EMPLOYMENT TRIBUNALS

Claimant: Mr K Melia

Respondents: 1. Canaccord Genuity Wealth Management
2. Hargreave Hale Limited

Heard at: Manchester **On:** 3 and 4 December 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondents: Mrs J Ferrario (Counsel)

WRITTEN REASONS

Introduction

1. These are the Written Reasons for the Judgment given orally with reasons at the conclusion of the hearing and sent to the parties in writing on 30 December 2019.

2. The claimant presented his claim form on 15 February 2019 complaining that he had been unfairly dismissed from his position as an Investment Manager in October 2018. He said that the procedure leading to his dismissal, ostensibly for gross misconduct, had been unfair, and the decision had been taken in his absence. He also alleged that the charges against him had been manufactured and the real reason for the dismissal was in order to avoid the cost of making him redundant.

3. His claim form was presented against Canaccord Genuity Wealth Management. At a preliminary hearing before Employment Judge Warren Hargreave Hale Limited was added as second respondent. In the course of this final hearing the claimant's contract of employment signed in January 2018 was produced which confirmed that Hargreave Hale Limited was the company that employed him. The claimant agreed that the proceedings should be brought against that company instead of the first respondent. In the remainder of these Reasons I will refer to Hargreave Hale Limited as “the respondent”.

4. The claim form had also contained a complaint of discrimination on the grounds of gender reassignment, but that (and an apparent age discrimination complaint) were dismissed by Employment Judge Warren on withdrawal, and the claim proceeded as one of unfair dismissal alone.

5. The grounds upon which the unfair dismissal claim was defended were set out in the response form of 23 July 2019. The respondent said it was a fair gross misconduct dismissal given problems with the claimant's behaviour which resulted in three disciplinary allegations. The claimant had not attended any investigatory or disciplinary meeting to put his side of the story and had not pursued any appeal.

Issues

6. I discussed the issues to be determined at the start of the hearing. They had been outlined by Employment Judge Warren in her Case Management Order following the preliminary hearing on 30 August 2019.

7. The claimant confirmed that he no longer contended that the real reason for his dismissal was to avoid a redundancy. He accepted that it was for a reason related to his conduct.

8. That meant that the sole issue for me to determine was whether the dismissal was fair or unfair applying the general test of fairness in section 98(4) Employment Rights Act 1996.

Evidence

9. The parties had agreed a bundle of documents running to over 170 pages. Any reference to page numbers in these Reasons is a reference to that bundle unless otherwise indicated.

10. The respondent called two witnesses. Heather Yeadon was the Human Resources ("HR") Manager involved in the investigation of the misconduct allegations. Lee Finlayson was the Deputy Head of UK Front Office based in London who took the decision to dismiss the claimant.

11. Despite a clear provision in the written Case Management Order of Employment Judge Warren, the claimant had not prepared any witness statement. The respondent had applied prior to the hearing for the claim to be struck out but Employment Judge Dunlop had directed that the consequences of non compliance be considered at this hearing.

12. We discussed the possibility of adjourning the hearing and making an Unless Order requiring the claimant to provide a witness statement by a certain date. That was not an attractive proposition for the respondent because their witnesses had travelled to be at the hearing today and they wanted the case to be heard. So did the claimant. Eventually it was agreed that the claimant would be allowed to give his evidence in chief orally without any witness statement, but we would then allow a break in order for Mrs Ferrario to take instructions before cross examination of the claimant. As it transpired the claimant's oral evidence in chief took an hour on the morning of the first day of the hearing, following which there was a break over lunchtime before he was cross examined.

Adjournment Application

13. After I confirmed that the hearing would proceed on the basis of oral evidence from the claimant, he applied for it to be postponed anyway so that he could obtain legal representation. He said he had not appreciated that the respondent would be represented not only by its solicitor but also by a barrister.

