EMPLOYMENT TRIBUNALS

Claimant: **Mr C Bermingham-McDonogh**

Respondent: **Panasonic Manufacturing (UK) Ltd**

Heard at: **Cardiff** **On: 11, 12 and 13 March 2020 and 23 April 2020 (in chambers)**

Before: **Employment Judge S Jenkins (sitting alone)**

Representation:
Claimant: Mr J Allsop (Counsel)
Respondent: Mr J Bromige (Counsel)

RESERVED JUDGMENT

(1) The Claimant was unfairly dismissed and his claim of unfair dismissal therefore succeeds.
(2) The Claimant's conduct before his dismissal was such that it is just and equitable to reduce the amount of the basic award by 25%.
(3) The Claimant's dismissal was to an extent contributed to by his actions and therefore it is just and equitable to reduce the amount of the compensatory award by 25%.
(4) The Claimant did not commit a repudiatory breach of contract and therefore his wrongful dismissal claim succeeds.

REASONS

Background

1. The hearing was to consider the Claimant's claims of unfair dismissal and wrongful dismissal following his dismissal, ostensibly on the ground of gross misconduct, on 20 March 2019. Due to the lack of availability of a Japanese interpreter until the third day of the hearing, required in the case

of two of the Respondent's witnesses, we reversed the usual order of evidence, with the Claimant going first.

2. I heard evidence from the Claimant on his own behalf and from Kevin Jones (Director), Sandra Connolly (HR Director of Panasonic Europe), Taro Yashima (Finance Director), Yasushi Morimoto (Managing Director), Helen Walker (HR Manager) and Carl Pocknell (Managing Director of Panasonic Europe) on behalf of the Respondent. I considered the documents in the bundle spanning 430 pages, together with several additional lettered pages (which took the overall size of the bundle to approximately 575 pages), to which my attention was drawn.

3. In the event there was only sufficient time on the three days allocated to the hearing to consider the evidence. The parties therefore subsequently submitted their submissions in writing, together with counter-submissions, and I then considered the case in order to produce this reserved Judgment.

Issues

4. A comprehensive List of Issues was produced by the Claimant at the outset of the hearing and the Respondent indicated its agreement with them. Those issues were as follows

Unfair dismissal

1. What was the reason for the dismissal? The Respondent contends that it was misconduct.

2. If the reason was misconduct, did the Respondent believe that the Claimant had committed an act of gross misconduct?

3. Was that belief based on reasonable grounds after a reasonable investigation?

4. Was the outcome of the disciplinary proceedings against the Claimant pre-determined?

5. Did the Respondent employ a fair procedure in dismissing the Claimant and was the ACAS Code followed? In particular:

(a) Was it appropriate for Mr Jones to conduct the disciplinary investigation?
(b) Was it appropriate that the Claimant did not have sight of the [HR Manager's] grievance against him?
(c) Was it appropriate that the Claimant was not afforded an opportunity to see the evidence regarding the alleged adverse impact of the [HR

Manager's] SAR on the Respondents negotiating position with respect to its settlement agreement with the [HR Manager]?

(d) Was the disciplinary investigation conducted in an unfair manner?

(e) Were the allegations against the Claimant clearly defined and properly put at both the disciplinary investigation and the disciplinary hearing stages?

(f) Was it appropriate to suspend the Claimant from work on 1 February 2019?

(g) Did the suspension of the Claimant from 1 February 2019 hamper his ability to respond to the disciplinary allegations that were subsequently made against him?

(h) Was it appropriate for Mr Yashima to conduct the disciplinary meeting?

(i) Did Mrs Connolly exceed her mandate of providing support as the HR Representative at the disciplinary meeting and in relation to the disciplinary outcome?

(j) Was the Claimant required to disprove the allegations against him?

(k) Did the Respondent fairly consider the responses made by the Claimant to the points put to him at the disciplinary meeting?

(l) Did the Respondent destroy evidence that might have assisted the Claimant during the disciplinary process?

(m) Was the appeal procedurally fair?

6. Whether dismissal was in the range of reasonable responses open to a reasonable employer. The Claimant avers that:

(a) Dismissal was a disproportionate sanction and was outside the range of reasonable responses;

(b) He was unfairly scapegoated for the fact that the [HR Manager] raised SAR, and how that SAR was processed by the Respondent

(c) It was inconsistent with other sanctions given to other employees

(d) The Respondent failed to take into account his mitigating circumstances, including but not limited to his unblemished service record over nearly 28 years and the lack of access to HR support in dealing with the HR Manager's investigation and long-term sickness absence.

7. If the dismissal was unfair, does Polkey arise, i.e. had a fair procedure been deployed what are the chances that this employer would have dismissed the Claimant in any event?

8. Did the Respondent unreasonably fail to comply with the ACAS Code of Practice in relation to the Claimant's grievance that he raised with the Respondent on 28 January 2019? If so, what uplift should be applied?

9. If the dismissal was unfair, to what extent did the Claimant cause or contribute to the dismissal; was the Claimant's conduct such that any compensation should be reduced under Sections 122(2) or 123(6) ERA 1996?

10. What compensation is the Claimant entitled to recover?

Wrongful dismissal

11. Did the Claimant commit a repudiatory breach of his contract of employment so as to entitle the Respondent to summarily terminate his employment on 20 March 2019?

12. What damages is the Claimant entitled to recover? The Claimant contends that, pursuant to clause 1 of his service agreement, he is entitled to damages equivalent to 6 months' notice, plus an uplift due to the Respondents failure to comply with the ACAS Code of Practice as above.

Findings

5. My findings relevant to the issues outlined, on a balance of probabilities where there was any dispute, are set out below.

6. The Respondent is part of the well-known Japanese electronics group and is based in Cardiff. The Claimant was initially employed by it in April 1991 and, following a number of promotions, was, by the end of 2018, employed as Director of the Respondent's Home Appliance Division. He was also its Company Secretary, having recently been appointed, in September 2018, into that role. The Claimant's role included responsibility for human resources (for which the Respondent had a dedicated team of employees under an HR Manager) and health and safety issues on site. However, the significant majority of his duties, in fact approximately 85%, related to operational matters. Over the nearly 28 years for which the Claimant was employed no issue appears ever to have arisen relating to his performance or conduct. Indeed, as noted, the Claimant was only appointed to the Company Secretary role in September 2018, which I took to provide confirmation of general satisfaction of his performance up to that point.

7. The background to the issues relating to the Claimant's dismissal started in March 2018. At that point, it seems that concerns had been identified following a review of the Respondent's pension scheme, which led to the Respondent deciding to replace two of its nominated trustees. The HR Manager published an announcement of this by email to all of the Respondent's employees on 13 March 2018 under the name of the Respondent's Managing Director, Mr Morimoto, by cutting and pasting his

signature into it. That was done without Mr Morimoto's knowledge and approval and, although on its face a relatively straightforward matter, appears not to have gone down at all well with Mr Morimoto.

8. Emails circulated amongst the Respondent's Directors, and also with Directors at Panasonic Europe, in which Mr Morimoto described the HR Manager's actions as a "*kind of fraud*" and stated, "*we cannot trust her anymore*". In an email on 15 March 2019, Mr Yashima stated that the board members (who were at the time himself, Mr Morimoto, Mr Jones and the Claimant) recognised that this was a very serious issue and agreed to start a disciplinary process. Mr Jones, in an email of 13 March 2019, noted that "*using the MD's signature without permission is a serious disciplinary issue. It's actually gross misconduct, for fraudulent use of someone's signature and/or misleading the company that the announcement is approved by the MD when it was clearly not*".

