EMPLOYMENT TRIBUNALS

Claimant and
Respondent to Employer's Contract Claim: Brendan Barry

Respondent and
Claimant in Employer's Contract Claim: AmTrust Management Services Ltd

Heard at: London Central Employment Tribunal

On: **7 to 11 September and 14 to 18 September 2020**

Before: Employment Judge Quill (sitting alone)

Appearances
For the Claimant: Mr D Hutcheon, counsel
For the respondent: Mr A Sendall, counsel

This was a remote public hearing. The form of remote hearing was [V: video fully (all remote)]. A face to face hearing was not held because it was not practicable. The documents that I was referred to are in a bundle of 1991 pages, and in written witness statements, the contents of which I have recorded.

Judgment on Liability

1. The claim for unfair dismissal is well-founded. That means that the Respondent unfairly dismissed the Claimant.
    a. The compensatory award would have an 80% reduction applied to it for Polkey
    b. The compensatory award would have an 20% uplift applied to it for failure to follow the ACAS code
    c. The basic and compensatory awards would each be reduced by 25% applying S122(2) and S123(6) respectively of the Employment Rights Act 1996

2. The Claimant's breach of contract claim fails.

3. The Employer's Contract Claim succeeds, but only to the extent of demonstrating a breach of contract. There is no entitlement to damages.

Judgment on Remedy and Costs

By consent, the Judgment of the Tribunal, made under rule 64 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, is as follows:

The parties have agreed terms as to remedy and all other matters arising out of each of the complaints, and there is no need for further order by the tribunal and the proceedings are at an end.

Reasons

1. Following the decision and reasons on liability being given orally and following the disposal of all outstanding matters by agreement, written reasons were requested, and these are they.

Claims

2. The claims were unfair dismissal and breach of contract by Mr Barry and an employer's contract claim brought against him.

Issues

3. The issues were as identified by me in the order of 9 September and clarified in Clyde & Co's letter of 23 September 2019.

Hearing

4. This was a hearing listed for 10 days from 7 September 2020. In fact, we had a case management hearing on 7 September 2020, reducing the public hearing to 9 days. It has been fully remote and conducted by video only.

Evidence

5. I had an agreed bundle of 1981 pages with two later items added bringing the total to 1991 pages. On the Claimant's side, there was his own witness statement and 2 schedules plus statements from Roberts, Salvato, Patient, Stacey and Ansell. On Respondent's side there were statements from Maloney, Challis, Sweetser and Coyne. Each witness attended the video hearing and gave sworn evidence and answered questions from the other side and from me

Background

6. The Claimant was an employee of AmTrust Management Services Limited ("The Respondent") from 16 May 2011 to 13 February 2019.

7. The Respondent is a service company providing operational and management services to companies within the AmTrust Financial Inc. group. The group

companies specialise in insurance underwriting.

8. There was more than one UK company, and at least one separate US corporation. I will refer to them collectively as AmTrust, except where it is necessary to be more specific.

9. The claims side of the Amtrust's business involved resolving claims made under an insurance policy underwritten by Amtrust. This could vary from very simple matters to significant multi-million pound cases with a range of complex legal and factual issues and multiple parties. It included resolving disputes around policy coverage between Amtrust and the insured party and or Amtrust and other potentially liable insurers.

10. Part of the claims function is "reserving", meaning deciding how much money Amtrust should put aside to cover all aspects of a claim including, analysing the size of the compensation payment, the size of the legal fees, and whether anything might be recovered from another party. "Reserving" is something which does not just happen when Amtrust first becomes aware of a claim, but is done throughout the lifetime of the claim. The bigger the sum which needs to be reserved, the more senior the employee(s) who need to become involved in the exercise.

11. A different part of claims handling is to decide whether there should be a reservation of rights. In other words, informing the insured that the claim against the insured will be handled by Amtrust, but on the basis that Amtrust reserves the right to ask the insured to contribute if the claim is later deemed to have been outside the policy. A notification of reservation of rights is something which policy holders do not like to receive.

12. Some claims handling is done, on behalf of Amtrust, by a Third Party Administrator ("TPA"). That is an outsourced organisation such as a firm of solicitors.

Employment history up to September 2018

13. The Claimant is dual-qualified solicitor, having been admitted as a solicitor to the Supreme Court of Queensland in February 2003 and to the roll of solicitors in England and Wales on 3 September 2012.

14. He was employed as a Professional Indemnity Claims Manager. His duties included resolving professional indemnity claims, including those brought against professionals such as solicitors and financial advisers by their own clients. Most commonly the claims alleged professional negligence and/or breach of a contractual obligation. Sometimes the claim might allege a breach of a statutory duty, including a breach of data protection obligations. He managed a team of 4.

15. Before September 2018, the hierarchy was that the Claimant and Ms Esther Tun both reported to Mr Tom Maloney. Mr Maloney reported to Mr Gary Ross, Group Head of Claims, Reinsurance.

16. At a similar level to Mr Maloney was Mr Andrew Wood, Head of Europe, who also reported to Mr Ross. In practice, despite these formal reporting lines, the Claimant

was managed on a day to day basis by Mr Wood.

17. Before September 2018, the Claimant and Ms Tun were at a similar level as Claims Managers. However, circa 6 September, a reorganisation led to Ms Tun being promoted to Head of Specialty and Financial Lines Claims of AmTrust Group Claims, and to the Claimant's being required to report into her. She continued to report to Mr Maloney, and he in turn to Mr Ross. As a result of this exercise, Mr Wood ceased to be involved in management of the Claimant.

18. The Claimant received regular pay increases during his employment, going from a starting salary of around £70,000 in 2011 to in excess of £120,000 by the time of his dismissal.

19. He was also awarded a discretionary annual bonus which varied from year to year, and which took into account Amtrust's overall performance for the year, as well as the performance of the individual.

Claimant's decisions to make covert recordings

20. During his employment, the Claimant made several covert recordings of conversations between himself and other employees. That is, he deliberately decided to make recordings of certain conversations knowing that he was the only person who knew that a recording was being made, and knowing that, unless he revealed the existence of the recording at a later date, no-one else would know that he had created the recording.

21. The Claimant was aware that if the details of the conversation did not seem to be to his advantage then he could destroy the recording afterwards, long before any litigation commenced, and therefore before any obligation to disclose a copy during such litigation arose.

22. The consent of the other participants to the making of the recording, or its retention, deletion or use, was neither sought nor given. The Claimant deliberately chose not to ask for consent because, firstly, he knew that consent might be refused, and, secondly, because he did not want the other participants to know that they were being recorded. He thought it might be to his advantage later on that he had a recording of the conversation and that no-one else had one, and no-one else knew that a recording existed.

23. Other than the Claimant's own testimony, there is no evidence about whether the Claimant made recordings other than those which he disclosed during this litigation. In particular, other than the Claimant's own testimony, there is no way of knowing whether there were recordings made by him which he later reviewed and deleted because he decided that they were of no use to him, or were harmful to him.

24. Based on the Claimant's own testimony, which is uncontradicted by other evidence (though, as mentioned, there would be no reasonable way of the Respondent obtaining its own evidence on the issue), he has disclosed to the Respondent during this litigation, every recording that he ever made of conversations with other employees. I will base my decisions about the recordings in reliance on the

Claimant's testimony on oath to that effect.

25. The first recording that he made was on 6 September 2018. The date is not a coincidence. The fact of the restructure caused the Claimant to decide that he would start making audio recordings of meetings.

26. The Claimant did not expect to be dismissed by the employer, and that was not the reason that he started making the recordings. The Claimant had formed the opinion that there might be some future date on which he wished to resign and allege constructive dismissal, and that was part of his reason for wanting to make recordings. However, the Claimant had not formed the definite intention that he would definitely resign and had not formed the definite intention that he would definitely try to claim constructive dismissal if he did resign. He was aware that, in part at least, his future decisions about whether to pursue a claim might be influenced by whether or not he decided that he had gathered good enough evidence on the recordings to be able to succeed.

27. The Claimant did genuinely believe that he was being treated badly. He believed that if he made recordings then would capture evidence that showed that he had been treated badly and that he could decide, at some future date, whether to, and how best to, use the recordings.

28. As a solicitor and someone with considerable litigation experience, the Claimant had in mind some of the things that might prove useful to him if caught on an audio recording, either if there was later litigation or else if there were later without prejudice negotiations.

29. He hoped that evidence that was useful to him might be caught on the recording so that he could use it against the Respondent (or against the Respondent's employees). By no later than December 2018, his intention was not that he would capture something said by a manager that he could later play to Human Resources in support of an internal grievance. By December 2018 (at the latest), he had decided that he would also record conversations with Human Resources as well with the intention that he would potentially use those recordings as part of an exit strategy and/or a legal claim against the Respondent.

Client F

30. One of the matters handled by the Claimant's team (both before and after September 2018) was in relation to an insured who has been described as Client F. The matter was handled by a team member, Mr Stacey, under the Claimant's supervision and then transferred to the Claimant to deal with directly after Mr Stacey left. The full details do not matter to this claim, but of note is that Andrew Wood flagged up in 2016 that a worst case for Amtrust might be a £12m loss, but the actual loss would depend on whether all potential Claimants did actually bring a claim against Client F, and also whether Amtrust could successfully persuade other insurers that they were liable for some of the loss. In 2016, Mr Wood suggested a reserve of £2m and, in March 2017, Mr Stacey reported that this had been increased to £3.55m for compensation and a further £0.3m for costs.

31. Mr Maloney's written witness statement was not prepared with sufficient care. For example, he discussed the Client F matter and stated that the amount reserved was around £2m short (that it should have been over £5m rather than over £3m). The version of his statement which was exchanged stated that this alleged discrepancy had only come to light after the Claimant was dismissed. At the outset of his evidence, before confirming the accuracy of the statement, Mr Maloney changed that to confirm that the £5m figure was identified prior to termination, but did not specify how long before. On being cross-examined, he said that the Claimant had undervalued the reserve figure until being challenged at a quarterly reserving meeting at which Mr Maloney had not been present. Mr Maloney could not recall which quarter. In itself, the date of the meeting was quite important given that the documents appear to show that there were a new batch of claims in October 2018, valued at circa £1.3m, after the Claimant had previously written to Mr Ross to specify figures of £3.825m (on 19 August 2018) and £4.478m (24 September 2018).

32. Based on the evidence produced to me, I have no reason to think that the Claimant could have been fairly dismissed in relation to his (or his team's) handling of the Client F matter, including in relation to the way potential liabilities were reported internally. In the unamended version of his statement, Mr Maloney stated that the Claimant could have been dismissed for his actions in relation to the reserving on the Client F matter, had he not being dismissed on 13 February 2019 for other matters. Although this is a statement of opinion by Mr Maloney, it is so unsupported by the contemporaneous documents, including emails which were cc'ed to Mr Maloney at the time, that this has led me to be sceptical of other opinions that Mr Maloney has given about the standards of the Claimant's work.

33. I accept that Mr Maloney was expressing his own genuine views about the matter.

Client A

34. One of the matters handled by the Claimant's team (both before and after September 2018) was in relation to an insured who has been described as Client A.

35. Criticism is made by Mr Maloney in relation to what the Claimant did in relation to Client A. More specifically, Mr Maloney comments that a large potential exposure in relation to Client A was identified after the Claimant left. Suffice it to say that I have not been satisfied that there would have been grounds for the Claimant to be fairly dismissed in direct consequence of any errors or misconduct in relation to his handling of the Client A matter, not least because the Respondent has not satisfied me that it has reasonable grounds to believe that there were any such errors or misconduct. Certainly, in general terms – at least – the Claimant had been corresponding with colleagues about the fact that Client A potentially presented an ongoing risk to Amtrust for future years, and that the full potential liability was not yet known.

September to November 2018

36. The Claimant had a good working relationship with Andrew Wood. Mr Wood gave the Claimant good appraisal scores and during his time working under Mr Wood,

the Claimant received bonuses which, in part were related to those appraisal scores. Mr Wood's style of management was to allow the Claimant a great deal of autonomy.

37. While being managed by Mr Wood, the Claimant's authority to make decisions (eg in relation to specifying appropriate reserves or to settle claims) without needing to seek advance sign off from more senior management was steadily increased. His authority in some respects had reached £1m.