14. Applying the overriding objective in rule 2, I declined that application. The overriding objective is to have a fair and just hearing, and this includes putting the parties on an equal footing and avoiding delay, so far as compatible with proper construction of the issues. I had already explained to the claimant that I would assist him with any legal issues which arose, recognising that he did not have a legal representative. Further, the issues in this case did not depend upon any complicated points of law. I was satisfied that it was possible to have a fair hearing without a postponement simply to enable the claimant to obtain legal representation. The hearing proceeded.

Relevant Legal Principles

15. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

16. The primary provision is section 98 which, so far as relevant, provides as follows:

> **"(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 sub-section (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 sub-section if it … relates to the conduct of the employee …**
>
> **(3) …**
>
> **(4) Where the employer has fulfilled the requirements of sub-section (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".**

17. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which

originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell** test" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

18. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

19. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

20. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

21. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.** The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

22. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Relevant Findings of Fact

23. Having heard from the three witnesses in person and having considered all the documents, I found that the relevant facts were as follows. I have omitted from this summary any matters raised in the evidence which were not relevant to deciding whether the dismissal was fair or unfair.

Background

24. The respondent is a wealth management solutions company operating across the UK and Europe with approximately 463 employees at the date of its response form. Since late 2017 it has been part of the Canaccord Genuity Group.

25. The claimant has worked for the respondent in various capacities since 1999. He was initially an employee but went onto a self-employed basis in 2003.

26. That was reversed in March 2007. A letter of 22 March 2007 at page 63 recorded that following an incident concerning the possible consumption of alcohol on the premises it was agreed that he would return to employee status. His attention was drawn to the provisions in the staff manual which dealt with consumption of alcohol and drugs (pages 61-62). The claimant acknowledged that he had an issue with alcohol at that stage, but apart from a further issue in July 2007 (when it was perceived that he had attended for work under the influence of alcohol) there were no further issues with his conduct or behaviour for over ten years.

27. At the time of the events in this case the claimant was an experienced and well-regarded Investment Manager. His work involved meeting with clients to give advice or to assist with discretionary investment decisions, portfolio management, and also "execution only" cases where he was responsible for putting into effect a financial planning decision which a client had already made.

Spring 2018

28. In 2018 the claimant's direct line manager was Matthew Whittington, who was the Deputy Manager of the Blackpool office. The office was managed by Leyton Hunt. Mrs Yeadon was the HR Manager with responsibility for that office.

29. From the spring of 2018 onwards there were some issues about attendance on the part of the claimant. On 4 April 2018 (page 65) Mr Hunt emailed the claimant about the need to conform to new office hours and the importance of notifying a manager when there was a medical appointment during working hours. The time would have to be made up.

June 2018

30. On 15 June 2018 Mr Hunt made a note of the late arrival of the claimant due to a problem with his car, and time spent on a personal call (page 66).

31. On 18 June 2018 Mr Hunt made a note that the claimant had been off sick but had not called in the office (page 67), and on 21 June 2018 he sent an email (page 68) saying that the claimant had not showed up again.

32. These issues led to a meeting on 22 June 2018 between the claimant, Mr Whittington and Mrs Yeadon. The note appeared at page 69. There was a concern that problems with alcohol had resurfaced. The claimant admitted that he had been binge drinking and said that only he could get himself out of the situation. There was a discussion of the support that the respondent could supply, including the Employee Assistance Programme ("EAP"), and a referral to Occupational Health ("OH") was agreed. EAP details were provided later the same day (page 70).

33. Mr Whittington sent an email to the claimant on 25 June (page 72). The email said he was setting out how he thought that they should take things forward in relation to work and workload. The email went on to impose a number of conditions on the claimant. They included being in work at 8.00am prompt every day and not leaving before 4.30pm. There were restrictions on his dealings with discretionary

clients and investment management. His incoming emails would be auto-forwarded to Mr Hunt and Mr Whittington. They would have to sign off all letters that went out. The claimant was allowed to deal with execution only client meetings, but all meetings were to be held in the office unless absolutely necessary to hold them somewhere else. The intention was that clients would be under the impression it was business as usual.

