EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr D Lambkin	AND	Ecosurety Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol **ON** 19 and 20 November 2019

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: **Mrs Lambkin (Wife of the Claimant)**
For the Respondent: **Ms H McLorinan (Counsel)**

JUDGMENT

1. **The Claimant was unfairly dismissed.**

2. **The compensatory award under s. 123 of the Act will be restricted to one of four weeks pay and both it and the basic award are reduced by 75% under ss. 122(2) and 123(6).**

REASONS

The claim

1. In this case the Claimant Mr Lambkin claims that he has been unfairly dismissed. The Respondent contends that the reason for the dismissal was gross misconduct and that the dismissal was fair. The Claimant presented his claim on 2 May 2019 having complied with the requirements of early conciliation via ACAS

The issues

2. At the start of the hearing the issues were discussed. It was confirmed that the principal issues to be determined were: (1) whether there was a fair reason for dismissal, (2) whether the Respondent held a reasonable belief in that reason, (3) was that belief based on reasonable grounds, (4) was a fair procedure followed, (5) was dismissal within the band of reasonable responses, (6) if the Claimant had been dismissed unfairly would he have been fairly dismissed if a fair procedure had been followed and (7) whether the Claimant contributed to his dismissal by reason of his conduct. Discussion also took place in relation to the number of witnesses being called. The Claimant's witness, Mr Timmins, was unable to attend on the second day and the Respondent had a witness who was unable to attend on the first day. It was agreed that the Claimant's witness and the Claimant would be interposed in order to make best use of the time available.

3. It was agreed by the parties that because the Respondent had only found one of the proven allegations amounted to gross misconduct that the focus of the evidence would be on that allegation.

The evidence

4. I heard from Mrs Nolan (Respondent Procurement Manager), Mr Hutchinson (Human Resources and investigator), Ms Granville-Smith (dismissal officer), Mr Timmins (Claimant's witness) the Claimant, and Mr Leefe (appeal officer). Each witness had provided a witness statement. I was also provided with a witness statement from Mr Borrman, on behalf of the Claimant, however he did not give oral evidence.

5. I was provided with a bundle of 220 pages, any references in square brackets in these reasons are references to pages in the bundle.

6. There was a degree of conflict on the evidence. I heard the witnesses give their evidence. The Claimant called Mr Timmins, who was not an impressive witness in that there were inconsistencies between his witness statement and documents in the bundle and it was clear that there was an ongoing business relationship between the Claimant and Mr Timmins. The Claimant had a tendency to avoid direct questions in cross-examination, which at times came across as being evasive. Mr Hutchinson and Ms Granville-Smith gave clear evidence and where appropriate made concessions. Little weight was attached to the statement of Mr Borrman, on the basis that he did not attend and could not be cross-examined.

The facts

7. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after

listening to and reading the factual and legal submissions made by and on behalf of the respective parties.

8. The Respondent is a company that sources evidence of recycling activity, e.g. recycling batteries or packaging, in order to offset the environmental compliance obligations of its clients. The Respondent's clients operate in 3 areas: packaging, electrical/electronic goods and batteries. Manufacturers, wholesalers and retailers must declare materials they put on the UK market in tonnes and fund a proportion of the UK recycling system. The funding is achieved through the trading of recycling evidence, for example suppliers and retailers of batteries are required to purchase evidence of battery recycling, equivalent to 45% of the batteries, by tonnage, they supplied over the preceeding 3 years. Nationally there are a number of compliance schemes and it is a competitive market. The compliance year for entities runs from 1 January to 31 December, however it is sometimes shown as ending on 30 January so that companies like the Respondent can ensure that the various transactions are in order. At the beginning of each compliance year the Respondent knew how much evidence it needed to buy and there followed a juggling act throughout the year to ensure that by 31 December it had the correct amount of evidence. Each month the Respondent received a return and upon receipt, it projected forwards to ascertain what further evidence was required. Contracts with the suppliers can be entered into at any stage during the compliance year. Within the industry it was normal for contracts with suppliers to be renewed.