38. On 6 September 2018, in a meeting which the Claimant recorded (the first such meeting), the Claimant was told by Mr Ross and Mr Maloney that his authority would be reviewed and might be reduced and that he would potentially need to send specific emails reporting, and seeking authority for, decisions to reserve, or proposals to settle claims, at much less than £1m. The Claimant was told that this decision did not affect just him and that other employees, including Mr Wood, would have their levels of authority reviewed and potentially reduced.

39. This was a decision made by Mr Ross on behalf of the Respondent and he made the decision because he considered it to be in the Respondent's best interests. He wanted there to be more clarity about each person's authority levels, and to have a more structured approach than there had been previously. Amongst other things, Mr Ross wanted Ms Tun to have a higher authority level than the Claimant while making sure that the Claimant had a higher authority level than his team members. The Claimant was assured that he would still be working on the same type of claims, and value of claims, but with a greater need to keep his superiors informed.

40. The Claimant, knowing that the meeting was recorded stated "*that's a change to my conditions of my work, fellas*". Mr Ross, not knowing the meeting was being recorded denied this, and asserted that authority levels were subject to annual review. Later he added, "*And I expected you to say 'that's a change in my terms and conditions'*", to which the Claimant replied "*Well it is*". From this latter exchange, I infer that the Claimant had previously made comments to Mr Ross to the effect that he considered that the Respondent might be breaching his terms and conditions.

41. At the same meeting, the Claimant was also informed that the Respondent was introducing peer reviews. The reason Mr Ross wanted there to be peer reviews was because he considered that to be in the best business interests of the Respondent and he wanted to ensure he had sufficient information about the quality of work that was being performed.

42. After 6 September 2018, the Respondent to wanted there to be changes in the way that the Claimant liaised with more senior managers. Mr Maloney took a more direct interest in the work being done by the Claimant and his team. The Respondent wanted the Claimant to be less independent and to report on his work matters to Ms Tun more formally and more regularly than he had previously done to Mr Wood.

43. During a meeting on 26 November 2018, Ms Tun informed the Claimant that he should send routine updates to her only in future (even for high value claims) rather than include Mr Maloney and Mr Ross as he had sometimes done previously. She

explained that Mr Maloney did want to receive reports about the work of the Claimant's team, but he wanted the information from Ms Tun, rather than directly from the Claimant. Likewise, Mr Ross wanted to be kept informed about relevant matters by Mr Maloney, rather than by Ms Tun or the Claimant.

44. This did not mean that there would never be direct discussions or communications between, for example, the Claimant and Mr Ross, or a member of the Claimant's team and Mr Ross. In particular, there would be occasions when Mr Ross might ask the Claimant or one of the Claimant's team members to give him specific information in relation to a particular matter and if he made such a request, then, of course, the employee would be expected to provide the answer to Mr Ross.

45. However, for normal day-to-day matters and in terms of keeping more senior management properly informed Mr Ross and Mr Maloney did not want the Claimant to bypass Ms Tun and come directly to them.

Esther Tun

46. In relation to Ms Tun in particular at different times he has accused her of having improper motives and seeking to get rid of him (possibly so that she could take his job and thereby avoid a TUPE transfer), or else of not understanding his team's work sufficiently properly and making decisions without his input, or else of simply following the instructions of Mr Ross or Mr Maloney, given to her with the intention of making the Claimant's work life difficult.

47. The Claimant recorded 3 meetings involving Ms Tun without her knowledge or consent. He did not know in advance what she might say at these meetings, but he hoped that if she did not know that she was being recorded, then she might say something that might help him build a case against the Respondent.

48. In her 26 November 2018 meeting with the Claimant, amongst other things, Ms Tun asked him to go through all the reservation of rights in relation to Client H matters, to see if the reservation was still appropriate, and to notify the policy holders if any of these reservations could now be lifted. She also requested that he start keeping a record of his own claims on the spreadsheet that some of his team were using, and informed him that more senior management wanted him to ensure that there was a full record of all his team's claims, including his own. The Claimant's answers were to the effect that a review of the reservations of right was not needed, and that he was too busy to complete the spreadsheet.

49. Ms Tun was not a witness. I have considered the transcripts and other documents and have no reason to believe that Ms Tun's interactions with the Claimant were anything other than a genuine attempt by her to do her duties as efficiently as possible. I have no reason to believe that she had any personal animosity towards the Claimant or any professional jealousy, or any desire to oust him from his role (whether to replace him, or for any other reason). To the extent that the Claimant implies that Ms Tun may have conspired with friends at Client H to make complaints about the Claimant, I reject that assertion and find that that is not what happened.

December meetings with HR

50. The Claimant approached human resources in December 2018, with the intention of putting forward his arguments (and recording them) as to why his treatment had been improper.

51. On 10 December 2018, he spoke first of all to Claire White. She later introduced him to Ms Elizabeth Defer-Wyatt and he spoke to her on 12 December. Ms White was someone with whom the Claimant was vaguely acquainted and that was why he went to her first of all, whereas Ms Defer-Wyatt was the HR Business Partner with particular responsibility for the Claimant's area, and so that was why that introduction was made.

52. Both conversations were recorded by the Claimant without he knowledge or consent of the other party. The Claimant wanted to see if Human Resources would say something that would potentially be useful to him at a future date. During the course of the meetings, the Claimant put forward the best arguments that he could think of at the time to suggest that he had been badly treated.

53. The Claimant wanted to create a record which showed that he had spoken to HR and raised some issues with them. He wanted there to be a record that, according to him, there had been problems for "the last eight or nine months"

54. During the year which started in April 2018, the Claimant received a pay increase of approximately 2% and he also received a bonus. He informed HR that he did not believe that either of these were high enough and that he did not think he had received a proper explanation. He alleged that Mr Ross had said that he, the Claimant was being too paid to highly, and that Mr Ross had not wanted to give him any increase at all until Mr Wood fought for the 2%. He thought he had been given misleading info as to whether there was a pay freeze affecting employees earning more than £100k. Ms White informed the Claimant that 2% was standard, and that there were some employees earning between £100K and £150K who had received zero.

55. In relation to bonuses, both the Claimant and Ms White acknowledged that it had been a bad year for the company and that bonuses had therefore been affected. The Claimant thought it was unfair that members of his team received a bonus that was higher as a percentage of their salary than the Claimant's 10% bonus and believed that Mr Ross should explain the reasons for that to him.

56. The Claimant also complained that he was having retention problems with his team because he perceived that salary levels were not high enough. He mentioned that he had been told that there had been an external review of salaries, and Ms White confirmed that he was correct.

57. He suggested that Mr Ross had said that he was having a "hissy fit" when he, the Claimant, tried to address remuneration.

58. He complained that Mr Maloney had approved the extension of a secondee to the Claimant's team in the Claimant's absence, and without discussing with him. The

Claimant had intended to agree the extension anyway but believed that Mr Maloney's actions implied to others that the Claimant had not been on top of things.

59. Ms White asked the Claimant what he wanted, and he stated a review of salary and bonus and/or an explanation of why they were not higher.

60. Ms White said that one option would be for him to wait for the next year's pay/bonus round and make his case then. The Claimant wanted to pursue in relation to the current year, and so was introduced to Ms Defer-Wyatt, who had recently started working for Amtrust and was therefore not part of the pay decisions earlier in 2018.

61. The Claimant repeated his comments about pay/bonus. Having listened, Ms Defer-Wyatt mentioned that he could choose. Either she would formally approach Ms Tun and Mr Maloney to say that the Claimant wanted a formal explanation, or else he could raise it with them directly and come back to her if he still not satisfied with their answers.

62. The Claimant then stated there were other issues apart from pay and was asked for examples. He again referred to the same issues as mentioned to Ms White. He also mentioned that he had been told to channel emails though Ms Tun. These were the main issues that he could think of, and the best examples, in his eyes, that he was being treated unfairly.

63. Neither Ms White nor Ms Defer-Wyatt sought to influence the Claimant against raising any issues formally. On the contrary, they each explained to him that doing so was an option that he could choose if he wanted to. They each also said that an alternative was for him to pursue things by direct conversations with managers.

64. After Ms Defer-Wyatt had also set out both these options three times, the Claimant stated: (1888 of bundle)

C: So that's a really not a very nice feeling to go to work feeling like that. Ah .So yeah, I thought about it a long it for a long time, I didn't know what to do. And I thought, well this "hang on, this is what HR is for. I've got a problem with my work environment. I'm not being treated the same as other people." And I thought, "What can I do?" I thought I'll just contact Clare and she said to speak to you. So...

E: Then I'm going to ask you formally, would you like to raise a grievance? A formal grievance? Would you like me to do something formally?

65. Rather than answer directly, the Claimant said that he wanted to have Ms Defer-Wyatt's advice. She made several useful and helpful points which implied that she thought that speaking directly to the people concerned might mean that the Claimant received answers to his queries.

66. The Claimant, knowing that the conversation was being recorded asked if the grievance process was serious. In reply, Ms Defer-Wyatt stated: *"it's a formal process and, again, I'm not saying you shouldn't, I mean if you feel that that's the only option you have available in order to raise the issues, for you to be heard and for you to bring these issues, yes. (If) I would probably advise to try and see what*

you can actually do through other means, you know."

67. After a couple more comments from the Claimant to the effect that it sounded like taking a grievance was a pretty serious step, Ms Defer-Wyatt replied to say that there was a third option. Apart from his speaking to managers directly, and apart from his raising it as a formal grievance, if he wanted her to, the third option was that she would approach managers informally on his behalf.

68. The Claimant said that he would speak to Ms Tun himself, and Ms Defer-Wyatt replied that he could come back to her again after he had done so, if he wished.

69. Each of the HR officers was entitled to assume that the Claimant had come to them with a query and about procedure and that he had received a satisfactory answer from them and that, unless he came back to them, there was nothing else that they needed to do.

Client H and events of January 2019

70. Client H is a broker. In the documents prepared for these proceedings they were sometimes referred to by their actual name and sometimes as Client H. I will stick to Client H for simplicity.

71. Client H has clients who have chosen to use its services, but who could, of course, terminate their arrangements with Client H and make other arrangements.

72. On behalf of its clients, Client H arranges for the clients to be insured by Amtrust or another insurer. It is in Client H's interests for its clients to be happy with the insurance that might have been arranged for them. Things that might cause a client to be unhappy include queries being raised over whether a claim against them is covered by their insurance policy, or dissatisfaction with solicitors appointed to defend the insured against allegations of (say) professional negligence.

73. In other words, Client H's interests might not always align with Amtrust's. Things that could potentially amount to a financial saving for Amtrust are things that could potentially lead to an insured becoming dissatisfied with their broker. This difference in perspective between brokers and Amtrust was something that was well understood by the Claimant, the Claimant's team members, Mr Maloney and Ms Tun. In relation to Client H in particular, Ms Tun and the Claimant had each discussed in November 2018 that they believed Client H sometimes made unreasonable requests for things to be done that would keep Client H's clients happy.

74. On 24 January 2019, 3 senior employees of Client H met Mr Maloney and a colleague, Ms Locke. Ms Locke took notes. Client H is an important broker for AmTrust and it places significant amounts of business. The purpose of Mr Maloney's meeting Client H was to discuss issues Client H had flagged up. Mr Maloney was aware before going into the meeting that some of the comments which Client H wanted to make related to the Claimant and Mr Maloney was aware that he would potentially wish to raise these issues formally with the Claimant. That was part of his reason for wanting there to be a note taker.

75. There was no conspiracy between Mr Maloney and Client H or any of its employees. Mr Maloney had not asked Client H to make a complaint about the Claimant.

76. Ms Locke's handwritten notes are in the bundle and so is the typed version. Her notes are a genuine attempt to summarise what was discussed, but are not presented as verbatim.

77. I do not need to make any findings as to the accuracy of the issues which Client H raised, but I do need to make some comments on what was said and the Claimant's opinions about it.

    a. One issue was that in 2013 DAC Beachcroft had been appointed as Third Party Administrator when Client H would have preferred someone else and/or more input into the decision. 2013 was, of course, 6 years prior to this meeting.

    b. Another issue was that Client H pointed out – correctly – that as of February 2019, the Claimant's wife works for DAC Beachcroft. The Claimant's case – undisputed – is that: firstly, as of 2013, he was not in a relationship with the person who is now his wife; secondly, in 2013 she worked for Amtrust not DAC Beachcroft; thirdly, she does not work on the Amtrust TPA contract.

    c. Client H complained about clients being asked for additional premiums, which the Claimant mentions is not his team's responsibility.

    d. Some other issues were also raised that Client H believed that it was in danger of losing business due to the way that (according to them) claims were being handled by the Claimant's team and/or external lawyers.