34. The claimant confirmed his agreement to these conditions the same day (page 71). He said the meeting had been very fair and constructive and it was time for him to fully embrace change and get back to being good at what he did.

July 2018

35. Following an appointment with a physician, the OH report was provided on 24 July 2018 (pages 75-77). It reviewed what the claimant said about his alcohol consumption. It concluded that he was fit for work but it might be prudent to restrict him from vocational driving, and to risk assess his work in terms of client finances, until the results of a blood test were received.

36. On 30 July 2018 the claimant had a meeting with a client arranged to take place in the Lancaster office (page 78). Mr Whittington was told that he had forgotten that appointment. Mr Whittington later told Mrs Yeadon (page 105) that because of this incident he had told the claimant that he was not to undertake any client meetings at all.

9 August 2018

37. On Thursday 9 August the diary for the office showed that the claimant had a meeting with a client in the office at 11.30am, and a meeting with Deborah Pink at 3.30pm. The morning meeting was a client who wanted to sell some shares. It as the policy of the respondent that the share certificate had to be in the office before that instruction could be executed. The client came into the office and the claimant met him for a couple of minutes to take the share certificate from him.

38. The afternoon appointment was out of the office and the claimant left early in order to go to it.

39. On the afternoon of 9 August 2018 the claimant obtained a copy of his contract from HR, and forwarded it to someone who worked for a competitor (page 87). That email was seen by Mr Whittington because emails to the claimant were being forwarded automatically to him pursuant to the arrangements put in place in June. He formed a belief that the claimant might be looking for employment with the competitor.

40. At just before 3.30pm on 9 August 2018 the claimant emailed Mr Whittington to confirm the details of that morning's meeting.

10 August 2018

41. The response from Mr Whittington on the morning of 10 August 2018 (page 89) was as follows:

> **"Thanks for doing this, but just a reminder that you shouldn't really be having client meetings at the moment. Just focus on the paperwork on your desk and ploughing on with your CPD.**
>
> **If a client asks you directly for a meeting, explain to the client that you are tied up with stuff and that one of your colleagues will attend instead."**

42. The claimant responded to say that he did not think there was a problem because it was an execution only client meeting, and asked what he should do in the future. Mr Whittington responded (page 88) to say that he should tell the client he was incredibly busy and someone else will see them.

43. Later that morning the claimant asked Mr Whittington if he could have annual leave because his mother was ill. Mr Whittington refused. The claimant left the office anyway.

44. At 11.25am Mrs Yeadon texted the claimant asking him to contact her. He responded (page 92) to say that he had booked a holiday to see his mother but Mr Whittington had said no, so he had left but was very polite.

13 August 2018 - Suspension

45. On Monday 13 August 2018 the claimant was suspended at a meeting with Mrs Yeadon. Suspension was confirmed in an email at page 93. No details of the allegations were given in the suspension email, but they were provided the following day.

14 August 2018

46. By an email of 14 August 2018 at page 96 Mrs Yeadon invited the claimant to an investigatory meeting on 15 August 2018. The email said:

> **"This meeting has been arranged because we are in the process of investigating allegations that have been made relating to your conduct in the workplace. The alleged misconduct includes not following controls with regards to holding client meetings, preparing to remove company property from the office and disregarding express instructions from the Deputy Branch Manager relating to taking leave.**
>
> **Please note that the meeting is entirely a fact-finding exercise and it does not form part of the formal disciplinary procedure. As such, you do not have a right to be accompanied at this stage. If, once our investigation has concluded, the company wishes to institute formal disciplinary proceedings against you, you will be invited to attend a disciplinary hearing at a later date."**

47. The claimant responded to the email by saying he was happy to attend.

48. Mrs Yeadon conducted some investigatory interviews on 14 August 2018 before seeing the claimant. The notes appeared between pages 99 and 107. During those interviews the following assertions were made by colleagues and managers:

- The claimant had been told that his request for holiday was refused but said he was leaving anyway, even though he was told there would be repercussions.