9. The Claimant commenced employment on 1 September 2014. He was initially employed as Head of Projects, however at the time of his dismissal he was employed as Head of Innovation. His role involved locating suppliers of evidence for the Respondent and finding new ways of locating the evidence needed. His role involved maintaining the relationship between the Respondent and its suppliers and this would involve regular contact with them. The negotiation of contracts was undertaken by Mr Piper, CEO of the Respondent. Clause 19 (Conflicts of Interest) of his contract of employment provided: "During your employment you will not, without the prior written consent of the Company, undertake any work or other activity, whether paid or unpaid, which may affect your ability to properly and efficiently perform your duties and responsibilities…"

10. Paul Timmins was originally the Claimant's line manager and a director of the Respondent, until he left the employment of Respondent. In October 2018, Mr Timmins set up Copse Associates Limited ("Copse") which supplied re-used batteries for power tools and other applications and then recycled the batteries it could not sell. In October 2018 the Respondent contracted with Copse for battery recycling evidence for the compliance year ending 31 December 2018. At the start of 2019, negotiations were

ongoing as to whether a contract would be entered into for the 2019 compliance year.

11. The Claimant had worked closely with Copse to provide it with key strategic advice to ensure that there was a long-term supply relationship with the Respondent. The Claimant was the primary person responsible for managing the relationship. The Claimant and Mr Timmins met and spoke on a daily or weekly basis. The Claimant agreed that Mr Timmins was a friend of his. After the Claimant's dismissal Mr Timmins assisted him with setting up his own business. On the balance of probability, the Claimant and Mr Timmins had a close relationship whilst the Claimant was employed by the Respondent and in the time that followed.

12. On 4 February 2019 Luke Hutchinson, Head of Human Resources, met the Claimant to discuss concerns about his work, that had arisen during the previous 8 months. The following matters were discussed: the Claimant's failure to engage with the Respondent's review processes, poor communication with line managers, failure to properly declare a trip to Chicago, failing to maintain up to date health and safety training and promoting his wife's online enterprise, Anywaste, to Belmont (a client). The Claimant's responses were noted in the investigation report [p85 to 87]. The Claimant was advised that the matters would be formally investigated.

13. On 11 February 2019 the Claimant sent an e-mail to Mrs Nolan [p79b] in which he said that, he had heard from Mr Timmins and been told that Copse had entered into an agreement with a different scheme who would be buying Copse's tonnage and handling its compliance obligations. The Claimant also said that the Respondent would need to start looking for alternative sources for portable mixed chemistry batteries going forwards. Mr Piper was made aware of the situation and Mr Hutchinson was asked to investigate.

14. On 11 February 2019 Mr Hutchinson met the Claimant to discuss the loss of Copse as a supplier. The Claimant told Mr Hutchinson that he had been telephoned that day by Mr Timmins. The Claimant was informed that Mr Piper was frustrated that the Claimant did not know about the change and the Claimant said that he was as shocked and surprised as the Respondent was.

15. The Claimant was suspended on 11 February 2019 whilst the Claimant's involvement in the loss of the Copse contract was investigated. The suspension was confirmed by way of an e-mail of the same date [p79a].

16. Mr Hutchinson investigated the allegations. It was ascertained that the Claimant had met Mr Timmins on 2 January 2019. He had further met Mr

Timmins on 14 January 2019, whilst in London, and that also involved a competitor of the Respondent, ERP.

17. On 13 February 2019 Mr Hutchinson obtained a statement from Mrs Nolan [p89]. Mrs Nolan said that on 14 January 2019 she had received a telephone call from the Claimant who had said that ERP had asked him for a meeting. Mrs Nolan said she was concerned that the Claimant was meeting with a direct competitor and highlighted her concern.