78. Another event on 24 January 2019 was that Ms Tun sent an email to the Claimant explaining that going forward Client H would previously do some work in relation to claims handling without needing pre-approval from Amtrust or the TPA.

79. The Claimant did not like this decision and forwarded Ms Tun's email to the personal email address of a work colleague. The Claimant and this colleague had previously discussed with each other that they were dissatisfied with Amtrust. Specifically, the Claimant had previously told the colleague that he did not like the way that he was being line-managed by Ms Tun.

80. In the covering email, sent at 9am, about 8 minutes after receiving Ms Tun's email, the Claimant stated

    Have a look at this I didn't hear a single thing about this. Esther is basically trying to do my job now. This is fucking outrageous. This is about the third or fourth example of her and Tom between them trying to do my job. I'm an incident or two from having a rock solid constructive dismissal claim.

81. The Claimant's colleague replied in terms that were abusive towards Ms Tun and to Amtrust. At 14:00, the Claimant sent a reply back to his colleague which was in more measured and deliberate terms. It included the paragraph

I`ve already talked to HR about some of these issues. I had two meetings with them. They said I should raise any concerns with my line manager (esther) before considering lodging a grievance. I`m going io raise all these things in my appraisal. Biding my time. Building my case. They're an absolute disgrace

82. During his oral evidence, the Claimant referred back to this 14:00 email several times in support of his assertion that he had not simply been planning a constructive dismissal claim, but rather that he had been intending to follow correct procedures.

83. In fact, immediately after sending the email to his colleague at 14:00, he forwarded the whole trail to his personal non-work Gmail account within a few seconds. My finding is that the Claimant's reasons for writing to Ms Caviet in detail, with his side of things, including the implication that HR had sought to dissuade him from raising a grievance, was that he wished to create a timestamped record that that was what his intentions had been. That was why he forwarded the whole trail, including his 14:00 email to Ms Caviet. If he had simply wanted a copy of the email which Ms Tun had sent to him, then he could have forwarded that in isolation.

Client C

84. In January 2019, a law firm chased the Claimant for payment of some invoices, by Amtrust, for some work done in relation to a claim. The oldest of these was for about £50,000 from the previous July and £15,000 for September and £50,000 for October, £100,000 for November and £53,000 for December.

85. Not all of these fell within the amounts that were previously reserved on Client C's claim. The payments were not made by 31 January 2019, when a further chaser was sent.

86. The lateness of payment was not, in itself, a disciplinary issue. Had the Claimant remained in employment, then he would have been asked to explain why he had not increased the reserves more promptly to take account of rising costs. However, in itself, this would not have been an issue which led to a fair dismissal.

1 February 2019.

87. On 1 February 2019, Mr Maloney called the Claimant into a meeting room. The Claimant recorded the meeting without Mr Maloney's knowledge or consent. This was an unplanned meeting and was at Mr Maloney's request rather than the Claimant's. From this I infer that the Claimant generally had his phone set up so that he was readily able to make recordings of unplanned meetings.

88. At the request of the Claimant, I listened to this recording, as well as reading the transcript.

89. Mr Maloney asked the Claimant to step into a meeting room because he perceived that the Claimant was standing over Ms Tun while she was seated and being demanding in his questions. Both now, and on the recording, the Claimant denies acting inappropriately.

90. The Claimant knew that he was being recorded and Mr Maloney did not. Each party raised their voice to some extent. The Claimant's attitude to Mr Maloney was as if he was trying to cross-examine a witness. He was putting to Mr Maloney, the same questions that he had just been asking Ms Tun. He was saying that he wanted to know about the contents of a phone call that had been taken place with an Amtrust underwriter, Russell Newell. The Claimant's attitude to Mr Maloney was hostile and he disputed Mr Maloney's right to treat the conversation as confidential.

4 February 2019

91. On 4 February 2019, the Claimant was presented with a letter. The letter stated that Client H had raised "serious allegations" in relation to the Claimant's conduct, and also that Ms Tun had raised "issues" in relation to the Claimant's conduct.

92. In relation to the latter, there were 7 bullet points which included his handling of the Client F matter, concealing information in relation to Matthew Stacey resigning, failing to communicate properly with line managers, and unacceptable behaviour towards colleagues.

93. The letter stated that there would be a fact-finding meeting between the Claimant and Ms Defer-Wyatt on 8 February 2019. The letter expressly said that no disciplinary or other formal procedure had yet commenced, and that the purpose of the fact-finding meeting was to consider whether the disciplinary procedure would in fact commence later.

94. The reason that this letter was given to the Claimant by Ms Defer Wyatt (during a meeting which the Claimant recorded covertly) was that Ms Tun, Mr Maloney, and Ms Ross had approached Ms Defer-Wyatt in late January (after Mr Maloney's meeting with Client H) for some advice.

95. Between them they produced a note with some bullet points, which they had intended should be kept just between themselves and Ms Defer-Wyatt, but which ended up being attached to the 4 February letter.

96. Mr Maloney's recollection is that Mr Defer-Wyatt advised that, given the allegations that were raised then the disciplinary procedure should be followed. Mr Maloney's evidence was that Ms Defer-Wyatt had referred to a pip or a performance improvement plan and that, as far as he was concerned, that was the same as disciplinary action.

97. My finding is that Mr Maloney misunderstood at the time what was going to happen, or else he has misremembered.

98. My finding is that the Respondent's intention, as of 4 February 2019, was that the meeting on 8 February 2019 was one which Ms Defer-Wyatt intended would be in accordance with the process described at 4.2 of the disciplinary policy. As per the letter, the intention was to have a fact-finding exercise and then subsequently decide whether any formal process should be followed. Furthermore, as a result of the fact finding, some of the allegations/issues might be dropped even if others

continued.

99. My finding is that Ms Tun, Mr Maloney and Mr Ross did not dishonestly act so as to deceive Ms Defer Wyatt. It was their genuine opinion that there were matters which needed to be addressed with the Claimant, and that they wanted to comply with the Respondent's HR policies when raising these matters with the Claimant. They therefore went to Ms Defer-Wyatt and they relied on her expertise to guide them.

100. The Respondent's disciplinary policy states that

Examples of conduct or performance which may lead to the instigation of the disciplinary procedure are:
Unsatisfactory work performance;
Failure to comply with the Company policies and procedures

and lists several more examples.

The Claimant's sending of emails to his Gmail account on 7 February

101. At times relevant to this dispute, the Respondent's employees (in the Claimant's work area) had each been issued with a work laptop. They used this work laptop to do work when they were working at a desk in the respondent's offices while. They could also take the work laptop home with them (or to other sites away from the office) and could work from those locations using the work laptop.

102. When an employee was not actually in the office, there were several options for accessing emails.

    a. One of these options was to connect the work laptop to Wi-Fi at the remote location.

    b. Another was to use the work phone issued to employees by Amtrust for this purpose.

    c. Another option was to obtain VPN access. Using VPN access meant that employees could use a personal device (phone, laptop et cetera) to directly access the respondent's systems, including their email accounts.

103. Other members of the Claimant's team were aware that VPN was only needed to access emails from a personal device and that the work laptop, like the work phone, could be used remotely without the need for VPN.

104. Had the Claimant specifically asked one of his own team members, or the IT department, if he needed VPN to use his work laptop remotely he would have been told that he did not.

105. The Claimant had not previously used his personal devices to access work emails and did not have VPN. Some time after receiving the 4 February letter, and before 17:30 on 6 February 2019, he requested VPN from the IT department. The request was sent to Mr Maloney who approved it promptly. This was probably at 10:40:25

on 7 February 2019 UK time, though the exact time does not matter. In any event, it was no earlier than 7 February UK time.

106. My finding is that an automatic notification went to the Claimant by no later than the time at which the IT department marked the job as complete. This was either 10:41am UK time or 3:41pm UK time, but the exact time does not matter. The Claimant had not opened the notification by the time he was suspended and did not notice it in his inbox until the morning on 8 February.

Events after 4 February and up to 8 February

107. At some stage on or before 6 February 2019, Ms Defer-Wyatt emailed the Claimant to say that the meeting that had been due to take place on 8 February was now postponed to 13 February and that it had been decided that she would not be the person conducting the fact finding meeting, but rather it would be done by a Mr Goodman and Ms Defer-Wyatt would be acting as an HR adviser instead.

108. I do not have a copy of the email sent by Ms Defer Wyatt. Both parties have it in their possession, but neither sought to have it included in the bundle.

109. It was the Claimant's evidence that the same email which said that Mr Goodman would conduct the meeting is the one which postponed it to 13 February. Ms Defer-Wyatt was aware by 5 February 2019 that Mr Goodman would do the fact finding, and she sent him an investigation plan by email that day. At 01:12am on 7 February 2019, the Claimant wrote to Ms Defer-Wyatt objecting to Mr Goodman's involvement. Therefore, he had received the postponement email prior to then.

110. Furthermore, and in any event, the Claimant admits that he forwarded a copy of the postponement email to himself shortly after midnight in the early hours of 7 February 2019. Therefore, at the latest, the Claimant must have received that email some time on 6 February before Ms Defer-Wyatt ceased working that day.

111. Starting shortly after midnight on 7 February 2019, the Claimant sent a total of 44 emails from his work email account to his personal, nonwork, Gmail account. When he sent the first batch of these 44 emails, he was in the office and using his work laptop connected directly to the respondent's systems. He then went home with his work laptop and his work phone. He sent an email to Ms Defer-Wyatt at 8.39am to say that he would come into the office late that day (7 February). He sent that email from home using his work phone. While at home, using his phone he sent some further emails to his personal Gmail address. Later in the day, he attended the office and continued sending further emails to his personal Gmail address.

112. In due course, after the Claimant had sent 44 emails, Amtrust put a block on the sending of emails from his account. The Claimant was not told on 7 February that a block had been placed on his emails. However, he became aware that his emails were not getting through.

113. Many of the 44 emails which the Claimant sent contained a large number of other emails attached, and some of those also had emails attached, and so on. Some of the various emails had documents attached, including spreadsheets. The various

emails and attachments contained privileged legal advice and various personal data both in relation to employees of the respondent and also people involved in claims which the Claimant's team was handling. Amongst other things, the emails contained salary details of various employees and advice over trial strategy, settlement strategy, and financial information in relation to various claims. The data also included details of various brokers, solicitors firms and other organisations with which the respondent did business.

114. The Claimant was aware that the emails in his work email account contained data and information and documents of the type just mentioned. The Claimant was also aware that - given the search terms which he had used - the search results would return emails which included such information (within the body of the email itself and/or within attachments). The Claimant was therefore aware that by using the search results to send batches of emails to himself he was certain to be sending, to his personal Gmail accounts, information, data and documents of this type.

115. The Claimant did not ask the local IT support team if it would be okay for him to send emails from his work account to his Gmail account. He did not ask this question when requesting VPN access or at any other time.

116. The extension of time from 8 February to 13 February, was at the Respondent's instigation, not the Claimant's. The Claimant did not ask for an extension. The Claimant did not inform Ms Defer-Wyatt that there were a quantity of emails that he wanted to examine before the fact-finding meeting and nor did he ask her if it would be OK to send work emails to his Gmail account (for that, or any other, purpose).

117. The Claimant did not ask Ms Defer-Wyatt for comments or advice in relation to what he had to do to prepare for the fact-finding meeting. The Claimant decided of his own accord that he wished to gather as much evidence as possible and to put that information in his personal possession. He wanted to make a copy of the information to ensure that he would be able to access the information, even if the Respondent sought to restrict his access to his work email account and/or if they dismissed him, or alternatively if he were to resign and claim constructive dismissal.

118. The fact that VPN access had not been approved by the early hours of 7 February 2019 was not the reason that the Claimant started to send emails to his email account at that time.

119. At paragraph 5 of his witness statement, the Claimant says that he sent the emails when tired and hungry. His paragraph implies that all 44 emails were sent in the early hours of 7 February while alone in the office late at night, and this is a point made even more explicitly at paragraph 100. However, even though some emails were sent at that time, some more were sent from home the next morning (after he had slept) and some more were sent after he reached the office.