- When the claimant first came into the office that morning he kicked his waste bin loudly.

- The claimant had packed some material into a box and told his colleague, Louise Rimmer, to remind him to take the boxes down when he left the office.

- The claimant seemed under the influence of alcohol to Ms Rimmer and she said that he had "been bad for weeks".

- The initial instruction to the effect that he could deal with execution only client meetings had been varied verbally by Mr Whittington so that the claimant had not been allowed to meet any clients.

- The boxes which the claimant had packed seemed to be mainly client holding report and bank statements.

49. The boxes in question had been left in the office on 10 August and it transpired that they contained a range of personal and work material including personal details of clients such as passport details and utility bills.

15 August 2018

50. The claimant attended for his investigatory interview on 15 August but told Mrs Yeadon it could not continue because his mother was unwell. They agreed to hold it on Monday 20 August instead.

20 August 2018

51. The claimant attended on 20 August but the meeting did not go ahead. He handed to Mrs Yeadon a letter (page 136) saying that he had taken advice and that he could not proceed with the meeting without being allowed legal representation. His letter referred to the right to a fair trial under Article of the European Convention on Human Rights ("ECHR") and the Human Rights Act 1998.

52. After that aborted meeting Mrs Yeadon emailed the claimant (page 134) saying that the meeting was part of an internal investigatory process and not a disciplinary meeting. There was no right to be accompanied and no right to legal representation. A right to be accompanied by a trade union representative or a work colleague would arise if the matter proceeded to formal discipline. Her email said that the meeting would be re-arranged for Wednesday 22 August, or at another convenient time. Alternatively the claimant could supply written submissions if he did not want to attend a meeting.

22-30 August 2018

53. Mrs Yeadon did not get a reply and emailed the claimant again on 22 August (page 138) asking him to reply by 28 August.

54. The claimant did respond on 24 August (in an email not provided during this hearing), and on 30 August Mrs Yeadon emailed him (page 137) to say that as he

would not attend an investigation meeting the file would now be passed to the investigating officer to consider the next stage.

Disciplinary Charges 18 September 2018

55. The investigating officer was Stuart Brooks, and having considered the paperwork gathered by Mrs Yeadon he confirmed on 10 September that the matter should progress to a disciplinary hearing for gross misconduct.

56. That was confirmed in an email of 18 September 2018 from Mrs Yeadon setting out the disciplinary allegations. They were put as follows:

> **"The basis for this allegation is that you:**
>
> - **Failed to follow measures which had been put in place as risk controls;**
> - **Took a period of unauthorised absence and left the office against express managerial instruction;**
> - **Prepared to remove information from the office including sensitive client data."**

57. The claimant was told that one outcome could be his dismissal without notice. A decision could be made in his absence. The disciplinary file and a copy of the disciplinary policy (pages 53-58) was sent to him by post.

58. The disciplinary policy offered examples of what might be considered gross misconduct. They appeared on page 57. They included serious failure to carry out a direct instruction from a director, theft of the company's or a colleague's property, and a serious breach of company rules or procedures.

Disciplinary Hearing

59. The disciplinary hearing was arranged for 26 September.

60. On 24 September the claimant emailed to say he would attend with a companion, Terry Ramsden (page 153). Mrs Yeadon was on leave, and her HR colleague, Megan Traynor, responded quoting the disciplinary procedure and saying that Mr Ramsden could not attend as he was neither a union representative nor a colleague. The claimant responded to say he would attend (page 152). In fact, he came to the meeting on 26 September only to hand over a further letter saying that he was not prepared to attend the meeting without legal representation. He said that the refusal to allow Mr Ramsden to attend showed that there was not going to be a fair and reasonable hearing. He said he would only attend with full legal representation.

