who had printed its responsibility to ensure that it remained confidential. The claimant stated he assumed that as Mr Muddasir was an executive his pay would be in a company published annual report in any event. This was not the case for the respondent. The claimant apologised but said that he did not feel that what he had done was that important and he regretted revealing it to a couple of people. Mr Osborne formed a view of the claimant in this meeting that his "attitude was different" and that he had a "combative stance."

37. Mr Redstall was also asked to attend a disciplinary hearing the same day, albeit the claimant was not aware of this at the relevant time. This meeting was also with Mr Osborne and Alice Usher from HR.

38. By letter dated 8 September 2017 the claimant was dismissed for gross misconduct. The claimant was dismissed with effect from the 8 September 2017 and given the right of appeal. Mr Osborne felt that:

> "At the hearing you said that the reason for sharing information is because you didn't see it as that important and that some companies do disclose their executive members pay. You said that you saw the information as office banter and not something that was that bad to share. This is a concern and demonstrated to me that you did not understand the severity of the incident. You also did not adequately show remorse for your actions or consideration for the injured party, instead suggesting the blame was that of the party for leaving the information on the printer. This leaves doubt as to whether you would do it again."
>
> "On coming to the decision on the outcome of the disciplinary hearing we did consider your clear disciplinary record and your six years employment with the respondent, however it was felt that there was a significant breach of trust and confidence between yourself and Jagex as your employer. You purposely shared the information without the consent of the individual that is was regarding and it is felt that this is a significant breach."

39. The claimant was never told that he was being disciplined for a breach of trust and confidence. Again, unbeknown to the claimant Mr Redstall received a first written warning for the same gross misconduct offence albeit under different circumstances.

40. By letter dated 14 September 2017 the claimant appealed against his dismissal.

41. By letter dated 20 September 2017 the claimant was invited to a disciplinary appeal meeting on Wednesday 27 September 2017 with Conor Crowley. The claimant duly attended that meeting, and notes of the meeting were taken albeit not signed by the claimant. Again, it was not until the course of these proceedings that the claimant was given a copy of those notes. At the time once again these were not verified as an accurate record of the meeting.

42. By letter dated 28 September 2017 Mr Crowley confirmed to the claimant that his appeal had been unsuccessful and he upheld the decision of Mr Osborne to dismiss him. Mr Crowley accepted when giving his evidence that the contents of this letter did not explain to the claimant the rationale for his decision. Mr Crowley explained that he did scrutinise the case as he too was concerned about the disparity of treatment between the claimant and Mr Redstall at first. Mr Crowley had not noted the procedural failings in the investigation and disciplining officer or the evidence not being supplied to the claimant but was supported by HR.

43. The respondent is not a small employer and has the resources of a HR department including senior members of HR team. Mr Osborne confirmed in evidence that he was unaware that under the terms of the respondent's disciplinary policy and indeed the ACAS Code of Practice the investigatory and disciplinary managers should be distinct. This is notwithstanding the high level of support received from the HR department during this process. The HR support attended the hearing but did not give evidence to the Tribunal.

Conclusions

44. I remind myself that it is not for the tribunal to substitute it's view for the respondent, it must merely satisfy itself that dismissal fell within a range of reasonable responses. With the exception of the claim for wrongful dismissal where I must determine if the claimant was guilty of gross misconduct or not, it is not for me to establish the guilt or innocence of the claimant in these proceedings.

45. Turning to the list of issues and the unfair dismissal claim first:

<u>What was the reason for dismissal?</u>

46. The respondent alleges conduct.

47. It was the claimant's actions which led to the disciplinary matter and the claimant has not advanced any alternative reasons for his dismissal. As such I accept that there are no other reasons for dismissal other than conduct.

<u>Did the respondent hold a genuine belief in the claimant's misconduct?</u>

48. The claimant accepted that he had seen the document on the printer and that he had discussed its contents with three individuals. The respondent did not consider in any real detail whether the information disclosed was in fact confidential as defined. This was merely taken as read. They sought guidance and relied on the terms of the contract which contain errors and do not support the case advanced. The defined term is then not defined as the terms Confidential Material and Confidential Information are used

alternatively. Further, the situation of a document of this kind disclosed internally is not covered under the contract as I have set out below.