18. On 15 February 2019 Mr Hutchinson obtained a statement from Mr Piper. Mr Piper said that on 13 February 2019 he telephoned John Redmayne, MD of ERP, who confirmed that ERP were to receive the Copse battery evidence. Mr Redmayne had told him that he had met with Mr Timmins on 14 January 2019 to discuss the potential contract. The statement said that Mr Redmayne had told him that all communication about the meeting was undertaken via the Claimant's personal e-mail address. Mr Piper said that the Claimant had led them to believe that he was meeting Steve from ERP and that he had no idea why ERP had wanted to meet him.

19. Mr Hutchinson considered all of the evidence he had gathered in relation to the Copse contract and the other allegations raised on 4 February 2019 and considered that they should progress to a disciplinary hearing.

20. On 19 February 2019 the Respondent sent the Claimant an e-mail attaching a letter dated 18 February 2019 inviting him to attend a disciplinary hearing on 27 February 2019 [p81-83] in relation to four allegations: (1) Deliberate loss of our contract with Copse Associates for batteries evidence, (2) Promoting the use of the AnyWaste app to their client Belmont for personal benefit, (3) Failure to maintain up to date health and safety training, and (4) Failing to engage with company policies and processes. Under each allegation heading, an explanation as to what the allegation entailed was provided. In cross-examination the Claimant accepted that the heading and explanatory text should be read together, in order to understand the allegation. The Copse allegation related to the loss of the potential contract for the supply of battery evidence for 2019 to a competitor. The Claimant was warned that if it was found he was guilty of gross misconduct he might be dismissed. He was also informed of his right to be accompanied by a colleague or trade union representative.

21. On 19 February 2019 Mr Hutchinson sent a separate e-mail to the Claimant attaching the documents for the disciplinary hearing.

22. On 20 February 2019 the Claimant provided a written response to the Respondent [p155-159]. He said that he made Mrs Nolan aware about the meeting with ERP and she was happy for him to attend and advised him to be careful about what he said. He said the meeting was a general

discussion with John Redmayne and Paul Timmins about market changes and what they foresaw the market doing in the future. At the point he left the meeting nothing was being discussed other than the general WEEE economy. He also said that Mr Piper had told him that the Respondent did not require the Copse tonnages and the reason the contract was lost was due to Mr Piper not agreeing a contract with Copse.

23. On 21 February 2019 Mr Hutchinson twice asked the Claimant to forward any e-mails he had received at his personal e-mail address from ERP or Copse Associates. The Claimant refused on both occasions.

24. On 27 February 2019, the Claimant attended the disciplinary hearing [p162]. He said that he had not received the invitation letter setting out the allegations. It was agreed that the hearing would be adjourned to a different date so that he could consider the allegations.

25. On 27 February 2019, following receipt of the disciplinary invitation letter, the Claimant provided a further response to the allegations. He said, that Mr Piper had told him on several occasions that the Respondent did not require the Copse tonnages. He said that the sole reason the Respondent lost the tonnages to another scheme was due to Mr Piper not agreeing a contract with Copse. In relation to personal emails he said it was not normal practice for the Respondent to ask employees for such access. He also said Mr Piper was handling the contract renewal negotiations directly with Copse and had failed to negotiate a contract renewal with Copse in time and on terms suitable to Copse.

26. On 1 March 2019, Mr Piper provided a further statement [p168]. Mrs Nolan also provided a further statement on 1 March 2019 [p169], in which she said that the Respondent was expecting approximately 308 tons of battery evidence via Copse in January 2019.

27. By way of a letter dated 4 March 2019 [p170] the Claimant was invited to attend the adjourned disciplinary hearing on 13 March 2019, the allegations were unchanged. He was provided with the additional statements. The Claimant was warned that if he was found guilty of gross misconduct that he could be dismissed and he was informed of his right to be accompanied by a colleague or trade union representative. The Claimant was informed that if he wished to call any relevant witnesses that he should provide their names to the Respondent by 8 March 2019.