61. On 2 October Mrs Yeadon emailed the claimant (page 157) saying that he would be given a final opportunity to attend and make representations. The hearing was re-arranged for 9 October. She reiterated that policy and the ACAS Code entitled him to be accompanied only by a union representative or a colleague.

62. On 8 October (page 159) the claimant reiterated his demand for legal representation, making reference to his human rights. Mrs Yeadon replied the same day (page 161) to reiterate the company's position. She reminded him that he was permitted to make a written submission instead.

63. On the morning of 9 October the claimant sent an email confirming he would not attend the hearing (page 163). Mrs Yeadon responded at 10.35am to say that he could have a final opportunity to provide any written submissions by close of business that day. The claimant responded to say that was not a reasonable timescale and he would supply them by close of business on Thursday 11 October (page 165).

64. On 10 October Mrs Yeadon emailed the claimant (page 167) to say that he had had a fair opportunity of making submissions in person or in writing and a decision would now be made. The claimant emailed the next day (page 170) to say that he thought that was unreasonable and unjust.

Decision 17 October 2018

65. Mr Finlayson considered the material provided to him. He had the notes of the interviews conducted by Mrs Yeadon. He had no input from the claimant because there had been no meeting and no written submission. He formed the view that the claimant could well have been looking to leave, based on the fact he had emailed his contract to a competitor on 9 August and that he had filled boxes with client information before leaving the office on 10 August.

66. His decision was set out in a letter of 17 October 2018 (pages 171-173). He concluded that the claimant was guilty of each of the three allegations. He had breached the instruction not to conduct client meetings by his meeting on 10 August, he had taken unauthorised absence by walking out of the office on 10 August when his request for annual leave had been refused, and he had been preparing to remove sensitive client data from the office, even if it was historical data. The letter went on as follows:

> **"In addition to these points, from the file there were other areas that give concern. The boxes containing client data were attempted to be removed in a deceitful manner, requesting another member of staff to assist. The client meeting with a Mrs Pink seems to have been a fabrication, again involving another member of staff to assist in a deceit.**
>
> **We have several apparently clear breaches of acceptable behaviour and amongst those some elements that I would consider display behaviour that falls well short of the expectations we have, and the levels needed to be considered fit and proper to carry out such a responsible role. I am cognisant of the issues raised concerning alcohol, but also consider that the firm and your colleagues did attempt to offer support to you, and indeed some of the measures were in place to assist in this area."**

67. The letter said the claimant was dismissed without notice. It offered him the right of appeal. He did not pursue an appeal.

Submissions

68. At the conclusion of the evidence each side made an oral submission.

Respondent's Submission

69. After summarising the effect of the **Burchell** test, Mrs Ferrario emphasised that the investigation had been carried out entirely in accordance with the respondent's own policy and the ACAS Code of Practice. The relevant witnesses

had been interviewed, the three allegations formulated, and the claimant had access to all the investigation material before the invitation to attend a disciplinary hearing. He was given a number of opportunities to attend both an investigatory meeting and a hearing but chose not to take any. Effectively he had disengaged from the process and in those circumstances it was reasonable to proceed in his absence.

70. That meant that the information before Mr Finlayson when he took the decision to dismiss was only the information gathered during the investigation. There was nothing from the claimant, and the evidence he gave to the Employment Tribunal had to be disregarded for these purposes. That material gave Mr Finlayson a clear picture of gross misconduct. There had been difficulties in the claimant's behaviour since April, there was evidence that he had been consuming alcohol during work, and there was reason to think that he was planning to leave and join a competitor. Those were all background matters which informed the reasonable conclusion reached on the three allegations. There were reasonable grounds for the conclusion that he was guilty of misconduct on all three matters.

71. Further, given how supportive the respondent had been to the claimant, Mrs Ferrario said there were reasonable grounds to conclude that this was gross misconduct, and the absence of any remorse or insight on the part of the claimant meant it was reasonable for Mr Finlayson to conclude that dismissal was the appropriate sanction. She invited me to dismiss the claim.