49. Other witnesses did not consider the information to be confidential. Matt Heath saw the documents but did not take it to the owner or dispose of it, just like the claimant. He engaged in the "bidding game" yet was not disciplined. The claimant was criticised for not having returned or disposed of the document in cross examination yet nor did Matt Heath and there is no evidence he was even disciplined given he is more senior, left it on the printer, discussed it with colleagues and then joined in the bidding game. Joe Redstall's evidence was that he did not at the time consider the confidential nature of the salary. None of the employees realised it was confidential and should not be repeated at the relevant time. This did not factor in the decision-making process.

50. It was not a work-related document. It is not disputed that it had an executive's pay on it. It was left in a place anyone could see it. This is not a clear case whether by the claimant has disclosed confidential information (being given its ordinary meaning) to a competitor or outside party. These would clearly fall within the definition of third party but do not apply to this disclosure. This was an internal matter. The claimant was upfront at the outset that he has seen it and discussed it with three colleagues. The respondent takes third party to mean anyone other than Mr Muddasir. This is not credible and outside its ordinary meaning.

<u>Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?</u>

51. I am invited to look at this as being two issues firstly did the respondent hold a reasonable belief that the information was confidential and was disclosed. In this regard the terms of the contract are said to be determinative of the unfair dismissal case.
52. The investigating officer was also the disciplinary officer. Given the respondent's size and administrative resources this is a highly unsatisfactory breach of its own policy let alone the ACAS COP1. Whilst Mr Osborne may well have conducted such matters for the first time with the respondent he was supported by a HR department who ought to have had the knowledge not only of their own disciplinary policy but also of the ACAS Code of Practice. This is relevant as to procedure below but it is also relevant given the views the investigating officer formed of the claimant at the investigation meeting and then proceeded to hear the disciplinary.

53. The investigating officer had an informal chat with the claimant in which he described him as "somewhat bemused and gave the impression that he could not really see what all the fuss was about", he the interviewed him as part of the investigation in which he said he was relatively "relaxed and open" but still "somewhat bemused." As the same employee also heard the disciplinary he describes the claimant as being "attitude was different" and that he had a "combative stance." These views influenced his

decision at disciplinary as to what sanction to provide to the claimant which would not have occurred had the claimant been afforded a fresh manager as envisaged by the respondent's own policy and the ACAS COP1.

54. The investigating officer has a closed mind as to the nature of the disclosure.

55. Clause 14 of the claimant's contract of employment does not define confidential material. It defines Confidential Information which is an error. There was no real examination as to whether the information was truly covered by the clause but an assumption it did. The dismissing officer quotes from the contract in his statement and said that he scrutinized this clause yet appears to have made assumptions as to its contents.

56. The respondent has also failed to give consideration to the fact that Mr Muddasir left the document on the printer in a public place. A number of other colleagues saw this. Indeed, Mr Redstall himself participated in a game with up to nine participants to guess the executive salary. I accept the claimant's evidence that it was highly probable that this would be viewed by others within the organisation. No real investigation into what others saw and did with that information was carried out other than with Joe Redstall.

57. The issues with the way the investigation carried out may not have been enough to find that there were no reasonable grounds for that belief. The claimant did accept that he had shared the information so this may not have made the dismissal unfair on its own.

<u>Was the decision to dismiss a fair sanction, ie within the range of reasonable responses for a reasonable employer?</u>

58. I have reminded myself of the established point that I must not substitute my view for that of the respondent. To this end I have reviewed the authorities referred to above as to whether dismissal was in the range and had regard to the same.

59. Given my findings of fact above, I find that in the circumstances of this case given the nature of the breach of confidential information relied upon by the respondent, I do not find that dismissal was in the range of reasonable responses for the employer to take. No reasonable employer faced with these circumstances would dismiss the claimant for the reason given. Summary dismissal in the circumstances was wholly unreasonable.

60. The respondent's interpretation and application of the contractual clauses was not reasonable in the circumstances. There was no disclosure outside the respondent. This was an internal disclosure of information on a personal document left lying around which was not classified as confidential.

61. The claimant had an otherwise unblemished record. Other employees were not disciplined at all or received a first written warning. Whilst I accept that it would be normal where breaches of confidential information are made outside of the company for this to constitute gross misconduct, this is not one of those cases. The respondent has sought to apply and interpret contractual clauses to turn a conduct matter into a gross misconduct matter to warrant dismissal. It has wanted to make an example of the claimant and reacted in an extraordinarily heavy-handed manner. No reasonable employer would class discussion of a colleague's salary internally as gross misconduct. The claimant did not breach any policies in obtaining that information and whilst it was an error of judgment to share information left lying around no reasonable employer would say that this type of disclosure would be gross misconduct.