9. It appears that the HR Manager, whilst recognising that she had not had Mr Morimoto's permission, had felt that what she was doing was something of a formality.

10. Advice was sought from the Respondent's external solicitors, who recommended that a disciplinary investigation be undertaken, although the advice was that, although the HR Manager had clearly acted inappropriately, her email was, in itself, unlikely to be a valid reason for dismissal given her record and length of service. The Claimant was identified as the person to undertake that investigation and throughout the process he made use of Mr Daniel Humphrey, one of the Respondent's General Managers, as his notetaker and assistant.

11. From the outset, the investigation proved to be difficult to manage. Indeed, in a disciplinary investigation meeting with the Claimant on 31 January 2019, Mr Jones noted, "*there is correspondence to suggest that there was some game playing by [the HR Manager] and attempts to frustrate the process*".

12. A meeting with the HR Manager took place on 22 March 2018 and a follow-up was arranged for 4 April 2018. However, the HR Manager commenced a period of sickness absence on that day and, as it transpired, never returned. The Claimant was able to meet with others who provided relevant evidence in relation to the investigation but never again met the HR Manager to progress it.

13. The Claimant did however manage to meet the HR Manager on 6 July 2018 for a long-term sickness review meeting under the Respondent's policy. The brief notes of this meeting taken by the Claimant note that the HR Manager started to discuss the disciplinary investigation and queried the "agenda"

behind it, and that when the Claimant reminded her that the meeting was to discuss the health issues preventing her return she stated only that she would return if no disciplinary action was taken.

14. The HR Manager appeared to take a different view of the meeting as she wrote to the Claimant on 12 July 2018 noting that she had left the meeting "*significantly more anxious, distressed and upset to the point of tears*", and that she felt that the Claimant's objective had been to ascertain her fitness to commence discussions into further allegations against her, which appeared also to relate to allegations in relation to her role as Pension Scheme Trustee. The HR Manager referred to feeling "*totally aggrieved by the current situation*". In the letter, the HR Manager also referred to having made "*repeated requests for documentation*", which appeared to relate to requests for amended notes of the interview on 22 March 2018 and hand-written notes from that meeting.

15. Advice on this letter was sought from the Respondent's external solicitors. They advised, by email on 18 July 2018, that the HR Manager's letter should be treated as a grievance but that it could be dealt with in the context of the disciplinary investigation. However, no action appears to have been taken to progress that with the HR Manager.

16. At this point, Mr Humphrey was temporarily assigned to take over responsibility for the HR Department during the HR Manager's absence, and from that point on he worked with, and supported, the Claimant. At no point was there any formal allocation of the Claimant's duties regarding the investigation or the long-term sickness process to Mr Humphrey, but it was clear from the documents that he assisted the Claimant with those. This included liaising with the operational HR Team to facilitate counselling for the HR Manager in July 2018.

17. On 12 September 2018, the Claimant received a letter from the HR Manager making a data subject access request ("SAR") in relation to her personal data. At the start of this letter, the HR Manager referenced several requests for copies of interview notes and additional information which she had not received. She then said, "*Therefore, in order to access these I feel I am left with no other option other than to exercise my rights under the General Data Protection Regulations and am therefore making a Subject Access Request in relation to personal data*". The letter also referred to a comment purported to have been made by the Claimant in the meeting on 22 March 2018, that "*a number of emails had been bandied about*" between the Respondent's Directors and Panasonic Europe colleagues regarding her and that she wished to receive copies of those emails and any text messages. The Claimant acknowledged that letter by letter dated 17 September 2018.

18. The Claimant passed the HR Manager's letter to Mr Humphrey, who in turn referred it to the external solicitors, and it appears that Mr Humphrey played the most central role in formulating the response although the Claimant retained formal responsibility for it. A letter was sent to the HR Manager in the Claimant's name, although drafted by Mr Humphrey, on 25 September 2018, noting that the time for responding to the SAR would be extended by 2 months, i.e. to 12 December 2018, due to the complexities involved in responding. There was no evidence that the Claimant had any specific direct involvement in the SAR response and it appears to have been managed by Mr Humphrey. The response itself was not before me, but it appears that a response was sent out, in the Claimant's name, on 14 December 2018.

19. In September and October 2018, the Claimant was chased by Mrs Walker in relating to agreement to fund further counselling for the HR Manager, contact having been made with Mrs Walker by the HR Manager in that regard. There appear to have been delays on the part of the Claimant in responding to Mrs Walker's requests, and indeed there never appears to have been any formal authorisation of further counselling by the Claimant, but it appears that it was arranged.

20. Also in October 2018, the Respondent, in the form of the Claimant and Mr Humphrey, took legal advice on the possible exercise by the Respondent of its discretion to withhold company sick pay during the HR Manager's ongoing absence. The advice was that this could be problematic due to the fact that sick pay had been paid for twelve months in other cases, all of whom had been male. The email containing the advice was provided to Mr Jones who, in an email copied to both Mr Morimoto and Mr Yashima, replied, "*This is a joke!*".

21. An Occupational Health Report into the HR Manager's health was received by 16 October 2018, although no copy of it was before me. References to it in an email however, mention that the advice was that the disciplinary proceedings should not be continued until the HR Manager was fit to return, and also that communication with her should only be by post and not by text.

22. The fact of receipt of the SAR was discussed informally at a board meeting on 28 September 2018, although it was not formally minuted and Mr Yashima was not in attendance.

23. By early November 2018, it appears that concerns existed amongst the Respondent's Directors about the management of the HR Manager's case, and therefore Mrs Connolly was brought in from Panasonic Europe on a part-time basis to assist. There does not appear to have been any formal written confirmation of her role, but it is clear that she was at least assigned

to support the Claimant in relation to the management of the HR Manager's case and also to take forward the review of the issues that had arisen in relation to the pension scheme.

24. The Claimant's evidence was that Mrs Connolly was effectively to take over the management of the HR Manager's case, including the response to the SAR, whereas Mrs Connolly was of the view that she was only there to support the Claimant in its management. I noted however that the minutes of the investigative meeting Mr Jones had with Mr Humphrey on 4 February 2019 record the latter stating, "*and then Sandra Connolly took over*". On balance, and bearing in mind that there was no evidence of any active role taken by the Claimant in the management of the HR Manager's case from this point on, I concluded that the intention had been that Mrs Connolly would take over matters from the Claimant at that point. However, at the very least, due to the fact that there was no formal demarcation of Mrs Connolly's role, there was scope for the Claimant to form the view that Mrs Connolly was effectively to take over from him and, as noted, that view seems to have been shared by Mr Humphrey.

25. On 30 November 2018, the HR Manager submitted a formal grievance to Mr Morimoto with regard to her treatment in relation to the disciplinary investigation and how she had been treated subsequently. The grievance spanned 12 pages and very largely related to the Claimant's role in managing the investigation, although it did make some reference to Mr Humphrey and also to the Claimant having received a "*threatening and intimidating letter*" from Mrs Connolly.

26. Mr Jones was appointed to investigate the grievance and was assisted by Mrs Walker. No meeting was arranged with the HR Manager, as would have been anticipated by the Respondent's policy. Also, the grievance was dealt with as a formal grievance without any consideration of dealing with it informally, as was a potential option within the Respondent's policy.