120. In fact, the IT department’s opinion was that, of all emails which the Claimant sent to his Gmail account between 4 February and 8 February, the majority were sent between 8:12am London time and 4:51pm London time on 7 February. They were not sent in a late-night panic, but were sent over several hours, including after VPN access had been approved (albeit the Claimant might not have noticed that approval

of VPN had been received).

121. The Claimant carried out some email searches and sent himself batches of emails on the basis that he might potentially want to refer to them at a later date. He did not conduct any thorough assessment of what he was sending to his Gmail account. He did not seek to identify any material which it was unnecessary for him to send, or any material that was commercially confidential, or any material that contained legally privileged information, or any material that contained sensitive personal data. He did not make any attempt to strip out any attachments which contained such information.

122. He did not send to himself only emails which he thought he would be likely to mention at the fact-finding meeting on 13 February.

123. The Claimant's intention was that once he had this information, in his Gmail account, it would be he who would decide what use that data would be put to in the future. In particular, it would be he who would decide if and when he should delete the data from his Gmail account and he who would decide whether to send copies of any of the data to any third party.

124. It was not the Claimant's intention to share the information within with any business rival of Amtrust and it was not the Claimant's intention to leak it, whether anonymously or otherwise, to the press or wider public.

125. However, the Claimant was willing to potentially use the data for his own purposes as he saw fit, including in litigation against the Respondent or the Respondent's employees.

Alert

126. The Claimant's actions had triggered an automatic alert in USA at one of the companies in the group. The Claimant had not been singled out for special monitoring by the respondent. Rather Amtrust had measures in place to look out for employees who might be transferring confidential data out of the group knowing that it intended to make some redundancies in the US.

127. Around 9.11am New York time, so 2.11pm UK time, a US based employee named Jonathan Gilman sent an email to Christopher Prewitt, Chief Information Security Officer. The heading was “Data sent externally – Brendan Barry”

128. The email stated that about 50 emails had been sent to the Claimant’s Gmail account within the previous 24 hours and mentioned that many of those contained layers of attachments. It recommended that immediate action be taken while the matter was investigated further. It also attached a screenshot of about 34 emails (all but 3 of which were to the Claimant’s Gmail account). The list had the most recent at the top (sent at 14:04:58 UK time) and the earliest at the bottom (at 10:46:38 UK time, in terms of emails to the Gmail account, with 2 emails to external lawyers about an hour earlier).

129. In other words, the screenshot did not include all the emails sent by the Claimant

on 7 February 2019. It did not include the email sent to Ms Defer-Wyatt at 8:39am nor those that he sent while still in the office after midnight. (Either those to his Gmail account, or the 1:12am email to Ms Defer-Wyatt).

130. In terms of information security, Mr Prewitt was the most senior employee within the Amtrust group. At 2.36pm, 25 minutes after receiving Mr Gilman's alert, Mr Prewitt sent an email to Mr Maloney and others, forwarding what Mr Gilman had send (including the printout). The first paragraph of Mr Prewitt's email said:

Hi Tom,

IT Security monitors email and systems for malicious or odd behavior. We had identified one of your employees who appears to be sending information (potentially confidential) to their personal email address. Is this normal or expected behavior? I would suspect it's not.

131. One of the people copied in was another US based employee: Amy Hall, Senior Vice President (Human Resources). Ms Hall is the US based equivalent of Ms Challis in the UK. They each report to the same person within the group. The second paragraph of Mr Prewitt's email read:

Amy, not sure who could be of assistance locally in London. Typically, if the intent didn't appear to be malicious and the employee doesn't appear to be leaving the company, I have talked with the employee directly or have had their supervisor speak with them.

132. Mr Maloney replied at 15:30 UK time to say that the Claimant's access to systems would be removed and that he would work with HR. As well as cc'ing the original recipients, he included Ms Defer-Wyatt in the reply, meaning that she could see what Mr Prewitt and Mr Gilman had sent. At 15:48 UK time, Mr Dadishoo, a London based IT worker, commenced action to attempt to block the Claimant's emails.

133. At 19:44 UK time, Mr Gilman supplied his phone number to Ms Challis, who called him. At 20:18 UK time, Ms Challis told Mr Dadishoo that she had spoken to Mr Gillman and the Claimant's access should be blocked. At 20:30, Mr Dadishoo reported that that as far as possible that had now done. In discussions between themselves, the IT people noted that removing VPN access did not necessarily prevent access to emails.

Suspension Meeting

134. On 8 February 2019, the Claimant was called to a meeting with Ms Defer-Wyatt and Mr Maloney. The purpose of the meeting was to suspend the Claimant. The reason for the suspension was pending further investigations into an allegation that the Claimant had sent confidential information outside the Company to his personal email address, which was alleged to be a serious breach of AmTrust rules.

135. During the meeting, Mr Maloney read from a preprepared script based on HR advice about the information that an employee who was being suspended should be given. There was no intention on the part of either Mr Maloney or Ms Defer-Wyatt to do

anything other than suspend the Claimant, collect his mobile phone, ID pass et cetera and have him escorted from the premises.

136. However, at the Claimant's insistence it was almost 2 hours by the time the meeting concluded, with a break within that time. The break in the middle was so that the Claimant could phone his solicitors. The transcript of the meeting is therefore also in 2 parts. The Claimant was covertly recording the meeting without the knowledge of the other participants using his mobile phone. He ceased the recording when he wanted to phone his solicitors and started it again later.

137. While the Claimant was phoning his solicitor, Mr Maloney went to speak to IT. This was because Mr Maloney believed that the Claimant had his work phone with him, but the Claimant was denying this. IT informed Mr Maloney hat the phone was in the vicinity of the Respondent's building and not at the Claimant's home address as the Claimant had claimed. At the resumption of the meeting, the IT department, the caused the phone to ring out, and it was in the Claimant's pocket.

138. The Claimant repeatedly asked to be told the specific rule which he had breached, by sending the emails to his Gmail accounts. Neither during that meeting, nor any subsequent time has the Respondent identified a specific rule which says in black and white terms that employees of Amtrust must not send work emails to their personal, non-work email addresses.

139. During the suspension meeting, a dispute arose as to what documents the Claimant could take with him. Ms Defer-Wyatt suggested that if there was a lot to go through, Mr Maloney should keep all of them, review at his own pace, and send on to the Claimant just those that it was appropriate for the Claimant to have. The Claimant wanted to have the exercise done there and then and Mr Maloney was content to do that. Mr Maloney sought to ensure that the Claimant was not taking any confidential material with him. The Claimant had his satchel with him in the room and Mr Maloney sought to go through the documents in the satchel.

140. Mr Maloney looked through the documents with the intention of weeding out anything that he regarded as information which the Claimant should not take with him. Amongst the information that the Claimant was permitted to take home in hardcopy form were legally privileged items in connection with cases which the Claimant was working on.

141. Some of the items which the Claimant took with him were printed versions of some emails which he had forwarded to his Gmail account. However, the items which the Claimant was allowed to take with him did not include any items other than those which Mr Maloney thought the Claimant might have a legitimate reason for having on the assumption that his suspension would be lifted at some stage and he would return to work.

142. During the meeting, Ms Defer-Wyatt stated that the Respondent would start an investigation, and the Claimant was given a letter which stated that the suspension was not itself disciplinary action and that the Claimant would be contacted after the independent investigation manager had conducted an investigation. The disciplinary policy was included with the letter.

143. The policy:

    a. At 4.2, refers to the investigation stage. An investigation may or may not include an interview with the employee

    b. At 4.4, refers to the written statement that will be provided to the employee if there is a case to answer and (therefore) a disciplinary hearing is required. The policy requires that there will be a reasonable period of time between receipt of the letter and the disciplinary hearing for the employee to consider the allegations and prepare their case.

    c. At 4.5, describes the disciplinary hearing. The hearing can take place in the employee's absence if the employee fails to attend without reasonable excuse, but the policy makes no reference to the company deciding that there is no need for a hearing. There is a right for the employee to call witnesses and present other evidence at the hearing.

    d. There is also a right to be accompanied, as well as contractual rights of appeal.

8 February to 13 February

144. In late evening on 7 February, Ms Challis, Group Head of Human Resources, co-ordinated a meeting for Mr Ross, Mr Maloney and Ms Defer-Wyatt to meet her early the following day. It was at that meeting which suspension was decided upon.

145. Between 8 February and 13 February, Ms Challis sought to understand more about the information that had been contained in the emails which the Claimant had sent to his Gmail account.

146. Ms Challis is an experienced HR professional. She had only worked for Amtrust for about 6 months before this matter but had extensive experience within financial services industry. Her opinion and belief was (and is) that it is extremely obvious to everybody in the industry that employees are not permitted to send vast quantities of confidential information to their personal email accounts and that doing so would potentially be grounds for dismissal.

147. Ms Challis asked Mr Maloney to review the emails that had been sent out, and to summarise the content for her. Mr Maloney did this. Ms Challis and Mr Maloney had approximately 3 meetings. The meetings were not minuted or documented at all and no emails or diary entries were produced in evidence to show the timing of the meetings or the number of the meetings or to describe what was said.

148. Mr Maloney sent an email on 12 February, which informed Ms Challis that the emails included the following information (which is partially redacted in the hearing bundle).

    Contains Claims Paid to date and pricing details - Fwd Renewal Meeting with — 28 June 2017
    Contains Policy endorsement and bespoke wording language - RE Urgent — Service Settlement definition
    Contains specific narrative to AmTrust defences and reserving startegy (historical position) - RE _ - large loss update

Contains AmTrust Claims reserves and narrative to loss, YoA and Class - Copy of Large Claims Oct 2018 movements 100000+ - PI team edit.xlsx
Contains AmTrust Client Postcode, addresses, scheme, broker and value of claim reserves - meeting
Contains Legal Advice for AmTrust — RE —
Contains Financial loss expousre of AmTrust and internal strategy - FW —
Contains Private & Confidential Legal Report for AmTrust and Strategy - _ — large loss update
Contains Copy of Underwriting Policy — RE _ - large loss update
Contains identity of AmTrust employees seperate to face to face business - RE — - summary and update
Contains Payment instruction and process to Nottingham and Confidentail Court Order - URGENT settlement payment request MW Claimants v — - FUNDS REQUEST — PAYMENT DUE BY 4OCTOBER
Contains AEL PI Loss run including company financials - RE Company Pl Claims Review
Conatins infomation around reserving, reinsurance & excess policy recovery stratgery - RE — update
Contains Letter from Insured on their headed paper in relation to a claim position and exposure - RE Sun
Screenshot of employees diary - screenshot tom and esther meeting
Conatins details of employee remuneration_salaries - RE AEL PI claims team
Contains Pricing for last two years in email body - - — _ - renewal - email from Angela

149. It was Mr Maloney's genuine opinion that some of the emails sent by the Claimant were confidential and that some of the contents were as described in his 12 February email. It was his genuine opinion that they should not have been sent to the Claimant's Gmail account and that is the view which he expressed to Ms Challis in their undocumented meetings.

150. Ms Defer-Wyatt and Mr Maloney also had a discussion. On 12 February, Ms Defer-Wyatt sent a formal (though brief) report to Ms Challis of actions taken from 7 February onwards. The report stated that, following her discussions with Mr Maloney, their recommendation was dismissal.

151. Ms Challis also liaised with IT experts in the US who supplied her with technical information in relation to the number of emails sent and the number of megabytes of information.

152. My finding of fact is that on the balance of probabilities, Ms Challis would have seen Mr Prewitt's 2:36pm (London time) email which gave advice to Tom Maloney and Amy Hall.

    a. Amy Hall, was, Ms Challis's own words, her opposite number in the US. Ms Challis and Ms Hall corresponded reasonably regularly and reasonably frequently. Given the wording of the email, I think that there is a reasonable chance that Ms Hall would have decided to forward it directly to Ms Challis.

    b. However, even ignoring that possibility, there were at least 3 other potential sources from which Ms Challis could receive a copy of the email: these are both Mr Maloney and Ms Defer-Wyatt, who each had more than one discussion with her as well as Mr Prewitt himself, who corresponded with Ms Challis on 7 February (albeit the email trail in the bundle does not show that his 14:36 email was sent to Ms Challis) and, she thinks, possibly by phone.

    c. I am confident that even if no-one else showed, or forwarded, the email to Ms

Challis, Ms Defer-Wyatt would have done so, given that Ms Defer-Wyatt was a reasonably new member of the team which was headed by Ms Challis, and given the fact that any reasonably competent HR professional would recognise the importance both of Mr Prewitt's email, and of Mr Maloney's reply.