Claimant's Submission

72. The claimant began his submission by emphasising that he had not been planning to leave. He had sent his CV to a competitor for an innocent reason, which was to inform a friend about the wording of a particular clause in his contract. He believed, however, that the view was formed by Mr Whittington that the claimant was planning to leave and that this affected the way the disciplinary matter was dealt with.

73. Even on the information before the respondent no reasonable employer could have sacked him. He could easily have taken a day of sick leave rather than request annual leave when his mother was ill. It was the first time he had ever been refused annual leave and he considered this was because of a dispute the previous day with Mr Whittington. The box of client papers had never been removed from the office. There was no evidence of any intention to remove it. Finally, the brief meeting with the client to obtain the share certificate in order to execute the transaction was something permitted by the email sent by Mr Whittington after the meeting in June 2018 and could not reasonably be seen as a breach of the measures. Nor was the meeting with Ms Pink: she was not yet a client of the firm.

74. The claimant accepted that the advice he had been given to insist on legal representation might not have been correct advice, but he had followed it. He had become convinced that the disciplinary investigation was only a rubber stamp and that he would be sacked come what may. Once he was dismissed, he did not have any funds to arrange legal support for the appeal, which he thought would be a waste of time in any event. In a situation where he was not a member of a trade union, and where none of his colleagues would be willing to stand up for him in a disciplinary context because of fear for their own position, he had effectively been

denied representation in a way that was unfair. He invited me to find that the claim succeeded.

Discussion and Conclusions

75. The sole issue for me to decide was whether the dismissal was fair or unfair under section 98(4) of the Employment Rights Act 1996. I took account of the wording of that provision reproduced above.

76. The relevant circumstances included the size and resources of the employer. In this case the respondent was a substantial employer with just over 460 employees at the date of the response form and with a dedicated HR function. I also had to take into account equity and the substantial merits of the case. However, the main point emerging from **Burchell** and other cases is the importance of a Tribunal not substituting its own view for that of the respondent. The test was whether the respondent's decision was within the band of reasonable responses. That meant that I had to disregard information which emerged only during this hearing if it was not before the decision makers at the relevant time. Such information is not relevant to the question of fairness unless the respondent ought reasonably to have discovered it.

77. Breaking down the **Burchell** test and section 98 I approached the matter by reference to the following questions:

(1) Did the respondent have a genuine belief the claimant was guilty of misconduct?

(2) If so, was that belief based on reasonable grounds?

(3) Was that belief formed following a reasonable investigation?

(4) Had the employer followed a reasonably fair procedure?

(5) Did the decision to dismiss the claimant rather than impose some lesser disciplinary punishment fall within the band of reasonable responses?

(1) Genuine Belief

78. This was not contested by the claimant. I was satisfied that Mr Finlayson genuinely believed the claimant was guilty of disciplinary misconduct. The points made by the claimant about the belief that he was planning to leave the respondent to go to another employer were relevant to the fifth question (the fairness of the sanction) and I will return to them at that stage.

(2) Reasonable Grounds

79. The claimant's refusal to attend the investigatory or disciplinary meetings or to put in any written submissions meant that Mr Finlayson had only one side of the story. That was the account contained in the notes from the interviews that Mrs Yeadon conducted. I considered the position in relation to each of the three disciplinary allegations.

80. The first allegation was that the claimant had failed to follow the measures put in place as risk controls. Mr Finlayson had a copy of the email from Mr Whittington of 25 June 2018 (page 72) which set out the restrictions imposed after the June meeting which were agreed by the claimant. They included that all meetings would take place in the office unless absolutely necessary. Nevertheless, according to the diary (page 78) and what Mr Whittington said (page 105), on 30 July the claimant had arranged a meeting in Lancaster. Mr Whittington said the claimant had forgotten that meeting and therefore he had told the claimant not to have any client meetings at all. Mr Whittington went on (page 106) to say that he then found the claimant in a client meeting on 9 August 2018. He said in his statement that this was the claimant completely ignoring his instruction. In the absence of any input from the claimant, Mr Finlayson had reasonable grounds for concluding the claimant had indeed failed to comply with the measures put in place after the June meeting as varied verbally by Mr Whittington.