27. A letter was sent to the Claimant on 13 December 2018 inviting him to attend a grievance meeting to "*hear and respond to a grievance that has been raised by [the HR Manager] making reference to your "management of her Investigation wellbeing meeting and absence management during her time off work.*"". No copy of the grievance itself was provided, and none was ever provided to the Claimant during the various processes that followed.

28. The grievance meeting took place on 18 December 2018, at which the Claimant was not accompanied, although he had been advised of his right to be accompanied. Present on the Respondent's side were Mr Jones and Mrs Walker. During the grievance investigation meeting, although Mr Jones

did not provide a copy of the HR Manager's grievance to the Claimant, he did summarise the concerns raised in 13 numbered points.

29. At the start of the meeting the Claimant raised concerns regarding the fact that the grievance had not been dealt with informally, and also about why it was being heard when the grievance policy stated that issues needed to be raised within three months of the relevant incident. Mrs Walker's response was that the HR Manager had specifically requested the matter be dealt with formally, and Mr Jones noted that the grievance covered a range of issues, the latest of which was within the previous three months.

30. In his witness statement, Mr Jones noted that, in dealing with the grievance he gained witness statements from relevant parties, but he only appears to have obtained a further statement from Mr Humphrey. By 2 January 2019 however, he appears to have completed his investigation as he then emailed Mr Morimoto with his findings and recommendations. These included: that the Respondent's policies and procedures had not been strictly adhered to; that there had been unnecessary delay in providing requested documents to the HR Manager; that there had been a failure to consider or adopt the Occupational Health recommendations; that there was no evidence of any response to the HR Manager's reasonable request for the company to provide recommendations as to what adjustments could be made to her work environment to facilitate her return to work (I observe in that regard, that the HR Manager's only request had been that the disciplinary investigation be dropped); that, with regard to GDPR matters, he found that the wording of an email to the HR Manager regarding her removal as a Trustee of the pension scheme was inappropriate, if not misguided, as was the initial delay in the response to the SAR request; and there was a delay in the execution and implementation of legal advice which could be argued to have unnecessarily frustrated and lengthened the process.

31. Mr Jones therefore confirmed that he had decided to uphold the HR Manager's grievance. He noted however that he had found no evidence to support any malice or intent on the part of the Claimant, and that he had been unable to substantiate the HR Manager's claims regarding comments made by the Claimant in meetings with her, or any evidence to support any discrimination against her. He went on to say, "*I uncovered what I can only describe as many examples of Gross Negligence and / or Gross Incompetence*", and, "*there are many examples where Mr McDonogh appears to have abdicated responsibility in his role as a Director of the Company, as HR Director, as [the HR Manager's] Line Manager and as the Investigating officer in [the HR Manager's] Disciplinary Investigation Meeting*". He concluded by recommending that the Respondent should initiate a formal disciplinary investigation into the conduct and actions of the Claimant in relation to his management of the disciplinary investigation and

long-term sickness absence of the HR Manager. He also recommended that Mr Humphrey be removed from any HR responsibility with immediate effect, noting that his lack of HR expertise and qualifications had, in part, contributed to some of the outlined issues.

32. Mr Jones also sent an outcome letter to the HR Manager in relation to her grievance on the same day. In this, he stated his findings and also that he had recommended to Mr Morimoto that formal disciplinary investigations, based on his findings and outlined concerns, should be instigated.

33. Ultimately the HR Manager left her employment with the Respondent on 31 January 2019 via a settlement agreement, the terms of which were not before me. It appears from the documentary evidence that the arrangements for that were finalised, presumably following negotiations with the HR Manager, earlier in the month of January.

34. On 4 January 2019, Mr Jones wrote to the Claimant noting that he had been appointed to conduct a disciplinary investigation meeting with regard to allegations surrounding the Claimant's conduct in managing the disciplinary investigation and long-term sickness absence of the HR Manager. Three specific allegations were noted as follows:

    - "*in your role as Company Director and [the HR Manager's] line Manager you fundamentally failed to adhere and apply Company policy and procedure in an appropriate and timely manner, thus potentially exposing the company to risk; and,*

    - *you failed to consider or adopt the recommendations made by Occupational Health in relation to [the HR Manager's] absence, thus potentially exposing the company to risk; and,*

    - *there was a failure to respond to [the HR Manager's] reasonable request for the Company to provide and consider potential adjustments that could facilitate a return to work.*"

35. The letter went on to confirm that the allegations could potentially be treated as gross negligence under the Respondent's disciplinary procedure (I observe that "gross negligence" is included in a list, set out in the Respondent's Disciplinary Policy, of matters which may amount to gross misconduct and may potentially warrant summary dismissal), that the meeting was scheduled for 8 January 2019, and that the Claimant had the right to be accompanied by a work colleague or trade union representative

36. On 4 January 2019, the Respondent also took the decision to suspend the Claimant from his HR responsibilities although he was not, at that point, suspended in relation to his other duties. It does not appear that the

Claimant was informed of this but, in practical terms, he was only actually in work for a handful of days following that decision.

37. Following a request from the Claimant, Mr Jones provided a summary of his grievance outcome to the Claimant by an email on 7 January 2019, which was very much along the same lines as his report to Mr Morimoto and his grievance outcome letter to the HR Manager.

38. The investigation meeting did not in fact take place on 8 January 2019, as the Claimant was signed off work with a stress related problem until 27 January 2019.

39. The Claimant returned to work on 28 January 2019 and a board meeting took place on that day, it is presumed in the normal course of events and not for any specific purpose to do with the disciplinary allegations against the Claimant. At that meeting, the Claimant read out a statement noting that he felt aggrieved by the treatment he had received over the past month. He concluded his statement by asking the Respondent's board to reconsider, based on the facts he had outlined, whether the matter could be better handled by using the discretionary and informal process, which the Respondent's policies appeared to allow, to address the matters that had been upheld by Mr Jones. He also raised a concern that it would not be appropriate for Mr Jones to carry out the disciplinary investigation bearing in mind that he had been involved in considering the grievance.

40. In his claim to the Tribunal, the Claimant contended that this statement amounted to a formal grievance. However, I considered that the purpose of this letter was not to ensure that his concerns were dealt with through the grievance policy, but could best be described as an attempt to persuade the Respondent to deal with the issues informally rather than formally. I did not consider that it amounted to a formal grievance which needed to be dealt with as such. In the event, Mr Morimoto responded to the Claimant's statement by a letter of 30 January 2019, in which he noted that the current formal investigations into the issues raised would continue to completion and that he was satisfied that the appointment of Mr Jones as Disciplinary Investigator was appropriate.

41. On 30 January 2019, a letter was then sent to the Claimant by Mrs Walker confirming that the postponed investigative meeting would take place on 31 January 2019. That meeting went ahead, the Claimant being accompanied by Mr Gareth Jones, a Senior Manager who reported to the Claimant.

42. At the outset of the meeting, Mrs Walker confirmed that the purpose of the meeting was to investigate further the three points specified in the letter inviting the Claimant to the originally scheduled meeting. Mrs Walker also referred to the Claimant's statement to the Board of Directors on 28 January

2019, and confirmed that the information it contained would also be included as part of the investigation.