Decision to dismiss

153. Ms Challis had a discussion with Ms Defer Wyatt about the suspension meeting on 8 February. As a result of the conversation with Ms Defer Wyatt, Ms Challis formed the opinion that the Claimant had had the opportunity to explain why, to explain his side of the story in relation to the sending of the emails.

154. What Ms Challis took away from the conversation with Ms Defer-Wyatt was that the Claimant admitted sending the emails. Ms Challis does not recall Ms Defer-Wyatt mentioning anything that the Claimant said about his reasons for sending the email, other than the fact that he intended to use them to defend himself following the 4 February letter. Ms Challis did not recall Ms Defer-Wyatt informing her that the Claimant said that he believed he been told to concentrate on his work, or that was under stress, or that he sent them late at night.

155. Ms Challis was aware that, at the suspension meeting, the Claimant was told (and informed in writing) that there would be an investigation and also aware that he had been given the disciplinary policy. She was aware that the Claimant would expect the Respondent to follow the requirements of the policy.

156. Ms Challis subsequently had a telephone conversation with chief executive, Mr Peter Dewey. During that conversation she relayed to him the facts that the emails which the Claimant had sent himself had triggered an email at an automatic alert at the US office, and the fact that the Claimant admitted sending the emails, and the fact that a review had been carried out by Mr Maloney, who had concluded that there was confidential information in the emails. She also conveyed her own view that it was highly inappropriate to send confidential information to a personal email address and that all employees in the industry were aware of this. Since she did not know them herself, she did not inform Mr Dewey of the full details of what the Claimant had said on 8 February 2019.

157. Based on the information received from Ms Challis, Mr Dewey decided that the Claimant's employment should be terminated with immediate effect. At Ms Challis's direction, Ms Defer-Wyatt informed the Claimant of the decision on 13 February 2019 orally and in writing.

158. The dismissal reasons as per the dismissal letter were:

… sending a large volume of emails outside of the Company to your personal email address. As a consequence, and as advised, we have taken the decision to terminate your contract of employment for gross misconduct with immediate effect from today.

We have reached this decision as we have evidence to prove that some of the emails you sent are of a highly confidential and highly sensitive nature and contain

Company and client information. This action is in serious breach of your contract of employment, our IT policy, and also amounts to criminal offences under the Data Protection Act 2018

159. The letter did not state which individual had taken the decision. Nor did the Grounds of Resistance submitted to the tribunal in response to the claim. At a case management discussion in September 2019 (at which I was the judge), the Respondent stated that the decision to dismiss the Claimant had been made by Helen Challis. There was no mention of Mr Dewey.

18 February 2019 letter

160. Following the dismissal, the respondent sent a further letter, signed by Helen Challis, on 18 February 2019. The letter alleged the Claimant was in breach of contract and made particular reference to Cluse 24 and parts of clauses 28 and 32. Amongst other things this letter stated that the Claimant was required to delete all of the emails.

161. In fact, the Claimant has still not (as of the hearing in September 2020) deleted all of the emails.

    a. On Day 5 of the hearing, he stated that he had not been asked to delete anything other than the 3 emails with spreadsheets and that therefore he had kept all the rest and they were still in his Gmail account.

    b. On Day 6, his account was different. He corrected the error of saying that he had not been asked to delete the emails. He stated that what he meant was that he had informed the Respondent of the terms on which he would do so, and the Respondent had not replied.

    c. On Day 6, he also stated that he may have deleted some of the remaining 41, being those sent after 8am on 7 February. (This was his explanation for why he had previously stated that he had looked at his email account, and seen nothing sent later than around 2am, or so, on 7 February).

162. His suggestion that he had told the Respondent he would only delete the emails if certain conditions were met is a reference to his email sent on 21 February which included the paragraph:

    I am willing to provide an undertaking that I will not show the emails to anyone else or forward those emails to anyone else. I also warrant that I have not shown those emails to anyone else or forwarded those emails to anyone else. Once the appeal has been determined, I undertake that I will delete the emails as requested. It would, however, be necessary for AmTrust to confirm that they would be preserved for the purposes of any subsequent hearings in the Employment Tribunal or elsewhere

163. The Respondent seemingly did not receive this email, probably due to the measures which IT had taken in connection with blocking the Claimant's Gmail account.

164. The Claimant was continuing to treat the copy of the data which he had made for himself as something in his control, which he could decide to retain or delete as he saw fit.

Instigation of Appeal

165. The Claimant appealed the decision to dismiss him and the Respondent agreed to deal with the appeal. The substantive grounds for his appeal are set out in a letter from his solicitors dated dated 26 February 2019.

166. The Respondent's policy states:

Where possible, an appeal will be heard by a senior manager not involved in any previous decision and by a more senior manager than attended the first meeting. Human Resources will also be in attendance

167. Neither the Claimant nor his solicitors knew that the decision had been taken by the CEO. The appeal letter was lengthy and commented both on an alleged failure to follow procedure in relation to dismissal and also on the 4 February allegations.

168. Amongst other things, the letter asserted that the Claimant had been told his suspension was for breach on of the "internet/email/social media policy" which is referred to in section 4.10 of AmTrust's disciplinary policy. It also admitted receipt – appended to dismissal letter – of the "Acceptable Use Policy" and the "Network Access and Security Policy. The appeal letter also stated:

Many of the original allegations against my client were made by his line manager, Ms Tun. In order to protect himself, my client recorded a number of meetings with Ms Tun including a lengthy meeting on 26 November 2018 and two subsequent meetings. Those recordings raise serious concerns about the veracity of the allegations Ms Tun made against my client and suggest she has made allegations which she knew were untrue. They also evidence that Ms Tun failed to disclose to AmTrusts HR department the fact that some of the "serious allegations" raised by [Client H] had previously been considered by her and dismissed by Mr Maloney.

169. Later, it added:

My client had gone to HR himself in December 2018 and had separate meetings with Ms Clare White and Ms Defer-Wyatt in respect of serious concerns he had about his workplace. My client recorded what was said in those two meetings and those recordings raise concerns as to the way in which AmTrust's HR department dealt with the serious matters raised by my client.

170. There then followed more than 2 pages of commentary on the meetings with HR – including many quotes from the recordings - followed .by

The inaction of your HR department following my client's clear and repeated communications about feelings of stress, anxiety, persecution and discrimination, arguably put AmTrust in breach of workplace health and safety legislation

171. Later, the letter stated:

In December my client approached HR with some legitimate and serious complaints and was discouraged from raising a grievance.

172. The letter also stated:

Given the events of the last three weeks, it is hard to envisage a way in which it is tenable for my client to return to AmTrust in his current role …

173. It asked for him to be reinstated to employment, but with a different reporting structure.

174. Correspondence thereafter was between solicitors, including in relation to the appeal arrangements. By letter dated 28 March 2019, the Claimant was invited to an investigation meeting to take place on 2 April 2019 before Mr Chris Sweetser, Chief Auditor at Amtrust International Ltd. The letter stated that

our client is re-investigating whether Mr Barry sent emails containing confidential and/or sensitive data from his work email address to his personal email address, the reasons for doing so and the surrounding circumstances.

175. The letter also stated that the appeal was being treated as a rehearing. It said that the investigation and appeal was confined to the email issue and that said what it called the "*original disciplinary proceedings which commenced in January 2019*" would be addressed if and only if the Claimant was reinstated.

Data Protection Officer

176. As mentioned in her witness statement, and confirmed by her during the hearing, Ms Challis was not aware, before 13 February 2019, that the Claimant's had sent a claims spreadsheet to himself, which contained thousands of entries and significant quantities of customer data and personal information. Thus that particular issue is not something which Mr Dewey could have known about either, given that Ms Challis was his only source of information.

177. As of February and March 2019, the UK based data protection officer for the Respondent was Mr Searle. Mr Searle reviewed the emails which the Claimant had sent to his Gmail account.

178. He was under the impression (based on what Ms Challis told him) that the Claimant had confirmed that the emails had been deleted. Ms Challis had formed that impression because she believed that the Claimant had said that he had sent an email to that effect, albeit the Respondent could not locate the email. I infer there was some mutual misunderstanding between Amtrust and the Claimant as to the contents of his 21 February email, which had not been received.

179. By 18 March 2019, Mr Searle concluded, and informed Ms Challis:

Given the circumstances i.e. data taken in support of personal defence claim, as

well as the fact that the personal data was not 'sensitive', and was low volume, I won't be reporting to the regulator.

If you can confirm, when possible that IT have located the email from him confirming deletion, that would be great

180. Ms Challis did not explore the matter further with Mr Searle or ask for additional details of how he had reached that conclusion.

181. My finding is that he acted as any prudent data protection officer would do and reviewed the contents of all of the 44 emails and attachments before deciding that no report was needed. Without providing evidence that he failed to do so, the Respondent is not entitled to ask me to infer that its own DPO was negligent. My finding is that - other than the confusion in relation to deletion - when he made his decision Mr Searle was in possession of the full facts including all the data which had been sent to the Gmail account. His review of the data took into account documents that Ms Challis may have overlooked, or been unaware of, or had forgotten about, including the spreadsheets referred to by her in paragraph 86 of her statement.

182. Ms Challis's statement refers to a decision made after Mr Searle had left to refer the matter to the Global Compliance Officer. She does not say who decided to make that referral or why it was believed that Mr Searle had not considered a particular spreadsheet.

183. The Respondent is adamant that it does not waive privilege (save to the extent set out in my case management decision in June 2020). It has not provided evidence of the specific reasons that Amtrust instructed Clyde & Co to undertake certain activity in June 2019. Furthermore, other than an invoice, there is no evidence of what specific activities Clyde & Co were instructed to carry out, or how any of the matters mentioned in the September 2019 invoice was distinguishable from any other work which Clyde and Co were performing for Amtrust around this time. Clyde & Co had been involved in various matters connected to the Claimant since at least March 2019 as they were writing to the Claimant's solicitors in relation to the appeal, and some defamation allegations, and related matters. Although privilege (according to the Respondent) privilege is not waived, I infer that the September 2019 invoice belatedly added to the bundle is not the only invoice that Clyde & Co submitted in connection with Mr Brendan Barry.

184. In short, the cause of the work charged for in the invoice has not been proven.

Appeal Investigation Stage

185. The person appointed to investigate the appeal was Mr Sweetser who more junior than the CEO.

186. He was assisted by HR officer Ms Watkins. Ms Watkins was a more junior officer in HR than Ms Challis. Ms Challis had discussions with Ms Watkins in March about the appeal and about who should be appointed to hear it. Ms Watkins also made

some enquiries in March of Mr Maloney and of the IT department.

187. In April, of her own accord, not requested by Mr Sweetser, she investigated what records Amtrust had in relation to data protection training that the Claimant might have undertaken.

188. Ms Challis received updates on the Claimant's comments during the appeal investigation. On 12 April, Ms Challis wrote to Ms Watkins to say:

I'm concerned that the investigation meeting went into areas outside of the reason for the dismissal, especially given we had agreed that it wouldn't. Regardless, let's pick up on the settlement issue on Monday.

189. Given his position within the company and Mr Sweetser was used to being independent minded. I am satisfied that in writing his report, he did not include any information that he thought should not be included, and he did not omit any information that he thought should be included.

190. The Claimant and Mr Sweetser met on 2 April. Mr Sweetser wanted to focus mainly on the sending of the 7 February emails. The Claimant wanted to discuss why he, the Claimant, believed that the 4 February allegations were unjustified and should not have been brought against him. Mr Sweetser allowed the Claimant to make those points.

191. In relation to the 7 February emails, the Claimant asserted that he had sent them to himself in order to prepare a defence against the 4 February allegations, and also referred to his discussion with Ms White in December, asserting that she had told him not to come to HR.

192. The Claimant was asked and answered questions in relation to his understanding of policies, and some IT issues, including VPN. Mr Sweetser asked the Claimant about making the covert recordings. The Claimant said that he had made 8 recordings without the knowledge or consent of the other parties and was willing to provide copies. He asserted that he had done nothing wrong, and that he had recorded a different work meeting and that the Head of Legal knew that he had done so and did not tell him that recordings should not be made.

193. Mr Sweetser allowed the Claimant to speak at considerable length in relation to the 4 February letter. Ms Watkins took notes during the meeting. After the meeting she sent her notes of the meeting to Mr Sweetser and stated that she had excluded the parts of the discussion in relation to the 4 February letter. Her email to Mr Sweetser did not ask him if he was content for the omission or offer him or offer that she would type up that part of the meeting notes as well at his request. She stated:

The meeting yesterday covered issues that were not pertinent for that meeting (the meeting was centred around his dismissal for gross misconduct for being in breach of our data policy). The additional evidence and commentary Brendan provided should be dismissed from your findings.

194. Ms Sweetser obtained from Ms Challis an email trail in which she had been included

on 7 February, including her liaison with Mr Gilman. It included one email from Mr Prewitt, but not the one sent at 14:36 to Mr Maloney and Ms Hall.

195. Mr Sweetser then had an email exchange and conversation with Mr Prewiit. Amongst other things, Mr Sweetser asked:

You would have recommended (or did recommend) serious disciplinary action against any individual sending this volume of information to a personal email address. [?]

196. Mr Prewitt's email reply was "confirmed" and he did not say anything to the contrary by phone.

197. By email dated 1 May 2019, the Claimant commented on the notes of the investigation meeting, including highlighting that he believed that the discussion about the 4 February allegation should have been included, and also suggesting that a 4 page note was quite short in relation to a 2 hour meeting. He referred to other documents which he believed should be taken into account. Mr Sweetser let Ms Watkins see the correspondence and left it to her to make the decision as to whether to amend the minutes from 2 April.

198. Mr Sweetser prepared a report dated 8 May 2019 and addressed to Mr Dewey and Ms Challis. Drafts of this report had been sent to Ms Watkins who had made some suggestions, some of which were accepted by Mr Sweetser and others rejected.

199. Amongst other things, the report stated that the Claimant would have been able (whether he knew it or not) to use his work laptop at home to read/send emails, without VPN. It also addressed the content of the 7 Feb emails, the Claimant's reasons for sending them, the covert recordings and the fact that the Claimant had sent emails to his Gmail account on 24 January with the heading "constructive"

200. The report referred to the Claimant's additional comments from 1 May and said they had been taken into account, and raised some questions that the appeal hearing officer might wish to consider based both on what the Claimant had said and on what Sweetser thought relevant. Amongst other things, it was stated that the Claimant appeared to be upset and show remorse when questioned about his motives. The recommendations were that there was a case to answer, and a long list of bullet points summarised why. There were also recommendations as to some of the factors that might be relevant to sanction, including length of service and remorse, on the one hand, and whether the purpose of gathering information to support defamation or constructive dismissal might be considered an aggravating factor on the other.

Appeal Hearing

201. The Sweetser report was sent by email to the Claimant's solicitors on Thursday 9 May 2019. The meeting was due to be taking place on Monday 13 May. In view of the lateness of the report, a postponement to Wednesday 15 May was given.

202. On 10 May, Ms Watkins supplied the report to the hearing officer and also the

Claimant's amended version of the minutes. She also sent an email which included, in her words, some bullet points that were a few salient points. These included the comment:

"The Irwin Mitchell letter cannot possibly have been written without their having been provided with the documents given the granular level of detail and verbatim quotes and reference to email sent time"

203. This was Ms Watkins own assertion.

204. Mr Coyne replied to say:

Thanks for all of this. It is exactly the kind of material I have been wanting and should help me arrive at the right conclusion on Monday

205. On 14 May, after 5pm, the Respondent, via its solicitors, sent a set of policy documents to the Claimant's solicitors. These documents had not previously been sent to the Claimant between 8 February 2019 and 14 May 2019.

206. The appeal hearing lasted about an hour starting at 10am on 15 May 2019. The Claimant did not ask for it to last longer. The Claimant was accompanied. The chair was Mr Chris Coyne. He was a senior member of staff and was on the board. He was Director of Operations. He was junior to the CEO. Ms Day from HR also attended the meeting and took notes

207. Mr Coyne had had no prior dealings with the Claimant and no involvement in the matter prior to being asked to conduct the appeal. He was asked to be hearing officer by Ms Watkins in April 2019 and received some briefings from her. Mr Coyne took into account the points made at the hearing by the Claimant. It was Mr Coyne's intention to approach the matter with an open mind and to make his own decision about whether the Claimant had committed misconduct and, if so, what the sanction should be.

208. Following the hearing, he reflected on the matter. He produced a draft outcome letter. He then sat down with Ms Day and made amendments to his draft. The final version was dated 7 June 2019 and sent to the Claimant's solicitors.

209. One thing that was added to the letter at the suggestion of HR was a comment that there would be a report made to the Claimant's regulator (SRA). Mr Coyne was not given any specific information by HR about what SRA rules required or why a referral was appropriate. He inserted that comment into his letter simply because HR suggested that addition to his draft.

210. There were also some other additions at the suggestion of HR, though it is not possible to say precisely what they were, because Mr Coyne does not remember. In general terms, the letter represents Mr Coyne's genuine beliefs in relation to the facts and opinions stated in the letter.

    a. Mr Coyne's opinion was that even though the original decision had been taken without the standard procedure being followed, he believed that the standard

procedure had now been followed by the time of his decision (albeit he acknowledged that it should have concluded prior to June).

b. Mr Coyne was aware that the Claimant had not received the policy documents during the investigation phase from February to May, but believed that the Claimant would have seen those documents during his employment.

c. Mr Coyne believed that in light of GDPR training, and the Claimant's knowledge and skills as a solicitor, he ought to have known that sending the 7 February emails to his Gmail account was misconduct and a breach of contract. He thought it particularly significant that there was personal data including banking details and other financial information included.

d. He was concerned that the Claimant's actions might have led to a fine from ICO had it fallen into wrong hands. He thought it an aggravating feature that the Claimant had not password protected or encrypted the data.

211. Amongst other things, his conclusion was:

Again, I simply do not believe you were not aware of the policies, restrictions, best practice and implications with regards to sending sensitive, confidential information given there are references within your Contract Employment and numerous Company policies, e.g The Data Breach Policy, The Acceptable Use Policy, Data Classification Policy and the Electronic Communications Polity, as well as the GDPR training you undertook recently.

212. This was Mr Coyne's genuine belief. Mr Coyne was aware that there was no black letter rule in Amtrust's policies which said that sending work emails to a personal email address was forbidden. However, he rejected the contention put forward by the Claimant that the absence of such a specific rule meant that no policy had been breached and/or no misconduct was committed.

213. There was evidence from which Mr Coyne could reach the conclusion that the Claimant was aware that sending such vast quantities of data to himself was contrary to contract, policies and best practice, including the requirements to process data securely.

214. Mr Coyne also took into account comments in the Claimant's solicitors' 15 page letter dated 14 May 2019. His finding was that that letter contained an admission that the 24 January email trail mentioned above (starting with Ms Tun's email to Claimant and including the exchange with Ms Caviet) had been forwarded to the Claimant's Gmail account with the intention of making a copy for the Claimant's personal use in contemplation of a potential constructive dismissal claim. That was a reasonable inference for Mr Coyne to draw (albeit the 14 May letter does not say that in express and unambiguous terms).

215. Mr Coyne did not believe that the Claimant did not know that he could access the work emails on his work laptop (without needing VPN) when away from the office. His conclusion was based on the way that the Claimant answered questions during the appeal hearing, and specifically Mr Coyne's opinion that the Claimant was

seeking to avoiding answering direct questions on that topic. Mr Coyne formed a genuine opinion that the Claimant was lying about this issue.

216. It seems to me that Mr Coyne was probably mistaken when he made his appeal decision in relation to whether the Claimant had VPN access, or knew about VPN access, at the time he started sending the 7 February emails. Therefore, Mr Coyne's specific opinion that the Claimant knew, at around 1am on 7 February, that he could simply access the emails from home using VPN is flawed.

217. Mr Coyne's opinion was that the Claimant could have prepared for the fact-finding meeting in connection with the 4 February allegations without sending emails to his Gmail account on 7 February and that the Claimant should have prepared for the hearing without creating his own permanent copy of the confidential information. He concluded the permanent copy was made because of a potential future legal claim. He had reasonable grounds for that overall conclusion, notwithstanding the error about the timing of the VPN approval.

218. Mr Coyne reviewed the letter sent on the Claimant's behalf by Irwin Mitchell alleging defamation by Ms Tun and concluded that:

I understand that you say you did not send them the actual emails and recordings, but at the very least, you must have copied and pasted part of the content of the emails. Based on this I have no alternative but to believe you have shared confidential information with a third party.

219. I am satisfied that Mr Coyne did independently reach this conclusion and did not simply rely on Ms Watkins suggestion as per her 10 May email. There were reasonable grounds for him to arrive at this conclusion.

220. He summarised his decision in the following manner:

I have reviewed this case as a neutral Senior Manager and I am concerned you have not shown a lack of remorse for your actions because you have denied them all and I strongly see the recording of conversation as not in good faith. Given you are a solicitor (with the highest duties of integrity) and you also held a senior position within the Company my opinion is the Company has acted appropriately.

As a result, having carefully considered this matter t can now confirm that it is the decision of the Company that there is no evidence to support your complaint and therefore your appeal will not be upheld. Factoring in everything above, I believe the Company acted appropriately to terminate your employment by reason of gross misconduct for all of the reasons mentioned above.

221. Mr Coyne did genuinely believe that it was appropriate that the Claimant's employment should be terminated based on the sending of the 7 February emails. However, his reasoning was also intertwined with his findings about information which only came to light after 13 February, such as the covert recordings and the contents of the Irwin Mitchell letters. Additionally, he was influenced by the belief that if he overturned the prior decision that would be tantamount to a finding that the company had acted inappropriately.

The Claimant's contract

222. The Claimant's written contract is in the bundle and its contents are not in dispute.

223. In relation to summary dismissal, the Claimant's contract includes the following potentially relevant clauses: 21.1, 21.3, 21.4 and 21.5.

224. Clause 24 deals with confidentiality and includes relevant definitions of what is considered confidential.

225. Clause 28 deals with communications systems and the internet and states that company policy must be followed. It includes sub-clause 28.3

Communications sent by you on the Office Systems can give rise to legal action against the Company, in particular claims for defamation, breach of confidence and breach of contract. You therefore agree, should you be in breach of this clause, to indemnify the Company against all liabilities, costs and expenses arising from such a breach, whether such liabilities, costs and expenses are incurred during your employment or after its termination

226. Clause 30 refers to the disciplinary procedure and sub-clause 30.3 states:

The rules and procedures set out in the Company's Disciplinary Procedure are intended as a guide to best practice only and therefore do not have contractual effect. They may be changed from time to time by the Company without prior notice, and where this occurs the most recent version will take priority.

227. The original version of the Claimant's contract also contained clause 32. However, the contract was validly varied with effect 16 May 2018, deleting clause 32 and replacing it with a new clause. The clause deals with data protection and the reason for the replacement was to update it to take account of GDPR which was coming into force that month. The Clause stated that there was a contractual obligation to comply with data protection legislation and the company's policy.

Policies and Training

228. During the Claimant's employment up to 2018, he had at least a passing familiarity with the requirements of the data protection policies and legislation then in force. As a solicitor, he was required to be mindful of the need to take proper care of personal data belonging to other people. As a claims handler dealing with professional indemnity, he was aware that policy holders owed duties to their customers, and others, in relation to data protection.

229. The Claimant sent his CV internally in Amtrust in November 2018, and in it he stated that he was responsible for ensuring GDPR compliance.

230. Specifically in relation to GDPR, the Claimant received 30 minutes training. At the end of the course, he clicked a button to say that he agreed to comply with the legislation and guidance.

231. He was also sent notifications via email with links requiring him to click through to read policies connected to data protection and information security. A failure to click and read did not lead to computer access being blocked entirely, but it did lead to reminders being sent. Based on the evidence presented, it not possible for me to determine precisely which polices were notified to the Claimant on precisely which dates. However, my finding is that there was no specific rule forbidding sending emails to the employee's own personal email address. There were general principles stated about the importance of handling data securely and only for proper purposes. Furthermore, according to the Claimant's own case, the requirement that Amtrust had to ensure that data was deleted in accordance with GDPR requirements was something drawn to employees' attention.

232. The Claimant's tendency was to assume that if he did not get locked out of the system entirely by a failure to read a document, then he did not have to read it. He did not read – or pay careful attention – to the requirements of Amtrust's policies, either at the time that he was considering sending the 7 February emails or at any other relevant date.