81. There were also reasonable grounds for Mr Finlayson to conclude that the meeting with Deborah Pink on 9 August was a fabrication. Mr Warnes suggested this in his interview at page 99, and there was nothing before Mr Finlayson from the claimant to explain or counter that.

82. The second allegation was of unauthorised absence when the claimant left the office on 10 August 2018. There were plainly reasonable grounds to conclude that that had happened. Mr Finlayson had the notes of interview with Mr Whittington (page 109), which were supported by the account given by Ms Cunningham (page 101). Even when warned that there would be repercussions, the claimant had chosen to take unauthorised leave on that occasion.

83. The third allegation was that the claimant had prepared to remove information from the office. Mr Finlayson knew the content of the boxes and that they contained client information, albeit two years old. He accepted that the age of the information suggested the claimant had not printed it off in August 2018 but it was reasonable for him to consider that it was still sensitive client data. As for any intention to remove those boxes from the office, the information before Mr Finlayson was the interview with Louse Rimmer (page 103) when she said that the claimant had asked her to remind him to take the boxes down when he was leaving the office. In those circumstances, and without anything from the claimant to contradict these accounts, it was reasonable to conclude he was intending to remove the boxes, particularly given the knowledge that the claimant had emailed his contract to a competitor on the previous day. The claimant did give an explanation in evidence to my hearing, but it was never given to Mr Finlayson and he cannot be criticised for the view he formed on the information in front of him at the time.

84. For those reasons I was satisfied that Mr Finlayson had reasonable grounds for his conclusion that the claimant was guilty of misconduct on all three allegations.

(3) Reasonable Investigation

85. Sensibly the claimant did not challenge the fairness of the dismissal on this ground. The investigation was plainly reasonable. The claimant was suspended but he was invited to an investigation meeting, which was postponed at his request, and then he declined to attend or to do written submissions to the investigation. Mrs Yeadon interviewed all the others and notes of the interviews formed part of the

disciplinary pack which was provided to Mr Finlayson and provided to the claimant. The only piece of the jigsaw missing was the claimant's own account, and the respondent cannot be blamed for the fact that he claimant chose not to put that forward.

(4) Reasonably Fair Procedure

86. The claimant was told of the allegations against him in the email inviting him to a disciplinary hearing of 18 September 2018 (page 141). He was given copies of the investigation file including the statements that had been taken and the disciplinary policy. The email said that he had the opportunity to provide any further documents.

87. The disciplinary hearing was initially arranged for 26 September. The claimant did not attend because of a dispute about his companion, to which I will return below. It was re-arranged for 9 October. He was warned that there could be a decision made in his absence, but he still did not attend.

88. Further, the claimant had four opportunities to provide written submissions without having to attend a meeting. He was given that opportunity in the investigation by Mrs Yeadon on 20 August (page 134). Once the disciplinary proceedings were underway, he was given an opportunity on 2 October (page 157) to provide any written submissions by 8 October. On 8 October he was given a further opportunity to provide submissions before the meeting the following day (page 161). On 9 October at 10.35am by an email at page 165 he was given another opportunity to provide anything in writing by close of business that day. The claimant did not take up any of those opportunities. Overall, therefore, it was clear that the claimant was given every reasonable opportunity to have his say on the allegations against him.

89. I considered the important question of the right to be accompanied, which was at the heart of the claimant's case. He argued that in view of the serious nature of the allegations against him, the severe effect on him if he were to be dismissed, and in circumstances where he was not a union member and no colleague would be willing to accompany him, an employer acting reasonably would have allowed him legal representation or the right to be accompanied by someone of his choice who was neither a union representative nor a work colleague.