43. The Claimant repeated his concerns regarding the role of Mr Jones as Investigating Officer, to which Mrs Walker confirmed that Mr Jones's role was to investigate matters, and that he was not the Disciplining Manager and would not decide what formal action, if any, would be taken. The Claimant noted that, whilst he believed Mr Jones's appointment to be inappropriate, he was willing to proceed.

44. The meeting then went on to discuss the three matters set out in the invitation letter and also the points raised by the Claimant in his statement to the Board. Some time appears to have been spent discussing one paragraph from the Claimant's statement in which he had said, "*Please note with respect that I have thus far not spoken of this matter to anyone other than yourselves, my wife and my own legal advisers. However if I am formally disciplined it will regrettably be necessary to involve other colleagues, which I do not believe will be helpful to the efficient working of PMUK*". Although no concern about any disciplinary breach arising from that paragraph had been identified in advance of the meeting, Mr Jones asked the Claimant for an explanation of his intention in making the statement, noting that it could be interpreted by the Board as a threat. The Claimant confirmed that it had not been intended as a threat, but only pointed out that, if matters were escalated, then other people would become involved and become aware of the situation.

45. Towards the end of the meeting Mr Jones noted that he would need to speak to Mr Humphrey to discuss several points raised. The Claimant queried whether he was able to speak to Mr Humphrey to give him formal warning of that, and Mr Jones confirmed that his advice would be not to do that as it could be perceived as interfering with the process.

46. Mr Jones and Mrs Walker then met with Mr Humphrey the following day, 1 February 2019, and during that meeting it transpired that the Claimant and Mr Humphrey had spoken that morning and had discussed that Mr Humphrey would be invited to such a meeting. The Claimant's evidence, which was not disputed, was that he had spoken to Mr Humphrey, along with several others, by telephone briefly on the morning of 1 February 2019, to discuss the impact of a snowfall on the site, that being part of the Claimant's health and safety responsibilities. Both Mr Humphrey and the Claimant confirmed that the discussion had included a reference to an invitation to the meeting with Mr Jones and Mrs Walker, although they differed as to who initiated that discussion. Both confirmed however that there was no further discussion on the topic, beyond the reference to the fact that Mr Humphrey would be attending the meeting.

47. However, the information provided by Mr Humphrey led Mr Jones to consider that the Claimant had breached an express direction not to approach or contact Mr Humphrey over the investigation. There was no evidence of any formal instruction and, as I have noted, Mr Jones's reference at the conclusion of the meeting on 31 January 2019 was that his "advice" would be not to speak to Mr Humphrey. However, when the issue was put to the Claimant by Mr Jones in a meeting held on 1 February 2019, he did not disagree that such an instruction had been given, only mentioning that he had not discussed any detail with Mr Humphrey, which, as I have noted, had been the case.

48. Nevertheless, Mr Jones's concerns led him and Mrs Walker to convene a formal meeting with Mr Jones, informing him that he would be suspended pending the completion of the investigation into the allegations against him to "*ensure a full, fair, thorough, unhindered investigation*" could take place without any "*intentional or unintentional influence*". The Claimant asked to be able to stay until the end of his shift (some further 45 minutes) to avoid speculation amongst his colleagues, but he was required to leave immediately, albeit without escort.

49. The Claimant attended the Respondent's site on 11 February 2019 to access records and systems with a view to providing further information to Mr Jones and Mrs Walker that had been discussed in the meeting on 31 January 2019. He was also provided with some further documents and with some answers to questions that had been raised in that meeting.

50. On 22 February 2019, Mrs Walker sent Mr Jones a draft management statement of case, spanning seven pages plus appendices. Mr Jones suggested some minor changes to that and the document was enclosed with a letter to the Claimant from Mrs Connolly on 28 February 2019 inviting him to a disciplinary hearing with Mr Yashima on 4 March 2019. The letter did not detail the specific disciplinary allegations, only stating that the hearing would discuss "*allegations of gross negligence and a breach of trust and confidence relating to the management of disciplinary investigations and long-term absence relating to [the HR Manager]*". The letter confirmed that, as the case was of alleged gross negligence and breach of trust and confidence, the most serious action that could be taken would be the termination of the Claimant's employment.

51. The meeting took place on 4 March 2019 with Mr Yashima as the Disciplinary Officer, with Mrs Connolly present as Official Notetaker and HR Support, and with the Claimant again being accompanied by Mr Gareth Jones.

52. At the start of the hearing, the Claimant raised concerns about Mr Yashima's involvement in the matters relating to the HR Manager since

March 2018, that he had had previous discussions on the detail of the HR Manager's case, and therefore may already have formed an opinion. He was therefore concerned that Mr Yashima's appointment conflicted with a section of the Respondent's disciplinary policy which noted, "*Wherever possible the person conducting the hearing should not have been involved in the investigation process, either as an investigator or as a witness and should not have been directly involved with the details of the case or incident, although this may not always be possible due to extenuating business needs, the nature of the case and the availability of senior management*".

53. Mrs Connolly indicated that the procedure made clear that, depending on available resources, a person could be involved in more than one stage, but she also noted that if the Claimant was concerned that he would not have a fair hearing then they could stop and appoint another director from another group company. She also confirmed that that could be done later that week. After a short break the Claimant indicated that, on balance, he would continue.

54. Mrs Connolly then outlined the three main points of the management statement which were those included in the letter inviting the Claimant to the disciplinary investigation meeting as set out at paragraph 34 above. During the meeting, most of the questioning was undertaken by Mrs Connolly, which I considered was not surprising, Mr Yashima not being a particularly fluent English speaker.

55. During the meeting the Claimant noted that he had already admitted to administrative failings such as not ensuring copies of letters were on file, but he pointed to a lack of support from HR and his contention that Mr Humphrey had been responsible for administrative matters, although he accepted that there had been no formal delegation. The Claimant also indicated his concern that his suspension on 1 February 2019 had been unfair and had impacted on his ability to prepare his defence as he had been unable to discuss matters with Mr Humphrey.

56. With regard to the response to the three areas outlined in the management statement, the Claimant's position was that he had not had the required administrative support, that Mr Humphrey had been responsible for the administration of the disciplinary and long-term sickness procedures, and that the only discussion regarding possible adjustments to facilitate the HR Manager's return to work had been her request for the cessation of the disciplinary process, which the Claimant had confirmed he had felt was not possible. The notes of the meeting do not reveal any discussion relating to the second area of the statement of case, i.e. the Occupational Health recommendations.

57. In fact, the focus of the meeting appears to have been on the response to the HR Manager's SAR. The Claimant noted that he had not seen the response. He also noted that there was a risk that the disclosure of several emails as part of the SAR response could have suggested that the Respondent had already concluded the outcome of the disciplinary investigation into the HR Manager. He noted that it was not clear to him what the risks were or how his actions had increased them. It appeared to me however, that the risk arising from the SAR was fairly self-evident in that the disclosure of the earlier emails would have increased the potential of success of any unfair dismissal claim by the HR Manager, and thus have been likely to have increased the amount that the Respondent would have paid to her under the settlement agreement. As I have noted however, the settlement agreement was not before me, nor was any evidence put before me, or indeed put to the Claimant during the course of the disciplinary hearing, as to the impact of the SAR on the Respondent's negotiating position with the HR Manager.