28. The disciplinary hearing on 13 March 2019 was heard by Ms Granville-Smith [p173 to 179]. The Claimant said, in relation to the meeting on 14 January 2019, that originally it was only meant to be with Mr Timmins, but Mr Timmins had mentioned he was meeting John from ERP and asked if he wanted to join them for a coffee. The Claimant said the meeting was not

prearranged and it happened because train times coincided. He said the meeting was not formal and much of the conversation was about personal topics, in the same way you would have a catch up with mates. When asked if there had been conversation about battery regulation or supply, he said there was some conversation around this. The Claimant said that he left the meeting before any conversation took place between Mr Timmins and Mr Redmayne about how they would work together. He said he did not remember any issues regarding supply being raised. The Claimant said he had no idea that Copse had any intention of moving and said that there was no contract with Copse in place for 2019. When asked why Mr Redmayne would believe that the meeting was to discuss moving the contract away from the Respondent, the Claimant suggested he may have arranged this with Mr Timmins and it overlapped with his meeting. In relation to personal email communication, the Claimant said it was very possible communication had taken place via his personal email address, but he had not looked to confirm. The Claimant said he would not give permission for the Respondent to access his personal emails. The Claimant asked whether the statement from Mr Redmayne had been verified and questioned. Ms Granville-Smith said she would decide whether further investigation was needed. The Claimant confirmed that Mr Timmins was a friend.

29. On 15 March 2019, following the disciplinary hearing, Ms Granville-Smith sent an email to Mr Redmayne [p181] asking for further information. Mr Redmayne replied [p180 to 181]. He said that he had arranged to meet Mr Timmins and once the meeting had been set up, Mr Timmins advised that the Claimant would also be there. Mr Timmins had emailed Mr Redmayne on 10 January 2019 and said "… *One of them is with Damian Lambkin who bought evidence from me last year. I'm meeting him at midday near Paddington. Would you be able to join us? He could give you some separate assurance of supply and we could talk further…*" Mr Redmayne described the contents of the meeting as "*We started off with a general discussion about a number of matters in UK and Europe and then some more details about Paul's business and the source of the batteries. Damian then had to leave for another meeting. Although slightly odd that Damian was there I understood that it was not with Ecosurety hat on and that he had been advising Paul on his business… Following that Paul and I discuss practical and commercial arrangements for compliant scheme membership and purchase of surplus evidence. Damien did not return*."

30. On 22 March 2019 Ms Granville-Smith sent a letter [p185-187] to the Claimant in which informed him of the disciplinary hearing outcome. She found that the allegation in relation to Copse had been proven. She said that she had carried out further investigation by contacting Mr Redmayne and attached the emails [p180-181] to the letter. She said that, "*To have been in a meeting with ERP, which is a direct competitor of Ecosurety, and Copse Associates, which is a supplier of battery evidence, and to have been*

seen as the adviser to the supplier and not an employee of Ecosurety is of significant concern." She said she believed that the Claimant was working with Copse to the detriment of the Respondent. Reference was also made to the suspension meeting on 11 February 2019, in which the Claimant had denied knowledge of where the batteries had gone or that he was aware that the Respondent could lose the batteries contract ; it was concluded that the Claimant had lied. She said that she believed that in the meeting on 14 January 2019 the Claimant was there to assist Copse moving the contract from the Respondent to ERP and that he was actively and deliberately involved in the loss of that contract. Ms Granville-Smith considered this to be extremely serious, that there had been a conflict of interest and the Claimant was in breach of his duties to the Respondent, which constituted gross misconduct. The allegation in relation to AnyWaste was upheld, but there was no evidence of financial benefit to the Claimant. In cross-examination, Ms Granville-Smith said that the email from Mr Redmayne was a key part of the evidence. She also said that the Respondent would not expect any employee to be with a competitor talking about supply with the supplier when the supplier had not been signed up and that was a big conflict-of-interest. I accepted Ms Granville-Smith's evidence that this was the belief she held when making her decision.

31. Ms Granville-Smith confirmed that she only considered the Copse allegation was gross misconduct. She also said that she had taken advice, about providing the Claimant with the email from Mr Redmayne, before making her decision. She said she thought the information was clear and any comment would not potentially change her decision. I accepted this evidence. The Claimant was informed that he was dismissed for gross misconduct.