90. That argument faced a number of difficulties. Firstly, the position taken by the respondent met the legal obligation under section 10 of the Employment Relations Act 1999, which provides for accompaniment only by a union representative or a work colleague. Secondly, the respondent's position was in line with the ACAS Code of Practice of Disciplinary and Grievance Procedures (paragraph 14). Thirdly, there was nothing in the contract of employment which gave the claimant any right to legal representation or to a companion of his choice beyond the statutory right. Fourthly, there was nothing in the disciplinary policy (page 55) which went beyond the statutory right. Fifthly, and importantly, the claimant's arguments based on the right to a fair trial under Article 6 of the ECHR were misconceived. In **R v The Governors of X School [2011] ICR 1033** the Supreme Court said the right to legal representation in internal disciplinary proceedings does not arise unless there are proceedings by a public sector employer which are intimately connected with the professional regulatory regime which will prevent any future participation in the

individual employee's chosen profession. This case concerned a private sector employer with no professional regulatory consequences necessarily flowing from a decision to terminate employment.

91. The effect of those five considerations meant it was in the band of reasonable responses for the respondent to reject the demand for legal representation or for a different companion - even though dismissal would make it much more difficult for the claimant to get another job in financial services.

92. I reached that conclusion having taken account of the obligation of this Tribunal, which is a public body, to interpret section 98(4) in a way which is consistent with Article 6.

93. Overall the procedure adopted was within the band of reasonable responses. Indeed, Mrs Yeadon and her colleagues could not be criticised for the efforts they made to allow the claimant to have his say. The investigation meetings were postponed at his request, the disciplinary meeting was postponed when he did not attend the first time, and the deadlines for written submissions were extended on more than one occasion.

(5) Reasonableness of Sanction

94. That left the final question of sanction. Was the respondent within the band of reasonable responses in concluding that what the claimant did was gross misconduct? If so, was it also reasonable to conclude that he should be dismissed for that gross misconduct rather than retained in employment with some form of disciplinary sanction, such as a final warning?

95. On the first question I was satisfied that it was within the band of reasonable responses to find that this was gross misconduct. The actions of the claimant could reasonably be viewed as showing that he did not intend to be bound by the contract any longer. On the information before Mr Finlayson he had deliberately breached the verbal prohibition on seeing clients in person. He deliberately flouted the refusal by Mr Whittington to give him annual leave on 10 August 2018 by leaving the office without permission. He had taken steps to remove sensitive client data from the office in circumstances where there was a reasonable suspicion he was planning to leave and join a competitor.

96. On the second question, even taking into account the claimant's long association with the respondent both on a self-employed and employed basis, and the fact he had a clean disciplinary record, in my judgment there were still reasonable grounds to conclude that enough was enough and this was time to dismiss him. The respondent had been hugely supportive of the claimant, not just in 2007 when he was offered employment despite difficulties that he was having at the time, but also in its approach to the problems that arose in the spring of 2018. The claimant himself, to his credit, recognised that the meeting in June 2018 had been fair and constructive, and he agreed with the measures set out in Mr Whittington's email of 25 June. He cooperated with the OH referral.

97. However, there were three factors suggesting that dismissal was a reasonable sanction. First was the combination of circumstances on 9 and 10 August 2018. Second was the evidence, according to Mr Whittington (page 106),

that the alcohol issue had arisen again. Third was the absence of any remorse or insight on the part of the claimant, who instead chose to pursue aggressive demands for legal representation. The combination of those three factors, in my judgment, meant that the decision to dismiss him was in the band of reasonable responses.

98. For those reasons this was a fair dismissal. The complaint of unfair dismissal failed and was dismissed.

Employment Judge Franey

5 February 2020

WRITTEN REASONS SENT TO THE PARTIES ON
18 February 2020

FOR THE TRIBUNAL OFFICE