58. The Claimant noted that the SAR response had been prepared by Mr Humphrey and that once Mrs Connolly had come on board he had thought that she was dealing with it. Mrs Connolly refuted that contention, saying that the SAR had been addressed to the Claimant, and that even if the preparation of the response had been delegated it had still been the Claimant's responsibility. As I have noted however, it seemed to me, from the evidence put before me, that Mrs Connolly did come in to the Respondent to take over the management of the HR Manager's case, and it therefore seemed reasonable for the Claimant to have concluded that this would have included the SAR request. That also, from the comment he made in his interview with Mr Jones and Mrs Walker, appeared to have been Mr Humphrey's perception of the situation.

59. Even if however, that had not been intended to be the case, and it had been intended that the management of the SAR response would remain with the Claimant, despite the fact that there was no indication of any formal delegation to Mr Humphrey, it is clear that the Claimant did not play any active role in the SAR response even if the correspondence went out in his name. In any event, the concerns of the Respondent did not seem to focus on the content of the SAR response but on the fact that the SAR had arisen because of the Claimant's delays in replying to the HR Manager, would not otherwise have arisen, and therefore that any potential embarrassment for the Respondent would not have arisen.

60. Mr Yashima's specific concerns appeared to be over the fact that he had not realised that an SAR would involve the disclosure of emails. The Claimant indicated that this had been discussed at the board meeting and a handwritten note produced by the Claimant of the board meeting suggests that it was, albeit only in very general terms, and this was confirmed by Mr

Jones. In any event, Mr Yashima had not been present at that meeting. However, I do not consider that Mr Yashima's knowledge, or lack of it, surrounding the SAR process had any direct bearing on the case, as, as I have noted, the focus of the Respondent's concerns appeared not to be on the content of the response but on the fact that the SAR had initially been made.

61. Mrs Connolly in fact expressed the view that if the HR Manager's case had been managed properly it was quite likely that the SAR would not have been requested as the case would have been resolved. To my mind however, there was no evidence to confirm that, and it is difficult to see how that could have happened bearing in mind that the HR Manager's only proposed resolution appeared to have been for the case against her to have been dropped. Whilst therefore the Claimant's delays may have contributed to the submission of the SAR, and was used by the HR Manager to confirm that, it seemed to me quite likely that an SAR would have been submitted at some juncture in any event, unless the Respondent had agreed to drop the disciplinary case against her, which did not appear ever to have been a likely outcome.

62. Mr Yashima commented that he felt that it was expected that the Respondent would have been in a strong position to defend the HR Manager's case, but that it was in a weak position due to the Claimant's procedural failures. At this juncture, the Claimant explained that the legal advice had been that there was not a case to dismiss the HR Manager fairly. Mrs Connolly questioned why the Claimant had not gone to Mr Morimoto to explain that, and the Claimant asked Mr Yashima if, in fact, he had misinterpreted Mr Morimoto's instructions, i.e. that the intention had been that the HR Manager should be dismissed. Mr Yashima in his reply focussed on the fact that there had been a procedure to be followed which had not been. In my view however, the content of the email sent by Mr Morimoto, supported by the comments of Mr Jones, in March 2018, would have left the Claimant under the clear impression that the intention behind the investigative process was to lead to the departure of the HR Manager.

63. Mr Yashima focused on the Claimant's 27 years' experience with the Respondent, and expressed the view that he was shocked that the Claimant had not followed procedures. The Claimant, by contrast, focused on the positive aspect of his lengthy career and that all the Japanese managers he had worked for would have confirmed that.

64. The meeting concluded on the basis that Mrs Connolly would clarify various outstanding matters with Mr Jones, and then that Mr Yashima and Mrs Connolly would consider the matter in detail and reach a conclusion which would be delivered to the Claimant.

65. Mrs Connolly subsequently sent an email to Mr Jones and Mrs Walker seeking clarification on matters relating to the SAR and the suspension of the Claimant. Both replied to that email and the Claimant also provided his handwritten note of the board meeting to Mrs Connolly on 6 March 2019.

66. Immediately after the disciplinary hearing however, the Claimant asked Mrs Connolly for a "without prejudice" discussion. Neither party appears to have taken any point about the disclosure of this discussion and, in any event, it did not go very far, did not involve any concessions on either side, and no sums were discussed. Mrs Connolly emailed Mr Yashima, Mr Morimoto, Mr Jones and Mrs Walker the next day, informing them of the discussion and in that email she also stated, "*whilst we continue to go through this process, can I ask you all to go through your emails sent and received including this one and delete any that could put the Company in a bad light including any that might have been sent to PE and or Japan*." Mrs Connolly's explanation for this in her evidence was that she wanted all the emails to be in one location, which would arise due to the fact that they were on the Respondent's IT system. However, whilst there was no indication that any particular emails had been deleted, and therefore there was no indication of any particular impact on the Claimant, this was an inappropriate request from an HR Director.

67. On 19 March 2019, Mrs Connolly emailed Mr Yashima with a draft of the potential outcome of the disciplinary hearing. The document noted that the hearing had focused on four points, the three previously noted and also the statement that Mr McDonogh had provided to the Board of Directors on 28 January 2019. The document then stated that it was alleged that the points could be classed as gross negligence, although it appears that that commentary did not apply to the fourth point, i.e. consideration of the Claimant's statement, as that does not appear to have been used as a disciplinary matter against him but only as part of his response to the case. The bulk of the document focused on a response to the Claimant's points in defence, i.e. that his suspension had been unfair, that he had not had administrative support from HR, that Mr Humphrey had been responsible for administrative matters, and that the SAR would have been received in any event and was not to do with his lack of management of the HR Manager's case. Responses to those points were provided in some detail. The document then, without any particular explanation, noted that the evidence the Claimant had put forward had not diminished the findings disclosed as part of the disciplinary investigation and that the Claimant's actions had been found wanting in several areas, with five being listed as follows:

    "(*a) Your lack of controlling of the entire process that you handled directly, clearly the policies and procedures for Disciplinary and Long-Term Absence were poorly executed.*

(b) Your lack of management of the processes that you delegated to others was non-existent and caused a massive issue for the process.

(c) The impact on the wellbeing of [the HR Manager] due to the follow-up of OCC health reports and the execution of policy & procedural control.

(d) The exposure of the company due to the materials exposed to [the HR Manager] in the SAR process, as there was no reviewing of the material that was being sent out by you. In addition, the lack of reporting on this issue and its possible impacts to the Board of Directors is extremely worrying and has clearly led to concerns over the trust and confidence in you as a Board Director and your capability to continue to hold a position of this level.

(e) The Impact that all the above had on the ability for the Company to successfully defend its employment case against [the HR Manager]."

68. Of those five, the first two and the last two seemed to me really to go hand in hand, and the third point never seemed to have been explored with the Claimant, whether in the disciplinary investigation or the disciplinary hearing.

69. Ultimately, Mrs Connolly completed the draft document with two possible outcomes. In both it was stated that it had been found that the Claimant's actions amounted to gross negligence and a clear breach of trust and confidence in him. One outcome however indicated that an alternative to dismissal would be that the Claimant would be issued with a final written warning and be demoted to General Manager, not being responsible for HR and health and safety. The second possible outcome was that the decision was that the Claimant should be dismissed with immediate effect.

70. Mr Yashima replied to Mrs Connolly by email on 20 March 2019 noting, "*I will skip to read outcome1, just read 2 only*", which I took to mean that Mr Yashima would focus only on option 2, i.e. the dismissal option.