32. By way of e-mail dated 23 March 2019 [p188], the Claimant appealed the decision to dismiss him, in which he said a statement had not been taken from Mr Timmins and that the decision was based on evidence he had seen for the first time on receipt of the disciplinary outcome letter. On 28 March 2019 the Claimant was invited to attend an appeal hearing [p189 to 190] and he was informed of his right to be accompanied.

33. The appeal was heard on 24 April 2019 by Mr Leefe, chairman [p193]. The Claimant said that there was no evidence to support the allegation that he had deliberately lost an opportunity for the Respondent and added that the contract had expired in 2018. He questioned why the Respondent had not sought a statement from Mr Timmins and that the emails from Mr Redmayne and Mr Chandan had not been sent to him before the decision to dismiss had been made and he therefore did not have an opportunity to respond. The Claimant said that Mr Timmins was the only part person who could provide clarity to the situation.

34. The Claimant provided a follow-up document after the hearing [p196-197], in which she said there was no contract to lose. He said, “At the meeting, I participated in an informal, general industry chat without wearing an Ecosurety specific cap - as confirmed by John in his email - before leaving for my scheduled meeting with Belmont.”

35. Mr Leefe asked Mr Piper for information in relation to his negotiations with Copse and was provided with some emails [p200 to 209].

36. On 29 April 2019 Mr Leefe wrote to the Claimant [p198 to 199], informing him that his appeal had been dismissed. It was explained that Mr Timmins had not been approached for a statement on the basis that he would not be independent due to his involvement with the failure to renew the battery evidence supply contract and that he was a friend of the Claimants. In relation to the email from Mr Redmayne he said that the company was not obliged to provide him with evidence for his comment every time the investigation produced something new. The follow-up document provided by the Claimant had also been taken into account. Mr Leefe saw no reason to alter the decision to dismiss the Claimant for gross misconduct.

37. In cross-examination Mr Leefe said that Mr Timmins employment with the Respondent did not end happily and that it was covered by an NDA. When questioned why the Respondent was happy to contract with Copse in such circumstances, Mr Leefe said that there is a scarcity of battery evidence in the market and that there was not a great luxury of choice. He denied being told not to contact Mr Timmins. He also said in a perfect world it would be more balanced to have obtained his evidence. This was clarified by Mr Leefe, as being in a perfect world he would be able to approach Mr Timmins thinking that reliable evidence would come back. He thought Mr Timmins would be conflicted, because he had enlisted one of the Respondents members of staff to provide evidence to one of their competitors. On the balance of probability, I accepted Mr Leefe’s evidence.

<u>Findings of fact relevant to contributory fault and if there had been a fair procedure what the outcome would have been.</u>

38. Under cross-examination Mr Timmins accepted that he had hoped that the Claimant would provide assurance about Copses supply of battery evidence to ERP. Mr Timmins, said in his witness statement, that he had arranged to meet Mr Redmayne for discussions and knew that the Claimant would be nearby so suggested they all caught up. This was inconsistent with the email he sent to Mr Redmayne [p180]. Mr Timmins said at paragraph 5 of his witness statement, “We met and had a general and useful catch up regarding the industry. Damian then left to attend another meeting when I conducted a confidential discussion with John.” In cross-examination Mr Timmins said that, in the presence of Mr Redmayne, he had

asked the Claimant to provide assurance and that the Claimant had said no and that he did not want to take part in confidential discussions. The Claimant, in cross-examination said that as his train arrived (on 14 January 2019) Mr Timmins suggested meeting for a coffee and just as he arrived in the station he said Mr Redmayne was there and therefore he contacted Mrs Nolan and asked if it would be a problem. The email [p180], from Mr Timmins to Mr Redmayne was dated 10 January 2019, contradicted the Claimant's evidence that the meeting was arranged as he was arriving at the station.

39. The Claimant said that he told Mrs Nolan he was meeting both men at the same time, but was unable to show where he said that in the documentation for the disciplinary and appeal meetings. The Claimant's evidence was inconsistent in relation to what he said was discussed. Initially he said he was having a chat with Mr Timmins about his business and when Mr Redmayne arrived they stopped. He said he did not recall being asked about reliability of supply during the meeting with both men. When it was suggested in cross-examination that if Mr Timmins had asked him to give assurance about supply, he would know that a transfer of the contract was on the cards, he volunteered that it was raised as an off-the-cuff remark and it just stopped there.

40. Taking into account the inconsistencies in the evidence of Mr Timmins and the Claimant, it is likely that the email sent by Mr Redmayne records what took place. Mr Timmins intended the Claimant to provide assurance to Mr Redmayne on his behalf and asked him to do so during the meeting. The Claimant was involved in discussing Copse's business and that involved discussion about the supply of evidence. The Claimant gave assurances to ERP, as requested by Mr Timmins.

41. Mr Timmins also said in his witness statement that he had been told by Mr Piper that the Respondent did not need the evidence from Copse, but he might be interested in taking and selling on such evidence. He was cross examined on the emails between Mr Piper and himself. In particular, that on 3 January 2019 Mr Piper had said that the Respondent was definitely interested. He also said, "*As we are not taking all your tonnage and will need to supply some to other schemes I'm asking the questions they are asking around confidence and supply*." On Friday 11 January 2019, Ms Nolan asked Mr Timmins questions about his supply for 2019 [p200 to 202] and Mr Timmins replied saying he would know more on Monday (14 January 2019). This evidence contradicted Mr Timmins' witness statement and oral evidence. On the balance of probability Mr Piper did not tell Mr Timmins that he did not need the evidence from Copse.

42. The Claimant said that he had been told by Mr Piper that the Respondent did not need Copse's evidence. This also appears to be contradicted by the emails between the Respondent and Mr Timmins. I accepted the evidence of the Respondent's witnesses that battery evidence was scarce. Further the Claimant, in his email on 11 February 2019 [p79b], said that they would need to start looking for alternative sources for portable mixed chemistry batteries going forwards. On the basis that there was a scarcity of battery evidence and that the Claimant considered that an alternative source of battery evidence was required and that Mr Piper had told Mr Timmins that they were definitely interested, it is unlikely that Mr Piper told the Claimant that the evidence was not wanted.

The law

43. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").

44. I have considered section 98 (4) of the Act which provides "…. 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".

45. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

46. The compensatory award is dealt with in section 123. Under section 123(1) "the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

47. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides: "where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant,

it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

48. The starting point should always be the words of section 98(4) themselves. In applying the section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair. (Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT)

49. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss. (Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA, Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR and British Home Stores -v-Burchell [1980] ICR 303). Crucially, it is not for the tribunal to decide whether the employee actually committed the act complained of.

50. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd [2006] ICR 1602 CA. A sufficiently thorough re-hearing on appeal can cure earlier shortcomings, see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors EAT 0293/14.

51. I also took into account the ACAS code of practice on disciplinary and grievance procedures

52. The decision in Polkey-v-AE Dayton Services [1988] ICR 142 introduced an approach which requires a tribunal to reduce compensation if it finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

53. It is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment. A degree of uncertainty is inevitable, but there may well be circumstances when the nature of the evidence is such as to make a prediction so unreliable that it is unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

54. I was invited to consider whether the Claimant's dismissal was caused by or contributed to by his own conduct within the meaning of s 123 (6) of the Act. In order for a deduction to have been made under these sections the conduct needs to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract or tortious (Nelson-v-BBC [1980] ICR 110).

55. The appropriate test was set out in Steen-v-ASP Packaging Ltd [2014] ICR 56; in that I have had to;
    (i) Indentify the conduct;
    (ii) Consider whether it was blameworthy;
    (iii) Consider whether it caused or contributed to the dismissal;
    (iv) Determined whether it was just and equitable to reduce compensation;
    (v) Determined by what level such a reduction was just and equitable.

56. I also considered the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to his dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

Conclusions

What was the principal reason for the Claimant's dismissal? Was it a potentially fair reason?

57. The Claimant was dismissed for gross misconduct. It was not disputed by the Claimant that this was the reason, but it was disputed that there was a reasonable belief that gross misconduct had occurred. I accepted the evidence of Ms Granville-Smith and Mr Leefe as to their reasoning. There was no evidence adduced that the principal reason was for anything other than gross misconduct. This was a potentially fair reason for dismissal.

Did the Respondent hold a genuine belief in the Claimant's misconduct and was this reason for his dismissal?

58. The Claimant disputed that the Respondent held a genuine belief in his guilt. The Claimant's case was that he was not responsible for negotiating the new contract and that the reason it was lost was due to Mr Piper not acting in a timely manner. Much of the Claimant's argument revolved around that there was no contract in existence. The Respondent had been in the process of negotiating with Copse in the lead up to the meeting on 14 January 2019, with the purpose of entering into a contract for the supply of evidence for 2019. The criticism of the Claimant was that he had become involved in the negotiations between Copse and the Respondent's competitor, ERP. The Claimant had provided explanations to the Respondent as to his involvement in the discussions. The Respondent considered that there had been inconsistency in what the Claimant had said in relation to who would be present and also what had been discussed. The e-mail of Mr Redmayne [p180-181] was particularly significant to the Respondent, which it considered contradicted the Claimant's account. I accepted the evidence of Ms Granville-Smith and Mr Leefe as to their reasoning. I accepted the Respondent's argument that it considered all of the evidence and held a genuine belief in the Claimant's misconduct, and this was the reason for his dismissal.

If yes, did the Respondent hold that belief on reasonable grounds, following a reasonable investigation?

59. It was reasonable for the Respondent to have held that belief. The e-mail from Mr Redmayne set out that Mr Timmins had arranged the meeting with the purpose of the Claimant providing ERP assurances and that discussions, involving the Claimant, about Copse's business had taken place, which contradicted the Claimant's account. Further Mr Redmayne had understood that the Claimant did not attend with his 'Ecosurety hat on' and that he was advising Mr Timmins about his business. The Respondent was entitled to take into account that after the meeting Copse entered into a contract with ERP. A reasonable employer could conclude that the Claimant was involved in the discussions and that his involvement lead to Copse entering into the contract with the Respondent's competitor. A

reasonable employer could have concluded that there had been a serious conflict of interest, such that it amounted to gross misconduct.

60. In relation to whether there was a fair investigation the Respondent faced two difficulties. The evidence of Ms Granville-Smith was that the significant piece of evidence was the e-mail from Mr Redmayne, this was also echoed by Mr Leefe. The Claimant was not given an opportunity to consider this evidence before the decision was taken by Ms Granville-Smith. Although she says that she had taken advice, it is a principle of natural justice that a person knows the case they have to meet. The e-mail was the most significant piece of evidence relied upon and the Claimant was not given an opportunity to provide an explanation. The failure to provide him with that opportunity was not the action of a reasonable employer.

61. The Claimant said that the Respondent should have sought further clarification from Mr Redmayne. Ms Granville-Smith's evidence was that she thought its meaning was clear. On considering the e-mail, the conclusion reached by the Respondent in relation to its meaning was one a reasonable employer could have reached and was clear that the Claimant was involved in the discussion of Copse's business. I also took into account that ERP was a competitor of the Respondent of which the Respondent was acutely aware.

62. In relation to whether the Respondent should have asked Mr Timmins to provide an account, the Claimant did not raise this at the disciplinary hearing, although he did at the appeal stage. Mr Leefe considered that the evidence would not be independent or reliable and based this on the fact that he was a friend of the Claimant, he had been involved in the transaction and his knowledge of Mr Timmins' departure. Mr Leefe acknowledged that in a perfect world information would have been sought from Mr Timmins. It is difficult to understand why if a competitor could be approached, Mr Timmins could not, particularly as the Respondent would be able to weigh the effect of the evidence when considering its decision. In the circumstances where the Claimant specifically raised on appeal that Mr Timmins could provide evidence, a reasonable employer would have undertaken further investigation.