233. No evidence was presented to me of any other named employee having been dismissed or disciplined for sending work emails to their personal address. That – in itself - does not lead me to conclude that the Claimant has being treated inconsistently.

    a. The Claimant's witnesses had each done something different to the Claimant, whether sending emails to personal accounts that did not contain personal data, and/or only having done that when different/historic IT arrangements were in place, and/or only having done so to enable them to do some work on Amtrust's behalf at a remote location.

    b. None of the Claimant's witnesses had sent a volume of emails that was event remotely comparable to the quantity of data sent by the Claimant on 7 February.

    c. Mr Prewitt's email of 14:36 on 7 February implies both that some people had been dismissed in some circumstances (if there was malicious intent and/or if they were intending to leave the company) for sending emails to personal accounts and that some people had been dealt with by a warning. There was no reason for the Respondent to believe that any of the Claimant's witnesses had had malicious intent or intent to leave Amtrust when sending emails.

The 4 February allegations

234. Mr Goodman conducted some interviews in relation to the allegations. He reached a conclusion and prepared a report which was not sent to the Claimant other than as part of disclosure for this litigation. He did not see grounds to take the Client H comments any further in terms of disciplinary action. He recommended that there were grounds to pursue the other matters mentioned in the 4 February letter. His recommendation was that, if proven, the maximum penalty would be a written warning.

What the Claimant said about work phone on 8 February 2019

235. In relation to the separate issue as to whether the Claimant lied to Mr Maloney and Mr Defer-Wyatt on 8 February 2019, about the location of his work phone it is obviously very surprising that the Claimant did not know he had the phone with him given that he had been using it as recently as 7 February to send emails and given that it was actually in his pocket at the time that he was saying that he was certain that it was at home. The Claimant was (as usual) ready to record the unplanned meeting on his personal phone, and so he did always seems to have a good idea of the location of that particular phone, at least.

236. Mr Maloney is only speculating when he thinks that the object which he saw the Claimant put into his pocket was the work phone, and even if his speculation is correct, people sometimes do such things on autopilot.

237. I have weighed the inherent implausibility of the Claimant's not knowing that the phone was in his pocket against the Claimant's evidence on oath that he had not realised it was with him. The Respondent bears the burden of proving to my satisfaction that the Claimant deliberately lied on 8 February and it has not done so.

Law

Unfair Dismissal

238. Section 98 of ERA 1996 says (in part)

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> …
> (c) relates to the conduct of the employee,
> …
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

239. The Respondent bears the burden of proving, on a balance of probabilities, that the Claimant was dismissed for misconduct. If the respondent fails to persuade the tribunal that it had a genuine belief that the Claimant committed the misconduct and that it genuinely dismissed him for that reason, then the dismissal will be unfair.

240. Provided the Respondent does persuade the tribunal that the Claimant was dismissed for misconduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

241. In considering this general reasonableness, I must take into account the respondent's size and administrative resources and I will decide whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal.

242. In doing so I have had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303; Iceland Frozen Foods Ltd v Jones [1993] ICR 17; and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82.

243. In considering the question of reasonableness, I must analyse whether the respondent had a reasonable basis to believe that the Claimant committed the misconduct in question. I should also consider whether or not the respondent carried out a reasonable process prior to making its decisions.

244. In terms of the sanction of dismissal itself, I must consider whether or not this particular respondent's decision to dismiss this particular Claimant fell within the band of reasonable responses in all the circumstances.

245. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23).

246. It is not the role of this tribunal – when deciding the unfair dismissal claim - to assess the evidence and to decide whether the Claimant did or did not commit misconduct, and/or whether the Claimant should or should not be dismissed. In other words, it is not my role to substitute my own decisions for the decisions made by the Respondent.

247. In some circumstances unfairness at the original dismissal stage may be corrected or cured as a result of what happens at the appellate process: that will depend on all the circumstances of the case. It will depend upon the nature of the unfairness at the first stage; the nature of the hearing of the appeal at the second stage; and the equity and substantial merits of the case.

248. If there is unfairness at the first stage, then that can potentially impact the overall fairness of the employer's decision to dismiss, even if the second stage is carried out to a high standard of fairness. See Taylor v OCS Group [2006] IRLR 614

Adjustments to award

249. S122(2) the Employment Rights Act 1996 states

> Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

250. In relation to compensatory award, S123(6) states

> Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

ACAS

251. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992).

252. Section 207A(2) TULR(C)A provides that: 'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) **the failure was unreasonable**, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent.'

253. For unfair dismissal cases, the provision applies only to the compensatory award.

Polkey

254. If assessing compensation for unfair dismissal, it is necessary to consider what would have happened (or might have happened) if the unfair dismissal had not occurred. It should not be assumed that, but for the unfair dismissal, the Claimant would have remained employed by the Respondent indefinitely. Stockman (see below) also addresses Polkey and makes the point that the Polkey doctrine will usually be concerned with facts and matters known to the employer at the time of dismissal, it is not necessarily limited to such facts. The tribunal may have to take into account facts which the employer might have found out if it had acted fairly, or future events which may have occurred if the employer had acted fairly. Polkey requires an assessment of the chances of different scenarios unfolding.

Breach of Contract

255. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the employment tribunal jurisdiction to consider (some) complaints of breach of contract.

256. When a tribunal is considering a wrongful dismissal claim (a claim that the dismissal was breach of contract) that requires an entirely separate, and different, analysis than the consideration of whether the dismissal was fair or unfair.

257. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant may have grounds to

succeed in a claim for wrongful dismissal. The amount of notice to which an employee is entitled is determined by the contract, subject to the statutory minimum.

258. It is an objective question for the Tribunal to consider whether the Respondent did, in fact, have good cause to dismiss the Claimant for committing a repudiatory breach of contract. Where there is a dispute about whether the Claimant did, in fact, commit certain acts (or make certain omissions) then the tribunal is required to make findings of fact about the Claimant's relevant conduct. In so doing, the tribunal is not limited to considering only the evidence which had been available to the Respondent when it made its decision to terminate. Any relevant evidence presented at the hearing can be taken into account.

259. To assess the seriousness of any breach which is found to have occurred, it is necessary for the Tribunal to consider all of the relevant circumstances including the nature of the employment contract, the nature of the term which was breached, the nature and degree of the breach, and also the nature of the Respondent's business and of the Claimant's position within that business. Having assessed the seriousness, the tribunal will decide if the breach was such that the Claimant had no entitlement to be given notice of dismissal (and no entitlement to a payment in lieu of notice).

260. In defending itself against a claim that it is required to pay damages for failure to give notice when dismissing an employee the employer is entitled to rely upon facts not known at the time. In other words, it is not only entitled to rely on the reasons that caused it to dismiss, but is entitled to rely on any other repudiatory breach that it later discovers.

261. The issue of whether the employer has waived any such prior breach would have to be considered.

262. I was referred to the case of Brandeaux Advisers (UK) Ltd and Others (Claimants) V. Chadwick (Defendant). It considers the circumstances in which there may be a repudiatory breach of contract where an employee transfers information to a personal email account to potentially make use of it in future litigation against the employer. Where an employee transfers confidential information to themselves, for their own future use, then that may be a breach of contract. Subject to the extent of the transfer, and the reasons for it, it might be a repudiatory breach.

263. I was also referred to Phoenix House v Stockman and specifically the passages about covert recordings.

264. At paragraph 79, the court mentions: "*That said, we consider that it is good employment practice for an employee or an employer to say if there is any intention to record a meeting save in the most pressing of circumstances; and it will generally amount to misconduct not to do so*"

265. Whether or not the actions of making covert recordings amount to a repudiatory breach of contract depend on all the circumstances. Factors to be assessed by the court include whether there was any element of entrapment and whether there was any attempted manipulation by the employee. As per paragraph 78, the full

circumstances should be considered and it does not automatically follow that all covert recordings amount to gross misconduct.

Analysis

1. Unfair Dismissal

266. The reason for the dismissal was the fact that the respondent (Mr Dewey) decided that the Claimant had sent large quantities of personal, sensitive, legally privileged, and confidential information to his own Gmail account on 7 February 2019.

267. Mr Dewey genuinely believed that the Claimant had done this. Mr Dewey believed both that the Claimant sent the emails, and that the emails contained personal, sensitive, legally privileged, confidential information.

268. Mr Dewey genuinely believed that summary dismissal was the appropriate sanction for the Claimant's conduct.

269. Mr Dewey had reasonable grounds for concluding that the Claimant had indeed sent the emails. He based his opinion on what Ms Challis told him. The US based IT department had notified London of the activity and, on 8 February, the Claimant had admitted sending the emails.

270. Mr Dewey also had reasonable grounds for the belief that the information contained in the emails, including attachments was personal, sensitive, legally privileged, confidential information. This was because Ms Challis informed him that that is what Mr Maloney's analysis showed. Ms Challis and therefore Mr Dewey did not know about a particular spreadsheet with thousands of rows of claims information. However, even without that knowledge there were reasonable grounds to decide that the information sent on 7 February was confidential and contained personal data.

271. Based on the Mr Dewey's opinion and belief that the Claimant had sent emails to his Gmail account of a highly confidential and highly sensitive nature and containing Company and client information, it was not outside the band of reasonable responses for Mr Dewey to decide that the Claimant should be dismissed.

272. The process which led to 13 February 2019 decision was not a fair or reasonable process. The decision-maker, Mr Dewey, was not in full possession even of all the information that the Claimant had mentioned on 8 February, let alone any additional points that the Claimant would have made during an investigation (if he was interviewed) or during the disciplinary hearing (that the Respondent's policy mentioned would take place if the investigation decided that there was a case to answer.)

273. I must consider the process as a whole, up to and including the appeal decision in order to consider whether the dismissal was fair or unfair

274. The procedure up to 13 February was defective in the following respects. Firstly, there was no hearing with the Claimant. The respondent argues that 8 February

suspension meeting should be treated as a meeting at which the Claimant had the opportunity to put his side of the story. That is not correct for several reasons.

a. Ms Challis herself stated that – on reflection – it may have been better to have followed the procedure set out on the disciplinary procedure. She made that concession despite having the false recollection that the Claimant had been invited in writing to attend the suspension meeting on 8 February and therefore would have had at least a few minutes to gather his thoughts.

b. The 8 February suspension meeting was not a meeting to which the Claimant had been formally invited in writing. The Claimant was not warned that it would be a disciplinary hearing which might lead to his dismissal, without any further opportunity to put his case.

c. The Claimant was not allowed to communicate with fellow employees, which he would have needed to do if he wanted to arrange a companion. Although he was permitted to phone his solicitors, this was after he had been told that he was simply being suspended and that he was not in the process of being interviewed.

d. Mr Maloney was only reading from a prepared script and was not intending to ask the Claimant any questions or to note down any answers from the Claimant.

e. Ms Defer-Wyatt made significant efforts to hurry Mr Maloney and the Claimant to finish looking through documents and to end the meeting, even though it was clear that the Claimant had other points that he wished to make. She was not writing his comments down or asking him questions.

f. The Claimant repeatedly asked for more specific details of the allegations to be explained to him. It was reasonable for the employer not to have full details during a suspension meeting and it was reasonable to tell the Claimant that that information would be forthcoming at a later date. However, having said those things, it was not reasonable to dismiss the Claimant without doing it.

g. On 8 February, the Claimant was also told that he would have the opportunity to make his representations, but that did not happen.

275. If the Claimant had been told at the end of 8 February meeting that a decision about whether to dismiss him would be made without a further interview then the Claimant would have had the opportunity at least to consider various other options. At the very least, he would have been on notice that it would be advisable to write to the Respondent and ask for a hearing and/or ask for written representations to be considered. However, he was not on notice that any such action might be required and was entitled to think that the disciplinary policy which had been given to him would be followed and he would be afforded an in person hearing.

276. The process was also unfair because the Claimant made various points on 8 February which were not relayed to Mr Dewey. He made points which should have been taken into account during a fair process prior to reaching a decision about

whether to dismiss the Claimant or not. The Claimant told Ms Defer-Wyatt that he believed it had been necessary for him to send these emails to his Gmail account because of his lack of VPN, and because he had been told by the managing director to focus on his work, and the fact that he felt before February allegations were not justified, and the fact that due to a combination of time pressure the and the lateness of the hour he had hurriedly sent the emails to himself without properly considering whether he could or should have removed confidential attachments from the emails.