71. The Respondent then held a disciplinary outcome meeting with the Claimant on 20 March 2019, in which Mr Yashima read out the decision document which contained only option 2, i.e. that the Claimant be dismissed. The document noted the Claimant's right to appeal within 5 days and his dismissal was then confirmed in writing, the effective date of termination being 20 March 2019.

72. The Claimant submitted an appeal to Mrs Walker on 27 March 2019, noting the procedural concerns over the involvement of Mr Jones and Mr Yashima that he had raised during the process, that he felt that the outcome of the immediate dismissal was unduly harsh and unwarranted and was inconsistent with the treatment of other employees in the past, that extenuating circumstances were not fully considered, that the allegation of

"breach of trust and confidence" was neither proven nor a valid reason to dismiss, and similarly the allegation of gross negligence was not an accurate description of his actions. He also noted that the Respondent had failed to disclose information regarding the adverse impact of the SAR on its negotiation of the settlement agreement with the HR Manager, although it relied on those effects as evidence of his failure to fulfil his duties correctly, and therefore it was difficult for him to defend his position with regard to the SAR. He also noted that his argument as to the delegation of the task was not fully considered.

73. In that regard, I noted that Mr Humphrey, in his investigative meeting with Mr Jones on 1 February 2019, did not discuss the SAR and whether the Claimant had any role in responding to it; indeed he did not appear to have been asked any questions on it. I also noted that the minutes of that meeting record that when Mr Humphrey was asked whether further action had been taken by the Claimant in relation to Occupational Health, he confirmed that he and the Claimant had talked about the HR Manager frustrating the process and about getting a second opinion before stating, "*and then Sandra Connolly took over*". To my mind, that supported the Claimant's contention that he had no direct involvement with the response to the SAR.

74. The appeal hearing took place on 4 April 2019 with Mr Pocknell as the decision-maker, accompanied by one of his HR colleagues as a Notetaker. The Claimant was again accompanied by Mr Gareth Jones. During the hearing, the Claimant expanded on the points raised in his appeal letter and also asked Mr Pocknell to consider the cases of three former colleagues who had not been dismissed despite committing what he contended to be very serious acts of misconduct. He noted that his treatment was not consistent with what had happened in the past, as he had been summarily dismissed for a first offence. In the appeal meeting the Claimant again accepted failings on his part but queried the conclusion reached that they amounted to gross negligence.

75. Mr Pocknell provided his decision on the appeal by a letter dated 18 April 2019, in which he confirmed that he considered that the original decision had been appropriate, noting in relation to the three former colleagues, that one had been a General Manager, i.e. someone who was not at the same level of responsibility and authority as the Claimant, and that there was no information or record of the incidents relating to the other two individuals.

76. The only other findings I need to record relate to the Claimant's contractual position. He entered into a service agreement dated 1 April 2007, and clause 7 of that document set out the circumstances in which the Respondent could terminate the Claimant's employment summarily without notice or payment in lieu of notice. The clause specified a number of

situations, the relevant one for the purposes of this case being where the Claimant was "*guilty of any grave misconduct*".

Law

77. The prevailing legal principles were largely summarised within the list of issues. In relation to unfair dismissal, I first had to consider whether the Respondent had established the reason for its dismissal of the Claimant, and that that was a potentially fair reason for the purposes of section 98(1) and (2) of the Employment Rights Act 1996 ("ERA"). In that regard, the Respondent asserted that its reason for dismissing the Claimant was his conduct, which is confirmed as a potentially fair reason for dismissal by section 98(2)(b) ERA.

78. If I considered that a potentially fair reason for dismissal had been established, I then needed to consider whether dismissal for that reason was fair in all the circumstances, pursuant to section 98(4) ERA. In the case of a dismissal for conduct, that involved consideration of the test set out in the seminal case of British Home Stores v Burchell [1978] ICR 303, which established that for a dismissal for conduct to be fair it will need to be concluded that the respondent had a genuine belief of the claimant's guilt of the disciplinary offence, that that belief was based on reasonable grounds, and that those grounds were formed from a sufficient investigation. The fairness of the procedure applied by the respondent, whether in terms of the ACAS Code or its own procedures, also needs to be assessed.

79. If I considered that the Burchell test had been satisfied and that appropriate procedural steps had been taken, I would then need to consider whether the imposition of the sanction of dismissal was a reasonable one, applying the "range of reasonable responses" test set out in Iceland Frozen Foods Limited v Jones [1983] ICR 17.

80. In these matters, it is clear, as can be seen from the references to reasonableness in the legislation and case law, that the Employment Judge is to assess the respondent's actions by reference to whether they were broadly reasonable, and not by substituting their own view as to the appropriateness of the actions taken.

81. Finally, in relation to unfair dismissal, if I concluded that the dismissal was unfair, with regard to remedy, I would need to consider whether, if the unfairness arose due to procedural failings, a fair dismissal may have ensued had those procedural failings not arisen, or indeed at some point in the future more generally, applying the principles set out by the House of Lords in Polkey v A E Dayton Services Ltd [1987] ICR 142. I would also need to consider whether either or both of the basic award and compensatory award should be reduced on account of any contributory

conduct of the Claimant, pursuant to sections 122(2) and 123(6) ERA respectively.

82. With regard to wrongful dismissal, I would need to consider whether the Claimant had committed a repudiatory breach of contract, i.e. an act or acts of "gross" or "grave" misconduct, which would then have entitled the Respondent to have terminated the Claimant's employment without notice. That would involve consideration of whether the Respondent had established, on the balance of probabilities, that the Claimant actually committed the repudiatory breach and was dismissed for it.

Conclusions

83. Applying my findings to the issues and legal principles identified above, my conclusions were as follows

Unfair Dismissal

84. The reason contended by the Respondent for the Claimant's dismissal was his conduct, in the form of his allegedly negligent handling of issues relating to the HR Manager. I noted that gross negligence is specified as a possible example of gross misconduct in the Respondent's disciplinary procedure, and it seemed clear to me that this was the reason in the mind of the Respondent when it dismissed the Claimant. I considered the possibility that a reason for dismissal may also have been the asserted breach of trust and confidence which could potentially amount to "some other substantial reason" for the dismissal, as reference to that was included in the dismissal letter and the appeal letter. However, I could see that, in its Response, the Respondent had focused purely on conduct as the reason for dismissal, and also that the Respondent's representative focused, in his submissions, entirely on the asserted fairness of the dismissal by reference to the Claimant's conduct. It seemed to me therefore that the Respondent had treated any concern over trust and confidence as part and parcel of its concerns surrounding the Claimant's conduct and not as a separate reason for dismissal in its own right.

85. Having concluded that the reason for dismissal was the Claimant's conduct, I then needed to consider the application of the "Burchell" test, which was encapsulated in items 2 and 3 of the list of issues. In that regard, I was satisfied that there was no ulterior motive behind the Respondent's conclusion that the Claimant had committed an act of gross misconduct, and therefore I was satisfied that the Respondent had genuinely believed that an act of gross misconduct, in the form envisaged by its disciplinary procedure, had taken place.

86. In terms of whether that belief was based on reasonable grounds after a reasonable investigation, whilst I considered that there were several procedural deficiencies, on which I comment below, I concluded that different procedures would not have been likely to have made any particular difference to the outcome, and also that the Claimant himself had accepted at all stages of the process that he had failed to manage matters entirely correctly. There were therefore reasonable grounds for the Respondent to have concluded that the Claimant had been guilty of misconduct, and its investigation into that was within the range of reasonable responses as established by the Court of Appeal in the case of Sainsburys Supermarkets Limited v Hitt [2003] ICR 111.