63. Accordingly, although the Respondent held a genuine belief on reasonable grounds it did not carry out a reasonable investigation.

<u>Was the dismissal fair or unfair in accordance with S. 98(4) ERA? Was the sanction of dismissal within the band of reasonable responses open to a reasonable employer?</u>

64. The Respondent argued that any defect in the investigatory process was cured on appeal in that the Claimant had an opportunity to consider Mr

Redmayne's e-mail and put his case. Considering the process as a whole, I rejected that submission. The e-mail was the significant piece of evidence in determining the Claimant's guilt and he did not have an opportunity to address it before the decision was taken. The purpose of an appeal is to reconsider the original decision and that original decision is partly based on the employee's response to the allegations. Essentially the Claimant was denied the opportunity to put forward his explanation and have a right of appeal to any findings made in relation to it, on the basis that his first opportunity to do so was at the appeal hearing. The defect was therefore not cured on appeal.

65. Accordingly, the dismissal was not fair within the meaning of s. 98(4) of the Employment Rights Act 1996, on the basis of those procedural failings.

<u>If the Respondent did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?</u>

66. I had the advantage of hearing evidence from Mr Timmins. In particular he confirmed that his intention was that the Claimant would provide assurance to ERP about Copse's supply of evidence and that he asked the Claimant to provide such assurance during the meeting with Mr Redmayne. This contradicted the evidence that the Claimant had given during the disciplinary process and also contradicted his assertion that he did not know that Copse might contract with another party. The Respondent argued that if Mr Timmins had provided evidence to it, the only conclusion would have been that the Claimant was lying. I accepted the Respondent's submission that such evidence was unlikely to have assisted the Claimant and in fact tended to support the Respondent's conclusion.

67. In relation to Mr Redmayne's e-mail, the Claimant did not put forward an alternative version of events to counter what was said, other than maintaining that he was not involved in the discussions. The Claimant did not give evidence to the effect that he would have said anything else at the disciplinary hearing if he had been provided with the e-mails before it took place. The Claimant's main contention was that the e-mail was not evidence, with which I disagree. The e-mail is an account by Mr Redmayne and is an explanation of what occurred. It was something that the Respondent could properly take into account in considering whether the allegation had been made out. It was evidence from an independent source and was clear that the Claimant had been involved.

68. Doing the best I could, after assessing the evidence as a whole, if the Respondent had sought information from Mr Timmins and provided the Claimant with the emails before making a decision, the Respondent would have operated a fair procedure. If the Respondent had operated a fair procedure, I am satisfied that it would have still fairly dismissed the Claimant

however the process would have taken four weeks longer. Providing information to a competitor about a potential supplier to the Respondent was a significant conflict of interest and was to the detriment of the Respondent.

Did the Claimant's conduct contribute to the dismissal?

69. The Respondent relied upon the meeting between the Claimant, Mr Timmins and Mr Redmayne as the relevant conduct. In the light of my findings of fact, that the Claimant was involved in discussing with Mr Redmayne about details of Copse's business and the source of the batteries it dealt with, this was conduct that was blameworthy in that there was a significant conflict of interest to the detriment of the Respondent. This was the conduct that led to the Claimant's dismissal. Taking into account the Claimant's conduct and the procedural failings by the Respondent it was just and equitable to reduce the compensatory award by 75%.

70. I also considered the slightly different test under s. 122(2) and whether the conduct made it just and equitable to reduce the basic award. No additional conduct was relied upon by the Respondent. In the circumstances it was just and equitable to reduce the basic award by 75%.

71. I was not addressed on uplift for failing to comply with the ACAS code of practice and this will need to be addressed at any future remedy hearing.

Employment Judge J Bax

Dated 25 November 2019

Judgment sent to parties: 5 December 2019

FOR THE TRIBUNAL OFFICE