277. My judgment is that the process as a whole, both what happened before 13 February and what happened from 13 February to 7 June 2019, was not fair and reasonable.

278. For one thing, both Mr Sweetser and Mr Coyne are junior to Mr Dewey. I am satisfied that each of them would have said so if they believed the dismissal decision was clearly wrong. However, for each of them, the fact that the Claimant had indeed already been dismissed influenced their thinking, as can be seen from the report and outcome letter respectively.

279. I cannot be satisfied that either of them took the same approach that they would have taken had they been appointed investigator/hearing officer respectively soon after 8 February, while the Claimant was suspended but not dismissed. They might have still reached the same end conclusions, or they might not, but the fact of the dismissal influenced how they reached those conclusions.

280. It is notable that Mr Sweetser's opinion was that he had been asked to prepare a report for Mr Dewey and Ms Challis, and that he told Ms Watkins that he might have worded it differently had he considered that it was intended for the Claimant.

281. It was not unreasonable in itself for Mr Sweetser to prepare a report in which his focus and his recommendations related to the 7 February emails. He decided for himself independently (and was not unduly influenced by Ms Watkins or anyone else) that he did not need to focus his recommendations on 4 February 2019 letter or the Claimant's opinions about that letter. However, he allowed a note of the 2 April meeting to be prepared which completely omitted a lot of what the Claimant had said. It would have been fair and reasonable to include the Claimant's comments and to leave it to the appeal officer to decide on relevance. It is true that, in fact, the appeal officer did get to see the Claimant's comments, but only after Mr Sweetser had said he would let Ms Watkins decide whether that was appropriate.

282. In relation to Ms Watkins role, she was a junior employee to Ms Challis and reporting to Ms Challis, and there was more than one undocumented meeting between Ms Challis and Ms Watkins. Ms Watkins also independently decided to gather certain pieces of evidence, not at Mr Sweetser's direction.

283. Mr Coyne reached a decision which took into account all the points which the Claimant wished to make at the meeting on 15 May 2019. The meeting lasted an hour, but that does not mean that it was too short. Mr Coyne genuinely felt that an hour was long enough and the Claimant did not ask for more than an hour.

284. A criticism of Mr Coyne's outcome letter is that he included a piece of information

stating that there would be a report made to SRA. This was something put into the letter by HR and Mr Coyne accepted the recommendation uncritically and without asking for more information.

285. It is not possible to know what changes were made to Mr Coyne's original draft when he sat with the HR officer Ms Day. The mere fact alone that HR has some input into finalising a letter does not render a decision unfair. However, in circumstances in which the most senior UK HR employee has had a role in the initial decision, and in circumstances in which Mr Coyne accepts that he sat down with HR and some changes were made to the letter, that is something which I must take into account when considering the fairness as a whole.

286. Other factors which I have taken into account are that it took almost 4 months to conclude the appeal process, that it took until 9 May for the Claimant to receive a copy of the investigator's report in advance of a hearing due to take place 4 days later, and that policies not previously sent to the Claimant were sent to him after 5pm on the day before the 10am appeal meeting.

287. I also think it significant that the Claimant was not told that Mr Dewey took the decision until many months after the litigation began, and long after the appeal process had concluded, and that no documents of any description showing what information was given to Mr Dewey, or by him to Ms Challis, have been disclosed.

288. I reject the Claimant's contention that Mr Maloney played an improper role. It was not unreasonable for the Respondent to ask Mr Maloney to review and comment upon the content of the 7 February emails, and the fact that Mr Maloney had played a role in drawing up the 4 February allegations makes no difference to that.

289. Mr Maloney and Ms Defer-Wyatt, and anyone else in the UK who saw Mr Prewitt's email of 14:36 on 7 February, which explained that such data transfers were not necessarily sackable offences, should have made sure that the email was seen by the investigator or decision-maker. Having seen the email, the investigator or decision maker should have made sure that it was seen by the Claimant. A fair and reasonable process would have including allowing the Claimant to make comments about this email, notwithstanding the discussions with Mr Prewitt later had with Mr Sweetser. It would have allowed the Claimant to make representations that he fell into the category of employees whom Mr Prewitt would usually think should be warned rather than dismissed, and would potentially open up other avenues of enquiry for the Claimant to ask the decision-maker to compare his own case to that of other employees who may (on the Claimants case, at least) have done something similar.

290. My decision is that the dismissal which took effect on 13 February 2019, and which was because of emails sent on 7 February 2019 was unfair, even taking account of the Respondent's actions, up to and including 7 June 2019.

291. Mr Coyne had some further reasons (his opinions that the Claimant had shared the data with Irwin Mitchell; made covert recordings; lied about the work phone) for stating that Claimant would not be reinstated in addition to the 7 February emails. However, focusing purely on the sending of the 7 February emails. There was also

a slight difference between the reason, as per Mr Dewey's February decision, and the reason, as per Mr Coynes June decision.

a. In terms of the February decision, it was simply and directly the fact that the Claimant sent those emails including that data which was deemed to be misconduct which merited dismissal.

b. In relation to the June decision, Mr Coyne both considered whether there was a satisfactory explanation (and decided that there was not), but also decided that (at least part of) the Claimant's actual motivation was to be able to have permanent access to the documents as part of a potential future legal claim.

292. Had Mr Coyne's June decision on the 7 February emails been the one which brought about termination of employment it would have been within the band of reasonable responses.

293. In either case, whether in relation to the 13 February decision or the 7 June decision, the Respondent was entitled to have regard to the potential for misuse once this vast amount of data had been transferred out of its control and into the Claimant's control.

294. The fact that data in an electronic format can easily be transmitted and published, is well known and it is common knowledge that many different organisations have faced adverse comment from the public, the media or regulators based on electronic versions of information having been leaked online. The fact that the Claimant had been permitted – by Mr Maloney – to take some hard copies of personal data away from the office after his 8 February suspension does not mean the decision to dismiss for making unauthorised electronic copies was outside the band of reasonable responses.

Polkey

295. For Polkey purposes, I have to consider what this employer would have done had it acted fairly. This is not the same as finding facts on the balance of probabilities but is an exercise in assessing the chances of what might have happened.

296. My assessment is that it is very likely indeed that, faced with the disciplinary investigation into the 7 February emails only, the Claimant would have proceeded along very much the same path he took in relation to the appeal before Sweetser and Coyne, and indeed during the tribunal litigation.

a. My assessment is that the Claimant would have been very keen to put forward his version of events in relation to the matters which (according to him) led to the 4 February letter being given to him.

b. Amongst other things, I think it very likely that the Claimant would have put into evidence, during the internal proceedings, the covert recordings which he believes support his version of events. The Claimant believed at the time (and still believes as of September 2020) that he can justify the sending of the emails by referring to the transcripts of the recordings. He mentioned their

existence (and quoted extensively from them) as part of his appeal as early as 26 February 2019.

c. The Claimant had made the recordings because he thought that he would use them at some later date, and my judgment is that he would have been very likely to have decided that the investigation into the sending the emails was the right time to use them. It does not follow – of course – that it is 100% certain that that is what he would have done.

297. My judgment is that if the Claimant did not disclose the covert recordings, and instead focused purely on a defence that the 7 February emails were a good faith mistake, and if he had access to Mr Prewitt's 14:36 7 February email, then there is 50% chance of a fair dismissal. I do not put the chances as lower than 50:50 because of the views of Ms Challis and Mr Coyne and Mr Dewey about the seriousness of the conduct, and because the January email referring to constructive dismissal would have come to light and been taken into consideration. However, I do not put it higher than 50:50 because I think that Mr Prewitt's opinion would have been influential (even allowing for what he said to Mr Sweetser later) and because of the arguments that the Claimant could have made if he had had access to that email.

298. However, if the Claimant did disclose the covert recordings, I think it is very likely indeed that he would have been dismissed and dismissed fairly. The Claimant did not just record managers whom he said had been telling lies about him; he also recorded HR officers. My opinion is that the Respondent would have been very likely to decide that the Claimant was trying to build a case against it and that it was not possible to have trust and confidence in the Claimant.

299. In other words, I think it highly likely that the Claimant could have disclosed the covert recordings, and highly likely that – if he did so – he would be fairly dismissed. A fair process is likely have taken until after 13 February and the Claimant would have been on full pay during that period. That is something that I have also taken into account. Taking all of the above into account, my judgement is that there should be an 80% Polkey reduction to the compensatory award.

ACAS Code

300. The Respondent accepts that the ACAS code was not followed before the 13 February dismissal. In my judgment, relevant paragraphs that were not correctly followed include paragraphs 6, 7, 9 10 and 12. Paragraphs 26 to 29 in relation to appeals were complied with, albeit the appeal took a long time to reach a conclusion.

301. There was therefore not a complete failure to comply with the Code, as there was an appeal. Given that the most important parts of the Code were not complied, with, the appropriate uplift in this case is 20%.

Contributory Fault

302. The blameworthy conduct that I take into account is the Claimant's sending of the

emails to his Gmail account. Part and parcel of that is his failure to ask HR or IT or anyone else whether it would be OK to do so.

303. It is also blameworthy that he failed to familiarise himself with GDPR requirements, although I do accept that the Respondent did not have a black letter rule forbidding sending emails to personal Gmail accounts.

304. He also failed to make any attempt to send only that which might reasonably be needed at the fact-finding meeting, but rather sent (thereby making unauthorised copies of) vast quantities of data just in case he might want to have it available for his use at some future date.

305. I think it just and equitable that I take all of this blameworthy conduct into account.

306. I do not think it just and equitable that I take into account the covert recordings or the Claimant's failure to check to see if the phone was in his pocket.

307. The Claimant's blameworthy conduct is a significant reason for the dismissal. Taking the above-mentioned conduct only, into account, and considering it against the other types of misconduct that can typically lead to summary dismissal, and taking into account that a reduction of 80% has already been made due to Polkey, my reductions is 25% to each of the basic award and the compensatory award.

2. <u>The Claimant's Breach of Contract claim</u>

308. By sending 44 emails, with various further emails embedded in them, on 7 February 2019, the Claimant breached his contract of employment.

309. On his own case, at para 110 of his witness statement, some of the spreadsheets with client data were sent because he did not take care to think what might be attached to the large numbers of emails that he was collating and embedding.

310. The Claimant's actions, if discovered by clients or regulators were likely to severely prejudice the interests of the Company and were potentially therefore within clause 21.5 which provides for summary dismissal.

311. In comparison to the employee referred to in the Brandeux case, the quantity of data sent was smaller and it was over a shorter time frame. However, based on my findings, at least part of the Claimant's reasons were that he was potentially intending to make use of the data at a future date in legal proceedings against the respondent.

312. Therefore, I consider the Claimant's conduct sending the 7 February emails to be a repudiatory breach of contract by him, and he was not entitled to notice for that reason.

313. Furthermore, I also consider the covert recordings to be a repudiatory breach. In September 2018, the Claimant was simply being told about new reporting lines and potential variations to authority. As early as that date, he was thinking about gathering evidence for a constructive unfair dismissal claim, based on alleged

changes to his terms and conditions. However, even if there was any argument that in September to November, the Claimant was ever simply gathering recordings to aid his own memory, or to potentially play at some internal hearing, that argument vanishes in relation to what he did in December. Ms White was someone with whom he was vaguely acquainted and with whom he was on good terms. He had no reason to think that she might lie or that he might need to protect himself in relation to her. Ms Defer-Wyatt was someone he had never met before and had only started work recently. Based on my findings, all of his covert recordings, but particularly those with HR, were gathered for the purpose of potentially using against the Respondent at some later date, and with the hope that he might catch someone saying something that he could make use of. His recordings were a repudiatory breach, and for that additional reason the Claimant was not entitled to notice and is not entitled to damages.

3. Employers Contract Claim

314. Although I have found above that the Claimant was in breach of contract, the only damages sought were in relation to the Clyde & Co invoice dated 13 September 2019. On the facts and evidence, causation has not been proved and the Respondent is not entitled to any award of damages.

Remedy and all other matters

315. The liability decision was given to the parties on 17 September. On 18 September, by consent of the parties, it was decided that there was no need for further judicial decision and that the proceedings were at an end.

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Employment Judge Quill

Date: 24 September 2020

JUDGMENT SENT TO THE PARTIES ON

24/09/2020

FOR THE TRIBUNAL OFFICE