87. With regard to item 4 of the list of issues, I did not find anything which caused me to conclude that the outcome of the disciplinary proceedings against the Claimant had been pre-determined.

88. With regard to the procedural matters set out at item 5 of the list of issues, as I have noted above, I did consider that there were several procedural failings. Dealing with the thirteen sub-paragraphs of item 5, I comment on each of them as follows.

    (a) I did not consider that it was appropriate for Mr Jones to conduct the disciplinary investigation. The Respondent's disciplinary procedure noted that an investigation should be carried out by someone who "*is not directly involved with the details of the case or incident being investigated*", and Mr Jones had clearly been involved in the details of the case as he had investigated the HR Manager's grievance. Indeed, it was Mr Jones who recommended, in quite strong terms, that disciplinary action should be implemented, as I have noted at paragraph 31 above. Whilst accepting, following the Sainsburys guidance, that the fairness of an investigation should be considered from the perspective of the range of reasonable responses, and also whilst noting that the ACAS Code only specifies that, where practicable, different people should carry out the investigation and disciplinary hearing, and does not therefore provide guidance on this particular issue, I considered that involving the same manager at the disciplinary investigation stage, as had dealt with the grievance which formed the entirety of the disciplinary case, was unfair. That was particularly the case when looking at an employer of the Respondent's size and taking into account its ability to bring in employees of connected companies, which happened at various stages.

    (b) Whilst I considered that it would have been appropriate for the Claimant to have had sight of the HR Manager's grievance against him, I noted that the issues raised in that grievance were read out in summary to the Claimant at the commencement of the investigative

meeting. I noted the guidance provided by the cases of Bentley Engineering Co Ltd -v- Mistry [1978] IRLR 436 and Fuller -v- Lloyds Bank PLC [1991] IRLR 336, and concluded that the Claimant had understood the basis of the areas of concern about the way he had handled the HR Manager's processes, and that he was in a position to respond to them.

(c) Similarly, I considered that it may have been appropriate for the Claimant to have been informed of the particular adverse impact of the HR Manager's subject access request on the Respondent's negotiating position with her. However, as I have noted above, the impact of the documentation disclosed as part of the SAR response would have been relatively self-evident in that the disclosure of the emails circulated in March 2018 would have strengthened the HR Manager's hand in any negotiations with the Respondent. I did not therefore consider that the failure to provide this information to the Claimant took the Respondent's actions outside the range of reasonable investigative steps, or that the Claimant suffered any material disadvantage in this regard.

(d) There were elements of unfairness in the way the Respondent conducted the disciplinary investigation. For example, there appeared to have been a focus by Mr Jones on the Claimant's statement to the Board of Directors and what he seemed to have perceived as an implied threat from the Claimant in that, although that did not ultimately form the basis for any action taken against the Claimant. I noted also that the Claimant contended that the Respondent had focused on looking for evidence of his guilt and not for evidence which might exonerate him. However I also noted that the Claimant had accepted failings on his part throughout the process. Overall therefore, whilst there were elements of the disciplinary investigation which could have been better handled, I did not consider, bearing in mind the range of reasonable responses test set out in the Sainsburys case, that the disciplinary investigation had been conducted in an unfair manner.

(e) The allegations against the Claimant were set out in his initial invitation to the disciplinary investigation meeting, and it did not appear that those allegations changed at any time thereafter. Whilst the invitation to the disciplinary hearing could perhaps have re-stated the specific allegations, they were confirmed at the start of the disciplinary hearing, and therefore I did not consider that there was any material failing in this regard.

(f) I did not consider that it was appropriate to suspend the Claimant on 1 February 2019. The suspension was based on the Claimant's

discussion with Mr Humphrey about his attendance at an investigative meeting. At most however, the Respondent had only advised the Claimant not to contact Mr Humphrey and had not put any express prohibition on him doing so. Of more importance however, the reference to Mr Humphrey attending an investigative meeting only arose in passing, and only a very brief discussion of the fact that he would be attending such a meeting took place. There was no indication that there had been any discussion, or any attempt to discuss, any matter of substance, and therefore I did not consider that the suspension of the Claimant was a step that a reasonable employer would have taken in the circumstances.

(g) However, bearing in mind that the disciplinary investigation was about to take place, and that the Claimant was afforded opportunities to access the Respondent's systems, I did not think this had any material impact on the Claimant's ability to respond to the allegations against him.

(h) I did not consider that it was inappropriate for Mr Yashima to conduct the disciplinary meeting. The Respondent's disciplinary process notes that the person conducting the hearing should not have been involved in the investigation process, either as an investigator or a witness, and should not have been directly involved with the details of the case. In that regard, Mr Yashima had not been involved in the investigative process, and whilst he had knowledge of the underlying issues raised by the HR Manager, I did not consider that he had direct involvement with them. In any event, Mrs Connolly had given the Claimant the opportunity of adjourning the hearing to obtain a different disciplinary officer, and had also confirmed that the hearing would be able to be reconvened within a matter of days.

(i) I did not consider that Mrs Connolly exceeded her mandate of providing HR support at the disciplinary meeting and in relation to the disciplinary outcome. Mr Yashima was the decision maker at that meeting, but it was understandable, in the context of someone with less than fluent English and relative lack of familiarity with UK HR processes, that the HR Manager would play a greater role, both in terms of asking questions at the meeting and in producing the draft outcome document, than might normally be the case.

(j) I did not consider that the Claimant had been required to disprove the allegations against him. Indeed, apart from the question of the Claimant's responsibility for the SAR response, he did not take issue with the assertion that there had been failings, for which he was responsible, in relation to the way matters with regard to the HR Manager had been handled.

(k) I concluded that the Respondent had broadly fairly considered the responses made by the Claimant to the points put to him at the disciplinary meeting. I did not however consider that the Respondent fully explored the points put to the Claimant at the disciplinary meeting. In particular, criticism appears to have been made of the Claimant's role in responding to the SAR request and yet the Claimant's contention that Mr Humphrey had played the major role in putting together that response was not put to Mr Humphrey. Nor, it seemed, was any weight given to Mr Humphrey's confirmation that Mrs Connolly had "taken over" matters in relation to the management of the HR Manager. As I have noted, even if there never appeared to have been a direct confirmation of Mrs Connolly's role, there at least appears to have been scope for confusion on the part of the Claimant and Mr Humphrey as to the extent of Mrs Connolly's role. In addition, one of the reasons for dismissing the Claimant, asserted failures with regard to the occupational health process which impacted on the HR Manager's wellbeing, did not appear to have been directly discussed with him at any of the meetings.

(l) As I have noted above, I heard no evidence that the Respondent had destroyed evidence that might have assisted the Claimant during the disciplinary process. As I have also noted above, I found the suggestion in Mrs Connolly's email that other parties should delete emails relating to the Respondent was a concerning step, but I did not see that there was anything which was likely to have existed which might have assisted the Claimant during the disciplinary process that was not provided to him.

(m) I did not have any concerns about the procedural fairness of the appeal.