62. I must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct on the facts of the case.

63. The label attached to the conduct is more akin to misconduct as Mr Redstall received a first written warning which is normally reserved for misconduct cases. Indeed, the respondent's own disciplinary policy specifies that a final written warning would usually be given for "a serious disciplinary offence amounting to gross misconduct" where summary dismissal is not used. The same allegation was made "unauthorised disclosure or misuse of confidential information" albeit the circumstances were stated to be different. Both were classed as gross misconduct and the outcome given to one supports in my view, that this was not gross misconduct but rather misconduct.

64. I have considered whether the difference in treatment between the claimant and Mr Redstall impacts on the fairness of the dismissal and have regard to the authorities provided by Mr Dyer in this regard since the same largely related to this issue. If I considered this to be a gross misconduct case then the provision of a final written warning and dismissal of another employee would both be within the range.

65. I am urged to consider with caution the disparity argument as it has limited application in the three situations indicated in Hadjionnou v Coral Casinos. One could argue that in fact by engaging in a public forum in a "bidding game" Mr Redstall's conduct was more severe than the claimant so I can understand why the claimant feels so aggrieved now he has discovered his treatment in contrast to his colleagues. However, what is really the issue here is whether the employer in this particular case dismissed the claimant as a reasonable response to the misconduct proved and I have already dealt with this point. The fact that Mr Redstall only received a first written warning for his conduct and the claimant was dismissed does not of itself make the dismissal unfair.

66. I must also consider the procedural unfairness in this case and whether is impacts on s98(4). The respondent has conducted this case with some

fundamental errors as to the principles of both law and equity and the claimant's right to a fair hearing. It has failed to follow its own policy and procedure and the ACAS COP1.

67. Given the size and administrative resources of the respondent including a HR department, the decision to use the same investigating and disciplinary officer was unacceptable. Whilst some managers were on leave during this period there was no reason why the matter could not have been handled by other managers or delayed for their return, given the claimant continued to work as normal during this period and was not suspended.

68. There are a number of breaches of the ACAS Code of Practice and the respondent's own disciplinary policy. Firstly, the person appointed to carry out the investigation, made the decision that there was a disciplinary case to answer and then proceeded to hear the disciplinary. There is a risk in these circumstances that the dismissing officer had already made his decision prior to the disciplinary hearing. In this case the dismissing officer has formed a view that the claimant was not treating the matter seriously and then his attitude changed and this clearly factored in his mind when he reached that decision. Had the respondent acted within the principles of natural justice and used a different investigator and disciplinary officer this may not have occurred.

69. Further, the respondent failed to comply with the ACAS Code of Practice and send to the claimant copies of the materials upon which it based its investigations. I do not accept the respondent's argument that it was not material that the claimant be given the full picture as to why the respondent took the approach it did with regard to this matter. I understand the claimant's confusion here since he told three colleagues internally of the matter. The respondent's use of section 14 of the contract of employment which is quite clearly designed for data breaches outside of the organisation was heavy handed to say the least. Had the claimant been provided with the full picture he may have appreciated the course of events for which he was disciplined was part of a larger picture.

70. This is particularly so where the claimant is then criticised for failing to appreciate the seriousness of his actions and to show remorse. This is to be set against the context of the background where the claimant has not been provided with the investigatory notes taken at interview, the company policy or indeed its own contract of employment, all of which were said to be before the disciplining officer and formed the basis of his decision once advice was sought. It seems more likely that the relevance of the contractual terms may have come afterwards to legally justify the decision since the disciplining officer did not note at the time the discrepancies in the definitions and assumptions were made that the conduct fell within the decisions without actually testing this for himself. The HR team sat through the hearing but did not give any evidence to explain why they failed to note the deviation from ACAS COP1 and their own policy.

71. I am invited to find that the failure to provide the investigation to the claimant in advance of the disciplinary was not fatal concerning the process. I do not accept this for the reasons set out above.

72. I am also invited to find that the appeal corrects any prior procedural defects. This cannot be correct as it was not until disclosure as part of this hearing that the respondent disclosed to the claimant the wider picture with Mr Redstall's notes or indeed the contract, disciplinary policy and the claimant's own interview notes. The appeal officer despite having guidance from HR failed to notice the breach of the disciplinary policy and ACAS COP1 with the way the matter had been conducted to date.

73. In light of all of the above dismissal was not within the range of reasonable responses and the claimant has been unfairly dismissed.

<u>If the dismissal was unfair, did the claimant contribute by culpable conduct?</u>

74. This requires the respondent to prove the claimant committed an act of gross misconduct as alleged. Given my findings and conclusions above, I do not find that the claimant committed an act of gross misconduct. Whilst his conduct contributed the disciplinary action against him it did not cause or contribute to the dismissal as this was outside the range of reasonable responses. There was thus no culpable conduct by the claimant.

<u>Does the respondent show that if it had been a fair procedure the claimant would have been dismissed in any event, and to what extent and when?</u>

75. Here I repeat my conclusions at 67-70 above. Given the size and administrative resources of the respondent including a HR department, the decision to use the same investigating and disciplinary officer was unacceptable. Whilst some managers were on leave during this period there was no reason why the matter could not have been handled by other managers or delayed for their return, given the claimant continued to work as normal during this period and was not suspended.

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respondent took the approach it did with regard to this matter. I understand the claimant's confusion here since he told three colleagues internally of the matter. The respondent's use of section 14 of the contract of employment which is quite clearly designed for data breaches outside of the organisation was heavy handed to say the least. Had the claimant been provided with the full picture he may have appreciated the course of events for which he was disciplined was part of a larger picture.

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79. None of the above were corrected on appeal in my view. The focus appears to have been on the discrepancies in the treatment between the claimant and Mr Redstall as the appeal officer's primary concern and this is a lesser concern as to the warnings given in contrast to this tribunal for the reasons set out above.

80. Given the above I cannot say with any certainty that the claimant would have been dismissed fairly in any event as a percentage likelihood or after a passage of time. The breaches in the procedure are numerous and unusual for a respondent of this size with those administrative resources.

Wrongful dismissal

Did the claimant commit an act of gross misconduct?

81. I have had in this regard considered the claimant's contract upon which the respondent relies. Nowhere in the clause which runs to almost 2.5 pages of A4 does the respondent particularise salaries as confidential material. There is no definition at all of confidential material. The respondent instead relies on the definition of confidential information at clause 14.9(a) as underlined above in the findings of facts. It seeks to extend this to any information concerning personnel which by the same analysis could someone's name or job title as this is "other information" relating to personnel. Finances is also relied upon in the widest sense and is said to include salary.

82. The respondent has sought to carefully draft a long clause but nowhere did it consider including a specific reference to salaries. Even if one was to say that the drafting errors are overcome and that the salary was confidential information, no consideration was given by the respondent to

whether there was a disclosure to third parties. Respondent's counsel sought to argue third parties meant anyone other than Mr Mudassir. This would be outside the ordinary meaning for matters relating to the respondent. The ordinary meaning would be those outside the respondent which is not the allegation here. Had the claimant disclosed game code for example to a competitor or outside the organisation I would have no hesitation to say regardless of the contract that this is clearly gross misconduct. This is totally different to the current case.

83. Further, there was no consideration by the respondent of clause 14.4 and whether the document being left on the printer meant it was in the public domain as it was seen by several people and unknown others. It also failed to consider clause 14.4b and that the information "was obtained from a third party" given that the respondent's counsel wanted employees to be third parties on the construction of this clause when considering who it has been disclosed to.

84. The claimant discussed the salary with three people within the respondent. This does not constitute gross misconduct. What is gross misconduct is a mixture of fact and law.

85. Gross misconduct must be so serious that it goes to the root of the contract, that is it must be repudiatory entitling the respondent to dismiss with immediate effect or be a deliberate or wilful breach of the contract amounting to gross negligence. It was an error of judgment but in my view was neither a clear breach of a contractual term entitling the respondent to dismiss nor was it serious enough to warrant dismissal. At best it was an act of misconduct. I therefore find that the claimant did not commit an act of gross misconduct.

<u>If not is there a breach of contract by the employer in failing to pay notice?</u>

86. Given that the respondent was not entitled to summarily dismiss the claimant the respondent has breached the employee's contract by failing to pay notice.

<u>Has the claimant suffered a loss as a result?</u>

87. As the claimant has not received notice pay he was suffered a loss. Those losses will be determined at the remedy hearing.

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Employment Judge S King

Date: ……17.05.2018……..

Sent to the parties on: ...17.05.2018.....

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For the Tribunal Office