89. Overall therefore, there were concerns over the procedural fairness of the dismissal. Had they been my only concerns with regard to the fairness of the dismissal in this case, then it may have been the case, applying Polkey, that I would have considered that the procedural deficiencies, whilst leading to a conclusion of unfairness, were not such as to lead to the making of any compensatory award in the Claimant's favour, or at least to an award of any significant magnitude. However, As I explain below, I considered that the dismissal in this case was also substantively unfair.

90. With regard to the sanction of dismissal, and considering the fundamental question of whether the sanction was outside the range of reasonable responses, as directed by the Employment Appeal Tribunal in the Iceland Frozen Foods case, my conclusion was that the dismissal was not within the range of reasonable responses open to a reasonable employer. Whilst,

as I have noted, there was some misconduct on the Claimant's part, as he himself admitted during the processes, I did not consider that dismissal was a proportionate sanction.

91. Putting the Claimant's conduct at its highest, he failed to progress the management of the disciplinary investigation in relation to the HR Manager and her long-term sickness absence to the extent that he might have, and the Claimant accepted that. However, the Respondent recognised that the HR Manager was "playing the game" and therefore that the management of her was difficult. I was also conscious of the underlying agenda of the Respondent's Managing Director, as set out in March 2018, which suggested that his desired outcome was that the HR Manager was to be dismissed. I also noted that the attitude of the Respondent's Directors to advice received during the management of the HR Manager's absence, for example describing legal advice that withholding sick pay would potentially lead to claims as "a joke", suggested that the overall approach of the management of the HR Manager was, until such time as she submitted her formal grievance, not one which was sympathetic to her. I also noted that management of HR matters, whilst part of the Claimant's responsibilities, was in fact quite a small part of his overall role.

92. To the extent that there were any issues arising in relation to the response to the HR Manager's SAR, I was not convinced that the Claimant could reasonably have been held responsible. There was no indication that he had been involved in the preparation of the response, as that appears to have been largely controlled by Mr Humphrey, and there was no evidence that he had done anything in relation to the SAR other than sign correspondence which went to the HR Manager.

93. With regard to the other sub-paragraphs at item 6 of the list of issues, I did not consider that the Claimant had been "unfairly scapegoated" for the fact that the HR Manager had raised an SAR, as the Claimant himself had accepted that there were failings in the way that he had handled matters with regard to the HR Manager, and she herself had made direct reference to the failure to provide documents as the trigger for the SAR. I also did not consider that the Claimant's circumstances were directly comparable with the way other employees had been treated, and therefore did not consider that there was any material element of inconsistency in the way he was treated. I did however consider that the Respondent failed to take into account the Claimant's lengthy unblemished record.

94. In that regard, the Respondent, in the form of Mr Yashima, appeared to approach the Claimant's service from entirely the opposite perspective, i.e. by considering that the fact that he was a very experienced employee made him more culpable. I was not convinced that a reasonable employer would have dismissed the Claimant, even with relatively short service, in relation

to the matters alleged, but certainly, the lack of credit for an unblemished 28-year career where the Claimant had not been subject to criticism, and had indeed been given the additional role of Company Secretary very recently, supported my conclusion that the sanction of dismissal was outside the range of reasonable responses. In that regard, I noted the guidance provided by the Court of Appeal in Newbound -v- Thames Water Utilities Ltd [2015] IRLR734, at paragraph 77, that, "*In assessing the reasonableness of the decision to dismiss, length of service is not forbidden territory for the employment tribunal*". The Court went on to note that the judge had been fully entitled to take into account the fact that the claimant was an employee with a clean disciplinary record over the course of a 34-year career, saying that, "*it would have been extraordinary if he had not done so*".

95. With regard to the question of Polkey, and whether, had a fair procedure been deployed the Claimant would have been fairly dismissed in any event, I did not consider that there was any cause to make any form of reduction to take account of this. I have concluded that the dismissal was unfair, in the sense of the sanction of dismissal being outside the range of reasonable responses, and whilst I also noted that there were procedural deficiencies on the part of the Respondent, I did not consider that any greater culpability on the part of the Claimant would have been established by any different or improved procedure. Nor did I consider that the Claimant's position would have been so fundamentally jeopardised by the imposition of a warning, even a final written warning, that any subsequent dismissal would have been likely to have ensued. I noted, in fact, that Mrs Connolly had put forward two alternative sanctions, one of which encompassed the imposition of a final written warning and a demotion, together with the removal of the Claimant's HR and Health and Safety responsibilities, and there was nothing to suggest that the Claimant would not have accepted that state of affairs had it applied. Finally in this regard, I noted the Respondent's references in its dismissal and appeal letters to concerns over the impact of the Claimant's actions on its trust and confidence in him. However, bearing in mind that the Claimant had provided such a long period of faithful and unblemished service, I did not consider that there was any material likelihood that the Claimant would not have been able to restore and then maintain the confidence of the Respondent had he remained in employment.

96. With regard to item 8 of the list of issues, as I have noted above, I did not consider that the Claimant's statement to the Board on 28 January 2019 amounted to a formal grievance in that it did nothing more than set out the Claimant's position with regard to the disciplinary investigation against him and why he felt that it would be better for matters to be dealt with informally. Those points were responded to by Mr Morimoto on 30 January 2019, and the Claimant's concerns were also aired at the investigation meeting. Even

therefore had I considered that the statement to the Board had been a formal grievance, I would not have considered that the Respondent failed to deal with it such that it would have led to any uplift on any compensation to be awarded.

97. With regard to the question of contributory conduct, as I have noted, the Claimant himself admitted failings in the handling of matters relating to the HR Manager. I noted the guidance from the case of Nelson -v- BBC (No 2) [1980] ICR 110, that conduct in this context includes that which is considered to have been unreasonable in all the circumstances.

98. In this case I have not considered that the Claimant's conduct was of sufficient level to justify dismissal. However, I did consider that the Claimant's misconduct, in the form of his admitted failings in his handling of matters relating to the HR Manager, had been more than trivial, and had been unreasonable in all the circumstances, such that account of it should be taken in assessing both the basic and compensatory awards. In the event, in assessing matters as best I could, I concluded that both the basic award and the compensatory awards should be reduced by 25% to reflect the Claimant's contributory conduct.

Wrongful dismissal

99. As I have noted above, there were some failings on the Claimant's part in his handling of matters relating to the HR Manager. However I did not consider that they were sufficient to justify a conclusion that there had been gross negligence, and consequently gross, or applying the express term in the service agreement, "grave", misconduct. On balance of probabilities therefore I concluded that the Claimant had committed acts of misconduct but not of such a level as to amount to gross misconduct. The Respondent was not therefore entitled to summarily terminate his contract of employment.

Next steps

100. In summary, I have decided that the Claimant's unfair dismissal claim succeeds but that his basic award and compensatory award should be reduced by the amount of 25%. I have also concluded that the Claimant was wrongfully dismissed and he will therefore be entitled to damages in respect of his 6 months' notice period.

101. Assessment of the compensatory award and the damages for wrongful dismissal will need to take into account the Claimant's attempts to mitigate his losses, and the assessment of the compensatory award will also need to consider the period over which compensation should be awarded, and take into account the impact of the statutory cap on such awards. A one-day

hearing will therefore now be scheduled to consider the remedy points, which will take place unless the parties are able to reach agreement between themselves on those matters.

Employment Judge S Jenkins
Dated: 5 June 2020

JUDGMENT SENT TO THE PARTIES ON
22 June 2020
……

……
FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS